



COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

**Implementation by Member States of the Convention on the Protection of
the European Communities' financial interests and its protocols**

Article 10 of the Convention

{SEC(2004) 1299}

1. INTRODUCTION

The protection of financial interests in criminal law has been promoted as a high priority for the European Community since the 1970s, but the first instruments adopted for this purpose were the PFI Convention of 26.7.1995,¹ the 1st Protocol of 27.9.1996,² the ECJ Protocol of 29.11.1996³ and the 2nd Protocol of 19.6.1997⁴ (referred to as the PFI instruments), all adopted under Title VI EU Treaty. The PFI instruments set out to establish a common base for the criminal-law protection of the EC's financial interests. The PFI Convention, the 1st Protocol and the ECJ Protocol entered into force on 17.10.2002 following ratification by the then 15 Member States. Ratification of the 2nd Protocol by IT, LU and AT is still awaited.

As the Council has not yet adopted a Common Position on the proposal for a Directive on the criminal-law protection of the Communities' financial interests on the basis of Article 280 EC Treaty,⁵ the Commission believes the time has come to look into the national implementation measures and to consider the impact of the PFI instruments. The purpose of this report is to check whether the objective of effective and equivalent protection of the EC's financial interests has already been attained in all Member States. The identification of persistent shortcomings in the implementation of the PFI instruments should contribute to advancing the legislative process concerning the proposal for a Directive or, as the case may be, to using dispute settlement procedures under the PFI instruments.

A report on implementing the PFI instruments is currently necessary to take stock of the developments in protecting the EC's financial interests through national criminal law, even if not all the Member States have ratified all the PFI instruments. The accession of new Member States opens a new chapter in the process of monitoring implementation, which will have to be dealt with separately.

2. BACKGROUND

2.1. Purpose

The main reason for this report is to evaluate the way Member States have conformed to the PFI instruments. The report is also the appropriate instrument to verify the need to proceed with the dispute settlement procedure under Article 8 PFI Convention.

¹ Convention on the protection of the European Communities' financial interests, OJ C 316, 27.11.1995, p. 49.

² Protocol to the Convention on the protection of the European Communities' financial interests, OJ C 313, 23.10.1996, p. 2.

³ Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests, OJ C 151, 20.5.1997, p. 2.

⁴ Second Protocol to the Convention on the protection of the European Communities' financial interests, OJ C 221, 19.7.1997, p. 12.

⁵ COM(2001) 272 final, 23.5.2001: OJ C 240 E, 28.8.2001, p. 125, as amended by COM(2002) 577 final, 16.10.2002: OJ C 71 E, 25.3.2003, p. 1.

Although the PFI instruments are placed in the 3rd pillar, they pursue aims required also under Article 280 EC Treaty:

- Measures under both Article 280(1) EC Treaty and the PFI instruments must act as a deterrent and be such as to afford effective protection of the EC's financial interests in the Member States.
- Article 280(2) EC Treaty obliges Member States to take the same measures to counter fraud affecting the EC's financial interests as they take to counter fraud affecting their own financial interests. This assimilation principle was an underlying consideration when drawing up the PFI instruments.
- Both Article 280(3) EC Treaty and the PFI instruments alike aim to foster cooperation between the Member States, together with the Commission.
- The PFI instruments are measures in the prevention of and fight against fraud affecting the EC's financial interests which are designed to afford equivalent protection in the Member States, as required by Article 280(4) EC Treaty. The PFI instruments are contributing to the attainment of the equivalence principle.

Article 10 PFI Convention requires Member States to transmit to the Commission the text of the provisions transposing the PFI instruments into their domestic law. Thus, this report also serves as a conduit for circulating the information that has been received.⁶

2.2. Method

The report focuses on the 15 Member States before the accession on 1.5.2004. It further concentrates on provisions in the PFI instruments relating to criminal or procedural law. It does not take into account provisions that do not require implementation, such as those on cooperation and data protection.

A look into the implementation of the 2nd Protocol is justified because the majority of Member States have ratified it. Seven years have passed since its adoption. AT and LU are preparing draft legislation to implement the provisions on liability of legal persons. IT has already enacted most of the related implementing measures. The main components, such as money laundering and confiscation, are closely linked to the existing *acquis*.

For evaluating the implementation of the PFI instruments, it is appropriate to take into account the same evaluation criteria as they have been already established for assessing the implementation of directives in the 1st pillar and Framework decisions in the 3rd pillar.

However, the assessment criteria are in the first place the provisions of the PFI instruments themselves. To evaluate the level of protection provided by criminal law of the EC's financial interests through national measures, it is necessary to verify

⁶ Point 4.1.1 of the Annual report 2002 on the Protection of the Communities' financial interests, COM(2003) 445 final, 4.12.2003, announces an analysis of the way in which the Member States have conformed to their obligations under the PFI instruments.

implementation for each article and each Member State based on a comparative law analysis. The following contains a summary assessment. A detailed evaluation is to be found in a Commission staff working paper associated with this report.

3. ASSESSMENT

3.1. Criminal offences

Fraud affecting the EC's financial interests (Articles 1 and 2, PFI Convention)

The prime intention of the PFI Convention was to overcome loopholes and incompatibilities as regards fraud affecting the EC's financial interests.

Thanks to the equivalence principle (which is also contained in Article 280(4) EC Treaty), the criminalisation of fraudulent conduct has become more similar throughout the EU.

That said, as regards fraud affecting the EC's expenditure, only DK, EL, ES and IE can be considered as completely compliant. Furthermore, the laws of IT and NL seem to avoid gaps and loopholes which could allow expenditure fraud to go unpunished. The laws of BE, DE, LU, AT, PT, FI and SE might not fully comply with the definition of fraud, since they require additional elements for some forms of fraud. In FR and UK there seems to be a risk that certain forms of fraud regarding EC expenditures are not criminalised. In FR, for instance, fraud committed through the non-disclosure of information should be further scrutinised, while UK law may present serious uncertainty as regards the misappropriation of funds.

The overall picture is better as regards fraud affecting the EC's revenues, where DE, ES, IT, NL, AT, PT and FI have complied with the PFI Convention. The scope of the criminal-law protection of VAT own resources is not completely clear in DK, EL, FR, IE and LU. Subject to further analysis of the legal practices of the courts, amendments of legislation appear necessary to address potential gaps for certain forms of fraud in SE and UK concerning the misappropriation of legally obtained benefits and in BE for the element of deceit in customs law. Finally, it seems that in the UK only fraud directed against its own authorities is criminalised and that fraud of VAT or customs duties requires additional subjective elements, namely being "knowingly concerned in, or in the taking of steps with a view to, the fraudulent evasion". In BE, FR and AT, the punishment for certain forms of fiscal fraud appears not to be proportionate and dissuasive, lacking sufficient custodial sentences.

This persisting lack of a common definition in the Member States of what constitutes fraud affecting EC financial interests can still make prosecution of cross-border fraud and EU-level cooperation difficult.

Criminalisation of the intentional preparation of false, incorrect or incomplete statements, required by Article 1(3) PFI Convention, appears to be found in DK, EL, ES, IT, IE, NL and SE. For the other Member States, no definitive conclusions can be drawn at this stage.

Corruption (Articles 2 to 5, 1st Protocol)

In general, implementation regarding active and passive corruption is more advanced, due in part to similar Member States' obligations under other international conventions. All Member States appear to provide for corruption offences. In DE, EL, IE, AT and SE, their specific scope may however be restrictive. ES, SE and UK have not put forward convincing arguments that the offences are also applicable to Community officials. With regard to the assimilation of members of European Institutions, in BE, DK, ES, NL and PT, full compliance seems to depend on the courts' interpretation of the relevant laws.

Money Laundering (Article 2, 2nd Protocol)

The Member States' degree of compliance with the 2nd Protocol as regards money laundering is largely positive. BE, DK, ES, FR, IE, IT, NL, PT, FI and UK seem to fully comply, ES only as regards 'serious' fraud. For SE, it seems uncertain whether tax and customs fraud constitutes predicate offences. In LU, fraud is only a predicate offence if committed by a criminal organisation. In DE and AT, predicate offences do not include fiscal fraud unless conducted in an organised way. In EL, VAT fraud appears not to be mentioned as a predicate offence.

3.2. General concepts of criminal law

Criminal liability of heads of businesses (Article 3, PFI Convention)

Article 3 PFI Convention stipulates criminal liability for heads of businesses in cases of fraud, corruption or money laundering affecting the EC's financial interests by a person under their authority acting on behalf of the business.

Only NL appears to explicitly provide for criminal liability of heads of businesses. The scope and coverage of criminal liability for heads of businesses remains unclear in BE, DK, DE, IT, LU, AT and SE, where the general rules on participation are taken as an argument to deny the need for specific rules. No certainty exists as to the full impact of the participation rules. Further explanations are required to assess whether the result to be achieved by Article 3 PFI Convention is effectively ensured, for instance through examples of standing jurisprudence (FR). IE seems not to have introduced the concept of criminal liability of heads of businesses, requiring 'guilty knowledge' in any case.

The Commission notes that the Member States have shown a certain reluctance to scrutinise their national systems with regard to the concept of criminal liability of heads of businesses. More feedback is needed, since Member States are simply relying on what is already to be found in their national laws. The Commission is not convinced that the reference to existing domestic provisions is sufficient and believes that incompatibilities continue to exist by virtue of the fact that a decision-maker is liable under different circumstances depending on the country concerned. Legislative action by Member States to introduce specific rules on the criminal liability of heads of businesses might well be necessary.

Liability of legal persons (Articles 3 and 4, 2nd Protocol)

Apart from LU and AT, Member States stipulate the liability of legal persons. Three of them appear to fail to provide for liability of legal persons for all offences contained in the PFI instruments, omitting, for example, active corruption and money laundering (PT), tax and customs fraud (FR) or fraud not deemed ‘serious’ (ES). For BE, DK, IE, SE and UK, it is doubtful whether they provide for liability where lack of supervision or control has made it possible for the offence to be committed or where the offence was committed by a subordinate person.

The analysis shows that, as regards similar treatment for firms and individuals guilty of the same criminal behaviour, the Member States have advanced considerably. Even LU⁷ and AT,⁸ which have not yet ratified the 2nd Protocol, seem to be ready to accept the liability of legal persons. The Commission also notes that the concept of liability of legal persons has, in the meantime, become a widespread requirement in recent EU and international instruments.

Confiscation (Article 5, 2nd Protocol)

Concerning the provision on confiscation, existing EU and international instruments providing for similar measures have doubtlessly helped to produce a positive result. BE, DK, DE, IE, NL, PT and FI appear to comply with Article 5, 2nd Protocol. The other Member States appear to lack provisions for the seizure and confiscation or removal of instruments (UK) or property of corresponding value (ES) or seem to have essentially omitted tax fraud (EL, SE) or other forms of fraud (FR).

3.3. Complementary elements relating to criminal procedure

Jurisdiction (Article 4, PFI Convention and Article 6, 1st Protocol)

All Member States provide generally for jurisdiction based on the territoriality principle for fraud, corruption or money laundering. FR, AT and UK seem not to provide for full territorial jurisdiction for fiscal fraud, for participation therein or for an attempt that has been committed only in part within their territory but regards another Member State’s authority. BE appears not to ensure jurisdiction for some categories of participation in fraud or money laundering committed abroad, while the UK seems to have procedural difficulties that render it practically impossible to pursue offences committed abroad, e.g. Scotland might lack jurisdiction for participation in and instigation of such fraud.

Some Member States have taken advantage of the possibility under the PFI instruments to submit reservations on the application of the personality principle for establishing jurisdiction. The persisting differences might therefore make it possible for offences to go unpunished and for the cross-border nature of many of the illegal activities affecting the EC’s financial interests to be inadequately treated.

⁷ In the explanatory report on the Draft Law No 5262, LU announced a draft law to introduce criminal liability of legal persons.

⁸ The federal ministry of justice recently issued a draft law on criminal liability of legal persons.

'Ne bis in idem' (Article 7, PFI Convention)

The '*ne bis in idem*' rule appears to be recognised in principle. For DK, IT, PT, AT, SE, it appears possible to state that implementation has been effected. However, due to lack of information, an evaluation for the remaining Member States could not be done at this stage.

3.4. General assessment

At first sight, an analysis of the national provisions adopted in the Member States shows that the level of effective criminal-law protection of the EC's financial interests has increased. As regards the definition of offences, national systems have grown closer to one another and penalties are usually set at a sufficiently high level so as not to impede mutual assistance.

The assimilation principle (which is also contained in Article 280(2) EC Treaty) has found some recognition among Member States. In particular, the PFI instruments have prompted Member States to take, in general, the same measures to counter fraud affecting the EC's financial interests as they take to counter fraud affecting their own financial interests.

Nevertheless, the Commission's analysis comes to the conclusion that none of the Member States under scrutiny appears to have taken all the measures needed to comply fully with the PFI instruments. Gaps and loopholes in the law which allow offences to go unpunished remain possible. The set of rules contained in the PFI instruments cannot be considered separately, since partial or non-implementation of an article also produces effects on provisions that, considered independently, might seem to comply with the PFI instruments. The considerable differences between the Member States as regards criminal penalties shed further doubt as to whether the penalties imposed always meet the Court of Justice criteria of being effective, proportionate and dissuasive.⁹

Since the harmonisation objective has not yet been fully achieved, the Commission still considers the level of protection not to be advanced enough to exclude any risk of leaving unpunished or of not deterring all conduct affecting the EC's financial interests that should be criminalised. The obligations of the Member States as regards their commitment to curb this sort of crime are still not fully met.

The Commission believes that many of the reasons for which it submitted a proposal for a Directive on the criminal-law protection of the EC's financial interests remain justified and considers it useful to relaunch negotiations within the Council on the amended proposal with a view to a Common Position.

In this context, the Commission notes that the PFI instruments drawn up on the basis of the tools available under the Maastricht Treaty do not give an adequate response to the specific need for criminal-law protection of the EC's financial interests. Therefore, the Commission will further examine possible approaches offered by subsequent Treaty amendments, such as the proposed Directive based on the new

⁹ Within the meaning of Case 68/88 *Commission v Greece* [1989] ECR 2965 and Case C-352/92 *Milchwerke Köln/Wuppertal eG* [1994] ECR I-3385.

Article 280 EC Treaty, and the means provided by the Draft Constitutional Treaty, including the ultimate possibility of establishing a European Financial Public Prosecutor's Office.

4. RECOMMENDATIONS

In view of the foregoing, it is therefore recommended that the Council should

- invite Member States
 - to step up their efforts to reinforce national criminal legislation to protect the Communities' financial interests, in particular with regard to complete criminalisation of fraudulent conduct and criminal liability in a corporate context;
 - to reconsider their reservations stated when ratifying the PFI instruments;
 - (those that have not done so) to implement and ratify the 2nd Protocol without delay, given that more than seven years have already passed since its signature;
- treat as a matter of priority the objective of full application of the PFI instruments so as to avoid initiation of the procedures under Article 8 PFI Convention;
- work towards adopting a Common Position on the amended proposal for a Directive on the criminal-law protection of the Communities' financial interests on the basis of Article 280 EC Treaty.

Once all Member States have notified their ratification of and/or accession to all PFI instruments, the Commission intends to submit a follow-up report on implementation in the new Member States and on implementation by IT, LU and AT of the 2nd Protocol.