



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the criminal-law protection of the Community's financial interests

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. GENERAL

Under Article 280 of the EC Treaty as amended by the Treaty of Amsterdam, the Community is responsible for taking measures for the protection of Community financial interests which afford effective and equivalent protection in all the Member States. The sheer extent of the damage done to Community financial interests by fraud and international economic and financial crime¹ calls for the current legal arrangements to be given more teeth as a matter of urgency, especially as the Member States have fallen behind schedule in ratifying the convention and protocols on the protection of the financial interests of the European Communities. The Commission is accordingly proposing this Directive, based on Article 280 of the EC Treaty, which is also motivated by the need to adopt concrete measures to implement its overall strategic approach to combating fraud.²

1.1. **State of play with ratification of the instruments for the criminal-law protection of Community financial interests and the need to take action**

The Convention on the protection of the European Communities' financial interests of 26 July 1995 and the additional protocols signed in 1996 and 1997 (the PFI instruments), which were adopted and signed by the Member States under the Third Pillar of the Treaty on European Union (the Maastricht Treaty) are the first important elements of a common base for the criminal-law protection of the Union's financial interests, as they deal with aspects of substantive criminal law and judicial cooperation in this field. The existence of harmonised definitions and penalties under the various national criminal law systems for certain offences harmful to Community financial interests, such as fraud and corruption in particular, and Member States' obligations as regards jurisdiction, judicial assistance, extradition and transferring and centralising prosecutions - to list just a few of the important elements contained in the instruments - would considerably strengthen the protection of the Community's financial interests, which is made harder by the fragmentary nature of the European criminal-law enforcement area.

The following table sets out the main contents of each of the instruments:

¹ See the 1998, 1999 and 2000 annual reports from the Commission on the protection of the Communities' financial interests and the fight against fraud (COM (1999) 590 final, COM(2000) 718 final and COM(2000)255 final).

² Communication from the Commission of 28 June 2000: Protection of the Communities' financial interests. The fight against fraud - For an overall strategic approach (COM(2000) 358 final). See in particular point 1.2.1 of the Communication.

1. Convention on the protection of the European Communities' financial interests of 26 July 1995³

- definition of fraud affecting the EC's financial interests;
- obligation of Member States to make it a punishable offence, to establish their powers on the basis of territoriality, to cooperate, to centralise prosecutions and to facilitate extradition;
- obligation of Member States to make heads of companies criminally liable.

2. First Protocol of 27 September 1996⁴

- definition of corruption affecting the EC's financial interests;
- obligation for Member States to make it a punishable offence⁵ and to establish their powers

3. Protocol of 29 November 1996 on the interpretation of the PFI Convention and its Protocols by the Court of Justice⁶

4. Second Protocol of 19 June 1997⁷

- obligation for the Member States, with regard to the offences listed in the PFI instruments, to make money-laundering an offence⁸ and to make legal persons liable;
- obligation for Member States to seize and confiscate the instruments and proceeds of these offences;
- rules on cooperation between the Commission and the Member States and on data protection.

However, notwithstanding repeated calls for ratification from the European Council, the Council, the European Parliament and the Commission,⁹ at the start of 2001 the instruments in question had not been ratified by all fifteen Member States and have therefore not yet entered into force.

The following table sets out the current state of play with ratification of each PFI instrument (as at 17 May 2001):

³ Convention on the protection of the European Communities' financial interests of 26 July 1995, drawn up on the basis of Article K.3 of the Treaty on European Union (OJ C 316, 27.11.1995).

⁴ Protocol of 27 September 1996, drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities' financial interests (OJ C 313, 23.10.1996).

⁵ The anti-corruption Convention of 26 May 1997 is based on the first Protocol, but its field of application is not limited to the protection of the EC's financial interests (OJ C 195, 25.6.1997).

⁶ Protocol of 29 November 1996, drawn up on the basis of Article K.3 of the Treaty on European Union, 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).

⁷ Second Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities' financial interests (OJ C 221, 19.7.1997).

⁸ The Second Protocol refers to Directive 91/308/EEC for the definition of money-laundering.

⁹ For example, the conclusions of the Amsterdam European Council of 16 and 17 June 1997, Recommendation No 27 in the EU strategy for the prevention and control of organised crime, approved by the Council and published in OJ C 124, 3.5.2000, the conclusions of the ECOFIN Council of 17 July 2000 and recently the European Parliament resolution of 13 December 2000.

	PFI Convention (26.7.1995)	1st Protocol (27.9.1996)	ECJ Protocol (29.11.1996)	2nd Protocol (19.6.1997)
B	ratification process under way	idem	idem	idem
DK	02.10.2000	02.10.2000	02.10.2000	02.10.2000
D	24.11.1998	24.11.1998	Act adopted, but Council not yet notified of ratification	ratification not expected in the near future
EL	26.07.2000	26.07.2000	26.07.2000	26.07.2000
E	20.01.2000	20.01.2000	20.01.2000	20.01.2000
F	04.08.2000	04.08.2000	04.08.2000	04.08.2000
IRL	ratification process under way	idem	idem	idem
I	Act adopted, but Council not yet notified of ratification	idem	idem	ratification process not yet under way
L	17.05.2001	17.05.2001	17.05.2001	internal consultation under way
NL	Act adopted, but Council not yet notified of ratification	Act adopted, but ratification not yet published	Act adopted, but Council not yet notified of ratification	ratification not expected in the near future
A	21.5.1999	21.5.1999	21.5.1999	ratification not expected before the end of 2002
P	15.1.2001	15.1.2001	15.1.2001	15.1.2001
FIN	18.12.1998	18.12.1998	18.12.1998	internal consultation under way
S	10.6.1999	10.6.1999	10.6.1999	internal consultation under way
UK	11.10.1999	11.10.1999	11.10.1999	11.10.1999

Although there has been an appreciable increase in the number of ratifications over the last two years, the stage reached in the ratification process in the remaining Member States gives grounds for concern that the PFI instruments will not enter into force before 2002, if not even later. The 2nd Protocol in particular looks unlikely to be ratified for several years yet, according to information received from certain Member States. This means that no headway will be made in this area until the Member States who have not done so get round to ratifying all the instruments. The lack of a common definition in the substantive criminal law of the Member States of what constitutes unlawful conduct affecting Community financial interests makes prosecution of cross-border fraud and European-level cooperation very difficult, if not impossible. Differences between the Member States as regards criminal penalties, which do not always meet the Court of Justice criteria of being effective, proportionate and dissuasive, provide an opportunity for criminal activity targeting the European Community's assets. Experience shows that these shortcomings are also an obstacle to administrative investigations carried out by the European Anti-Fraud Office (OLAF) actually resulting in court actions.

This state of affairs is extremely detrimental not only to the protection of Community financial interests, but also, more generally, to the credibility of the institutions and the Member States as regards their commitment to curb this sort of crime. The need

to re-assert 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.

1.2. What needs to be done - proposal for a legislative act based on Article 280(4) of the EC Treaty

The fact is that, nearly six years after the PFI convention was drawn up, the harmonisation objective has not been achieved and the whole area of the protection of Community financial interests continues to suffer from a lack of minimum standards of criminal-law protection that can actually be applied throughout the European Union. In the meantime the Amsterdam Treaty, signed and ratified by all the Member States after the PFI instruments, came into force on 1 May 1999. This Treaty brought about a major change for the protection of Community financial interests by replacing the former Article 209a of the EC Treaty by Article 280. This new provision requires the Community and the Member States alike to take measures for the protection of Community financial interests which afford effective and equivalent protection in all the Member States.

To this end, Article 280(4) of the EC Treaty stipulates the following: "The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice". In this area the new Article 280 of the EC Treaty constitutes the specific legal basis which, by virtue of Articles 29 and 47 of the EU Treaty stipulating that Community law takes precedence over Union law, must now be used for the adoption of measures in the area of protection of Community financial interests. The Nice Intergovernmental Conference in December 2000 also confirmed that the protection of Community financial interests is essentially a first-pillar matter.

The Amsterdam Treaty thus requires the adjustment of the PFI instruments to the new situation, especially as these instruments have not yet entered into force. The Commission therefore considers it necessary to replace, at least in part, the current third-pillar instruments, with an act adopted on the basis of Article 280 of the EC Treaty, as also called for by the European Parliament on several occasions.

The advantage of an act adopted on the basis of Article 280 of the EC Treaty is that it affords the benefits that go with first-pillar Community legislation. Community law offers supervisory mechanisms not available under the third pillar, namely the powers conferred on the Commission, as guardian of the Treaties, and the powers of the Court of Justice in this context. As they relate to the protection of Community financial interests, these powers can be used to ensure correct transposal and application of Community law in national legislation and hence effective and equivalent protection in all the Member States. These benefits should also be taken into account when it comes to having the applicant countries take over the *acquis communautaire*.

On the question of the extent to which the exception referred to in the second sentence of Article 280(4) of the EC Treaty precludes adoption of a legislative act in the area of criminal law, it should be noted that the exception does not refer to the

whole of criminal law in general, but specifically to two aspects of it, namely "the application of national criminal law" and "the national administration of justice". Since, in principle, Article 280(4) covers all measures in the area of preventing and curbing fraud, it is in this context that the second sentence specifies exceptions to this, so given the general purpose of the article, the second sentence can but be interpreted narrowly. The wording and the legal context of the article do not preclude the adoption of measures setting certain harmonisation objectives of a criminal type, provided that they do not "concern the application of national criminal law or the national administration of justice".

The Commission believes that its proposal for a legislative act based on Article 280(4) of the EC Treaty is a necessary and important step with the current Treaty, but without losing sight of the possibility of further steps at a later stage. On this point, and as announced in its work programme, the Commission is planning to adopt, before the end of the year, a Green Paper on the conditions for putting in place the office of European public prosecutor for the protection of Community financial interests, something which would in any case require amendment of the treaties.¹⁰

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

1.3.1. Form of the act

The Commission is of the view that a directive is the most appropriate instrument in this instance. From the point of view of legal design, practice and wording, a directive has a lot in common with the PFI instruments in that, like a convention, it requires the Member States to transpose measures into their domestic law. This solution will make it possible to take over certain provisions as they stand from the PFI instruments and also to better respect the different national traditions regarding criminal law. This approach should, therefore, enjoy considerable support from the Member States, since they have all signed the PFI instruments, as well as making for swift adoption of the directive.

1.3.2. Content of the act

The proposal is to include in the Directive all the provisions from the current PFI instruments that do not fall under the restriction referred to in the second sentence of Article 280(4) of the EC Treaty. This means all the provisions that do not relate to procedural criminal law or judicial cooperation, since these may be considered to concern the "application of national criminal law" or "the national administration of justice".

Article 280 of the EC Treaty is a suitable legal basis for aligning substantive criminal law in the Member States as regards the definition of fraud, corruption and money laundering affecting Community financial interest as well as criminal liability and the criminal penalties applicable. The provisions of the PFI instruments that concern

¹⁰ The Commission has already proposed that the office of European public prosecutor be set up for the protection of Community financial interests, but this proposal was not accepted by the Nice Intergovernmental Conference on institutional reform (see Commission Communication of 29 September 2000 on the protection of the Community's financial interests: A European Prosecutor (COM(2000)608 final)).

the harmonisation of the definitions of offences, liability and penalties do not concern the application of national criminal law or the national administration of justice, since the transposition of the provisions into domestic law and prosecution and enforcement by national authorities in respect of the offences are matters for the Member States. A directive like this would also guarantee an equivalent level of protection of Community financial interests in all Member States as regards substantive criminal law, in line with the base-line objectives already laid down by the Council.

The proposal is that the directive should also include provisions on cooperation with the Commission, since these do not fall under the exception in Article 280(4) of the EC Treaty either. These provisions do not concern horizontal cooperation between the authorities in the various Member States, as provided for in Article 31 of the EU Treaty, but vertical cooperation between national authorities and the Commission, the relations between whom are principally defined by the EC Treaty and Article 280(3) in particular.

This approach is well-founded legally speaking and will give new impetus to the process of transposing substantive rules from the PFI instruments, without replacing the Third Pillar instruments altogether. In any case, it remains in the Member States' interests to continue ratifying the PFI instruments as promptly as possible, so that the provisions not taken over into the Directive can enter into force. These provisions are just as important, since they relate to Member States' obligations regarding jurisdiction, the principle of "non bis in idem", judicial assistance, extradition, transfer and centralisation of prosecutions and enforcement of judgments. The possibility of incorporating these provisions into another Title VI instrument, a framework decision, could also be envisaged. But for the time being, it would be better to complete the ratification processes in progress.

To ensure smooth implementation of the provisions of the Directive, the Commission proposes that an advisory committee involving the Member States in regular consultation should be given the job of helping uniform implementation of the Directive by the Member States and of resolving specific problems arising out of implementation. The committee could also help with consultation between Member States concerning any more stringent conditions and obligations at national level and advise the Commission on any additions or changes to be made to the Directive or any alterations deemed necessary.

2. THE ARTICLES

The articles in the proposal for a directive on the criminal-law protection of the financial interests of the European Communities are without exception based on provisions from the Third Pillar PFI instruments. As these instruments have already been signed by all the Member States and have each been the subject of an explanatory report approved by the Council,¹¹ the substance of the provisions will not be commented on again in detail here.

¹¹ See: Explanatory Report on the Convention on the protection of the European Communities' financial interests, approved by the Council on 26 May 1997 (OJ C 191, 23.6.1997); Explanatory Report on the Protocol to the Convention on the protection of the European Communities' financial interests, approved by the Council on 19 December 1997 (OJ C 11, 15.1.1998); Explanatory Report on the 2nd

After a first chapter setting out the purpose and some general definitions, Chapter II of the proposal for a directive goes on to specify the conduct that damages the financial interests of the Community, namely fraud (Article 3), active and passive corruption (Article 4), with certain provisions on equal treatment (Article 5), and money laundering (Article 6), and requires Member States to make criminal offences of such conduct (Article 7).

Chapters III and IV contain provisions on liability and penalties, including for bodies corporate (Articles 9 and 11).

Chapter V contains provisions on cooperation of national authorities with the Commission (Article 13) and the final provisions.

To help with reading the draft directive, two tables have been produced. The first is a table comparing the articles in the proposal for a directive with the articles in the Third Pillar PFI instruments.

Proposal for a directive	PFI instruments under Third Pillar
Article 1(purpose)	
Article 2 (definitions)	1st Protocol, Article 1(1) 2nd Protocol, Article 1(d)
Article 3(1) (fraud) Article 3(2)	Convention, Article 1 Convention, Article 2(2)
Article 4(1) (passive corruption) Article 4(2) (active corruption)	1st Protocol, Article 2 1st Protocol, Article 3
Article 5 (equal treatment)	1st Protocol, Article 4(1), (2), (3) and (5)
Article 6 (money laundering)	2nd Protocol, Article 2 in conjunction with Article 1(e) referring to the definition in Article 1 of Directive 91/308/EEC
Article 7(1) (criminalisation requirement) Article 7 (2)	referred to in each of the instruments Convention, Article 1(3)
Article 8 (criminal liability of heads of businesses)	Convention, Article 3
Article 9 (liability of bodies corporate)	2nd Protocol, Article 3
Article 10 (penalties on natural persons)	Convention, Article 2
Article 11 (penalties on bodies corporate)	2nd Protocol, Article 4
Article 12 (confiscation)	2nd Protocol, Article 5
Article 13 (cooperation with the European Commission)	2nd Protocol, Articles 7 <i>et seq.</i>
Article 14 (domestic law)	Convention, Article 9
Article 15 (transposition), paragraphs 1 and 2 paragraph 3	General provisions Convention, Article 10(1)

Protocol to the Convention on the protection of the European Communities' financial interests, approved by the Council on 12 March 1999 (OJ C 91, 31.3.1999).

Article 16 (entry into force)	
Article 17 (addressees)	

The second table shows all the articles from the PFI instruments that have not been incorporated into the draft directive and still need to be ratified by all the Member States.

PFI instruments under Third Pillar	Reason for non-inclusion in the draft directive
Convention, Article 4 (jurisdiction) 1st Protocol, Article 6 (jurisdiction)	exception under Article 280(4) of EC Treaty
Convention, Article 5 (extradition and prosecution)	idem
Convention, Article 6 (cooperation)	idem
Convention, Article 7 (non bis in idem)	idem
Convention, Article 8 (Court of Justice)	not applicable
Convention, Article 10(2) (communication)	provided for under Community law
Convention, Articles 11-13	not applicable
1st Protocol, Article 4(4)	exception under Article 280(4) of EC Treaty
1st Protocol, Articles 7-12	not applicable
2nd Protocol, Article 6	exception under Article 280(4) of EC Treaty
2nd Protocol, Articles 8, 9 and 11-19	not applicable

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the criminal-law protection of the Community's financial interests

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 280(4) thereof,

Having regard to the proposal from the Commission,¹

Having regard to the opinion of the Court of Auditors,²

Acting in accordance with the procedure referred to in Article 251 of the Treaty,

Whereas:

- (1) The institutions and the Member States attach great importance to the protection of the Community's financial interests and to the fight against fraud and any other illegal activities that damage Community financial interests. The protection of the Community's financial interests concerns not only the management of budget appropriations, but extends to all measures affecting or liable to affect its assets. All available means must be deployed to fully attain these objectives, in view of the legislative power devolved to the Community level, while maintaining the current distribution and balance of responsibilities between the national and Community levels.
- (2) Criminal law in the Member States needs to make an effective contribution to protecting the Community's financial interests.
- (3) 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, namely the Convention of 26 July 1995³ and the Protocols of 27 September 1996,⁴ 29 November 1996⁵ and 19 June 1997,⁶ contain several provisions on closer alignment of criminal law in the Member States and on improving cooperation between them. As these instruments have not been ratified by all Member States, their entry into force continues to remain uncertain.

¹ OJ C

² OJ C

³ OJ C 316, 27.11.1995, p.48.

⁴ OJ C 313, 23.10.1996, p.1.

⁵ OJ C 151, 20.5.1997, p.1.

⁶ OJ C 195, 25.6.1997, p.1.

- (4) Under Article 280 of the Treaty it is possible to include in a Community legislative act any provisions of these instruments that do not concern the application of national criminal law or the administration of justice in the Member States.
- (5) In many cases, fraud involving Community revenue and expenditure is not restricted to a single country, but is often the work of organised criminal networks.
- (6) Since the Community's financial interests can be damaged or threatened by acts of fraud, corruption or money laundering, common definitions of these types of conduct need to be adopted in order to protect these interests.
- (7) Changes need to be made, as appropriate, to national legislation to make corruption involving Community officials or other Member States' civil servants a criminal offence. As regards Community officials, these changes to national legislation must not be restricted to acts of active and passive corruption, but must also cover other offences affecting or liable to affect Community revenue or expenditure, including offences committed by or directed towards people with powers at the highest level.
- (8) Acts of fraud, corruption and money laundering need to be made punishable criminal offences. Member States determine the criminal penalties applicable to offences under the national provisions adopted pursuant to this Directive, without prejudice to the imposition of other penalties in certain appropriate cases, and make provision for custodial sentences, at least in cases of serious fraud. They take whatever measures are required to ensure that these penalties are applied. The penalties must be effective, proportionate and dissuasive.
- (9) Businesses play an important role in areas financed by the Community and people with decision-making power in businesses should not avoid criminal liability in certain circumstances.
- (10) The financial interests of the Community can be damaged or threatened by acts committed in the name of bodies corporate.
- (11) Changes need to be made, as appropriate, to national legislation, so that bodies corporate can be held responsible for acts of fraud, active corruption and money laundering committed in their name that damage or threaten to damage the financial interests of the Community.
- (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.
- (13) For the purpose of ensuring effective action against fraud, active and passive corruption and the money laundering that goes with them damaging or liable to damage the Community's financial interests, there is a need to lay down measures for cooperation between the Member States and the Commission. This cooperation involves processing of personal data and in particular the exchange of information between the Member States and the Commission and between the Commission and non-member countries. This processing must comply with the rules on the protection of personal data, notably Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the

processing of personal data and on the free movement of such data⁷ and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data⁸ and the relevant rules concerning the confidentiality of judicial investigations.

- (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.
- (15) This act, which sets out to align national legislation as regards the criminal-law protection of the Community's financial interests, respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union,

HAVE ADOPTED THIS DIRECTIVE:

Chapter I

Purpose and definitions

Article 1 *Purpose*

The purpose of this Directive is to bring the Member States' legislation closer together as regards the criminal-law protection of the financial interests of the Community.

Article 2 *Definitions*

For the purposes of this Directive:

- 1) 'official' shall mean any Community or national official, including any national official of another Member State;
- 2) 'Community official' shall mean:
 - any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of employment of other servants of the European Communities,

⁷ OJ L 281, 23.11.1995, p. 31.

⁸ OJ L 8, 12.1.2001, p. 1.

- any person seconded to the European Communities by the Member States or by any public or private body who carries out functions equivalent to those performed by European Community officials or other Community servants.

Members of bodies set up in accordance with the Treaties establishing the European Communities and the staff of such bodies shall be treated as Community officials, inasmuch as the Staff Regulations of Officials of the European Communities or the Conditions of employment of other servants of the European Communities do not apply to them;

- 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;

- 4) ‘legal person’ shall mean any entity having such status under the applicable national law, except for States and other public bodies exercising state authority and public international organisations.

Chapter II

Offences

Article 3

Fraud

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;
 - (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.
2. 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.

Article 4 *Corruption*

3. For the purposes of this Directive, passive corruption shall consist of the deliberate act on the part of an official, whether directly or through an intermediary, of requesting or receiving advantages of any kind whatsoever, for themselves or for a third party, or accepting a promise of such an advantage, as inducement to breach their official obligations and carry out or refrain from carrying out an official duty or an act in the course of their official duties in a way that damages or is likely to damage the Community's financial interests.
4. For the purposes of this Directive, active corruption shall consist of the deliberate act of promising or giving, directly or through an intermediary, an advantage of any kind whatsoever to officials, for themselves or for a third party, as inducement for them to breach their official obligations and carry out or refrain from carrying out an official duty or an act in the course of their official duties in a way that damages or is likely to damage the Community's financial interests.

Article 5 *Equal treatment*

1. Member States shall take the necessary measures to ensure that in their criminal law the descriptions of the offences constituting conduct of the type referred to in Article 3 of this Directive where committed by their national officials in the exercise of their duties apply in the same way where such offences are committed by Community officials in the exercise of their duties.
2. Member States shall take the necessary measures to ensure that in their criminal law the descriptions of the offences referred to in paragraph 1 of this Article and in Article 4 where committed by or in respect of their government ministers, elected members of their parliamentary assemblies, members of their highest courts or members of their national audit body in the exercise of their functions apply in the same way where such offences are committed by or in respect of members of the Commission of the European Communities, the European Parliament, the Court of Justice or the Court of Auditors of the European Communities in the exercise of their duties.
3. Where a Member State has enacted special legislation concerning acts or omissions for which government ministers are responsible by reason of their special political

position in that Member State, paragraph 2 may not apply to such legislation, provided that the Member State ensures that Members of the Commission of the European Communities are also covered by the criminal legislation implementing Article 4 and paragraph 1 of this Article.

4. This Directive shall apply without prejudice to the provisions on the lifting of the immunities contained in the Treaty, the Protocol on the Privileges and Immunities of the European Communities, the Statutes of the Court of Justice and the texts implementing them.

Article 6
Money laundering

1. For the purposes of this Directive ‘money laundering’ shall consist of the types of conduct listed below involving the proceeds of fraud, at least in serious cases, and of active and passive corruption as referred to in Articles 3 and 4, where committed deliberately:
 - (a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any persons involved in the commission of such activity to evade the legal consequences of their action,
 - (b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity,
 - (c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity,
 - (d) participation in one of the acts listed in the three preceding indents and association for the purpose of committing the act.
2. Money laundering shall be regarded as such even where the activities which generated the property to be laundered were perpetrated in the territory of another Member State or in that of a third country.

Article 7
Duty to criminalise

1. Member States shall take the necessary measures to transpose the provisions of this Chapter into their national criminal law in such a way that the conduct referred to therein constitutes criminal offences.

Member States shall take appropriate measures for the purpose of establishing, on the basis of the objective factual circumstances, when such conduct is deliberate.

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.

Chapter III

Liability

Article 8

Criminal liability of heads of businesses

Member States shall take the necessary measures to allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by their national law in the event of conduct as referred to in Chapter II on the part of a person under their authority acting on behalf of the business.

Article 9

Liability of bodies corporate

1. Member States shall take the necessary measures to ensure that bodies corporate can be held liable for fraud, active corruption and money laundering as referred to in Chapter II and committed for their benefit by any person who has a leading position within the body corporate, whether acting individually or as a member of an organ of the body corporate, based on:
 - a power of representation of the body corporate, or
 - or
 - an authority to take decisions on behalf of the body corporate, or
 - or
 - an authority to exercise control within the body corporate,as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud.
2. Without prejudice to paragraph 1, Member States shall take the necessary measures to ensure that a body corporate can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of an act of fraud, active corruption or money laundering for the benefit of that body corporate by a person under its authority.

3. Liability of a body corporate under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering.

Chapter IV

Penalties

Article 10

Penalties on natural persons

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.

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

Article 11

Penalties on bodies corporate

1. Member States shall take the necessary measures to ensure that a body corporate held liable pursuant to Article 9(1) is punishable with effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties such as:
 - (a) exclusion from entitlement to public benefits or aid;
 - (b) temporary or permanent disqualification from engaging in business activities;
 - (c) placing under judicial supervision;
 - (d) a judicial winding-up order.
2. Member States shall take the necessary measures to ensure that a body corporate held liable pursuant to Article 9(2) is punishable by effective, proportionate and dissuasive penalties or measures.

Article 12

Confiscation

Member States shall take the necessary measures to enable the seizure and, without prejudice to the rights of *bona fide* third parties, the confiscation or removal of the instruments and

proceeds of the conduct referred to in Chapter II or property the value of which corresponds to such proceeds. Any instruments, proceeds or other property seized or confiscated shall be dealt with by the Member State in accordance with its national law.

Chapter V

Final provisions

Article 13

Cooperation with the European Commission

1. As part of the cooperation with the Commission on fighting fraud, corruption and money laundering as referred to in Chapter II, Member States shall take the necessary measures to enable the Commission to provide all the technical and operational assistance required to facilitate the coordination of investigations undertaken by the relevant national authorities.
2. Member States shall take the necessary measures to enable the relevant authorities in their countries to exchange information with the Commission for the purposes of facilitating the establishment of the facts and ensuring effective action against the conduct referred to in Chapter II. Such measures shall require the Commission and the competent national authorities to take account, in each specific case, of the requirements of confidentiality of investigations and protection of personal data.
3. Any processing of personal data by the Commission and the Member States pursuant to this Directive must be in compliance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.
4. In order to safeguard the confidentiality of judicial investigations and in connection with the exchange of information under paragraphs 1 to 3:
 - (i) the Member State supplying information to the Commission is entitled to lay down specific conditions for the use of such information by the Commission and by any other Member State to which this information might be transmitted;
 - (ii) in the event of disclosure to any other Member State of personal data it has obtained from a Member State, the Commission shall inform the Member State which supplied this information of the disclosure;
 - (iii) before disclosing to a third country personal data which it has obtained from a Member State, the Commission shall obtain an assurance that the Member State which supplied the information has authorised this disclosure.

Article 14
Domestic law

Nothing in this Directive shall prevent Member States adopting or maintaining, in the field covered by this Directive, more stringent provisions in their domestic law for the purpose of effectively protecting the financial interests of the Community.

Article 15
Transposition

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 December 2001.

Such measures adopted by the Member States shall contain a reference to this Directive or shall be accompanied by such reference when officially published. The methods of making such reference shall be laid down by Member States.

2. Member States shall promptly communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

Article 16
Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

Article 17

This Directive is addressed to the Member States.

Done at Brussels, [...]

For the European Parliament
The President

For the Council
The President