

5316/97

LIMITE

JUSTPEN 3

OUTCOME OF PROCEEDINGS

of : Working Party on Criminal and Community Law

on : 14 January 1997

No. prev. doc.: 12770/96 JUSTPEN 155

No. Cion prop.: 4727/96 JUSTPEN 17

Subject: a) Draft second Protocol to the Convention on the protection of the European Communities' financial interests

b) Draft explanatory report to the Protocol to the Convention on the protection of the European Communities' financial interests

Ad subject a)

At its meeting on 14 January 1997, the Working Party on Criminal Law and Community Law examined the above draft Protocol on the basis of 12770/96 JUSTPEN 155, with particular reference to Articles 5 and 7 of the draft. The modified text emerging from the discussion is set out in the Annex with the comments made by delegations in footnotes.

The Commission representative presented a joint room document of the Presidency and the Commission bearing the title "Penal protection of the Communities financial interests, Second Protocol: Title IV, *"Shared responsibilities"*"⁽¹⁾.

⁽¹⁾ The document was available in French and English and will be made available in the other official languages by the services of the Commission as soon as possible.

The document aims at providing explanatory notes on Article 6(1) and (2) of the draft Second Protocol, that could ultimately be taken up in the framework of the explanatory report to that Protocol. It should be considered also in the context of the room document on judicial cooperation presented to the Working Party by the representative of the Commission in March 1996.

Delegations were invited to study the document with a view to the further examination of Article 6 of the draft Second Protocol and the suggestions made in respect of data protection in 11026/96 JUSTPEN 138.

Ad subject b)

The Commission representative presented the draft explanatory report to the Protocol to the Convention on the protection of the European Communities' financial interests set out in 12938/96 JUSTPEN 158.

The Chairman observed that the Presidency aimed at having the final version of the report approved by Council JHA during its term. He invited delegations to send any comments they may have to the Council Secretariat (for the attention of Mr. Bent Mejbom, fax: 32 2 285 81 54) in writing before the 17 February 1997. A modified version of the draft report could then be established in the light of comments made and examined by the Working Party and higher levels before its submission, hopefully as an A-point, to Council JHA in May 1997 for approval.

COUNCIL ACT⁽²⁾

of

drawing up the Second Protocol to the Convention
on the protection of
the European Communities' financial interests

THE COUNCIL OF THE EUROPEAN UNION.

Having regard to the Treaty on European Union, and in particular Article K.3(2)(c) thereof,

Whereas, for the purposes of achieving the objectives of the Union, the Member States regard the combating of crime that damages the European Communities' financial interests as a matter of common interest coming under the cooperation provided for in Title VI of the Treaty;

Whereas by its Act of 26 July 1995 the Council drew up, as a first agreement, the Convention on the protection of the Communities' financial interests which is intended more specifically to combat fraud that damages those interests;

Whereas by its Act of 27 September 1996 the Council drew up, as a second stage, a protocol to the Convention directed in particular at acts of corruption that involve national and Community officials and damage or are likely to damage the European Communities' financial interests;

Whereas the Convention needs to be further supplemented by a second protocol directed in particular at the liability of legal persons, confiscation, money laundering and mutual assistance in the context of the protection of the European Communities' financial interests;

⁽²⁾ The draft Council Act has not yet been examined.

DECIDES that the Second Protocol, the text of which is set out in the Annex hereto and which is signed today by the Representatives of the Governments of the Member States of the Union, is hereby drawn up;

RECOMMENDS that it be adopted by the Member States in accordance with their respective constitutional requirements.

Done at Brussels,

For the Council
The President

SECOND PROTOCOL,
DRAWN UP ON THE BASIS OF ARTICLE K.3
OF THE TREATY ON EUROPEAN UNION,
TO THE CONVENTION ON THE PROTECTION
OF THE EUROPEAN COMMUNITIES' FINANCIAL INTERESTS

THE HIGH CONTRACTING PARTIES to this Protocol, Member States of the European Union,⁽³⁾

REFERRING TO THE ACT OF THE Council of the European Union of ...,

DESIRING to ensure that their criminal laws contribute effectively to the protection of the financial interests of the European Communities;

RECOGNIZING the importance of the Convention on the protection of the European Communities' financial interests of 26 July 1995 in combating fraud affecting Community revenue and expenditure;

RECOGNIZING the importance of the Protocol of 27 September 1996 to the said Convention in the fight against corruption damaging or likely to damage the European Communities' financial interests;

AWARE THAT THE FINANCIAL INTERESTS OF THE European Communities may be damaged or threatened by acts committed on behalf of legal persons and acts involving money laundering;

CONVINCED of the need for national law to be adapted where it does not provide that legal persons can be held liable for acts of fraud or active corruption committed for their benefit that damage or are likely to damage the European Communities' financial interests;

CONVINCED also of the need for national law to be adapted, where necessary, to penalize acts of laundering of proceeds of fraud or corruption that damage or are likely to damage the European Communities' financial interests and to make it possible to confiscate proceeds of such fraud and corruption;

CONSIDERING that appropriate rules should also be laid down on mutual assistance, including exchange of information between the Member States and the Commission;

⁽³⁾ The recitals to the draft Protocol have not yet been examined.

CONSIDERING finally that the relevant provisions of the Convention on the protection of the European Communities' financial interests of 26 July 1995 should be made applicable to certain acts covered by this Protocol,

HAVE AGREED ON THE FOLLOWING PROVISIONS :

TITLE I
Definitions

Article 1

For the purposes of this Protocol:

- (a) "Convention" shall mean the Convention on the protection of the European Communities' financial interests, drawn up in Brussels by the Council Act of 26 July 1995 ⁽⁴⁾;
- (b) "fraud" shall mean the conduct referred to in Article 1 of the Convention;
- (c) "passive corruption" shall mean the conduct referred to in Article 2 and "active corruption" shall mean the conduct referred to in Article 3 of the (...) Protocol to the Convention on the protection of the European Communities' financial interests, drawn up in Brussels by the Council Act of 27 September 1996⁽⁵⁾;
- (d) "legal person" shall mean any entity having such status under the applicable national law ⁽⁶⁾, except for States or other public bodies in the exercise of State authority and for public international organizations;
- (e) "money laundering" shall mean money laundering as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering.⁽⁷⁾

⁽⁴⁾ OJ No C 316, 27.11.1995, p. 48.

⁽⁵⁾ OJ No C 313, 23.10.1996, p. 1.

⁽⁶⁾ The explanatory report to be drafted on the Protocol will indicate that this means the national law of the Member State taking measures against a legal person in accordance with the Protocol, in particular Title II thereof.

⁽⁷⁾ Scrutiny reservation by the Austrian delegation linked to the inclusion of laundering in other articles. The text has been slightly modified for technical reasons as a consequence of the new text of Article 5.

TITLE II⁽⁸⁾⁽⁹⁾

Legal persons

Article 2⁽¹⁰⁾

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud, money laundering and active corruption committed for their benefit by any person having power to take decisions on behalf of⁽¹¹⁾, or exercise control within⁽¹²⁾, the legal person as well as for involvement as accessories or instigators in or attempted commission of such fraud, money laundering or active corruption.
⁽¹³⁾

[1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud, money laundering and active corruption committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position and a power of representation involving the power to take decisions on behalf of the legal person, as well as for involvement as accessories or instigators in such fraud, money laundering or active corruption or the attempted commission of such fraud, money laundering or active corruption.] ⁽¹⁴⁾⁽¹⁵⁾

⁽⁸⁾ General reservation on Title II by the Austrian delegation. The German delegation has maintained its reservation on Article 2 (1) and has proposed the modified version of Article 2 set out in 9647/96 JUSTPEN 112.

⁽⁹⁾ Scrutiny reservation by the Austrian delegation on the inclusion of money laundering in Article 2.

⁽¹⁰⁾ The references to money laundering may have to be modified for technical reasons depending on the final version of Articles 1(e) and 5.

⁽¹¹⁾ Scrutiny reservation by some delegations.

⁽¹²⁾ Scrutiny reservation on "exercise control" by the Portuguese delegation.

⁽¹³⁾ The Commission representative has underlined as a general comment that the original proposal made by the Commission provided for a criminal liability for legal persons. The Commission could, however, support a solution along the lines set out in this text.

⁽¹⁴⁾ This alternative text has been presented by the Presidency in the light of comments made by delegations.

⁽¹⁵⁾ At an earlier stage, the United Kingdom delegation suggested the following wording:

"1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud and active corruption committed for their benefit by any person [or group of persons] having a position of seniority [or] [and] power of representation which involves power to take decisions on behalf of, or exercise control within, the legal person as well as the involvement as accessories or instigators in such fraud or active corruption or the attempted commission of such fraud.

[2.] Member States may restrict the application of paragraph 1 to cases where the person is in a [senior] position [of seniority] and has power of representation."

The Working Party had a detailed discussion on paragraph 1 but was unable to agree on the provision to be made in respect of the liability of legal persons in the paragraph. This matter will be further examined at a future meeting.

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of a fraud, money laundering or an act of active corruption for the benefit of a legal person by a person under its authority. ⁽¹⁶⁾⁽¹⁷⁾⁽¹⁸⁾

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, money laundering ⁽¹⁾ or active corruption.

⁽¹⁶⁾ Some delegations have suggested that only intentional acts and omissions should be covered. Other delegations (I,NL,P,COM) felt this would limit the scope of the paragraph too much.

⁽¹⁷⁾ Scrutiny reservation by several delegations (P,NL,UK,IRL,DK,GR). Some delegations observed that as paragraph 2 was closely linked to paragraphs 1 and 3 and Article 3, it was difficult to give a definite view on paragraph 2 at this stage. The Presidency also indicated that it will be necessary to ensure that the wording of the paragraph is fully consistent with the final text of paragraph 1.

⁽¹⁸⁾ Some delegations have suggested that consideration should be given to the possibility of making the application of the paragraph optional for Member States. Other delegations (P,D,NL,COM) have indicated that the provision should be mandatory.

Article 3 ⁽¹⁹⁾

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 2(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as :

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;
- (d) a judicial winding-up order.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 2(2) is punishable by effective, proportionate and dissuasive penalties or measures.

⁽¹⁹⁾ Some delegations (A,NL,D,S,COM) would prefer to merge paragraphs 1 and 2. The German delegation has proposed the text set out in Article 3 of 9647/96 JUSTPEN 112. Others (DK,IRL,F,UK) expressed a preference for keeping the text as it stands.

General scrutiny reservation by the Commission on Article 3.

The Chairman observed that the distinction between paragraphs 1 and 2 was linked with Article 2 and that the text would need to be reconsidered after a reexamination of Article 2.

TITLE III
Confiscation and money laundering

Article 4 ⁽²⁰⁾

Each Member State shall take the necessary measures to enable it to seize⁽²¹⁾ and, without prejudice to the rights of bona fide third parties⁽²²⁾, to confiscate instruments and proceeds of fraud, money laundering⁽²³⁾ and active and passive corruption, or of property the value of which corresponds to such proceeds⁽²⁴⁾. Any instruments, proceeds or other property seized or confiscated shall be dealt with by the Member State in accordance with its national law.

Article 5 ⁽²⁵⁾⁽²⁶⁾

Each Member State shall take the necessary measures to establish as a criminal offence money laundering of the proceeds of fraud, (...) at least in cases of serious fraud within the meaning of Article 2(1) of the Convention, and of active and passive corruption.⁽²⁷⁾ ⁽²⁸⁾

⁽²⁰⁾ Reservation by the German delegation which proposes the text of Article 4 in 9647/96 JUSTPEN 112.

⁽²¹⁾ It will be explained in the explanatory report to the Protocol that the expressions "seize" and "seized" cover "freezing" and "seizure" as defined in Article 1(1) of the United Nations 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

⁽²²⁾ A number of delegations have sought the deletion of the reference to bona fide third parties while other delegations have supported its retention. This is a matter that will be addressed at a future meeting.

⁽²³⁾ The reference to money laundering may have to be modified for technical reasons depending on the final version of Articles 1(e) and 5.

⁽²⁴⁾ Scrutiny reservations by the Austrian delegation on the inclusion of active corruption and money laundering.

⁽²⁵⁾ The German delegation has proposed the text of Article 5 in 9647/96 JUSTPEN 112.

⁽²⁶⁾ The Austrian delegation has maintained its reservation on Article 5, in particular regarding the inclusion of "revenue fraud" (see Article 1(1)(b) of the Convention), and has proposed the addition of the following paragraph:
"2. Each Member State may declare when giving the notification provided for in Article 9(2) that it will not apply paragraph 1 or that it will apply paragraph 1 only in specific cases, as far as the laundering of the proceeds of fraud as defined in Article 1(1)(b) of the Convention is concerned."

The Swedish delegation has expressed a scrutiny reservation on the question of "revenue fraud".

⁽²⁷⁾ Scrutiny reservation by the Austrian and Swedish delegations on the inclusion of active corruption.

⁽²⁸⁾ In the light of comments made by the Legal Service and various delegations, the Presidency proposes the following new paragraph 2 of Article 5 for further consideration:

"2. However, a Member State may decide not to incriminate minor money laundering concerning minor cases of fraud and corruption, in particular where its law does not confer discretionary powers to its prosecuting authorities allowing them to refrain from bringing proceedings in respect of criminal offences of a minor character."

TITLE IV
Cooperation

Article 6 ⁽²⁹⁾⁽³⁰⁾

1. Member States shall cooperate among themselves and with the Commission in the fight against fraud.
⁽³¹⁾⁽³²⁾

To that end, the Commission shall lend any technical and operational assistance necessary to facilitate coordination of the investigations undertaken by the competent national authorities. ⁽³³⁾

2.⁽³⁴⁾ The competent authorities in the Member States may exchange information with the Commission so as to make it easier to establish the facts and to ensure effective prevention of fraud. The Commission and the competent national authorities shall take account in each specific case of the requirements of investigation secrecy.

[3. A Member State may not refuse to provide mutual assistance in respect of fraud for the sole reason that it concerns a tax or customs duty offence.]⁽³⁵⁾

⁽²⁹⁾ The German delegation has proposed the modified text set out in Article 6 of 9647/96 JUSTPEN 112.

⁽³⁰⁾ The Legal Service of the Council has in its opinion set out in 8031/96 JUR 179 JUSTPEN 84 concluded that it is possible to bind the Commission by means of a Convention established on the basis of Article K.3 of the Treaty. The Legal Service has suggested that there should be an active acceptance by the Commission of the tasks the Protocol would entrust to it. The Commission representative agreed in principle with the said opinion but observed that the Commission needed to examine further which form the active acceptance would take.

⁽³¹⁾ Reservation by the Netherlands delegation.

⁽³²⁾ The French delegation has requested that specific reference be made to Article 6 of the Convention. Other delegations do not favour that approach and, in particular, the United Kingdom delegation has indicated that the emphasis should be on the development of cooperation between Member States and the Commission.

⁽³³⁾ It has been proposed that the application of this sentence in practice should be explained in the explanatory report, perhaps on the basis of the room document referred to on page 1.

⁽³⁴⁾ See 11026/96 JUSTPEN 138.

⁽³⁵⁾ The Working Party agreed that the inclusion of this text, which has been proposed by the German delegation in 9647/96 JUSTPEN 112, should be considered at a future meeting.

TITLE V
Relation with the Convention

Article 7

1. The provisions of Articles 3, 4, 5 and 6 of the Convention shall also apply to the conduct referred to in Article 5 of this Protocol.

2. ⁽³⁶⁾The following provisions of the Convention shall also apply to this Protocol:
 - Article 7, it being understood that, in the absence of any indication to the contrary when the notification referred to in Article 9(2) of this Protocol is being given, any declaration within the meaning of Article 7(2) of the Convention is valid also for this Protocol;⁽³⁷⁾
 - Article 9;
 - Article 10.

⁽³⁶⁾ The French delegation called for the addition of a reference to Article 4(2) of the Convention.

⁽³⁷⁾ The Netherlands delegation thought that the "ne bis in idem" principle should apply in certain cases where both a legal and a physical person are criminally liable concerning the same offence, if the financial interests of the physical person and the legal person can be considered identical.

The German delegation has proposed the modified text of Article 7 set out in 9647/96 JUSTPEN 112.

Article 8 ⁽³⁸⁾

Court of Justice

1. Any dispute between Member States on the interpretation or application of this Protocol must in an initial stage be examined by the Council in accordance with the procedure set out in Title VI of the Treaty on European Union with a view to reaching a solution.

If no solution is found within six months, the matter may be referred to the Court of Justice of the European Communities by a party to the dispute.

2. Any dispute between one or more Member States and the Commission of the European Communities concerning the application of [Articles ...] of this Protocol which it has proved impossible to settle through negotiation may be submitted to the Court of Justice of the European Communities.

Article 9 ⁽³⁹⁾

Entry into force

1. This Protocol shall be subject to adoption by the Member States in accordance with their respective constitutional requirements.

2. Member States shall notify the Secretary-General of the Council of the European Union of the completion of the procedures required under their respective constitutional rules for adopting this Protocol.

3. This Protocol shall enter into force ninety days after the notification provided for in paragraph 2, by the last Member State of the European Union to fulfil that formality. If, however, the Convention has not entered into force on that date, the Protocol shall enter into force on the date on which the Convention enters into force.

⁽³⁸⁾ Text proposed by the Irish Presidency. See also 11026/96 JUSTPEN 138.

⁽³⁹⁾ Text proposed by the Irish Presidency. See also 11026/96 JUSTPEN 138.

Article 10

Accession of new Member States

1. This Protocol shall be open to accession by any State that becomes a member of the European Union.
2. The text of this Protocol in the language of the acceding State, drawn up by the Council of the European Union, shall be authentic.
3. Instruments of accession shall be deposited with the depositary.
4. This Protocol shall enter into force with respect to any State that accedes to it ninety days after the deposit of its instrument of accession or on the date of entry into force of the Protocol if it has not yet entered into force at the time of expiry of the said period of ninety days.

Article 11 ⁽⁴⁰⁾

Reservations

1. No reservation shall be authorized.

⁽⁴⁰⁾ Text proposed by the Irish Presidency.

Article 12 ⁽⁴¹⁾

Depositary

1. The Secretary-General of the Council of the European Union shall act as depositary of this Protocol.
2. The depositary shall publish in the Official Journal of the European Communities information on the progress of adoptions and accessions, declarations and reservations and any other notification concerning this Protocol.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries have hereunto set their hands.

Done at, this in a single original, in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, each text being equally authentic, such original remaining deposited in the archives of the General Secretariat of the Council of the European Union.

⁽⁴¹⁾ Text proposed by the Irish Presidency.