

Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests

(2001/C 240 E/19)

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(Submitted by the Commission on 23 May 2001)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 280(4) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Court of Auditors,

Acting in accordance with the procedure referred to in Article 251 of the Treaty,

Whereas:

- (1) The institutions and the Member States attach great importance to the protection of the Community's financial interests and to the fight against fraud and any other illegal activities that damage Community financial interests. The protection of the Community's financial interests concerns not only the management of budget appropriations, but extends to all measures affecting or liable to affect its assets. All available means must be deployed to fully attain these objectives, in view of the legislative power devolved to the Community level, while maintaining the current distribution and balance of responsibilities between the national and Community levels.
- (2) Criminal law in the Member States needs to make an effective contribution to protecting the Community's financial interests.
- (3) The instruments laid down on the basis of Chapter VI of the Treaty on European Union concerning the protection of the European Communities' financial interests, namely the Convention of 26 July 1995 ⁽¹⁾ and the Protocols of 27 September 1996 ⁽²⁾, 29 November 1996 ⁽³⁾ and 19 June 1997 ⁽⁴⁾, contain several provisions on closer alignment of criminal law in the Member States and on improving cooperation between them. As these instruments have not been ratified by all Member States, their entry into force continues to remain uncertain.
- (4) Under Article 280 of the Treaty it is possible to include in a Community legislative act any provisions of these instruments that do not concern the application of national criminal law or the administration of justice in the Member States.

(5) In many cases, fraud involving Community revenue and expenditure is not restricted to a single country, but is often the work of organised criminal networks.

(6) Since the Community's financial interests can be damaged or threatened by acts of fraud, corruption or money laundering, common definitions of these types of conduct need to be adopted in order to protect these interests.

(7) Changes need to be made, as appropriate, to national legislation to make corruption involving Community officials or other Member States' civil servants a criminal offence. As regards Community officials, these changes to national legislation must not be restricted to acts of active and passive corruption, but must also cover other offences affecting or liable to affect Community revenue or expenditure, including offences committed by or directed towards people with powers at the highest level.

(8) Acts of fraud, corruption and money laundering need to be made punishable criminal offences. Member States determine the criminal penalties applicable to offences under the national provisions adopted pursuant to this Directive, without prejudice to the imposition of other penalties in certain appropriate cases, and make provision for custodial sentences, at least in cases of serious fraud. They take whatever measures are required to ensure that these penalties are applied. The penalties must be effective, proportionate and dissuasive.

(9) Businesses play an important role in areas financed by the Community and people with decision-making power in businesses should not avoid criminal liability in certain circumstances.

(10) The financial interests of the Community can be damaged or threatened by acts committed in the name of bodies corporate.

(11) Changes need to be made, as appropriate, to national legislation, so that bodies corporate can be held responsible for acts of fraud, active corruption and money laundering committed in their name that damage or threaten to damage the financial interests of the Community.

⁽¹⁾ OJ C 316, 27.11.1995, p. 48.

⁽²⁾ OJ C 313, 23.10.1996, p. 1.

⁽³⁾ OJ C 151, 20.5.1997, p. 1.

⁽⁴⁾ OJ C 195, 25.6.1997, p. 1.

(12) Changes need to be made, as appropriate, to national legislation to make it possible to confiscate the proceeds of acts of fraud, corruption and money laundering.

(13) For the purpose of ensuring effective action against fraud, active and passive corruption and the money laundering that goes with them damaging or liable to damage the Community's financial interests, there is a need to lay down measures for cooperation between the Member States and the Commission. This cooperation involves processing of personal data and in particular the exchange of information between the Member States and the Commission and between the Commission and non-member countries. This processing must comply with the rules on the protection of personal data, notably Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽¹⁾ and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data ⁽²⁾ and the relevant rules concerning the confidentiality of judicial investigations.

(14) Those Member States who have yet to ratify the instruments laid down on the basis of Chapter VI of the Treaty on European Union concerning the protection of the European Communities' financial interests should do so forthwith, so that the provisions not falling within the scope of Article 280(4) of the Treaty (namely jurisdiction, judicial assistance, transfer and centralisation of prosecutions, extradition and enforcement of judgments) can also enter into force.

(15) This act, which sets out to align national legislation as regards the criminal-law protection of the Community's financial interests, respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

PURPOSE AND DEFINITIONS

Article 1

Purpose

The purpose of this Directive is to bring the Member States' legislation closer together as regards the criminal-law protection of the financial interests of the Community.

⁽¹⁾ OJ L 281, 23.11.1995, p. 31.

⁽²⁾ OJ L 8, 12.1.2001, p. 1.

Article 2

Definitions

For the purposes of this Directive:

1. 'official' shall mean any Community or national official, including any national official of another Member State;
2. 'Community official' shall mean:

— any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of employment of other servants of the European Communities,

— any person seconded to the European Communities by the Member States or by any public or private body who carries out functions equivalent to those performed by European Community officials or other Community servants.

Members of bodies set up in accordance with the Treaties establishing the European Communities and the staff of such bodies shall be treated as Community officials, inasmuch as the Staff Regulations of Officials of the European Communities or the Conditions of employment of other servants of the European Communities do not apply to them;

3. 'national official' shall mean any person with the status of 'official' or 'public officer' as defined in the national law of the Member State for the purposes of the application of that Member State's criminal law.

Nevertheless, in the case of proceedings involving an official from one Member State instituted by another Member State, the latter shall not be bound to apply the definition of 'national official' except in so far as that definition is compatible with its national law;

4. 'legal person' shall mean any entity having such status under the applicable national law, except for States and other public bodies exercising State authority and public international organisations.

CHAPTER II

OFFENCES

Article 3

Fraud

1. For the purposes of this Directive, fraud affecting the Community's financial interests shall consist of:

- (a) in respect of expenditure, any intentional act or omission relating to:

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the Community or budgets managed by, or on behalf of, the Community,
 - non-disclosure of information in violation of a specific obligation, with the same effect,
 - the misuse of such funds for purposes other than those for which they were originally granted;
- (b) in respect of revenue, any intentional act or omission relating to:
- the use or presentation of false, incorrect or incomplete statements or documents, which has the effect of unlawfully reducing the resources of the general budget of the Community or budgets managed by, or on behalf of, the Community,
 - non-disclosure of information in violation of a specific obligation, with the same effect,
 - misuse of a legally obtained benefit, with the same effect.

2. For the purposes of this Directive, serious fraud shall consist of any case of fraud as defined in paragraph 1 and involving a minimum amount set in each Member State. This minimum amount may not be more than 50 000 euros.

Article 4

Corruption

1. For the purposes of this Directive, passive corruption shall consist of the deliberate act on the part of an official, whether directly or through an intermediary, of requesting or receiving advantages of any kind whatsoever, for themselves or for a third party, or accepting a promise of such an advantage, as inducement to breach their official obligations and carry out or refrain from carrying out an official duty or an act in the course of their official duties in a way that damages or is likely to damage the Community's financial interests.

2. For the purposes of this Directive, active corruption shall consist of the deliberate act of promising or giving, directly or through an intermediary, an advantage of any kind whatsoever to officials, for themselves or for a third party, as inducement for them to breach their official obligations and carry out or refrain from carrying out an official duty or an act in the course of their official duties in a way that damages or is likely to damage the Community's financial interests.

Article 5

Equal treatment

1. Member States shall take the necessary measures to ensure that in their criminal law the descriptions of the

offences constituting conduct of the type referred to in Article 3 of this Directive where committed by their national officials in the exercise of their duties apply in the same way where such offences are committed by Community officials in the exercise of their duties.

2. Member States shall take the necessary measures to ensure that in their criminal law the descriptions of the offences referred to in paragraph 1 of this Article and in Article 4 where committed by or in respect of their government ministers, elected members of their parliamentary assemblies, members of their highest courts or members of their national audit body in the exercise of their functions apply in the same way where such offences are committed by or in respect of members of the Commission of the European Communities, the European Parliament, the Court of Justice or the Court of Auditors of the European Communities in the exercise of their duties.

3. Where a Member State has enacted special legislation concerning acts or omissions for which government ministers are responsible by reason of their special political position in that Member State, paragraph 2 may not apply to such legislation, provided that the Member State ensures that Members of the Commission of the European Communities are also covered by the criminal legislation implementing Article 4 and paragraph 1 of this Article.

4. This Directive shall apply without prejudice to the provisions on the lifting of the immunities contained in the Treaty, the Protocol on the Privileges and Immunities of the European Communities, the Statutes of the Court of Justice and the texts implementing them.

Article 6

Money laundering

1. For the purposes of this Directive 'money laundering' shall consist of the types of conduct listed below involving the proceeds of fraud, at least in serious cases, and of active and passive corruption as referred to in Articles 3 and 4, where committed deliberately:

- (a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any persons involved in the commission of such activity to evade the legal consequences of their action,
- (b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity,

- (c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity,
- (d) participation in one of the acts listed in the three preceding indents and association for the purpose of committing the act.

2. Money laundering shall be regarded as such even where the activities which generated the property to be laundered were perpetrated in the territory of another Member State or in that of a third country.

Article 7

Duty to criminalise

1. Member States shall take the necessary measures to transpose the provisions of this Chapter into their national criminal law in such a way that the conduct referred to therein constitutes criminal offences.

Member States shall take appropriate measures for the purpose of establishing, on the basis of the objective factual circumstances, when such conduct is deliberate.

2. Member States shall take the necessary measures to ensure that the intentional preparation or supply of false, incorrect or incomplete statements or documents having the effect of fraud as referred to in Article 3 constitutes a criminal offence if it is not already punishable as a principal offence or as participation in, instigation of, or attempted commission of such fraud.

CHAPTER III

LIABILITY

Article 8

Criminal liability of heads of businesses

Member States shall take the necessary measures to allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by their national law in the event of conduct as referred to in Chapter II on the part of a person under their authority acting on behalf of the business.

Article 9

Liability of bodies corporate

1. Member States shall take the necessary measures to ensure that bodies corporate can be held liable for fraud, active corruption and money laundering as referred to in Chapter II and committed for their benefit by any person who has a leading position within the body corporate, whether acting individually or as a member of an organ of the body corporate, based on:

- a power of representation of the body corporate, or
- or
- an authority to take decisions on behalf of the body corporate, or
- or
- an authority to exercise control within the body corporate,

as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud.

2. Without prejudice to paragraph 1, Member States shall take the necessary measures to ensure that a body corporate 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 an act of fraud, active corruption or money laundering for the benefit of that body corporate by a person under its authority.

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

CHAPTER IV

PENALTIES

Article 10

Penalties on natural persons

Without prejudice to the provisions of the second paragraph, Member States shall take the measures necessary to ensure that the conduct referred to in Chapter II as well as involvement in such conduct as an accessory or instigator and, with the exception of the conduct referred to in Article 4, the attempted commission of acts involving such conduct are punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases involving serious fraud, custodial sentences.

However, in cases of minor fraud involving a total amount of less than 4 000 euros and not involving particularly serious circumstances under its laws, a Member State may provide for penalties of a different type from those laid down in the first paragraph.

Article 11

Penalties on bodies corporate

1. Member States shall take the necessary measures to ensure that a body corporate held liable pursuant to Article 9(1) is punishable with effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties such as:

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

2. Member States shall take the necessary measures to ensure that a body corporate held liable pursuant to Article 9(2) is punishable by effective, proportionate and dissuasive penalties or measures.

Article 12

Confiscation

Member States shall take the necessary measures to enable the seizure and, without prejudice to the rights of bona fide third parties, the confiscation or removal of the instruments and proceeds of the conduct referred to in Chapter II or property the value of which corresponds to such proceeds. Any instruments, proceeds or other property seized or confiscated shall be dealt with by the Member State in accordance with its national law.

CHAPTER V

FINAL PROVISIONS

Article 13

Cooperation with the European Commission

1. As part of the cooperation with the Commission on fighting fraud, corruption and money laundering as referred to in Chapter II, Member States shall take the necessary measures to enable the Commission to provide all the technical and operational assistance required to facilitate the coordination of investigations undertaken by the relevant national authorities.

2. Member States shall take the necessary measures to enable the relevant authorities in their countries to exchange information with the Commission for the purposes of facilitating the establishment of the facts and ensuring effective action against the conduct referred to in Chapter II. Such measures shall require the Commission and the competent national authorities to take account, in each specific case, of the requirements of confidentiality of investigations and protection of personal data.

3. Any processing of personal data by the Commission and the Member States pursuant to this Directive must be in compliance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of

individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

4. In order to safeguard the confidentiality of judicial investigations and in connection with the exchange of information under paragraphs 1 to 3:

- (i) the Member State supplying information to the Commission is entitled to lay down specific conditions for the use of such information by the Commission and by any other Member State to which this information might be transmitted;
- (ii) in the event of disclosure to any other Member State of personal data it has obtained from a Member State, the Commission shall inform the Member State which supplied this information of the disclosure;
- (iii) before disclosing to a third country personal data which it has obtained from a Member State, the Commission shall obtain an assurance that the Member State which supplied the information has authorised this disclosure.

Article 14

Domestic law

Nothing in this Directive shall prevent Member States adopting or maintaining, in the field covered by this Directive, more stringent provisions in their domestic law for the purpose of effectively protecting the financial interests of the Community.

Article 15

Transposition

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 December 2001.

Such measures adopted by the Member States shall contain a reference to this Directive or shall be accompanied by such reference when officially published. The methods of making such reference shall be laid down by Member States.

2. Member States shall promptly communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

Article 16

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

Article 17

This Directive is addressed to the Member States.