(Acts adopted under Title VI of the Treaty on European Union)

EXPLANATORY REPORT ON THE CONVENTION ON THE PROTECTION OF THE EUROPEAN COMMUNITIES' FINANCIAL INTERESTS

(Text approved by the Council on 26 May 1997)

(97/C 191/01)

CONVENTION

on the protection of the European Communities' financial interests

I. BACKGROUND

The protection of financial interests has been a high priority for the Governments and Parliaments of the Member States and for Community institutions for many years. The first steps were taken in the 1960s. On 10 August 1976 the Commission presented a draft Treaty [1] amending the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the Communities' financial interests and the prosecution of infringements of the provisions of those Treaties; this draft underwent lengthy discussion throughout the 1980s.

Since the late 1980s action in this sphere has intensified and discussion has proceeded on the question of legal protection under Community law and national law.

On 21 September 1989 the Court of Justice established in its judgment in Case 68/88 [2] that Member States had an obligation to protect the Communities' financial interests as they did their own and to provide for penalties that were effective, proportionate and dissuasive.

The Council (Justice) in its resolution of 13 November 1991 [3] stated that 'cooperation between the Member States in the prevention and combating of fraudulent practices by which harm is done to the financial interests of the Communities is enhanced by a compatibility of norms in the legal and administrative provisions of the Member States by which such conduct is sanctioned' and requested the Commission to conduct 'a comparative law study of the abovementioned legal and administrative provisions of the Member States, in order to see whether action should be taken to achieve greater compatibility of these provisions', a study which was styled 'the Delmas-Marty report'.

The Commission, on its own initiative, had already undertaken a comparative study on the systems of administrative and criminal penalties of the Member States and on the general principles of the system of Community penalties. The findings of these studies, which revealed the need for legislative action in both areas, were forwarded to the Council and the European Parliament in July 1993 [4].

In October 1992, the United Kingdom Presidency submitted to the Council *ad hoc* Working Party on Community and Criminal Law, set up under European Political Cooperation, a draft intergovernmental declaration on combating fraud affecting the financial interests of the Communities.

The Copenhagen European Council on 21 and 22 June 1993 clearly underlined the need to strengthen the protection of the Communities' financial interests under the new provisions of the Treaty on European Union (TEU) and 'invited the Commission to submit proposals in March 1994 at the latest'.

On 29 and 30 November 1993 the Justice and Home Affairs Council (JHA), at its first meeting after the entry into force of the TEU adopted a resolution on the protection of the Community's financial interests [5], in which it stated that 'it considered it

(1) OJ No C 222, 22. 9. 1976, p. 2.
(2) [ECR] 1989, p. 2965.
(3) OJ No C 328, 17. 12. 1991, p. 1.
(4) Commission staff working paper: SEC(93) 1172, 16 July 1993.
(5) OJ No C 224, 31. 8. 1992, p. 2.

appropriate to examine the measures which should be taken to achieve a greater degree of compatibility in the laws, regulations and administrative provisions of the Member States in the effort to combat fraud by which harm is done to the financial interests of the Community'.

The Working Party on Criminal and Community Law, set up after the informal meeting of Justice Ministers in Rome in November 1990 to deal in particular with the legal protection of the Communities' financial interests, examined in depth the 17 recommendations of the Delmas-Marty report during the first half of 1994.

Endeavours to ensure that financial interests are legally protected against fraud have been explicitly embodied in Article 209a of the Treaty establishing the European Community (EC Treaty) on the protection of the Communities' financial interests and in Title VI of the TEU on cooperation in the fields of justice and home affairs.

On 3 March 1994 the United Kingdom tabled a draft joint action, based on Title VI of the TEU, regarding the protection of the Communities' financial interests, which developed the ideas set out earlier in the United Kingdom Presidency's draft declaration.

In response to the Greek Presidency's report on the study of the Delmas-Marty report's recommendations, the Corfu European Council on 24 and 25 June 1994 'asked the Justice and Home Affairs Council to reach agreement on tackling the criminal aspects of fraud and report back to its meeting' in Essen.

In parallel, on 11 July 1994 the Commission tabled a draft Council Act establishing a Convention for the protection of the Communities' financial interests [1]. This draft was accompanied by a proposal for a Council Regulation on protection of the Communities' financial interests based on the EC Treaty.

In its resolution of 6 December 1994 [2] adopted under the German Presidency, the Council requested the elaboration of a legal instrument for the protection under national criminal law of the Communities' financial interests on the basis of the drafts from the United Kingdom for a joint action and from the Commission for a convention, taking into account the guiding principles which the Council then set out.

On the basis of that resolution the Essen European Council on 9 and 10 December 1995 asked the JHA Council to 'pursue its deliberations actively, so that joint action could be decided upon or a convention drawn up in the first half of 1995'.

The JHA Council on 9 and 10 March 1995 recorded political agreement on the advisability of first drawing up 'a separate legal instrument' covering certain basic questions and 'then continuing work on a more comprehensive legal instrument' [3]. The separate instrument would cover: a definition of fraud, the requirement to make fraud a criminal offence, fittingness of penalties, rules on the jurisdiction of Member States' courts, extradition and the criminal liability of heads of businesses.

The discussions of the Working Party on Community and Criminal Law proceeded under the Greek, German and French Presidencies on the basis of the two drafts (United Kingdom joint action and Commission convention) with additional compromise texts from the German and French Presidencies.

After the JHA Council in Luxembourg on 20 and 21 June 1995 had worked out compromise solutions, the Cannes European Council on 26 and 27 June 1995 noted agreement on the text of the Convention.

II. PRINCIPLES OF THE CONVENTION

The Convention originates in growing alarm at the fraud committed against the Community budget.

In its 1994 annual report on the fight against fraud, the Commission underlined the serious nature of fraud against the Communities' financial interests and the extent of the damage to the Communities' budget. The 1995 Community budget amounts to ECU 70 billion. In 1994 fraud reported under current Regulations and other sources amounted to

[1] COM(94) 214 final of 15 June 1994.
[2] OJ No C 355, 14. 12. 1994, p. 2.
[3] A first protocol to the Convention was drawn up on 27 September 1996 (OJ NO C 313, 23. 10. 1996, p. 1).

ECU 1,33 billion, i.e. 1,5 % of the total budget for that year.

Admittedly, the primary responsibility for combating fraud lies with the Member States, which must take the necessary steps to prevent and punish fraud and irregularities effectively and to recover the losses incurred.

It is the task of national authorities to collect revenue and administer the bulk of expenditure. Article 5 of the EC Treaty requires Member States to implement Community law and ensure that the obligations under the Treaty are fulfilled.

Furthermore, Article 209a of the Treaty states that:

'Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.

Without prejudice to other provisions of this Treaty, Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organize, with the help of the Commission, close and regular cooperation between the competent departments of their administrations.'

Thus Article 209a establishes the principle of assimilation identified by the Court of Justice in its ruling in Case 68/88 and spells out the principle that Member States are, with the Commission's assistance, to cooperate closely and regularly in order to protect the Communities' financial interests against fraud.

In addition, the introductory phrase and point(s) of Article K.1 (5) state that:

'For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest:

— combating fraud on an international scale in so far as this is not covered by (7) to (9)' (judicial cooperation in criminal matters, customs cooperation, police cooperation).

As noted, Article K.1 (7) defines judicial cooperation in criminal matters as a matter of common interest.

However, the transnational scale of much fraud and the fact that financial crime is spreading by means of criminal organizations which know how to exploit loopholes in the different legal systems and organize and distribute their illegal activities throughout the Member States and in third countries make it necessary to strengthen Member States' weapons to counter it.

Although Member States already have criminal law provisions to protect the Communities' financial interests in many areas, the comparative studies carried out have identified loopholes and incompatibilities which are prejudicial to the punishment of fraud and to judicial cooperation in criminal matters between Member States.

Given the current distribution of powers between Member States and the Communities, this Convention is designed to ensure greater compatibility between Member States' criminal law provisions by establishing minimum rules in criminal law, in order to make the fight against fraud affecting the Communities' financial interests more effective and even more dissuasive and to strengthen cooperation in criminal matters between the Member States.

By this Convention, on the basis of a single definition of fraud, Member States undertake in principle to make the conduct defined as fraud against the budget of the European Communities a criminal offence (Article 1) and to provide for criminal penalties including, at least in cases of serious fraud, penalties involving deprivation of liberty which can give rise to extradition (Article 2).

In addition, Member States are required to take the necessary measures so that heads of businesses or decision-makers may in certain cases be declared criminally liable (Article 3).

Article 4 lays down rules on the jurisdiction of Member States' courts, and Article 5 introduces rules on extradition and prosecution which break new ground.

Article 6 spells out the principle of closer judicial cooperation between Member States in criminal matters, notably in cases of transnational fraud.

Article 7 requires application of the *ne bis in idem* rule.

Article 8 specifies the conditions under which the Court of Justice of the European Communities will

exercise jurisdiction in the settlement of disputes between Member States and between Member States and the Commission.

Article 9 lays down the principle that the Convention does not prevent Member States from adopting internal legal provisions imposing more stringent obligations than those deriving from the Convention.

Article 10 introduces a system for communicating information between Member States and the Commission.

As with all Conventions drawn up pursuant to Article K.3 (2) (c) of the Treaty on European Union, no reservations are allowed unless expressly provided for in the Convention.

III. COMMENTARY ON THE ARTICLES

1. *Article 1: definition of fraud; criminal offence of fraud*

Article 1 introduces for the first time a definition of fraud affecting the Communities' financial interests ('fraud'), which will be common to the Member States. The extraordinary importance of this is confirmed by the fact that as regards Community administrative penalties, in the recitals of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the Communities' financial interests[1], reference is made to fraudulent acts as defined in this Article.

Subject to Article 2 (2), Article 1 imposes on Member States a general obligation to define the fraudulent conduct which it describes chiefly as criminal offences in order to ensure a common minimum level of penal action against fraud committed by economic agents in Member States. This will ensure that punishment of fraud has full deterrent effect.

1.1. Paragraph 1

In order to cover various types of fraud, Article 1 (1) lays down two separate but matching definitions, one applying to expenditure, the other to revenue.

Expenditure means not only subsidies and aid directly administered by the general budget of the Communities but also subsidies and aid entered in budgets administered by the Communities or on their behalf. This basically means subsidies and aid paid by the European Acricultural Guidance and Guarantee Fund and by the Structural Funds (European Social Fund, European Regional Development Fund, European Agricultural Guidance and Guarantee Fund — Guidance Section, Financial Instrument for Fisheries Guidance, Cohesion Fund). The Development Fund administered by the Commission and the European Investment Bank are also included, as are certain funds not covered by the budget, and which are administered for their own account by Community bodies which do not have institutional status, such as the European Centre for the Development of Vocational Training or the European Environment Agency. Such aids and subsidies are not for personal use but are intended for the general purpose of financing the common agricultural policy, contributing to economic, social or cultural structural renewal or strengthening cohesion in the Union.

Revenue means revenue deriving from the first two categories of own resources referred to in Article 2 (1) of Council Decision 94/728/EC of 31 October 1994 on the system of the European Communities' own resources[2], i.e. levies in respect of trade with non-member countries in the framework of the common agricultural policy and contributions provided for in the framework of the common organization of the markets in sugar and customs duties in respect of trade with third countries. This does not include revenue from application of a uniform rate to Member States' VAT assessment base, as VAT is not an own resource collected directly for the account of the Communities. Nor does it include revenue from application of a standard rate to the sum of all the Member States' GNP.

[1] OJ No L 312, 23. 12. 1995, p. 1.

[2] OJ No L 293, 12. 11. 1994, p. 9.

For both expenditure and revenue, the aspects common to the definition of fraud are: the intentional nature of the act or omission constituting the fraud and the main elements constituting fraudulent conduct.

Intention must apply to all the elements constituting the offence, particularly to the action and the effect.

The principal elements of fraudulent conduct are use of false documents, failure to disclose information in breach of a specific obligation to do so under particular legal provisions, or misapplication of funds.

The distinction between fraud in respect of expenditure and fraud in respect of revenue is essentially one of effect: 'the misappropriation or wrongful retention of funds' in the case of expenditure, and the 'illegal diminution of resources' in the case of revenue.

The effect of misappropriation and wrongful retention is not required in the misapplication of funds as regards expenditure; this is because misapplication consists in the misuse of funds which, although legally obtained, may subsequently have been wasted or used for purposes other than those for which they were granted. Such instances of misapplication of funds may be considered as equivalent to wrongful retention.

1.2. Paragraph 2

Article 1 (2) requires Member States to adopt the necessary and appropriate measures in their internal criminal law to ensure that the conduct defined in paragraph 1 constitutes criminal offences. Member States will therefore have to check whether their criminal law as it stands does indeed cover all the fraudulent conduct defined in paragraph 1. If not, Member States will have to introduce one or more criminal offences, the constituent elements of which correspond to that conduct. They may make these specific or explicit criminal offences, or include them under a general offence of fraud.

Member States need not provide for criminal penalties for instances of minor fraud as described in Article 2 (2) of the Convention.

1.3. Paragraph 3

Article 1 (3) stipulates that the preparation or supply of false, incorrect or incomplete statements or documents having the effects referred to in paragraph 1 constitutes a criminal offence.

In principle, such conduct is *per se* to be a criminal offence; those alleged to have committed such acts or omissions would be prosecuted as authors of or parties to the offence.

However, where such conduct is not in itself a criminal offence in the Member States, prosecution must be possible at least on the charge of participation in, instigation of or attempt to commit fraud. For 'participation', 'instigation' and 'attempt', the definitions in national criminal law apply.

All the elements constituting the offence must be intentional, i.e. of the action and the effect.

1.4. Paragraph 4

Proof of intention may be inferred from objective, factual circumstances; this formula is taken from Article 3 (3) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted in Vienna on 16 December 1988 and Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering[1] and refers to rules of evidence.

2. *Article 2: Penalties*

The exemplary and deterrent nature of criminal penalties as opposed to other possible forms of punishment make them the most efficient means of combating financial crime. That is the reason why Article 2 contains one of the fundamental principles of the Convention: Member States are required to lay down criminal penalties for the punishment of the conduct constituting fraud against the Communities' financial interests as defined in Article 1.

This requirement does not affect Member States' entitlement to apply administrative penalties in addition.

[1] OJ No L 166, 28. 6. 1991, p. 77.

In line with the case-law of the Court of Justice of the European Communities, the penalties must be proportionate, effective and dissuasive. However, Member States retain a margin of discretion in deciding the amount and the severity of criminal penalties.

Not all penalties will involve deprivation of liberty; for example, they may consist in fines or fines and the deprivation of liberty.

However, at least in instances of serious fraud, the Convention stipulates that Member States must lay down penalties involving the deprivation of liberty which can give rise to extradition. Apart from cases of fraud involving a minimum amount to be set in each Member State but not in excess of ECU 50 000, the Convention leaves it to Member States to define according to their own legal traditions the factual circumstances which define certain fraudulent conduct as elements constituting serious fraud.

Those circumstances may be, for example: recidivism; the level of organization of the fraud; the fact that the offender is a member of a criminal organization or a ring; the fact that the offender is a public servant or a national or Community civil servant; bribery of a civil servant; injury involving sums above a certain amount in ecus. However, each Member State is free to provide for penalties involving deprivation of liberty in the other cases of fraud.

Such penalties are imposed by criminal courts. However, in Austria some administrative authorities, in certain specific instances, have powers to impose criminal penalties involving the deprivation of liberty. The Austrian system as a whole may be considered as also meeting the obligation under Article 2 (1).

The participation in, instigation of and attempt to commit fraud must also be punishable by criminal penalties. These three concepts are defined in accordance with Member States' criminal law. Generally speaking, participation and instigation cover knowingly aiding and assisting the commission of the offence or prompting or inducing the commission of the offence.

By way of derogation from the principle stated in Article 2 (1), the second paragraph makes an exception to allow for some flexibility; in cases of minor fraud Member States may provide for non-criminal penalties; these are mainly administrative penalties.

Minor fraud within the meaning of the Convention involves a total amount of less than ECU 4 000 and the circumstances must not be particularly serious. The term 'particularly serious circumstances' is to be evaluated in the light of a Member State's national law and legal traditions.

Member States using the derogation under paragraph 2, which in cases of minor fraud permits them to provide for administrative penalties only, will in addition not be required to impose penalties for the participation in, instigation of or attempt to commit such fraud.

3. *Article 3: Criminal liability of heads of businesses*

Article 3 establishes the principle that heads of businesses exercising legal or effective power within a business are not automatically exempt from all criminal liability where fraud affecting the Communities' financial interests has been committed by a person under their authority acting on behalf of the business.

The Article requires each Member State to take the measures it deems necessary to allow heads of businesses or other persons having power to take decisions or exercise control within a business to be held criminally liable where the principles defined by its national law so permit, for example, if fraud has been committed by a person under the authority of those heads of business.

The Convention leaves Member States considerable freedom to establish the basis for criminal liability of decision-makers and heads of business.

As well as covering the criminal liability of heads of businesses or decision-makers on the basis of their personal actions (as authors of, associates in, instigators of or participants in the fraud), Article 3 allows Member States to consider making heads of businesses and decision-makers criminally liable on other grounds.

Within the meaning of Article 3 a Member State may make heads of businesses and decision-makers criminally liable if they have failed to fulfil a duty of supervision or control *(culpa in vigilando)*.

The criminal liability of heads of businesses could also be based on an offence, distinct from the fraud, of failure to fulfil an obligation under national law to exercise supervision or control.

The criminal liability of the head of a business or decision-maker could also attach to negligence or incompetence.

Lastly, nothing in Article 3 prevents Member States from providing for objective criminal liability to attach to heads of businesses and decision-makers by virtue of others' actions, without it being necessary to prove fault, negligence or failure to exercise supervision on their part.

4. *Article 4: Rules on the jurisdiction of Member States' courts*

The Convention lays down rules on jurisdiction enabling Member States' courts to prosecute and judge offences of fraud against the Communities' financial interests, in particular where such offences have been only partially committed within their territory.

Article 4 requires each Member State to establish the jurisdiction of its national courts in the three following situations:

1. Where fraud, participation in fraud or attempted fraud has been committed in whole or in part within its territory. This includes the situation in which the benefit of the fraud has been obtained in that territory.

2. Where a person within its territory has knowingly committed the offence of participating in or instigating ('knowingly assists or induces') fraud committed in the territory of another Member State or third country. As already stated in the commentary on Article 2, the terms 'participation' and 'instigation' are to be interpreted in accordance with national law.

   In some Member States broader definitions may apply: the United Kingdom, for example, has said that it will interpret 'assist' in the light of the concept of 'conspiracy' in its domestic law.

   It should be noted that where fraud has been committed in a third country, some Member States may require application of the principle of dual criminality in order to prosecute the offence of assisting or inducing fraud; the fraud must also be punishable by the foreign law.

   In addition, it is recognized that some Member States, for reasons of expediency or on legal grounds, will be unable to prosecute the offences of participating in or instigating fraud until the offence of fraud itself has been established by final decision of the court of the Member State or third country having jurisdiction.

3. Where the offender is a national of the Member State concerned, irrespective of where the offence was committed (Member State or third country).

   In order to establish jurisdiction, Member States may require that the condition of dual criminality be fulfilled.

   Not all Member States' legal traditions recognize such extra-territorial jurisdiction. Article 4 (2) therefore permits Member States to declare that they will not apply this provision.

5. *Article 5: Rules on extradition and prosecution*

The three extradition rules established in Article 5 are designed to supplement, in regard to the protection of the Communities' financial interests, the provisions on the extradition of own nationals and tax offences applying between Member States under bilateral or multilateral extradition agreements.

(a) Extradition of nationals of a Member State:

A number of Member States do not extradite their own nationals. Article 5 lays down rules to prevent persons alleged to have committed fraud against the Communities' financial interests going scot-free because extradition is refused on principle.

For the purposes of Article 5 'national' is to be interpreted in the light of the declarations made in Article 6 (1) (b) of the European Convention on Extradition of 13 December 1957 by the Parties to that Convention.

Article 5 firstly requires a Member State which does not extradite its own nationals to take the necessary measures to establish its jurisdiction over the offences defined and punished within the meaning of Article 1 and Article 2 (1) of this Convention when committed by its own nationals outside its territory. The offences may have been committed in another Member State or in a third country.

The instances of minor fraud which, pursuant to Article 2 (2), are punishable only by administrative penalties in some Member States are not covered by this Article.

In addition, if fraud has been committed in the territory of one Member State by a national of another Member State who cannot be extradited for the sole reason that the latter Member State does not extradite its own nationals, Article 5 requires the requested Member State to submit the case to its legal authorities for the purpose of prosecution. Thus, Article 5 (2) plainly sets out the principle *aut dedere aut judicare*. This provision is not, however, intended to affect national rules regarding criminal proceedings.

In order to apply this principle, the requesting Member State undertakes to transmit the files, information and exhibits relating to the offence to the Member State which is to prosecute its national. The requesting Member State will be kept informed of the prosecution and its outcome.

Article 5 sets no prior conditions on the proceedings brought by the requested Member State. No application from the requesting Member State is needed for the requested Member State to initiate the prosecution.

(b) Tax offences:

The Convention stipulates that extradition may not be refused for the sole reason that it has been requested in connection with a tax or customs duty offence.

For the Parties to the European Convention on Extradition, this constitutes a limitation on Article 5 of this Convention. 'Tax' covers revenue (taxes, duties) within the meaning of the European Convention on Extradition.

6. *Article 6: Cooperation between Member States*

In the face of complex fraud cases with international ramifications, cooperation between the Member States is of fundamental importance. Closer cooperation between Member States should facilitate the detection and punishment of fraud and enable the prosecution of a fraud case involving more than one country to be centralized in one Member State wherever possible.

Firstly, where two or more Member States are concerned by the same case of fraud against the Communities' financial interests, they are required to cooperate effectively at every stage of the procedure, and specifically in the investigation, prosecution and enforcement of the sentence.

The forms of cooperation in Article 6 (1) are cited as examples. The expression 'for example' was inserted in this provision to take account of the situation of Member States which are not Parties to all the relevant European Conventions on cooperation in criminal matters. The forms of cooperation listed as examples are: mutual legal assistance in criminal matters, extradition, transfer of proceedings and the enforcement of sentences passed in another Member State, allowing the most appropriate means of cooperation to be chosen in each specific case. The relevant Conventions currently applying between the Member States are not affected by the present Convention.

Article 6 (2) allows for the situation in which more than one Member State has jurisdiction to prosecute an offence connected with the same facts.

In such cases, this paragraph requires Member States to cooperate in deciding which of them is to have jurisdiction to prosecute. This provision should improve efficiency by enabling prosecutions to be centralized in a single Member State wherever possible.

Member States will be able to settle such conflicts of jurisdiction by reference, for example, to: the scale of the fraud committed in their respective territories, the place where the misapplied sums were obtained, the place where the suspects were arrested, their nationalities, previous prosecutions, and so on.

7. *Article 7:* Ne bis in idem

Paragraph 1 establishes the *ne bis in idem* rule.

This rule assumes particular importance in cases of transnational fraud which are liable for prosecution by courts in more than one Member State, when it has not been possible to centralize the prosecution in a single Member State by applying the principle laid down in Article 6 (2).

Paragraph 2 lists the declarations regarding exceptions for which limited provision is made under Conventions drawn up or applying between some Member States.

Paragraph 4 states that the principles applying between Member States and the declarations contained in bilateral or multilateral agreements remain unaffected by this Article.

Member States which are currently Contracting States or Parties to the abovementioned instruments will be required to renew declarations already made in connection with them.

It should also be noted that those Member States may not make any other declarations than those made earlier in connection with the said Conventions.

Member States which are not Parties to the abovementioned Conventions may also, if they so wish, make declarations relating exclusively to the exceptions referred to in paragraph 2 when giving the notification referred to in Article 11 (2).

8. *Article 8: Jurisdiction of the Court of Justice*

Article 8 (1) of the Convention specifies the conditions under which the Court of Justice of the European Communities will have jurisdiction to rule on disputes between Member States on the interpretation or application of the Convention.

It is stipulated in the paragraph that any dispute will in an initial stage be examined by the Council in accordance with the procedure set out in Title VI of the Treaty on European Union with a view to reaching a solution. If no solution is found within six months, a Member State party or the Member States parties to the dispute may refer the dispute to the Court of Justice of the European Communities for a ruling.

Article 8 (2) provides that, in disputes between one or more Member States and the Commission concerning Article 1 or Article 10, an attempt must first be made to reach a settlement through negotiation.

If negotiation fails, the dispute may be submitted to the Court of Justice of the European Communities.

Disputes between one or more Member States and the Commission concerning Article 1 and Article 10 which may be submitted to the Court of Justice are those which relate to the way in which a Member State has adopted the legislative acts required to ensure that certain types of conduct constitute criminal offences or the way in which the Member State has fulfilled its obligation to communicate certain information to the Commission.

The Court of Justice has no jurisdiction whatsoever to challenge decisions by national courts (in cases concerning infringement of the Convention or of national provisions implementing the Convention).

The High Contracting Parties may, if they so wish, subsequently set out in an additional protocol the arrangements for any exercise by the Court of Justice of jurisdiction to give preliminary rulings concerning the interpretation of the provisions of the Convention [1].

[1] At its meeting on 28 and 29 November 1996 the Council adopted the Act drawing up, on the basis of Article K.3 of the Treaty on European Union, the 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 (11899/96 JUR 348 COUR 21 + COR 1 (d), COR 2 (en), REV 1 (ga)).

9. *Article 9: Internal provisions*

The Convention is a starting-point only. Article 9 therefore states the principle that no provision in this Convention shall prevent Member States from adopting internal legal provisions which go beyond the obligations deriving from this Convention or from concluding agreements pursuant to Article K.7 of the Treaty on European Union.

Member States may for example broaden the moral element under Article 1 (1) to include gross negligence or decide that the effects specified under Article 1 (1) (a) and (b) are not required for prosecution of the offence.

In addition, Member States may, in the matter of sanctions, decide that all instances of fraud will be punishable by penalties involving the deprivation of liberty.

10. *Article 10: Transmission*

Article 10 introduces arrangements for communicating information from Member States to the Commission. Within the meaning of paragraph 1, Member States must transmit to the Commission the texts of the provisions transposing into their domestic law the obligations imposed on them under the Convention.

Paragraph 2 provides that, without prejudice to the obligations under Community Regulations and pursuant to Article K.3 (2) (c) of the Treaty on European Union, Member States are to exchange among themselves or with the Commission information on the implementation of the Convention; that information and the arrangements for communicating or exchanging it are to be determined by the Council.

It was decided that decisions on these points would be adopted by the High Contracting Parties acting by a two-thirds majority. Account may be taken, in particular, of national rules on the secrecy of preliminary investigations, professional secrecy and the protection of computerized personal data.

11. *Article 11: Entry into force*

Article 11 provides for the Convention to enter into force in accordance with the relevant rules established by the Council. The Convention will enter into force 90 days after the notification referred to in paragraph 2 by the last Member State to fulfil that formality.

12. *Article 12: Accession*

Article 12 stipulates that the Convention is open to accession by any State that becomes a member of the European Union and it lays down the rules governing such accession.

If the Convention is already in force when the new Member State accedes to it, it will enter into force in respect of that Member State 90 days after the deposit of its instrument of accession. If, on expiry of that period of 90 days, the Convention has not yet entered into force, it will enter into force in respect of that Member State on the date of its general entry into force laid down in Article 11.

It is to be noted that if a State becomes a member of the European Union before the general entry into force of the Convention but does not immediately accede to the Convention, the Convention will none the less enter into force as soon as all the States which were members of the European Union when the Act drawing up the Convention was adopted by the Council have deposited their instruments of ratification.