



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 21 February 2008

6744/08

**DROIPEN 15
FIN 69**

COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 14 February 2008

to: Mr Javier SOLANA, Secretary-General/High Representative

Subject: SECOND REPORT FROM THE COMMISSION
Implementation of the Convention on the Protection of the European
Communities' financial interests and its protocols
- Article 10 of the Convention

Delegations will find attached Commission document COM(2008) 77 final.

Encl.: COM(2008) 77 final



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14.2.2008
COM(2008) 77 final

SECOND REPORT FROM THE COMMISSION

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

Article 10 of the Convention

{SEC(2008) 188}

SECOND REPORT FROM THE COMMISSION

Implementation of the Convention on the protection of the European Communities' financial interests and its protocols

1. PURPOSE OF THE REPORT

On 25 October 2004 the Commission adopted a report on implementation by Member States of the Convention on the protection of the European Communities' financial interests and its protocols.¹ That report took stock of how the EU-15 Member States had fulfilled the obligations placed on them by the PFI Convention,² the 1st Protocol,³ the ECJ Protocol⁴ and the 2nd Protocol⁵ ("the PFI instruments").

That first report announced that the Commission intended to submit a follow-up report on implementation in the whole EU of now 27 Member States. Although ratification is not yet completed, neither in the EU-15 nor in the Member States which joined the EU on 1 May 2004 or 1 January 2007, the Commission considers that, ten years after signature of the 2nd Protocol and three years after the enlargement of 2004, the time has come to take a fresh look at the national implementing measures and to consider the impact of the PFI instruments.

The purpose of this report, and even more so of the accompanying Commission Staff Working Paper, is to check the progress made towards the objective of effective and equivalent protection of the EC's financial interests in the EU as a whole. It looks at the state of play with transposition of the PFI instruments in the EU-15 Member States, in the light of the conclusions of the first report, and also at the legislative situation in the other Member States, whether they have ratified all the PFI instruments or not.

2. ASSESSMENT OF THE NATIONAL IMPLEMENTING MEASURES IN THE MEMBER STATES WHICH HAVE RATIFIED THE PFI INSTRUMENTS

This assessment is limited to the Member States which have ratified the relevant PFI instruments and focuses only on those where shortcomings have been identified.

¹ COM (2004) 709 final, 25.10.2004.

² Convention on the protection of the European Communities' financial interests, OJ C 316, 27.11.1995, p. 49.

³ Protocol to the Convention on the protection of the European Communities' financial interests, OJ C 313, 23.10.1996, p. 2.

⁴ Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests, OJ C 151, 20.5.1997, p. 2.

⁵ Second Protocol to the Convention on the protection of the European Communities' financial interests, OJ C 221, 19.7.1997, p. 12.

2.1. Criminal offences

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

As regards fraud affecting the EC's expenditure, considerable progress has been made towards achieving satisfactory, if not complete, compliance since the first report. However, Belgium, Italy, Latvia, Lithuania, Luxembourg and Austria still ask for additional indications of intent not provided for in Article 1(1)(a). In France fraud in the form of non-disclosure of information in violation of a specific obligation seems to be punished only in exceptional cases, while Hungary and Estonia, as regards misapplication of funds, do not cover all expenditure. In both cases, prosecution is rendered more difficult than the standard laid down in Article 1(1)(a).

Concerning fraud affecting the EC's revenue, in Belgium the punishment for certain forms of fiscal fraud appears neither proportionate nor dissuasive, with no sufficient custodial sentences. In Lithuania and Slovenia revenue-related fraud offences are subject to minimum thresholds. The Latvian legislation asks for additional indications of intent not provided for in Article 1(1)(b).

The Commission will collect further information on compliance by Member States as regards fraud offences which were initially applicable to national officials and, due to the assimilation requirement, need to be extended to Community officials.

Corruption (Articles 2 to 5 of the 1st Protocol)

In general, implementation of the provisions on active and passive corruption is well advanced. In Germany, however, compliance is only formal and implementation of the assimilation principle is not satisfactory in the case of bribery for licit deeds, which is punished only if committed by a German national official respectively. In Slovakia full compliance may depend on the courts' interpretation of the relevant laws.

Money laundering (Article 2 of the 2nd Protocol)

Thanks to the Community acts existing in this field, such as Directive 2005/60/EC,⁶ implementation regarding money laundering is good overall. For the moment, *de facto*, fraud affecting the EC's revenue is missing from the list of predicate offences for money laundering in Germany.

2.2. General concepts of criminal law

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

The Commission notes that most Member States show no intention of scrutinising their national systems with regard to the concept of criminal liability of heads of businesses. The scope and coverage of criminal liability for heads of businesses therefore remains unclear in Belgium, Denmark, Germany, Ireland, France, Italy, Luxembourg, Austria, Slovenia and Sweden, where the general rules on participation are taken as an argument that there is no need for specific rules.

⁶ OJ L 309, 25.11.2005, p. 15.

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

Apart from Luxembourg and Slovakia, the Member States have established the liability of legal persons. Spain and Latvia, however, fail to provide for liability of legal persons as a self-standing liability besides that of natural persons. In the cases of Belgium, Denmark and the UK, it is doubtful whether they provide for liability where lack of supervision or control made it possible for the offence to be committed or where the offence was committed by a subordinate. Recent practice in Germany may give cause for doubts about whether effective, proportionate and dissuasive criminal penalties are applied to punish legal persons.

Confiscation (Article 5 of the 2nd Protocol)

Apart for Latvia, which has no provisions on seizure, confiscation or removal of instruments of fraud, positive results have been achieved.

2.3. Elements relating to criminal procedure

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

All the Member States generally provide for jurisdiction based on the territoriality principle for fraud, corruption or money laundering. Some Member States are compliant, because they have exercised their right, under the PFI instruments, to submit reservations on the jurisdiction rules. The Irish jurisdiction rules on passive personality do not cover passive corruption, while the Latvian and Slovenian rules on jurisdiction over headquarters on their territories are limited to persons residing in the country itself.

2.4. General assessment

The harmonisation objective of the PFI instruments has still not been fully achieved for all 27 Member States, neither formally nor materially.

The Commission regrets that, due to the lack of ratification by Italy, the 2nd Protocol has still not entered into force and that ratification by Member States which joined the EU on 1 May 2004 has still not been finalised. *De facto* the current system of protection, based on conventions, creates a multi-speed situation. It results in a mixture of different legal situations in terms of the binding effect of the PFI instruments in the individual Member States' internal legal order. Formally, this situation does not produce the desired effective and dissuasive penal protection.

From the point of view of material compliance, the Commission's analysis concludes that five of the Member States which have ratified the PFI instruments now appear to have taken all the measures needed to comply in a satisfactory way with the PFI instruments. However, loopholes in the legislation applicable within the EU which allow offences to go unpunished remain possible. The rules laid down in the PFI instruments cannot be considered separately, since non-implementation of one article also has knock-on effects on provisions which, examined in isolation, seem to comply with the PFI instruments.

The need for a Directive on criminal-law protection of the Communities' financial interests⁷ persists. The PFI instruments based on the Maastricht Treaty are not an adequate response to the specific need for criminal-law protection of the EC's financial interests. Not only do many of the reasons for a proposal for a Directive on the criminal-law protection of the EC's financial interests still apply, but also the Commission will further examine possible approaches opened up by the reform of the EU/EC Treaty.

3. CONCLUSIONS

3.1. General conclusions

Given that formal compliance has not yet been achieved, the Commission urges those Member States which, more than ten years after adoption of the last of the PFI instruments and more than three years after accession, still have not done so (the Czech Republic, Hungary, Malta and Poland along with Estonia for the ECJ Protocol and Italy for the 2nd Protocol) to ratify all the PFI instruments without delay.

As concerns material compliance, the failure to achieve the harmonisation objective calls for further work towards adoption of a common position in the Council on the amended proposal for a Directive on the criminal-law protection of the Communities' financial interests and for asking Member States to reconsider the reservations which they entered when ratifying the PFI instruments.

All Member States are invited to step up their efforts to reinforce their national criminal legislation to protect the Communities' financial interests, in particular addressing the shortcomings identified in this report. Furthermore, those Member States considered not to have supplied sufficient information are invited to do so.

At the same time, a distinction must be drawn between the EU-15 Member States, which were already covered by the first report, and the relevant criminal law provisions of the twelve "new" Member States, ten of which joined the EU on 1 May 2004 and two on 1 January 2007, since the PFI instruments have entered into force in only some of them.

3.2. Follow-up to the recommendations made in the first report for the EU-15 Member States

The Council, the European Parliament and the Commission have repeatedly invited Member States to ratify the 2nd Protocol without delay.⁸ In 2006 the Commission addressed Italy as the only EU-15 State that has still not ratified the 2nd Protocol. Due to its non-ratification, Italy is indirectly impeding completion of the legal framework established by the PFI instruments, not only as regards the liability of

⁷ COM (2001) 272 final, 23.5.2001, as amended by COM (2002) 577 final, 16.10.2002.

⁸ For example: Resolution concerning a comprehensive EU policy against corruption, adopted by the Justice and Home Affairs Council on 14 April 2005 (Council Doc. 6902/05, 6901/2/05); European Parliament resolution on the protection of the financial interests of the Communities and the fight against fraud (OJ C 124 E, 15.5.2006, p. 232, paragraph 41); Report from the Commission to the European Parliament and the Council – Protection of the Communities' financial interests, COM(2006) 378 final.

legal persons but also with regard to the provisions on information exchange. The solidarity and coordination obligations under Article 10 and, especially, Article 280 of the EC Treaty should provide a means of tackling a situation where one Member State is holding back entry into force of a unanimously agreed legal instrument across the EU as a whole, if this instrument is a necessary measure contributing to aims also required under the EC Treaty. This is, in particular, the case for the 2nd Protocol, which the Council considered “*necessary ... to improve the effectiveness of protection under criminal law of the European Communities’ financial interests.*”⁹

The first report asked Member States to step up their efforts to reinforce their national criminal legislation and to treat the objective of full application of the PFI instruments as a priority. The Commission believes that the criminal legislation of the following EU-15 Member States still shows serious shortcomings in implementation of the other PFI instruments:

- (1) Belgium, since the Belgian Criminal Law does not fully comply with the definition of fraud because it requires the additional subjective element of being explicitly aware (“*sciemment*”) that the offender is not entitled to the grant;
- (2) Germany, because it fails to meet the requirements of the assimilation principle for corruption offences, since bribery for licit deeds is punished only if committed by a German national official but not by European Community staff or by an official of another Member State;
- (3) France, for not punishing fraud in the form of non-disclosure;
- (4) Ireland, whose jurisdiction rules on passive personality do not cover passive corruption;
- (5) Italy, where the penalties provided for by the implementing provisions are inadequate, because they are neither dissuasive nor proportionate;
- (6) Luxembourg, because for fraud it requires the additional subjective element of intentionally (“*sciemment*”) making a false declaration;
- (7) Austria, whose criminal law requires, for fraud, proof of the additional subjective element of enrichment (“*Bereicherungsvorsatz*”).

The Commission will address these seven Member States to gather their views on these alleged shortcomings. Should these contacts reveal diverging positions on application of the relevant provisions in the PFI instruments, initiation of procedures under Article 8 of the PFI Convention may be appropriate.

⁹ Recital to the Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities’ financial interests, OJ C 316, 27.11.1995, p. 48.

3.3. Recommendations to the Member States which joined the EU on 1 May 2004 or on 1 January 2007

The Member States which joined the EU on 1 May 2004 or on 1 January 2007 are invited to meet their commitments under the Accession Treaties. Consequently, the Czech Republic, Hungary, Malta and Poland, together with Estonia in the case of the ECJ Protocol, should proceed as fast as possible with accession to the PFI instruments to which they have not yet acceded.

4. FURTHER ACTION

4.1. Ensuring ratification

The Commission will send a letter inviting Italy to finalise ratification of the 2nd Protocol. The Commission will also address the Member States which have still not ratified the PFI instruments (the Czech Republic, Hungary, Malta and Poland plus Estonia in the case of the ECJ Protocol) should there be any further unreasonable delay in ratification.

4.2. Ensuring transposition

The Commission will invite the following Member States to state their positions on application of provisions in the PFI instruments which they have not yet fully implemented:

- (1) France, Belgium, Luxembourg and Austria, for not having fully implemented Article 1(1)(a) of the PFI Convention;
- (2) Germany, for not having fully implemented Articles 2 and 3 in conjunction with Article 4 of the 1st Protocol;
- (3) Italy, for not having implemented Article 1(1) in conjunction with Article 2 of the PFI Convention;
- (4) Ireland, for not having implemented Article 6(1)(c) of the 1st Protocol.

Based on these positions, the Commission will consider proceedings under Article 8 of the PFI Convention and the 1st Protocol or Article 35(7) of the EU Treaty.

Furthermore, Member States considered not to have supplied sufficient information (Belgium, the Czech Republic, Denmark, Germany, Ireland, France, Italy, Luxembourg, Hungary, Malta, Austria, Poland, Slovenia, Slovakia, Sweden and the UK) are invited to do so with a view to a third report, which the Commission intends to submit once the aforementioned procedures have produced practical results.

ANNEX - Overview of transposition

I = no/insufficient information; N = not transposed; P = partly transposed; T = fully transposed

Nyr = not yet ratified (for the EU-15). Nya = not yet acceded (for the Member States which joined the EU on or after 1 May 2004)

Member State (EU-15 in bold)	Article 1 of the Convention (expenditure fraud)	Article 1 of the Convention (resource fraud)	Articles 2 and 3 of the 1st Protocol (corruption)	Article 2 of the 2nd Protocol (money laundering) NOT YET IN FORCE	Article 3 of the Convention (criminal liability of heads of businesses)	Articles 3 and 4 of the 2nd Protocol (liability of legal persons) NOT YET IN FORCE	Article 5 of the 2nd Protocol (confiscation) NOT YET IN FORCE	Article 4 of the Convention (jurisdiction for fraud)	Article 6 of the 1st Protocol (jurisdiction for corruption)
BE	N (requires specific knowledge of the offence)	N (no effective, proportionate and dissuasive penalties)	T	T	I (lack of case law)	N (liability for lack of supervision)	T	N (jurisdiction for some categories of participation in fraud or money laundering committed abroad)	T
BG	T	T	T	Nya (T)	T	Nya (T)	Nya (T)	T	T

Overview of transposition

Member State (EU-15 in bold)	Article 1 of the Convention (expenditure fraud)	Article 1 of the Convention (resource fraud)	Articles 2 and 3 of the 1st Protocol (corruption)	Article 2 of the 2nd Protocol (money laundering) NOT YET IN FORCE	Article 3 of the Convention (criminal liability of heads of businesses)	Articles 3 and 4 of the 2nd Protocol (liability of legal persons) NOT YET IN FORCE	Article 5 of the 2nd Protocol (confiscation) NOT YET IN FORCE	Article 4 of the Convention (jurisdiction for fraud)	Article 6 of the 1st Protocol (jurisdiction for corruption)
CZ	Nya (N, requires severely distorted information)	Nya (N, requires severely distorted information)	Nya (T)	Nya (T)	Nya (I, lack of case law)	Nya (N, no provision for liability of legal persons)	Nya (T)	Nya (T)	Nya (I, depends on declaration)
DK	T	T	T	T	I (lack of case law)	N (liability for lack of supervision)	T	T	T
DE	P (subsidiary offence requires enrichment)	T	N (no full assimilation with national officials)	N (resource fraud is <i>de facto</i> no predicate offence)	I (lack of case law)	T	T	T	T

Overview of transposition

Member State (EU-15 in bold)	Article 1 of the Convention (expenditure fraud)	Article 1 of the Convention (resource fraud)	Articles 2 and 3 of the 1st Protocol (corruption)	Article 2 of the 2nd Protocol (money laundering) NOT YET IN FORCE	Article 3 of the Convention (criminal liability of heads of businesses)	Articles 3 and 4 of the 2nd Protocol (liability of legal persons) NOT YET IN FORCE	Article 5 of the 2nd Protocol (confiscation) NOT YET IN FORCE	Article 4 of the Convention (jurisdiction for fraud)	Article 6 of the 1st Protocol (jurisdiction for corruption)
IE	T	T	T	T	I (lack of case law)	N (liability for lack of supervision)	T	T	N (passive personality principle for active corruption only)
EE	N (subsidiary offence requires deception; misapplication of funds does not cover all expenditure)	T	T	T	T	T	T	T	P (depends on application of double criminality)
EL	T	T	T	T	T	T	T	T	T

Overview of transposition

Member State (EU-15 in bold)	Article 1 of the Convention (expenditure fraud)	Article 1 of the Convention (resource fraud)	Articles 2 and 3 of the 1st Protocol (corruption)	Article 2 of the 2nd Protocol (money laundering) NOT YET IN FORCE	Article 3 of the Convention (criminal liability of heads of businesses)	Articles 3 and 4 of the 2nd Protocol (liability of legal persons) NOT YET IN FORCE	Article 5 of the 2nd Protocol (confiscation) NOT YET IN FORCE	Article 4 of the Convention (jurisdiction for fraud)	Article 6 of the 1st Protocol (jurisdiction for corruption)
ES	T	T	T	T	T	N (subsidiary liability of legal persons)	T	T	T
FR	N (no rules on non- disclosure)	T	T	T	I (lack of case law)	T	T	I (lack of case law)	T
IT	N (no effective, proportionate and dissuasive penalties; requires enrichment)	T	T	Nyr (T)	I (lack of case law)	Nyr (T)	Nyr (N, value confiscation for money laundering)	N (additional procedural barriers)	T

Overview of transposition

Member State (EU-15 in bold)	Article 1 of the Convention (expenditure fraud)	Article 1 of the Convention (resource fraud)	Articles 2 and 3 of the 1st Protocol (corruption)	Article 2 of the 2nd Protocol (money laundering) NOT YET IN FORCE	Article 3 of the Convention (criminal liability of heads of businesses)	Articles 3 and 4 of the 2nd Protocol (liability of legal persons) NOT YET IN FORCE	Article 5 of the 2nd Protocol (confiscation) NOT YET IN FORCE	Article 4 of the Convention (jurisdiction for fraud)	Article 6 of the 1st Protocol (jurisdiction for corruption)
CY	T	T	T	T	T	T	T	T	T
LV	N (requires specific knowledge of the offence)	N (requires specific knowledge of the offence)	T	T	T	N (subsidiary liability of legal persons)	N (no confiscation of instruments)	T	N (offender has to be a resident)
LT	N (requires specific knowledge of the offence)	N (no punishment for small amounts)	T	T	T	T	T	T	T
LU	N (requires specific knowledge of the offence)	T	T	T	I (lack of case law)	N (no liability of legal persons)	T	T	T

Overview of transposition

Member State (EU-15 in bold)	Article 1 of the Convention (expenditure fraud)	Article 1 of the Convention (resource fraud)	Articles 2 and 3 of the 1st Protocol (corruption)	Article 2 of the 2nd Protocol (money laundering) NOT YET IN FORCE	Article 3 of the Convention (criminal liability of heads of businesses)	Articles 3 and 4 of the 2nd Protocol (liability of legal persons) NOT YET IN FORCE	Article 5 of the 2nd Protocol (confiscation) NOT YET IN FORCE	Article 4 of the Convention (jurisdiction for fraud)	Article 6 of the 1st Protocol (jurisdiction for corruption)
HU	Nya (I, definition of “assistance”)	Nya (I, definition of “payments”)	Nya (T)	Nya (T)	Nya (P, limited to fraud)	Nya (N, subsidiary liability of legal persons)	Nya (T)	Nya (T)	Nya (I, depends on declaration)
MT	Nya (T)	Nya (T)	Nya (T)	Nya (T)	Nya (I, lack of case law)	Nya (P, no liability for fiscal offences)	Nya (T)	Nya (T)	Nya (I, depends on declaration)
NL	T	T	T	T	T	T	T	T	T
AT	N (requires enrichment)	T	T	T	I (lack of case law)	T	T	I (lack of case law)	T

Overview of transposition

Member State (EU-15 in bold)	Article 1 of the Convention (expenditure fraud)	Article 1 of the Convention (resource fraud)	Articles 2 and 3 of the 1st Protocol (corruption)	Article 2 of the 2nd Protocol (money laundering) NOT YET IN FORCE	Article 3 of the Convention (criminal liability of heads of businesses)	Articles 3 and 4 of the 2nd Protocol (liability of legal persons) NOT YET IN FORCE	Article 5 of the 2nd Protocol (confiscation) NOT YET IN FORCE	Article 4 of the Convention (jurisdiction for fraud)	Article 6 of the 1st Protocol (jurisdiction for corruption)
PL	Nya (P, requires enrichment)	Nya (T)	Nya (T)	Nya (T)	Nya (I, lack of case law)	Nya (T)	Nya (T)	Nya (T)	Nya (I, depends on declaration)
PT	P (definition of grants)	T	T	T	T	T	T	T	T
RO	T	T	T	Nya (T)	I, lack of case law	Nya (I, lack of information on liability for lack of supervision)	Nya (N, lack of value confiscation for money laundering)	T	T
SI	T	N (no punishment for small amounts)	T	T	I (lack of case law)	T	T	T	N (offender has to be a resident)

Overview of transposition

Member State (EU-15 in bold)	Article 1 of the Convention (expenditure fraud)	Article 1 of the Convention (resource fraud)	Articles 2 and 3 of the 1st Protocol (corruption)	Article 2 of the 2nd Protocol (money laundering) NOT YET IN FORCE	Article 3 of the Convention (criminal liability of heads of businesses)	Articles 3 and 4 of the 2nd Protocol (liability of legal persons) NOT YET IN FORCE	Article 5 of the 2nd Protocol (confiscation) NOT YET IN FORCE	Article 4 of the Convention (jurisdiction for fraud)	Article 6 of the 1st Protocol (jurisdiction for corruption)
SK	T	T	I (lack of case law)	T	P (limited to fraud)	N (no liability of legal persons)	T	T	T
FI	P (definition of grants)	T	T	T	T	T	T	T	T
SE	P (subsidiary offence requires enrichment)	T	T	T	I (lack of case law)	T	T	T	P (depends on application of double criminality)

Overview of transposition

Member State (EU-15 in bold)	Article 1 of the Convention (expenditure fraud)	Article 1 of the Convention (resource fraud)	Articles 2 and 3 of the 1st Protocol (corruption)	Article 2 of the 2nd Protocol (money laundering) NOT YET IN FORCE	Article 3 of the Convention (criminal liability of heads of businesses)	Articles 3 and 4 of the 2nd Protocol (liability of legal persons) NOT YET IN FORCE	Article 5 of the 2nd Protocol (confiscation) NOT YET IN FORCE	Article 4 of the Convention (jurisdiction for fraud)	Article 6 of the 1st Protocol (jurisdiction for corruption)
UK	T (England & Wales and Northern Ireland) I (Scotland)	T (England & Wales and Northern Ireland) I (Scotland)	T	T	T	N (criminal liability for lack of supervision)	T	T	T