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REPORT

from : Permanent Representatives Committee

to : Council (Justice and Home Affairs)

No. prev. doc. : 10830/94 JUSTPEN 90

Subject : Protection of the financial interests of the Communities

I. INTRODUCTION

The Justice and Home Affairs Council gave at its meeting on 20 June 1994 instructions that work in respect of the legal protection of the financial interests of the Communities should continue as a matter of priority on the basis of the draft joint action put forward by the United Kingdom and the proposals expected from the Commission. The Council furthermore asked for a progress report to be submitted to it before the end of 1994⁽¹⁾.

The European Council asked at its meeting at Corfu on 24 and 25 June 1994 the Justice and Home Affairs Council to reach agreement on tackling the criminal aspects of fraud and report back to its meeting at Essen in December 1994. The present document constitutes the report requested.

⁽¹⁾ See 7927/94 PV/CONS 44 JAI 23.

II. OUTCOME OF PROCEEDINGS

1. In accordance with the mandate given by Steering Group III (Criminal Law) at its meeting on 1 July 1994⁽¹⁾ as confirmed by the K.4 Committee at its meeting on 27 and 28 July 1994⁽²⁾, the Working Party on Community Law and National Criminal Law has in the course of a number of meetings⁽³⁾ examined
 - the draft Council Decision on joint action on the basis of Article K.3 of the Treaty on European Union regarding the protection of the financial interests of the European Communities, presented by the United Kingdom⁽⁴⁾, and
 - the proposal from the Commission for a Council of the European Union Act establishing a Convention for the protection of the Communities' financial interests⁽⁵⁾.

The proposal for a Council Regulation (EC, Euratom) on protection of the Communities' financial interests, presented by the Commission together with the above proposal for a Convention, deals with administrative sanctions, as opposed to criminal sanctions, and is being examined under Council (ECOFIN) by the Budgetary Committee (group on protection of the financial interests of the Communities). The K.4 Committee agreed at its meeting on 27 and 28 July 1994 that the Presidency, assisted by the Secretariat, should work for the optimum coordination of the proceedings.

2. Substantial progress has been made on a number of issues. It has in particular been agreed that it would be appropriate to establish a legal instrument for the protection under national criminal law of the financial interests of the Communities.

⁽¹⁾ See 8209/94 JUSTPEN 47

⁽²⁾ See 8823/94 CK4 65

⁽³⁾ On 5 and 6 July, 15 and 16 September, 29 and 30 September and 17, 18 and 19 October 1994.

⁽⁴⁾ 5342/94 JUSTPEN 92 + ADD 1

⁽⁵⁾ 8076/94 JUSTPEN 46 ECOFIN 100

In addition, agreement has to a large extent been reached on the minimum area to be covered by such an instrument, in particular in respect of the scope of the instrument, the nature of the criminal sanctions to apply concerning different types of offences, jurisdiction, mutual cooperation, criminal or other sanctions on legal persons, fraud and bribery involving Community officials and money laundering.

However, within the relatively short period that has been available, it has not been possible for the Working Party to finalize its examination of the proposals and agree on a text for a legal instrument. Several questions are still outstanding. The question of the exact nature of the legal instrument to establish still needs further examination. The details of most of the elements which would form part of the instrument likewise need further scrutiny.

On that basis it was agreed that the elaboration and adoption of a Council Resolution at this stage as a first step towards a legal instrument would be an appropriate way to confirm the progress made and create clearer guidelines for the future work.

The draft Resolution set out in the Annex was acceptable to delegations. The Commission representative did not object to the adoption of a Resolution but expressed the view that the Resolution was without prejudice to the proposal from the Commission and referred to the key elements of that proposal.

III. CONCLUSIONS

The K.4 Committee invites the Permanent Representatives Committee/Council to

- take note of the progress made regarding the question of the protection of the financial interests of the Communities,
- adopt the draft Resolution set out in the Annex, taking into account the mandate given by the European Council at Corfu on 24 and 25 June 1994,
- decide the publication of the Resolution in part C of the Official Journal of the European Communities.
- take note that work on the elaboration of a legal instrument for the protection under criminal law of the financial interests of the Communities will be continued with a view to its finalization as soon as possible in 1995.

Draft Resolution
on the legal protection
of the financial interests of the Communities

The Council,

Having regard to the Treaty on European Union,

Having regard to the Council Resolution of 13 November 1991 concerning the protection of the financial interests of the Communities⁽¹⁾, in which the Council and the Representatives of the Governments of the Member States, meeting within the Council, stated that cooperation between the Member States in the prevention and combating of fraudulent practices by which harm is done to the financial interests of the Communities is enhanced by a compatibility of the norms in the legal and administrative provisions of the Member States by which such conduct is sanctioned,

Taking into consideration the study of the relationship between Community law and national criminal law conducted in 1991 by the ad hoc Working Party on Community Law and National Criminal Law,

Taking into consideration the Comparative Study of the laws, regulations and administrative provisions of the Member States applicable to fraud against the Community budget and the Report of June 1994 from the Greek Presidency,

Having regard to the Study on the systems of administrative and criminal penalties of the Member States and on the general principles applicable to Community penalties conducted by the Commission, and the proposal from the Commission for a Council Regulation (EC, Euratom) on protection of the Communities financial interests,

⁽¹⁾ OJ C 328, 17.12.1991, p. 1.

Having regard to the Council Resolution of 29 November 1993 on the protection of the Community's financial interests, in which the Council has stated that considering that, without prejudice to Community competence, the question of protection of the financial interests of the Community must be examined also in the light of the cooperation introduced under Title VI of the Treaty on European Union, and that it considered it appropriate to examine the measures which should be taken to achieve a greater degree of compatibility in the laws, regulations and administrative provisions of the Member States in the effort to combat fraud by which harm is done to the financial interests of the Community,

Having regard to the Presidency Conclusions on the European Council at Corfu on 24 and 25 June 1994, in which it is stated that the European Council asked the Justice and Home Affairs Council to reach agreement on tackling the criminal aspects of fraud and report back to its meeting at Essen in December 1994,

Having regard to the draft Council Decision on joint action on the basis of Article K.3 of the Treaty on European Union regarding the protection of the financial interests of the European Communities, presented by the United Kingdom,

Having regard to the proposal from the Commission for a Council of the European Union Act establishing a Convention for the protection of the Communities' financial interests,

Having regard to the reports of the Court of Auditors, and in particular its Annual Report concerning the financial year 1993 presented in November 1994,

Recalling that the Council has invited the European Parliament to give its views on the two proposals,

1. Recognizes afresh the need to protect the financial interests of the Communities, inter alia by criminal sanctions;
2. Notes, in this connection, that criminal provisions protecting the Communities' financial interests already exist in many areas in the Member States; there are wide variations, however, as to what constitutes an offence and/or in legal consequences; there are also gaps which may affect cooperation between Member States;

3. Is of the opinion that taking into account the existing distribution of responsibility between the Member States and the Communities, the criminal laws of the Member States should be made more compatible in the interest of effectively deterring and combating criminal offences against the financial interests of the Communities, and of improving cooperation on criminal matters between the Member States;
4. Calls upon the Member States to ensure that the obligation arising out of Article 209a, first paragraph, of the Treaty establishing the European Community is fully implemented;
5. Welcomes efforts to strengthen the legal protection of the financial interests of the Communities by developing minimum standards of protection in Member States' criminal laws, and in this connection also to improve cooperation in combating fraud;
6. Is of the opinion that a legal instrument should be established for the protection under national criminal law of the financial interests of the Communities.
7. Requests the elaboration as soon as possible of such a legal instrument on the basis of the proposals from the United Kingdom for a Joint Action and from the Commission for a Convention between Member States, taking into account inter alia the following guiding principles:
 - (a) For the purposes of such an instrument a definition of fraud should be drawn up. It should refer, subject to conditions and terms to be defined more closely, to intentional⁽¹⁾ acts or omissions, including at least incorrect statements and concealment of facts in violation of duties of disclosure, resulting in damage to the budget of the Communities or to budgets managed by or on behalf of them, and involving, on the one hand, misappropriation, wrongful retention and misapplication of funds and, on the other hand, the wrongful diminution of revenues.
 - (b) Each Member State should apply to such fraud appropriate sanctions which take into account the seriousness of the conduct concerned. At least serious fraud, for example where more than a certain amount of funds (to be defined) is involved, should be regarded as criminal and imprisonable. So should attempting, assisting in or inducing the commission of such fraud.

⁽¹⁾ The Commission is of the opinion that the scope of the instrument should in addition include gross negligence as provided by its proposal.

- (c) Every Member State should be competent to prosecute relevant criminal offences committed in whole or in part within its territory. It should also be possible, in principle, for a Member State to prosecute one of its nationals who has committed a relevant criminal offence wholly outside its territory but who is not extradited solely because of his nationality.
- (d) Where a relevant offence of fraud against the financial interests of the Communities involves two or more Member States, those States should cooperate effectively in relation to such an offence, for example through mutual assistance, extradition, the transfer of criminal proceedings or the enforcement of foreign criminal sentences. The principle of "ne bis in idem" shall apply.
- (e) Serious cases of fraud should be extradition offences. Mutual assistance and extradition should also be provided for regarding relevant offences as referred to in a) involving violations of customs provisions and provisions concerning value added tax.
- (f) In addition to criminal sanctions against a natural person for a relevant criminal offence, it should also be possible, under conditions to be defined, to impose appropriate criminal or other sanctions on legal persons.
- (g) Member States should take the same measures to punish fraud referred to in a) involving officials of the European Communities as they take in respect of their own officials.
- (h) Member States should take effective measures to punish bribery involving officials of the European Communities in relation to the financial interests of the Communities.
- (i) Member States' laws concerning money laundering should also be extended to the protection of the Communities' financial interests.