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*****I**

REPORT

on the proposal for a Directive of the European Parliament and of the Council
on the criminal-law protection of the Communities' financial interests
(COM(2001) 272 – C5-0225/2001 – 2001/0115(COD))

Committee on Budgetary Control

Rapporteur: Diemut R. Theato

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

CONTENTS

	Page
PROCEDURAL PAGE	4
LEGISLATIVE PROPOSAL	5
DRAFT LEGISLATIVE RESOLUTION	27
EXPLANATORY STATEMENT	28
OPINION OF THE COMMITTEE ON CITIZENS' FREEDOMS AND RIGHTS, JUSTICE AND HOME AFFAIRS	32
OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET	39

PROCEDURAL PAGE

By letter of 30 May 2001 the Commission submitted to Parliament, pursuant to Article 251(2) and Article 280(4) of the EC Treaty, the proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Communities' financial interests (COM(2001) 272 - 2001/0115 (COD)).

At the sitting of 14 June 2001 the President of Parliament announced that she had referred this proposal to the Committee on Budgetary Control as the committee responsible and to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and the Committee on Legal Affairs and the Internal Market for their opinions (C5-0225/2001).

At its meeting of 10 July 2001 the Committee on Budgetary Control appointed Diemut R. Theato rapporteur .

It considered the Commission proposal and draft report at its meetings of 10 September, 9 October and 6 November 2001.

At the last meeting it adopted the draft legislative resolution by 13 votes to 2, with 2 abstentions.

The following were present for the vote: Diemut R. Theato, chairman and rapporteur; Herbert Bösch and Freddy Blak, vice-chairmen; Christopher Heaton-Harris, Michiel van Hulten, Eluned Morgan, Michel Ange Scarbonchi, Bart Staes, Gabriele Stauner, Jeffrey William Titford; Ioannis Averoff, Jean-Louis Bourlanges (for Thierry B. Jean-Pierre), Bert Doorn (for Raffaele Costa), Christos Folias (for Brigitte Langenhagen), John Joseph McCartin (for José Javier Pomés Ruiz), Jan Mulder (for Lousewies van der Laan), Heide Rühle (for Claude Turmes) and Kyösti Tapio Virrankoski (for Antonio Di Pietro).

The opinions of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and the Committee on Legal Affairs and the Internal Market are attached.

The report was tabled on 8 November 2001.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

LEGISLATIVE PROPOSAL

Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Communities' financial interests (COM(2001) 272 – C5-0225/2001 – 2001/0115(COD))

The proposal is amended as follows:

Text proposed by the Commission ¹

Amendments by Parliament

Amendment 1 Title of the regulation

Directive of the European Parliament and of the Council on the criminal-law protection of the Communities' financial interests

Regulation of the European Parliament and of the Council on the criminal-law protection of the Communities' financial interests **and the European Public Prosecutor**

Justification

Merely approximating Member States' criminal-law provisions is not enough to provide effective protection for the Community's financial interests. The appointment of a European Public Prosecutor on the basis of Article 280 of the EC Treaty has been called for repeatedly by Parliament (most recently in a roll-call vote on 14 March 2001 by 392 votes to 96 with 20 abstentions). A regulation is more suitable than a directive - because it is binding and directly applicable - for enforcing effective and equivalent protection of the Community's financial interests in the Member States.

Amendment 2 Recital 4 (new)

(4) Since the entry into force of the Amsterdam Treaty, in accordance with the new Article 280(4) of the EC Treaty, the Council must adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with

¹ OJ C 240, 28.8.2001, p. 125.

a view to affording effective and equivalent protection in the Member States.

Justification

The Council has already adopted the instruments in question (1995 Convention and the additional protocols of 27 September 1996, 29 November 1996 and 19 June 1997); nonetheless, as they have not been ratified unanimously by the Member States, the instruments cannot enter into force. The resulting legal vacuum needs to be filled.

Amendment 3
Recital 4 a (new)

(4a) The Community's financial interests are among its essential interests. Their protection must fall within the first pillar.

Justification

In order to be effective, the protection of these essential interests must go beyond debates on the distribution of competences among the first and third pillars and be the subject of a Community approach. The Nice Intergovernmental Conference confirmed that the protection of the Community's financial interests essentially fell within the first pillar.

Amendment 4
Recital 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.

Changes need to be made, as appropriate, to national legislation to make it possible to ***seize for evidentiary and/or precautionary purposes and*** confiscate the proceeds of acts of fraud, corruption and money laundering.

Justification

This addition makes a more precise link with the provisions of Article 12 (confiscation).

Amendment 5
Recital 13 a (new)

(13a) It is necessary in particular that effective coordination should be established between OLAF and the Member States in accordance with Regulation 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) in order to ensure that there is judicial or administrative follow-up to OLAF investigations, and that the role of OLAF is taken into account in national codes of criminal-law procedure.

Justification

OLAF is currently the only vertical mechanism under the first pillar engaged in fighting fraud against the European Union's financial interests. Its investigations, which are administrative in nature, cannot be effectively acted upon unless they are taken into account by the competent authorities in the Member States. OLAF should be given the status of an assistant of the national judicial authorities.

Amendment 6
Recital 13 b (new)

(13b) It is also necessary to envisage forthwith, in accordance with Article 15 of Regulation 1073/1999, the adjustments that are needed, particularly as regards the legitimacy and efficacy of the Office's activities.

Justification

Over and above cooperation between OLAF and the Member States, the fight against fraud against European financial interests must form part of an integrated system such as a European public prosecutor's office, which has been called for on numerous occasions by the European Parliament.

Amendment 7

Recital 14

(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.

(14) The present act is without prejudice to future institutional developments such as the introduction of a European Public Prosecutor to protect the Community's financial interests by means of revision of Article 280 of the EC Treaty at the next Intergovernmental Conference. Initially, however, the powers of the prosecutor would be limited to internal investigations and to coordination with the competent authorities of Member States.

Amendment 8

Recital 14 a (new)

(14a) A European Public Prosecutor must be appointed in order to ensure the legitimacy and efficacy of the internal investigations by the European Anti-Fraud Office OLAF pursuant to Article 4 of Regulation (EC) No 1073/1999.

Justification

In its Opinion 3/2001 of 6 September 2001 for Parliament, the OLAF Supervisory Committee identified serious problems surrounding investigations carried out by OLAF, in particular as regards observing the rights of the defence and judicial scrutiny of investigations, but also as regards judicial or disciplinary follow-up to investigations. The difficulties which have been established are seriously jeopardising the efficacy of OLAF's internal investigations.

Amendment 9
Recital 14 b (new)

(14b) A European Public Prosecutor must be appointed in order to enable Eurojust effectively to perform duties in connection with protection of the Community's financial interests.

Justification

The proposals currently under discussion by the Council make provision for each Community Member State to send a magistrate or public prosecutor to Eurojust. To enable Eurojust effectively to perform duties concerning protection of the Community's financial interests, the 15 national magistrates and prosecutors should be joined by the European Public Prosecutor.

Amendment 10
Recital 14 c (new)

(14c) The appointment of a European Public Prosecutor directing and supervising OLAF's internal investigations, whose sole duty towards the competent courts and public prosecutor's offices of the Member States would be to provide advice and support, without being subject to instructions, in no way infringes the subsidiarity principle under Article 5 of the EC Treaty. As the appointment of a European Public Prosecutor does not concern the application of national criminal law or the national administration of justice, it is also in accordance with Article 280(4) of the EC Treaty, which provides for the adoption of the necessary measures in the fields of the prevention of and fight against fraud. Nor does the appointment of a European Public Prosecutor impinge upon the interinstitutional balance; rather, it allows the institutions jointly to exercise existing powers more effectively.

Justification

In its second report of 10 September 1999 on reform of the Commission (points 5.14.1.-5.14.9.), the Committee of Independent Experts recommended that a European Public Prosecutor be appointed and explained that it would be possible and desirable to set up the public prosecutor's office, without amending the EC Treaty, within one year.

Amendment 11 Recital 15 a (new)

(15a) The present act will become an integral part of the *acquis communautaire* and will have to be incorporated into the legislation of the applicant countries.

Justification

The applicant countries are concerned as of now by protection of the European Union's financial interests.

Amendment 12 Article 2 (3)

(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;

(3) 'national official' shall mean any person with the status of 'official ***of the State or of regional or local government***' 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;

Justification

Since criminal-law provisions are being dealt with, the term 'national official' could be interpreted as an explicit and restrictive definition and the further pleonastic use of the term 'public officer' would be irrelevant. This would risk excluding the liability of officials of regional, provincial, local government and other bodies which manage Community resources.

Amendment 13

Article 3, paragraph 1, subparagraph a

(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;

(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 ***preparation, supply***, 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;

Justification

It is illogical and legislatively incorrect to define as criminal offences the acts of preparing and supplying documents in an article (Article 7(2)) separate from that defining the other activities which are usually combined or linked with them for the purposes of evidence. In order not to create any gaps in legislation, all these unlawful activities should be covered by the same provision.

Amendment 14
Article 3 a (new)

Article 3a

Market-rigging

For the purposes of this Directive, market-rigging shall consist of the act, in the context of an adjudication process governed by Community law, of submitting a tender on the basis of an agreement calculated to restrict competition and intended to cause the relevant authority to accept a particular offer

Justification

The Commission proposal must be complemented by provisions to combat market-rigging fraud. The proposed wording is based on the Corpus juris 2000 (draft agreed in Florence).

Amendment 15
Article 3, paragraph 1, subparagraph b

(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.

(b) in respect of revenue, any intentional act or omission relating to:

- the **preparation, supply**, 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.

Justification

It is illogical and legislatively incorrect to define as criminal offences the acts of preparing and supplying documents in an article (Article 7(2)) separate from that defining the other

activities which are usually combined or linked with them for the purposes of evidence. In order not to create any gaps in legislation, all these unlawful activities should be covered by the same provision.

Amendment 16
Article 4 b (new)

Article 4b

Abuse of office

For the purposes of this Directive, misappropriation of funds shall consist of the act by an official duly authorised to dispose of Community funds who appropriates or misapplies them either by deciding to award a subsidy, grant or exemption in favour of a person who clearly has no right to such a decision or by intervening directly or indirectly in the awarding of grants or exemptions from duty to any business or operation in which he has a personal interest

Justification

The Commission proposal must be complemented by provisions to combat abuse of office. The proposed wording is based on the Corpus juris 2000 (draft agreed in Florence).

Amendment 17
Article 4 c (new)

Article 4c

Conspiracy

For the purposes of this Directive, a conspiracy shall have been formed when three or more persons work together within a stable organisational structure with a view to committing criminal offences defined in this Chapter.

Justification

The Commission's fraud reports show that many criminal offences harmful to the Community budget are the work of organised crime.

Amendment 18
Chapter II a (new)

Chapter IIa

***THE EUROPEAN PUBLIC
PROSECUTOR***

Justification

The appointment of a European Public Prosecutor on the basis of Article 280 of the EC Treaty has been called for repeatedly by Parliament (most recently in a roll-call vote on 14 March 2001 by 392 votes to 96 with 20 abstentions).

Amendment 19
Article 7, paragraph 2

(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.

Delete

Justification

In accordance with amendments 3 and 4, paragraph 2 is superfluous.

Amendment 20
Article 7 a (new)

Article 7a

Competences of the European Public Prosecutor

1. The European Public Prosecutor shall be competent in respect of the offences defined in Chapter II in so far as they were committed by members of Community institutions or Community officials or persons with an equivalent status within the meaning of Article 2.

2. The European Public Prosecutor shall assist the work of Eurojust with the aim of coordinating investigations and prosecution if the financial interests of the Community are affected

Justification

To date, the prosecution of offences within Community institutions has been totally unsatisfactory (problem of the competence of national prosecutors, unresolved issues concerning the immunity of Community officials, doubts as to the lawfulness of OLAF investigations without supervision by prosecutors and/or magistrates). In this respect, a European Public Prosecutor would signify a radical improvement. At the same time, he or she would be the appropriate contact point for members of Eurojust in connection with the protection of the Community's financial interests. The detailed arrangements for cooperation with Eurojust must be laid down in the legislative act governing Eurojust.

Amendment 21
Article 7 b (new)

Article 7b

Powers of investigation of the European Public Prosecutor

1. In order to discover the truth and to bring cases to a point where they may be tried, the European Public Prosecutor shall conduct investigations into the offences defined in Chapter II in so far as they could have been committed by members of Community institutions or Community officials or persons with an equivalent

status within the meaning of Article 2 or those persons could have been parties to them.

2. Investigations against Members of the European Parliament shall be possible only if Parliament has previously granted an immunity waiver application by the European Public Prosecutor.

3. Investigations shall extend to incriminating and exonerating circumstances.

4. In the course of investigations, and with due regard for the rights, defined in Article 7d, of the parties concerned, the European Public Prosecutor shall be empowered to:

(a) Question suspects,

(b) Hear witnesses,

(c) Collect information and documents necessary for the investigations,

(d) Conduct, under judicial supervision, searches, seizures and telephone intercept operations on the premises of the institutions, bodies, offices and agencies,

(e) Inform the competent national judicial authorities and request any assistance which seems appropriate to him,

(f) Call on OLAF to carry out on-the-spot inspections, pursuant to Regulation (Euratom, EC) No 2185/96, on the premises of the economic operators concerned.

He may direct servants of the European Anti-Fraud Office OLAF to discharge the powers set out under (a) to (d).

Justification

Until the EC Treaty is amended, the European Public Prosecutor could only investigate members of the Community's institutions and bodies and their officials and other staff. If investigations needed to be extended to third parties, he would request assistance from the competent national judicial authorities or call on OLAF to take action pursuant to Regulation

Amendment 22
Article 7 c (new)

Article 7c

Opening and completion of investigations

1. The European Anti-Fraud Office OLAF shall notify the European Public Prosecutor of any actions which could constitute one of the offences defined in Chapter II. Upon request, he shall have access at any time to any information at OLAF's disposal. Offences may also be reported to the European Public Prosecutor by citizens, who shall not be disadvantaged in any way as a result of so doing.

2. Where there are grounds for supposing that an offence within the meaning of Article 7a(1) has been committed, the European Public Prosecutor shall open an investigation.

3. Should suspicions not be substantiated, the investigation shall be terminated by means of an official cessation decision by the European Public Prosecutor.

4. Should suspicions be substantiated, the European Public Prosecutor shall draw up a report containing information on any actions liable to result in criminal proceedings and recommendations for the competent national judicial authorities. When the report is drawn up, account shall be taken of the procedural requirements of the law of the Member State or States concerned.

5. Where obligations of members or servants deriving from the EC Treaty are infringed, or where obligations deriving from the Staff Regulations of Officials or from the Financial Regulation are infringed, the European Public Prosecutor shall address recommendations to the institution, body, office or agency

concerned, which shall notify him, by a deadline he has set, of action taken.

6. The European Public Prosecutor shall be heard, should he so request, during disciplinary proceedings or proceedings to establish financial liability. The detailed arrangements for this shall be laid down in the Staff Regulations and the Financial Regulation

Justification

The European Public Prosecutor would be able to rely on OLAF's findings. The Community's institutions and bodies and their servants, but also the Member States, are required to report suspected offences to OLAF. In addition, however, provision should also be expressly made for members of the public to be entitled to contact the European Public Prosecutor directly without suffering any adverse consequences. The European Public Prosecutor would be required to open an investigation into suspected offences (legality principle). He would be able to refer the findings of his investigations to the competent national judicial authorities and issue recommendations, but would not be empowered to give instructions to national authorities. In addition, it must be possible for the European Public Prosecutor to participate in disciplinary proceedings and proceedings to establish the financial liability of officials.

Amendment 23 Article 7 d (new)

Article 7.

Protecting the rights of persons involved

1. A person may not be heard as a witness but must be questioned as accused from the point at which it is established, reported or revealed that there is clear and conclusive circumstantial evidence in support of an accusation of guilt

2. The accused shall have the right, no later than at the start of the first questioning, to be informed about the charge against him, to be represented by defence counsel of his choice, and, if necessary, to be assigned an interpreter. He shall have the right to refuse to testify.

3. For the entire duration of the investigation, judicial supervision shall be exercised by a judge of the Court of Justice.

He shall authorise the possible coercive measures under Article 7b after he has satisfied himself that they are necessary and proportionate. If there is a risk that delay may frustrate the conduct of the investigation, and in particular if there is a risk that evidence may be mislaid, ex post facto authorisation within 48 hours shall be permissible. The judge's authorisation shall be obtained if investigations are to extend beyond nine months.

Justification

It must be comprehensively ensured that investigations are lawful and legitimate in accordance with the European Convention on Human Rights.

Amendment 24
Article 7 e (new)

Article 7 e

Official oath and right of action

1. The European Public Prosecutor and his staff shall be sworn in before the Court of Justice and shall undertake to conduct investigations objectively and impartially and, in the process, not to seek or take instructions from any quarter

2. If the European Public Prosecutor considers that the performance of his duties is being hampered by a measure, or by a failure to act, for which an institution, body, office or agency is responsible, he may bring an action before the Court of Justice

Justification

Self-explanatory.

Article 7f

7. The posts allocated to the European Public Prosecutor shall be listed in an Annex to the Commission's establishment plan. The European Financial Public Prosecutor shall, in relation to his staff, exercise the powers conferred by the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the Community on, respectively, the appointing authority and the authority authorised to conclude employment contracts.

Appointment and status of the European Public Prosecutor

1. The European Public Prosecutor shall be appointed by the Commission for a term of seven years. Reappointment shall not be permissible. Any persons whose independence is beyond doubt and who possess the qualifications for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence may be appointed.

2. With a view to appointing the European Public Prosecutor, the Supervisory Committee provided for in Article 11 of Regulation (EC) No 1073/1999 shall, following a call for applications to be published in the Official Journal, draw up a list of suitably qualified candidates. The European Parliament shall conduct a public hearing of the candidates. The Commission shall appoint a candidate endorsed by the European Parliament and the Council

3. The European Public Prosecutor shall report to the European Parliament, the Council, the Commission and the Court of Auditors on the findings of the investigations conducted by him and shall publish an annual report on his activities. In this connection, investigations shall

remain confidential, national provisions applicable to judicial proceedings shall be observed, where appropriate, and the protection of the legitimate rights of the persons concerned and the public interest in comprehensive information shall be reconciled

4. The European Public Prosecutor shall take all appropriate steps to cooperate closely with the Supervisory Committee provided for in Article 11 of Regulation (EC) No 1073/1999.

5. The Commission may take disciplinary action against the European Public Prosecutor only after a favourable opinion has been delivered by the Supervisory Committee provided for in Article 11 of Regulation (EC) No 1073/1999.

6. The appropriations for the European Public Prosecutor shall be entered under a special heading within Part A of the section of the general budget of the European Union relating to the Commission and shall be set out in detail in an Annex to that Part. The European Public Prosecutor shall be the authorising officer for the appropriations entered in that Annex.

7. The posts allocated to the European Public Prosecutor shall be listed in an Annex to the Commission's establishment plan. The European Public Prosecutor shall, in relation to his staff, exercise the powers conferred by the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the Community on, respectively, the appointing authority and the authority authorised to conclude employment contracts.

Justification

The independence of the European Public Prosecutor must be ensured. The proposed procedure is based on experience with the OLAF Regulation.

Amendment 26
Article 7 g (new)

Article 7g.

Seat of the European Public Prosecutor

Pursuant to Article 289 of the EC Treaty, the seat of the European Public Prosecutor shall be determined by common accord of the Governments of the Member States.

Justification

The seat of the European Public Prosecutor cannot be laid down in this regulation; rather, there must be agreement between the Member State governments. In its resolution of 14 March 2001, Parliament insisted that the seat of the European Public Prosecutor must be in Luxembourg in order, through proximity to the Court of Justice, to emphasise his independence.

Amendment 27
Article 10(1)

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.

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 ***possibly leading to extradition.***

Justification

In accordance with the amended recital 14.

Amendment 28
Article 12 a (new)

Article 12 a

Jurisdiction

Each Member State shall take the necessary measures to establish its jurisdiction over the offences it has established in accordance with Article 7 when:

(a) fraud, participation in fraud or attempted fraud is committed in whole or in part within its territory,

(b) the offender is a national or official of the Member State concerned,

(c) the fraud is committed against a national of the Member State, whether the national is a national or Community official or a member of a Community institution;

(d) the offender is a Community official working for an institution of the European Communities or for a body set up in accordance with the Treaties establishing the European Communities which has its headquarters in the Member State in question.

Justification

In accordance with recital 14 as proposed by Parliament, these are aspects of the instruments not covered by the directive which must be covered by it in order to provide maximum efficiency in fighting fraud against the financial interests of the European Communities.

Amendment 29
Article 12 b (new)

Article 12 b

Extradition and prosecution

- 1. Any Member State which, under its law, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over the offences it has established in accordance with Article 7 of the Directive when committed by its own nationals outside its territory.*
- 2. Each Member State shall, when one of its nationals is alleged to have committed in another Member State a criminal offence involving the conduct described in Chapter II, and it does not extradite that person to the other Member State solely on the grounds of his or her nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate. In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be transmitted in accordance with the procedures laid down in Article 6 of the European Convention on Extradition. The requesting Member State shall be informed of the prosecution initiated and of its outcome.*
- 3. A Member State may not refuse extradition in the event of fraud affecting the European Communities' financial interests for the sole reason that it concerns a tax or customs duty offence.*
- 4. For the purposes of this Article, the term 'nationals of a Member State' shall be interpreted in accordance with any declaration made by it under Article 6 (1) (b) of the European Convention on Extradition and with paragraph 1 (c) of the said article.*

Justification

In accordance with recital 14 as amended. Some Member States do not extradite their nationals. The aim of this provision is to prevent people presumed to be guilty of fraud against the financial interests of the European Communities from enjoying total immunity because of this blanket refusal to extradite.

Article 12 c

Cooperation

1. If an offence as established in accordance with Article 7 of the present Directive constitutes a criminal offence and concerns at least two Member States, those States shall cooperate effectively in the investigation, in the prosecution and in carrying out the punishment imposed by means, for example, of mutual legal assistance, extradition, transfer of proceedings or enforcement of sentences passed in another Member State.

2. Where more than one Member State has jurisdiction and has the possibility of viable prosecution of an offence based on the same facts, the Member States involved shall cooperate, in coordination with OLAF, in deciding which shall prosecute the offender or offenders with a view to centralising the prosecution in a single Member State where possible.

Justification

In accordance with recital 14 as amended. In view of the complex, cross-border nature of some fraud cases, cooperation between Member States is of fundamental importance. Reinforced cooperation between Member States, in coordination with OLAF, must enable cases of fraud to be detected and action to be taken against them, and allow the action taken against a case of cross-border fraud to be centralised in a single Member State. This centralisation of legal action will be a measure of the effectiveness of the system.

1a. Regulation 1073/1999 concerning investigations carried out by OLAF shall apply in its entirety; the role of OLAF

*must be defined in a set of rules
incorporated in the codes of criminal-law
procedure.*

Justification

Although changes to this regulation are necessary, particularly as regards controls on the legality of the activities of the Office, it is essential that the authorities in the Member States should take the results of the Office's investigations into account and that OLAF's role should be defined in a set of rules incorporated in the codes of criminal-law procedure.

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Communities' financial interests (COM(2001) 272 – C5-0225/2001 – 2001/0115(COD))

(Codecision procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to the European Parliament and the Council (COM(2001) 272¹),
 - having regard to Article 251(2) and Article 280(4) of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C5-0225/2001),
 - having regard to Rule 67 of its Rules of Procedure,
 - having regard to the report of the Committee on Budgetary Control and the opinions of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and the Committee on Legal Affairs and the Internal Market (A5-0390/2001),
1. Approves the Commission proposal as amended;
 2. Asks to be consulted again should the Commission intend to amend the proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council and Commission.

¹ OJ C 240, 28.8.2001, p. 125.

EXPLANATORY STATEMENT

Parliament welcomes the fact that the Commission has submitted a European Parliament and Council legislative proposal on the criminal-law protection of the Community's financial interests pursuant to Article 280(4) of the EC Treaty, as it had said it would in its Communication COM(2000) 358 final on action to combat fraud.

The proposal for a directive under consideration here incorporates many of the provisions laid down in the 1995 Convention on the protection of the European Communities' financial interests and its additional protocols, which have yet to enter force on account of the fact that they have not been ratified by all the EU Member States. The European Parliament takes the view that the Commission's prudent approach has led it to omit certain aspects of the PFI Convention and its protocols from the directive's scope. Parliament takes the view that the debate as to whether the competences fall within the first or third pillars must now be left to lie, given the 'essential' nature of the European Union's financial interests. The Community institutions must respond more in terms of the political will to prevent fraud than in terms of judicial analysis, and equip themselves with the necessary instruments, most of which already exist. Such efforts to communitarise the criminal-law protection of the EU's financial interests and therefore to place such matters within the scope of first-pillar legislation must not be undermined by the Member States' foot-dragging tendencies. Parliament therefore calls on the Council to ensure that the Commission proposal (which for the most part matches Parliament's expectations) is adopted with a minimum of delay.

Parliament considers that the task of bringing the Member States' laws closer together (as required under the proposal for a directive) is essential if the EU's financial interests are to be protected under criminal law, but that it constitutes only one step towards the necessary introduction of a European public prosecutor - an office which should also be established under the first pillar.

Parliament therefore encourages the Commission to continue its efforts in this direction as well (with a view to the next revision of the treaties) and calls on the Commission to involve Parliament as of now in the drawing up of a Green Paper on the terms and conditions for the appointment of a European public prosecutor to deal with matters relating to the protection of the Community's financial interests.

Europe must respond to the violent events of 11 September 2001 by addressing the many questions they have raised, including: dubious or criminal financial dealings, and organised crime; the need for an integrated European judicial area based on the principle of European territoriality, and not on that of national territoriality, which has been responsible for so much obstruction to the conduct of investigations in the past.

Concerning the legislative act proposed on the basis of Article 280 of the EC Treaty

Since the Amsterdam Treaty came into force (on 1 May 1999) and pursuant to Article 280 (which has replaced Article 209a), the Community, in the same way as the Member States, is required to adopt measures which will enable the Community's financial interests to be protected in an effective and equivalent fashion in all the Member States. Paragraph 4 of that

article lays down the provisions which will allow such an objective to be achieved.

Parliament therefore welcomes the fact that the Commission, on account of the need to bring matters into line with the Amsterdam Treaty, is proposing that the current third-pillar instruments be partially replaced by an act adopted on the basis of Article 280 of the EC Treaty - something which Parliament has called for on a number of occasions.

This is also in line with the view taken at the December 2000 Nice Intergovernmental Conference, at which it was confirmed that protection of the EU's financial interests is essentially a first-pillar issue.

Form and content of the legislative act to be proposed on the basis of Article 280 of the EC Treaty

A directive (the instrument chosen by the Commission) appears to be the most suitable tool and should not pose any transposition problems, at least not in the case of the Member States which have already adopted the PFI instruments. Pursuant to Article 249 of the EC Treaty the directive is binding upon each Member State as to the result to be achieved, although the choice of form and methods is left to the national authorities. The process of bringing national criminal-law policies into line with the new requirements imposed by the Treaty (Article 280) also needs to be speeded up. Parliament urges the Council to be consistent by ensuring that the statements made at Nice to the effect that protection of financial interests comes under the first pillar are matched by the adoption of the directive under consideration here.

Shifting this directive to the first pillar will give it added value in the context of ratification of agreements, since it will be subject to the Court of Justice's judicial control mechanisms, as well as to controls by the Commission, in its capacity as guardian of the Treaties.

Furthermore, it will make the directive easier to introduce in the applicant countries since it will be part of the *acquis communautaire*. An integrated system of criminal-law protection for the Community's financial interests will provide additional guarantees before accession.

Provisions relating to vertical cooperation between the national authorities and the Commission (pursuant to Article 280(3)) are also included in the proposal for a directive. However, as Parliament stated in its December 2000 resolution on the Commission Communication entitled 'Protection of the Communities' financial interests - The fight against fraud - For an overall strategic approach' (COM(2000) 358 final), there must be cooperation between the national bodies and OLAF, which must genuinely enjoy the independence (above all from the Commission) which the legislator intended it to have in terms of staffing and operational activity, and whose rules of procedure must also be amended. For example, OLAF should be recognised in criminal-law procedure codes as an assistant of the judicial authorities.

Criminal-law protection of the EU's financial interests and Eurojust

Once the criminal-law protection of the EU's financial interests is communitarised, Eurojust

(whose remit encompasses crime of any kind and which is a body subject to intergovernmental cooperation) will no longer necessarily have a role to play in the protection of financial interests. Parliament notes that the Commission, OLAF and the Supervisory Committee are currently establishing a basis for cooperation between OLAF and Eurojust in cases where investigations conducted by OLAF in connection with the protection of financial interests have implications in the wider field of criminal investigation.

Gaps that need filling

However, it seems essential to reintroduce into the body of the directive the articles of the PFI Convention and its additional protocols that relate to competence, extradition and judicial proceedings, and cooperation. In particular, centralisation of prosecutions is essential if the system is to be effective. This is why Parliament has tabled amendments in these areas.

Penalties

The directive contains an obligation for the Member States to provide for sanctions under criminal law to penalise behaviour constituting fraud against the financial interests of the European Communities, as defined in Chapter II. This obligation is without prejudice to the possibility for the Member States also to apply administrative sanctions.

In accordance with the case law of the Court of Justice of the European Communities, these sanctions must be proportionate, effective and have a deterrent effect. However, the Member States retain a margin of manoeuvre in deciding on the level and extent of these judicial sanctions.

Inevitably, in order to ensure that this system of criminal-law protection offers a minimum level of guarantees throughout the territory of the Community, minimum penalties could be envisaged in accordance with the nature of the behaviour constituting fraud against the financial interests of the European Union and the amounts involved.

A necessary supplement to the directive

This directive represents the lowest common denominator among the Member States in criminal-law protection of financial interests. It will have to be supplemented because of the international environment, which can only encourage the establishment of a European judicial area, and in this context we welcome the Council's proposal for a framework decision on a European arrest warrant to be operative between the Member States of the Union, which is intended to replace the process of extradition of persons sought or sentenced by the judicial authorities. The *acquis communautaire* represented by this directive is in a process of development; new definitions are called for, in the area of corruption, for example (selling influence). The list of crimes must be supplemented to include all crimes which are detrimental to the Community's financial interests, whether they are committed by economic operators or national officials.

Reference must be made to the work and analyses being carried out by the Commission and

by national experts and recorded in the Corpus Juris, which represents the 'Lex desiderata' that may in the future apply to the protection of the Community's financial interests in the Union's Member States and the applicant countries.

The Green Paper currently being drafted by the Commission should lead, after the institutions and Member States have stated their opinions, to the introduction of a European public prosecutor (as proposed by the Corpus Juris and tabled by the Commission at the Intergovernmental Conference in Nice) who would bring actions before the competent judicial authorities in the Member States in connection with protecting the Community's financial interests and in the framework of specific rules adopted to this end. This will call for a revision of the Treaties at the next Intergovernmental Conference, in 2004, inserting a new Article 280 a.

But, in the immediate term, and with a view to the agenda for the Intergovernmental Conference, the Laeken summit (in December 2001) must take account:

- of the need to move beyond the debate about the relative merits of the first and third pillars as suitable locations for the provisions on protection of the Community's financial interests, and to introduce legislation which is comprehensible to all the Member States and the applicant countries (cf. declaration on the future of the Union - annexed to the Nice Treaty; point 5: 'a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning');

- of the need to place on the agenda for the next Intergovernmental Conference the establishment of a European public prosecutor. The Nice Treaty did not solve the problems of a horizontal model of international cooperation, and Eurojust is simply a cooperation unit without 'vertical' powers.

23 October 2001

OPINION OF THE COMMITTEE ON CITIZENS' FREEDOMS AND RIGHTS, JUSTICE AND HOME AFFAIRS

for the Committee on Budgetary Control

on the proposal for a directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests (COM(2001)272 – C5-0225/2001 – 2001/0115 (COD))

Draftsman: Giuseppe Di Lello Finuoli

PROCEDURE

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Giuseppe Di Lello Finuoli draftsman at its meeting of 11 July 2001.

It considered the draft opinion at its meetings of 12 October and 22 October 2001.

At the latter meeting it adopted the following conclusions by 36 votes to 0, with 1 abstention.

The following were present for the vote: Graham R. Watson, chairman; Robert J.E. Evans and Bernd Posselt, vice-chairmen; Giuseppe Di Lello Finuoli, draftsman; Niall Andrews, Alima Boumediene-Thiery, Marco Cappato, Michael Cashman, Charlotte Cederschiöld, Carmen Cerdeira Morterero (for Ozan Ceyhun), Carlos Coelho, Thierry Cornillet, Gérard M.J. Deprez, Francesco Fiori (for Marcello Dell'Utri pursuant to Rule 153 (2)), Glyn Ford (for Sérgio Sousa Pinto), Pernille Frahm, Evelyne Gebhardt (for Gerhard Schmid), Daniel J. Hannan, Jorge Salvador Hernández Mollar, Margot Keßler, Timothy Kirkhope, Eva Klamt, Baroness Sarah Ludford, Lucio Manisco (for Fodé Sylla), Luís Marinho (for Anna Karamanou), Hartmut Nassauer, Elena Ornella Paciotti, Paolo Pastorelli, Martine Roure (for Adeline Hazan), Agnes Schierhuber (for Mary Elizabeth Banotti pursuant to Rule 153 (2)), Patsy Sörensen, Anna Terrón i Cusí, Astrid Thors (for Bertel Haarder pursuant to Rule 153 (2)), Maurizio Turco (for Frank Vanhecke), Anne E.M. Van Lancker (for Joke Swiebel), Gianni Vattimo, Christian Ulrik von Boetticher.

SHORT JUSTIFICATION

On 23 May 2001 the Commission submitted a proposal for a directive on the criminal-law protection of the Community's financial interests (COM(2001)272).

The explanatory memorandum refers to Article 280 of the EC Treaty inserted by the Treaty of Amsterdam:

- "1. *The Community and the Member States shall counter fraud and any other illegal activities through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States.*
2. *...*
3. *Without prejudice to other provisions of this Treaty, the Member States shall coordinate their action ... against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.*
4. *The Council, acting in accordance with the procedure referred to in Article 251 ... shall adopt the necessary measures These measures shall not concern the application of national criminal law or the national administration of justice.*
5. *... "*

The memorandum states that a number of instruments to protect the financial interests (PFI), adopted and signed by the Member States under the third pillar of the TEU have, despite urgent and repeated appeals from Parliament, the Council and the Commission, not yet been ratified by all fifteen Member States and hence have not entered into force.

These instruments are:

1. Convention of 26 July 1995 on the protection of the European Communities' financial interests;
2. First Protocol of 27 September 1996;
3. The Protocol of 29 November 1996;
4. Second Protocol of 19 June 1997.

According to information obtained by the Commission, some of these instruments will not be ratified before 2002, whilst the Second Protocol, in particular, could take years to ratify.

The lack of legislative harmonisation in the Union and the legislative disparities in the individual Member States, especially as regards penalties, which are not always effective, proportionate and dissuasive, seriously jeopardise the Union's financial interests and in court actions are likely to make the administrative enquiries carried out by OLAF pointless.

Bearing in mind the Community's obligations to protect the Union's financial interests in accordance with Article 280(4) of the EC Treaty, and the clear provision set out in Article 29

of the EU Treaty, which establishes that Community law takes precedence over Union law, the Commission considers that this matter should be covered by a first-pillar instrument, not least in order to remedy the ineffectiveness of the third-pillar instruments, which have not yet entered into force, but can still be incorporated by being inserted in the Directive, with the exceptions laid down in Article 280(4) of the EC Treaty.

The Commission takes the view that the last part of paragraph 4 '*These measures shall not concern the application of national criminal law or the national administration of justice*' refers to procedural criminal law and to cooperation between judicial authorities and, hence, makes it possible to incorporate in a directive (first-pillar), all the rules and provisions contained in the above-mentioned PFI concerning substantive criminal law and cooperation between the national judicial authorities and the European Commission.

We agree with this view, in that legislation establishes an explicit division of competences between the EU and the EC and hence must be subject to a restrictive interpretation.

In accordance with this interpretation, the Directive incorporates almost all the rules and provisions already contained in the ineffective PFI instruments, except those which are strictly relevant to third-pillar instruments and which may be implemented by means of the ratification of the PFI instruments or their incorporation in a framework decision.

This proposal for a directive on the criminal-law protection of the Community's financial instruments therefore continues the attempt to make simultaneous and complementary use of first- and third-pillar instruments, thereby restating the urgent need for a decision on whether or not it is appropriate to maintain two parallel systems, which are partially in conflict with each other, to safeguard the same interests, be they financial, environmental or other.

In the case under consideration, which deals with specific action to prevent and combat crime against and within the Union (envisaged in Title IV of the EC Treaty), in order to avoid an overlapping of legislation and instruments and the resulting difficulty of ensuring effective protection for the Community's financial instruments, Article 42 of the EU Treaty could be taken up again to regulate the whole field with a first-pillar instrument.

In the light of the above, the Committee on Citizens' Freedoms and Rights calls on the Committee on Budgetary Control to incorporate the following paragraph and amendments in its report:

1. Agrees completely with the Commission's decision to use a first-pillar instrument in order to protect the Union's financial interests more effectively;
2. Considers, however, that the use of a third-pillar instrument to apply the provisions contained in the Convention and Protocols mentioned, which have not yet been ratified, would make it possible to avoid further delays;
3. Calls on the European Council, therefore, to use Article 42 of the EU Treaty to regulate the whole matter comprehensively, uniformly and more effectively.

AMENDMENTS

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs calls on the Committee on Budgetary Control, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission¹

Amendments by Parliament

Amendment 1 Recital 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.

Changes need to be made, as appropriate, to national legislation to make it possible to ***seize for evidentiary and/or precautionary purposes and*** confiscate the proceeds of acts of fraud, corruption and money laundering.

Justification

This addition makes a more precise link with the provisions of Article 12 (confiscation).

Amendment 2 Article 2 (3)

(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

(3) 'national official' shall mean any person with the status of 'official ***of the State or local government***' 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

¹ OJ C240, 28.08.2001, p.125.

national law;

national law;

Justification

Since criminal-law provisions are being dealt with, the term 'national official' could be interpreted as an explicit and restrictive definition and the further pleonastic use of the term 'public officer' would be irrelevant. This would risk excluding the liability of officials of regional, provincial, local government and other bodies which manage Community resources.

Amendment 3 Article 3(a)

(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;

(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 **preparation, supply**, 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;

Justification

It is illogical and legislatively incorrect to define as criminal offences the acts of preparing and supplying documents in an article (Article 7(2)) separate from that defining the other activities which are usually combined or linked with them for the purposes of evidence. In order not to create any gaps in legislation, all these unlawful activities should be covered by the same provision.

Amendment 4

Article 3(b)

(b) in respect of revenue, any intentional act or mission 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.

(b) in respect of revenue, any intentional act or mission relating to:

- the ***preparation, supply***, 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.

Justification

It is illogical and legislatively incorrect to define as criminal offences the acts of preparing and supplying documents in an article (Article 7(2)) separate from that defining the other activities which are usually combined or linked with them for the purposes of evidence. In order not to create any gaps in legislation, all these unlawful activities should be covered by the same provision.

Amendment 5

Article 7 (2)

(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.

Delete

Justification

In accordance with amendments 3 and 4, paragraph 2 is superfluous.

5 November 2001

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET

for the Committee on Budgetary Control

on the proposal for a directive of the European Parliament and of the Council
on the criminal-law protection of the Community's financial interests
(COM(2001) 272 – C5-0225/2001 – 2001/0115 (COD))

Draftsman: Luís Marinho

PROCEDURE

The Committee on Legal Affairs and the Internal Market appointed Luís Marinho draftsman at its meeting of 11 September 2001.

It considered the draft opinion at its meetings of 10 October and 5 November 2001.

At the last meeting it adopted the following conclusions unanimously.

The following were present for the vote: Ana Palacio Vallelersundi, chairman; Rainer Wieland and Ward Beysen, vicechairmen; Luís Marinho, draftsman; Brian Crowley, Bert Doorn, Janelly Fourtou, Gerhard Hager, The Lord Inglewood, Ioannis Koukiadis (for Maria Berger), Toine Manders and Bill Miller.

SHORT JUSTIFICATION

1. The directive in question encompasses the main aspects of the Convention on the protection of the European Communities' financial interests of 26 July 1995 and the additional Protocols of September and November 1996 and June 1997.

The considerable delay in ratifying the Convention by some Member States¹ and the scale of the damage caused by fraud and economic and financial crime to the Community budgets has compelled the Commission to submit the current proposal.

This **failure to protect Community finances**, the victim of which is ultimately the Community tax payer¹, undermines the credibility of the commitment by the institutions

¹ The explanatory memorandum to the proposal for a directive gives details of the state of play with regard to ratification.

and the Member States to combat this form of crime. As the Commission says, *'the need to reassert this commitment vis-à-vis the citizens of the Union and the countries applying for accession calls for urgent solutions to get things moving again'*².

2. After the signing of the abovementioned Conventions and Protocols, the Treaty of Amsterdam replaced former Article 209a of the EC Treaty by current Article 280. This new article urges the Community and the Member States to adopt firm and effective measures to protect the EU's financial interests.

On the basis of this article, the Commission is proposing that most of the Convention and Protocols referred to above be incorporated in a directive. In the meantime, the ratification process is continuing.

Parliament endorsed this position in the abovementioned resolution.

3. The problem, however, is that, after stipulating that the Community and the Member States should counter fraud through measures 'which shall act as a deterrent and be such as to afford effective protection', Article 280 of the Treaty makes provision for an exception to this requirement in the second sentence of paragraph 4.

It stipulates that these measures 'shall not concern the application of national criminal law or the national administration of justice'.

4. **The crux of the problem lies in determining the scope of this exception, in other words whether Article 280(4) precludes any element of criminal law in first pillar legal instruments or whether, on the contrary, the exception only affects 'the application of national criminal law' and 'the national administration of justice' in the Member States.**

Apparently a majority of Member States within the Council are favourable to allowing the Community to define, i.e. to classify, criminal offences. The situation is less favourable, however, when it comes to requiring the Member States to lay down criminal penalties.

The Commission considers that the legal context of Article 280 does not preclude the adoption of criminal law provisions which classify offences or seek to harmonise penalties, provided that they do not concern the application of national criminal law or the national administration of justice.

5. In accordance with this restrictive or teleological interpretation of Article 280, the Commission is proposing **to include in a directive all the provisions of the Convention and Protocols that do not fall under the restriction referred to in the second sentence of Article 280(4)**. This means all the provisions that do not relate to procedural criminal law or judicial cooperation. In its explanatory memorandum, the Commission

¹ As highlighted by Parliament in its resolution of 13 December 2000 on the protection of the Communities' financial interests (A5-0376/2000).

² COM(2001) 272 final, explanatory memorandum, point 1.1.

has produced two tables comparing the articles in the Convention and Protocols (**already negotiated and adopted by the Member States and the European Parliament, and in the process of ratification**) and the relevant articles of the directive. They also show which parts of the Conventions have not been included in the proposal for a directive because of the exception provided for in Article 280(4).

It should also be pointed out that new Article 280 is a specific legal basis which, by virtue of Articles 29 and 47 of the Treaty on European Union, takes precedence when adopting measures regarding the protection of interests.

6. The European Parliament, which in its December 2000 resolution endorsed the need to make effective progress once and for all towards protecting the EU's financial interests, cannot but be sensitive to the Commission's arguments. **Your rapporteur does not believe, as some have maintained, that the present directive is seeking to bring criminal law within the Community sphere. It is purely and simply an attempt to strictly enforce the provisions of Article 280**, which has been approved by all the Member States' parliaments. Had the legislator wished to exclude any kind of reference to criminal law, he would simply have said that the measures needed to counter fraud and corruption would have no implications in the sphere of criminal law. He has not done so, but has chosen instead to confine his reservations to a specific area of criminal law.
7. In the final analysis, it will be the task of the Court of Justice to explain and clarify the scope of the exception laid down in the Treaty.

Your rapporteur considers it urgent to guarantee effective legal protection of the EU's financial interests. The aim of introducing Article 280 at Maastricht was for it to be used and for it to facilitate the task of the legislator, by excluding from his scope only the most sensitive areas of criminal law, in other words those referring to criminal prosecution or judicial cooperation. There is nothing to prevent the **approximation** of substantive criminal law in the area we are concerned with; in other words, the definition of fraud, corruption and money laundering which affect the Community's financial interests, together with a very circumspect approximation of the criminal penalties applicable to these offences.

CONCLUSIONS

The Committee on Legal Affairs and the Internal Market calls on the Committee on Budgetary Control, as the committee responsible, to incorporate the following amendments into its report:

Text proposed by the Commission¹

Amendments by Parliament

Amendment 1
Article 3, paragraph 2

¹ JO C 240E, 28.8.2001, p. 125

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.

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.

Justification

Although the Community is competent to adopt this directive, pursuant to Article 280 of the EC Treaty, the inclusion of a detailed definition of criminal penalties (e.g. custodial sentences) will make adoption difficult.

Amendment 2 Article 10, first paragraph

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.***

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.

Justification

See justification to amendment 1.

Amendment 3 Article 10, second paragraph

However, in cases of minor fraud ***involving a total amount of less than 4 000 euros*** and

However, in cases of minor fraud and not involving particularly serious circumstances

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.

under its laws, a Member State may provide for penalties of a different type from those laid down in the first paragraph.

Justification

See justification to amendment 1.