

EXPLANATORY REPORT

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

(Text approved by the Council on 19 December 1997)

(98/C 11/02)

I. INTRODUCTION

Various studies and other projects undertaken in the Member States and the Community institutions⁽¹⁾ have highlighted the fact that the legislation of Member States contains provisions which can be used to combat fraud and active and passive corruption of national officials.

While the specific characteristics of such legislation vary from one Member State to another, all have common elements which make it possible to arrive at a common definition.

It has also been established that the Member States' criminal laws are far from complete in their applicability to the international dimension of corruption, involving Community officials or the officials of other Member States, actually or potentially affecting the European Communities' financial interests.

The fact that there are these common elements in the national laws points up the need for action to promote an adequate response at European Union level and to secure greater convergence in the manner in which the Member States' criminal laws apprehend forms of corruption with international ramifications.

The present Protocol on corruption of officials was proposed at the request of the Spanish Presidency as an

additional instrument to complement the Convention⁽²⁾ drawn up on 26 July 1995 and to reinforce the protection of the Communities' financial interests. It is in particular a response to point 7h of the resolution of the Council of 6 December 1994 on the legal protection of the financial interests of the Community⁽³⁾ according to which the 'Member States should take effective measures to punish bribery involving officials of the European Communities in relation to the financial interests of the Communities'.

II. COMMENTARY ON THE ARTICLES

Article 1

This introductory provision defines the terms 'official' and 'Convention' for the purposes of the Protocol wherever the terms are used in it.

- 1.1. 'Official' means any of various categories of persons, Community officials, national officials or officials of another Member State, to ensure a broad and homogeneous application of the substantive provisions of the Protocol in the fight against corruption.

These categories are defined in relation to their respective statuses.

- 1.2. Point (b) of paragraph 1, based on the formulation in the 1976 draft Treaty, applies to 'Community officials', which means not only permanent officials, *stricto sensu*, covered by the Staff Regulations of Officials of the European Communities, but also the various categories of staff engaged on contract under the Conditions of Employment of Other Servants. It includes national

⁽¹⁾ Notably:

- draft Treaty of 10 August 1976 (OJ C 222, 22.9.1976, p. 13),
- European Parliament resolution of 11 March 1994 (OJ C 91, 28.3.1994, p. 334),
- Council resolution of 6 December 1994 (OJ C 355, 14.12.1994, p. 2),
- European Parliament resolution of 15 December 1995.

The Spanish Presidency asked the Commission to present the findings of the comparative study of the matter. The work was completed on 1 December 1994; it was found that each legal system had coherent measures of its own but that there were inevitable, and counter-productive, divergences between Member States as regards the definition both of corruption itself and of the persons against whom measures to combat corruption among public servants were directed.

⁽²⁾ OJ C 316, 27.11.1995, p. 48.

⁽³⁾ OJ C 355, 14.12.1994, p. 2.

experts seconded to the European Communities to carry out functions equivalent to those performed by Community officials and other servants.

Members of the Community institutions, the Commission, the European Parliament, the Court of Justice of the European Communities and the European Court of Auditors, are not covered by this definition (see comments on Article 4(2)).

1.3. The last sentence of point (b) brings the staff of bodies established under Community law within the definition of 'Community official'. This concerns at present:

- the European Agency for Cooperation ⁽¹⁾,
- the European Investment Bank ⁽²⁾,
- the European Centre for the Development of Vocational Training ⁽³⁾,
- the European Foundation for the Improvement of Living and Working Conditions ⁽⁴⁾,
- the European University Institute ⁽⁵⁾,
- the European Investment Fund ⁽⁶⁾,
- the European Environment Agency ⁽⁷⁾,
- the European Training Foundation ⁽⁸⁾,
- the European Monitoring Centre for Drugs and Drug Addiction ⁽⁹⁾,

- the European Agency for the Evaluation of Medicinal Products ⁽¹⁰⁾,
- the European Agency for Safety and Health at Work ⁽¹¹⁾,
- the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ⁽¹²⁾,
- the European Monetary Institute ⁽¹³⁾,
- the Community Plant Variety Office ⁽¹⁴⁾,
- the Translation Centre for the Bodies of the Union ⁽¹⁵⁾,
- the European Monitoring Centre on Racism and Xenophobia ⁽¹⁶⁾.

This provision concerns the personnel of bodies responsible in a very broad sense for applying Community legislation, already enacted or yet to be enacted under the Community Treaties, whose activities are such that corruption of them could have an adverse effect on protection of the Community's financial interests.

1.4. Point (c) of paragraph 1 defines the concept of 'national official' in terms of an official or public officer as defined in the national law of each Member State for the purposes of its own criminal law. The criminal law definition is thus given priority. Where a national official of the prosecuting State is involved, this means that its national definition is applicable. Where an official of another Member State is involved, it means that the definition in the law of that Member State is not conclusive where the person concerned would

⁽¹⁾ Council Regulation (EEC) No 3245/81 (OJ L 328, 16.11.1981, p. 1).

⁽²⁾ Articles 198d and 198e of the EC Treaty.

⁽³⁾ Council Regulation (EEC) No 337/75 (OJ L 39, 13.2.1975, p. 1). Regulation altered by Council Regulation (EC) No 354/95 (OJ L 41, 23.2.1995, p. 1).

⁽⁴⁾ Council Regulation (EEC) No 1365/75 (OJ L 139, 30.5.1975, p. 1), as last amended by Regulation (EEC) No 1947/93 (OJ L 181, 27.7.1993, p. 13).

⁽⁵⁾ Convention setting up a European University Institute (OJ C 29, 9.2.1976, p. 1).

⁽⁶⁾ Statute of the European Investment Fund (OJ L 173, 7.7.1994, p. 1) see also Article 30 of the Protocol on the Statute of the European Investment Bank and Article 239 of the EC Treaty.

⁽⁷⁾ Council Regulation (EEC) No 1210/90 (OJ L 120, 11.5.1990, p. 1).

⁽⁸⁾ Council Regulation (EEC) No 1360/90 (OJ L 131, 23.5.1990, p. 1). Regulation altered by Regulation (EC) No 2063/94 (OJ L 216, 20.8.1994, p. 9).

⁽⁹⁾ Council Regulation (EEC) No 302/93 (OJ L 36, 12.2.1993, p. 1). Regulation as amended by Regulation (EC) No 3294/94 (OJ L 341, 30.12.1994, p. 7).

⁽¹⁰⁾ Council Regulation (EEC) No 2309/93 (OJ L 214, 24.8.1993, p. 1).

⁽¹¹⁾ Council Regulation (EC) No 2062/94 (OJ L 216, 20.8.1994, p. 1). Regulation as last amended by Regulation (EC) No 1643/95 (OJ L 156, 7.7.1995, p. 1).

⁽¹²⁾ Council Regulation (EC) No 40/94 (OJ L 11, 14.1.1994, p. 1). Regulation altered by Regulation (EC) No 3288/94 (OJ L 349, 31.12.1994, p. 83).

⁽¹³⁾ Article 109f of the EC Treaty; Protocol on the Statute of the European Monetary Institute, annexed to the Treaty on European Union.

⁽¹⁴⁾ Council Regulation (EC) No 2100/94 (OJ L 227, 1.9.1994, p. 1). Regulation altered by Regulation (EC) No 2506/95 (OJ L 258, 28.10.1995, p. 3).

⁽¹⁵⁾ Council Regulation (EC) No 2965/94 (OJ L 314, 7.12.1994, p. 1). Regulation altered by Regulation (EC) No 2610/95 (OJ L 268, 10.11.1995, p. 1).

⁽¹⁶⁾ Council Regulation (EC) No 1035/97 (OJ L 151, 10.6.1997, p. 1).

not have had the status of official under the law of the prosecuting Member State. This follows from subparagraph 2 of point (c), according to which a Member State may determine that corruption offences involving national officials of another Member State refer only to such officials whose status is compatible with that of national officials according to the national law of the prosecuting Member State.

The reference to the law of the official's Member State means that due account can be taken of specific national situations regarding the status of persons exercising public functions.

Article 4(2) and (3) show that the notion of 'national official' does not automatically include members of parliament, ministers, members of the highest courts or members of a court of auditors in the Member States. However, this does not preclude any Member State from extending its definition of 'national official' to one or more of these categories of persons.

- 1.5. Article 1(2) defines 'Convention' for the purposes of the Protocol to the Convention drawn up at Brussels on 26 July 1995 on the protection of the European Community's financial interests, published in *Official Journal of the European Communities* C 316 of 27 November 1995.

Reference to the relevant provisions of that Convention is made in Article 4(1), Article 7 and Article 9(3).

Article 2

Article 2 defines the elements of the offence of passive corruption actually or potentially damaging the Communities' financial interests. This definition links the Protocol to the Convention it supplements.

The expression 'likely to damage' is used to cover cases of corruption whose effect on the Communities' financial interests has not attained the objective pursued.

- 2.1. Paragraph 1 enumerates a series of elements constituting corruption of an official, of which intent is a necessary component.
- 2.2. The material components of corruption include requesting, accepting and receiving certain things, 'directly or through an intermediary'.

This includes:

- a unilateral act by an official who requests a benefit for himself by letting it be known to another person, explicitly or implicitly, that he will have to 'pay' to have some official act done or abstained from; it is immaterial whether the request is acted on, the request itself being the core of the offence,
- acceptance or receipt by the offender of certain things pursuant to a meeting of minds between himself and the giver; the offence is complete when consents have been exchanged, even if the official subsequently waives performance of the agreement or returns the thing received.

The Protocol makes no distinction between direct and indirect means of corruption. The fact that an intermediary may be involved, which would extend the scope of passive corruption to include indirect action by the official, necessarily entails identifying the criminal nature of the official's conduct irrespective of the good or bad faith of the intermediary involved.

- 2.3. The offence also covers the case where the official for example requests a gift or another advantage not for himself but for a third party, such as a spouse or a partner, a close friend, a political party or other organisation.
- 2.4. The things that constitute the material substance of the corruption include offers, promises or advantages of any kind whatsoever for the benefit of the official or of any other person.

'Advantages of any kind whatsoever' is a deliberately broad concept, embracing not only material objects (money, precious objects, goods of all kinds, services rendered) but also anything that might represent an indirect interest, such as settlement of the corrupted person's debts, work on property belonging to him. This enumeration is not exhaustive. The concept of advantage, requested, received or promised, covers all kinds of material or intangible advantages.

For the purposes of the Protocol, the point in time at which things constituting the substance of the corruption are given or provided is immaterial. By expressly covering the acceptance of promises, Article 2(1) catches deferred payments, provided their origin lies in a criminal agreement between the corrupted and the corruptor.

- 2.5. It is essential that the request or acceptance should predate the act or abstention offered or accepted by the official.

The text is unequivocal: 'the ... action of an official who ... requests, or receives advantages ... or accepts a promise ... to act or refrain from acting ...'.

It is thus clear that, chronologically speaking, there must first be the request or acceptance and then the act or refraining therefrom by the official.

A benefit received after the act but without a prior request or acceptance therefore does not generate criminal liability under the Protocol. Moreover, the Article does not apply to the gifts that are not related to any subsequent act in the performance of duties by the official.

- 2.6. The official's duties or functions are the target of the practices to which the Protocol applies.

The Protocol applies to performance of, or abstention from performing, any act within the powers of the holder of the office or function by virtue of any law or regulation (official duty) in so far as they are carried out in breach of the official's duties. In addition this behaviour must be such that it causes or is likely to cause damage to the Communities' financial interests.

The laws of certain Member States cover cases where an official, contrary to his official duty to act impartially, receives an advantage in return for acting in accordance with his function (e.g. by giving preferential treatment by accelerating or suspending the processing of a case). These cases are covered by the present Article.

- 2.7. Article 2(2) requires Member States to enact the criminal law measures needed to ensure that conduct of the type described in paragraph 1 is made a criminal offence.

It is therefore up to the Member States to see whether their current criminal law does indeed cover all the relevant categories of persons and forms of conduct and, if not, to enact measures establishing one or more offences corresponding to them. They may do so either by establishing one offence of a general nature or by establishing several specific offences.

Article 3

This Article describes the components of an offence of active corruption of an official which actually or potentially damages the Communities' financial interests.

It is the corollary of the offence defined in Article 2, seen from the corruptor's side; it is in particular intended to ensure that public administration functions properly and to protect officials from possible manoeuvres targeting them, on the understanding that in most Member States active and passive corruption are distinct, autonomous offences for which distinct, autonomous prosecutions may be brought.

Article 3(1) identifies a series of reprehensible forms of conduct by the corruptor that constitute active corruption of an official.

- 3.1. Any 'deliberate action of whosoever promises or gives ... an advantage ...' refers to the corruptor, whatever the capacity (business, public service, etc.) in which he acts; the corruptor may be a private individual acting as such or for a company, or a person exercising a public function.

The act constituting the corruption must be done intentionally, that is to say from a deliberate desire to have acts performed contrary to the duties attached to public service.

Whether the offence exists where the corruptor acts deliberately but is mistaken as to the authority which he believes the official to enjoy, will be a matter for determination in accordance with national law.

- 3.2. The corruptor's action would consist of promising or giving, directly or through an intermediary, an advantage (material or intangible) of any kind whatsoever, whether or not the offer is acted on and whether or not any advantage materialises.

The corrupt manoeuvre could be unilateral or bilateral; it could relate to a material or an immaterial thing: the concept of advantage must be taken in its broadest possible sense, subject to points 2.4 and 2.5.

The Article makes no distinction between the means, direct or indirect, whereby the corrupt manoeuvre is undertaken. It includes manoeuvres targeted at the official, whether directly or through an intermediary.

- 3.3. Active corruption is targeted at a person who must, by definition, be an official, irrespective of whether the advantage is for the official himself or for some other person.
- 3.4. The objective pursued by the corruption is the same as that concerned by passive corruption; see 2.6.
- 3.5. Article 3(2) is drafted in the same terms as Article 2(2); see 2.7.

Article 4

This Article reinforces the anti-fraud and anti-corruption measures by requiring adjustment of the criminal law of the Member States relating to relevant conduct by its national officials so as to cover similar conduct by Community officials that actually or potentially affects the Community's revenue and expenditure.

- 4.1. Paragraph 1 concerns offences which in each Member State relate to fraudulent conduct affecting the Community's finances, as defined by Article 1 of the Convention, and are committed by national officials in the exercise of their functions.

Here, the criminal law of all the Member States is to apply the assimilation principle to punishability of offences in the same manner as in relation to the offences referred to in Articles 2 and 3, so that whatever is an offence when done by officials of one category (national) is also an offence when done by officials of the other category (Community).

The effect of the principle is that Member States are also required to take measures to extend the application of their fraud offences to similar conduct attributable to Community officials acting in the exercise of their functions. The extension is not related to the conduct itself but to the category of offenders.

The manner in which this extension is effected is left to the discretion of each Member State.

- 4.2. At the Council meeting of 23 November 1995, the Member States and the Commission were in agreement that for the purposes of this Protocol national government ministers and members of the Commission, should be treated similarly.

This view is reflected in paragraph 2 as regards fraud offences actually or potentially damaging to the Community's financial interests and active and passive corruption offences as defined by the Protocol. At national level it concerns government ministers, members of parliament, members of the highest courts and members of the court of auditors; at Community institution level, it concerns their counterparts acting in the exercise of their duties (members of the Commission, members of the European Parliament, members of the Court of Justice of the European Communities and members of the European Court of Auditors).

It follows that for the purposes of punishable offences of fraud and corruption, members of the Commission will be assimilated to government ministers, members of the European Parliament to members of national parliaments, members of the Court of Justice to members of the highest national courts and members of the European Court of Auditors to their national counterparts. By this assimilation, national provisions in so far as they cover such offences committed by members of national parliaments, government ministers, etc., have to be extended to include the aforementioned members of the institutions of the European Communities.

As certain Member States do not have a court of auditors as such, the counterpart bodies will be:

- the National Audit Office in the United Kingdom,
- the Office of the Comptroller and Auditor-General in Ireland,
- Rigsrevisionen in Denmark,
- Riksrevisionsverket in Sweden,
- Valtiontalouden tarkastusvirasto/Statens revisionsverk in Finland.

- 4.3. Paragraph 3 allows for the possibility of derogating from the assimilation principle of paragraph 2 in those Member States where the

criminal liability of government ministers is governed by special legislation applicable in specific national situations. This, however, shall not preclude criminal liability for offences committed against or by members of the Commission under the common rules of national criminal law.

This possibility is especially useful in Denmark, where the rules of criminal law governing ministers' liability apply in specific situations (e. g. those where the minister can be held criminally liable for acts done by his subordinates) in which other persons occupying leading positions would not be criminally liable.

- 4.4. Under paragraph 4, the preceding paragraphs on assimilation as regards punishability are 'without prejudice to the provisions applicable in each Member State concerning criminal proceedings and the determination of the competent court'.

For the purposes of the various paragraphs of Article 4 taken together, the Protocol clearly cannot affect or jeopardise national rules of criminal procedure or the rules conferring jurisdiction on courts to try cases relating to the relevant offences. But this does not prevent the Article from having full effect in the national legal systems.

With particular reference to persons covered by paragraph 2, with regard to whom the assimilation principle generally and without exclusions implies an equal treatment under criminal law, the following should be noted. Where a special law of a Member State confers on a specific court the jurisdiction to try government ministers, members of parliament, members of the highest courts or members of the court of auditors accused of an offence, that court may also have jurisdiction in similar cases concerning members of the Commission, members of the European Parliament, members of the Court of Justice of the European Communities and members of the European Court of Auditors, but without prejudice to national provisions governing jurisdiction.

- 4.5. Paragraph 5 provides that the Protocol is without prejudice to provisions governing the withdrawal of immunity for staff of the Community institutions.

Withdrawal of immunity is thus a prior condition for exercising jurisdiction. The Protocol recognises the obligation of each of the institutions concerned to give effect to the provisions governing privileges

and immunities, subject to existing procedures and redress facilities under Community law ⁽¹⁾.

Article 5

- 5.1. Article 5(1) requires the Member States to ensure that the offences of active and passive corruption defined in Articles 2 and 3 are always punishable by criminal penalties, in other words triable by criminal courts.

This applies likewise to participation in and instigation of offences, to be interpreted in accordance with the definitions given in the criminal laws of each Member State.

Since the offences of active and passive corruption include conduct consisting of making promises independent of whether such promises are actually kept or fulfilled, it was not considered necessary to impose an obligation to criminalise attempts to commit active or passive corruption. However, Member States which so wish, may also make attempted offences punishable.

Penalties must be effective, proportionate and dissuasive, the expression being taken over from a judgment of the Court of Justice of the European Communities. In the case 68/88 (judgment of 21 September 1989, ECRp. 2965) the Court of Justice expressed itself as follows, (the Member States) 'must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive'.

In complying with this ruling, the Member States have some discretion in determining the nature and severity of the penalties which may be provided for. These need not always necessarily involve deprivation of liberty. Fines might be imposed in addition or as an alternative to imprisonment.

- 5.2. The Protocol does, however, require the Member States to provide for penalties involving deprivation of liberty, which can give rise to extradition, in the most serious cases. It will be for the Member States to decide what criteria or factual elements determine the seriousness of an offence in the light of their respective legal traditions.

⁽¹⁾ See in particular Article 18 of the Protocol on the privileges and immunities of the European Communities.

5.3. Paragraph 2 deals with the link between criminal law and disciplinary rules where the circumstances are such that one and the same act of corruption may be subject to both; priority is given to the principle of the independence of national or European disciplinary systems in that the conduct of criminal proceedings is 'without prejudice to the exercise of disciplinary powers by the competent authorities against national officials or Community officials'.

To take account of certain national legal traditions, the paragraph further allows national authorities to give effect to the principles of their own legislation whereby, in determining the criminal penalty to be imposed, account may be taken of disciplinary penalties already imposed on the same person for the same offence. This is a specific provision that will not be mandatory in Member States not recognising or giving effect to disciplinary sanctions.

Article 6

6.1. This Article establishes a series of criteria conferring jurisdiction to prosecute and try cases involving the offences covered by the Protocol, active and passive corruption and the offences specified in Article 4, on national enforcement and judicial authorities.

6.2. Pursuant to paragraph 1, a Member State is to establish its jurisdiction in four situations:

- (a) where the offence is committed in whole or in part on its territory, i. e. the corruption manoeuvre takes place there, the advantage is given there or the offending agreement is reached there, irrespective of the status or the nationality of the corruptor or the official involved (territoriality principle);
- (b) where the offender is a national or one of its officials (active personality principle): the criterion of the offender's status means that jurisdiction can be established regardless of the *lex loci delicti*. It is then up to Member States to prosecute for offences committed abroad, including in non-member countries. This is particularly important for Member States which do not extradite their own nationals.
- (c) where the offence is committed against a national of the Member State, being an official, or member, of a Community institution (passive personality principle). This is of particular interest in cases of active corruption

abroad by persons who are not nationals of the relevant Member State;

- (d) where the offender is a Community official working for a Community institution with its headquarters in the relevant Member State. The headquarters criterion is useful for exceptional cases not covered by other competence rules, notably where an offence is committed outside the Community by a Community official who is not a national of a Member State ⁽¹⁾.

6.3. Paragraph 2 allows any Member State which so wishes not to accept or to accept subject to conditions any of the rules in paragraph 1 (b), (c) and (d) by making a declaration to that effect when giving the notification provided for in Article 9(2) of the Protocol.

The effect of Article 11(1), as will be seen, is that Article 6(1)(b), (c) and (d) are the only provisions in respect of which reservations may be entered.

Article 7

Article 7 refers to specific provisions of the Convention declaring them applicable to active and passive corruption as defined in the Protocol and to the offences defined in Article 4.

The relevant provisions of the Convention may be summarised as follows:

- Article 3 establishes that business managers may be criminally liable,
- Article 5(1), (2) and (4) deals with extradition and the *aut dedere aut judicare* rule,
- Article 6 establishes the principle of close cooperation between Member States in cases of fraud against the Community's financial interests.

These three principles all apply without restriction to the conduct to which the Protocol applies.

⁽¹⁾ Although Community officials as a general rule will have the nationality of one of the Member States, exceptions to this principle are possible.

- Article 7 establishes the *ne bis in idem* rule, which is also applicable in Protocol matters. It is to be noted that the enforcement of a sentence does include cases where enforcement is suspended on probation,
- Article 9 allows the Member States to enact provisions of national law that are more demanding than those of the Convention. The Protocol likewise constitutes a set of minimum standards,
- Article 10 establishes, *inter alia*, arrangements for the provision of information by the Member States to the Commission, which also applies in Protocol matters.

Details about the content of these rules are given in the Explanatory Report on the Convention.

Article 8

This Article specifies the jurisdiction conferred on the Court of Justice to settle disputes between Member States and between Member States and the Commission relating to the interpretation or application of the Protocol ⁽¹⁾.

Detailed commentaries are to be found in the Explanatory Report to the Convention. This Article of the Protocol reproduces Article 8 of the Convention in order to ensure consistency between the two instruments.

Article 8(2) deals with the question in which cases the Court of Justice is competent concerning disputes between Member States and the Commission.

One noteworthy point is that the Court of Justice has specific jurisdiction to interpret the concept of Community official as defined in Article 1.

Article 9

This Article concerns the entry into force of the Protocol, which may not precede that of the Convention.

Article 10

This Article concerns the accession of new Member States of the European Union to this Protocol.

Article 11

This Article provides that reservations may be entered in relation to Article 6(1)(b), (c) and (d) only. A reservation may be withdrawn at any time by notice given to the Secretary-General of the Council.

⁽¹⁾ It is noted that the Council by Act of 29 November 1996 has drawn up the Protocol concerning 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. 1). This Protocol covers not only the Convention but also the present Protocol.