CHAPTER 508

EUROPEAN COMMUNITIES' FINANCIAL INTERESTS CONVENTION ACT

To provide for the protection of the European Communities' financial interests and to make provision for the criminal prosecution of fraudulent conduct injuring those interests whilst adopted a common definition.

21st December, 2010

ACT XXV of 2010.

1. The short title of this Act is the European Communities' Financial Interests Convention Act. Short title.

2. In this Act, unless the context otherwise requires: Interpretation.

"Convention" means the Convention on the Protection of the European Communities' Financial Interests signed in Brussels on the 26th of July 1995 and the First, Second and the ECJ Protocol thereto;

"ECJ Protocol" means the Protocol on the Interpretation by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention;

"European Communities" includes the institutions of the European Union;

"the European Union" shall have the meaning as assigned to it in the European Union Act; Cap. 460.

"Member State" means any State which is a member of the European Union;

"person" as referred to in the provisions of the laws mentioned in article 3, includes the European Communities and the institutions of the European Union;

"Treaty on European Union" means the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, signed in Athens on the 16th day of April, 2003, of which an electronic copy

of the Maltese and English texts was laid on the Table of the House on the 23rd day of June, 2003, and includes any other treaty, agreement or protocol to which Malta became a party or which became applicable to Malta in virtue thereof.

Applicability of provisions of the Criminal Code. Cap. 9.

3. For the avoidance of any doubt, the provisions of Sub-Title II of Title V and of Sub-Title III of Title IX of Part II of Book First of the Criminal Code shall, *mutatis mutandis*, apply when the offences mentioned therein are committed to the detriment and to the prejudice of the European Communities and references, in those articles, to "public act" shall be construed as references to acts and instruments according to the provisions of this article.

Enforcement of Convention.

4. The Convention as reproduced in the Schedule, shall be, and be enforceable as, part of the Law of Malta.

Language of Schedule.

5. The Schedule to this Act is being published in the English language only together with the English text of this Act.

SCHEDULE

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

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

REFERRING to the Act of the Council of the European Union of 26 July 1995;

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

NOTING that fraud affecting Community revenue and expenditure in many cases is not confined to a single country and is often committed by organized criminal networks;

CONVINCED that protection of the European Communities' financial interests calls for the criminal prosecution of fraudulent conduct injuring those interests and requires, for that purpose, the adoption of a common definition;

CONVINCED of the need to make such conduct punishable with effective, proportionate and dissuasive criminal penalties, without prejudice to the possibility of applying other penalties in appropriate cases, and of the need, at least in serious cases, to make such conduct punishable with deprivation of liberty which can give rise to extradition;

RECOGNIZING that businesses play an important role in the areas financed by the European Communities and that those with decision-making powers in business should not escape criminal responsibility in appropriate circumstances;

DETERMINED to combat together fraud affecting the European Communities' financial interests by undertaking obligations concerning jurisdiction, extradition, and mutual cooperation,

HAVE AGREED ON THE FOLLOWING PROVISIONS:

Article 1

General provisions

1. For the purposes of this Convention, fraud affecting the European Communities' 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 European Communities or budgets managed by, or on behalf of, the European Communities,
- non-disclosure of information in violation of a specific obligation, with the same effect,
- the misapplication 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 as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,

- non-disclosure of information in violation of a specific obligation, with the same effect,
- misapplication of a legally obtained benefit, with the same effect.

2. Subject to Article 2(2), each Member State shall take the necessary and appropriate measures to transpose paragraph 1 into their national criminal law in such a way that the conduct referred to therein constitutes criminal offences.

3. Subject to Article 2(2), each Member State shall also take the necessary measures to ensure that the intentional preparation or supply of false, incorrect or incomplete statements or documents having the effect described in paragraph 1 constitutes a criminal offence if it is not already punishable as a principal offence or as participation in, instigation of, or attempt to commit, fraud as defined in paragraph 1.

4. The intentional nature of an act or omission as referred to in paragraphs 1 and 3 may be inferred from objective, factual circumstances.

Article 2

Penalties

1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1, and participating in, instigating, or attempting the conduct referred to in Article 1(1), are punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty which can give rise to extradition, it being understood that serious fraud shall be considered to be fraud involving a minimum amount to be set in each Member State. This minimum amount may not be set at a sum exceeding ECU 50 000.

2. However in cases of minor fraud involving a total amount of less than ECU 4 000 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 paragraph 1.

3. The Council of the European Union, acting unanimously, may alter the amount referred to in paragraph 2.

Article 3

Criminal liability of heads of businesses

Each Member State 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 its national law in cases of fraud affecting the European Community's financial interests, as referred to in Article 1, by a person under their authority acting on behalf of the business.

Article 4

Jurisdiction

1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences it has established in accordance with Article 1 and 2(1) when:

- fraud, participation in fraud or attempted fraud affecting the European Communities' financial interests is committed in whole or in part within its territory, including fraud for which the benefit was obtained in that territory,

- a person within its territory knowingly assists or induces the commission of such fraud within the territory of any other State,
- the offender is a national of the Member State concerned, provided that the law of that Member State may require the conduct to be punishable also in the country where it occurred.

2. Each Member State may declare, when giving the notification referred to in Article 11(2), that it will not apply the rule laid down in the third indent of paragraph 1 of this Article.

Article 5

Extradition and prosecution

1. Any Member State which, under its law, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over the offences it has established in accordance with Articles 1 and 2(1), when committed by its own nationals outside its territory.

2. Each Member State shall, when one of its nationals is alleged to have committed in another Member State a criminal offence involving the conduct described in Articles 1 and 2(1), and it does not extradite that person to that other Member State solely on the ground of his or her nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate. In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be transmitted in accordance with the procedures laid down in Article 6 of the European Convention on Extradition. The requesting Member State shall be informed of the prosecution initiated and of its outcome.

3. A Member State may not refuse extradition in the event of fraud affecting the European Communities' financial interests for the sole reason that it concerns a tax or customs duty offence.

4. For the purposes of this Article, a Member State's own nationals shall be construed in accordance with any declaration made by it under Article 6(1)(b) of the European Convention on Extradition and with paragraph 1(c) of the Article.

Article 6

Cooperation

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

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

Article 7

Ne bis in idem

1. Member States shall apply in their national criminal laws the '*ne bis in idem*' rule, under which a person whose trial has been finally disposed of in a Member State may not be prosecuted in another Member State in respect of the same facts, provided that if a penalty was imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the

sentencing State.

2. A Member State may, when giving the notification referred to in Article 11(2), declare that it shall not be bound by paragraph 1 of this Article in one or more of the following cases:

(a) if the facts which were the subject of the judgement rendered abroad took place on its own territory either in whole or in part; in the latter case this exception shall not apply if those facts took place partly on the territory of the Member State where the judgement was rendered;

(b) if the facts which were the subject of the judgment rendered abroad constitute an offence directed against the security or other equally essential interests of that Member State;

(c) if the facts which were the subject of the judgment rendered abroad were committed by an official of the Member State contrary to the duties of his office.

3. The exceptions which may be the subject of a declaration under paragraph 2 shall not apply if the Member State concerned in respect of the same facts requested the other Member State to bring the prosecution or granted extradition of the person concerned.

4. Relevant bilateral or multilateral agreements concluded between Member States and relevant declarations shall remain unaffected by this Article.

Article 8

Court of Justice

1. Any dispute between Member States on the interpretation or application of this Convention 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 the application of Article 1 or 10 of this Convention which it has proved impossible to settle through negotiation may be submitted to the Court of Justice.

Article 9

Internal provisions

No provision in this Convention shall prevent Member States from adopting internal legal provisions which go beyond the obligations deriving from this Convention.

Article 10

Transmission

1. Member States shall transmit to the Commission of the European Communities the text of the provisions transposing into their domestic law the obligations imposed on them under the provisions of this Convention.

2. For the purposes of implementing this Convention, the High Contracting Parties shall determine, within the Council of the European Union, the information to be communicated or exchanged between the Member States or between the Member States and the Commission, and also the arrangements for doing so.

Article 11

Entry into force

1. This Convention 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 their constitutional requirements for adopting this Convention.

3. This Convention shall enter into force 90 days after the notification, referred to in paragraph 2, by the last Member State to fulfil that formality.

Article 12

Accession

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

2. The text of this Convention 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 Convention 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 the Convention if it has not already entered into force at the time of expiry of the said period 90 days.

Article 13

Depositary

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

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 also any other notification concerning this Convention.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries have hereunto set their hands.

DONE AT Brussels on the twenty-sixth day of July in the year one thousand nine hundred and ninety-five 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.

FIRST PROTOCOL

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 1995 (1).

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 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.

SECOND PROTOCOL

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

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 19 June 1997;

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 in combating fraud affecting Community revenue and expenditure;

RECOGNIZING the importance of the Protocol of 27 September 1996 to the said Convention in the fight against corruption damaging or likely to damage the European Communities' financial interests;

AWARE that the financial interests of the European Communities may be damaged or threatened by acts committed on behalf of legal persons and acts involving money laundering;

CONVINCED of the need for national law to be adapted, where necessary, to provide that legal persons can be held liable in cases of fraud or active corruption and money laundering committed for their benefit that damage or are likely to damage the European Communities' financial interests;

CONVINCED of the need for national law to be adapted, where necessary, to penalize acts of laundering of proceeds of fraud or corruption that damage or are likely to damage the European Communities' financial interests and to make it possible to confiscate proceeds of such fraud and corruption;

CONVINCED of the need for national law to be adapted, where necessary, in order to prevent the refusal of mutual assistance solely because offences covered by this Protocol concern or are considered as tax or customs duty offences;

NOTING that cooperation between Member States is already covered by the Convention on the protection of the European Communities' financial interests of 26 July 1995, but that there is a need, without prejudice to obligations under Community law, for appropriate provision also to be made for cooperation between member States and the Commission to ensure effective action against fraud, active and passive corruption and related money laundering damaging or likely to damage the European Communities' financial interests, including exchange of information between the Member States and the Commission;

CONSIDERING that, in order to encourage and facilitate the exchange of information, it is necessary to ensure adequate protection of personal data;

CONSIDERING that the exchange of information should not hinder ongoing investigations and that it is therefore necessary to provide for the protection of investigation secrecy;

CONSIDERING that appropriate provisions have to be drawn up on the competence of the Court of Justice of the European Communities;

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 certain acts covered by this Protocol,

HAVE AGREED ON THE FOLLOWING PROVISIONS:

Article 1

Definitions

For the purposes of this Protocol:

(a) '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 1995 (1);

(b) 'fraud' shall mean the conduct referred to in Article 1 of the Convention;

(c) - 'passive corruption' shall mean the conduct referred to in Article 2 of the 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, of 27 September 1996 (2),

- 'active corruption' shall mean the conduct referred to in Article 3

of the same Protocol;

(d) 'legal person' shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organizations;

(e) 'money laundering' shall mean the conduct as defined n the third indent of Article 1 of Council Directive 91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering (3), related to the proceeds of fraud, at least in serious cases, and of active and passive corruption.

Article 2

Money laundering

Each Member State shall take the necessary measures to establish money laundering as a criminal offence.

Article 3

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on

- a power of representation of the legal person, or
- an authority to take decisions on behalf of the legal person, or
- an authority to exercise control within the legal person,

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. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person 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 a fraud or an act of active corruption or money laundering for the benefit of that legal person by a person under its authority.

3. Liability of a legal person 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.

Article 4

Sanctions for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

(a) exclusion from entitlement to public benefits or aid;

(b) temporary or permanent disqualification from the practice of commercial activities;

(c) placing under judicial supervision;

(d) a judicial winding-up order.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

Article 5

Confiscation

Each Member State 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 fraud, active and passive corruption and money laundering, 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.

Article 6

Cooperation with the Commission of the European Communities

A Member State may not refuse to provide mutual assistance in respect of fraud, active and passive corruption and money laundering for the sole reason that it concerns or is considered as a tax or customs duty offence.

Article 7

Cooperation with the Commission of the European Communities

1. The Member States and the Commission shall cooperate with each other in the fight against fraud, active and passive corruption and money laundering.

To that end, the Commission shall lend such technical and operational assistance as the competent national authorities may need to facilitate coordination of their investigations.

2. The competent authorities in the Member States may exchange information with the Commission so as to make it easier to establish the facts and to ensure effective action against fraud, active and passive corruption and money laundering. The Commission and the competent national authorities shall take account, in each specific case, of the requirements of investigation secrecy and data protection. To that end, a Member State, when supplying information to the Commission, may set specific conditions covering the use of information, whether by the Commission or by another Member State to which that information may be passed.

Article 8

Data protection responsibility for the Commission

The Commission shall ensure that, in the context of the exchange of information under Article 7(2), it shall observe, as regards the processing of personal data, a level of protection equivalent to the level of protection set out in 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 (4).

Article 9

Publication of data protection rules

The rules adopted concerning the obligations under Article 8 shall be published in the Official Journal of the European Communities.

Article 10

Transfer of data to other Member States and third countries

1. Subject to any conditions referred to in Article 7 (2), the Commission may transfer personal data obtained from a Member State in the performance of its functions under Article 7 to any other Member State. The Commission shall inform the Member State which supplied the information of its intention to make such as transfer.

2. The Commission may, under the same conditions, transfer personal data obtained from a Member State in the performance of its functions under Article 7 to any third country provided that the Member State which supplied the information has agreed to such transfer.

Article 11

Supervisory authority

Any authority designated or created for the purpose of exercising the function of independent data protection supervision over personal data held by the Commission pursuant to its functions under the Treaty establishing the European Community, shall be competent to exercise the same function with respect to personal data held by the Commission by virtue of this Protocol.

Article 12

Relation to the Convention

1. The provisions of Articles 3, 5 and 6 of the Convention shall also apply to the conduct referred to in Article 2 of this Protocol.

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

- Article 4, on the understanding that, unless otherwise indicated at the time of the notification provided for in Article 16(2) of this Protocol, any declaration within the meaning of Article 4 (2) of the Convention, shall also apply to this Protocol,
- Article 7, on the understanding that the *ne bis in idem* principle also applies to legal persons, and that, unless otherwise indicated at the time the notification provided for in Article 16(2) of this Protocol is being given, any declaration within the meaning of Article 7(2), of the Convention shall also apply to this Protocol,
- Article 9,
- Article 10.

Article 13

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 by a party to the dispute.

2. Any dispute between one or more Member States and the Commission concerning the application of Article 2 in relation to Article 1(e), and Article 7, 8, 10 and 12(2), fourth indent of this Protocol which it has proved impossible to settle

through negotiation may be submitted to the Court of Justice, after the expiry of a period of six months from the date on which one of the parties has notified the other of the existence of a dispute.

3. The Protocol 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, of 29 November 1996 (5), shall apply to this Protocol, on the understanding that a declaration made by a Member State pursuant to Article 2 of that Protocol is also valid regarding this Protocol unless the Member State concerned makes a declaration to the contrary when giving the notification provided for in Article 16(2) of this Protocol.

Article 14

Non-contractual liability

For the purposes of this Protocol, the non-contractual liability of the Community shall be governed by the second paragraph of Article 215 of the Treaty establishing the European Community. Article 178 of the same Treaty shall apply.

Article 15

Judicial control

1. The Court of Justice shall have jurisdiction in proceedings instituted by any natural or legal person against a decision of the Commission addressed to that person or which is of direct and individual concern to that person, on ground of infringement of Article 8 or any rule adopted pursuant thereto, or misuse of powers.

2. Articles 168a(1) and (2), 173, fifth paragraph, 174, first paragraph, 176, first and second paragraphs, 185 and 186 of the Treaty establishing the European Community, as well as the Statute of the Court of Justice of the European Community, shall apply, *mutatis mutandis*.

Article 16

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 ninety days after the notification provided for in paragraph 2, by the State which, being a member of the European Union on the date of the 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.

4. However, the application of Article 7(2) shall be suspended if, and for so long as, the relevant institution of the European Communities has not complied with its obligation to publish the data protection rules pursuant to Article 9 or the terms of Article 11 concerning the supervisory authority have not been complied with.

Article 17

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 ninety 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 ninety days.

Article 18

Reservations

1. Each Member State may reserve the right to establish the money laundering related to the proceeds of active and passive corruption as a criminal offence only in serious cases of active and passive corruption. Any Member State making such a reservation shall inform the depositary, giving details of the scope of the reservation, when giving the notification provided for in Article 16(2). Such a reservation shall be valid for a period of five years after the said notification. It may be renewed once for a further period of five years.

2. The Republic of Austria may, when giving its notification referred to in Article 16(2), declare that it will not be bound by Articles 3 and 4. Such a declaration shall cease to have effect five years after the date of the adoption of the act drawing up this Protocol.

3. No other reservations shall be authorized, with the exception of those provided for in Article 12(2), first and second indent.

Article 19

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.

For the Government of the United Kingdom of Great Britain and Northern Ireland

Joint Declaration on Article 13(2)

The Member States declare that the reference in Article 13(2) to Article 7 of the Protocol shall apply only to cooperation between the Commission on the one hand and the Member States on the other and is without prejudice to Member States' discretion in supplying information in the course of criminal investigations.

Commission Declaration on Article 7

The Commission accepts the tasks entrusted to it under Article 7 of the Second Additional Protocol to the Convention on the protection of the European Communities' financial interests.

ECJ PROTOCOL

COUNCIL ACT of 29 November 1996 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 (97/C 151/01)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article K.3(2)(c) thereof,

Whereas Article K.3(2)(c) provides that conventions drawn up on the basis of Article K.3 of the Treaty on European Union may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application in accordance with such arrangements as they may lay down,

HAS DECIDED on the drawing up of the Protocol the text of which is annexed, which has been signed today by the representatives of the Governments of the Member States of the European Union,

RECOMMENDS that it be adopted by the Member States in accordance with their respective constitutional requirements.

Done at Brussels, 29 November 1996.

For the Council

The President

N. OWEN

ANNEX

PROTOCOL 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

THE HIGH CONTRACTING PARTIES,

HAVE AGREED on the following provisions, which shall be annexed to the Convention:

Article 1

The Court of Justice of the European Communities shall have jurisdiction, pursuant to the conditions laid down in this Protocol, to give preliminary rulings on the interpretation of the Convention on the protection of the European Communities' financial interests and the Protocol to that Convention drawn up on 27 September 1996 (1), hereinafter referred to as 'the first Protocol'.

Article 2

1. By a declaration made at the time of the signing of this Protocol or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice of the European Communities to give preliminary rulings on the interpretation of the Convention on the protection of the European Communities' financial interests and the first Protocol to that Convention pursuant to the conditions specified in either paragraph 2(a) or paragraph 2(b).

2. A Member State making a declaration pursuant to paragraph 1 may specify that either:

(a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice of the European Communities to give a preliminary ruling on a question raised in a case pending before it and concerning the interpretation of the Convention on the protection of the European Communities' financial interests and the first Protocol thereto if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment, or

(*b*) any court or tribunal of that State may request the Court of Justice of the European Communities to give a preliminary ruling on a question raised in a case pending before it and concerning the interpretation of the Convention on the protection of the European Communities' financial interests and the first Protocol thereto if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.

Article 3

1. The Protocol on the Statute of the Court of Justice of the European Communities and the Rules of Procedure of that Court of Justice shall apply.

2. In accordance with the Statute of the Court of Justice of the European Communities, any Member State, whether or not it has made a declaration pursuant to Article 2, shall be entitled to submit statements of case or written observations to the Court of Justice of the European Communities in cases which arise pursuant to Article 1.

Article 4

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 depositary of the completion of their respective constitutional requirements for adopting this Protocol and communicate to him any declaration made pursuant to Article 2.

3. This Protocol shall enter into force 90 days after the notification, referred to in paragraph 2, by the Member State which, being a member of the European Union on the date of adoption by the Council of the Act drawing up this Protocol, is the last to fulfil that formality. However, it shall at the earliest enter into force at the same time as the Convention on the protection of the European Communities' financial interests.

Article 5

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

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

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

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

Article 6

Any State that becomes a member of the European Union and accedes to the

Convention on the protection of the European Communities' financial interests in accordance with Article 12 thereof shall accept the provisions of this Protocol.

Article 7

1. Amendments to this Protocol may be proposed by any Member State, being a High Contracting Party. Any proposal for an amendment shall be sent to the depositary, who shall forward it to the Council.

2. Amendments shall be established by the Council, which shall recommend that they be adopted by the Member States in accordance with their respective constitutional requirements.

3. Amendments thus established shall enter into force in accordance with the provisions of Article 4.

Article 8

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 the notifications, instruments or communications concerning this Protocol.

In witness whereof the undersigned Plenipotentiaries have signed this Protocol.

Done at Brussels, this twenty-ninth day of November in the year one thousand nine hundred and ninety-six, 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.

For the Government of Ireland

For the Government of the United Kingdom of Great Britain and Northern Ireland

DECLARATION concerning the simultaneous adoption of the Convention on the protection of the European Communities' financial interests and the Protocol on the interpretation by way of preliminary rulings, by the Court of Justice of the European Communities, of that Convention

The representatives of the Governments of the Member States of the European Union meeting within the Council,

At the time of the signing of the Council Act drawing up 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,

Wishing to ensure that the said Convention is interpreted as effectively and uniformly as possible as from its entry into force,

Declare themselves willing to take appropriate steps to ensure that the national procedures for adopting the Convention on the protection of the European Communities' financial interests and the Protocol concerning its interpretation are completed simultaneously at the earliest opportunity.

In witness whereof the undersigned Plenipotentiaries have signed this Declaration.

Done at Brussels on the twenty-ninth day of November in the year one thousand nine hundred and ninety-six.

For the Government of the United Kingdom of Great Britain and Northern Ireland

Declaration made pursuant to Article 2

At the time of the signing of this Protocol, the following declared that they accepted the jurisdiction of the Court of Justice of the European Communities in accordance with the procedures laid down in Article 2:

The French Republic, Ireland and the Portuguese Republic in accordance with the procedures laid down in Article 2(2)(a);

The Federal Republic of Germany, the Hellenic Republic, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, in accordance with the procedures laid down in Article 2(2)(b).

DECLARATION

The Federal Republic of Germany, the Hellenic Republic, the Kingdom of the Netherlands and the Republic of Austria, reserve the right to make provision in their national law to the effect that, where a question relating to the interpretation of the Convention on the protection of the European Communities' financial interests and the first Protocol thereto is raised in a case pending before a national court or tribunal against whose decision there is no judicial remedy under national law, that court or tribunal will be required to refer the matter to the Court of Justice.

For the Kingdom of Denmark and the Kingdom of Spain, the declaration(s) will be made at the time of adoption.