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Annex to the

REPORT FROM THE COMMISSION

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

Article 10 of the Convention

{COM(2004)709 final}

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1. HISTORICAL BACKGROUND

The PFI Convention is the outcome of discussions in the Council based on a Commission proposal to establish a Convention on the protection of European Communities' financial interests, submitted to Council on 7 July 1994.[1] Shortly before that date, on 4 March 1994, the UK tabled a draft Council Decision on joint action regarding the protection of the financial interests of the EC, that was rejected by the European Parliament, which, by the same token, called for a Commission Directive in this field.[2] The Commission proposal had been elaborated on the basis of two comparative studies on the systems of administrative and criminal penalties of the Member States regarding the protection of the EC's financial interests, one undertaken by the Commission on its own initiative,[3] 'the Commission study', one requested by the Council (Justice) in its resolution of 13 November 1991[4]. This second study was referred to as 'the Delmas-Marty report'.[5]

These studies indicated a factual situation in which:

- illegal activities affecting the European Communities' financial interests are often transnational and are committed by criminal organisations which know and exploit the differences between domestic legislations in such a way as to undermine the effective protection of the EC's financial interests;

- a common definition of offences against the Communities' financial interests is the only way to secure greater convergence in the manner in which the Member States' criminal laws apprehend forms of illegal activities directed against the European Communities;

- the territorial application of criminal law is no longer adequate to face the ever more evolving transnational illegal activities which can be only combated by more than one jurisdiction involved.

It became obvious that the lack of harmonised definitions and penalties under the various national criminal law systems for certain offences was harmful to the EC's financial interests, such as fraud and corruption in particular. Any harmonisation would considerably strengthen the protection of the Community's financial interests, which still remains difficult due to the fragmentary nature of the European criminal-law enforcement area.

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1 COM (1994) 214 final, 1.6.1994: OJ C 216, 6. 8.1994, p. 14.

2 Legislative resolution embodying Parliament's opinion on the draft Council Decision on joint action regarding the protection of the financial interests of the European Communities on the basis of Article K.3 of the Treaty on European Union (5342/94 - C4-0157/94 - 94/0146(CNS)) (United Kingdom initiative): OJ C 89, 10.4.1995, p. 82.

3 Commission staff working paper SEC(1993)1172, 16.7.1993.

4 OJ C 328, 17.12.1991, p. 1.

5 Delmas-Marty, "Incompatibilities between legal systems and harmonisation measures: Final report of the working party on a comparative study on the protection of the financial interests of the Community" in Commission of the European Communities, "The legal protection of the financial interests of the Community: Progress and prospects since the Brussels seminar of 1989" Brussels, 25 and 26 November 1993, p. 59.

The Commission's proposal led in a modified way to the Convention of 26 July 1995,[6] in relation to which the Council approved an explanatory report on 26 May 1997.[7] The PFI Convention establishes essentially a common definition for fraud affecting Community expenditure and revenue and sets out principles for cooperation and jurisdiction in the field of the protection of the European Communities' financial interests.

Under the Spanish Presidency the 1st Protocol was elaborated, mainly to further harmonisation of Member States' criminal laws regarding corruption and ensure assimilation of other Member States officials, Community officials and members of the Institutions to these crimes. The 1st Protocol had to contain new rules on jurisdiction taking into account the specificity of corruptive actions. Regarding the 1st Protocol, signed on 27 September 1996[8], the Council approved an explanatory report on 19 December 1997[9]. Only a month later, the so-called ECJ Protocol was adopted on 29 November 1996[10] allowing for preliminary rulings of the Court of Justice of the European Communities on the interpretation of the PFI Convention and the 1st Protocol.

Since the studies also indicated that the principle of personal liability alone, although of significant importance in criminal law, is not sufficient to protect the European Communities' financial interests in a world that is ever more run by enterprises, i.e. legal persons with a complicated structure, the Commission decided to propose a another additional protocol to the PFI Convention[11] aiming at introducing the concept of liability of legal persons for the offences established by the other PFI instruments. The proposal, also containing a provision on money-laundering, became in a modified form the 2nd Protocol of 19 June 1997[12], in relation to which the Council approved an explanatory report on 12 March 1999.[13]

It took until 17 October 2002 for the Convention, the 1st Protocol and the ECJ Protocol to enter into force, 90 days after notification of ratification by the last of the fifteen Member States to the depository – the Secretary-General of the Council of the European Union. The 2nd Protocol has not yet entered into force, but looks more likely to be ratified, since the three Member States still lacking notification have informed the Commission that they are working on drafts for the necessary national legislation to allow ratification. The analysis of domestic law already existing in the Member States to transpose the 2nd Protocol is attached – indicating these provisions specifically – notwithstanding the need to speed up the still outstanding measures by Italy, Luxembourg and Austria to ratify the protocol.

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6 Convention on the protection of the European Communities' financial interests: OJ C 31, 27.11.1995.

7 OJ C 191, 23.6.1997, p. 1.

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

9 OJ C 11, 15.1.1998, p. 5.

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

11 COM (1995) 693 final, 20.12.1995: OJ C 83, 20.3.1996, p. 10.

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

13 OJ C 91, 31.3.1999, p. 8.

1.1. State of play with ratification of the Convention on the Protection of the European Communities' financial interests and its protocols

The Commission's explanatory memorandum to its proposal for a Directive on the criminal-law protection of the Community's financial interests indicated the state of play with ratification of each PFI instrument on 17 May 2001. Notwithstanding repeated calls for ratification from the European Council, the Council, the European Parliament and the Commission,[14] none of the PFI instruments had come into force at that time. Three years later, a table on the current state of play on August 2004 with ratification of each PFI instrument therefore indicates clear progress. The table displays in italics the date of notification of the last of the 15 Member States, before accession on 1 May 2004, that triggered the entering into force of the concerned PFI instrument:

Table 1: Dates of notification on completion of constitutional requirements for adopting the PFI Instruments per Member State

	PFI Convention (signed 26.7.1995 entered into force 17.10.2002) Date of notification according to Article 11 (2)	**1st Protocol (signed 27.9.1996 entered into force 17.10.2002)** Date of notification according to Article 9 (2)	**ECJ Protocol (signed 29.11.1996 entered into force 17.10.2002)** Date of notification according to Article 4 (2)	**2nd Protocol (signed 19.6.1997, not yet entered into force)** Date of notification according to Article 16 (2)
Belgium	12.03.2002	12.03.2002	12.03.2002	12.03.2002
Denmark	02.10.2000	02.10.2000	02.10.2000	02.10.2000
Germany	24.11.1998	24.11.1998	03.07.2001	05.03.2003
Greece	26.07.2000	26.07.2000	26.07.2000	26.07.2000
Spain	20.01.2000	20.01.2000	20.01.2000	20.01.2000
France	04.08.2000	04.08.2000	04.08.2000	04.08.2000
Ireland	03.06.2002	03.06.2002	03.06.2002	03.06.2002
Italy	*19.07.2002*	*19.07.2002*	*19.07.2002*	*Not yet ratified*
Luxembourg	17.05.2001	17.05.2001	17.05.2001	*Not yet ratified*
The Netherlands	16.02.2001	28.03.2002	16.02.2001	28.03.2002
Austria	21.05.1999	21.05.1999	21.05.1999	*Not yet ratified*
Portugal	15.01.2001	15.01.2001	15.01.2001	15.01.2001
Finland	18.12.1998	18.12.1998	18.12.1998	26.02.2003
Sweden	10.06.1999	10.06.1999	10.06.1999	12.03.2002
UK	11.10.1999	11.10.1999	11.10.1999	11.10.1999

1.2. State of play with the Commission's proposal for Parliament and Council Directive on the criminal-law protection of the Community's Financial Interests

When the harmonisation objective had still not been achieved in 2001, nearly six years after the PFI Convention was drawn up, the Commission felt the need to give a

[14] For example, the conclusions of the Amsterdam European Council of 16 and 17.6.1997, 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, p. 26; conclusions of the Economic and Financial Affairs Council of 17.7.2000; and the European Parliament Resolution of 13.12.2000.

fresh impetus to the process of transposing substantive rules from the PFI instruments, without replacing the third pillar instruments altogether. It proposed a Directive on the criminal-law protection of the Community's financial interests on the basis of Article 280 of the EC Treaty.[15]

Two main motivations underpinned the proposal: first, the need to replace, at least in part, the current third pillar instruments by an instrument based on Article 280 of the EC Treaty, in its wording as newly introduced by the Treaty of Amsterdam, and second, the advantages of a first pillar instrument. The Commission's proposal, which takes over all the provisions of the PFI instruments relating to the definitions of offences, liability, penalties and cooperation with the Commission, offers the benefits that go with Community legislation, to ensure correct transposal and application of Community law in national legislation and hence efficiently promote effective and equivalent protection in all the Member States.

Following the opinion of the European Parliament at the first reading on 29 November 2001[16] and of the Court of Auditors of 8 November 2001[17], the Commission presented an amended proposal for the Directive.[18] Most of the PFI instruments came into force the day after the amended proposal was presented. Member States' doubts on the Community's power to legislate in criminal matters slowed down the action to follow up the legislative process on the proposed Directive. The Commission remains of the view that 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 interests and criminal liability and the criminal penalties applicable. The exception referred to in the second sentence of Article 280(4) of the EC Treaty precluding the adoption of a legislative act in the area of criminal law does not refer to criminal law as a whole but specifically to two aspects of it, namely "the application of national criminal law" and "the national administration of justice". As the Council has not yet adopted a Common Position on the proposal, the Commission believes the time has come to look into the national implementation measures and to consider the impact of the PFI instruments in order to improve effective and equivalent protection of the Community's financial interests in all the Member States.

2. DOCUMENTATION GATHERED

The documentation which the Commission asked the Member States to supply, as provided by Article 10 of the PFI Convention, is the main though not the only source of information for the analysis. The Commission reminded Member States of their obligation, by letter, in October 2003.

The value of the analysis depends largely on the quality and punctuality of the national information received by the Commission. The Commission also took into account, where appropriate, the information contained in the documents sent by the

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15 COM (2001) 272 final, 23.5.2001: OJ C 240 E, 28.8.2001, p. 125.
16 OJ C 153 E, 27.6.2002.
17 OJ C 14, 17.1.2002, p. 1.
18 COM (2002) 577 final, 16.10.2002: OJ C 71 E, 25.3.2003, p. 1.

Member States to the Commission with a view to preparing the annual report on the measures taken to implement Article 280 EU Treaty. The table below briefly indicates what documentation was made available to the Commission by Member States, regardless of whether specifically labelled as being related to Article 10 of the PFI Convention.

Table 2: Transmission to the Commission of the texts of the provisions transposing into domestic law the obligations imposed on Member States under the PFI instruments by Member States

(Transmission in accordance with Article 10 of the PFI Convention (referred to as also applicable in Article 7(2) of the 1st Protocol and Article 12(1) of the 2nd Protocol)

	Date of latest transmission	Comments
Belgium	02.04.2004	At the Commission's request, Belgium provided a short table of the applicable provisions and the texts. Belgium forwarded on its own initiative the extract of its official gazette concerning ratification of PFI instruments.
Denmark	03.12.2003	At the Commission's request, Denmark provided a short summary of the applicable provisions and the texts. Denmark also submitted on its own initiative the legislative materials related to ratification and implementation of the PFI instruments.
Germany	02.12.2003	At the Commission's request, Germany provided a short summary of the applicable provisions and the texts. Referring to Article 10 of the PFI Convention. Germany also submitted on its own initiative the legislative materials related to ratification and implementation of PFI instruments to the Secretary-General of the Council of the European Union.
Greece	10.05.2001	When notifying ratification, Greece submitted on its own initiative the extract of its official gazette concerning the law on ratification and implementation of PFI instruments to the Secretary-General of the Council of the European Union.
Spain	08.01.2004	At the Commission's request, Spain provided a short summary of the applicable provisions. Spain has not transmitted the texts.
France	23.12.2003	At the Commission's request, France provided a short summary of the applicable provisions. France provided also on its own initiative the materials relating to ratification of PFI instruments, but France has not transmitted the texts of its national legislation.
Ireland	15.12.2003	At the Commission's request, Ireland provided a short summary of the applicable provisions and the texts.
Italy	13.01.2004	At the Commission's request, Italy provided a short summary of the applicable provisions and the legal texts. Italy also forwarded on its own initiative some background information on the legislation ratifying and implementing PFI instruments .
Luxembourg	05.12.2003	At the Commission's request, Luxembourg provided a short summary of the applicable provisions and the relevant texts.

Netherlands	17.02.2003	When notifying ratification, the Netherlands gave the Secretary-General of the Council of the European Union the reference for the law on the ratification and implementation of the PFI instruments. The Netherlands indicated the applicable national provisions in its contribution for the annual report on the measures taken to implement Article 280 EU Treaty. The Netherlands has not transmitted the texts of its national legislation.
Austria	05.12.2003	At the Commission's request, Austria provided a short summary of the applicable provisions and the texts. Austria forwarded also on its own initiative the legislative materials relating to ratification and implementation of PFI instruments.
Portugal	19.02.2003	Portugal forwarded on its own initiative the extract of its official gazette concerning ratification of PFI instruments. Portugal has indicated the applicable national provisions in its contribution for the annual report on the measures taken to implement Article 280 EU Treaty. Portugal has not transmitted the texts.
Finland	09.12.2003	At the Commission's request, Finland sent a short summary of the applicable provisions and the texts.
Sweden	27.08.2002	Sweden submitted on its own initiative the legislative materials related to ratification and implementation of PFI instruments and relevant texts.
UK	19.03.2004	At the Commission's request, the UK sent a short summary of the applicable provisions and the texts.

There is no deadline for forwarding the implementing texts. Information provided up to August 2004 has been taken into account. The analysis thus takes stock of the transposal situation deriving from the legislation forwarded to the Commission by that date. The tables in the Annexes specify, in accordance with the information received by the Commission, all national provisions transposing the Articles in the PFI instruments as relevant.

3. EVALUATION METHOD

3.1. Establishing a method

Given the legal nature of the PFI instruments, public international law seems at first sight to be the reference point for a method for evaluation of the implementation of them. In terms of impact on national legislation, conventions established under Article 34(2)(d) of the EU Treaty are no different from traditional conventions under public international law. Whether any of the provisions of the PFI instruments needs to be ratified, may have a direct effect or requires legislative or administrative implementing measures by the Member States is a question to be answered from a viewpoint of domestic law, which governs the relationship of an international treaty with a country's national legal system.

Conventions based on Article 34(2)(d) of the EU Treaty are hierarchically subordinated to EU-Treaty provisions; yet they are, by their nature, agreements in international law which become binding on the Member States only after they have expressed their consent to be bound. Such conventions therefore also appear to be

subject to international law, first and foremost the Vienna Convention on the Law of Treaties.[19] The Vienna Convention contains no rules making it possible to assess whether a State that has concluded a treaty is actually living up to the obligations imposed by it. Article 26 of the Vienna Convention merely provides for the binding effect of a treaty; Article 27 excludes a State party from relying on provisions of its internal law as justification for failure to perform a treaty. There appears to be no standard method in international law for evaluating the implementation of treaties by States. If one instead looks at how the PFI instruments must be interpreted in order to verify whether Member States have performed them in good faith, Article 31 of the Vienna Convention requires that this be done in the light of the instruments' objectives and purpose.

There is no doubt from the text and preamble of the PFI instruments that their objective is to ensure that Member States' criminal laws "contribute effectively to the protection of the financial interests of the European Communities".[20] The PFI instruments, although placed in the third pillar, pursue an objective and purpose which is also to be achieved under Article 280 EC Treaty.

As regards EU conventions, the Treaty refers to "adoption in accordance with their respective constitutional requirements". In impact, the legal instrument most comparable with the conventions established under Article 34(2)(d) of the EU Treaty are the Framework Decisions,[21] since both are binding on the Member States as regards the result to be achieved, while leaving national authorities the choice of form and methods. The reference to the methodology developed by the practice of the Court of Justice for legal evaluation of the implementation of Directives was already considered as appropriate for the Framework Decisions and the same criteria are therefore also applied, *mutatis mutandis*, to evaluate whether the PFI instruments have been transposed.

3.2. The method used

3.2.1. Assessment of national implementation measures

The general criteria developed with respect to Directives and Framework Decision[22] should be applied *mutatis mutandis* also to the PFI instruments:

1. Form and methods of implementation of the result to be achieved must be chosen in a manner which ensures that the legal instrument functions effectively with account being taken of its aims;[23]

2. Each Member State is obliged to implement the instruments in a manner which satisfies the requirements of clarity and legal certainty and thus to transpose the

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19 The Convention was adopted on 22.5.1969 and entered into force on 27.1.1980. The full text, details on its status and are available at http://www.un.org/law/ilc/texts/treatfra.htm.

20 2nd recital to the PFI Convention, the 1st Protocol and the 2nd Protocol.

21 Article 34(2)(b) of the EU Treaty.

22 See in this context the application of the same criteria *mutatis mutandis* from Directives on Framework Decisions in COM(2001) 771 final, 13.12.2001.

23 See relevant case law on the implementation of Directives: Case 48/75 *Royer* [1976] ECR 497, paragraph 73.

provisions into mandatory national provisions.[24] In the specific field of criminal law, besides formal legality, conformity with the European approach to criminal law[25] demands that offences be accessible, precise and have foreseeable consequences, which implies also that the concerned provisions be interpreted strictly, in particular with regard to the prohibition of applying analogy in penal law;

3. Transposal need not necessarily require enactment in precisely the same words in an express legal provision; thus a general legal context (such as appropriate already existing measures) may be sufficient. However, full application of the legal instrument must be assured in a sufficiently clear and precise manner.[26]

Given the specific context of the PFI instruments as criminal law, the shortcomings in national criminal law identified by the Delmas-Marty report and the Commission study must also be kept in mind.

In accordance with established case-law regarding Directives, it is important to determine the nature of each provision of the PFI instruments in order to gauge the extent of the obligation for implementation.[27] Three levels of compliance can be distinguished. In all three, it is essential that the legal situation resulting from national implementing measures be sufficiently precise and clear to enable individuals to know the extent of their rights and obligations.

- The first group comprises provisions relating to conduct that is punishable under substantive criminal law, such as fraud, corruption and money-laundering and the criminal liability of heads of businesses and legal persons. The principle that a provision of criminal law may not be applied extensively to the detriment of the defendant[28] must be observed when the national legislation adopted in order to implement the PFI instrument is interpreted in the light of its wording and purpose.

- The second group consists of provisions that affect the rights and duties of an individual, as in the case of confiscation. Here, it is essential for national law to guarantee that the legal position under national law is sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them in the national courts.[29]

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24 See relevant case law on the implementation of Directives: Case 239/85 *Commission v Belgium* [1986] ECR 3645, paragraph 7. See also Case 300/81 *Commission v Italy* [1983] ECR 449, paragraph 10.

25 The European approach to criminal law is essentially based on Article 7 of the European Convention on Human Rights that overcomes the difference between common law and continental countries (See M. Delmas-Marty and J.A.E. Vervaele, "The implementation of the Corpus Juris in the Member States", Volume I, 2000, p. 34).

26 See relevant case law on the implementation of Directives: Case 29/84 *Commission v Germany* [1985] ECR 1661, paragraph 23.

27 See relevant case law on the implementation of Directives: Case C-233/00 *Commission v France* [2003] ECR I-6625, paragraph 77.

28 See relevant case law on the implementation of Directives: Joined cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] ECR I-6609, paragraphs 25 and 26.

29 See relevant case law on the implementation of Directives: Case C-365/93 *Commission v Greece* [1995] ECR I-499, paragraph 9.

- Finally, there is the third group of complementary elements usually relating to criminal procedure, such as jurisdiction, extradition and prosecution, the '*ne bis in idem*' principle and preliminary rulings, where the existence of general rules or principles of procedural law may render transposal by specific legislative or regulatory measures dispensable provided, however, that those principles actually ensure the full and effective application of the PFI instruments by the national authorities and that individuals, where appropriate, can rely on them in the national courts.[30]

One of the specific features of the PFI instruments is that some of their provisions require the necessary implementation measures to be taken "in accordance with the principles defined by ... national law", either explicitly, as in Article 3 of the PFI Convention, or implicitly, for instance for Articles 1(3), 2(1) and 4(1) of the PFI Convention.[31] The reference to principles defined by national law aims to respect the different dogmatic foundations of criminal-law in the Member States, particularly in the context of those provisions that touch on general aspects of substantive criminal law, such as the rules on participation and attempts. Where Member States are allowed to transpose obligations imposed by PFI instruments in accordance with the principles defined by their national law, they are not dispensed from taking any implementing action.. Whether the Member States complied with the relevant obligations under the PFI instruments can only be assessed in terms of whether the result to be achieved is actually ensured. An equivalent level of criminal law protection must be attained. Member States cannot argue that there is no need at all to modify existing national law.

3.2.2. Assessing the successful creation of effective EU-wide protection of the Communities' financial interests

The general purpose of the PFI instruments is to achieve and ensure an effective, dissuasive and equivalent level of criminal-law protection of the European Communities' financial interests by measures to be taken by the Member States, such as defining specific punishable conduct regarding fraud, corruption and money-laundering and providing effective, proportionate and dissuasive criminal penalties.

The principles under Article 280 EC Treaty require the following to be considered:

1. whether, in implementing the PFI instruments, Member States have taken the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests or, to put it another way, whether the differences between national systems as regards the definition of the offences implementing the PFI instruments are tight enough to avoid gaps and loopholes in the law which would allow offences to go unpunished;[32]

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30 See, inter alia, relevant case law on the implementation of Directives: Case 29/84 *Commission v Germany* [1985] ECR 1661, paragraph 22 and 23; and Case C-217/97 *Commission v Germany* [1999] ECR I-5087, paragraphs 31 and 32.

31 Explanatory report on the PFI Convention: OJ C 191, 23.6.1997.

32 Explanatory report on the PFI Convention: OJ C 191, 23.6.1997.

2. whether, while the choice of penalties remains within Member States' discretion where the PFI instruments are not explicit, the Member States have ensured that offences are penalised under conditions, both procedural and substantive, which make the penalty effective, proportionate and dissuasive.

The general assessment on the basis of these two criteria should lead to a conclusive evaluation on whether 'effective and equivalent protection of the financial interests of the Communities' throughout the EU has been attained. Article 9 of the PFI Convention allows Member States to adopt internal legal provisions going beyond the obligations deriving from the PFI instruments is of interest, so as to complete the impact of the PFI instruments.

3.2.3. Dispute settlement

The PFI instruments were still drawn up according to the EU Treaty in its Maastricht version, not allowing for general jurisdiction of the European Court of Justice on the application of third pillar conventions. Article 8(2) of the PFI Convention, Article 8(2) of the 1st Protocol and Article 13(2) of the 2nd Protocol provide, by way of exception from the rules applicable under the Maastricht Treaty, that jurisdiction is given to the European Court of Justice to settle any persistent dispute between the Commission and one or more Member State on the application of Article 1 and 10 of the PFI Convention, Article 1(a) and (b) and Articles 2, 3, 4 and 7(2) third indent of the 1st Protocol and Article 2 in relation to Article 1(e) and Articles 7, 8, 10 and 12(2) (fourth indent) of the 2nd Protocol.

Article 35(7) of the EU Treaty as amended by the Treaty of Amsterdam provides for the possibility for the Commission to bring a legal action in the Court of Justice regarding the interpretation and application of conventions established under Article 34(2)(d) of the EU Treaty. The question arises whether the subsequent amendment of the EU Treaty by the Treaty of Amsterdam and the related extension of the European Court of Justice's jurisdiction allows the Commission to use the dispute settlement provisions not only as regards implementation of the provisions specifically listed in the PFI instruments but also of all other provisions in the PFI instruments.

4. ANALYSIS OF NATIONAL MEASURES TAKEN

4.1. Analysis of the general approach on legislative implementation[33]

Two Member States opted for the enactment of new specific legislation defining criminal offences affecting financial interests in order to comply with the ratification requirements of the PFI instruments. In addition, the ratification has triggered the amendment of domestic criminal legislation in nine Member States. Four Member States did not adopt specific legislation when ratifying the PFI instruments, arguing that the required offences and all other provisions were already covered by their respective criminal codes and other relevant legislation.

Greece and Ireland alike implemented and ratified all the PFI instruments by enacting new 'codified' legislation. In Greece, the whole set of rules devised to

[33] See also Annex Table 1 to Annex Table 4.

transpose the PFI instruments is to be found in Act No 2803/2000, except for the provisions regarding money laundering, which were enacted by an amendment to Act No 2331/1995 on Prevention and Combating the Legislation of Income from Criminal Activities. Likewise, Ireland introduced in part 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001 all the provisions on criminal offences related to the PFI instruments, again with exception of those relating to money laundering. Section 31 of the Criminal Justice Act 1994 was amended to provide for compliance with the PFI instruments as regards money-laundering.

Denmark, Spain, Italy, Luxembourg, the Netherlands, Finland and Sweden chose to amend their criminal codes to implement the PFI instruments. Danish Act No 228 of 4 April 2000 ratified all three instruments at once and amends the criminal code. In Spain, Institutional Act No 6/1995 introduced the amendments required to implement all the three PFI instruments at once. Shortly afterwards, however, Spain enacted a new criminal code by Institutional Act 10/1995 that is still under revision and subject to intense legislative activity. Sweden amended its criminal code twice, once with Act No 1999:197 implementing the PFI Convention, the 1st Protocol and the ECJ Protocol, and then with Act No 2001:780 for the 2nd Protocol. The Netherlands applied the same approach: they enacted a Kingdom Act on 13 December 2000 for ratifying the PFI Convention, the 1st Protocol and the ECJ Protocol and a separate Act of the same date to amend the criminal code. As regards the 2nd Protocol, the Netherlands estimated that no amendment of the criminal code is needed to comply with the provisions of the protocol and therefore the Kingdom Act of 22 June 2001 only concerns the ratification of that protocol. In Luxembourg, the law of 30 March 2001 ratifies the PFI Convention, the 1st protocol and the ECJ-protocol with the related amendments to the criminal code. Luxembourg has not yet ratified the 2nd protocol. Italy only ratified the PFI Convention, the 1st protocol and the ECJ-protocol and amended its criminal code through Act No 2000/300, which also amends some specific criminal provisions outside the criminal code as regards agricultural expenditure. Finland also chose to amend its criminal code separately for each of the three PFI instruments through Acts No 814/1998 regarding the PFI Convention, No 815/1998 regarding the 1st Protocol, No 837/2002 on the ECJ-Protocol and No 1191/2002 regarding the 2nd Protocol.

In all these seven Member States, the offences to transpose the PFI instruments are generally to be found in the criminal codes. In Spain, the Netherlands and Sweden some offences related to taxes and customs fraud may also be found in specific criminal legislation. Italy enacted not only specific legislation as regards customs and taxes but also concerning agricultural expenses.

Austria amended its criminal code and code of criminal procedure by Federal Act of 1998 to implement the PFI instruments, except for the 2nd Protocol. But the offences indicated by Austria as being provided for in transposing these PFI instruments are not all in the criminal code; in particular, as regards fraud affecting Community revenues, the offences are provided for exclusively by the tax criminal code. Germany enacted a specific Act for each instrument and amended several pieces of legislation outside the criminal code. A Federal Act of 1998 to transpose the PFI Convention amended the criminal code and the criminal provisions of the tax code. A second Federal Act to transpose the 1st Protocol of the same year contains some substantive provisions and also further amendments to the criminal code. In 2000, Germany enacted a Federal Act to transpose the 2nd Protocol, which amended the law

on administrative penalties, the criminal code and the Federal Act of 1998 to transpose the 1st Protocol.

In these two Member States, the offences to transpose the PFI instruments is to be found in the criminal code and in specific statutory provisions, most notably specific tax criminal offences.

Of the four Member States that did not adopt specific legislation when ratifying the PFI instruments, Belgium enacted amendments to their criminal codes with a view to subsequently ratifying the PFI instruments, namely the Act of 10 February 1999 on the fight against corruption and the Act of 4 May 1999 on the liability of legal persons with a view to preparing ratification of the 1st and 2nd protocols. Although France enacted Act No 2000-595 of 30 June 2000 amending the criminal code and the code of criminal procedure as regards the fight against corruption only after having ratified the PFI instruments, the French answers indicated that the amendments were not needed for ratification. Portugal and the UK did not amend their legislation in relation to ratifying the PFI instruments. In Belgium, France and Portugal the offences considered to transpose the PFI instruments are not only found in the criminal codes but also in specific statutory provisions. In the UK, the relevant offences belong partly to the common law and partly to statutory instruments. Their respective scope may vary among the three jurisdictions of the UK (England and Wales, Scotland, Northern Ireland).

A short overview of the legislative technique applied for transposing the PFI instruments into national legislation is given in the table below:

Table 3: Group of Member States according to chosen method of implementation

Member States having introduced completely new criminal offences based on the PFI Instruments	**Member States having amended their criminal law partially in order to implement the PFI Instruments**	**Member States having taken no implementing measures considering that their law fulfils the requirements of the PFI Instruments**
Greece, Ireland (both with exception of money-laundering)	Denmark, Germany, Spain, Italy, Luxembourg, the Netherlands, Austria, Finland, Sweden	Belgium, France, Portugal, UK

The model of implementation introducing specific new criminal offences based on the PFI instruments, as chosen by Greece and Ireland, is preferable to all other ways of implementation. The draft Article 1 of the Commission's proposal for a convention[34] provided that there should be a specific offence of fraud against the Communities' financial interests. At the time, the Commission argued that providing for a specific offence of fraud in national legislation was the only way of ensuring that the same facts were treated as criminal offences in all the Member States.

Although none of the PFI instruments expressly requires specific offences, such specific offences for fraud, and even for active and passive corruption and money-laundering, offer advantages. In elaborating the analysis, the Commission has noted that 'codified' national legislation with regard to the PFI instruments made it easier

[34] COM (1994) 214 final, 1.6.1994: OJ C 216, 6.8.1994, p. 14.

to provide for clear reference to the applicable legal provisions and a full understanding of the conduct constituting the offence. The amendment of already existing criminal offences bears the risk of additional factual or mental elements to the offences. As regards fraud, while Article 1(1) of the PFI Convention intends to overcome the distinction between fraud regarding expenditure and revenue dealing with it in the same terms in a single article, there is doubt whether assimilation is achieved in those national legislations which continue to contain two separate offences,[35] sometimes even in different legal instruments, as is the case in Belgium, Germany, Austria and Portugal. From the Commission's point of view, the whole set of rules contained in the PFI instruments cannot be contemplated separately, since the fact that a provision or even part of a provision is implemented only in part or not at all also reflects on linked provisions that considered independently might seem to comply with the PFI instruments. Due to this effect, any such partial or inexistent implementation of an article or even part of an article endangers the attainment of "effective and equivalent protection of the financial interests of the Communities" as a scope of the PFI instruments. For example, only correct implementation of the predicate offences for money-laundering results in a complete system as envisaged by the PFI instruments. In other words, any failure to implement the predicate offences of fraud and corruption also has repercussions on the criminal provisions of money-laundering. As regards money laundering, incidentally, the reference to such specific offences as predicate offences is sufficient wherever the general offence of money-laundering is placed, since the conduct constituting the offence of money-laundering is already harmonised by Article 14 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.[36]

A specific offence in all the Member States is also desirable as a means of facilitating means of inquiry and prosecution. Specific offences common to all Member States would reduce the risks of divergent practice, since a uniform interpretation and a homogeneous way to meet all the necessary prosecution requirements could be established. Specific offences in national laws would also facilitate mutual assistance and allow for a clear attribution of powers to a future European Public Prosecutor.[37]

4.2. Analysis of the implementation of specific provisions

The provisions to be looked at in the PFI instruments are respectively related to substantive criminal or procedural law; yet, as there are four instruments, these provisions are distributed in a historical sequence rather than in a content-related way. Consequently this analysis does not take the articles in numerical order but examines first the offences that have to be provided in substantive criminal law (fraud, corruption and money-laundering), then the provisions related to these offences but touching on more general concepts of substantive criminal law (criminal liability of heads of businesses and liability of legal persons) and finally those elements usually relating to criminal procedure (jurisdiction, extradition and

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35 See already COM(1995) 556 final, 14.11.1995.

36 OJ L 166, 28.6.1991, p. 77, as amended by Directive 2001/97/EC: OJ L 344, 28.12.2001, p. 76.

37 See also section 3.2.1 of the follow-up report on the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM(2003) 128 final, 19.3.2003.

prosecution, '*ne bis in idem*' and preliminary rulings by the European Court of Justice).

In the course of this analysis, the implementing measures for each of the PFI instruments' provisions are:

- structured according to which Member States introduced new provisions in their legal system, amended existing provisions or took no legislative action at all;
- explained by establishing groups of Member States that provide for similar national legal approaches;
- evaluated according to the criteria elaborated.

Consequently, the standards applicable for the implementation of the provisions related to substantive criminal law (fraud, corruption and money-laundering and the criminal liability of heads of businesses and liability of legal persons) are generally the most stringent ones.

5. OFFENCES THAT HAVE TO BE PROVIDED IN SUBSTANTIVE CRIMINAL LAW

5.1. Fraud affecting the European Communities' financial interests

The definition of fraudulent conduct in Article 1 of the PFI Convention is the key provision in ensuring a common minimum level of criminal protection against fraud.. To cover various types of fraud, Article 1(1) of the PFI Convention lays down two separate but matching definitions, one applying to expenditure, the other to revenue. It appears useful to look at the national provisions for expenditure and revenue separately, in particular since five Member States (Belgium, Germany, France, Austria, Portugal) regulate the offence regarding revenue exclusively outside their criminal code in specific legislation regarding taxes and customs. In the UK's jurisdiction of England & Wales and Northern Ireland, cheating the revenue is likewise a common law crime only applicable to revenue.

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

5.1.1. Fraud in respect of expenditure (Article 1(1)(a) of the PFI Convention)[38]

Expenditure "means not only subsidies and aid directly administered by the general budget of the Communities but also subsidies and aid entered in budgets administered by the Communities or on their behalf."[39] Fraud regarding expenditure is defined by three different conducts, namely:

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[38] See also Annex Table 5.

[39] Explanatory report on the PFI Convention: OJ C 191, 23.6.1997.

(1) the use or presentation of false, incorrect or incomplete statements or documents;

(2) the non-disclosure of information in violation of a specific obligation; and

(3) the misapplication of funds.

Only four Member States (Denmark, Greece, Spain, Ireland) amended the criminal law as regards all three of these forms of conduct. In two Member States (Germany, Italy, Finland), existing fraud offences to cover the three forms of conduct were modified or extended. In other four Member States (Luxembourg, the Netherlands, Austria, Sweden) a new offence regarding the misapplication of funds has been introduced. Before ratifying the PFI Convention, Belgium enacted legislation[40] to extend its criminal law rules on subsidy fraud to Community funds.

Newly introduced offence	Amendment of an existing offence	No change in existing national legislation
Denmark, Greece, Spain, Ireland	Germany, Italy, Luxembourg, the Netherlands, Austria, Finland, Sweden	Belgium, France, Portugal, United Kingdom

Fraud committed through the use or presentation of false, incorrect or incomplete statements or documents

The conduct relating to fraud affecting the Communities' expenditures committed through the use or presentation of false, incorrect or incomplete statements or documents is a specific offence in Denmark, Greece, Spain and Ireland. These offences are shaped exactly along the wording of the PFI Convention as regards both conduct and intention.

France, the Netherlands, Austria, Sweden and the UK cover fraud affecting the Communities' expenditures by the general offence of fraud; Belgium, Germany, Italy, Luxembourg, Portugal, Finland have enacted specific offences of fraud affecting public entities' expenditure.

Belgium, Germany, Luxembourg, Portugal, Finland distinguish fraud concerning grants and subsidies and general fraud. The relevant conduct is incriminated in different provisions: the former is punished by a specific criminal offence, the latter seems to be only in Belgium and Germany covered by the general provisions of the criminal code on fraud, albeit subject to different conditions. In Belgium and Germany, fraud concerning subsidies and grants is punished regardless of whether the effect of misappropriation and wrongful retention is achieved. However, for fraud concerning subsidies and grants, Belgium and Luxembourg require an additional subjective element, namely in Belgium that the offender be aware that he is not entitled to the grant or subsidy and in Luxembourg that the offender knowingly makes a false incorrect or incomplete statement. Portuguese law, on the other hand, is restrictive in the definitions in Article 21 of Legislative Decree 28/84, to the extent that it covers expenditure made to an economic operator to support the development

[40] Act of 7 June 1994 amending the Royal Order of 31 May 1933 concerning statements made in the field of grants or any other allocations (Belgisch Staatsblad/Moniteur Belge, 8.7.1994).

of the economy and penalises conduct only if the result is effectively obtained. Chapter 29(5) of the Finnish criminal code does not criminalise fraud with regard to financial support given for personal consumption. The subsidiary general offence of fraud in Germany (Section 263 German criminal code) requires the additional element of deceit.

Two jurisdictions of the UK – England & Wales and Northern Ireland – must be mentioned in this group, as fraudulent conduct regarding subsidies or grants is covered by various statutory offences of the Theft Act 1968 and the Theft (Northern Ireland) Act 1969 respectively. The offences also require deceit and dishonesty. Fraudulent conduct in general, and in relation to the Communities' financial interests, in a more or less subsidiary way, may also fall under the common law offence of conspiracy to defraud, but only if it is committed in agreement by at least two persons.

France, Italy and the Netherlands already criminalise the use or presentation of false, incorrect or incomplete statements or documents without requiring such use or presentation to have a detrimental financial effect. In these Member States the criminal code additionally recognises the offence of fraud, albeit subject to different conditions. In France and the Netherlands, the offences do not distinguish whether a public entity is affected or not. The subsidiary general offence of fraud in France ("*escroquerie*") and Italy ("*truffa*") further requires an element of deceit and, in Italy and the Netherlands, an intention to enrich the offender or a third person. In Italy, the offence of the use or presentation of false, incorrect or incomplete statements or documents may be committed only against public entities, whereas fraud affecting public entities' expenditure is an aggravating circumstance of the general offence of fraud.[41] Italy also provides for a specific offence as regards fraud affecting the European Agriculture Guidance and Guarantee Fund in Article 2 of Act No 1986/898 criminalising the presentation of false data. According to the Italian Supreme Court,[42] the application of the special provision in relation to the general fraud is confined to cases where no additional element than the use of false data is encountered. The Italian Supreme Court[43] has observed that the Italian system produces a situation in which different norms punish very similar – if not the same – conduct very differently according to differing circumstances and that, although Community funds are assimilated to Italy's own state funds, the present situation may cause legal ambiguities casting doubts on the effective, proportionate and dissuasive penalisation due to differences in punishment between the different ways the offences are committed.

Fraudulent conduct affecting the European Communities' expenditures is considered in Austria and Sweden as falling within the general offence of fraud. The Austrian Supreme Court interprets, in practice[44], the wording of the Austrian criminal code's requirement of "deceit as to factual circumstances" in the definition of fraud as fulfilled if an administrative authority decides on the mere basis of false factual

41 Italian Corte di Cassazione, Judgment No 26351, 10.7.2002.

42 As constantly held by the Italian Corte di Cassazione, starting with Judgment No 2780, 15.3.1996.

43 Italian Corte di Cassazione, Judgment No 26351, 10.7.2002.

44 As constantly held by the Austrian Oberster Gerichtshof, starting with Judgment No 12 Os 135/85, 10.10.1985.

indications even if it is not misled. The general offence of fraud in Austria and Sweden is only committed, moreover, when there is an element of deceit and, in Austria, an intention to enrich the offender or a third person.

Likewise, the third jurisdiction of the UK, Scotland, provides for the common law offence of fraud, which also comprises conduct affecting the European Communities' expenditure. The offence appears to require additional subjective elements, namely deception and dishonesty.

Fraud committed through failure to disclose information in violation of a specific obligation

The situation as regards fraudulent conduct affecting the Communities' expenditures committed through failure to disclose information in violation of a specific obligation is in principle similar to the situation regarding fraud committed through the use or presentation of false, incorrect or incomplete statements or documents. In this section, therefore, reference is made only to those countries where the particularities of their criminal law so require.

Belgium, Denmark, Greece, Italy, Ireland, Portugal, Spain and Sweden cover the commission of fraud through omission by the same provision as fraud committed through the use or presentation of false, incorrect or incomplete statements or documents. Germany, Luxembourg, the Netherlands and Finland, instead, provide for specific alternatives as regards non-disclosure.

The Austrian criminal code provides for a general system of committing any crime, hence including fraud, by omission, if the offender had an obligation to act, thereby including an obligation to disclose information.

In the UK jurisdictions of England & Wales and Northern Ireland, non-disclosure of information is only covered insofar as it is part of a non completely correct statement and hence falls under the offences mentioned before of using incorrect statements or documents. An omission as such may constitute under specific conditions the statutory offence of suppression of documents or false accounting under the Theft Act 1968 or the Theft (Northern Ireland) Act 1969.

In France, fraudulent conduct is dependent on particular types of manifest behaviour. Since the conduct as such is therefore not penalised explicitly, French courts only rule under further specific conditions[45] that silence can be construed as fraud, namely if an actual risk of obtaining a fraudulent result was created. The situation appears to be similar in Scotland, where the common law offence of fraud cannot be committed by non-disclosure.

Fraud committed through misapplication of funds

[45] French Cour de cassation, Chambre criminelle, Judgment 20.3.1997, Droit pénal (1997).

Misapplication of funds as regards expenditure consists in the misuse of funds which, although legally obtained, may subsequently have been wasted or used for purposes other than those for which they were granted.[46]

In Greece and Ireland fraud committed through misapplication of funds is to be found in the codified legislation enacted to ratify the PFI instruments.

In Belgium, Germany, Portugal and Finland the misapplication of funds is one of the possible forms of fraudulent conduct considered by the specific laws or provisions covering fraud concerning grants and subsidies. In all these countries, the existence of a criminal offence covering misapplication of Community expenditure not labelled as subsidy or grant may be doubted, unless it is, under very specific circumstances, punished as a breach of trust. Additionally, Article 37 of the Portuguese Legislative Decree 28/84 limits its application to expenditure in as far as intended for the development of the economy made to an economic operator. Chapter 29(5) of the Finnish Criminal Code does not criminalise fraud with regard to financial support for personal consumption.

In the Austrian, Danish, Dutch, Italian, Luxembourg, Spanish and Swedish criminal codes, fraudulent conduct regarding misapplication of funds is set out in a specific different provision. In Italy, the offence defined by Article 316bis of the criminal code is confined to misapplication of funds intended for activities of public interest. The offence as defined in Luxembourg, the Netherlands, Austria and Sweden appears to cover only expenditure related to grants and subsidies. Additionally, the Luxembourg and Dutch law require the deliberate use for another aim than for which it was granted.

Taking a different approach, Article 314-1 of the French criminal code penalises misappropriation of funds principally as an offence implying a breach of trust. It requires that misappropriation be done in a way detrimental to others and irrespective of the purpose for which it was granted.

Unlike the other fourteen Member States, none of the UK's three jurisdictions provides for a specific offence on the misapplication of funds. In some specific cases, misapplication could be considered, in England & Wales and Northern Ireland, as theft under the Theft Act 1968 and the Theft Act (Northern Ireland) 1969, respectively. In Scotland, the common law crime of embezzlement could be of relevance. In all of the UK's jurisdictions, the fulfilment of these offences would require that the person who receives funds is obliged to keep them separate. The obligation to separate funds, however, is not generally imposed in the UK's jurisdictions.

Evaluation

The PFI Convention requires Member States to provide for one or more criminal offences, the constituent elements of which correspond to the conduct set out in Article 1(1)(a). In assessing the implementation of the offences set out in the PFI Convention, the principle that a provision of criminal law may not be applied

[46] Explanatory report on the PFI Convention: OJ C 191, 23.6.1997.

extensively to the detriment of the defendant must be observed when interpreting the different offences existing in the Member States.

With this very cautious approach in mind, it might appear that only four Member States (Denmark, Greece, Spain and Ireland) have fully complied with the requirements of the PFI Convention and criminalised all possible forms of conduct with regard to fraud affecting the Communities' expenditure.

In two Member States (the Netherlands and Italy) compliance could fall short in as far as misapplication of funds does not cover all kinds of expenditure. In one of them, Italy, the fraudulent conduct is criminalised by superseding provisions, in particular on European Agriculture Guidance and Guarantee Fund, a fact that may raise doubts as to whether these different provisions are compatible with the requirement of legal certainty, since the legal situation resulting from national implementing measures must be precise and clear to enable individuals to know how far their conduct might constitute a criminal offence.

In six Member States (Belgium, Finland, Germany, Luxembourg, Portugal, Sweden), the three forms of fraudulent conduct regarding Community expenditure cover subsidies and grants in the first place. Additionally, in five of these Member States, the offences vary as regards the intention (Belgium, Luxembourg, Sweden) or the description of what constitutes a subsidy or grant (Portugal, Finland).

In three Member States (France, Austria, UK), the degree of protection of financial interests as regards fraud on expenditure varies widely among the three different forms of committing the offence. In one of them, Austria, additional subjective elements, namely enrichment, are added to the fraudulent conduct, and misapplication of funds does not seem to cover all kinds of expenditure.

In one Member State (France), fraud committed in the form of failure to disclose information in violation of a specific obligation is punished only exceptionally, and in accordance with relevant case law, and misapplication of funds requires additional elements. Finally, in another Member State (UK) fraudulent conduct may fall under various different offences. But they require additional factual, such as at least two offenders agreeing to undertake the crime, or subjective elements, namely deception and dishonesty. Fraud committed through failure to disclose information in violation of a specific obligation and misapplication of funds appears to be only very exceptionally punishable.

It can be concluded from this analysis that an equivalent level of criminal law protection as regards fraud affecting the European Communities' expenditure might not yet have been attained, even though as regards assimilation, all the fifteen Member States under examination took the same or even more stringent measures to counter fraud affecting the expenditure of the Community as they take to counter fraud affecting their own financial interests.

5.1.2. Fraud in respect of revenue (Article 1(1)(b) of the PFI Convention)[47]

All the Member States penalise fraud in respect of Community revenues stemming from customs duties in trade with third countries, levies in agricultural trade with non-member countries and contributions provided for in the common organisation of the market in sugar. In the Commission's view,[48] the revenue resulting from the application of a uniform rate to Member States' VAT assessment base is also protected by Article 1(1)(b) of the PFI Convention, although the explanatory report considers VAT to be excluded from the PFI Convention's scope because it is not "an own resource collected directly for the account of the Communities".[49] However, Article 1(1)(b) of the PFI Convention nowhere states that revenue must be collected directly for the account of the Communities. Reading the PFI instruments in context, also the use of the wording "tax or customs duty offence" in Article 5(3) of the PFI Convention and in Article 6 of the 2nd Protocol cannot be understood other than referring to fraud affecting VAT as possible "tax offence". Also the scope of the PFI instruments clearly comprises the protection of the Community financial interests from fraud in respect of VAT. As net VAT receipts contribute towards the calculation of VAT Own Resources payable to the Community Budget which are determined from national volumes of transactions subject to VAT by applying a uniform rate of 0.5%, large-scale VAT fraud may negatively impact Member States' VAT revenues and consequently their contributions to the Community budget. This aspect clearly affects the financial interests of the Community. The preliminary studies preceding the drafting of the PFI Convention also always took VAT fraud into account.[50]

Similar to expenditure-related fraud, revenue-related fraud consists of three different forms of conduct, namely:

(1) the use or presentation of false, incorrect or incomplete statements or documents;

(2) the non-disclosure of information in violation of a specific obligation; and

(3) the misapplication of a legally obtained benefit.

In five Member States (Denmark, Greece, Spain, Ireland and Luxembourg) transposal took the form of new criminal provisions as regards all three of these forms of conduct.

In two Member States (Austria, Finland), existing fraud offences were amended to cover the three forms of conduct. In Finland, the scope of fiscal fraud was extended

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47 See also Annex Table 6.

48 See for example the Commission Declaration attached to Parliament and Council Directive 2001/97/EC of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (OJ L 344, 28.12.2001, p. 82) explicitly stating that the protection of the Communities' financial interests against illegal activities includes VAT fraud.

49 Explanatory report on the PFI Convention: OJ C 191, 23.6.1997.

50 In Delmas-Marty, "Incompatibilities between legal systems and harmonisation measures: Final report of the working party on a comparative study on the protection of the financial interests of the Community" in Commission of the European Communities, "The legal protection of the financial interests of the Community: Progress and prospects since the Brussels seminar of 1989", Brussels, 25 and 26 November 1993, p. 62; and in COM(1995) 556 final, 14.11.1995.

to Community revenues, whereas in Austria, an existing administrative fiscal fraud offence was modified in order to render it a criminal offence covering export refunds.

In the remaining eight Member States (Belgium, Germany, France, Italy, the Netherlands, Portugal, Sweden and UK) no amendments to existing offences or new offences were introduced.

Newly introduced offence	Amendment of an existing offence	No change in existing national legislation
Denmark, Greece, Spain, Ireland, Luxembourg	Austria, Finland	Belgium, Germany, France, Italy, the Netherlands, Portugal, Sweden, United Kingdom

Fraud committed through the use or presentation of false, incorrect or incomplete statements or documents

Although Denmark, Greece, Spain, Ireland and Luxembourg introduced specific new provisions penalising fraudulent conduct with regard to the Communities' revenue, none of the mentioned offences outlines specifically what is intended by 'revenue'. Section 289a of the Danish criminal code requires a decision concerning a "payment to the Communities", the Greek and Irish offences interpret the concept of revenue by reference to Article 1 of the PFI Convention, Article 496-4 of the Luxembourg criminal code punishes conduct that avoids or reduces contributions to the resources of the budget of a public international organisation. Since the principle that a provision of criminal law may not be applied extensively to the detriment of the defendant must be observed, there is reason to assume that, whereas agricultural levies, sugar and customs duties are clearly covered, none of these provisions refers to VAT. VAT fraud, hence, appears not necessarily to be penalised by the newly inserted offences. The same is probably true for the related offence in the Spanish criminal code.

The Spanish criminal code also penalises fraud affecting all forms of revenue, including the revenue of any public entity, so that full coverage of all EC resources is ensured. As regards the other four Member States, VAT fraud committed against the concerned State is penalised as a specific fiscal offence under conditions that may be different from the ones set out in Article 1(1)(b) of the PFI Convention. Luxembourg, for instance, distinguishes for some forms of VAT fraud between administrative and criminal punishment, according to the fraudulent conduct. All of these five Member States still have legislation in force that may overlap with the newly enacted provisions as regards smuggling offences.

Revenue-related fraud is also to be found in the criminal codes of the Netherlands, Finland and Sweden. Through a reference in the Finnish criminal code, the offence of tax fraud is extended to "a levy collected on behalf of the European Communities". Again, one may assume that such a reference falls short of comprising VAT fraud, given also the wording used in the explanatory report to exclude VAT from the scope of the PFI Convention. In Finnish law the standard provision already penalises tax fraud regarding the revenue of all public entities, so that full coverage of all resources of the Communities, including VAT, is provided for. In the Netherlands and Sweden, the general offence of fraud may also apply to

tax fraud, yet in both countries fraud requires an additional subjective element, in the Netherlands the offender's intention to enrich himself or a third person, in Sweden an element of deceit. In the Dutch system, however, the use or presentation of false, incorrect or incomplete statements or documents as evidence is already penalised in general without requiring such use or presentation to have a monetary effect. In both countries, these general offences are complemented by customs offences and tax offences enacted in specific legislation.

In Germany and Austria, offences affecting the public revenue are traditionally laid down in specific legislation penalising tax fraud for levies regardless of on whose account they are charged. The applicable offence in Germany is codified in a single provision referring to all obligations relating to public revenue, including VAT, customs and other duties, in Austria the offence relating to taxes, comprising VAT, and the offence concerning import and export levies are distinct but provided for by the same Act – the tax offences code. In Austria, tax fraud below a threshold of €75 000 as regards VAT and €37 500 as regards import and export levies is prosecuted as an administrative offence, yet, above a threshold of €22 000 and €11 000 respectively may be punished with imprisonment of up to three months as well.

In a somewhat similar way, the UK's jurisdictions of England & Wales and Northern Ireland penalise all kinds of revenue fraud through the common law offence of cheating the revenue. It might need to be verified whether the concept applies to any conduct covered by the fraud definition on the income side. In Scotland, no such common law offence exists. In all three jurisdictions of the UK, statutes such as the Customs and Management Excise Act 1979 and the VAT Act 1994 provide for specific offences regarding false declarations and using false documents in customs procedures and covering fraudulent evasion of VAT by using false documents or statements. However, these specific offences are limited to defrauding the UK's tax or customs administration and hence lack protection when the offended is another Member States' administration; in addition, they either are confined to documentary fraud for customs purposes or require the additional subjective element of "knowingly defrauding" as regards customs fraud which is not fulfilled simply by presenting false documents.

The criminal law systems of Belgium, France, Italy and Portugal provide for different offences in the specific laws on the relevant category of revenue. Usually a distinction is made at least between offences in the customs codes and in other tax codes. In Belgium, the VAT code penalises VAT fraud, and defrauding the customs is penalised in the general customs and excise Act, which makes explicit reference to infringements of Community customs regulations and decisions. On customs fraud, Belgian law appears to require an intention to deceive the custom authorities. Not only does the French system criminalise customs fraud and VAT fraud in two different pieces of legislation, namely the customs code and the general tax code, but it also provides for a difference between administrative and criminal punishment, according to the type of fraudulent conduct. Italy and Portugal provide for several offences regarding customs and import-export fraud in their respective customs code or customs criminal code and punish VAT fraud as a general tax offence. In Italy, fraud regarding revenues may additionally fall under the general offence enshrined in Article 640bis of the criminal code if circumstances imply leading the offended person into error with the intention of enriching the offender himself or a third person.

Fraud committed through failure to disclose information in violation of a specific obligation

In all fourteen Member States under scrutiny except the UK, failure to disclose information is treated similarly and in the same provisions as those applicable to the use or presentation of false, incorrect or incomplete statements or documents, since tax and customs provisions usually provide for a specific obligation to declare events influencing the amount of revenues levied or reimbursed.

In the UK's jurisdictions of England & Wales and Northern Ireland, where the specific statutory offences are confined to documentary fraud for customs, the common law offence of cheating the revenue is presented as filling in the possible gap caused by a missing document as regards failure to disclose information in violation of a specific obligation. Whether it covers fully the ground, is uncertain. Scottish law does not provide for such a common law offence that could be applied in subsidiary way.

Fraud committed through the misapplication of legally obtained benefit

The effect of misappropriation and wrongful retention is required as regards the misapplication of a legally obtained benefit.

For Denmark, Greece, Spain, Ireland and Luxembourg, this is one of the possible forms of fraudulent conduct criminalised with regard to EC revenue.

In Germany, France, Italy, the Netherlands, Austria, Portugal and Finland, tax fraud, regardless whether regulated in one code or differently as regards customs and VAT, is so defined that fraudulent conduct comprises any omission to indicate any changes in circumstances that may lead to either misappropriation or wrongful retention of a legally obtained benefit.

In Belgium the same system of committing tax fraud by reference to failure to comply with an obligation to declare changing circumstances applies, but as regards customs it seems more difficult to be fulfilled since the related offence appears to require an intention to deceive the customs authorities.

Under the Swedish criminal code, misapplication of a legally obtained benefit does not appear to be penalised. One may doubt that the offence is covered in subsidiary way by tax fraud as defined in Section 2 of the Swedish tax criminal code, since such tax fraud in Sweden requires an element of deceit, which is missing in case of misapplications.

Neither the common law offence of cheating the revenue in England & Wales and Northern Ireland nor the statutory offences enacted in the Customs and Management Excise Act 1979 and the VAT Act 1994 applicable in mainland UK seem to criminalise fraudulent conduct leading to the misapplication of a legally obtained benefit.

Evaluation

Although always applying a careful approach in interpreting the offences as enacted in the relevant fifteen Member States, compliance with the requirements of the PFI

Convention regarding fraud affecting the Communities' revenue appears more advanced than the corresponding expenditure fraud.

Eight Member States (Germany, Spain, France, Italy, the Netherlands, Austria, Portugal, Finland) cover in their offences all possible forms of fraudulent conduct with regard to the revenue of the Communities. In all those countries the offences were basically in place even before the PFI Convention.

In the four Member States (Denmark, Greece, Ireland and Luxembourg) that enacted specific offences to protect the Communities' financial interests, compliance falls short as regards the differences in the offences concerning VAT fraud.

In two of the abovementioned Member States (France and Luxembourg), the same fraudulent conduct may be criminalised by superseding criminal or administrative offences. These countries ensure precise and clear application of these superseding administrative and criminal offences through a system of consumption, where the criminal offence prevails over the administrative one.

In three Member States (Belgium, Sweden, UK), the degree of protection of financial interests as regards fraud on the revenue side varies widely among the three different forms of committing the offence. One of them (Belgium) requires an additional element of intention, namely deceit, in the field of customs fraud. In the two other (Sweden and UK), misapplication of legally obtained benefit does not appear to be penalised. Finally, in one of them (UK), fraudulent conduct may fall under various different offences requiring additional factual elements, such as defrauding the country's own tax or customs authority, and subjective elements, namely undertaking the fraudulent conduct knowingly.

For an equivalent level of criminal law protection of fraudulent conduct affecting the EC's revenue, the legislation in seven Member States (Germany, Spain, Italy, the Netherlands, Austria, Portugal and Finland) appears tightly enough drafted to avoid all kinds of gaps and loopholes. The scope of the criminal law protection of VAT is not completely clear in Denmark, Greece, France, Ireland and Luxembourg. In two other Member States (Belgium, Sweden), gaps remain open, so that specific ways of committing fraud on revenues may go unpunished due to the additional elements required. In one Member State (UK) there appears to be a risk that certain forms of fraudulent conduct regarding the Communities' revenue may go unpunished.

5.1.3. Intentional preparation or supply of false incorrect or incomplete statements or documents (Article 1(3) of the PFI Convention)[51]

The purpose of Article 1(3) of the PFI Convention may be clarified by referring to the recommendation according to which "efforts should be made to reduce incompatibilities flowing from different rules on participation in offences".[52] As

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51 See also Annex Table 7.

52 Delmas-Marty, "Incompatibilities between legal systems and harmonisation measures: Final report of the working party on a comparative study on the protection of the financial interests of the Community" n Commission of the European Communities, "The legal protection of the financial interests of the Community: Progress and prospects since the Brussels seminar of 1989", Brussels, 25 and 26 November 1993, p. 91, R. 8.

regards effective punishment of preparatory acts, the PFI Convention proposes two approaches. On the one hand, Member States may either define a criminal offence of preparing or supplying false, incorrect or incomplete statements or documents affecting the Communities' financial interests. On the other hand, where such conduct is not in itself a criminal offence in the Member States, prosecution must be possible at least on the charge of participation in, instigation of or attempt to commit fraud, whereby for 'participation`, 'instigation' and 'attempt', the definitions in national criminal law apply.[53]

The second option was clearly the one preferred by Member States, since they could use the definitions in their national criminal law to argue that the criminal offences as defined under Article 1(1) of the PFI Convention are already punishable as principal offence as well as the participation in, instigation of or attempt to commit such offence. Only the two Member States providing for a 'codified' transposal thus introduced new provisions in relation to Article 1(3) of the PFI Convention (Greece, Ireland), and only one of them (Greece) introduced a specific offence, whereas the other one (Ireland) only extended punishment of the principal offence to participation, instigation and attempt. All other thirteen Member States consider their existing national criminal law as already providing for sufficient protection in this regard. This lax legislative activity might seem to contradict the intentions at the time of drafting the PFI Convention, when incompatibilities in the different rules on participation in offences were considered to be a major obstacle to effective protection of the EC's financial interests against fraudulent preparatory acts.

Newly introduced offence	Amendment of an existing offence	No change in existing national legislation
Greece, Ireland	-	Belgium, Denmark, Germany, Spain, France, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden, United Kingdom

Only Greece specifically punishes the preparation or supply of false, incorrect or incomplete statements or documents affecting the Communities' financial interests.

Dutch and Swedish law provide for offences criminalising the preparation or supply of false, incorrect or incomplete statements or documents, regardless of whether the EC's financial interests are affected or not. The criminal system in the Netherlands and in Sweden alike contain rules on participation, instigation and attempt.

All the others, Belgium, Denmark, Germany, Spain, France, Ireland, Italy, Luxembourg, Austria, Portugal, Finland and the UK, rely on what is provided for by their national criminal law system on participation, instigation and attempt. All these countries provide for rules on document forgery that may, under the specific circumstances in each national system, be likewise applicable. In Belgium, the general law on customs and excise tax provides a specific offence for preparing documents intended for customs fraud.

[53] Explanatory report on the PFI Convention: OJ C 191, 23.6.1997.

In Germany, Italy, Luxembourg, Austria and Portugal, for fraud related to grants and subsidies (Germany, Luxembourg), customs and agricultural levies (Luxembourg) and VAT (Italy, Austria, Portugal), the conduct is already punishable even if no result is achieved so that the stage of fraudulent conduct already matches that of attempt as defined in other countries' criminal law systems.

In all three jurisdictions of the UK, participation, instigation and attempt in fraudulent activities are criminalised in as far as the principal criminal offence exists. Incitement to commit an offence throughout the UK and instigation in Scotland are common law offences. In England & Wales and Northern Ireland, using a false instrument may also be an offence under the Forgery and Counterfeiting Act 1981.

It is not clear whether the French system penalises attempt under the customs code and the general tax code, in particular when the conduct only leads to an administrative punishment.

The implicit statement in Article 1(3) of the PFI Convention that, if the preparation or supply of false, incorrect or incomplete statements or documents is already punished as principal offence or as participation in, instigation of or attempt to commit a fraud as defined by Article 1(1), no implementing measure needs to be taken by a Member State, makes it tricky to assess the Member States' transposal of the article. What can be said is that the reason to insert this provision was to allow criminalising this conduct even if ultimately no fraud offence was committed or attempted using the false statements supplied. This, however, is generally the condition for triggering the application of the rules on participation or instigation under the "*Akzessorietätsprinzip*".

Whether the Member States complied with Article 1(3) of the PFI Convention can hence be assessed only in terms of whether the result to be achieved is actually ensured. Consequently, evaluating implementation basically means assessing whether an equivalent level of criminal law protection has been attained.

In this context, it can reasonably be assumed that in those five Member States where either the preparation or supply of false, incorrect or incomplete statements or documents constitutes already an offence (Greece, the Netherlands, Sweden) or a unitary approach to participation in criminal conduct is applied (Denmark, Italy), incompatibilities are reduced so as to avoid gaps or loopholes and implementation is achieved. With regard to the remaining nine Member States, since they all rely on their general national rules on participation, instigation and attempt being linked to the principal offence, it appears justified to assume full implementation only where also the principal offence is correctly and fully implemented. Therefore only two Member States (Spain, Ireland), however, due to their complying as regards implementation of principal offences, appear to have implemented Article 1(3) of the PFI Convention by reference to their general rules with regard to the result to be achieved.

At this stage, for the other Member States (Belgium, Germany, France, Luxembourg, Austria, Portugal, Finland, Sweden and UK), an evaluation as regards their positive compliance with Article 1(3) of the PFI Convention appears impossible.

5.1.4. Penalties (Article 2 of the PFI Convention)[54]

In its present form Article 2 of the PFI Convention is understood to require Member States to:

- provide at least for administrative, non-criminal penalties for the punishment of the conduct constituting fraud against the EC's financial interests as defined in Article 1 of the PFI Convention involving a total amount of less than €4 000, so-called minor fraud;

- lay down effective, proportionate and dissuasive criminal penalties for the punishment of the fraudulent conduct if involving a total amount of more than €4 000; and

- always impose proportionate and dissuasive criminal, penalties at least providing for the deprivation of liberty which can give rise to extradition for the punishment of fraudulent conduct involving a minimum amount in excess of €50 000 Euro, so-called serious fraud.

Unlike in the Commission's proposal,[55] Member States are not required to provide for an offence labelled as 'serious' or 'minor' fraud in their criminal laws, but only for a minimum punishment for fraudulent conduct. Member States also retain a margin of discretion in deciding the amount and severity of criminal penalties as long as the penalties are effective, proportionate and dissuasive. The PFI Convention is also interpreted as leaving it to Member States whether or not to define according to their own legal traditions additional factual circumstances which define certain fraudulent conduct as elements constituting serious fraud.

The introduction of penalties as required by Article 2 of the PFI Convention was automatic for those four Member States (Denmark, Greece, Spain, Ireland) that introduced specific offences related to fraudulent conduct and for those four which amended their criminal law by introducing new additional offences (Italy, Luxembourg, the Netherlands, Austria). Only one Member State of the last mentioned group (Italy) modified already existing offences – the ones for smuggling where the penalties are laid down in Article 295 of the consolidated customs act – just with the scope to provide for penalties as required by the PFI Convention, namely by providing prison penalty where amounts exceed €49 993.03. The remaining seven Member States did not touch their existing criminal penalties.

Newly introduced provision	Amendment of an existing provision	No change in existing national legislation
Denmark, Greece, Spain, Ireland	Italy, Luxembourg, the Netherlands, Austria	Belgium, Germany, France, Portugal, Finland, Sweden, United Kingdom

The implementation of Article 2 of the PFI Convention regarding criminal penalties is very heterogeneous.

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54 See also Annex Table 7.

55 Article 4 of COM (1994) 214 final, 1.6.1994: OJ C 216, 6. 8.1994, p. 14.

Penalties under national legislation

Except for Spain and, as regards tax offences, for Austria, all Member States provide for penalties involving deprivation of liberty already for 'standard' fraudulent conduct and do not require serious fraud to impose prison sentences.

In Denmark, Germany, Greece, Spain, Ireland, Luxembourg, Finland and Sweden, the principle offences of fraudulent conduct in accordance with Article 1 of the PFI Convention are punished in the same way. The lowest penalty is in the Spanish criminal code, that imposes penalties from one to two months, that is to say, a daily fine of from €2 to €400 for the period of between one and two months. In Finland and Sweden an offender risks deprivation of liberty up to two years or a fine, in Denmark deprivation of liberty up to four years or a fine, in Germany and Luxembourg deprivation of liberty up to five years or a fine, in Ireland an unlimited fine and/or imprisonment for up to five years and in Greece deprivation of liberty up to ten years.

In Belgium, France, Italy, the Netherlands, Austria, Portugal and the UK, the penalty depends on the actual offence that was committed. The legislation in Austria, Portugal and the Netherlands appears to provide for a system of penalties that achieves a certain degree of homogeneity. Under Dutch law, for fraud offences attract a prison sentence ranging from maximum three years to six years and a fine of maximum €11 250 to €45 000. In Austria, fraud regarding expenditure is punishable by prison for up to two years (for misapplication) or three years (for the other forms of the offence) and tax fraud attracts a criminal fine imposed by the tax administration. As regards crimes below the thresholds of €75 000 for customs fraud and €37 500 for tax fraud, Austria provides for a specific procedure whereby administrative bodies are authorised to impose criminal penalties, which may also comprise a custodial sentence up to three months. The Portuguese system as regards fraud concerning expenditure imposes imprisonment for between one and five years (for the other forms of commission) and up to two years (for misapplication) and, for fraud concerning revenue, up to three years, all of which can be combined with fines. In Belgium, France, Italy and the UK, the possible penalties depend merely on the incriminated conduct. In Italy, penalties imply a maximum of six, four or three years' deprivation of liberty. In Italy, customs fraud, if not serious, is punished only with criminal financial penalties. Penalties are combined with fines. In the UK, there is no limit on penalties regarding common law offences. As regards the statutory crimes, instead, penalties comprise a maximum of ten, seven, five or two years' imprisonment and/or unlimited fines. In Belgium the punishment varies between deprivation of liberty up to five, three or two years combined with a fine. It appears that in the Belgian system customs fraud is only punished with a fine. In the French system, penalties imposed range from maximum ten, seven, five, three or two years' deprivation of liberty and may be combined with fines. But for some forms of tax or customs fraud, only administrative penalties and no criminal penalties are provided for in France, in particular for failure to disclose information for assessment to VAT, incomplete or incorrect statements and proved dishonesty.

Implementation of Article 2 of the PFI Convention requires, in the first place, that all Member States provide for criminal penalties to punish fraudulent conduct. Ten Member States (Belgium, Denmark, Greece, Ireland, Luxembourg, the Netherlands, Portugal, Finland, Sweden and the UK) clearly impose criminal penalties for all

fraudulent conduct regardless of the amount. Four (Germany, Spain, Italy, Austria) provide for alternative administrative penalties for some possible forms of fraudulent conduct, though three (Germany, Spain and Italy) do so only for total amounts of less than €4 000. One of those Member States (Austria) has a sentencing system, including deprivation of liberty, imposed by administrative authorities and is accordingly considered as meeting the requirements of Article 2 of the PFI Convention[56], but tax fraud, including VAT fraud, is triable in the courts only above a threshold of €75 000. Two Member States (France, Luxembourg) do not appear to fully comply with Article 2, since they do not impose criminal penalties for all forms of fraudulent conduct provided for by Article 1 of the PFI Convention, providing only for administrative penalties for certain forms of VAT and customs fraud.

Thresholds for penalties under national legislation

It should be noted that only Greece, Germany, Spain, Italy, Austria and Finland follow an approach where the concept of serious fraud and/or minor fraud exists alongside 'normal' fraud in relation to the amount involved. Greece considers fraud below €5 878 as minor and above €73 475 as serious. Greek law provides for an even harsher punishment for fraud concerning amounts above €146 950. Spain set the threshold according to the PFI Convention at €50 000 and €4 000 respectively, whereas Austria considers fraud as serious when the amount involved exceeds €40 000 and as minor, only for non-tax frauds, if the amount involved is below €2 000. For customs fraud, if the damage caused in the area of competence of a levying entity exceeds a threshold of €37 500, the judicial authorities are competent for pursuing the fiscal fraud and only then, the full charge of custodial sentence may be applied. For tax fraud, the Austrian legislation established the similar threshold of €75 000. In Italy, the legislation refers to minor and serious fraud based on thresholds only in the sectoral legislation: fraud affecting the European Agricultural Guidance and Guarantee Fund and customs fraud is minor if below €3 999.96 and serious if exceeding €49 993.03. Finland and Germany consider only the concept of 'minor' fraud related to a threshold which in Finland is €4 000 and in Germany is confined to tax fraud for amounts below €125.

In the Spanish system, serious fraud for amounts totalling more than €50 000 is regulated separately as the principal offence and attracts a sentence of deprivation of liberty from one to four years and a financial penalty. In the Greek and Austrian system the exceeding of the threshold is an aggravating circumstance that attracts a prison sentence of up to 20 years in Greece and Austria, from six months to five years (for misapplication of expenditure) or from one to ten years (for the other forms of expenditure fraud) and a criminal penalty of deprivation of liberty up to two years for customs fraud exceeding €37 500 and tax fraud exceeding €75 000, whereas between €22 000 and 75 000, tax fraud may only be charged with maximum three months deprivation of liberty imposed by an administrative authority.

The Italian criminal law system recognises serious offences related to specific circumstances but does not explicitly establish an offence of serious fraud for an amount beyond €50 000 for the general offences to be found in its criminal code. Only for the custom crimes, the amended Article 295 of the consolidated customs act

[56] Explanatory report on the PFI Convention: OJ C 191, 23.6.1997, p. 1.

imposes deprivation of liberty up to tree years in addition to the financial penalty if the amounts involved exceed €49 993.03.

Denmark, Germany, Portugal, Finland and Sweden provide in their criminal law system for aggravating circumstances that increase the possible penalties. The amounts involved are among the aggravating circumstances in fraud cases. Courts' practice in these countries appears to consider the €50 000 threshold in Article 2(1) of the PFI Convention as an indication of an aggravating circumstance.

Greece and Austria impose criminal penalties also for 'minor' fraud, namely deprivation of liberty up to one year or financial fine for amounts below €5 878 in Greece and deprivation of liberty up to six months or financial penalty for amounts below €2 000 in Austria. Finnish and Swedish law recognise the concept of a petty fraud, punished less severely, related to specific circumstances but do not explicitly establish a threshold for petty fraud with an amount below €4 000.

The German, Spanish and Italian system provide for administrative penalties where fraudulent conduct implies only minor amounts, which in all three states are set below the threshold of Article 2(2) of the PFI Convention.

Extradition under national legislation

Member States must provide for penalties involving deprivation of liberty which can give rise to extradition to punish fraudulent conduct involving a minimum amount which may not be set at a sum exceeding €50 000. Two elements are of particular importance for evaluating correct implementation, namely whether deprivation of liberty is provided for and whether the potential prison sentence is heavy enough to allow extradition. On the first aspect, thirteen Member States (Denmark, Germany, Greece, Spain, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden and the UK) provide for a punishment of deprivation of liberty. One Member State (Italy) does so for fraud affecting revenues only if a minimum threshold, established below the requirements of Article 2 of the PFI Convention, is met. Another one (Austria) fulfils the requirement as regards customs fraud, where the criminal courts have jurisdiction as soon as the amount involved exceeds €37 500 but appears to fail to do so for VAT fraud, since tax fraud is punished by administrative authorities up to an amount of €75 000. One Member State (Belgium), however, appears to punish customs fraud only with a criminal financial fine and fails insofar to comply with the PFI Convention.

Verifying whether the punishment imposed gives rise to extradition requires a reference to the Council Framework Decision 2002/584/JHA of 13 June 2002[57] on the European arrest warrant and surrender procedures between Member States, with the provisions of which Member States have to comply as of 1 January 2004. That Framework Decision refers, among others, to fraud affecting the Communities' financial interests as one of the offences where, if punishable by the issuing Member State with a maximum period of three years, no verification of double criminality is needed to give rise to surrender. In this context, eight Member States (Denmark, Germany, Greece, Spain, Ireland, Italy, Luxembourg and the Netherlands) are falling

[57] OJ L 190, 18.7.2002, p. 1.

under these categories, two (Spain and Italy) only as regards fraud or some forms of fraud above the thresholds imposed by their national laws. In the other seven Member States (Belgium, France, Austria, Portugal, Finland, Sweden and the UK) the application of European arrest warrant is guaranteed, since all of them impose a maximum period of at least one year's imprisonment, and for some forms of fraud a penalty above the three-year requirement.

Evaluation

The above analysis of implementation shows also that as regards effectiveness, the overall picture seems satisfactory, particularly since all Member States impose in principle imprisonment as the standard punishment for fraudulent conduct. The overall picture would be even more positive if four Member States (Belgium, France, Luxembourg, Austria) introduced criminal prison punishment for some tax of fiscal fraud in their legislation. Given that at least for serious fraud, the requirement of giving rise to extradition is fulfilled, the penalties imposed seem to be effective.

Article 2 of the PFI Convention generated a degree of harmonisation imposing criminal penalties for normal fraud and imprisonment for serious fraud. The result is a certain conformity of penalties. In eight countries (Denmark, Germany, Greece, Spain, Ireland, Luxembourg, Finland and Sweden), fraudulent conduct in all forms is punished in the same way. In a further three Member States (Austria, Portugal and the Netherlands), the penalties provided for fraudulent conduct are essentially similar and distinguish either between the forms of fraud or the amounts involved and are thus related to the danger implied by the specific conduct. In the remaining four Member States (Belgium, France, Italy and the UK), there appears to be no evident reason why some forms of fraudulent conduct are more heavily punished than others although the danger created or the good and/or person offended remain the same.

Given that the wide differences between penalties for different forms of fraudulent conduct in the last mentioned group of Member States (Belgium, France, Italy and the UK) leave room for doubting whether the imposed penalties are really proportionate, there may not be an adequate deterrent for those forms of fraudulent conduct that attract the lower range of penalties, without there being a real distinction from similar forms of fraud attracting a high penalty. High court decisions in Italy, for instance, state that the Italian implementation of the PFI Convention, although complying with the principle of assimilation, leaves a lot to be desired as regards the dissuasive character of penalties.[58]

The probability of detecting criminal conduct, the type of prosecution (mandatory or discretionary prosecution) and court sentencing practice in each Member State have a further impact on the perception of penalties, especially as to whether they are really dissuasive and effective.

[58] Italian Corte di Cassazione, Judgment 26351, 10.7.2002.

5.1.5. Assimilation of Community officials and Members of the Institutions as regards fraud (Article 4(1), (2) and (3) of the 1st Protocol)[59]

Although the assimilation of Community officials and Members of the Institutions as regards fraud is provided for in Article 4 of the 1st Protocol, it appears useful to analyse that provision in the context of the Member States' measures to criminalise fraudulent conduct. Essentially, Article 4 of the 1st Protocol requires Member States to extend the application of their fraud offences to similar conduct attributable to Community officials or Members of the Institutions, so providing for an extension related not to the conduct but to the category of offenders.[60]

One Member State (Germany) introduced a new provision providing explicitly for an extension of the offences regarding fraud in its criminal code. The other Member States saw no need to amend their law in this regard.

Newly introduced provision	Amendment of an existing provision	No change in existing national legislation
Germany	-	Belgium, Denmark, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden, United Kingdom

The fact that Germany took legislative action reflects the situation that under the German criminal law system for revenue fraud. It is an aggravating circumstance if the offence is committed by or with the help of a national – or now also a Community – official. In the other fourteen Member States, offences regarding fraud are applicable to any person. Specific circumstances based on whether committed by or with the help, participation or instigation of a national official do not constitute an aggravating circumstance.

Assimilation appears therefore ensured with regard to this aspect of Article 4(1) of the 1st Protocol.

5.2. Corruption

The fight against corruption has gained even more political momentum at national, EU and international level than the fight against fraud. In its Communication on a Comprehensive EU Policy against Corruption,[61] the Commission set out an overview of what had been achieved at EU level, but also indicated what needed to be improved to give fresh impetus to the fight against corruption. It listed not only the relevant EU instruments, including the 1st Protocol under examination and the EU Convention on the fight against corruption involving officials of the European Communities or officials of the EU Member States[62] still in the process of being ratified, but also the OECD Convention on combating bribery of foreign public

59 See also Annex Table 7.
60 Explanatory report on the 1st Protocol: OJ C 11, 15.1.1998, p. 9.
61 COM(2003) 317 final, 28.5.2003.
62 OJ C 195, 25.6.1997, p. 2.

officials in international business transactions[63] and the Council of Europe Criminal Law Convention on Corruption.[64] In the meantime, the United Nations Convention against Transnational Organized Crime[65] has entered into force and the UN Convention against Corruption[66] has been finalised. Both conventions require State parties to establish, among others, criminal offences of active and passive corruption.

The main purpose of the corruption offences defined by the 1st Protocol is to ensure that corruption in one Member State is also penalised if committed by Community officials or officials of another Member State. To this end, Article 1 contains a wide definition of Community and national officials. The OECD Convention on combating bribery of foreign public officials in international business transactions[67] generally extends the obligation to criminalise corruption to officials of foreign countries, the Council of Europe Criminal Law Convention on Corruption[68] extends it to all public international organisations.

The corruption offences set out in the 1st Protocol are confined to acts or omissions which damage or are likely to damage the European Communities' financial interests. The EU Convention on the fight against corruption involving officials of the European Communities or officials of the EU Member States requires criminalisation of the same corruptive conduct without this additional element.[69] The 1st Protocol and the EU corruption Convention alike penalise conduct that includes performance of or abstention from any act within the powers of the holder of the office or function in so far as they are carried out in breach of the official's duties.[70]

Only two of the Member States under scrutiny (Greece, Ireland), namely the ones that have enacted a single legislative instrument to implement the PFI instruments, distinguish between corruption offences that damage or are likely to damage the European Communities' financial interests and other offences. Most of the Member States (Denmark, Germany, Spain, France, Italy, Ireland, Luxembourg, the Netherlands, Austria, Portugal, Finland and Sweden) separate active and passive bribery. All fifteen Member States already provided for offences of bribery involving

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63 The Convention was signed on 21.11.1997 and entered into force on 15. 2.1999. The full text, details on ratification and implementing legislation and evaluation reports are available at http://www.oecd.org/department/0,2688,en_2649_34859_1_1_1_1_1,00.html.

64 The Convention was signed on 27.1.1999 and entered into force on 1. 7.2002. The full text, details on ratification and implementing legislation and evaluation reports are available at http://www.greco.coe.int.

65 The Convention was adopted by resolution A/RES/55/25 at the fifty-fifth session of the General Assembly of the United Nations on 15.10.2000 and entered into force on 29.9.2003. The full text, details on ratification and implementing legislation and evaluation reports are available at http://www.unodc.org/unodc/en/crime_cicp_convention.html#final.

66 The Convention approved was adopted by A/RES/58/4 at the fifty eighth session of the General Assembly of the United Nations on 31.10.2003 and has not yet entered into force. The full text, details on ratification and implementing legislation and evaluation reports are available at http://www.unodc.org/unodc/en/crime_convention_corruption.html#documentation.

67 See Article 1 of the OECD Convention.

68 See Articles 5 and 9 of the Council of Europe Criminal Law Convention.

69 Explanatory report on the EU Convention on the fight against corruption involving officials of the European Communities or officials of the EU Member States: OJ C 391, 15.12.1998, p. 2.

70 Explanatory report on the 1st Protocol: OJ C 11, 15.1.1998, p. 8; and Explanatory report on the EU Convention on the fight against corruption involving officials of the European Communities or officials of the EU Member States: OJ C 391, 15.12.1998, p. 5.

their own national officials in their legal systems. Three of them (Belgium, France, Finland) took legislative action to ratify and/or implement the 1st Protocol as well as the EU Convention on the fight against corruption, given their nearly equivalent content; two (Italy and Austria) did so also with regard to the OECD Convention and another three (Denmark, the Netherlands and Sweden) also covered the Council of Europe Convention. One Member State (Portugal) has amended its criminal law system following its ratification of the Council of Europe Convention.

5.2.1. Passive corruption (Article 2 of the 1st Protocol)[71]

The main difference between active and passive corruption is the person committing the offence. In passive corruption it is the official who is acting. The conduct to be punished according to Article 2 of the 1st Protocol consists of requesting, accepting and receiving an advantage of any kind, directly or through an intermediary.

Legislative action taken with regard to passive corruption as required by the 1st Protocol again indicates that only those two Member States (Greece and Ireland) that transposed the PFI instruments in a single legal text introduced a new specific offence shaped along the elements of Article 2 of the 1st Protocol.

To comply with the scope of the 1st Protocol, which seeks to penalise also bribery committed by Community officials and officials of other Member States, the majority, namely seven Member States either amended (Denmark) or extended (Germany, Italy, the Netherlands, Austria, Finland, Sweden) the scope of application of an existing offence of passive corruption in their national legal system. Six Member States (Belgium, Spain, France, Luxembourg, Portugal, UK) did not undertake legislative measures to implement the 1st Protocol, though most of them recently revised their criminal laws with regard to corruption offences, four of them (Belgium,[72] France,[73] Luxembourg[74] and Portugal[75]) with the specific aim of strengthening anti-corruption measures.

Newly introduced offence	Amendment of an existing offence	No change in existing national legislation
Greece, Ireland	Denmark, Germany, Italy, the Netherlands, Austria, Finland, Sweden	Belgium, Spain, France, Luxembourg, Portugal, United Kingdom

71 See also Annex Table 8.

72 Act of 10 February 1999 on the fight against corruption (Belgisch Staatsblad/Moniteur Belge, 23.3.1999).

73 Act No 2000-595 of 30 June 2000 amending the Criminal Code and the Code of Criminal Procedure concerning the fight against corruption (OJ of the French Republic, 1. 7.2000, 9944).

74 Act of 15 January 2001 on the approval of the OECD Convention on combating bribery of foreign public officials in international business transactions and concerning abuse of office, destruction of files and documents, illegal promotion of others' interests, corruption and other legal measures (OJ of the Grand Duchy of Luxembourg, A No 17, 7.2.2001).

75 Act 108/2001 amending the legal provisions related to the offences of traffic in influence and corruption (Diário de República, Series I-A No. 276, 28.11.2001).

Analysis

As has already been seen, only Greece and Ireland confine the newly introduced offence to the application to an act or omission damaging or likely to damage the European Communities' financial interests.

Denmark and France modified the existing offence of passive corruption so as to comprise Member State or Community officials. Under Danish law, the offence does not refer explicitly to Community officials but to officials or servants of a public international organisation.

Belgium, Italy, Luxembourg, the Netherlands, Austria, Portugal and Finland define an offence of passive bribery and extend its scope by one or more separate provisions of the criminal code to other Member States' or Community officials. The Portuguese provision refers to officials of the 'European Union'. Belgium, the Netherlands and Finland do not extend their bribery offences explicitly to Community officials but to officials or servants of public international organisations in general. In Finland, it is worth recapitulating the legislative history of the relevant provisions, which were first amended on the basis of the 1st Protocol only, then referring to Community officials and were ultimately amended to implement the Council of Europe Criminal Law Convention on Corruption with regard to staff of international organisations in general. In Austria, passive corruption may also fall under the concept of abuse of office provided for in Section 153 of the Criminal Code, in cases where the offender's official duties include administering someone else's funds, including Community funds, and the offender knowingly abuses his or her powers thereby causing financial damage.

Germany's Criminal Code first punishes passive bribery for performing an act carried out in breach of the official's duties, then a separate provision explicitly considers abstention from performing an act in breach of the official's duties as an equivalent conduct and finally, in a separate provision inserted in the implementing Act, which is not amending the Criminal Code, extends the scope of these offences to other Member States' or Community officials.

In Spain and Sweden, the criminal code defines passive corruption as an offence, but there is no explicit reference to the possibility that the offence would apply also to other Member States' or Community officials. In both countries, it is argued that application to Community or other Member States' officials was ensured through the wide definition of who is an official in the respective criminal codes.

For all three jurisdictions of the UK, passive corruption of public bodies is criminalised by a statutory offence recently amended by the Anti-terrorism, Crime and Security Act 2001. Section 108(3) of the Act provides that 'public body' "includes any body which exists in a country or territory outside the United Kingdom and is equivalent to" a public body in the UK. It is reasonable to assume that application to Member States' officials in the sense of the 1st Protocol was put beyond doubt by these amendments. Whether also Community institutions can be understood as being equivalent to a public body in the United Kingdom is not clarified. Additionally it should be mentioned that bribery is a common law crime in

England, Wales and Northern Ireland applicable to any public official, whereas in Scotland it appears to be limited to judicial officers.

Although Article 2 of the 1st Protocol provides only for an obligation to criminalise passive corruption with regard to a breach of the official's duties, it should be noted that Belgium, Denmark, Spain, France, Italy, Luxembourg, the Netherlands, Portugal, Finland and, as regards the statutory offence, the UK penalise also corruption that does not imply a breach of the official's duties. In Belgium, France and Luxembourg there is no difference in corruption whether related to a breach of the official's duties or not. In Denmark, Spain, Italy, the Netherlands, Portugal and Finland, on the other hand, bribery for licit action is usually less heavily punished but likewise applied to other Member States' or Community officials. Germany and Austria appear to criminalise bribery for licit deeds only if committed by their national officials, whereas Greece, Ireland and Sweden seem not to criminalise corruption if the relevant action of the official is still within the official's duties.

Evaluation

Bearing in mind that regarding substantive criminal provisions the highest standard of compliance always has to be provided for, seven Member States (Germany, Greece, France, Ireland, Italy, Luxembourg, Austria) can be considered to have criminalised at least the conduct to which Article 2 of the 1st Protocol applies and are fully compliant as regards the scope of their national provisions; five of them (Germany, France, Italy, Luxembourg, Austria) do not require that the offence is damaging or likely to damage the European Communities' financial interests.

Concerning those five Member States (Belgium, Denmark, the Netherlands, Portugal and Finland), that do not explicitly refer to Community officials but to 'EU officials' (Portugal) or officials of other international organisations (Belgium, Denmark, the Netherlands and Finland), despite lacking evidence to this end, it seems very reasonable to assume that the concept used in the national laws will likely be so interpreted by the courts as to match the definitions in Article 1 of the 1st Protocol. In particular, the historical development of the relevant Finnish legislation and the reference in the parliamentary materials of the concerned countries to the fact that amendments were made to comply with the 1st Protocol's requirements support this view.

Doubts subsist as to the remaining three Member States (Spain, Sweden and the UK), where it is largely up to the courts to consider whether Community officials are within the scope of the relevant bribery offences. In a field of law where legal certainty is of utmost importance, the lack of an explicit reference is very regrettable[76].

Taking this analysis into account, also the attainment of an equivalent level of criminal law protection as regards fraud affecting the European Communities' expenditures appears not to be ascertained.

[76] See Article II-109(1) draft Treaty establishing a Constitution for Europe

The legal system of twelve Member States (Belgium, Denmark, Germany, Greece, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal and Finland), however, can be considered as tightly enough drawn to avoid all kind of gaps and loopholes in the concept of passive corruption. But in six of them (Germany, Belgium, Denmark, the Netherlands, Portugal and Finland), problems cannot be excluded either through imprecise legislative techniques in defining the scope of application (Belgium, Denmark, the Netherlands, Portugal and Finland) or in providing for the extension to other Member States' and Community officials in a separate law without being there any visible link between the main offence set out in the criminal code and the extension in a separate enactment (Germany). In the other three Member States (Spain, Sweden and UK) there remains a considerable risk that the courts will deny that the offence of passive corruption can be committed by Community officials.

Germany and Austria have apparently failed to live up to the requirements of the assimilation principle, as regards bribery for licit deeds, since the conduct is only punished if committed by a German or an Austrian national official respectively.

5.2.2. Active corruption (Article 3 of the 1st Protocol)[77]

Active corruption is the corollary of the offence defined in Article 2 of the 1st Protocol, seen from the corruptor's side.[78]

As regards legislative action and the specific way of devising the offence, the foregoing considerations on passive corruption apply also to active corruption. Three Member States penalise active and passive bribery by the same offence (Belgium, Greece and the UK). Of those separating active from passive corruption, nine (Germany, Spain, Ireland, Italy, Luxembourg, Austria, Portugal, Finland, Sweden) use a common reference as regards the notion of official whereas the remaining three redefine the 'official' twice (Denmark, France, the Netherlands). The specific Austrian offence of abuse of power is of relevance for active corruption in so far as attempts, instigation and participation are penalised.

The evaluation of the Member States' implementing measures and their relation to a possible attainment of an equivalent level of criminal law protection, due to the parallelism of each Member States' measures in this regard, is identical to the one before on passive corruption.

5.2.3. Assimilation of Members of the Institutions as regards corruption (Article 4(2) and (3) of the 1st Protocol) [79]

The purpose of Article 4 of the 1st Protocol is that members of national (parliamentarian and governmental) bodies and members of the European Institutions should be treated in the same way as regards the offences set out in the PFI instruments. On the one hand, criminal conduct by these persons must be criminalised, but the specific situation of these persons exercising a constitutional or political function should not be disregarded.

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77 See also Annex Table 8.

78 Explanatory report on the 1st Protocol: OJ C 11, 15.1.1998, p. 8.

79 See also Annex Table 8.

Member States are required to ensure that for the purposes of punishable offences of fraud and corruption, members of the Commission are assimilated to government ministers, members of the European Parliament to members of national parliaments, members of the Court of Justice to members of the highest national courts and members of the European Court of Auditors to their national counterparts. By this assimilation, national provisions in so far as they cover such offences committed by members of national parliaments, government ministers, etc., have to be extended to include members of the corresponding institutions of the European Communities. Under Article 4(3) of the 1st Protocol, the assimilation as concerns may be limited, if criminal liability of government ministers is governed by special legislation (e.g. the constitution) applicable in a specific national institutional context without precluding criminal liability for offences committed against or by members of the Commission. Article 4 (4) of the 1st Protocol provides that where a special law of a Member State confers on a specific court jurisdiction to try government ministers, members of parliament, members of the highest courts or members of the court of auditors accused of an offence, that court could be also given jurisdiction in similar cases concerning members of the Commission, members of the European Parliament, members of the Court of Justice of the European Communities and members of the European Court of Auditors for committing an offence.

To live up to the obligations under Article 4 of the 1st Protocol, Member States either extended their national provisions on corruption and fraud – for the latter insofar as not generally applicable – to members of the European Institutions or took advantage of the facultative possibility to submit members of the European Institutions to the specific criminal proceedings or did both at the same time. Six Member States (Denmark, Greece, Ireland, Italy, Luxembourg, the Netherlands) provided for this assimilation by introducing these concepts into new provisions, four (Germany, Austria, Finland, Sweden) by amending existing ones. Five Member States (Belgium, Spain, France, Portugal and the UK) considered that there was no need for legislative action with regard to the assimilation principle in Article 4 of the 1st Protocol.

Newly introduced provision	Amendment of an existing provision	No change in existing national legislation
Denmark, Greece, Ireland, Italy, Luxembourg, the Netherlands	Germany, Austria, Finland, Sweden	Belgium, Spain, France, Portugal, UK

Analysis

Given that Article 4 of the 1st Protocol sets out the assimilation principle and provides for specific ways of implementing it, namely by providing for two derogations with regard to each Member State's specific public structure, the analysis of the Member States' provisions in this context also was subdivided along these two obligations.

Firstly, compliance with the assimilation principle as such is looked at.

Denmark, Greece, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Finland and Sweden took the view that fraud offences are generally applicable to everybody irrespective of their specific political or judicial function and as regards corruption that the members of the European Institutions are to be specifically listed.

Greece and France did so in the provisions on the offences themselves, Italy, Ireland, Luxembourg, Austria and Sweden in the definition of who falls under the category of Community official. Denmark, the Netherlands and Finland, however, do not explicitly refer to the members of European Institutions, but consider these persons as falling under the category of persons appointed or elected to a function in an international organisation.

Germany is the only country that enacted a specific law to extend criminal liability of members of the Commission for fraud and corruption alike. As regards corruption, members of the Court of Justice and of the Court of Auditors are made liable by the same law.

In Austria and Finland, also, there is no liability for national members of parliament for passive corruption and hence also none for members of the European Parliament. In Finland, the penalising of active corruption refers to national and European parliamentarians alike.

In Germany, corruption with regard to national and European parliamentarians is limited to the buying and selling of votes.

The situation in Portugal is very particular, since members of the Commission and the European Parliament are subject to a specific law on criminal liability of political functions,[80] which comprises fraudulent and corruptive conduct, whereas the members of the European Court of Justice and the European Court of Auditors are within the definitions of 'EU officials' given in Article 386(3) of the criminal code.

Belgium and Spain fail to provide explicitly for criminal liability of members of the Commission, the European Parliament, Court of Justice and Court of Auditors, instead, they seem to assume that courts' practice will consider the notion of an official as comprising also appointed or elected members, including to the European institutions. Spain, however, explicitly treats members of the European Parliament in the same way as members of Spanish parliaments.

Neither statutory instruments nor common law in the UK seem to provide for the assimilation required by Article 4 of the 1st Protocol.

As regards the derogations possible under Article 4(3) and (4) of the 1st Protocol, Denmark, Italy, Luxembourg, the Netherlands and Sweden provide that specific rules for the criminal prosecution of national members of government, parliament or high courts also apply to similar functions exercised by members of the Commission, the European Parliament and the Court of Justice of the European Communities.

Evaluation

Six Member States (Greece, France, Ireland, Italy, Luxembourg, Austria, Sweden and Finland) seem to ensure full compliance with Article 4 of the 1st Protocol, in five Member States (Belgium, Denmark, Spain, the Netherlands and Portugal) full application seems possible according to their possible courts' practice to be

[80] Act No 34/87 on criminal liability in political functions (Diário de República, Series I-A Nº. 161, 16.7.1987).

established. However, again assuming a very restrictive interpretation in a criminal law field, it would be preferable if in those countries a more explicit way to ensure assimilation of members of European Institutions could be found. It is not clear why one Member State (Germany) does not explicitly extend criminal liability for fraudulent conduct to members of the Court of Justice of the European Communities and of the European Court of Auditors. Finally, one Member State (UK) appears, at this stage, not to have applied the assimilation principle.

The legal situation must be sufficiently precise and clear to enable members of the European Institutions to understand the constitutive elements of a fraudulent or corruptive conduct. An equivalent level of incriminating offences committed by members of the European Institutions can therefore not be assumed, where the legal situation is not yet completely clear as regards application of the offences to all (Belgium, Denmark, Spain, the Netherlands, Finland) or some (Portugal) of these persons or where it appears certain that the otherwise penalised conduct is not extended to all (UK) or some (Germany, Austria and Finland) of the categories of members of European Institutions.

5.2.4. Penalties (Article 5 of the 1st Protocol)[81]

Article 5 of the 1st Protocol requires the Member States to ensure that the offences of active and passive corruption defined in Articles 2 and 3 are always punishable by criminal penalties, in other words triable by criminal courts, though these penalties need not always necessarily involve deprivation of liberty.[82] The provision does require the Member States to provide for penalties involving deprivation of liberty, which can give rise to extradition, in the most serious cases. Unlike for fraud, the protocol fails to indicate any criteria or factual element for determining the seriousness of a corruption offence. It is instead up to the Member States to define what is 'serious corruption' in the light of their respective legal traditions.

Where coupled with legislative activity related to introducing new bribery offences (Greece, Ireland) or modifying existing bribery offences (Denmark, Germany, Italy, the Netherlands, Austria, Finland, Sweden) in their criminal law systems, Member States did revise the existing level of penalties foreseen for such offences in their legal system. All of them provide for criminal punishment. None of them made an effort to extend rules of participation and attempt with regard to corruption offences at the occasion of signing or ratifying the 1st Protocol. Spain and Italy, however, specifically provide for an offence of attempted corruption. The overview on legislative action is therefore the same as for ensuring the implementation of the corruption offences.

Punishment for the standard offence as contemplated by Articles 2 and 3 of the 1st Protocol varies in Member States depending on whether the penalties for active and passive corruption are the same or not.

Belgium, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Finland, Sweden and the UK punish active and passive corruption in the same way.

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81 See also Annex Table 8.

82 Explanatory report on the 1st Protocol: OJ C 11, 15.1.1998, p. 10.

The highest maximum punishment is provided for in France and Luxembourg, imposing imprisonment for corruption of up to ten years, followed by the UK, where for the statutory offences imprisonment of up to seven years is possible. Next are Ireland and Italy providing a maximum punishment of five years of deprivation of liberty and the Netherlands and Spain up to four years. Finally, Belgium, Finland and Sweden provide for punishment of up to two years. The Greek system provides for a minimum punishment of one year of imprisonment. In Belgium, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Finland and Sweden the imprisonment may also be combined with a financial penalty.

In Denmark, Germany, Austria and Portugal, passive and active corruption are penalised differently, in all of them active corruption less severely. In Portugal the imprisonment penalty for passive corruption ranges from minimum one year to maximum eight years and for active corruption from six months to five years. Danish law punishes passive corruption with imprisonment up to six years and active corruption up to three years. Under German law, the maximum penalty for active and passive corruption is the same, namely, five years, yet, the minimum for passive corruption fixed at six months imprisonment is higher than the minimum for active corruption of three months. The Austrian system penalises passive corruption with imprisonment of up to three years or, where the advantage exceeds €2 000, up to five years, whereas active corruption is always punished with a maximum imprisonment of two years.

Only Belgium, Italy, Luxembourg, the Netherlands, Austria, Portugal and Finland provide for the notion of 'serious' corruption. Belgium, Germany, Finland and Sweden list specific aggravating circumstances, one of which is collaboration between corruptor and corrupted in Belgium, Finland and Sweden or advantages of high value or their repetitive acceptance in Germany. In Belgium, Italy, Luxembourg, the Netherlands and Portugal, a higher punishment is provided for corruption as regards officials performing a specific function, notably Belgium, Italy, Luxembourg, the Netherlands provide for harsher penalties for active or passive corruption of judicial functions, whereas Portugal incriminates more heavily corruption of persons holding certain political positions, amongst which explicitly being member of the Commission or of the European Parliament. As already stated, in Austria, a higher punishment is provided for only in cases of passive corruption involving advantages exceeding a threshold of €2 000. Where the corruption offence falls within the specific form of abuse of power, Austrian law also links the level of punishment to whether the advantage exceeds €2 000.

In compliance with Article 5 of the 1st Protocol, all fifteen Member States under scrutiny clearly impose criminal penalties for the corruption offences punished in their legal system. There is no need to verify whether at least in cases of 'serious' corruption under the applicable national law a punishment of deprivation of liberty is provided for and whether this imprisonment punishment is high enough to allow for extradition. Firstly, all fifteen impose in all cases a penalty including deprivation of liberty and secondly, corruption is one of the offences listed in Article 2(2) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant.[83] The possibility of issuing a European arrest warrant shall be ensured since

[83] OJ L 190, 18.7.2002, p. 1.

all the Member States under scrutiny provide for a penalty for corruption exceeding a maximum period of one year. For those twelve of them (Denmark, Greece, Spain, Germany, France, Ireland, Italy, Luxembourg, the Netherlands, Austria for passive corruption only, Portugal and the UK) which provide for punishment of a maximum period of more than three years, the verification of double criminality is abolished.

The 1st Protocol appears to have no impact on further enhancing harmonisation of penalties with regard to corruption offences. The more favourable starting conditions – namely that corruption was perceived by the existing legal traditions as conduct that needed to be punished – led to an overall picture that seems satisfactory with regard to effectiveness and dissuasiveness, particularly since all Member States impose in principle imprisonment as the standard punishment for active and passive corruption and fulfil the requirement of providing for punishment that gives rise to extradition.

Disregarding the differences between Member States and looking at the proportionality of the penalties imposed by them individually, punishment for active or passive corruption is either the same (Belgium, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Finland, Sweden and the UK) or at least not disproportionately higher for passive corruption in comparison to active corruption (Denmark, Germany, Austria and Portugal). Those Member States (Belgium, Italy, Luxembourg, the Netherlands, Austria, Portugal and Finland) accentuating punishment with regard to either the forms of committing the crime or to the function of the official involved or even to both appear to have evaluated the specific danger implied by the more severely penalised conduct.

5.3. Money Laundering (Article 2 of the 2nd Protocol)[84]

In its proposal for an additional protocol to the PFI Convention,[85] the Commission proposed to regard laundering of profits made from fraud against the financial interests of the European Communities as a form of criminal conduct as defined by Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.[86] As a result, Article 2 of the 2nd Protocol requires Member States to ensure that the criminal offence of money laundering in their national legislation also includes the offences of fraud, at least in serious cases, and of active and passive corruption as predicate offences.[87] In the meantime, the same obligation was introduced by Directive 2001/97/EC[88] that amended Directive 91/308/EEC to explicitly require Member States to criminalise money laundering also for the predicate offences of fraud, at least serious, as defined in Articles 1(1) and 2 of the PFI Convention, and corruption. Given that Member States were to transpose this Directive by 15 June 2003, as regards money

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84 See also Annex Table 9 and note that, as the 2nd Protocol providing for this offence has not yet entered into force, the section is here only for completeness' sake.

85 Article 6(1) of COM (1995) 693 final, 20.12.1995: OJ C 83, 20.3.1996, p. 10.

86 OJ L 166, 28.6.1991, p. 77.

87 Explanatory report on the 2nd Protocol: OJ C 91, 31.3.1998, p. 10.

88 OJ L 344, 28.12.2001, p. 76. The Commission has since proposed a new Directive on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing, COM (2004) 448, 30.6.2004, which in Art. 3 (7) point (d) and (e) continues to require that at least serious fraud against the EC's financial interests and corruption must constitute predicate offences.

laundering, all Member States, including the ones which have not yet ratified the 2nd Protocol (Italy, Luxembourg and Austria) and the new ones alike, have to provide for serious fraud and corruption as predicate offences already under the Directive.

The general European policy of inviting Member States to provide for a broad list of predicate offences is also underpinned by Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime[89] and Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime,[90] on which the Commission recently issued a report.[91] The Framework Decision essentially requires Member States not to make or uphold reservations to Articles 2 and 6 of the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[92]

In accordance with Directive 91/308/EEC, all Member States had already provided for an offence of money laundering. That is why even the two Member States (Greece, Ireland) that implemented the PFI instruments through and in one piece of 'codified' legislation decided to amend their existing legislation on money laundering. Legislative action was taken by three Member States to comply with the requirements of Article 2 of the 2nd Protocol, one of which (Denmark[93]) extended the list of predicate offences to fraud and corruption and two of which (Greece, Ireland) modified the existing money laundering offence.

One Member State (Germany) modified the scope of application of the existing money laundering offence to ensure application to corruption of other Member States' and Community officials. Eight Member States (Belgium, Spain, France, the Netherlands, Portugal, Finland, Sweden and the UK) saw no need to modify their national offences of money laundering in light of the 2nd Protocol, and neither did those three Member States (Italy, Luxembourg and Austria) that have not yet ratified the 2nd Protocol. Five of these Member States (Spain,[94] the Netherlands,[95] Portugal,[96]

89 OJ L 333, 9.12.1998, p. 1.

90 OJ L 182, 5.7.2001, p. 1.

91 COM (2004) 230 final, 5.4.2004.

92 The Convention was signed on 8.11.1990 and entered into force on 1.9.1993. The full text, details on ratification and implementing legislation and evaluation reports are available at http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm at item 141.

93 In view of complying with Article 1 of Framework Decision 2001/500/JHA of 26 June 2001, Denmark revised its criminal law as regards money laundering by Act No 465 of 7 June 2001.

94 To comply with Article 1 of Framework Decision 2001/500/JHA of 26 June 2001, Spain enacted Institutional Act No 15/2003 amending the criminal code (BOE 26.11.2003, 283-2003), section 1 point 108 of which amends section 301 of the Criminal Code by removing the requirement of "seriousness" for predicate offences once it comes into force on 1.10.2004.

95 To implement Directive 2001/97/EC, the Netherlands introduced a specific offence of money laundering by Act of 6 December 2001 (Stb 2001 606).

96 Act No 10/2002 amending the statutory provisions to prevent and punish laundering of the proceeds from crime and amending for the fifth time Legislative Decree No 325/95 (Diário de República, Series I-A N° 35, 11.2.2002), which extends the list of predicate offences contained in Article 2 of Legislative Decree No 325/95 to tax fraud.

Finland[97] and the UK[98]), however, recently revised their national money laundering offences as regards the list of predicate offences.

Newly introduced offence	Amendment of an existing offence	No change in existing national legislation
Denmark	Greece, Germany, Ireland	Belgium, Spain, France, the Netherlands, Portugal, Finland, Sweden and the UK Italy, Luxembourg and Austria have not yet ratified the 2nd Protocol, but are obliged to bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2001/97/EC by 15.6.2003.[99]

Analysis

The offence of money laundering as provided for by the national provisions of Belgium, Denmark, Spain, France, Ireland, Italy, the Netherlands, Finland, Sweden and all three jurisdictions of the UK considers as predicate offences all possible crimes under their respective national legislation. In these countries, fraud and corruption offences are hence likewise covered. In the French system there is also a specific provision on money laundering of the proceeds stemming from tax fraud. In Spain only serious fraud affecting the Community's financial interests exceeding an amount of €50 000 is a predicate offence, whereas fraud below that amount is punished as *falta* and hence not included in the definition of the offence of money laundering. Spain accordingly made a reservation in accordance with Article 18 of the 2nd Protocol.[100] Although the Netherlands considers as predicate offences for money laundering only *misdrijven* under national criminal law, all of the required predicate offences in the Dutch criminal law related to fraud and corruption fulfil this criterion. Under the Swedish system, the reference to all possible offences as predicate offences seems to comprise tax fraud, criminalised outside the criminal code in the tax criminal code, or a crime committed according to the law on criminal charges for smuggling as a predicate offence.

In Germany, Greece, Luxembourg, Austria and Portugal, the offence of money laundering is linked to a defined list of predicate offences. The Greek and Portuguese modification of their respective specific laws on money laundering refer to fraud and

97 Act No 61/2003 amending the criminal code.

98 Section 340 of the Proceeds of Crime Act 2002, applicable to all three jurisdictions, provides that the offences under sections 327, 328 and 329 are to be interpreted in such a way that money laundering comprises the proceeds of any criminal conduct which would constitute an offence in the United Kingdom if it occurred there.

99 So far, Italy and Luxembourg, together with Greece, France, Portugal and Sweden, however, have failed to notify their measures to implement Directive 2001/97/EC. On 9.2.2004, the Commission decided to send formal requests to these Member States to implement the Directive (Press statement IP/04/180, 9.2.2004).

100 The reservation reads: "*In accordance with the provisions of Article 18, Spain reserves 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.*"

corruption offences introduced or already existing. In the Greek system, minor fraud, involving less than €5 878, as well as VAT fraud seem not to constitute a predicate offence. Under German and Austrian law, predicate offences are either offences punishable with a minimum imprisonment or specifically listed in the money laundering offence. German law defines as predicate offences those punishable by imprisonment for a minimum of more than one year or those specifically mentioned, amongst which fraudulent obtaining of subsidies, tax fraud committed on a repetitive basis or by a gang and active and passive corruption. Lacking a reference to tax fraud not committed on a repetitive basis or by a gang, even if the amounts involved exceed €50 000, or fraud committed by Community officials do not qualify as predicate offences for money laundering under German law. In the Austrian system,[101] predicate offences are either offences punishable with a maximum imprisonment of more than three years or those specifically mentioned, amongst which tax fraud, if the offence is triable in the courts, and corruption. Due to this list, tax fraud – as the offence covering the Communities' revenues – constitutes a predicate offence where it is triable in the criminal courts, which is the case for customs fraud exceeding €37 500, but for tax fraud, and therefore VAT fraud, only if committed with an intent to obtain professional gain from the fraudulent activity as well as exceeding a threshold of €500 000. Other forms of VAT fraud, although to be considered as serious fraud according to Article 2(1) of the PFI Convention, are thus no predicate offence for money laundering in Austria. As regards expenditure fraud, the general notion of predicate offences as offences punishable with a maximum imprisonment of more than three years comprises fraud committed through the use or presentation of false, incorrect or incomplete statements or documents or failure to disclose information in violation of a specific obligation due to the maximum penalty that is imposed for these offences, namely three years. Only if fraudulent misapplication of funds exceeds €40 000 will it attract a sentence of up to five years and the offence qualifies as predicate offence. The list of predicate offences of money laundering in the Luxembourg criminal code includes corruption but not fraud. Fraud could constitute a predicate offence, only in so far as committed by a criminal organisation, though in the context of implementing Directive 2001/97/EC, Luxembourg indicated that it was working on a legislative proposal to amend the list of predicate offences by extending it explicitly to fraud[102].

Evaluation

Two preliminary remarks related to evaluating compliance and impact with regard to Article 2 of the 2nd Protocol are necessary. Firstly, those three Member States (Italy, Luxembourg and Austria), which have not ratified the 2nd Protocol are equally assessed. This may be justified at least with regard to their compliance with Directive 2001/97/EC.

Ten Member States (Belgium, Denmark, Spain, France, Ireland, Italy, the Netherlands, Finland, Portugal and the UK) seem to comply with the obligations

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101 Note that the offence of money laundering in Austria had to be changed following the Commission's decision to refer to the Court of Justice an infringement proceeding concerning Directive 91/308/EEC. The related case was subsequently removed from the register (Order of 29.9.2000, Case C-290/98 *Commission v Austria* [2000] ECR I-7835).

102 Article 10 of Draft law no. 5165, amongst others, foresees to modify the list of predicate offences in Art. 506-1 Luxembourg criminal code.

under Article 2 of the 2nd Protocol, one of them (Spain) considering only 'serious' fraud in the sense of Article 2(1) of the PFI Protocol as a predicate offence. For one Member State (Sweden), if it turns out to be certain that tax and customs fraud are predicate offences, compliance is achieved. Four Member States (Germany, Greece, Luxembourg, Austria) seem to fall short of compliance as regards fraud as a predicate offence. One can categorise different degrees of non-compliance in this field, namely where fraud in general is a predicate offence only if committed by a criminal organisation (Luxembourg), where predicate offences do not include tax fraud unless conducted on a repetitive basis or by a gang (Germany[103]) or in an organised way exceeding a certain threshold (Austria) and where VAT fraud appears not to be referred to (Greece).

It is clear that due to Directive 2001/97/EC, the attainment of an adequate level of protection of the Communities' financial interests is rather advanced in the field of money laundering. Given Luxembourg's intention of shortly revising its criminal law with regard to money laundering, the only aspect that remains to be tackled is to ensure that tax fraud, including VAT fraud, is completely covered by the existing offences. However, as long as this aim is not achieved, gaps and loopholes remain that do not allow a conclusion that all possible offences affecting the financial interests of the Communities are properly punished. Unlike the offences related to fraud and corruption in the PFI instruments, the 2nd Protocol only requires criminalisation of the conduct, but it does not contain a specific provision on the penalties to be imposed. It is Article 2 of Framework Decision 2001/500/JHA which aims at ensuring a minimum harmonisation of penalties for money laundering offences. Whether a satisfactory level of effective, proportionate and dissuasive penalties has been achieved can be seen in the related Commission report.[104]

6. PROVISIONS RELATED TO MORE GENERAL CONCEPTS OF SUBSTANTIVE CRIMINAL LAW

6.1. Criminal liability of heads of businesses (Article 3 of the PFI Convention, Article 7(1) of the 1st Protocol and Article 12(1) of the 2nd Protocol)[105]

The concept of criminal liability of heads of businesses introduced by Article 3 of the PFI Convention for the fraud offences regulated therein and then extended to the offences of corruption and money laundering under the 1st and 2nd Protocols is one of the innovative aspects of the PFI instruments. It was introduced to tackle the obvious need for harmonisation to overcome the very different national circumstances for decision-makers' criminal liability[106] and is already contained in the Commission's

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103 The case law of the German Bundesgerichtshof (5 StR 85/04, 22.7.2004) is insofar of interest: The concepts used in the related predicate offence of Section 370a of the German fiscal code are not specific enough to satisfy constitutional criminal law guarantees, which makes the court reluctant to apply this concept.

104 COM (2004) 230 final, 5.4.2004; The Commission concluded that a majority of Member States seem to comply with the Framework Decision.

105 See also Annex Table 9.

106 Delmas-Marty, "Incompatibilities between legal systems and harmonisation measures: Final report of the working party on a comparative study on the protection of the financial interests of the Community" in Commission of the European Communities, "The legal protection of the financial interests of the

proposal for the PFI Convention.[107] The present Article 3 of the PFI Convention establishes the principle that heads of businesses exercising legal or effective power within a business are not automatically exempt from all criminal liability where an offence incriminated under the PFI instruments has been committed by a person under their authority acting on behalf of the business. The provision requires each Member State to take the measures it deems necessary to allow heads of businesses or other persons having power to take decisions or exercise control within a business to be held criminally liable where the principles defined by its national law so permit. According to the explanatory report, Member States have retained considerable freedom to establish the basis for criminal liability of decision-makers and heads of business, notably on the basis of their personal actions as authors of, associates in, instigators of or participants in the offence up to introducing specific offences.[108] The 1st and 2nd Protocols require an extension of the concept of criminal liability of heads of businesses for the offences introduced by these instruments, namely corruption and money laundering.

Despite the obvious concern to make a step towards harmonisation of the concept of criminal liability of heads of businesses, only one Member State (Greece) introduced that concept when implementing the PFI instruments. The other fourteen Member States (Belgium, Denmark, Germany, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden and the UK) saw no need for legislative action here. One Member State (Austria) considered the notion in one of its newly introduced offences, namely fraud by misapplication of funds.

Newly introduced provision	Amendment of an existing provision	No change in existing national legislation
Greece	Austria	Belgium, Denmark, Germany, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Finland, Sweden, United Kingdom

Analysis

As a preliminary, it should be noted that none of the Member States under scrutiny provides for a distinct offence or introduces strict liability, both referred to as possible solutions in the explanatory report.[109]

The Greek law implementing the PFI instruments contains a specific section providing that, for the offences laid down in Act No 2803/2000, heads of businesses or other persons having power to take decisions or exercise control within a business are to be held criminally liable. The section takes over the wording of Article 3 of the PFI Convention, though the exact scope of the provision in relation to the general provision of Greek criminal law is not clear.

Community: Progress and prospects since the Brussels seminar of 1989", Brussels, 25 and 26 November 1993, analysis on p. 69 and recommendation on p. 91 R. 9.

107 Article 3 (2) of COM (1994) 214 final, 1.6.1994: OJ C 216, 6. 8.1994, p. 14.

108 Explanatory report on the PFI Convention: OJ C 191, 23.6.1997, p. 1.

109 Explanatory report on the PFI Convention, OJ C 191, 23.6.1997, p. 1.

Spain, the Netherlands, Portugal, Finland and the UK seem to recognise criminal liability of heads of businesses as a general concept of liability in their legal systems. Article 51(2) of the Dutch criminal code provides for penalties to be imposed on natural persons "who have ordered the commission of the criminal offence, and against those in control of such unlawful behaviour". In Spanish and Finnish law, there appears to be the possibility of attaching criminal liability to the legal or de facto representatives of companies. Private individuals acting for or on behalf of a company will be criminally liable for a criminal offence, even though they do not meet the requirements or conditions legally established in order to be considered as the 'offender', provided the company meets those requirements. These provisions cover heads of businesses or other persons having power to take decisions, and seem to address the failure of exercising control within a business, due to the specific reference to the fact that such a person may be held liable even if not fulfilling all elements provided for by the offence as such. The Portuguese system applies a concept of liability for action taken on behalf of others, which is provided for partially in specific legislation, in particular the tax offences code, but also generally in Article 12 of the Portuguese criminal code for all criminal offences. Essentially, the provision penalises the actual or de facto representative of companies or factual organisations for offences committed in the interest of said companies or organisations. As regards the liability of persons not having exercised control, the Portuguese system refers to the general criminal liability for omission, requiring a guarantor status. In all three jurisdictions of the UK, Schedule 1 of the Interpretation Act 1978, applicable to England & Wales and Scotland, and Section 37 of the Interpretation (Northern Ireland) Act 1954 appear to allow a principle of criminal liability of heads of business where the offence can be attributed to a specific person, also in case of lack of control or supervision.

Belgium, Denmark, Germany, France, Ireland, Italy, Luxembourg, Austria and Sweden consider it sufficient that heads of business may be criminally pursued according to their national rules on authors of, associates in, instigators of or participants in the offences. On basis of these general rules, the French courts acknowledge the principle of criminal liability of heads of businesses for any act or omission in breach with legislative or statutory rules, including tax fraud.[110] Austria, when introducing a new provision criminalising fraud by misapplication of funds, also provided for a specific clause on criminal liability of heads of businesses in this context, since the offence is applicable only to subjects that asked for the underlying grants and, in case of legal persons, the punishable conduct needs to be attributable to a natural person. For all other offences, Austria also relies on its general rules of participation. As regards Belgium, Denmark, Germany, Italy, Luxembourg, Austria and Sweden, the actual criminal liability of heads of businesses may hence vary according to the specific case, without there being a clear line of cases as in France. As regards the liability of persons not having exercised control, all of these countries appear to refer to the general criminal liability for omission, requiring a guarantor status in all these countries.

Ireland, although having implemented the PFI instruments through one specific legal instrument, omitted the provision on criminal liability of heads of businesses. It

[110] French Cour de cassation, Chambre criminelle, 19.8.1997, Rev. soc. 1997, p. 863 stating explicitly that the presumption of liability of heads of businesses does not contradict the presumption of innocence.

remains therefore that Irish law does not recognise the concept of criminal liability of heads of businesses, unless one could prove a head of business to possess 'guilty knowledge' and hence establish that he is liable through some way of participation.

Evaluation

Assessing the correct implementation of Article 3 of the PFI Convention is difficult due to the discretion given to Member States with regard to this concept touching essentially on a general aspect of criminal law systems and a certain reluctance to introduce an unknown concept in national criminal laws. Assuming a very restrictive interpretation in a criminal law field, only one criminal code, the Dutch code, seems to be completely in line with the requirements of Article 3 of the PFI Convention. It would be preferable if all Member States provide for such an explicit way to ensure criminal liability of heads of businesses for offences affecting the financial interests of the European Communities. One Member State (Ireland), instead, seems to lack criminal liability of heads of businesses. For other five of the remaining Member States (Greece, Spain, Portugal, Finland, the UK), there is a tendency in principle to impose specific criminal liability on heads of businesses, but the scope of the individual provisions is not always obvious (Greece) or comprehensive of all requirements, notably as regards persons exercising control within a business (Portugal).

Not only scope and coverage are unclear in those Member States (Belgium, Denmark, Germany, France, Italy, Luxembourg, Austria and Sweden), where the general rules of participation are considered as sufficient, so that, despite possible reference to a regular line of cases (France), compliance can be doubted as long as no certainty exists on the full impact of the existing rules. But compliance also seems not ascertained in those Member States (Belgium, Denmark, Germany, Greece, Spain, France, Italy, Luxembourg, Austria, Portugal, Finland, Sweden and the UK) having relied on their general systems. It is indispensable to be able to assess whether the result to be achieved by the provision is actually ensured. This can be done, for instance by convincing examples from a long line of cases in the courts. Consequently, evaluating implementation amounts to assessing whether an equivalent practical level of criminal law protection has been attained. However, the assessment of equivalent protection of the financial interests is also limited since the need to provide for criminal liability of heads of businesses is linked to the existence of corresponding offences of fraud, active and passive corruption and money laundering. The Delmas-Marty report,[111] which was the original inspiration behind Article 3 of the PFI Convention, demonstrated a need for harmonisation since incompatibilities lie in the fact that the decision-maker is liable in very different circumstances depending on the national legal system. With this statement in mind, the fact that in thirteen Member States the rules on the criminal liability of heads of businesses remained untouched leads also to the observation that incompatibilities

[111] Delmas-Marty, "Incompatibilities between legal systems and harmonisation measures: Final report of the working party on a comparative study on the protection of the financial interests of the Community" in Commission of the European Communities, "The legal protection of the financial interests of the Community: Progress and prospects since the Brussels seminar of 1989", Brussels, 25 and 26 November 1993, analysis on p. 69 and recommendation on p. 91 R. 9.

prima facie continue to persist and are not reduced so as to avoid gaps or loopholes and implementation.

At this stage, there are no safe grounds for a positive conclusive evaluation as regards compliance with Article 3 of the PFI Convention in most of the Member States (Belgium, Denmark, Germany, Greece, Spain, France, Italy, Luxembourg, Austria, Portugal, Finland, Sweden, United Kingdom) and Member States need to be invited to complete their information.

6.2. Liability of Legal Persons (Article 3 and 4 of the 2nd Protocol)[112]

Following the results of the Commission study in this field[113] and the Commission proposal,[114] Article 3 of the 2nd Protocol has shaped the EU formula regarding the liability of legal persons for criminal activities. It can now be found in many other EU third pillar instruments[115] and in conventions of other international organisations to combat corruption.[116] Member States are required to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by any person holding certain leading positions or decision-making powers within the legal person. It is not required that such liability be exclusively criminal.

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112 See also Annex Table 10 and note that, as the 2nd Protocol providing for this concept has not yet entered into force, the section is here only for completeness' sake.

113 Commission staff working paper SEC(1993)1172, 16.7.1993, point 2.4.

114 Article 2 to 5 of COM (1995) 693 final, 20.12.1995: OJ C 83, 20.3.1996, p. 10.

115 See:
Article 8 and 9 of Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro. (OJ L 140, 14.6.2000, p. 1);
Article 8 and 9 of Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment. (OJ L 149, 2.6.2001, p.1);
Article 7 and 8 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ L 164, 22.6.2002, p. 3);
Article 4 and 5 of Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings (OJ L 203, 1.8.2002, p. 1);
Article 2 and 3 of Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the criminal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 1);
Article 6 and 7 of Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (OJ L 29, 5.2.2003, p. 55);
Article 5 and 6 of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003, p. 54);
Article 6 and 7 of Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (OJ L 13, 20.1.2004, p. 44).
See also with different wording Article 3 of Joint Action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (OJ L 351, 29.12.1998, p. 1).

116 See:
Article 2 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Negotiating Conference on 21.11.1997;
Article 18 of the Council of Europe Criminal Law Convention on Corruption, Strasbourg, 27.1.1999;
Article 10 of the United Nations Convention against Transnational Organized Crime adopted by the General Assembly by resolution A/RES/55/25 of 15.10.2000;
Article 26 of the United Nations Convention against Corruption adopted by the General Assembly by resolution A/RES/58/4 of 31.10.2003.

The provision extends liability to cases where the lack of supervision or control by a person in a position to exercise them has rendered the commission of the offence possible. This extension does not necessarily imply objective liability on the part of the legal person but may be interpreted as being limited to covering cases where the legal person as such may be blamed for culpable behaviour of persons acting on its behalf[117]. Article 3(3) of the 2nd Protocol stresses that the liability of a legal person should not exclude the liability of the natural person involved in the commission of the offences for which the legal person is liable.

Article 4 of the 2nd Protocol addresses the issue of penalties against legal persons held liable for the offences referred to in Article 3, the minimum obligation being to impose criminal or non-criminal fines. It recognises the different forms of liability dealt with in Article 3, distinguishing liability for an offence committed by a person in a leading position from liability for an offence committed by a subordinate employee. However, whatever the mechanism to establish criminal liability of legal persons, effective, proportionate and dissuasive penalties or measures must be provided for and, even if they need not be provided for in the criminal law or administrative criminal legislation of the Member States, they should have a certain punitive character in the sense of going beyond mere reparation of damages or restitution of wrongful enrichment.[118]

Only one Member State (Greece) introduced this concept in its legal system in the law implementing the PFI instruments. One (Denmark[119]) extended the already existing possibility of liability of legal persons to these offences and another one (Germany) introduced the liability for cases where the lack of supervision or control by a person in a position to exercise them has rendered the commission of the offence possible. The other nine (Belgium[120], Spain, France, Ireland, the Netherlands, Portugal, Finland, Sweden and the UK) did not amend their legislation in this field when ratifying the 2nd Protocol. Of the three Member States (Italy, Luxembourg and Austria) not having yet ratified the 2nd Protocol, one (Italy) has taken already measures to provide for liability of legal persons, whereas the other two (Luxembourg[121], Austria[122]) have finally tabled legislative proposals to introduce this concept into their criminal or administrative law system.

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117 Explanatory report on the 2nd Protocol, OJ C 91, 31.3.1998 p. 11.

118 Explanatory report on the 2nd Protocol, OJ C 91, 31.3.1998 p. 12.

119 Denmark subsequently enacted Act 378 of 6.6.2002, extending the criminal liability of legal persons to all offences against the Danish Criminal Code.

120 Before ratification, Belgium enacted the Act of 4 May 1999 on the liability of legal persons (Belgisch Staatsblad/Moniteur Belge, 22.6.1999).

121 In the explanatory report of the Draft law no. 5262, the Government of Luxembourg announced a draft law to introduce the principle of criminal liability of legal persons.

122 The Austrian federal ministry of Justice recently issued a draft law introducing the principle of criminal liability of legal persons (Doc. of the Austrian federal ministry of Justice JMZ 318.017/0001-II 2/2004).

Newly introduced provision	Amendment of an existing provision	No change in existing national legislation
Greece *Needed for implementation in Austria and Luxembourg*	Denmark, Germany *Needed for implementation in Italy*	Belgium, Spain, France, Ireland, the Netherlands, Portugal, Finland, Sweden, United Kingdom

6.2.1. Liability of legal persons

Amongst the Member States under scrutiny, there exist, roughly speaking, four systems of providing for liability of legal persons for fraud, active corruption and money laundering committed for their benefit:

- Criminal liability for all criminal offences;
- Criminal liability for specific offences;
- Liability of legal persons for offences provided for in the criminal legislation but punishing them with 'corporate fines', and
- Administrative law linking liability of legal persons to either all or specific criminal offences committed by natural persons. This system aims essentially to hold up a principle according to which only natural persons can commit criminal deeds.

Criminal liability for all criminal offences

Belgium, Denmark, Ireland, the Netherlands and the UK consider that legal persons can be held criminally liable for all criminal offences committed for their benefit. More specifically, the Belgian criminal code recognizes the criminal liability of legal persons for offences linked to the realization of their object or the defence of their interests or committed on their behalf. When the liability of a legal person derives exclusively from the conduct of an identified natural person, only the legal or natural person who committed the most serious offence may be convicted. When the natural person intentionally commits the offence, as is the case for the Belgian offences corresponding to fraud, active corruption and money laundering, then both may be convicted. In Denmark, criminal liability of legal persons covers offences committed with intent, including attempts. The Belgian and Danish provisions, however, are not clear as regards cases where lack of supervision or control has rendered the commission of the offence possible. In Ireland and all three jurisdictions of the UK, criminal liability of legal persons for all possible criminal offences is based on the doctrine of identification developed under common law, thereby extinguishing the distinction between legal and natural persons for the purpose of criminal liability.[123] The Interpretation Act 1937 in Ireland, the Interpretation Act 1978 in the UK (England & Wales and Scotland), and the Interpretation (Northern Ireland) Act 1954 all confirm this concept. However, Ireland and the UK's jurisdictions lack a clear

[123] For the UK jurisdiction of England & Wales, see *DPP v Kent & Sussex Contractors Ltd* [1944] 1 All E.R. 119 as the leading common law case.

approach as regards the persons whose acts are attributable to the legal person, in particular where the offence was committed by a subordinate person and the lack of supervision or control has rendered the commission of the offence possible. The same approach of assuming a complete identification is provided for by Article 51 of the Dutch criminal code. It punishes offences "committed by a legal person", thus also by any of the natural persons "who have ordered the commission of the criminal offence, and against those in control of such unlawful behaviour".

Criminal liability for specific offences

The French and Portuguese systems provide that legal persons can be held criminally liable for specifically defined offences committed on their account by their representatives or managing bodies, without excluding liability of natural persons. In France and Portugal, the criminal liability of legal persons is set out in specific provisions usually following the provisions on the criminalised conduct. The French approach systematically excludes liability for state-owned legal persons. France's criminal code provides for the criminal liability of legal persons for active corruption, money laundering and forgery of documents and some specific forms of fraud. It appears that tax and customs fraud and fraud through the misappropriation of funds are not included. The criminal liability of legal persons is also not subject to the existence of deliberate intent but to the fact that the offence was committed on its behalf and by its representatives or managing bodies. On these grounds, the lack of supervision and control can be regarded as a basis for liability.[124] In the Portuguese system, criminal liability of legal persons is provided for by the specific law addressing offences of subsidy fraud and the tax offences code, covering therefore tax fraud. Legal persons are liable for these offences committed in their name and collective interest by their managing bodies or representatives, or by a person under their authority if the commission of the offence was rendered possible by a wilful violation of their obligations of surveillance or control. No criminal liability for legal persons, however, seems to be provided for as regards the offences related to active and passive corruption and money laundering.

Liability of legal persons for offences provided for in the criminal legislation but punishing them with 'corporate fines'

Finnish and Swedish law appear somehow reluctant to attribute criminal liability to legal persons in the same way as to natural persons, providing instead a specific 'corporate criminal liability' having as a consequence 'corporate fines'. In Finland, 'corporate criminal liability' of legal persons is referred to as applicable in the relevant provisions related to fraud, active corruption and money laundering. These provisions allow a legal entity in whose operations an offence has been committed to be sentenced, on the request of the Public Prosecutor, to a 'corporate fine', even if the offender cannot be identified or otherwise is not punished. An offence is deemed to have been committed in the operation of a corporation if the offender has acted on behalf or for the benefit of the corporation and belongs to its management or is in a service or employment relationship with it or has acted on assignment by a

[124] French Cour de cassation, Chambre criminelle, 18.1.2000, Bulletin criminelle No 28 and the opinion of the French parliament expressed in the report of Mr Pierre Fauchon for the Legal Affairs Committee of the French Senate, No 177 (1999-2000), p. 31.

representative of the corporation. It is a prerequisite for liability of the legal person that a person who is part of a management body or exercises management or decision-making authority has been an accomplice to an offence or allowed the commission of the offence, or if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation. The Swedish criminal code also provides for a 'corporate fine' for any crime committed in the exercise of business activities, if the crime has entailed gross disregard for the special obligations associated with the business activities, or is otherwise of a serious kind and the entrepreneur has not done what could reasonably be required of him to prevent the crime. But it is doubtful whether 'corporate criminal liability', while punishing what has not been done although could have been reasonably required, is sufficient to cover systematically cases where lack of supervision or control has rendered the commission of the offence possible.

Administrative law linking liability of legal persons to either all or specific criminal offences committed by natural persons

Germany, Greece and Spain do not provide for criminal liability of legal persons since a legal person itself has no mind on its own and hence lacks criminal intent.[125] These countries accordingly have a system whereby administrative provisions concerning legal persons render them liable for criminal offences committed on their behalf. German law provides for the possibility of imposing administrative fines on legal persons for all intentional or negligent criminal offences committed by their management bodies or representatives for the benefit of or in breach of the duties incumbent on the legal person. When lack of supervisory measures makes the commission of an offence possible, the owner of an undertaking, whether a natural or a legal person, is deemed to have committed an administrative offence. In Greek law, administrative penalties are provided for enterprises that derive profits from criminal offences committed by persons acting either individually or as agents of the enterprise concerned. The Spanish criminal law provides for administrative and civil liability of legal persons that derive profits from criminal offences committed on their behalf, linking the possibility to impose penalties on legal persons for the crime of money laundering.[126] The wide scope of the Spanish money laundering offence would in principle comprise the mere receiving of proceeds from all possible crimes, but in Spain only serious fraud affecting the Community's financial interests exceeding an amount of €50 000 is a predicate offence, whereas fraud below that amount is punished as *falta* and hence not included in the offence of money laundering. Spanish law principally aims at attaching liability to those persons acting on behalf of the legal person.

Of those Member States that have not yet ratified the 2nd Protocol, only Italy already provides for the possibility of holding a legal person liable for criminal offences and is part of the last group. In Italy, there is the administrative liability of legal persons for offences committed for their benefit or interest by those who have a power of

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125 Point 3.1.6 of the Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union: COM (2004) 334 final, 30.4.2004.

126 The possibility of imposing sanctions on legal persons will be provided for by a reference to section 129 of the Spanish Criminal Code to be introduced in section 301 of the Spanish Criminal Code by Institutional Act No 15/2003 amending the criminal code (BOE 26.11.2003 No 283-2003), which will come into force on 1.10.2004.

representation, administration or management or exercise control within the legal person or by persons subject to their management or supervision, if the lack of supervision or control made the commission of the offence possible. The list of possible offences giving rise to liability of a legal person already includes the relevant fraud offences – except, oddly enough, for fraud affecting the European Agriculture Guidance and Guarantee Fund as criminalised by Article 2 of Act No 1986/898 – and corruption. Italy is well aware of the need to extend this list to money laundering when ratifying the 2nd Protocol. In Luxembourg and Austria, on the other hand, discussions are still going on as to how best to introduce a system of liability of legal persons for criminal offences. The Luxembourg government appears inclined towards a solution of administrative liability, whereas the one of Austria seems to work at a draft creating a specific 'corporate criminal liability'.

6.2.2. Penalties for legal persons

Whether criminal or non-criminal penalties are imposed by Member States naturally depends, in the first place, on the system chosen to provide for liability of legal persons for criminal offences.

Belgium, Denmark, France, Ireland, the Netherlands, Portugal and the UK apply in the first place criminal financial penalties imposed by the courts. Belgium and France foresee as possible additional criminal sanctions all or some of the other optional penalties indicated in Article 4 of the 2nd Protocol or additional penalties, such as exclusion from public procurement or publication of the conviction.

The 'corporate fine' in the Finnish and Swedish is a financial fine imposed by the judge of the criminal proceeding.

In Spain, apart from civil liability, the possible penalties among those contained in Article 4 of the 2nd Protocol are provided for in the Criminal Code, but are deemed to be administrative penalties, which can be imposed by the criminal court.

Germany and Greece provide for administrative financial fines, imposed by an administrative authority, and likewise under administrative law for all or some of the other optional penalties indicated in Article 4 of the 2nd Protocol. The Italian legislation provides for a similar system.

6.2.3. Overall evaluation

Liability for persons holding certain leading positions or decision-making powers within that legal person

The aim of Articles 3 and 4 of the 2nd Protocol was to do away with a different treatment of firms and individuals engaging in the same criminal conduct[127] in a field where it was considered that it was more important to extend liability of legal persons to all offences affecting the Communities' financial interests.[128] All the

127 5th and 6th recitals to the 2nd Protocol.

128 Delmas-Marty, "Incompatibilities between legal systems and harmonisation measures: Final report of the working party on a comparative study on the protection of the financial interests of the Community" in Commission of the European Communities, "The legal protection of the financial interests of the

Member States that have ratified the 2nd Protocol provide for the possibility of holding legal persons liable for criminal activities. Putting aside the need to provide for corresponding offences of fraud, active corruption and money laundering, the treatment of firms and individuals fulfilling the same criminal behaviour is achieved in at least ten Member States (Belgium, Denmark, Germany, Greece, France, Ireland, the Netherlands, Finland and Sweden, UK). Some Member States (France, Spain, Portugal) might appear to fail to provide for liability of legal persons for all offences contained in the PFI instrument, omitting for example active corruption and money laundering (Portugal) or some specific forms of fraudulent conduct such as tax and customs fraud (France) or fraud, if not serious (Spain). It is also doubtful that the argument of one Member State (Spain) to provide for stricter requirements for criminal liability of heads of businesses is sufficient to compensate for a lack of implementation as regards the liability of legal persons for criminal offences.

Liability where the lack of supervision or control by a person in a position to exercise them has rendered the commission of the offence possible

It appears that no Member State introduced an objective liability on the part of the legal person.

Compliance with the 2nd Protocol could be doubted in those five Member States (Belgium, Denmark, Ireland, Sweden, UK), where no definition was given as regards the persons capable of acting or omitting to act to render the legal person liable was not meet. The same Member States (Belgium, Denmark, Ireland, Sweden, UK) do not provide for liability where the lack of supervision or control has rendered the commission of the offence possible or where the offence was committed by a subordinate person. The uncertainties persisting in these Member States related to the mentioned circumstances may also be incompatible with the requirement of legal security, since the legal situation resulting from national implementing measures must be precise and clear to enable individuals, including legal persons, to know to what extent their possible conduct might constitute a criminal offence.

Sanctions

Of the twelve Member States that have ratified the 2nd Protocol, eleven provide for financial sanctions, two of which (Germany and Greece) impose them as administrative fines and four (Belgium, Germany, Greece, France) provide for all or some of the other optional penalties indicated in Article 4 of the 2nd Protocol or even additional penalties. One Member State (Spain) seems not to provide for financial fines but only for other penalties, a system that appears not to meet the requirements of Article 4 (1) of the 2nd Protocol.

Adding an evaluation of whether the penalties provided for by the legal systems are effective, proportionate and dissuasive, it should be noted that financial fines determined in advance are not on their own an adequate deterrent for legal persons, unless combined with other penalties that have a more direct impact on the working of an enterprise (Belgium, Germany, Greece, France) or are adaptable to the

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Community: Progress and prospects since the Brussels seminar of 1989", Brussels, 25 and 26 November 1993, p. 71.

capitalisation and performance of an enterprise (Ireland, the Netherlands, Finland, UK).

Of the three States that have not ratified the 2nd Protocol (Luxembourg, Italy and Austria), one (Italy) just needs to extend the catalogue of offences giving rise to criminal liability of legal persons, but two (Luxembourg and Austria) still do not provide for the concept as such.

6.3. Confiscation (Article 5 of the 2nd Protocol) - Annex Table 11[129]

To ensure effective cooperation in the fight against Community fraud and corruption, it was considered necessary for Member States' legislation to allow minimum measures to be taken in cases regarding the seizure and the confiscation or removal of instruments and proceeds of fraud, active and passive corruption and money laundering. Article 5 of the 2nd Protocol requires seizure, confiscation or removal measures to cover the instruments used to commit fraud, active or passive corruption or money laundering, and the proceeds of these offences as well as property whose value corresponds to such proceeds.[130] In the meantime, there has been some further EU legislation concerning confiscation orders, notably through the already mentioned Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime and the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of order freezing property or evidence.[131]Framework Decision 2001/500/JHA provides that Member States must enable the confiscation of instruments and proceeds or property the value of which corresponds to proceeds for offences punishable with more than one year imprisonment. Further progress in achieving effective cross-border cooperation is to be expected with regard to confiscation and facilitating mutual recognition and execution of confiscation orders within the EU.[132]

Notwithstanding these third pillar instruments, only one Member State (Ireland) amended its national legislation on confiscation. The remaining twelve Member States (Belgium, Denmark, Germany, Greece, Spain, France, the Netherlands, Portugal, Finland, Sweden and the UK) saw no need to amend their national legislation in regard to Article 5 of the 2nd Protocol, and neither did those three Member States (Italy, Luxembourg and Austria) that have not yet ratified the 2nd Protocol.

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129 Note that as the 2nd Protocol providing for this provision has not yet entered into force, the section is here only for completeness' sake.

130 Explanatory report on the 2nd Protocol: OJ C 91, 31.3.1998, p. 12.

131 OJ L 196, 2.8.2003, p. 45. The Council Framework Decision refers, amongst others, to fraud affecting the Communities' financial interests and corruption as one of the offences where, if punishable by the issuing Member State with a maximum period of three years, no verification of double criminality is needed to execute in one Member State a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings.

132 In this context the Initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on Confiscation of Crime-related Proceeds, Instrumentalities and Property (OJ C 184, 2.8.2002, p. 3) and Initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders (OJ C 184, 2.8.2002, p. 8).

Newly introduced provision	Amendment of an existing provision	No change in existing national legislation
Ireland	-	Belgium, Denmark, Greece, Germany, Spain, France, the Netherlands, Portugal, Finland, Sweden and the UK Italy, Luxembourg and Austria have not yet ratified the 2nd Protocol, but are obliged to provide for a similar way of confiscation n order to comply with Council Framework Decision 2001/500/JHA.

Analysis

The Commission's recent report[133] on Framework Decision 2001/500/JHA indicates that Belgium, Denmark, Germany, Spain, France, Portugal, Finland and the UK have never made or, in the case of the UK, have withdrawn reservations as regards Article 2 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, which essentially means that these Member States must provide legislation to enable the confiscation of instrumentalities and proceeds or property the value of which corresponds to such proceeds for all possible criminal offences. Since Article 2 of the Convention and Article 5 of the 2nd Protocol, apart from the latter being limited to the offences foreseen in the PFI instruments, essentially match in aim and scope, one should assume that these Member States provide for the seizure and the confiscation or removal of instruments and proceeds of fraud, active and passive corruption and money laundering and property whose value corresponds to such proceeds. In France, confiscation is related to specific offences, including all those required by the PFI instruments, but as regards some forms of customs fraud is limited to the object of fraud or to the instrument and the proceeds, and confiscation of the property of whatever kind belonging to the convicted person is possible only for money laundering. In Spain and all three jurisdictions of the UK, as in the case of money laundering, it seems that although the list of offences that may give rise to confiscation is unlimited, the measures imposed are, since in Spain the property whose value corresponds to criminal proceeds and in the UK's jurisdiction the instruments of the offence cannot be seized.

The Irish, Dutch and Swedish legislation also provide for confiscation of the value of the proceeds of any criminal offence. In Ireland, a confiscation order can be made by a court against the person sentenced for crimes, but aims at recovering a sum of money equal to the value of the pecuniary advantage derived from the offence. All the offences introduced when the PFI instruments were ratified are indictable crimes. Similar to the predicate offences for money laundering, the Netherlands allows confiscation only for *misdrijven* under its national criminal law, though all the required offences in the Dutch criminal law related to fraud and corruption fulfil this

133 COM (2004) 230 final, 5.4.2004.

criteria. In the Swedish system, despite the reference to all possible offences as giving rise to confiscation, it seems unclear whether tax fraud is included. It appears that in Greece offences that can give rise to confiscation comprise fraud and corruption offences introduced or already existing. In the Greek system, however, it is not clear whether money laundering, minor fraud, involving less than €5 878, and VAT fraud can give rise to a confiscation.

A short look at the three Member States that have not yet ratified the 2nd Protocol reveals that Austria provides for confiscation of the proceeds, instruments and property the value of which corresponds to proceeds for all crimes. In Italy, for some crimes, including money laundering, it does not seem possible to confiscate property whose value corresponds to proceeds, whereas confiscation as such is mandatory and not in the judge's discretion. In Luxembourg, the concept of confiscation exists but is not currently applicable to the proceeds of money laundering, the instruments and proceeds of fraud and, in general, property of value corresponding to any proceeds from crimes.

Evaluation

Seven Member States (Belgium, Denmark, Germany, Ireland, the Netherlands, Portugal, Finland) appear to comply with the requirements of Article 5 of the 2nd Protocol, whereas two do not provide for the seizure and confiscation or removal of instruments (UK) or property of corresponding value to proceeds (Spain) and three more seem to have essentially omitted tax fraud (Greece, Sweden) or are not complete as regards other forms of fraud (France).Given the importance of tax fraud and of removing the instruments and property of corresponding value of proceeds regarding economic crimes, the persisting lack of full compliance might undermine the effective cooperation in the fight against Community fraud and corruption related thereto.

7. ELEMENTS USUALLY RELATING TO CRIMINAL PROCEDURE

7.1. Jurisdiction

Before the PFI instruments were drawn up, it was perceived that serious differences between Member States regarding extraterritorial jurisdiction were liable to create possibilities of unpunished offences and an inadequate response to the cross-border nature of most illegal activities affecting the Communities' financial interests.[134] It became clear that harmonising the Member States' substantive criminal law and merely trusting in the generally applied principle of national territoriality would not guarantee could the possibility to prosecute and to judge offending conduct throughout the EU. The PFI instruments therefore had to lay down jurisdiction rules to enable Member States' courts to prosecute and judge offences against the

134 Delmas-Marty, "Incompatibilities between legal systems and harmonisation measures: Final report of the working party on a comparative study on the protection of the financial interests of the Community" in Commission of the European Communities, "The legal protection of the financial interests of the Community: Progress and prospects since the Brussels seminar of 1989", Brussels, 25 and 26 November 1993, p. 75.

Communities' financial interests, in particular where such offences have been only partly committed within the territory of a Member State.

The Commission's proposal for the PFI Convention[135] contained text to extend the territoriality principle to "all essential elements constituting a fraud". Should the "essential factual elements" have occurred in the territory of a third country, the proposal provided for conditions in which Member State should treat the fraud "as having been committed entirely within their own territory", hence an extensive concept of territoriality. With this legal fiction of territoriality, the issue of 'personal jurisdiction' was avoided in the Commission's proposal.

The final version of the PFI instruments, instead, contains provisions regarding territorial and personal jurisdiction. The particularity of offences regulated in the different PFI instruments led to two distinct clauses on jurisdiction as regards the principle of personality in jurisdiction. The PFI Convention and the 2nd Protocol require the Member States to establish jurisdiction where the offender is one of their nationals. The 1st Protocol introducing active and passive corruption additionally requires Member States to introduce the 'passive personality principle' for corruption offences, that is to establish jurisdiction where the offence is committed against an official or national of the Member State, if said national is an official, or member, of a Community institution. As regards the extension of the personality principle, the PFI instruments allow each Member State to declare that it will not apply or will apply only in specific cases or conditions the PFI instruments' jurisdiction rules related to the personality principle. The two different jurisdiction provisions have therefore to be looked at separately. On grounds of the PFI instruments, these declarations are to be taken into account in evaluating on whether a Member State has fully implemented its obligations under the PFI instruments. The substance of all the declarations made is also of relevance on whether the Member States ensure that offences are ,under procedural conditions, effectively penalized.

7.1.1. Jurisdiction over fraud and money laundering (Article 4 of the PFI Convention, by reference in Article 12 (2) of the 2nd Protocol)[136]

Article 4 of the PFI Convention lays down rules on jurisdiction to prosecute and judge offences of fraud and, by reference in the 2nd Protocol, money laundering affecting the Communities' financial interests. The provision clarifies the scope of the territoriality principle requiring Member States to establish jurisdiction where the offence, participation in the offence or the attempted offence has been committed in whole or in part within their territory, including situations in which the benefit of the offence has been obtained in the concerned territory and where a person within their territory has knowingly committed the offence of participating in or instigating the offence committed in the territory of another Member State or third country. Article 4 of the PFI Convention also undertakes to harmonise the application of the active personality principle by obliging Member States to provide for jurisdiction where the offender is a national of the relevant Member State, irrespective of where the offence was committed. In order to establish jurisdiction, Member States may require that the condition of double criminality be fulfilled. It should be noted that Article 4(2) of the

135 COM (1994) 214 final, 1.6.1994: OJ C 216, 6.8.1994, p. 14.

136 See also Annex Table 11.

PFI Convention permits Member States to declare that they will not apply the active personality principle.

It appears that the jurisdiction rules introduced by the PFI Convention apply, besides fraud, not only to the offence of money-laundering as required under the 2nd Protocol but also for rendering legal persons liable for criminal activities. The 'Delmas-Marty report'[137] refers to the problem of rendering the 'active personality principle' compatible with the jurisdiction over legal persons and comes to the conclusion that the 'nationality' of a legal person should be resolved by applying Court of Justice case-law. However, a first glance at the Member States' jurisdiction rules in this regard shows that only the territoriality principle is applied to legal persons, so that the need of establishing their nationality is essentially circumvented, and as such, they seem to be exempted from other principles extending jurisdiction of a Member State.

Only two Member States saw a need to introduce an extension of their jurisdiction in the national legislation (Greece, Ireland), whereas two other Member States (France, UK) took advantage of the possibility of submitting declarations under Article 4(2) of the PFI Convention without amending their legislation. The UK[138], however, did extend its territorial jurisdiction before ratifying the PFI Instruments. All other Member States (Belgium, Denmark, Germany, Spain, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden) considered their existing legislation as fulfilling the requirements of Article 4.

Newly introduced provision	Amendment of an existing provision	No change in existing national legislation
Greece, Ireland	-	Belgium, Denmark, Germany, Spain, France, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden and the UK

<u>The offence, participation in the offence or the attempted offence has been committed in whole or in part within a Member State's territory</u>

The principle of establishing jurisdiction based on territoriality was never considered to pose a difficulty.[139]

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137 Delmas-Marty, "Incompatibilities between legal systems and harmonisation measures: Final report of the working party on a comparative study on the protection of the financial interests of the Community" in Commission of the European Communities, "The legal protection of the financial interests of the Community: Progress and prospects since the Brussels seminar of 1989", Brussels, 25 and 26 November 1993, p. 73.

138 To comply with the second indent of Article 4(1), the UK Government brought into force Part I of the Criminal Justice Act 1993 through the Criminal Justice Act 1993 (Commencement No 10) Order 1999, Statutory Instrument 1999 No. 1189 (C. 32) before ratification.

139 Delmas-Marty, "Incompatibilities between legal systems and harmonisation measures: Final report of the working party on a comparative study on the protection of the financial interests of the Community" in Commission of the European Communities, "The legal protection of the financial interests of the Community: Progress and prospects since the Brussels seminar of 1989", Brussels, 25 and 26 November 1993, p. 72.

Greece explicitly enacted a jurisdiction provision with regard to the first indent of Article 4 of the PFI Convention.

Belgium, Denmark, Germany, Spain, Italy, Luxembourg, the Netherlands, Portugal, Finland and Sweden seem to recognise territorial jurisdiction for fraud and money laundering alike even if only one constitutive element, including those of participation or the obtaining of the benefit, was fulfilled on their territory.

In France and Austria, the situation seems to be the same, though not for tax offences committed in other EU Member States or abroad. For tax offences in Austria above a threshold of €37 500 for customs fraud and €75 000 for tax fraud, including VAT fraud, the courts have jurisdiction and, due to the extended territoriality of the offence as such, namely the whole EU customs territory, tax offences committed in other EU Member States or abroad are within the jurisdiction of the Austrian courts even if only the benefit was obtained in Austria. Should the offences fall within those thresholds, administrative authorities, namely those competent to levy the tax or customs, are competent to pursue the crime. The competence of Austrian administrative authorities to pursue tax or customs offences is hence confined to their local jurisdiction.

Jurisdiction over fraud and money laundering alike committed on Irish territory under the first indent of Article 4 of the PFI Convention is assumed on the basis of the common law as applied by Irish courts. In all three jurisdictions of the UK, the situation is the same as in Ireland as regards the common law offences. For money laundering, given that the related statute, the Proceeds of Crime Act 2002, is applicable throughout the UK and incriminates money laundering even where only one element was committed in the UK, territorial jurisdiction in the three jurisdictions of the UK is guaranteed. As regards the fraud-related statutory offences and conspiracy to defraud, jurisdiction in England & Wales and Northern Ireland comprises the first indent of Article 4 of the PFI Convention due to specific provisions in the Criminal Justice Act 1993 and the Criminal Justice (Northern Ireland) Order 1996. For tax offences committed outside the UK, the facts constituting the offence itself exclude punishment if the offence is not committed against UK authorities.

A person within a Member State's territory has knowingly committed the offence of participating in or instigating the offence committed in the territory of another Member State or third country

According to the explanatory report, the terms 'participation' and 'instigation' have to be interpreted in accordance with national law.[140] It must be noted that the systems regarding aiding, abetting or being an accomplice for offences vary strongly between the Member States,[141] which renders a comprehensive insight into jurisdiction over such acts difficult. Clearly, the limits already set out before for territorial jurisdiction also apply in relation to jurisdiction over persons having knowingly participated in or

140 Explanatory report on the PFI Convention: OJ C 191, 23.6.1997.

141 Point 3.1.1.3 of the Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union: COM (2004) 334 final, 30.4.2004.

instigated the offence committed in the territory of another Member State or third country.

Greece and Ireland explicitly enacted a jurisdiction clause with regard to the second indent of Article 4 of the PFI Convention.

Denmark, Italy, Austria have a unitary approach to participation in criminal conduct and, hence, territorial jurisdiction as set out above includes participation and instigation.

Belgium, Germany, Spain, France, Luxembourg, the Netherlands, Portugal, Finland and Sweden distinguish different ways of participating or instigating an offence. Germany, Spain, Luxembourg, the Netherlands, Portugal, Finland and Sweden extend their jurisdiction to participators or instigators. In line with the possible limits allowed for by the explanatory report,[142] French criminal law provides for jurisdiction over any accomplice to a crime or misdemeanour committed abroad provided it is punished by both French law and foreign law and sentenced definitely by a foreign court. In Belgium, it appears that jurisdiction is only granted as far as assisting and inducing falls under 'committing' an offence in the sense of Article 66 Belgian criminal code, yet not in as far as only 'participation' in the sense of Article 67 Belgian criminal code is concerned.

In England & Wales and Northern Ireland, the bringing into force of the Criminal Justice Act 1993 extended jurisdiction to persons within the UK who assist or induce the commission of any of the fraud related statutory offences and conspiracy to defraud outside these jurisdictions. As regards fraud-related offences in Scotland and money-laundering in all three jurisdictions of the UK, only section 71 of the Criminal Justice Act 1993 appears applicable, extending jurisdiction to persons within the UK who assist or induce the commission of a serious offence outside the UK against the law of another Member State in relation to Community provisions on duties and taxes, agricultural levies, or movement of goods. However, until now, UK courts seem to require evidence – obviously difficult to provide – that the law of a foreign Member State regards the offence as a serious offence.[143]

<u>The offender is a national of the concerned Member State, irrespective of where the offence was committed</u>

Again, Greece and Ireland explicitly enacted a jurisdiction clause with regard to the third indent of Article 4 of the PFI Convention and waived the 'double criminality' requirement.

In Belgium, Denmark, Germany, Spain, France, Italy, Luxembourg, the Netherlands, Austria, Finland and Sweden, the principle of active personality is generally recognised. As allowed for by Article 4(1) third indent, Belgium, Denmark, Luxembourg the Netherlands, Finland and Sweden require double criminality, Germany and France only in as far as some or all forms of tax fraud are concerned, Austria, for all relevant offences of fraud and money laundering except tax fraud.

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142 Explanatory report on the PFI Convention: OJ C 191, 23.6.1997.

143 Such proof failed in the so-called 'Southwark Crown Court case' (*Customs and Excise v Ghiselli*, 15.5.1996).

France and Italy provide a procedural barrier. Jurisdiction in Italy is based on a specific application from the Italian Ministry of Justice. France reserved prosecution by submitting a declaration in compliance with Article 4 (2) of the PFI Convention.[144]

The UK took advantage of Article 4(2) of the PFI Convention and declared that it would not apply the third indent of Article 4 of the PFI Convention.

Evaluation

Compliance with the jurisdiction rules in the PFI instruments is difficult to evaluate since they essentially refer to general concepts of criminal law. Transposal by specific legislation may be superfluous if the general legal framework provides for adequate implementation.

In point of fact, all the Member States under scrutiny provide for some forms of jurisdiction under all three indents required by Article 4(1) of the PFI Convention, apart from one (UK) that explicitly used Article 4(2) of the PFI Convention to declare that it would not apply the rules on the active personality principle. Three Member States (France, Austria, UK) seem not to have provided for full territorial jurisdiction for tax fraud or participation or attempts committed only in part within their respective territory but detrimental to another Member State's tax authority. Two Member States (Belgium, UK) appear not to ensure jurisdiction for some categories of participation in fraud or money laundering committed abroad (Belgium) or require procedural difficulties that render it practically impossible to pursue offences in this regard (jurisdiction of Scotland for participation and instigation in fraud and all three jurisdictions of the UK for money laundering).

The endeavour to fully harmonise the application of the active personality principle has remained unaccomplished, allowing Member States to declare that they would not apply the provision at all (UK) and to introduce the concept of double criminality, of which fully or partially nine Member States took advantage (Belgium, Denmark, Germany, France, Luxembourg, the Netherlands, Austria, Finland and Sweden). These limitations are, perhaps, still in compliance with the text of the PFI Convention and so is probably one Member State's declaration on procedural specificities when applying the active personality principle (France). Different Framework Decisions, amongst which that on the European Arrest Warrant[145], and proposals for such Framework Decisions[146] aim at doing away with the double-

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144 The French declaration reads: "*Where the offences covered by Article 1 and Article 2(1) of this convention are committed outside the territory of the French republic, France states, in accordance with the provisions of Article 4(2), that charges for such offences may be brought against the persons listed in Article 4(1), third indent, only at the request of the public prosecutor. Prosecution must be preceded by a complaint by the victim or by his legal successor(s) or by official denunciation of the offence by the authorities of the country in which it was committed.*"

145 Council Framework Decision 2002/584/JHAon the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1); also Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003, p. 45) and Council Framework Decision 2002/475/JHA on combating terrorism (OJ L 164, 22.6.2002 p. 3).

146 For instance Proposal for a Council Framework Decision on combating racism and xenophobia (COM(2001) 664 final, 29.11.2001, OJ C 075 E, 26.3.2002 p. 269)

criminality principle within the EU. One Member State (Italy) requires additional procedural barriers that are neither allowed by Article 4 of the PFI Convention nor covered by a declaration submitted by the relevant country. This Member State may only be considered compliant if the additional procedural requirement of a request by the Ministry of Justice is a non discretionary decision on the basis of the applicable regulatory provisions.

The main concern when drafting these provisions was to abolish serious differences between Member States regarding jurisdiction that might create possibilities of unpunished offences and an inadequate response to the cross-border nature of most illegal activities affecting the Communities' financial interests. The fact that three Member States (France, Austria, UK) still do not adequately provide for territorial jurisdiction as regards tax fraud and two (Belgium and UK) as regards participation in offences committed partly abroad appears to be an obstacle to ensure an adequate level of criminal law protection of the financial interests of the European Communities.

7.1.2. Jurisdiction over corruption (Article 6 of the 1st Protocol)[147]

Article 6 of the 1st Protocol establishes different criteria for conferring jurisdiction to prosecute and try cases involving active and passive corruption. Besides the territoriality principle, where the offence is committed in whole or in part on a Member State's territory, and the active personality principle, where the offender is a national or a Member State's official, the provision introduces the passive personality principle, where active corruption is committed abroad by persons who are not nationals of the relevant Member State against a national of that Member State, being a national or Community official or member of a Community institution. Further, Article 6 of the 1st Protocol provides for jurisdiction where the offender is a Community official working for a Community institution with its headquarters in the relevant Member State. Article 6(2) allows Member States to declare that they will not apply all or one of the conditions for jurisdiction apart from territoriality.

Only two Member States (Greece, Ireland) have introduced specific jurisdiction rules for corruption offences introduced on the ratification of the 1st Protocol. One (Germany) extended its jurisdiction for corruption when ratifying the 1st Protocol. The other twelve Member States (Belgium, Denmark, Spain, France, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden, UK) did not change their jurisdiction rules, though ten of them (Denmark, France, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden, UK) submitted declarations in accordance with Article 6(2) of the 1st Protocol. The declarations usually concern additional rules for applying the jurisdiction. Only one Member State (UK) does not apply any of the jurisdiction rules laid down in Article 6 apart from the territoriality principle. Two (Portugal, Finland) have excluded application of the passive personality principle and the headquarter principle and one (Sweden) refused jurisdiction in cases where the offender is a Community official working for an institution or body which has its headquarters in its territory.

147 See also Annex Table 12.

Newly introduced provision	Amendment of an existing provision	No change in existing national legislation
Greece, Ireland	Germany	Belgium, Denmark, Spain, France, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden and the UK

The offence is committed in whole or in part within a Member State's territory

Greece explicitly enacted a jurisdiction clause referring to Article 6 of the 1st Protocol. Even if only one constitutive element is fulfilled within their territory, Belgium, Denmark, Germany, Spain, France, Italy, Ireland, Luxembourg, the Netherlands, Austria, Portugal, Finland and Sweden apply their general rules for territorial jurisdiction for active and passive corruption. As regards Ireland, jurisdiction is based on the common law and also specifically provided for in statutory instruments.

In the UK, there appears to be a specific statute. Section 1 of the Public Bodies Corrupt Practices Act 1889, applicable throughout all jurisdictions of the UK, confines territorial jurisdiction to offences against public bodies established in the UK. Section 7 of the Public Bodies Corrupt Practices Act 1889[148] provides that 'public body' "includes any body which exists in a country or territory outside the United Kingdom and is equivalent to" a public body in the UK. Whether the Community and its institutions, bodies or agencies fall hereunder is not clear.

The offender is one of the Member State's nationals or one of its officials

Greece and Ireland specifically establish jurisdiction according to the active personality principle as defined in the 1st Protocol.

As already stated with regard to the active personality principle in the third indent of Article 4(1) of the PFI Convention, Belgium, Denmark, Germany, Spain, France, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland and Sweden apply the principle in general. Of these countries, Denmark,[149] the Netherlands,[150] Austria,[151]

148 As recently amended by Section 108(3) of the the Anti-terrorism, Crime and Security Act 2001.

149 The Danish declaration reads: "*With reference to Article 6(2), the reservation is made that in the circumstances described in the first phrase of Article 6(1)(b), Denmark may make Danish jurisdiction conditional on the offence also being punishable under the legislation of the country in which the offence was committed (double criminality).*"

150 The Dutch declaration reads: "*The Netherlands Government declares that with regard to Article 6(1), jurisdiction may be exercised by the Netherlands in the following cases: (a) where the offence is committed in whole or in part within Netherlands territory; (b) in respect of the offence punishable under Article 2, with regard to Netherlands officials and also with regard to Netherlands nationals who are not Netherlands officials, insofar as it is punishable under the law of the country where it was committed, in respect of the offences punishable under Articles 3 and 4, with regard to both Netherlands nationals and Netherlands officials, insofar as the relevant offence is punishable under the law of the country where it was committed; (c) with regard to Netherlands nationals, insofar as the offence is punishable under the law of the country where it was committed; (d) with regard to public servants working for a European Community institution which has its headquarters in the Netherlands or for a body set up in accordance with the Treaties establishing the European Communities which has its headquarters in the Netherlands, insofar as the offence is punishable under the law of the country where it was committed.*"

Portugal[152] and Finland[153] declared under Article 6(2) of the 1st Protocol that they make jurisdiction conditional on the offence being punishable under the legislation of the country in which the offence was committed. Such a double criminality appears to be required also under Swedish law, though Sweden has not submitted a declaration to this effect. Luxembourg[154] has declared that it will limit jurisdiction to offenders who are Luxembourg nationals. France,[155] Italy[156] and Portugal also declared that they would apply the active personality principle only under specific procedural conditions. In France, active and passive corruption committed by their nationals abroad is prosecuted only on a specific request of the public prosecutor provided that prosecution is preceded by a complaint by the victim or by official denunciation of the offence by the authorities of the country in which it was committed. In Italy, a request by the Ministry of Justice is required. Portugal indicated that it will apply the jurisdiction rule only if the offender is discovered in Portugal. Belgian law, as regards corruption of officials of other Member States, requires that prosecution take place only following an official denunciation of the offence by the authorities of the country in which it was committed, but Belgium did not submit a declaration to this end.

The UK declared that it would not apply Article 6(1)(b) of the 1st Protocol.

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151 The Austrian declaration reads: "*Pursuant to Article 6(2) of the Protocol, the Republic of Austria hereby declares that it shall be bound by Article 6(1)(b) of the Protocol in respect of offences committed by its nationals only if the acts are also punishable in the country in which they were committed.*"

152 The Portuguese declaration reads: "*a) [Portugal] will apply the jurisdiction rule in Article 6(1)(b) of the Protocol only if: - the offender is discovered in Portugal; - the acts committed are also punishable under the legislation of the place in which they were carried out, unless punitive powers are not exercised in that place; they additionally constitute extraditable crimes and extradition cannot be granted; (b) it will not apply the jurisdiction rule in Article 6(1)(b) of the Protocol if the offender does not have Portuguese nationality, even if for criminal purposes he has to be considered an official under Portuguese domestic law; c) it will not apply the jurisdiction rules in Article 6(1)(c) and (d) of the Protocol.*"

153 The Finnish declaration reads: "*Finland applies the rules laid down in Article 6(1)(b) of the Protocol in respect of its own nationals in accordance with Chapter 1(11) of the Finnish criminal code only if the offence is also punishable under the law of the place where the offence was committed and if this could also be considered a punishable offence before a court of the foreign state. No stricter penalties may be imposed in Finland than those prescribed under the law of the place of the offence. 2. Finland does not apply the rules as laid down in Article 6(1)(c) and (d) of the Protocol*"

154 The Luxembourg declaration reads: "*The Grand Duchy of Luxembourg hereby declares that, saving the cases covered by Article 6(1)(a) 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, it will apply the jurisdiction rules referred to in Article 6(1)(b), (c) and (d) of that Protocol only if the offender is a Luxembourg national.*"

155 The French declaration reads: "*Where the offences covered by Articles 2, 3 and 4 of this protocol are committed outside the territory of the French republic, France states, in accordance with the provisions of Article 6(2), that charges for such offences may be brought against the persons listed in Article 6(1)(b), (c) and (d) only at the request of the public prosecutor. Prosecution must be preceded by a complaint by the victim or by his legal successor(s) or by official denunciation of the offence by the authorities of the country in which it was committed.*"

156 The Italian declaration reads: "*In relation to Article 6(2) of the first Protocol to the Convention on the protection of the Communities' financial interests, done at Dublin on 27 September 1996, Italy declares that it will apply the jurisdiction rules laid down in Article 6(1)(a) and (d) of that Protocol without reservation, while it will apply the rules under Article 6(1)(b) and (c) in accordance with the conditions currently specified in Articles 7, 9 and 10 of the Italian Criminal Code.*"

The offence is committed against a national of the Member State, being a national or Community official or member of a Community institution

The situation and conditions with regard to the passive personality principle are the same as for the active personality principle as regards Belgium, Germany, Greece, Spain, France, Italy, Luxembourg and the Netherlands. The UK declared that it would not apply Article 6(1)(c) of the 1st Protocol.

Differently from the active personality principle, Denmark and Austria require no double criminality to apply the passive personality principle. Ireland provides for jurisdiction only for active corruption committed against Irish nationals. Although the passive personality principle is of particular interest for active corruption,[157] Article 6(1)(c) of the 1st Protocol likewise comprises passive corruption, so that it seems unclear why Ireland did not extend its jurisdiction to all other offences as well.

In the context of Article 6(1)(c), Sweden[158] declared that it would not apply its jurisdiction for corruption against a Community official or member of a Community institution who is not a Swedish national, which effectively confines jurisdiction to cases of Swedish national officials. According to the Portuguese and Finnish declarations, the passive personality principle is not applied.

The offender is a Community official working for a Community institution with its headquarters in the Member State concerned

Jurisdiction over an offender who is a Community official working for a Community institution with its headquarters in the Member State concerned, is provided for by the Belgian, Danish, German, Greek, Spanish, French, Irish, Italian, Luxembourg, Dutch and Austrian legal system. France, Luxembourg and the Netherlands declared limitations on exercising this jurisdiction rule, whereby France requires the usual procedural barriers, the Dutch system double criminality and the Luxembourg declaration that the offender is a Luxembourg national[159].

Portugal, Finland and the UK were joined by Sweden in their declaration that they would not apply this jurisdiction rule.

Evaluation

Assessing compliance with Article 6 of the 1st Protocol gives in the first place a quite positive picture, since Member States either provide for an adequate jurisdiction rule

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157 Explanatory report on the 1st Protocol: OJ C 11, 15.1.1998, p. 11.

158 The Swedish declaration reads: *"Declare, in accordance with Article 6(2) of the Protocol, that: (a) Sweden does not intend to exercise jurisdiction in cases where the offence was committed against a Community official referred to in Article 1 or against a member of one of the institutions referred to in Article 4(2) who is at the same time a national of Sweden (Article 6(1)(c)), and (b) Sweden does not intend to exercise jurisdiction in cases where the offender is a Community official working for an institution or body which has its headquarters in Sweden (Article 6(1)(d))."*

159 The latter could reveal embarrassing in view of the Decision of the Representatives of the Governments of the Member States on the provisional location of certain institutions and departments of the Communities of 8.4.1965 and the Decision taken by common agreement between the Representatives of the Governments of the Member States on the location of the seats of the institutions and of certain bodies and departments of the European Communities of 12.12.1992.

or made a declaration under Article 6(2) of the 1st Protocol. In fact, only one Member State (UK) appears not to provide for sufficient territorial jurisdiction and three (Belgium, Sweden, Ireland) limit the application of the jurisdiction rules laid down in Article 6(1)(b) and (c) of the 1st Protocol without having submitted an adequate declaration, namely as regards procedural barriers (Belgium), the requirement of double criminality (Sweden) or the scope of applicable offences (Ireland).

Considering that in the field of corruption, harmonisation of criminal law is even more advanced than for the fraud related offences, the condition of double criminality as upheld by some Member States (Denmark, the Netherlands, Austria, Portugal, Finland, Sweden) causes less perturbation for achieving an adequate level of protection of the financial interests in procedural criminal law. Nor are the procedural requirements of prosecution as imposed by three Member States (Belgium, France, Italy) problematic as long as the additional procedural requirement of a request can be reasonably fulfilled in practice.

Although allowed for by Article 6(2) of the 1st Protocol, declarations refusing the application of all or some of the jurisdiction rules save the territoriality principles (Portugal, Finland, Sweden, UK) or limiting prosecution only to own nationals in the case where the offender is a Community official working for a Community institution with its headquarters in the Member State concerned (Luxembourg) appear more detrimental to attempts to ensure that substantive criminal law can also be effectively enforced.

7.2. Extradition and Prosecution (Article 5 of the PFI Convention, by reference to Article 7 (1) of the 1st Protocol and Article 12 (1) of the 2nd Protocol)

When the PFI Instruments were drafted, the extradition rules established in Article 5 of the PFI Convention were designed to supplement, with regard to the protection of the Communities' financial interests, the provisions on the extradition of own nationals and tax offences applying between Member States, especially under the European Convention on Extradition of 13 December 1957.[160] In the meantime, the provisions of the European Convention on Extradition have been complemented by Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States. Under Article 2 of that Framework Decision, an arrest warrant may be issued for acts punishable of at least 12 months. Should the issuing Member State provide for a maximum period of punishment of at least three years, offences such as corruption, fraud, including that affecting the European Communities' financial interests, and laundering of the proceeds of crime, the European arrest warrant gives rise to surrender without verification of double criminality.

The introduction of Framework Decision 2002/584/JHA should lead to the abolishment of Member States' practice of not extraditing their own nationals. There is no possibility of refusing extradition for the sole reason that it has been requested

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160 Explanatory report on the PFI Convention: OJ C 191, 23.6.1997. The European Convention on Extradition was drawn up in the context of the Council of Europe, was signed on 13.12.1957 and entered into force on 18.4.1960. The full text, details on ratification and implementing legislation and evaluation reports are available at http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm at item 024.

in connection with a tax or customs duty offence. Therefore, compliance with the Framework Decision 2002/584/JHA means compliance with the requirements of Article 5 of the PFI Convention.

At this stage, it therefore appears redundant to evaluate the impact of Article 5 of the PFI Convention and more useful to hint at a future report from the Commission based on Article 34(3) of the Framework Decision 2002/584/JHA.

7.3. '*Ne bis in idem*' (Article 7 of the PFI Convention, by reference in Article 7 (2) of the 1st Protocol and Article 12 (1) of the 2nd Protocol)[161]

The '*ne bis in idem*' rule to be applied for convictions in other Member States was introduced by Article 7 of the PFI Convention, considering that cases of transnational offences are of particular importance when it comes to the protection of the financial interests of the European Communities and that the jurisdiction rules may not be sufficient to centralize the prosecution in a single Member State.

As with the other provisions of the PFI instruments related to criminal procedure, Article 7(2) allows for declarations of the Member States and sets out specific cases where the '*ne bis in idem*' rule can be derogated. The system introduced provides for the general application of the '*ne bis in idem*' rule for the offences contained in the PFI instruments with very few cases specifically described as exceptions. Council discussions on the draft Framework Decision on the '*ne bis in idem*' principle[162] have shown that the application of the principle is easier to accept where the penalties are comparable and actually applied, as is the case for the PFI instruments, and that the proper operation of the '*ne bis in idem*' rule depends very much on settling the issue of conflicts of jurisdiction. The Council adopted a statement wherein it "stressed that further work should continue on '*ne bis in idem*' principle in particular in the light of the publication of the Commission's Communication on Conflicts of Jurisdiction".[163] In this context, Article 6(2) of the PFI Convention appears to be of interest, since it provides that "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". The provision should improve efficiency to settle conflicts of jurisdiction,[164] but none of the Member States concerned has informed the Commission that it has ever had recourse to this provision.

Regarding the current rules, Article 7(1) of the PFI Convention is worded in nearly the same way as Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985,[165] and Article 7(2) and (3) of the PIF Convention are similar to Article 55(1) and (3) of the Convention implementing the Schengen Agreement. Although the Schengen implementing Convention is only applicable to the 13 Member States authorised to establish closer cooperation among themselves

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161 See also Annex Table 13.

162 Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the '*ne bis in idem*' principle: OJ C 100, 26.4.2003, p. 24.

163 Conclusions of the Justice and Home Affairs Council of 17.9.2000.

164 Explanatory report on the PFI Convention: OJ C 191, 23.6.1997.

165 OJ L 239, 22.9.2000, p. 19.

within the scope of the Schengen acquis, as provided by Article 1 of the Protocol integrating the Schengen acquis into the framework of the EU, annexed to the EU Treaty and to the EC Treaty, Ireland and UK have agreed to apply, amongst others, its '*ne bis in idem*' provisions.[166] The related Court of Justice case-law on these provisions is therefore relevant also with regard to Article 7 of the PFI Convention for all Member States. On the basis of the Court's case-law[167] one can therefore assume that the '*ne bis in idem*' principle also applies to procedures whereby further prosecution is barred, such as the procedures whereby the public prosecutor of a Member State discontinues criminal proceedings brought in that Member State, without a court being involved, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the public prosecutor.

Only one Member State (Austria) adapted its procedural code to introduce the '*ne bis in idem*' rule with regard to offences prosecuted in other Member States, although it argued that this amendment was be necessary due to the possible direct application of Article 7 of the PFI Convention as an agreement under international public law. The argument of direct application was also put forward by other six Member States (Denmark, Germany, Greece, Italy, Finland, Sweden).

Newly introduced provision	Amendment of an existing provision	No change in existing national legislation
-	Austria	Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg the Netherlands, Portugal, Finland, Sweden and the UK

Belgium, Greece, Spain, France, Ireland, Luxembourg, the Netherlands, Finland and the UK argue that the '*ne bis in idem*' rule is generally foreseen in their legal system also with regard to other Member States or even third countries. In Spain[168] and Luxembourg,[169] the case law seems to confirm this approach. Greece[170] and Finland[171] additionally made declarations under Article 7(2) of the PFI Convention.

Denmark, Germany, Italy, Portugal and Sweden, instead, consider that the '*ne bis in idem*' rule results from the possible direct application of Article 7 of the PFI Convention as an agreement under international public law. In Denmark, Italy, Portugal and Sweden, the PFI instruments are specifically referred to in this context; in Germany, this effect seems to stem from the national constitutional order allowing

166 Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis: OJ L 131, 1.6.2000, p. 43; and Council Decision 2000/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis: OJ L 64, 7.3.2002, p. 20.

167 Joined cases C-187/01 *Gözütok* and C-385/01 *Brügge*.

168 Spanish Tribunal Supremo, 22.12.2003.

169 Luxembourg Cour de cassation, 6.7.1972.

170 The Greek declaration reads: "*In accordance with Article 7(2) of the Convention, Greece will not be bound by paragraph 1 of the Article in the cases referred to in subparagraphs (b) and (c) of Article 7(2) of 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.*"

171 The Finnish declaration reads: "*Article 7(1) does not bind Finland in the cases mentioned in Article 7(2)(a) to (c).*"

for direct application of international agreements in this regard. Again, Denmark,[172] Germany,[173] Italy[174] and Sweden[175] declared exceptions in accordance with Article 7(2) of the PFI Convention.

Austria is the only Member State that took legislative action to ensure the application of the '*ne bis in idem*' rule, though Austria also argues that its national constitutional order provides for direct application of international agreements in this regard. Austria still introduced the provision to augment legal certainty and, at the same time, made a declaration under Article 7(2) of the PFI Convention.[176]

Apart from Austria, compliance depends on whether the general principles of law existing in the Member States are sufficient to ensure effective application of this principle as required by Article 7 of the PFI Convention. Due to lack of information, no evaluation could be done for ten Member States (Belgium, Germany, Greece, Spain, France, Ireland, Luxembourg, the Netherlands, Finland and the UK) at this stage, whereas for the remaining five (Denmark, Italy, Portugal, Austria, Sweden) it appears possible to state that implementation was effected.

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172 The Danish declaration reads: "*With reference to Article 7(2)(a) to (c), Denmark shall not be bound by Article 7(1) in the cases listed in Article 7(2)(a), (b) and (c). As regards the acts listed in Article 7(2)(b), this declaration covers offences under Chapter 12 (Offences against the independence and safety of the State), Chapter 13 (Offences against the Constitution and the supreme authorities of the State) and Chapter 14 (Offences against public authority) of the Danish Criminal Code, and offences which may be similarly categorised. Denmark understands Article 7(2)(b) inter alia to include acts described in §8(1) of the Danish Criminal Code. Furthermore, Denmark interprets Article 7 as only applying to the ability to impose punishment, not the ability to deprive someone of their rights. The Faroe Islands and Greenland are not covered by the Convention for the time being.*"

173 The German declaration reads: "*The Federal Republic of Germany is not bound by Article 7(1) if the act which was the subject of the judgement rendered abroad took place entirely or partly on its territory, unless the act took place partly on the territory of the Member State where the judgement was rendered.*"

174 The Italian declaration reads: "*In relation to Article 7(2) of the Convention on the protection of the European Communities' financial interests, done at Brussels on 26 July 1995, Italy declares that it shall not be bound by Article 7(1) in respect of the cases described in Article 7(2)(a),(b) and (c)*"

175 The Swedish declaration reads: "*declare, in accordance with Article7(2)(a) and(b) of the Convention, that Sweden will be able to bring proceedings against a person who has been convicted of the same offence in another State which is a member of the European Union if the offence was: (a) wholly or partly committed on Swedish territory, or (b) directed against Sweden's security or other equally essential interests of Sweden.*"

176 The Austrian declaration reads: "*Pursuant to Article 7(2) of the Convention, the Republic of Austria hereby declares that it is not bound by Article 7(1) of the Convention in the following cases: (a) if the facts which were the subject of the judgment rendered 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 judgment was rendered; (b) if the facts which were the subject of the judgment rendered abroad constitute one of the following offences: Exploitation of a business or industrial secret in favour of foreign interests (Article 124 of the Criminal Code) High treason and preparations to that end (Arts 242 and 244 of the Criminal Code) Subversive links (Article 246 of the Criminal Code) Debasing the State and its image (Article 248 of the Criminal Code) Attacks on supreme organs of the State (Arts 249 to 251 of the Criminal Code) Treason (Arts 252 to 258 of the Criminal Code) Punishable acts committed against the armed forces of the State (Arts 259 and 260 of the Criminal Code) Punishable acts committed against an Austrian official (Article 74, fourth line of the Criminal Code) in the performance of his duties, or by virtue thereof Offences against the Foreign Trade Law and Offences against the War Materials Law; c) if the facts which were the subject of the foreign judgment rendered were committed by an Austrian official (Article 74, fourth line of the Criminal Code) contrary to his official duties.*"

7.4. Preliminary rulings by the Court of Justice of the European Communities on the Convention on the Protection of the European Communities' financial interests and its protocols[177]

The Protocol on the interpretation by way of preliminary rulings by the Court of Justice of the European Communities complements the other PFI instruments by introducing a system for the interpretation of the PFI instruments. Essentially, Article 2 of the Protocol allows for two ways of implementation, namely either to allow only courts whose decisions no longer are subject to judicial remedies to request a preliminary ruling or to allow any court to do so.

Six Member States provided for specific legal instruments (Greece, Ireland, Luxembourg) or amended existing legislation (Denmark, Germany, Austria) to permit their courts to request a preliminary ruling. Seven other Member States (Belgium, Spain, France, the Netherlands, Portugal, Finland, Sweden) merely submitted declarations accepting the jurisdiction of the Court of Justice of the European Communities to issue preliminary rulings, but took no legislative action. In two Member States (Italy, UK), the situation is not clear and, as regards one of them (Italy), it appears that an implementing measure to be taken by government would be necessary.

Newly introduced provision	Amendment of an existing provision	No change in existing national legislation
Greece, Ireland, Luxembourg	Denmark, Germany, Austria	Belgium, Spain, France, Italy, the Netherlands, Portugal, Finland, Sweden and the UK

Belgium, Denmark, Germany, Greece, France, Luxembourg, the Netherlands, Austria, Finland and Sweden accepted that any of their courts 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 PFI instruments if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.

In Spain, Ireland, Portugal, only courts or tribunals against whose decisions there is no judicial remedy under national law may request such a preliminary ruling.

In Italy, there is a need for the government to enact an implementation decree on the basis of Article 12 of Act No 2000/300 ratifying and transposing the PFI instruments. Since no such decree seems yet to have been enacted, it is not clear whether Italian courts may request a preliminary ruling in this field. As regards the UK, it is not clear on which legal basis courts are allowed to ask for preliminary rulings of the Court of Justice of the European Communities in the field of the PFI instruments.

Two Member States (Italy, UK) seem not to have implemented the Protocol on preliminary rulings by the Court of Justice of the European Communities. It should also be noted that no question was yet referred to the Court of Justice of the European Communities under the procedure of this protocol.

[177] See also Annex Table 13.

8. EXPLANATORY COMMENTS TO THE TABLES

The tables are available in English only. The first four tables give a short overview of the legislative activities of the Member States under scrutiny regarding the PFI instruments.

Along the order of the analysis, the following nine tables present a compilation of the applicable national provisions of the Member States under scrutiny. The tables were essentially drafted in accordance with the information received by the Commission, the national provisions transposing each of the articles in the PFI instruments are indicated in as far as considered of relevance. The tables are intended to serve as a basis for easier reference to the national provisions referred to above but does not contain information on the specificities of the concerned national provisions. No table is provided for the provisions on extradition and prosecution considering that this issue will be addressed in the context of the European arrest warrant.

The tables are logically divided by the Member States under scrutiny; as regards the UK, however, its three jurisdictions are treated separately unless the applicable law is the same for all three of them.

Annex Table 1

Instrument	PFI Convention		
Reference	**Notification**	**Legislative text**	**Method of implementation**
Belgium	12.03.2002	Act of 17 February 2002 ratifying the PFI Convention, the first Protocol, the second Protocol, the ECJ Protocol and the convention on the fight against corruption involving officials of the European Communities (Belgisch Staatsblad/Moniteur Belge of 15.05.2002, Ed. 2 page 20555)	No amendments to existing provisions were undertaken by Belgium at the occasion of the ratification
Denmark	02.10.2000	Act no. 228 of 4 April 2000 on the modification of the Penal Code	Amendment of the Penal Code (insertion of § 289a and modification of § 289)
Germany	24.11.1998	Federal Act on the transposition of the PFI Convention (EG-Finanzschutzgesetz - BGBl 1998 II S. 2322)	Amendment of the Penal Code (insertion of § 264 (1) point (2) and modification of § 264 (7)) and of the penal provisions of the German Fiscal Code (modification of § 370 (7))
Greece	26.07.2000	Act no. 2803/2000 ratifying the PFI Convention, the first Protocol, the second Protocol and the ECJ Protocol (OJ of the Hellenic Republic of 03.03.2000, Part A, nr. 48, p. 639)	The Act provides for a codification of the provisions on criminal offences related to the PFI Convention without amending the Penal Code
Spain	20.01.2000	The Organic Law 6/1995 introduced the main concepts of the PFI Convention into the Spanish Penal Code of 1973. Shortly afterwards, a new Penal Code was enacted by Organic Law 10/1995 taking over the modified norms. The Penal Code 1995 was modified by Organic Law 15/2003 as regards fraud and corruption (BOE 26.11.2003 no. 283-2003)	Amendment of the new Spanish Penal Code (Art. 305, 306 and 309 recently modified by Organic Law 15/2003 without specific link to the PFI Convention)
France	04.08.2000	Act no. 99-419 of 27 May 1999 for the ratification of the PFI Convention (OJ of the French Republic, 28.05.1999, 7857)	No amendments to existing provisions were undertaken by France at the occasion of the ratification.
Ireland	03.06.2002	Criminal Justice (Theft and Fraud Offences) Act, 2001(Enacted as Act no. 50. of 2001), Section 41 giving the force of law to PFI instruments (with conditions).	Enactment of Criminal Justice (Theft and Fraud Offences) Act, 2001. The Act provides for a codification of the provisions on criminal offences related to the PFI Convention in its Part 6.
Italy	19.07.2002	Act no. 2000/300 ratifying and transposing the PFI Convention, the first protocol to the PFI convention, the Protocol on the interpretation by the European Court of Justice, the convention on the fight against corruption involving officials of the European Communities and the OSCE convention on the fight against corruption involving foreign public officials in international economic operations as well as delegating to the government to enact provision on the administrative liability of legal persons (Legge 29 settembre 2000, no. 300 GURI no. 250 of 25.10.2000)	Amendment of the Italian Penal Code (insertion of Art. 316ter and modification of Art. 9) and of the amalgamated law in respect of custom matters (modification of Art. 295, 295bis and 297) and the Act on fraud affecting the European Agriculture Guidance and Guarantee Fund (modification of Art. 23)

Luxembourg	17.05.2001	Act of 30 March 2001 on the ratification of the Convention and the First protocol and the Protocol on the jurisdiction of the ECJ (OJ of the Grand-Duché du Luxembourg, A-no. 47, 26.04.2001)	Amendment to the Penal Code (modification of Art. 496-2, Art. 496-3 and insertion of Art. 496-4)
the Netherlands	16.02.2001	Kingdom Act of 13 December 2000 ratifying the PFI Convention, the first protocol to the PFI convention, the Protocol on the interpretation by the European Court of Justice, the convention on the fight against corruption involving officials of the European Communities and the OSCE convention on the fight against corruption involving foreign public officials in international economic operations (Stb 2000 615) and Act of 13 December 2000 adapting some provisions of the Penal Code in connection with the ratification and implementation of the conventions on the fight against corruption (Stb 2000 616)	Amendment of the Penal Code (Introduction of Art. 323a)
Austria	21.05.1999	Federal Act of 1998 modifying the penal law (Strafrechtsänderungsgesetz 1998 - BGBl I 1998/153) and the federal Act on modifying levies and charges (Abgabenänderungsgesetz 1998 - BGBl I 1999/28)	Amendment of the Penal Code (insertion of § 153b) and the Code of Penal Procedure (modification of § 34)
Portugal	15.01.2001	Parliamentary Resolution no. 80/2000 (Diário da república, Série I-A No. 288 of 15.12.2000, p. 7305) and presidential Decree no. 82/2000 (Diário da república, Série I-A No. 288 of 15.12.2000, p. 7253) ratifying the PFI Convention, the first Protocol, the second Protocol and the ECJ Protocol	No amendments to existing provisions were undertaken by Portugal at the occasion of the ratification
Finland	18.12.1998	Decree of the President 834/2002 and Act no. 814/1998 (Finland's Statute Book of 18.11.1998, p. 2227) modifying the penal law	Amendment of the Penal Code (modification of Chapter 1 § 13 and Chapter 29 § 5 and § 9)
Sweden	10.06.1999	Act no. 1999:197 modifying the Penal Code	Amendment of the Penal Code (insertion of Chapter 9 § 3a and modification of Chapter 2 § 5a)
United-Kingdom - England and Wales	11.10.1999	Ratification is done through the Foreign Secretary signing the necessary Instruments of Adoption, which he did in September 1999 in order to complete the ratification process for mainland United Kingdom, i.e. the three jurisdictions of England and Wales, Scotland, Northern Ireland.	No amendments to existing provisions were undertaken by the UK at the occasion of the ratification. Ratification was undertaken after the government had acted to bring into force Part I of the Criminal Justice Act 1993 through the Criminal Justice Act 1993 (Commencement No. 10) Order 1999, Statutory Instrument 1999 No. 1189 (C. 32) .
United-Kingdom - Scotland			
United-Kingdom - Northern Ireland			

Annex Table 2

Instrument	First Protocol		
Reference	**Notification**	**Legislative text**	**Method of implementation**
Belgium	12.03.2002	Act of 17 February 2002 ratifying the PFI Convention, the first Protocol, the second Protocol, the ECJ Protocol and the convention on the fight against corruption involving officials of the European Communities (Belgisch Staatsblad/Moniteur Belge of 15.05.2002, Ed. 2 page 20555)	No amendments to existing provisions were undertaken by Belgium at the occasion of the ratification
Denmark	02.10.2000	Act no. 228 of 4 April 2000 on the modification of the Penal Code	Amendment of the Penal Code (modification of § 122 and § 144)
Germany	24.11.1998	Federal Act on the transposition of the protocol to the PFI Convention (EU-Bestechungsgesetz - BGBl 1998 II S. 2340)	Additional provisions to implement the First Protocol are foreseen in the Federal Act itself (Art. 2 § 1 and § 2) and also amendments of the Penal Code (inserting a paragraph in § 5 to extend jurisdiction on crimes under § 108a)
Greece	26.07.2000	Act no. 2803/2000 ratifying the PFI Convention, the first Protocol, the second Protocol and the ECJ Protocol (OJ of the Hellenic Republic of 03.03.2000, Part A, no. 48, p. 639)	The Act provides for a codification of the provisions on criminal offences related to the PFI Convention without amending the Penal Code
Spain	20.01.2000	The Organic Law 6/1995 introduced the main concepts of the first Protocol into the Spanish Penal Code of 1973. Shortly afterwards, a new Penal Code was enacted by Organic Law 10/1995 taking over the modified norms. The Penal Code 1995 was modified by Organic Law 15/2003 as regards fraud and corruption (BOE 26.11.2003 no. 283-2003)	Organic Law 15/2003 does not modify the new Spanish Penal Code as regards the First Protocol
France	04.08.2000	Act no. 99-420 of 27 May 1999 for the ratification of the PFI Convention (OJ of the French Republic, 28.05.1999, 7857)	No amendments to existing provisions were undertaken by France at the occasion of the ratification. Subsequent amendments were introduced by Act no. 2000-595 of 30 June 2000 modifying the Penal Code (introduction of Art. 435-1 and Art. 435-2) and the Code of Penal Procedure concerning the fight against corruption (OJ of the French Republic 01.01.2000, 9944).
Ireland	03.06.2002	Criminal Justice (Theft and Fraud Offences) Act, 2001 (Enacted as no. 50. of 2001), Section 41 giving the force of law to PFI instruments (with conditions).	Enactment of Criminal Justice (Theft and Fraud Offences) Act, 2001. The Act provides for a codification of the provisions on criminal offences related to the Protocol in its Part 6.

Italy	19.07.2002	Act no. 2000/300 ratifying and transposing the PFI Convention, the first protocol to the PFI convention, the Protocol on the interpretation by the European Court of Justice, the convention on the fight against corruption involving officials of the European Communities and the OSCE convention on the fight against corruption involving foreign public officials in international economic operations as well as delegating to the government to enact provision on the administrative liability of legal persons (Legge 29 settembre 2000, no. 300 GURI no. 250 of 25.10.2000)	Amendment of the Penal Code (insertion of Art. 322bis and modification of Art. 10)
Luxembourg	17.05.2001	Act of 30 March 2001 on the ratification of the Convention and the First protocol and the Protocol on the jurisdiction of the ECJ (OJ of the Grand-Duché du Luxembourg, A-no. 47, 26.04.2001).	Amendment to the Code of Penal Procedure (insertion of Art. 503-1) and the Act on judicial organisation (insertion of paragraph 5 to Art. 40)
the Netherlands	28.03.2002	Kingdom Act of 13 December 2000 ratifying the PFI Convention, the first protocol to the PFI convention, the Protocol on the interpretation by the European Court of Justice, the convention on the fight against corruption involving officials of the European Communities and the OSCE convention on the fight against corruption involving foreign public officials in international economic operations (StB 2000 615) and Act of 13 December 2000 adapting some provisions of the Penal Code in connection with the ratification and implementation of the conventions on the fight against corruption (StB 2000 616)	Amendment of the Penal Code (Modification of Art. 4, Art. 6, Art. 84, Art. 363, Art. 177 and introduction of Art. 364a, Art. 178a)
Austria	21.05.1999	Federal Act of 1998 modifying the penal law (Strafrechtsänderungsgesetz 1998 - BGBl I 1998/153) and the federal Act on modifying levies and charges (Abgabenänderungsgesetz 1998 - BGBl I 1999/28)	Amendment of the Penal Code (insertion of points (4b) in § 74(1) and modification of § 304, § 307)
Portugal	15.01.2001	Parliamentary Resolution no. 80/2000 (Diário da república, Série I-A Nr. 288 of 15.12.2000, p. 7305) and presidential Decree no. 82/2000 (Diário da república, Série I-A Nr. 288 of 15.12.2000, p. 7253) ratifying the PFI Convention, the first Protocol, the second Protocol and the ECJ Protocol	No amendments to existing provisions were undertaken by Portugal at the occasion of the ratification, however, Act no. 108/2001 following up on the Council of Europe Criminal Law Convention on Corruption modified Art. 372, Art. 386 and Art. 3, Art. 16 and Art. 18 Act no. 34/87.
Finland	18.12.1998	Decree of the President 836/2002 and Act no. 815/1998 (Finland's Statute Book of 18.11.1998, p. 2229) modifying the penal law (the concerned provisions were essentially through Act no. 604/2002 extending criminal liability for these crimes to public international organisations as such)	Amendment of the Penal Code (modification of Chapter 16 § 13 and § 20 and Chapter 40 § 9, yet amendments overtaken by Act no. 604/2002)

Sweden	10.06.1999	Act no. 1999:197 modifying the Penal Code	Amendment of the Penal Code (insertion of Chapter 9 § 3a and modification of Chapter 17 § 7and § 17, Chapter 20 § 2 and § 5)
United-Kingdom - England and Wales	11.10.1999	Ratification is done through the Foreign Secretary signing the necessary Instruments of Adoption, which he did in September 1999 in order to complete the ratification process for mainland United Kingdom, i.e. the three jurisdictions of England and Wales, Scotland, Northern Ireland.	No amendments to existing provisions were undertaken by the United Kingdom at the occasion of the ratification. Ratification was undertaken after the government had acted to bring into force Part I of the Criminal Justice Act 1993 through the Criminal Justice Act 1993 (Commencement No. 10) Order 1999, Statutory Instrument 1999 No. 1189 (C. 32). However, the Anti-terrorism, Crime and Security Act 2001 extends the common law crime of bribery and of corruption to foreign agents in all jurisdictions of the United Kingdom.
United-Kingdom - Scotland			
United-Kingdom - Northern Ireland			

Annex Table 3

Instrument	ECJ-Protocol		
Reference	**Notification**	**Legislative text**	**Method of implementation**
Belgium	12.03.2002	Act of 17 February 2002 ratifying the PFI Convention, the first Protocol, the second Protocol, the ECJ Protocol and the convention on the fight against corruption involving officials of the European Communities (Belgisch Staatsblad/Moniteur Belge of 15.5.2002, Ed. 2 page 20555)	No amendments to existing provisions were undertaken by Belgium at the occasion of the ratification
Denmark	02.10.2000	Act no. 228 of 4 April 2000 on the modification of the Penal Code	§ 2 Act no. 228 of 4.4.2000
Germany	03.07.2001	Act on the preliminary rulings of the European Court of Justice in the filed of penal and judicial cooperation under Art. 35 TEU (EuGH-Gesetz - BGBl 1998 I 2035)	Specific Act on the related procedure in front of German courts
Greece	26.07.2000	Act no. 2803/2000 ratifying the PFI Convention, the first Protocol, the second Protocol and the ECJ Protocol (OJ of the Hellenic Republic of 03.03.2000, Part A, nr. 48, p. 639)	Art. 12 Act no. 2803/2000.
Spain	20.01.2000	The ECJ Protocol was published in the Spanish Official Journal together with the declarations as regards its application and its entering into force (BOE 29.7.2003 no. 180-2003)	Spain appear to consider that it is not necessary to provide for an additional implementing measure
France	04.08.2000	Act no. 99-421 of 27 May 1999 for the ratification of the Protocol on the jurisdiction of the ECJ (OJ of the French Republic of 28.05.1999, 7857)	No amendments or no implementing provisions were undertaken by France at the occasion of the ratification.
Ireland	03.06.2002	Criminal Justice (Theft and Fraud Offences) Act, 2001 (Enacted as no. 50. of 2001), Section 41 giving the force of law to PFI instruments (with conditions).	Enactment of Criminal Justice (Theft and Fraud Offences) Act, 2001. Section 41 refers to the application of the ECJ-Protocol.
Italy	19.07.2002	Act no. 2000/300 ratifying and transposing the PFI Convention, the first protocol to the PFI convention, the Protocol on the interpretation by the European Court of Justice, the convention on the fight against corruption involving officials of the European Communities and the OSCE convention on the fight against corruption involving foreign public officials in international economic operations as well as delegating to the government to enact provision on the administrative liability of legal persons (Legge 29 settembre 2000, no. 300 GURI no 250 of 25.10.2000)	Need for the government to enact an Implementation decree on the basis of Art. 12 Act no. 2000/300 ratifying and transposing the PFI Convention etc., yet, no such decree seems to have been enacted.
Luxembourg	17.05.2001	Act of 30 March 2001 on the ratification of the Convention and the First protocol and the Protocol on the jurisdiction of the ECJ (OJ of the Grand-Duché du Luxembourg, A-no. 47, 26.04.2001)	Art. 8 Act of 30 March 2001

the Netherlands	16.02.2001	Kingdom Act of 13 December 2000 ratifying the PFI Convention, the first protocol to the PFI convention, the Protocol on the interpretation by the European Court of Justice, the convention on the fight against corruption involving officials of the European Communities and the OSCE convention on the fight against corruption involving foreign public officials in international economic operations (Stb 2000 615)	The Netherlands appear to consider that it is not necessary to provide for an additional implementing measure
Austria	21.05.1999	Federal Act on preliminary rulings by the Court of Justice of the European Communities in the field of police and judicial cooperation in criminal matters (BGBl I 1999/89) in relation to the updated list as announced by the Federal Chancellor (BGBl III 2003/5)	Specific Act on the related procedure in front of Austrian courts
Portugal	15.01.2001	Parliamentary Resolution no. 80/2000 (Diário da república, Série I-A no. 288 of 15.12.2000, p. 7305) and presidential Decree no. 82/2000 (Diário da república, Série I-A no. 288 of 15.12.2000, p. 7253) ratifying the PFI Convention, the first Protocol, the second Protocol and the ECJ Protocol	Portugal considered that it is not necessary to provide for an implementing measure
Finland	18.12.1998	Decree of the President 838/2002 and Act no. 837/2002 giving the content of the protocol of legislative nature status of an act of parliament in Finland (Finland's Statute Book of 9.10.2002, p. 3968)	Finland considered that it is not necessary to provide for an implementing measure
Sweden	10.06.1999	Act no. 1999:197 modifying the Penal Code also ratifies the ECJ-Protocol	Act 1998:1352 provides for the implementation for all conventions based on Title VI TEU
United-Kingdom - England and Wales	11.10.1999	Ratification is done through the Foreign Secretary signing the necessary Instruments of Adoption, which he did in September 1999 in order to complete the ratification process for mainland United Kingdom, i.e. the three jurisdictions of England and Wales, Scotland, Northern Ireland.	No amendments to existing provisions were undertaken by the United Kingdom at the occasion of the ratification
United-Kingdom – Scotland			
United-Kingdom - Northern Ireland			

Annex Table 4

Instrument	Second Protocol (not yet entered into force)		
Reference	**Notification**	**Legislative text**	**Method of implementation**
Belgium	12.03.2002	Act of 17 February 2002 ratifying the PFI Convention, the first Protocol, the second Protocol, the ECJ Protocol and the convention on the fight against corruption involving officials of the European Communities (Belgisch Staatsblad/Moniteur Belge of 15.05.2002, Ed. 2 page 20555)	No amendments to existing provisions were undertaken by Belgium at the occasion of the ratification
Denmark	02.10.2000	Act no. 228 of 4 April 2000 on the modification of the Penal Code	Amendment of the Penal Code (modification of § 284 and insertion of § 306)
Germany	05.03.2003	Federal Act on the transposition of the second protocol to the PFI Convention, the joint action of 22 December 1998 on corruption in the private sector and the Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (BGBl 2002 I S. 3387)	Amendment of the Act on administrative sanctions (modification of § 30 and § 130), the Penal Code (by adding a point (5) to § 75) and the Federal Act on the transposition of the protocol to the PFI Convention (extending its scope to money laundering).
Greece	26.07.2000	Act no. 2803/2000 ratifying the PFI Convention, the first Protocol, the second Protocol and the ECJ Protocol (OJ of the Hellenic Republic of 03.03.2000, Part A, no. 48, p. 639) As regards the second protocol, the Act will come into force in Greece on ratification by all MS (Art. 13 Act no. 2803/2000)	Modification of the Act no. 2331/1995 on Prevention and Combating the Legislation of Income from Criminal Activities
Spain	20.01.2000	A new Penal Code was enacted by Organic Law 10/1995. The Penal Code 1995 was modified by Organic Law 15/2003 as regards fraud and corruption (BOE 26.11.2003 no. 283-2003)	Modification of the new Spanish Penal Code (Art. 31, 127, 129 and 301 recently modified by Organic Law 15/2003 without specific link to the second protocol)
France	04.08.2000	Act no. 99-422 of 27 May 1999 for the ratification of the Second Protocol (OJ of the French Republic 28.05.1999, 7858)	No amendments to existing provisions were undertaken by France at the occasion of the ratification. No amendments to existing provisions were undertaken by France at the occasion of the ratification
Ireland	03.06.2002	Criminal Justice (Theft and Fraud Offences) Act, 2001 (Enacted as no. 50. of 2001), Section 41 giving the force of law to PFI instruments (with conditions).	Enactment of Criminal Justice (Theft and Fraud Offences) Act, 2001. The Act provides for a codification of the provisions on criminal offences related to the Second Protocol in its Part 6.
Italy	Not yet ratified	Not yet ratified: Legislative proposal on the ratification of the UN Convention on transnational organised crimes foresees to introduce a new extended concept of administrative penal liability for legal persons in the Italian legal system.	Envisaged method of implementation is to enact a new Act as proposed in the legislative proposal.

Luxembourg	Not yet ratified	Not yet ratified: Legislative proposal No. 5262 for the ratification of the Convention on fight against corruption of 26 May 1997, the Second Protocol on the protection of the financial interests of the Communities of 19 June 1997, the Penal Convention on corruption of 27 January 1999 and the additional protocol to the convention on corruption of 15 May 2003. Legislative proposal No. 5165 on the fight against money laundering and the financing of terrorism, implementing the 2001/97 EC Directive of 4 December 2001. Legislative proposal No. 5019 on confiscation and various amendments to the Penal Code, Penal Procedural Code and special laws.	Envisaged method of implementation is the amendment to the Penal Code and the Act of 28 December 1988 on the profession of artisan, trader, industrialist and some liberal activities.
the Netherlands	28.03.2002	Kingdom Act of 22 June 2001 ratifying the second protocol to the PFI convention and the Convention on the fight against corruption (Stb 2001 315)	No amendments to existing provisions were undertaken by the Netherlands at the occasion of the ratification
Austria	not yet ratified. The specific possibility for Austria not to be bound by Art. 3 and 4 of the second protocol under Art. 18 (2) ceased on 19 June 2002	Not yet ratified: Legislative proposal of the Ministry of Justice to introduce a general law on the criminal liability of legal persons	Envisaged method of implementation is to enact a new Act as proposed in the legislative proposal.
Portugal	15.01.2001	Parliamentary Resolution no. 80/2000 (Diário da república, Série I-A no. 288 of 15.12.2000, p. 7305) and presidential Decree no. 82/2000 (Diário da república, Série I-A no. 288 of 15.12.2000, p. 7253) ratifying the PFI Convention, the first Protocol, the second Protocol and the ECJ Protocol	No amendments to existing provisions were undertaken by Portugal at the occasion of the ratification, however, Act no. 10/2002 modified Art. 2 of Decree-Law no. 325/95 extending it to fiscal fraud.
Finland	26.02.2003	Act no. 1191/2002 (Finland's Statute Book of 27.12.2002, p. 4795) giving the content of the protocol of legislative nature status of an act of parliament in Finland (the provisions of the Finnish Penal Code were not altered, yet were essentially modified through the later Act no. 61/2003)	No amendments to existing provisions were undertaken by Finland at the occasion of the ratification
Sweden	12.03.2002	Act no. 2001:780 modifying the Penal Code	Amendment of the Penal Code (modification of Chapter 2 § 5a and Chapter 9 § 11)
United-Kingdom - England and Wales	11.10.1999	Ratification is done through the Foreign Secretary signing the necessary Instruments of Adoption, which he did in September 1999 in order to complete the ratification process for mainland United Kingdom, i.e. the three jurisdictions of England and Wales, Scotland, Northern Ireland.	No amendments to existing provisions were undertaken by the United Kingdom at the occasion of the ratification. Ratification was undertaken after the government had acted to bring into force Part I of the Criminal Justice Act 1993 through the Criminal Justice Act 1993 (Commencement No. 10) Order 1999, Statutory Instrument 1999 No. 1189 (C. 32). However, the Proceeds of Crime Act 2002 extends the anti money laundering regime to all criminal conduct which constitutes an offence in the United Kingdom.
United-Kingdom - Scotland			
United-Kingdom - Northern Ireland			

Annex Table 5

Instrument	PFI Convention		
Reference	**Art (1) point (a) first indent - Expenditure fraud**	**Art. 1 (1) point (a) second indent - Expenditure fraud**	**Art. 1 (1) point (a) third indent - Expenditure fraud**
Belgium	Art. 2 § 2 of Royal Decision of 31 May 1933	Art. 2 § 2 of Royal Decision of 31 May 1933	Art. 2 § 3 of Royal Decision of 31 May 1933
Denmark	§ 289a (1) Danish Penal Code.	§ 289a (1) Danish Penal Code.	§ 289a (2) Danish Penal Code.
Germany	§ 264 (1) point (1) and (4) or § 263 (1) German Penal Code.	§ 264 (1) point (3) or § 263 (1) German Penal Code	§ 264 (1) point (2) German Penal Code
Greece	Art. 4 (1) Act no. 2803/2000 or Art. 386 Greek Penal Code	Art. 4 (1) Act no. 2803/2000 or Art. 386 Greek Penal Code	Art. 4 (1) Act no. 2803/2000
Spain	Art. 309 Spanish Penal Code for frauds above €50 000, referred to as offence for amounts between €4000 and 50 000 by Art. 627 Spanish Penal Code	Art. 309 Spanish Penal Code for frauds above €50 000, referred to as offence for amounts between €4000 and 50 000 by Art. 627 Spanish Penal Code	Art. 306 Spanish Penal Code for frauds above €50 000, referred to as offence for amounts between €4000 and 50 000 by Art. 628 Spanish Penal Code
France	Art. 313-1 French Penal Code or Art. 441-1 French Penal Code or Art. 441-6 third indent French Penal Code.	-	Art. 314-1 French Penal Code
Ireland	Section 42 Criminal Justice (Theft and Fraud Offences) Act, 2001	Section 42 Criminal Justice (Theft and Fraud Offences) Act, 2001	Section 42 Criminal Justice (Theft and Fraud Offences) Act, 2001
Italy	Art. 316ter Italian Penal Code or Art. 640bis Italian Penal Code or, as regards fraud concerning the EAGGF, Art. 2 (1) Act no. 1986/898.	Art. 316ter Italian Penal Code or Art. 640bis Italian Penal Code.	Art. 316bis Italian penal Code
Luxembourg	Art. 496-1 Luxembourg Penal Code	Art. 496-1 and also Art. 496-3 Luxembourg Penal Code	Art. 496-2 Luxembourg Penal Code
the Netherlands	Art. 326 or Art. 225 (2) or Art. 227a Dutch Penal Code.	Art. 326 or Art. 227b Dutch Penal Code.	Art. 323a Dutch Penal Code
Austria	§ 146 and 147 Austrian Penal Code	§ 146 and 147 read together with § 2 Austrian Penal Code	§ 153 b Austrian Penal Code
Portugal	Art. 36 (1) of Decree-Law no. 28/84	Art. 36 (1) of Decree-Law no. 28/84	Art. 37 (1) of Decree-Law no. 28/84
Finland	Chapter 29 § 5 (1) Finnish Penal Code applicable to expenditures done on behalf of the European Communities due to reference in Chapter 29 § 9 (2) Finnish Penal Code	Chapter 29 § 5 (2) Finnish Penal Code applicable to expenditures done on behalf of the European Communities due to reference in Chapter 29 § 9 (2) Finnish Penal Code	Chapter 29 § 7 Finnish Penal Code applicable to expenditures done on behalf of the European Communities due to reference in Chapter 29 § 9 (2) Finnish Penal Code
Sweden	Chapter 9 § 1 (1) Swedish Penal Code	Chapter 9 § 1 (1) Swedish Penal Code	Chapter 9 § 3a Swedish Penal Code

United-Kingdom - England and Wales	Attempt to commit the offence of dishonestly obtaining by deception property (Section 15 Theft Act 1968) or a money transfer (Section 15A Theft Act 1968) or a pecuniary advantage (Section 16 Theft Act 1968). If committed by at least two persons, conspiracy to defraud is a common law offence.	Omissions may be statutory offences as suppression of documents to the detriment of another person with the intention to gain for himself or cause a loss to another (Section 20 Theft Act 1968); false accounting with the same intention by concealing or modifying any accounting document or providing misleading, false or deceptive information (Section 17 Theft Act 1968).	Theft under Section 7 Theft Act 1968 due to the definition in Section 5 (3) namely when "a person receives property from another [...] and is under the obligation to the other to retain or deal with that property or its proceedings in a particular way [...]". The offence requires that the person who receives funds is obliged to keep them separate.
United-Kingdom - Scotland	Fraud is a common law offence	-	Misapplication could be assumed as embezzlement under common law.
United-Kingdom - Northern Ireland	Attempt to commit the offence of dishonestly obtaining by deception property (Section 15 Theft (Northern Ireland) Act 1969) or a money transfer (Section 15A Theft (Northern Ireland) Act 1969) or a pecuniary advantage (Section 16 Theft (Northern Ireland) Act 1969). If committed by at least two persons, conspiracy to defraud is a common law offence.	Omissions may be statutory offences as suppression of documents to the detriment of another person with the intention to gain for himself or cause a loss to another (Section 20 Theft (Northern Ireland) Act 1969); false accounting with the same intention by concealing or modifying any accounting document or providing misleading, false or deceptive information (Section 17 Theft (Northern Ireland) Act 1969).	Theft under Section 7 Theft (Northern Ireland) Act 1969 due to the definition in Section 5 (3) namely when "a person receives property from another [...] and is under the obligation to the other to retain or deal with that property or its proceedings in a particular way [...]". The offence requires that the person who receives funds is obliged to keep them separate.

Annex Table 6

Instrument	PFI Convention		
Reference	**Art. 1 (1) point (b) first indent - Revenue fraud**	**Art. 1 (1) point (b) second indent - Revenue fraud**	**Art. 1 (1) point (b) third indent - Revenue fraud**
Belgium	Art. 259 point 2 and Art. 261 of the General law on customs and excise tax or Art. 10 Act of 11 September 1962 concerning the importation, exportation and transit of goods and related technologies. On VAT-fraud, Art. 73 to Art. 73bis of the VAT-Code.	Art. 259 point 2 and Art. 261 of the General law on customs and excise tax or Art. 10 Act of 11 September 1962 concerning the importation, exportation and transit of goods and related technologies. On VAT-fraud, Art. 73 to Art. 73bis of the VAT-Code.	Art. 259 point 2 and Art. 261 of the General law on customs and excise tax or Art. 10 Act of 11 September 1962 concerning the importation, exportation and transit of goods and related technologies. On VAT-fraud, Art. 73 to Art. 73bis of the VAT-Code.
Denmark	§ 289a (1) Danish Penal Code, insofar as fiscal fraud § 289 Danish Penal Code	§ 289a (1) Danish Penal Code, insofar as fiscal fraud § 289 Danish Penal Code	§ 289 Danish Penal Code as regards fiscal fraud
Germany	§ 370 (1) point (1) German Fiscal Code	§ 370 (1) point (2) German Fiscal Code	§ 370 (1) point (1) German Fiscal Code due to its reference to § 153 German Fiscal Code
Greece	Art. 4 (1) Act no. 2803/2000 or Art. 102 (1) Code of Customs	Art. 4 (1) Act no. 2803/2000 or Art. 102 (1) Code of Customs	Art. 4 (1) Act no. 2803/2000
Spain	Art. 305 (1) and (3) Spanish Penal Code for frauds above €50 000, referred to as offence for amounts between €4000 and 50 000 by Art. 628 Spanish Penal Code or Art. 2 of the Organic Law 12/1995 for smuggling.	Art. 305 (1) and (3) Spanish Penal Code for frauds above €50 000, referred to as offence for amounts between €4000 and 50 000 by Art. 628 Spanish Penal Code or Art. 2 of the Organic Law 12/1995 for smuggling.	Art. 305 (1) and (3) Spanish Penal Code for frauds above €50 000, referred to as offence for amounts between €4000 and 50 000 by Art. 628 Spanish Penal Code or Art. 2 of the Organic Law 12/1995 for smuggling.
France	Punishable criminally under Art. 414 to 417 and administratively under Art. 410 to 412 of the Customs Code or under Art. 1741 and administratively under Art. 1728 to 1729 of the General Code on taxes	Punishable criminally under Art. 414 to 417 and administratively under Art. 410 to 412 of the Customs Code or under Art. 1741 and administratively under Art. 1728 to 1729 of the General Code on taxes	Punishable criminally under Art. 414 to 417 and administratively under Art. 410 to 412 of the Customs Code or under Art. 1741 and administratively under Art. 1728 to 1729 of the General Code on taxes
Ireland	Section 42 Criminal Justice (Theft and Fraud Offences) Act, 2001	Section 42 Criminal Justice (Theft and Fraud Offences) Act, 2001	Section 42 Criminal Justice (Theft and Fraud Offences) Act, 2001
Italy	Art. 640bis Italian Penal Code or, for customs duties, Art. 282 to 292 of the amalgamated law in respect of custom matters for smuggling or, for taxes, Art. 2 Implementation Decree 2000/74 on the new provisions of offences concerning taxes on income and value added	Art. 640bis Italian Penal Code or, for customs duties, Art. 282 to 292 of the amalgamated law in respect of custom matters for smuggling or, for taxes, Art. 2 Implementation Decree 2000/74 on the new provisions of offences concerning taxes on income and value added	Art. 640bis Italian Penal Code or, for customs duties, Art. 282 to 292 of the amalgamated law in respect of custom matters for smuggling or, for taxes, Art. 2 Implementation Decree 2000/74 on the new provisions of offences concerning taxes on income and value added
Luxembourg	Art. 496-4 Luxembourg Penal Code	Art. 496-4 Luxembourg Penal Code	Art. 496-4 Luxembourg Penal Code

the Netherlands	Art. 326 or Art. 225 (2) or Art. 227a Dutch Penal Code or Art. 47 Customs Law or Art. 18 of the Import and Exports Act or Art. 68 State Taxes Act.	Art. 326 or Art. 225 (2) or Art. 227a Dutch Penal Code or Art. 47 Customs Law or Art. 18 of the Import and Exports Act or Art. 68 State Taxes Act.	Art. 47 Customs Law or Art. 225 (2), 227a and 227b Dutch Penal Code.
Austria	§ 33 Austrian Fiscal Penal Code (for taxes) and § 35 Austrian Fiscal Penal Code (for import or export duties or customs)	§ 33 Austrian Fiscal Penal Code (for taxes) and § 35 Austrian Fiscal Penal Code (for import or export duties or customs)	§ 33 Austrian Fiscal Penal Code (for taxes) and § 35 Austrian Fiscal Penal Code (for import or export duties or customs)
Portugal	Art. 23 Fiscal Offence Code or Art. 23 Customs Offence Code	Art. 23 Fiscal Offence Code or Art. 23 Customs Offence Code	Art. 23 Fiscal Offence Code and Art. 23 Customs Offence Code
Finland	Chapter 29 § 1 Finnish Penal Code applicable to a levy collected on behalf of the European Communities due to reference in Chapter 29 § 9 (1) (2) Finnish Penal Code	Chapter 29 § 1 Finnish Penal Code applicable to a levy collected on behalf of the European Communities due to reference in Chapter 29 § 9 (1) (2) Finnish Penal Code	Chapter 29 § 1 Finnish Penal Code applicable to a levy collected on behalf of the European Communities due to reference in Chapter 29 § 9 (1) (2) Finnish Penal Code
Sweden	Chapter 9 § 1 (1) Swedish Penal Code or § 2 Fiscal Penal Code or the law on penal charges for smuggling	Chapter 9 § 1 (1) Swedish Penal Code or § 2 Fiscal Penal Code or the law on penal charges for smuggling	-
United-Kingdom - England and Wales	Cheating revenue is a common law offence. Section 167 and 168 or 170 Customs and Management Excise Act 1979 or Section 72 VAT Act 1994.	Cheating revenue is a common law offence. Section 167 and 168 or 170 Customs and Management Excise Act 1979 or Section 72 VAT Act 1994.	-
United-Kingdom - Scotland	Section 167 and 168 or 170 Customs and Management Excise Act 1979 or Section 72 VAT Act 1994.	Section 167 and 168 or 170 Customs and Management Excise Act 1979 or Section 72 VAT Act 1994.	
United-Kingdom - Northern Ireland	Cheating revenue is a common law offence. Section 167 and 168 or 170 Customs and Management Excise Act 1979 or Section 72 VAT Act 1994.	Cheating revenue is a common law offence. Section 167 and 168 or 170 Customs and Management Excise Act 1979 or Section 72 VAT Act 1994.	

Annex Table 7

Instrument	PFI Convention				First Protocol
Reference	**Art. 1 (3) - Preparative action**	**Art. 2 (1) - Penalties for fraud**	**Art. 2 (1) - Penalties for serious fraud**	**Art. 2 (2) - Penalties for minor fraud**	**Art. 4 (1) - Assimilation of Community officials**
Belgium	Art. 51 Belgian Penal Code penalises the attempt of and Art. 67 Belgian Penal Code the participation. Art. 259 point 1 and Art. 260 of the General law on customs and excise tax provides a specific offence for preparing documents intended for customs fraud.	Art. 2 § 2 Royal Decision 1933: Deprivation of liberty from 6 months to 3 years and financial fine; Art. 2 § 3 Royal Decision 1933: Deprivation of liberty from 6 months to 5 years; Art. 2 § 4 Royal Decision 1933: Deprivation of liberty from 1 to 5 years and financial fine; Art. 259, Art. 260 and Art. 261 General law on customs and excise tax: financial fine; Art. 73 VAT Code: financial fine and deprivation of liberty up to 2 years. Art. 73bis VAT Code: financial fine and deprivation of liberty up to 5 years.	-	-	-
Denmark	§ 21 and § 23 Danish Penal Code provide for punishing attempt and participation in all crimes under the Danish Penal Code. § 171 Danish Penal Code incriminates document forgery.	Deprivation of liberty up to 4 years or financial fine for all crimes under § 289 or § 289a Danish Penal Code	-	-	-
Germany	§ 264 (1) point (4) German Penal Code and § 25 to 27 of the German Penal Code for participation. § 267 German Penal Code incriminates document forgery.	Deprivation of liberty up to 5 years or financial penalty	-	As regards revenue, fraud for sums below €125 alternative measure other than criminal sanctions	Assimilation for fraud committed by Community officials ensured through reference made in Art. 2 § 1 (2) of the Federal Act on the transposition of the protocol to the PFI Convention

Greece	Art. 6 Act no. 2803/2000 unless punished by another provision or as attempt to a crime punished under another provision (deprivation of liberty up to 1 year)	Deprivation of liberty up to 10 years (Art. 4 (2) Act no. 2803/2000), unless below 5878 Euro	Deprivation of liberty up to 20 years (Art. 4 (2) Act no. 2803/2000) above 73475 Euro	Deprivation of liberty up to 1 year or financial fine (Art. 5 Act no. 2803/2000) below 5878 Euro	-
Spain	Art. 15 (1) in connection with Art. 305, 306 and 309 as well as Art. 15 (2) in connection wit Art. 627 and 628 Spanish Penal Code. Articles 27and 28 Spanish Penal Code for participation.	Penalty from 1 to 2 months, that is to say, a daily pecuniary penalty from €2 to 400 for the period from 1 to 2 months (Art. 627 and 628 Spanish Penal Code), unless below 4000 Euro	Deprivation of liberty from 1 to 4 years and financial penalty (Art. 305, 306 and 309 Spanish Penal Code) if the involved total amount exceeds 50 000 Euro	As regards fraud for sums below €4000 'non criminal' sanctions are foreseen.	Assimilation for fraud committed by Community officials ensured through the wide definition of official in Art. 24 (2) Spanish Penal Code
France	Article 121-4 French Penal Code for attempt and Article 121-6 French Penal Code for participation	Expenditure fraud: Art. 313-2 French Penal Code: punished by 5 years deprivation of liberty and financial fine; Art. 441-2 French Penal Code: 3 years deprivation of liberty and financial fine; Art.314-2 and Art. 314-3 French Penal Code: 3 years deprivation of liberty and financial fine, Revenue fraud: first class customs misdemeanour under Art. 414 Customs Code: 3 years deprivation of liberty and financial fine	-	No reference to minor fraud, but administrative penalties against VAT offences and customs fraud. VAT fraud	-
Ireland	Participation, attempt and instigation punished as the principal offence under Section 42 point (b) Criminal Justice (Theft and Fraud Offences) Act, 2001	Section 42 Criminal Justice (Theft and Fraud Offences) Act, 2001: maximum of an unlimited fine and/or imprisonment for 5 years maximum.	-	-	Section 45 Criminal Justice (Theft and Fraud Offences) Act, 2001

Italy	Art. 110 Italian Penal Code on participation.	Art. 640bis Italian Penal Code: Deprivation of liberty from 1 to 6 years. Art. 316ter Italian Penal Code: Deprivation of liberty from 6 months to 3 years; Art. 316bis Italian Penal Code: Deprivation of liberty from 6 months to 4 years; Art. 2 (1) Act no. 1986/898: deprivation of liberty from 6 months to 3 years	Art. 282 to 292 of the amalgamated law in respect of custom matters provides for criminal financial penalties, Art. 295 of the same law provides for deprivation of liberty up to 3 years in addition to the financial penalty, if exceeding 49 993,03 Euro	Art. 2 (1) Act no. 1986/898 and for the custom crimes punishable under Art. 282 to 292 of the amalgamated law in respect of custom matters (Art. 295bis of that law), below €3 999.96, financial administrative sanction.	-
Luxembourg	Art. 66 Luxembourg Penal Code on complicity. Preparation of false or incorrect documents and statements may also be fall under Art. 194 Luxembourg Penal Code (forgery)	For offences under Art. 496, 496-1, 496-2, 496-4 Luxembourg Penal Code: deprivation of liberty from one month to 5 years, as well as a financial fine. For offences under Art. 496-3, deprivation of liberty from 8 days to 2 years and financial fine.	-	-	-
the Netherlands	Art. 225 (1) Dutch Penal Code	Art. 225 (1), (2) Dutch Penal Code, deprivation of liberty up to 6 years or financial fine. Art. 227a and Art. 227b Dutch Penal Code, deprivation of liberty up to 4 years or financial fine. Art. 323a and Art. 326 Dutch Penal Code, deprivation of liberty up to 3 years or financial fine. Art. 68 State Taxes Act, deprivation of liberty up to 6 months or financial fine. Art. 18 of the Import and Exports Act, deprivation of liberty up to 6 years or financial fine. Art. 48 of the Customs law, deprivation of liberty up to 6 years or financial fine or the equivalent of the sum of duties due, if higher than €45 000. Art. 47 of the Customs Law, deprivation of liberty up to 1 year or financial fine or the equivalent of the sum of duties due, if higher than €11 250.	-	-	-

Austria	§ 15 in connection with § 146 and § 153b Austrian Penal Code for expenditure and § 13 in connection with § 33 and § 35 Austrian Fiscal Penal Code for revenues	§ 146 and § 147 (2) Austrian Penal Code: Deprivation of liberty up to 3 years for amounts exceeding €2 000 and § 153b (3) Austrian Penal Code: deprivation of liberty up to 2 years for amounts exceeding €2 000. For fraud concerning revenue, a financial or custodial penalty imposed by the fiscal administration is foreseen unless considered a serious fraud (beyond € 37500 for customs and € 75 000 for tax fraud)	Serious fraud for expenditure at €40 000, § 146 and § 147 (3) Austrian Penal Code: Deprivation of liberty from 1 to 10 years; § 153b (4) Austrian Penal Code: deprivation of liberty from 6 months to 5 years. Serious fraud for customs at €37 500 and for taxes at €75 000, § 33 (5) and § 35 (4) and § 53 (2) point (a) Austrian Fiscal Penal Code: Deprivation of liberty up to 2 years, if exceeding €500 000, up to 5 years	For fraud concerning expenditure, § 146 Austrian Penal Code and § 153b (1) Austrian Penal Code: Deprivation of liberty up to 6 months or financial penalty below €2 000.	-
Portugal	Art. 2 on liability for action taken on behalf of others and Art. 4 for attempt in connection with offences punished under Art. 36 and 37 Decree-Law no. 28/84 for expenditure and Art. 6 on liability for action taken on behalf of others in connection with Art. 23 (2) Portuguese Fiscal Offence Code for revenues	For fraud concerning expenditure: Deprivation of liberty from 1 to 5 years and financial fine when punishable under Art. 36 of Decree-Law no. 28/84 and deprivation of liberty up to 2 years and a financial fine when punishable under Art. 37 of Decree-Law no. 28/84. For fraud concerning revenue: Deprivation of liberty up to 3 years and financial fine for crimes under Art. 23 Portuguese Fiscal Offence Code.	-	-	-
Finland	Chapter 5 § 1 in connection with Chapter § 29 (1) and (5) Finnish Penal Code	Deprivation of liberty up to 2 years or financial penalty	-	-	-

Sweden	Chapter 15 § 11 Swedish Penal Code	Deprivation of liberty up to 2 years for all crimes falling under Chapter 9 § 1 and § 3a and Chapter 15 § 11 Swedish Criminal Code and § 2 Fiscal Criminal Code. For attempting fraud according to Chapter 9 § 1 and § 3a, § 11 of Chapter 9 provides specifically for their punishment.	-	-	-
United-Kingdom - England and Wales	Participation and instigation punished as a principal offence under Section 8 of the Accessories and Abettors Act 1861. Incitement (crime) is a common law offence in itself. Attempt punishable under Section 1 Criminal Attempts Act 1981. Using a false instrument is contrary to the Forgery and Counterfeiting Act 1981.	For fraud concerning expenditure: for offences under Section 15 and 15A Theft Act 1968, 10 years imprisonment maximum; under Sections 17 and 20 of that Act, 7 years imprisonment maximum; under Section 16 of that Act, 5 years imprisonment maximum. For fraud concerning revenue: For cheating the revenue, since common law, no limit on penalties. For offences under Section 170 Customs and Management Excise Act 1979 and Section 72 VAT Act 1994, 7 years imprisonment maximum and/or unlimited fine; for offences under Sections 167 and 168 Customs and Management Excise Act 1979, 2 years imprisonment maximum and/or unlimited fine	-	-	-
United-Kingdom - Scotland	In Scotland, participation is punishable under Section 293 Criminal Procedure (Scotland) Act 1995; incitement and instigation are common law offences. Attempt is regarded as a crime under Section 294 Criminal Procedure (Scotland) Act 1995.	For fraud concerning expenditure: For fraud and embezzlement, since common law, no limit on penalties. For fraud concerning revenue: For offences under Section 170 Customs and Management Excise Act 1979 and Section 72 VAT Act 1994, 7 years imprisonment maximum and/or unlimited fine; for offences under Sections 167 and 168 Customs and Management Excise Act 1979, 2 years imprisonment maximum and/or unlimited fine			

United-Kingdom - Northern Ireland	Participation and instigation punished as a principal offence under Section 8 of the Accessories and Abettors Act 1861 applicable also to Northern Ireland. Incitement (crime) is a common law offence in itself. Attempt punishable under Article 3 of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983. Using a false instrument is contrary to the Forgery and Counterfeiting Act 1981, applicable also to Northern Ireland.	For fraud concerning expenditure: for offences under Section 15 and 15A Theft (Northern Ireland) Act 1969, 10 years imprisonment maximum; under Sections 17 and 20 of that Act, 7 years imprisonment maximum; under Section 16 of that Act, 5 years imprisonment maximum. For fraud concerning revenue: For cheating the revenue, since common law, no limit on penalties. For offences under Section 170 Customs and Management Excise Act 1979 and Section 72 VAT Act 1994, 7 years imprisonment maximum and/or unlimited fine; for offences under Sections 167 and 168 Customs and Management Excise Act 1979, 2 years imprisonment maximum and/or unlimited fine			

Annex Table 8

Instrument	First Protocol			
Reference	**Art. 2 - Passive Corruption**	**Art. 3 - Active Corruption**	**Art. 4 (2) and (3) - Assimilation of members of the European Institutions**	**Art. 5 - Penalties for corruption**
Belgium	Art. 246 § 1 and Art. 247 § 2 Belgian Penal Code, which are applicable to foreign public officials and officials of a public international organisation by reference in Art. 250 and Art. 251 Belgian Penal Code	Art. 246 § 2 and Art. 247 § 2 Belgian Penal Code, which are applicable to foreign public officials and officials of a public international organisation by reference in Art. 250 and Art. 251 Belgian Penal Code	-	Active and passive corruption alike (Art. 247 § 2 Belgian Penal Code): Deprivation of liberty from 6 months to 2 years and financial fine
Denmark	§ 144 Danish Penal Code comprising foreign public officials and officials of a public international organisation.	§ 122 Danish Penal Code comprising foreign public officials and officials of a public international organisation	Reference to representative bodies of international organisations in § 122 and § 144 Danish Penal Code. For members of the European Commission the special procedure for ministers' liability is applicable.	Active corruption: Deprivation of liberty up to 3 years; passive corruption: Deprivation of liberty up to 6 years
Germany	§ 332 German Penal Code applicable for other Member States' and Community officials in the sense of the protocol due to a reference thereto made in Art. 2 § 1 (2) of the Federal Act on the transposition of the protocol to the PFI Convention	§ 334 German Penal Code on active corruption applicable for other Member States' and Community officials due to reference made in Art. 2 § 1 (2) of the Federal Act on the transposition of the protocol to the PFI Convention	Criminal liability of members of the European Commission, Court of Justice and Court of Auditors provided for through reference made in Art. 2 § 1 (1) and (2) of the Federal Act on the transposition of the protocol to the PFI Convention. No liability for national members of parliament and hence not for members of the European Parliament. Active corruption for members of the European Parliament and of the German national parliaments is a criminal offence according to § 108e German Penal Code	Deprivation of liberty from 6 months (passive corruption) and 3 months (active corruption) up to 5 years or financial penalty
Greece	Art. 3 Act no. 2803/2000 or Art. 235 Greek Penal Code.	Art. 3 Act no. 2803/2000 or Art. 236 Greek Penal Code	Criminal liability of members of the European Commission, the European Parliament, Court of Justice and Court of Auditors provided for through reference made in Art. 10 (2) Act no. 2803/2000 to Articles 3 (active and passive corruption), 4, 5 and 6 (fraud)	Deprivation of liberty of at least 1 year

Spain	Art. 420 Spanish Penal Code, the application for Community officials in the sense of the protocol due to a wide definition of official in Art. 24 (2) Spanish Penal Code	Art. 423 Spanish Penal Code, the application for Community officials in the sense of the protocol due to a wide definition of official in Art. 24 (2) Spanish Penal Code as well as the reference in Art. 445bis Spanish Penal Code	Criminal liability of members of the European Commission, Court of Justice and Court of Auditors provided for through the wide definition of Art. 24 (2) Spanish Penal Code. Assimilation for members of the European Parliament to the chambers of the Spanish parliaments is ensured through explicit mentioning in Art. 24 (1) Spanish Penal Code.	Art. 420 and 423 Spanish Penal Code: deprivation of liberty from 1 to 4 years, in case the official does not succeed to act, from 1 to 2 years.
France	Art. 435-1 French Penal Code	Art. 435-2 French Penal Code punishes	Assimilation of the Members of the European Commission, the European Parliament, the European Court of Justice and the European Court of Auditors to national officials, other MS' officials and Community officials by enlisting these persons explicitly in Art. 435-1 and 435-2 French Penal Code, but not assimilated to members of the national government, the national parliament, the highest courts or the court of auditors	For offences of active and passive corruption under Art. 435-1 and 435-2 French Penal Code: deprivation of liberty of 10 years and financial fine.
Ireland	Section 44 Criminal Justice (Theft and Fraud Offences) Act, 2001. The application for Member States' and Community officials in the sense of the Protocol due to a reference thereto made in Section 40 Criminal Justice (Theft and Fraud Offences) Act, 2001	Section 43 Criminal Justice (Theft and Fraud Offences) Act, 2001. The application for Member States' and Community officials in the sense of the Protocol due to a reference thereto made in Section 40 Criminal Justice (Theft and Fraud Offences) Act, 2001	Section 40 (1) Criminal Justice (Theft and Fraud Offences) Act, 2001: assimilation to national officials, including ministers of the government, the Attorney General, the Controller and Auditor General, members of the national parliament, judges of a court in the state, director of public prosecutions, directors of public bodies.	Section 43 Criminal Justice (Theft and Fraud Offences) Act, 2001 (active corruption): fine or imprisonment for a term not exceeding 5 years or both. Section 44 Criminal Justice (Theft and Fraud Offences) Act, 2001 (passive corruption): same penalty.
Italy	Art. 319 Italian Penal Code. The application for Member States' and Community officials in the sense of the protocol due to a reference thereto made in Art. 322bis (1) Italian Penal Code	Art. 321 Italian Penal Code. The application for Member States' and Community officials in the sense of the protocol due to a reference thereto made in Art. 322bis (1) Italian Penal Code	Criminal liability of members of the European Commission, the European Parliament, Court of Justice and Court of Auditors provided for through reference made in Art. 322bis (1) point 1 of the Italian Penal Code. As regards the members of the Court of Justice, Art. 319ter Italian Penal Code provides for a specific incrimination as regards judicial proceedings, which is likewise to be considered applicable for active and passive corruption regarding members of the Court of Justice	Deprivation of liberty from 2 to 5 years for active and passive corruption alike, for attempted corruption the punishment is reduced by a third due to Art. 322 Italian Penal Code, as regards corruption aiming at the conclusion of contracts the punishment may be augmented by a third (Art. 319bis Italian Penal Code), for crimes under Art. 319ter Italian Penal Code, deprivation of liberty from 3 to 8 years.

Luxembourg	Art. 246 Luxembourg Penal Code. The application to other Member States' and Community officials in the sense of the Protocol due to a reference in Article 252 (1) Luxembourg Penal Code.	Art. 247 Luxembourg Penal Code. The application to other Member States' and Community officials in the sense of the Protocol due to a reference in Article 252 (1) Luxembourg Penal Code.	Art. 252 Luxembourg Penal Code refers to members of the Commission, the European Parliament, the Court of Justice and the Court of Auditors. Art. 40 Act on judicial organisation: assimilates the members of the European Commission to the members of the government under accusation by virtue of Art. 82 of the Constitution for the offences referred to in Art. 496-1 to 496-4 and Art. 246 to 252 Luxembourg Penal Code committed in the exercise of their functions. Art. 503-1 Luxembourg Penal Code assimilates the members of the European Court of Justice to the members of the courts other than the Supreme Court (Cour de cassation) for the offences referred to in Art. 496-1 to 496-4 and Art. 246 to 252 Luxembourg Penal Code committed in the exercise of their functions (application of Art. 485 Penal Code).	Active and passive Corruption alike: Deprivation of liberty from 5 years up to 10 years and a financial fine. As regards corruption of judges, either active or passive: Art. 250 Luxembourg Penal Code, deprivation of liberty from 10 up to 15 years and a financial fine
the Netherlands	Art. 363 Dutch Penal Code. The application to other Member States' and Community officials in the sense of the protocol due to a reference in Article 364a (1) which gives a definition of foreign public official as a person holding a public function on behalf of a foreign state or a public international organisation.	Art. 177 Dutch Penal Code. The application to other Member States' and Community officials in the sense of the protocol due to a reference in Article 178a (1) which gives a definition of foreign public official as a person holding a public function on behalf of a foreign state or a public international organisation.	Criminal liability of members of the European Commission, the European Parliament, Court of Justice and Court of Auditors provided for through reference made in Art. 84 Dutch Penal Code extending the notion of officials to members appointed to a function or elected thereto. As regards the members of the Court of Justice, Art. 178a (3) and Article 364a (3) Dutch Penal Code provides for a specific incrimination as regards judicial corruption, which is likewise to be considered applicable for active and passive corruption regarding members of judicial bodies of international organisations. Members of the Commission and of the European Parliament are subject to a specific penal procedure in front of the Hoge Raad foreseen for members of the Dutch government and Parliament due to Art. 94 Act on Judicial Organisation.	Active and passive corruption alike: Deprivation of liberty up to 4 years or financial fine. As regards corruption of judges: For passive corruption, deprivation of liberty up to 9 years and in penal proceedings 12 years, for active corruption, deprivation of liberty up to 6 years and in penal proceedings 9 years, for all crimes also alternatively financial fine .

Austria	§ 304 (1) Austrian Penal Code, which is through § 74 (1) point (4b) explicitly applicable to other Member States' or Community officials	§ 307 (1) point (1) Austrian Penal Code, which is explicitly in § 74 (1) point (4b) applicable to other Member States' and Community officials	Criminal liability of members of the European Commission, Court of Justice and Court of Auditors provided for by the extensive definition of Community officials given in § 74 (1) point (4b) Austrian Penal Code.	For passive corruption: Deprivation of liberty up to 3 years, if the advantage exceeds €2 000 up to 5 years. However, if punishable under § 153 Austrian Penal Code, deprivation of liberty up to 6 months or financial penalty for a damage below €2 000, deprivation of liberty up to 3 years for a damage between €2 000 and 40 000 and deprivation of liberty from 1 to 10 years for a damage beyond €40 000. For active corruption: Deprivation of liberty up to 2 years.
Portugal	Art. 373 (1) Portuguese Penal Code. The application for Member States' and Community officials in the sense of the protocol due to a reference in Art. 386 (3) points (a) and (b)	Art. 374 referring to the definitions in Art. 373 Portuguese Penal Code. The application for Member States' and Community officials in the sense of the protocol due to a reference in Art. 386 (3) points (a) and (b)	Criminal liability of members of the European Commission and the European Parliament fall under the definition of political functions in Art. 3 Act no. 34/87. Art. 16 and Art.18 Act no. 34/87 establish specific crimes as regards passive and active corruption for these offences. Members of the Court of Justice and Court of Auditors seem to fall under the definition of "magistrates" in Art. 386 (3) point (a) Portuguese Penal Code.	Deprivation of liberty from 1 to 8 years (passive corruption under Art. 372 Portuguese Penal Code) or from to 2 to 8 years (passive corruption under Art. 16 Act no. 34/87) and 6 months to 5 years (active corruption under Art. 374 Portuguese Penal Code and Art. 18 Act no. 34/87 alike)
Finland	Chapter 40 § 1 (1) and (2) Finnish Penal Code. The application for Member States' and Community officials in the sense of the protocol due to a reference in Chapter 40 § 12 (3) and a definition of foreign public official as a person who attends to a public function on behalf of a foreign state or a public international organisation according to Chapter 40 § 11 (4).	Chapter 16 § 13 Finnish Penal Code. The application for Member States' and Community officials in the sense of the protocol due to a reference in Chapter 16 § 20 to the definition of foreign public official as a person who attends to a public function on behalf of a foreign state or a public international organisation according to Chapter 40 § 11 (4)	Criminal liability of members of the European Commission, Court of Justice and Court of Auditors provided for by the extensive definition of Community officials given in Chapter 40 § 11 (4) Finnish Penal Code. No liability for national members of parliament and hence not for members of the European Parliament. Active corruption for members of the European Parliament and of the national parliaments is a criminal offence according to Chapter 16 § 14a Finnish Penal Code due to a reference in Chapter 16 § 20 to the definition of member of a foreign parliament according to Chapter 40 § 11 (6)	Deprivation of liberty up to 2 years or financial penalty for active and passive corruption alike and in aggravated cases, Chapter 40 § 2 and Chapter 16 § 14 augment fines to deprivation of liberty from 4 months to 4 years

Sweden	Chapter 20 § 2 (1) Swedish Penal Code, the application for other Member States' and Community officials in the sense of the protocol due to a reference in Chapter 20 § 2 (2) point 4 comprising a wide definition of persons "exercising public powers".	Chapter 17 § 7 Swedish Penal Code, the application for other Member States' and Community officials in the sense of the protocol due to a reference in Chapter 20 § 2 (2) point 4 comprising a wide definition of persons "exercising public powers".	Criminal liability of members of the European Commission, European Parliament, Court of Justice and Court of Auditors concerning fraud is provided for by the general application of Chapter 9 § 1. As regards active and passive corruption Chapter 20 § 2 (2) point 6 Swedish Penal Code enlists members of the European Commission, European Parliament, Court of Justice and Court of Auditors as possible offenders and offended. Chapter 17 § 17 regulates the role of public prosecutor in this regard.	Deprivation of liberty up to 2 years or financial penalty for active and passive corruption alike and, for passive corruption, in aggravated cases, Chapter 20 § 2 augments the fine to deprivation of liberty to 6 years
United-Kingdom - England and Wales	Bribery is a common law offence. Section 108 (1) Anti-terrorism, Crime and Security Act 2001 declares it immaterial if the person who receives or is offered a reward has no connection wit the United Kingdom and the functions are carried out outside the United Kingdom. Active and passive Corruption of public bodies is also criminalised by Section 1 Public Bodies Corrupt Practices Act 1889; Section 108 (3) Anti-terrorism, Crime and Security Act 2001 ensures that "public body" "includes any body which exists in a country or territory outside the United Kingdom and is equivalent to" a public body in the United Kingdom. The United Kingdom considers that the application for Member States' and Community officials in the sense of the protocol was put beyond doubt by these amendments contained in the Anti-terrorism, Crime and Security Act 2001.		-	For bribery, since common law, no limit on penalties. Under Section 1 Public Bodies Corrupt Practices Act 1889, the offender is guilty of a misdemeanour and liable: (a) on summary conviction to imprisonment for a term not exceeding 6 months or to a fine up to the statutory maximum or to both; (b) on conviction on indictment to imprisonment for a term not exceeding 7 years or to a fine or to both.
United-Kingdom - Scotland	In Scotland, bribery as a common law offence is limited to judicial officers. Active and passive Corruption of public bodies is criminalised by Section 1 of the Public Bodies Corrupt Practices Act 1889, applicable also to Scotland; Section 108 (3) Anti-terrorism, Crime and Security Act 2001, enacted through Section 68 Criminal Justice (Scotland) Act 1993, ensures that "public body" "includes any body which exists in a country or territory outside the United Kingdom and is equivalent to" a public body in the United Kingdom. The United Kingdom considers that the application for Member States' and Community officials in the sense of the protocol was put beyond doubt by these amendments contained in the Anti-terrorism, Crime and Security Act 2001.			

United-Kingdom - Northern Ireland	Bribery is a common law offence. Section 108 (1) Anti-terrorism, Crime and Security Act 2001 declares it immaterial if the person who receives or is offered a reward has no connection wit the United Kingdom and the functions are carried out outside the United Kingdom. Active and passive Corruption of public bodies for deeds is also criminalised by Section 1 Public Bodies Corrupt Practices Act 1889, applicable also to Northern Ireland; Section 108 (3) Anti-terrorism, Crime and Security Act 2001 ensures that "public body" "includes any body which exists in a country or territory outside the United Kingdom and is equivalent to" a public body in the United Kingdom. The United Kingdom considers that the application for Member States' and Community officials in the sense of the protocol was put beyond doubt by these amendments contained in the Anti-terrorism, Crime and Security Act 2001.		

Annex Table 9

Instrument	Second Protocol (not yet entered into force)	PFI Convention
Reference	**Art. 2 - Money laundering related to the proceeds of fraud, at least in serious cases, and of active and passive corruption**	**Art. 3 - Criminal liability of heads of businesses**
Belgium	Art. 505 Belgian Penal Code referring to all proceeds of any crime according to Art. 42 Belgian Penal Code without enlisting specific predicate offences	-
Denmark	§ 290 Danish Penal Code as modified by Act no. 465 of 7 June 2001 (Said Act abolished § 284 Danish Penal Code originally referring explicitly to § 289 (2) and § 289a (fraud) as predicate offences).	-
Germany	§ 261 German Penal Code	-
Greece	Act no. 2331/1995 on Prevention and Combating the Legislation of Income from Criminal Activities penalises money laundering considering fraud according to Art. 4 and 6 Act no. 2803/2000	Art. 7 Act no. 2803/2000 provides specifically for criminal liability of heads of businesses
Spain	Art. 301 Spanish Penal Code	Art. 31 Spanish Penal Code
France	Art. 324-1 French Penal Code. Specific provision for money laundering of the proceeds derived from tax offences (Art. 415 Customs Code).	-
Ireland	Section 31(1) Criminal Justice Act, 1994, as modified by the Section 21 Criminal Justice (Theft and Fraud Offences) Act, 2001	-
Italy	Not yet ratified: Art. 648bis Italian Penal Code	-
Luxembourg	Not yet ratified: Art. 506-1 Luxembourg Penal Code	-
the Netherlands	Art. 420bis Dutch Penal Code	Art. 51 (2) point (2) Dutch Penal Code provides for punishment of natural persons "who have ordered the commission of the criminal offence and [...] those in control of such unlawful behaviour".
Austria	Not yet ratified: § 165 (1) Austrian Penal Code	As regards misapplication of expenditure, due to the structure of the offence, a specific provision for criminal liability of heads of businesses is provided for in § 153b (2) Austrian Penal Code.
Portugal	Art. 1 Decree-Law no. 325/95	Art. 2 on liability for action taken on behalf of others in connection with offences punished under Art. 36 and 37 Decree-Law no. 28/84 for expenditure and Art. 6 on liability for action taken on behalf of others in connection with Art. 23 (2) Portuguese Fiscal Offence Code. Art. 12 Portuguese Penal Code provides this criminal liability in general for all criminal offences.
Finland	Chapter 32 § 6 Finnish Penal Code	Chapter 5 § 8 Finnish Penal Code provides specifically for criminal liability of heads of businesses
Sweden	Chapter 9 § 6a Swedish Penal Code	-

United-Kingdom - England and Wales	Section 340 Proceeds of Crime Act 2002, applicable to all three jurisdictions	For offences under Sections 15, 16 and 17 Thefts Act 1968, Section 18 of that Act provides specifically for criminal liability of heads of businesses. The United Kingdom indicates that according to Schedule 1 of the Interpretation Act 1978 the principle of criminal liability of heads of business is acknowledged in case of possibility of attributing the offence to the person, also in case of lack of control or supervision
United-Kingdom - Scotland		The United Kingdom indicates that according to Schedule 1 of the Interpretation Act 1978, applicable also to Scotland, the principle of criminal liability of heads of business is acknowledged in case of possibility of attributing the offence to the person, also in case of lack of control or supervision
United-Kingdom - Northern Ireland		For offences under Sections 15, 16 and 17 Theft (Northern Ireland) Act 1969, Section 18 of that Act provides specifically for criminal liability of heads of businesses. The United Kingdom indicates that according to Section 37 of the Interpretation (Northern Ireland) Act 1954, applicable also to Northern Ireland, the principle of criminal liability of heads of business is acknowledged in case of possibility of attributing the offence to the person, also in case of lack of control or supervision

Annex Table 10

Instrument	Second Protocol (not yet entered into force)		
Reference	**Art. 3 (1) - Liability of legal persons for fraud, active corruption or money laundering**	**Art. 3 (2) - Liability of legal persons for lack of supervision and control**	**Art. 4 (1) - Sanctions for liability under Art. 3**
Belgium	Art. 5 Belgian Penal Code	-	Art. 7bis Belgian Penal Code provides for a criminal financial penalty and to take other measures, namely winding up of the company, closure of the enterprise or of some of its establishments, temporary suspension of activities, publication of the verdict.
Denmark	§ 25 to § 27 Danish Penal Code provide for criminal liability of legal persons, who are held responsible for an act of any of their members (originally § 306 foresaw the legal persons' criminal liability specifically for the offences of § 122, § 144 and § 289a, yet, § 306 was modified by Act no. 378 of 6.6.2002 extending it to all crimes under the Penal Code, hence comprising also money laundering)	-	Legal persons are sanctioned with financial fines.
Germany	§ 30 Act on administrative sanctions provides for liability of legal persons for all criminal offences	§ 30 in relation with § 130 Act on administrative sanctions provides for liability of legal persons for lack of supervision and control for all criminal offences	administrative /'non criminal' fines of up to 1 Mio. Euro: §. 30 Act on administrative sanctions in combination with other measures, such as civil law action for damages or commercial law sanctions, such as a winding up of the company in serious cases
Greece	Art. 8 Act no. 2803/2000 provides for liability of legal persons for all criminal offences	Art. 8 Act no. 2803/2000 provides for liability of legal persons for all criminal offences	Art. 8 Act no. 2803/2000 provides for financial administrative fines or permanent or temporary exclusion from entitlement to public benefits or aid or for temporary or permanent disqualification from the practice of commercial activities. The fines are imposed by an administrative authority and temporary measures may be imposed from 1 month up to 2 years.
Spain	Possible civil liability under circumstances set in Art. 301 Spanish Penal Code allowing for the application of Art. 129 Spanish Penal Code.	-	Art. 31 Spanish Penal Code provides for civil responsibility of legal persons. Art. 129 foresees possible additional measures.

France	Art. 121-2 first indent Penal Code foresees that legal persons, except public ones, are liable to criminal prosecution for offences committed on their behalf by their representatives or organs in the cases specified by law. Art. 121-2 second indent provides for liability of territorial communities limited to the activities subject to sub-contracting. Criminal liability for the following offences: fraud offences as defined by Articles 313-1 to 313-3 and Art. 313-6 (1) French Penal Code (Art. 313-9 French Penal Code); money laundering as defined by Art. 324-1 (Art. 324-9 Penal Code); forgery as defined by Art. 441-1 to 441-6 French Penal Code (Art. 441-12 French Penal Code). Criminal liability for corruption offences as defined by Art. 435-2,435-3, 435-4 French Penal Code (Art. 435-6).	-	For all offences: Art. 313-9, 324-9 and Art. 435-6 French Penal Code refer to Art. 131-37 French Penal Code imposing a fine up to 5 times the maximum amount applied to natural persons (Art. 131-38); b) penalties mentioned in Article 131-39 (winding up, interdiction to carry out professional or social activities during which the offence was committed, placing under judicial supervision; definitive or provisional closing of the firm's establishments; exclusion from entitlement to public procurement; interdiction to appeal to public investment; interdiction to issue checks or use credit card; confiscation of the instrument or the proceed of the offence; dissemination of the judgement).
Ireland	The Interpretation Act 1937 reflects the opinion that there is no distinction between natural and legal persons.	-	-
Italy	Not yet ratified: Art. 5 of the Implementation decree n. 2001/231 together with Art. 11 (1) point (a) Act no. 2000/300 ratifying and transposing the PFI Convention etc. provides for liability of legal persons provides for liability of legal persons for fraud and active and passive corruption	Not yet ratified: Art. 7 of the Implementation decree n. 2001/231 together with Art. 11 (1) point (a) Act no. 2000/300 ratifying and transposing the PFI Convention etc. provides for liability of legal persons for lack of supervision and control regarding fraud and active and passive corruption	Not yet ratified: administrative /'non criminal' financial fines according to Art. 10 to 12 of the Implementation decree n. 2001/231 in combination with other measures, such as a winding up of the company, exclusion from entitlement to public benefits, temporary or permanent disqualification from commercial practice, prohibition to contract with the public authorities and prohibition to advertise its goods or services in serious cases
Luxembourg	Not yet ratified: Concept of liability of legal persons still to be introduced	Not yet ratified: Concept of liability of legal persons still to be introduced	Not yet ratified: Concept of liability of legal persons still to be introduced
the Netherlands	Art. 51 (2) point (1) Dutch Penal Code provides in general for punishment of legal persons.	Art. 51 (2) point (2) Dutch Penal Code which provides in general for punishment of legal persons extends also to control due to the possibility to punish heads of businesses	Usually the financial fine is applied to legal persons, which may be augmented by the judge (Art.23 (7) Dutch Penal Code)
Austria	Not yet ratified: Concept of liability of legal persons still to be introduced	Not yet ratified: Concept of liability of legal persons still to be introduced	Not yet ratified: Concept of liability of legal persons still to be introduced

Portugal	Criminal liability of legal persons is foreseen in Art. 3 Decree-Law no. 28/84 (covering therefore the offences of subsidy fraud under Art. 36 and 37 of the Decree-Law no. 28/84), in Art. 7 of the Portuguese Fiscal Offence Code (covering therefore the fiscal fraud under Art. 23 Portuguese Fiscal Offence Code). There appears to be no general concept of criminal liability of legal persons in the Portuguese Penal Code	-	For offences of subsidy fraud under Art. 36 and 37 of the Decree-Law no. 28/84, the legal persons may be condemned to a financial fine and the judge may order its dissolution (Art. 36 ((3) and Art. 37 (4)). For fiscal fraud, the same is foreseen under Art. 12 Portuguese Fiscal Offence Code.
Finland	Chapter 9 § 2 Finnish Penal Code provides for corporate criminal liability for "persons belonging to a statutory organ or other management or exercises actual power of decision" and foresee corporate fines. Reference thereto is made for fraud (Chapter 29 § 10), active corruption (Chapter 16 § 18) and money laundering (Chapter 32 § 14)	Chapter 9 § 2 Finnish Penal Code provides for corporate criminal liability "if the care and diligence necessary for the prevention of the offence has not been observed " and foresee corporate fines. Reference thereto is made for fraud (Chapter 29 § 10), active corruption (Chapter 16 § 18) and money laundering (Chapter 32 § 14)	Chapter 9 § 5 Finnish Penal Code foresees compulsory corporate fines from €850 to 850 000.
Sweden	Criminal liability of legal persons is covered by Chapter 36 § 7 Swedish Penal Code on corporate fines	Sweden considers that criminal liability of legal persons is covered by Chapter 36 § 7 Swedish Penal Code on corporate fines, which foresees also punishment for what has not been done although could have been reasonably required.	On request of the public prosecutor only, legal persons are fined with financial fines under Chapter 36 § 8 Swedish Penal Code between 10 000 and 3 000 000 SKr.
United-Kingdom - England and Wales	Criminal liability of corporations is recognised by case-law in all three jurisdictions of the United Kingdom in application of the principle of identification	Liability for insufficient supervision or control is addressed, in all three jurisdictions, under civil law of negligence with the view to repairing damages. The United Kingdom considers this sufficient to fulfil the requirements of the 2nd Protocol	Legal persons liable to same penalties as natural persons by virtue of Interpretation Act 1978, also applicable to Scotland and to Northern Ireland, according to Section 37 Interpretation (Northern Ireland) Act 1954: In practice, courts impose penalties on organisations.
United-Kingdom - Scotland			
United-Kingdom - Northern Ireland			

Annex Table 11

Instrument	Second Protocol (not yet entered into force)	PFI Convention		
Reference	**Art. 5 – Confiscation**	**Art. 4 (1) first indent of the PFI Convention - Jurisdiction on commitment of fraud on the MS' territory**	**Art. 4 (1) second indent of the PFI Convention - Jurisdiction on the person committing fraud in the MS' territory**	**Art. 4 (1) third indent of the PFI Convention - Jurisdiction on nationals of a MS - possible declaration under Art. 4 (2)**
Belgium	Art. 42 Belgian Penal Code and for the value of proceeds Art 43bis Belgian Penal Code	Art. 3 Belgian Penal Code	Art. 3 Belgian Penal Code in as far as assisting and inducing falls under "committing" an offence in the sense of Art. 66 Belgian Penal Code, yet not in as far as only "participation" in the sense of Art. 67 Belgian Penal Code is concerned	Art. 7 § 1 Belgian Code of Penal Procedure on condition of so-called double criminality
Denmark	§ 75 Danish Penal Code and for the value of proceeds § 77 Danish Penal Code	§ 6 point (1) Danish Penal Code	§ 6 point (1) and § 9 Danish Penal Code	Generally foreseen in § 7 (1) Danish Penal Code on condition of so-called double criminality
Germany	§ 73 German Penal Code	§ 3 German Penal Code	§ 3 and § 9 (2) German Penal Code	For money laundering on condition of so-called double criminality § 7 German Penal Code)
Greece	Art. 76 (1) Greek Penal Code	Art. 11 Act no. 2803/2000 referring directly to jurisdiction as set out in Art. 4 of the PFI Convention	Art. 11 Act no. 2803/2000 referring directly to jurisdiction as set out in Art. 4 of the Pie Convention	Art. 11 Act no. 2803/2000.
Spain	Article 302 and Art. 127 Spanish Penal Code. Article 589 Spanish Code of Penal Procedure	Art. 23 (1) and 23 (4) point (g) Spanish Act on Judiciary 6/1985	Art. 23 (1) and 23 (4) point (g) Spanish Act on Judiciary 6/1985	Art. 23 (2) Spanish Act on Judiciary 6/1985 only on specific request of the damaged party or the finance ministry and on condition of the so-called double criminality.

France	Art. 414 Customs Code provides for confiscation of the object of fraud, transportation and concealment means; Art. 412 Customs Code: confiscation of the defrauded goods only. Art. 131-21 second indent French Penal Code applicable to fraud (Art. 313-7 French Penal Code), active and passive corruption (Art. 435-5 French Penal Code) and money laundering (Art. 324-7 French Penal Code) provides for confiscation of the instrument and the proceeds. For money laundering (Art. 324-7 French Penal Code) confiscation of the possessions (whatever their nature) belonging to the convicted person.	Art. 113-2 French Penal Code	Art.113-5 French Penal Code	Art. 113-6 French Penal Code
Ireland	Section 9 (1) Criminal Justice Act, 1994: confiscation order by a court is possible against the person sentenced for an indictable offence, but aims at recovering a sum of money equal to the value of the pecuniary advantage derived from the offence.	Common Law	Section 45 (1) Criminal Justice (Theft and Fraud Offences) Act, 2001	Section 45 (1) Criminal Justice (Theft and Fraud Offences) Act, 2001
Italy	Not yet ratified: for crimes according to Art. 316bis, Art. 316ter, Art. 319, Art. 321 (applicable also under the conditions of Art. 322bis), Art. 640bis Italian Penal Code (i.e. fraud for expenditure and corruption), Art. 322ter and the reference in Art. 640 quarter provide for obligatory confiscation, also of the value. As regards crimes according to Art. 648bis Italian Penal Code (i.e. fraud for revenue and money laundering) or crime of fraud by presenting false data related to revenues of the EAGGF according to Art. 2 (1) Act no. 1986/898 and custom crimes punishable under Art. 282 to 292 of the amalgamated law in respect of custom matters, Art. 240 Italian Penal Code	Art. 6 Italian Penal Code	Art. 6 Italian Penal Code	Art. 9 Italian Penal code on specific request of the Italian Ministry of Justice
Luxembourg	Not yet ratified: Art. 31 Luxembourg Penal Code	Art. 7-2 Luxembourg Code of Penal Procedure	Art. 7-2 Luxembourg Code of Penal Procedure read together with Art. 66 and 67 Luxembourg Penal Code	Art. 5 (2) Luxembourg Code of Penal Procedure on condition of so-called double criminality
the Netherlands	Articles 33 to 33a Dutch Penal Code and Art. 36 for the confiscation of the value of proceeds.	Art. 2 Dutch Penal Code	Art. 2 Dutch Penal Code read together with Art. 47 Dutch Penal Code	Art. 5 (1) second intent Dutch Penal Code on condition of so-called double criminality
Austria	Not yet ratified: § 20, § 20b (2) , § 26 and § 65 Austrian Penal Code	For expenditure: § 62 as explained by § 67 (2) Austrian Penal Code. For revenue: § 5 (1) and (2) of the Austrian Fiscal Penal Code.	For expenditure: § 62 as explained by § 67 (2) including reference to § 12 Austrian Penal Code. For revenue: § 5 (1) and (2) including reference to § 11 Austrian Fiscal Penal Code	§ 65 (1) point (1) Austrian Penal Code on condition of so-called double criminality (§ 65 (4) Austrian Penal Code).

Portugal	Art. 109 to 111 Portuguese Penal Code allow general for confiscation, also of the value of proceeds.	Art. 4 Portuguese Penal Code	Art. 4 and 7 Portuguese Penal Code	Art. 5 (1) point (c) Portuguese Penal Code
Finland	Chapter 10 § 3 Finnish Penal Code appears to provide confiscation for fraud, corruption and money laundering, Chapter 10 § 8 allows also for confiscation of the value.	Chapter 1 § 1 as explained by § 10 Finnish Penal Code	Chapter 1 § 1 as explained by § 10 Finnish Penal Code	Generally foreseen in Chapter 1 § 6 Finnish Penal Code on condition of so-called double criminality due to Chapter 1 § 11 (1)
Sweden	Chapter 36 § 1 Swedish Penal Code appears to provide confiscation for any offence, Chapter 36 § 4 allows also for confiscation of the value.	Chapter 2 § 1 Swedish Penal Code	Chapter 2 § 1 as explained by § 4 Swedish Penal Code	Chapter 2 § 2 (1) point (1) Swedish Penal Code on condition of so-called double criminality due to Chapter 2 § 1 (1)
United-Kingdom - England and Wales	Part 2 Proceeds of Crime Act 2002	For offences under Sections 15, 16 and 17 Thefts Act 1968 and Sections 1 to 5 of the Forgery and Counterfeiting Act 1981 jurisdiction is established for any event that occurred in England and Wales (Section 2 Criminal Justice Act 1993) or the benefit is obtained in England and Wales (Section 4 Criminal Justice Act 1993)	For offences under Sections 15, 16 and 17 Thefts Act 1968 and Sections 1 to 5 of the Forgery and Counterfeiting Act 1981 jurisdiction is established for any event that occurred in England and Wales (Section 2 Criminal Justice Act 1993) or the benefit is obtained in England and Wales (Section 4 Criminal Justice Act 1993)	United Kingdom declared not apply this rule
United-Kingdom - Scotland		Common law	Section 71 Criminal Justice Act 1993 extends jurisdiction to the persons within the United Kingdom who assist or induce the commission of a serious offence outside the UK against the law of another Member State in relation to Community provisions on duties and taxes, agricultural levies, or movement of goods. However, United Kingdom courts require proving the law of a foreign Member State as being a serious offence - such proof failed in the Southwark fraud case (Customs and Excise v Ghiselli, 15.5.1996)	

United-Kingdom - Northern Ireland		For offences under Sections 15, 16 and 17 Thefts (Northern Ireland) Act 1969 and Sections 1 to 5 of the Forgery and Counterfeiting Act 1981 jurisdiction is established for any event that occurred in Northern Ireland or the benefit is obtained in Northern Ireland (Article 42 Criminal Justice (Northern Ireland) Order 1996)	For offences under Sections 15, 16 and 17 Thefts Act 1968 and Sections 1 to 5 of the Forgery and Counterfeiting Act 1981 jurisdiction is established for any event that occurred in England and Wales (Section 2 Criminal Justice Act 1993) or the benefit is obtained in England and Wales (Section 4 Criminal Justice Act 1993)	

Annex Table 12

Instrument	First Protocol			
Reference	**Art. 6 (1) point (a) - Jurisdiction**	**Art. 6 (1) point (b) - Jurisdiction - Declaration under Art. 6 (2)**	**Art. 6 (1) point (c) - Jurisdiction - Declaration under Art. 6 (2)**	**Art. 6 (1) point (d) - Jurisdiction - Declaration under Art. 6 (2)**
Belgium	Art. 3 Belgian Penal Code	Art. 10quarter of the Preliminary Title of the Belgian Code of Penal Procedure	Art. 10quarter of the Preliminary Title of the Belgian Code of Penal Procedure	Art. 10quarter of the Preliminary Title of the Belgian Code of Penal Procedure
Denmark	§ 6 point (1) Danish Penal Code	§ 7 (1) Danish Penal Code on condition of double criminality.	§ 8 point (3) Danish Penal Code	§ 8 point (5) Danish Penal Code
Germany	§ 3 German Penal Code	§ 3 and § 9 (2) German Penal Code	Jurisdiction for corruption against nationals committed outside German territory ensured through reference made in Art. 2 § 2 of the Federal Act on the transposition of the protocol to the PFI Convention	Jurisdiction on corruption due to headquarter of the Institution concerned ensured through reference made in Art. 2 § 2 of the Federal Act on the transposition of the protocol to the PFI Convention
Greece	Art. 11 Act no. 2803/2000 referring directly to jurisdiction as set out in Art. 6 of the First Protocol	Art. 11 Act no. 2803/2000 referring directly to jurisdiction as set out in Art. 6 of the First Protocol	Art. 11 Act no. 2803/2000 referring directly to jurisdiction as set out in Art. 6 of the First Protocol	Art. 11 Act no. 2803/2000 referring directly to jurisdiction as set out in Art. 6 of the First Protocol
Spain	Art. 23 (1) and 23 (4) point (g) Spanish Act on Judiciary 6/1985	Art. 23 (1) and 23 (4) point (g) Spanish Act on Judiciary 6/1985. Rules of participation and instigation on articles 27,28 and 29 Spanish Penal Code.	Art. 23 (3) point (h) Organic Law 6/1985 of the Judiciary	Art. 23 (1) Organic Law 6/1985 of the Judiciary together with the wide definition of public official in Art. 24 (2) Spanish Penal Code
France	Art. 113-2 French Penal Code	Art. 689-8 second indent French Code of Penal Procedure provides for prosecution of any national individual and national official, who finds himself on the territory, guilty of the offences described in Art. 435-1 and 435-2 French Penal Code. France submitted a declaration with conditions for the prosecution.	Art. 689-8 third indent French Code of Penal Procedure provides for prosecution of any person who finds himself on the French territory and is guilty of the offence described in Art. 435-2 Penal Code. France submitted a declaration with conditions for the prosecution.	Art. 689-8 first indent French Code of Penal Procedure provides for prosecution of any Community official, working in a EU body with its headquarter on the French territory, who finds himself on the territory for the commission of the offence as described in Art. 435-1 French Penal Code. France submitted a declaration with conditions for the prosecution.
Ireland	Common Law	Section 45 (2) point (a) Criminal Justice (Theft and Fraud Offences) Act, 2001	Section 45 (2) point (b) Criminal Justice (Theft and Fraud Offences) Act, 2001	Section 45 (2) point (a) Criminal Justice (Theft and Fraud Offences) Act, 2001

Italy	Art. 6 Italian Penal Code	Art. 6 Italian Penal Code. Italy submitted a declaration with conditions for the prosecution.	Art. 10 Italian Penal Code. Italy submitted a declaration with conditions for the prosecution.	Art. 6 Italian Penal Code
Luxembourg	Art. 7-2 Luxembourg Code of Penal Procedure	Luxembourg declared that it would apply the jurisdiction rules referred to in Article 6(1) point (b) of the Protocol only if the offender is a Luxembourg national. As regards its nationals, Luxembourg will apply Art. 5 Code of Penal Procedure	Luxembourg declared that it would apply the jurisdiction rules referred to in Article 6(1) point (c) of the Protocol only if the offender is a Luxembourg national.	Luxembourg declared that it would apply the jurisdiction rules referred to in Article 6(1) point (d) of the Protocol only if the offender is a Luxembourg national.
the Netherlands	Art. 2 Dutch Penal Code	The Netherlands submitted a declaration with conditions for the prosecution	The Netherlands submitted a declaration with conditions for the prosecution	The Netherlands submitted a declaration with conditions for the prosecution
Austria	§ 62 as explained by § 67 (2) Austrian Penal Code	§ 65 (1) point (1) Austrian Penal Code on condition of double criminality. Austria submitted a declaration with conditions for the prosecution	Austria considers said article of the protocol as an international obligation for prosecution based on § 64 (1) point (6) Austrian Penal Code	Austria considers said article of the protocol as an international obligation for prosecution based on § 64 (1) point (6) Austrian Penal Code
Portugal	Art. 4 Portuguese Penal Code	Portugal submitted a declaration with conditions for the prosecution	Portugal declared not apply this jurisdiction rule	Portugal declared not apply this jurisdiction rule
Finland	Chapter 1 § 1 as explained by § 10 Finnish Penal Code	Finland submitted a declaration with conditions for the prosecution	Finland declared not to apply this jurisdiction rule	Finland declared not to apply this jurisdiction rule
Sweden	Chapter 2 § 1 Swedish Penal Code	Chapter 2 § 2 (1) point (1) Swedish Penal Code on condition of so-called double criminality	Sweden submitted a declaration with conditions for the prosecution	Sweden declared not to exercise its jurisdiction in cases where the offender is a Community official working for an institution or body which has its headquarters in Sweden.
United-Kingdom - England and Wales	Section 1 Public Bodies Corrupt Practices Act 1889 seems to limit territorial jurisdiction to offences against public bodies established in the United Kingdom	The United Kingdom declared not to apply the jurisdiction rules laid down in paragraph 1(b) of Article 6. Yet, Section 109 Anti-Terrorism, Crime and Security Act 2001 provides that nationals of the United Kingdom may be punished if they do anything outside the United Kingdom that constitutes, if committed in the United Kingdom, the	The United Kingdom declared not to apply the jurisdiction rules laid down in paragraph 1(c) of Article 6.	The United Kingdom declared not to apply the jurisdiction rules laid down in paragraph 1 (d) of Article 6.
United-Kingdom - Scotland				

United-Kingdom - Northern Ireland		offence of bribery under common law or under Section 1 of the Public Bodies Corrupt Practices Act 1889.		

Annex Table 13

Instrument	PFI Convention	ECJ Protocol		
Reference	**Art. 7 (1) - Ne bis in idem**	**Art. 7 (2) to (3) - Possible exceptions for the Ne bis in idem-rule**	**Art. 2 (1) - Declaration to accept the jurisdiction of the Court under Art. 2(2) point (a)**	**Art. 2 (1) - Declaration to accept the jurisdiction of the Court under Art. 2(2) point (b)**
Belgium	Art. 13 of the Preliminary Title of the Belgian Code of Penal Procedure if the offence was committed outside Belgium	-		Belgium declared to accept the Court's jurisdiction as specified by Art. 2 (2) point (b).
Denmark	§ 10a Danish Penal Code for all conventions concluded by Denmark	Denmark submitted a declaration with exceptions to the 'ne bis in idem'-rule		§ 2 (1) Act no. 228 of 4.4.2000: acceptance of the Court's jurisdiction as specified by Art 2. (2) point (b).
Germany	Art. 7 (1) is directly applicable and hence ensures the 'ne bis in idem'-rule between Member States	Germany submitted a declaration with exceptions to the 'ne bis in idem'-rule		Acceptance of the Court's jurisdiction with reservations
Greece	Art. 57 Greek Code of Penal Procedure	Greece submitted a declaration with exceptions to the 'ne bis in idem'-rule		Art. 12 (2) Act no. 2803/2000: acceptance of the Court's jurisdiction as specified by Art 2. (2) point (b).
Spain	-	-	Acceptance of the Court's jurisdiction with reservations.	
France	Art. 692 Penal Procedural Code	-		France stated at the notification stated that it accepts the Court's jurisdiction
Ireland	Common law	-	Acceptance of the Court's jurisdiction; Section 41 (1) Criminal Justice (Theft and Fraud Offences) Act, 2001: the Protocol on interpretation (other than Art. 2 (2) point (b)) shall have the force of law in the State. Section 41 (2) Criminal Justice (Theft and Fraud Offences) Act, 2001: judicial notice of any ruling, decision, or opinion of the ECJ relating to the meaning or effect of any provision of the PFI instruments.	

Italy	Art. 731 of the Italian Code of Penal Procedure	Italy submitted a declaration with exceptions to the 'ne bis in idem'-rule		Italy, however, already declared to accept the Court's jurisdiction as specified by Art. 2 (2) point (b).
Luxembourg	Art. 5 (4) Luxembourg Code of Penal Procedure	-		Art. 8 Act of 30 March 2001: acceptance of the Court's jurisdiction as specified by Art 2. (2) point (b).
the Netherlands	Art. 68 Dutch Penal Code	-		Acceptance of the Court's jurisdiction with reservations
Austria	§ 34 of the Austrian Code of Penal Procedure	Austria submitted a declaration with exceptions to the 'ne bis in idem'-rule		Acceptance of the Court's jurisdiction with reservations
Portugal	Art. 229 Portuguese Code of Penal Procedure ensures the 'ne bis in idem'-rule on the basis of international conventions concluded by Portugal	-	Acceptance of the Court's jurisdiction (Art. 2 of the Presidential Decree)	
Finland	Chapter 1 § 13 Finnish Penal Code	Finland submitted a declaration with exceptions to the ne bis in idem-rules		Acceptance of the Court's jurisdiction
Sweden	Chapter 2 § 5a Swedish Penal Code	Sweden submitted a declaration with exceptions to the ne bis in idem-rules		Acceptance of the Court's jurisdiction
United-Kingdom - England and Wales	Common law	-	-	-
United-Kingdom - Scotland				
United-Kingdom - Northern Ireland				