

K oznámeniu č. 704/2004 Z. z.

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

THE HIGH CONTRACTING PARTIES to this Protocol,
Member States of the European Union,

REFERRING to the Act of the Council of the
European Union of 27 September 1996,

DESIRING to ensure that their criminal laws
contribute effectively to the protection of the financial
interests of the European Communities;

RECOGNIZING the importance of the Convention on
the protection of the European Communities' financial
interests of 26 July 1995 for combating fraud affecting
Community revenue and expenditure;

AWARE that the financial interests of the European
Communities may be damaged or threatened by other
criminal offences, particularly acts of corruption by or
against national and Community officials, responsible
for the collection, management or disbursement of
Community funds under their control;

CONSIDERING that people of different nationalities,
employed by different public agencies or bodies, may
be involved in such corruption and that, in the
interests of effective action against such corruption
with international ramifications, it is important for
their reprehensible nature to be perceived in a similar
manner under Member States' criminal laws;

NOTING that several Member States' criminal law on
crime linked to the exercise of public duties in general
and concerning corruption in particular covers only
acts committed by or against their national officials
and does not cover, or covers only in exceptional cases,
conduct involving Community officials or officials of
other Member States;

CONVINCED of the need for national law to be
adapted where it does not penalize acts of corruption
that damage or are likely to damage the financial
interests of the European Communities involving
Community officials or officials of other Member
States;

CONVINCED also that such adaptation of national
law should not be confined, in respect of Community
officials, to acts of active or passive corruption, but
should be extended to other crimes affecting or likely to
affect the revenue or expenditure of the European
Communities, including crimes committed by or
against persons in whom the highest responsibilities
are vested;

CONSIDERING that appropriate rules should also be
laid down on jurisdiction and mutual cooperation,

without prejudice to the legal conditions under which
they are to apply in specific cases, including waiver of
immunity where appropriate;

CONSIDERING finally that the relevant provisions of
the Convention on the protection of the European
Communities' financial interests of 26 July 1995
should be made applicable to the criminal acts covered
by this Protocol,

HAVE AGREED ON THE FOLLOWING PROVISIONS:

Article 1

Definitions

For the purposes of this Protocol:

1.

- (a) 'official' shall mean any 'Community' or 'national'
official, including any national official of another
Member State;
- (b) the term '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,
 - 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 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 the
European Communities or the Conditions of
employment of other servants of the European
Communities do not apply to them;

- (c) the term 'national official' shall be understood by
reference to the definition of 'official' or 'public
officer' in the national law of the Member State in
which the person in question performs that
function for the purposes of application of the
criminal law of that Member State.

Nevertheless, in the case of proceedings involving
a Member State's official initiated 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;

2. 'Convention' shall mean the Convention drawn up

on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, of 26 July 1995¹;

Article 2

Passive corruption

1. For the purposes of this Protocol, the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests shall constitute passive corruption.

2. Each Member State shall take the necessary measures to ensure that conduct of the type referred to in paragraph 1 is made a criminal offence.

Article 3

Active corruption

1. For the purposes of this Protocol, the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests shall constitute active corruption.

2. Each Member State shall take the necessary measures to ensure that conduct of the type referred to in paragraph 1 is made a criminal offence.

Article 4

Assimilation

1. Each Member State shall take the necessary measures to ensure that in its criminal law the descriptions of the offences constituting conduct of the type referred to in Article 1 of the Convention committed by its national officials in the exercise of their functions apply similarly in cases where such offences are committed by Community officials in the exercise of their duties.

2. Each Member State shall take the necessary measures to ensure that in its criminal law the descriptions of the offences referred to in paragraph 1 of this Article and in Articles 2 and 3 committed by or against its Government Ministers, elected members of its parliamentary chambers, the members of its highest Courts or the members of its Court of Auditors in the exercise of their functions apply similarly in cases where such offences are committed by or against members of the Commission of the European

Communities, the European Parliament, the Court of Justice and the Court of Auditors of the European Communities respectively 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 of this Article may not apply to such legislation, provided that the Member State ensures that Members of the Commission of the European Community are covered by the criminal legislation implementing Articles 2 and 3 and paragraph 1 of this Article.

4. Paragraphs 1, 2 and 3 shall be without prejudice to the provisions applicable in each Member State concerning criminal proceedings and the determination of the competent court.

5. This Protocol shall apply in full accordance with the relevant provisions of the Treaties establishing the European Communities, the Protocol on the Privileges and Immunities of the European Communities, the Statutes of the Court of Justice and the texts adopted for the purpose of their implementation, as regards the withdrawal of immunity.

Article 5

Penalties

1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 2 and 3, and participating in and instigating the conduct in question, are punishable by effective, proportionate and dissuasive criminal penalties, including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition.

2. Paragraph 1 shall be without prejudice to the exercise of disciplinary powers by the competent authorities against national officials or Community officials. In determining the penalty to be imposed, the national criminal courts may, in accordance with the principles of their national law, take into account any disciplinary penalty already imposed on the same person for the same conduct.

Article 6

Jurisdiction

1. Each Member State shall take the measures necessary to establish its jurisdiction over the offences it has established in accordance with Articles 2, 3 and 4 where:

- (a) the offence is committed in whole or in part within its territory;
- (b) the offender is one of its nationals or one of its officials;
- (c) the offence is committed against one of the persons referred to in Article 1 or a member of one of the

¹ OJ C 316 of 27th November 1995, p. 49

institutions referred to in Article 4 (2) who is one of its nationals;

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

2. Each Member State may declare when giving the notification provided for in Article 9 (2) that it will not apply or will apply only in specific cases or conditions one or more of the jurisdiction rules laid down in paragraph 1 (b), (c), and (d).

Article 7

Relation to the Convention

1. Articles 3, 5 (1), (2) and (4) and Article 6 of the Convention shall apply as if there were a reference to the conduct referred to in Articles 2, 3 and 4 of this Protocol.

2. The following provisions of the Convention shall also apply to this Protocol:

- Article 7, on the understanding that, unless otherwise indicated at the time of the notification provided for in Article 9 (2) of this Protocol, any declaration within the meaning of Article 7 (2) of the Convention shall also apply to this Protocol,
- Article 9,
- Article 10.

Article 8

Court of Justice

1. Any dispute between Member States on the interpretation or application of this Protocol must 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, the matter may be referred to the Court of Justice of the European Communities by a party to the dispute.

2. Any dispute between one or more Member States and the Commission of the European Communities concerning Article 1, with the exception of point 1 (c), or Articles 2, 3 and 4, or the third indent of Article 7 (2) of this Protocol which it has proved impossible to settle through negotiation may be submitted to the Court of Justice of the European Communities.

Article 9

Entry into force

1. This Protocol shall be subject to adoption by the Member States in accordance with their respective constitutional requirements.

2. Member States shall notify the Secretary-General of the Council of the European Union of the completion

of the procedures required under their respective constitutional rules for adopting this Protocol.

3. This Protocol shall enter into force 90 days after the notification provided for in paragraph 2 has been given by the State which, being a Member of the European Union at the time of adoption by the Council of the Act drawing up this Protocol, is the last to fulfil that formality. If, however, the Convention has not entered into force on that date, this Protocol shall enter into force on the date on which the Convention enters into force.

Article 10

Accession of new Member States

1. This Protocol shall be open to accession by any State that becomes a member of the European Union.

2. The text of this Protocol in the language of the acceding State, drawn up by the Council of the European Union, shall be authentic.

3. Instruments of accession shall be deposited with the depositary.

4. This Protocol shall enter into force with respect to any State that accedes to it 90 days after the deposit of its instrument of accession or on the date of entry into force of this Protocol if it has not yet entered into force at the time of expiry of the said period of 90 days.

Article 11

Reservations

1. No reservation shall be authorized with the exception of those provided for in Article 6 (2).

2. Any Member State which has entered a reservation may withdraw it at any time in whole or in part by notifying the depositary. Withdrawal shall take effect on the date on which the depositary receives the notification.

Article 12

Depositary

1. The Secretary-General of the Council of the European Union shall act as depositary of this Protocol.

2. The depositary shall publish in the Official Journal of the European Communities information on the progress of adoptions and accessions, declarations and reservations and any other notification concerning this Protocol.

In witness whereof, the undersigned Plenipotentiaries have hereunto set their hands.

Done in a single original, in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, each text being equally authentic, such original remaining deposited in the archives of the General Secretariat of the Council of the European Union.

