The Convention on the Protection of EU Financial Interests was adopted in 1995 but entered into force only in 2002. Subsequently, it has been amended by three protocols which expanded its scope to cover not only fraud, but also corruption and money laundering, as well as to provide for interpretation of its text by the Court of Justice of the EU in the framework of the preliminary reference procedure. New EU Member States – most recently Croatia – have acceded to the Convention automatically, by virtue of their Act of Accession. However, the exact date on which the Convention enters into force for a new Member State is set by the Council of the EU.

The Convention does not apply directly; it sets Member States the requirement to implement it. It obliges them, in particular, to introduce criminal sanctions against three types of crimes affecting EU financial interests: fraud, corruption (both active and passive) and money laundering. Member States must also provide for the liability of legal persons for such criminal acts, which may include imposing fines but also other sanctions, such as exclusion from state aid, prohibition of business activity, placing under judicial supervision or even liquidation. Criminal sanctions for individuals must be effective, dissuasive and proportionate. Importantly, Member States are obliged to provide for the equal treatment of crimes affecting their own financial interests and those of the Union, for instance, in terms of periods of limitation. Finally, the Convention imposes on Member States far-reaching duties of cooperation, both between themselves and with the Commission. In such cases, the applicable EU rules on data protection must be observed, and if the Commission is to transmit data outside the EU, it must warn the national authorities about that.

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Background

According to estimates, every year the EU’s financial interests may be at risk of being eroded by about €3 billion – roughly 2% of the EU’s annual budget – as a result of fraud. At the same time, it is estimated that the level of recovery by Member States remains below 10%. These figures point clearly to the need for efficient legal instruments at EU level, obliging Member State law enforcement agencies to combat fraud affecting the EU’s financial interests. Such an instrument – the Convention on the Protection of the European Communities’ Financial Interests (‘the Convention’) was drawn up in 1995 and entered into force seven years later. Amended by three additional protocols, it remains the main EU-level legal instrument obliging Member States to combat crimes against the financial interests of the Union.

In 2012, the Commission tabled a proposal for a directive on the fight against fraud to the Union’s financial interests by means of criminal law, which would repeal the Convention (2012/0193(COD)). In 2013, the Council adopted a general approach, proposing to switch the legal basis from Article 325(4) TFEU to Article 83(2) TFEU, as well as to introduce a number of other modifications, in particular by removing revenues arising from VAT from the scope of the proposed directive, amending the article relating to penalties (including imprisonment) for natural persons, introducing a new article on aggravating circumstances (inter alia for organised crime), as well as introducing an article specifically providing that the directive replaces the 1995 Convention. The UK and Ireland may opt in to the proposed directive; Denmark does not participate in its adoption.

In April 2014, the European Parliament adopted a legislative resolution at first reading with numerous amendments to the Commission’s proposal, among them a change of the legal basis, deletion of the minimum sanctions and a more specific definition of ‘public official’. It did not concur with the Council, however, on deleting VAT revenue from the scope of the directive. In September 2014, interinstitutional negotiations were opened. Currently, the Council is still to deliver its first reading position. The Commission has indicated that it can, in general, accept most of Parliament’s amendments. However, on the issue of the appropriate legal basis, the Commission does not accept Parliament’s amendments that change the legal basis to Article 83(2) TFEU, delete the minimum sanctions and restrict the definition of ‘public official’. For the time being, the Commission is set on maintaining its position and on continuing to defend its proposal in the negotiations.

In its February 2016 Report on the Commission’s Annual Report 2014 on the Protection of the EU’s Financial Interests – Fight against fraud, the Parliament reiterated its view that there is an urgent need to adopt the anti-fraud directive as soon as possible.

Legal basis and entry into force of the Convention

Legal basis of the Convention

The 1995 Convention was drawn up by the Member States of the then European Communities on the basis of Article K.3(2)(c) of the Treaty on European Union (TEU). This article was part of Title VI TEU on ‘Cooperation in the fields of Justice and Home Affairs’, which constituted the ‘third pillar’ of the EU.

The former third pillar of the Union

Under the Treaty of Maastricht (1992), the third pillar comprised, inter alia, combating fraud on an international scale and judicial cooperation in criminal matters. However, at the time the EU did not have the power to enact legislation in this area, and the only possibility of drawing up new legal rules was through conventions concluded by the Member States. Specifically, Article K.3(2)(c) TEU authorised the Council to draw up conventions and recommend them to the Member States for adoption under their
domestic constitutional requirements. Such third pillar conventions could give the Court of Justice of the EU (CJEU) jurisdiction to interpret them and rule on any disputes concerning their application. The Treaty of Amsterdam introduced legislative acts to the third pillar, that is, framework decisions adopted in a special legislative procedure.

After the adoption of the Treaty of Lisbon, the pillar structure of the EU was abandoned and the protection of the financial interests of the Union by means of criminal law was regulated in Article 325 TFEU which provides that the Parliament and Council may enact legislation under the ordinary legislative procedure, after consulting the Court of Auditors.

Entry into force, additional protocols and possible repeal in the future
The Convention entered into force on 17 October 2002. Two subsequent protocols, adopted in 1996 and 1997, modified the substantive rules of the Convention, and a third conferred jurisdiction on the CJEU to interpret the Convention in preliminary reference proceedings. The First Protocol of 1996 and the CJEU Jurisdiction Protocol entered into force together with the Convention, following its ratification by the then EU-15. However, the Second Protocol of 1997 entered into force only on 19 May 2009, following ratification by the then 27 EU Member States.

This delay in the Second Protocol's entry into force is a direct consequence of its Article 16, which provides that the Protocol must be adopted by all Member States 'in accordance with their respective constitutional requirements' and will enter into force 90 days after the notification by the last Member State which, being a member of the EU on the date of the adoption by the Council of the act drawing up the Protocol, is the last to fulfil that formality. It is interesting to note that although the Second Protocol was adopted two years after the adoption of the Convention (in 1997), it was not until 12 years later that it had been ratified by all Member States and finally entered into force.

The three types of crimes prohibited by the Convention
Crime of fraud
Essential elements of the crime
The 1995 Convention defines the notion of 'fraud affecting [EU] financial interests' which may be related both to expenditure and revenue, and covers both intentional acts as well as omissions. Fraudulent acts include:

- the use or presentation of false, incorrect or incomplete statements or documents, which results in the misappropriation or wrongful retention of funds from the general EU budget or budgets managed by or on behalf of the EU;
- the non-disclosure of information in violation of a specific obligation to disclose such information, if it results in misappropriation or wrongful retention of EU funds;
- the misapplication of a legally obtained benefit, which likewise leads to misappropriation or wrongful retention of EU funds.

Forms of commission of the crime of fraud
Member States have an obligation to transpose the definition of 'fraud affecting [EU] financial interests' into their criminal law. They must punish not only acts or omissions, but also participation in fraud committed by someone else, as well as instigation and attempt at committing fraud.

Criminal liability of business managers
Furthermore, Member States must also provide for the criminal liability of business managers, that is, 'heads of business', persons having decision-making power in businesses as well as persons exercising control within a business. They are to be
criminally liable for fraud committed by persons under their authority, acting on behalf of the business.

The Convention does not define the notion of 'business', hence it must be understood, lege non distingui
te, as including all types of business undertakings, regardless of their legal form and ownership structure (for instance, publicly or privately held, public limited companies with legal personality or civil-law partnerships, and so forth).

**Requirement of similarity**
The First Protocol requires Member States to ensure that when defining 'fraud' in their criminal law, they include in its scope not only the fraudulent acts committed by national officials in the exercise of their functions, but also those committed by EU officials in the exercise of their duties.

In its judgment of 8 September 2015 in *Criminal proceedings against Ivo Taricco and Others* (Case C-105/14), the CJEU ruled that the crime of fraud, as defined in the 1995 Convention, also covers revenue derived from applying a uniform rate to the harmonised VAT assessment bases determined according to EU rules. This is not affected by the fact that VAT is not collected directly for the account of the EU, because the definition of 'fraud' in the Convention does not formulate such a requirement. Furthermore, excluding VAT fraud from the concept of fraud under the Convention 'would be contrary to that convention’s objective of vigorously combatting fraud affecting the European Union’s financial interests', the CJEU pointed out.

**Crime of corruption**
The First Protocol to the Convention introduced the crime of corruption in two forms – passive and active. Crimes of passive and active corruption can be said to be two sides of the same coin, and one corrupt transaction committed jointly by two persons (an official and a person corrupting the official) gives rise to two separate crimes and allows the prosecution of both sides of the act of corruption.

**Active corruption**
According to the definition in Article 3 of the First Protocol, for there to be a crime of active corruption, the following elements need to be present:

- the offender (who can be any person) gives an advantage of any kind to an official;
- the advantage is for the official or for a third party;
- in exchange for the advantage, the official undertakes to breach their official duty (by acting in a certain way or refraining from acting in a certain way);
- the breach of the official's duties damages the EU's financial interests or is likely to damage them.

Member States are obliged to make the crime of active corruption a criminal offence.

**Passive corruption**
The crime of passive corruption is defined in Article 2 of the First Protocol as follows:

- the crime can be committed only by an official;
- the official requests or receives an advantage of any kind;
- in exchange for the advantage, the official undertakes to breach their official duty (by acting in a certain way or refraining from acting in a certain way);
- the breach of the official's duties damages the EU's financial interests or is likely to damage them.
Notion of 'official'

The crimes of passive and active corruption require the involvement of an official, defined as a Community (now EU) or national official. The concept of an EU official covers both officials sensu stricto, as well as contracted agents and experts seconded by national authorities or by private bodies, provided that they carry out functions equivalent to those performed by EU officials or other EU servants.

As regards the notion of 'national official', the Second Protocol refers to the national law of the Member State where the person in question performs their functions. However, if an official from Member State A is involved in criminal proceedings in Member State B, Member State B will not be bound by Member State A's definition of an 'official' (Article 1(1)(c) second indent).

Requirement of similarity

Each Member State must ensure that the definition of 'corruption' in their criminal law, as regards acts committed by or against government ministers, members of parliament, members of highest courts or members of a court of auditors, must apply similarly in cases where such offences are committed against members of four of the EU institutions (Commission, Parliament, CJEU, Court of Auditors). A contrario, this requirement does not apply to the officials of the Council of the EU, European Central Bank and other institutions, bodies or agencies of the EU.

Crime of money laundering

International legal context

The crime of money laundering has been the object of regulation at international level through a series of conventions, including the Strasbourg Convention and the Warsaw Convention. These address the problem of money laundering, especially in the context of financing terrorism. Money laundering has also been addressed by a series of EU directives, the most recent dating from 2015.

Requirements imposed by the Convention


- the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to escape responsibility;
- the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity;
- the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity.

Furthermore, the Second Protocol requires Member States to punish not only the commission of money laundering, but also attempts at commission, aiding, abetting, facilitating and counselling the commission of this criminal act.
However, whilst the Anti-Money-Laundering Directive of 2005, currently in force, requires Member States to 'prohibit' money laundering and obliges them to introduce 'effective, proportionate and dissuasive' penalties in national law, it does not oblige them to introduce criminal liability. Only the Second Protocol imposes this duty.

In 2015, the EU legislature adopted the most recent, Fourth Anti-Money-Laundering Directive, which Member States have to implement by 26 June 2017 in national law. The definition of 'money laundering' in the new Directive is the same as in that of 2005, hence it does not modify the subject matter of the crime of money laundering as defined in the 1995 Convention.

**Penalties on individuals and liability of legal persons**

**Criminal penalties on individual offenders**

Member States are obliged to introduce effective, proportionate and dissuasive criminal penalties, which must include, at least in cases of serious fraud, deprivation of liberty. In cases of minor fraud involving amounts up to ECU 4 000 (€4 000), Member States may limit themselves to providing for non-criminal (i.e. administrative) penalties, but may provide for criminal penalties too. These requirements were extended to the crimes of corruption and money laundering in the First and Second Protocol, without making an exception for minor corruption or minor money laundering. Therefore, these two latter forms of corruption are subject to criminal penalties.

In its judgment of 8 September 2015 in Criminal proceedings against Ivo Taricco and Others (Case C-105/14), the CJEU ruled that Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the EU through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests. Furthermore, measures Member States adopt with regard to EU financial interests (for instance, VAT revenue) must be the same as those they adopt to combat equally serious cases of fraud affecting their own financial interests.

The CJEU pointed out that the effectiveness of such penalties could be jeopardised by national provisions on the interruption of the limitation period if, in a considerable number of cases, the commission of serious fraud would escape criminal punishment because the offences will usually be time-barred before a criminal penalty is imposed by a final judicial decision. This would be a violation of Article 352 TFEU and the 1995 Convention.

**Liability of legal persons for criminal acts committed by individuals**

**Instances of liability**

An important novelty in the Second Protocol of 1997 was the introduction of liability of legal persons for the crimes of fraud, active corruption and money laundering. The liability of a legal person is triggered if any of these three types of crimes was committed for the benefit of the legal person by any natural person acting either individually or as part of the legal person's organ, if that natural person had a 'leading position' in the legal person, based on:

- the natural person's power of representation of the legal person;
- the natural person's authority to take decisions on behalf of the legal person;
- the natural person's authority to exercise control within the legal person.

**Sanctions against legal persons**

Member States must introduce sanctions against legal persons held liable for fraud, corruption and money laundering. Such sanctions must be effective, proportionate and
'dissuasive', that is, **sufficiently serious** as to deter people from committing the crimes in question. They may include criminal or non-criminal fines, as well as other sanctions, such as:

- exclusion from entitlement to public benefits or state aid;
- temporary or permanent disqualification from the practice of commercial activities;
- placing the legal person under judicial supervision; or
- a judicial winding-up (liquidation) order.

**Confiscation of proceeds from criminal acts**

The Second Protocol of 1997 introduced the sanction of **seizure** and, subject to rights of third parties acquired in good faith, also the **confiscation or removal** of instruments and proceeds of the three types of crimes penalised by the Convention and its Protocols (fraud, corruption, money laundering). The confiscation may also be imposed on property, the value of which corresponds to the proceeds from the crimes.

**Jurisdiction and extradition**

**Connecting factors for the purpose of establishing jurisdiction**

Member States must ensure they have jurisdiction over fraud affecting EU financial interests whenever:

- the fraud was **committed or attempted**, at least in part, in that Member State, or someone **participated** in the fraud in that Member State;
- a person in the territory of a Member State **knowingly assisted** in the fraud or **induced** the commission of such fraud, even if the fraud was committed in a different Member State; or
- the offender is a **national** of that Member State.

**Rules on extradition and application of the European Arrest Warrant**

The 1995 Convention contains rules on extradition. However, the 2002 Framework Decision on the European Arrest Warrant (EAW) replaced traditional extradition with the EAW procedure and made it applicable to all EU Member States. Specifically, an EAW can be used for cases of fraud within the meaning of the 1995 Convention, thereby making the rules on extradition **obsolete**.

**Duty of cooperation**

**Importance of cooperation**

The Court of Auditors has underlined the importance of cooperation, both on a horizontal level (between Member States) and at vertical level (between the Member States and the Commission) in combatting crimes against the EU's financial interests. As the Court of Auditors has pointed out, the lack of sufficient cooperation has a **major negative impact** on the Union's financial interests. Hence the paramount importance of implementing in practice the relevant provisions of the Convention, presented below.

**Cooperation between Member States**

The 1995 Convention obliges Member States to cooperate with each other with regard to investigation, prosecution and carrying out of punishment, in particular through mutual assistance, extradition (today: the EAW procedure), transfer of proceedings, as well as enforcement of sentences passed in another Member State.

If the same facts give rise to jurisdiction of more than one Member State, the countries involved should **centralise prosecution** in a single Member State, if possible.
The Second Protocol of 1997 introduced a new rule, whereby a Member State may not refuse to provide mutual assistance in respect of the three types of crimes penalised by the Convention and its protocols only because that Member State considers a given act to be merely a tax or customs offence (and not a criminal act).

**Cooperation with the Commission**

The Second Protocol of 1997 introduced, on top of the duty of mutual cooperation between the Member States, also a duty to cooperate with the Commission. The Commission has a duty to assist the Member States technically and operationally. The competent national authorities may exchange information with the Commission. However, due to the requirements of secrecy of investigation and data protection, a Member State transmitting information to the Commission may set specific conditions covering the use of that information. The data protection rules must be observed, and if the Commission intends to retransmit the data outside the EU, it must inform the Member State of its intent.

**The ne bis in idem rule**

The rule

According to a long-standing principle of criminal law, expressed in the Latin maxim *ne bis in idem* ('the same shall not be [prosecuted] twice'), an offender may not be tried and sentenced twice for the same offence. The 1995 Convention enshrines this principle and provides the following requirements for its application:

- the offence consists of the same facts; and
- if a penalty has been imposed, has been enforced or is being enforced, or can no longer be enforced under the legal rules in force in the sentencing Member State.

**Possible exceptions**

However, Member States may, at the time of accession to the Convention, provide for exceptions from the *ne bis in idem* rule in the following situations:

- if the offence was committed wholly or partly in the Member State's territory, unless the offence was committed at least partly in the territory of the Member State which rendered the earlier judgment;
- if the offence was directed against the security of other 'equally essential interests' of the Member State,
- if the offence had been committed by an official of the Member State in breach of their official duties.

**Jurisdiction of the Court of Justice**

The 1995 Convention provides that if there is a dispute between Member States regarding the interpretation of its text, the matter must be initially examined by the Council. If no solution is found within six months, the matter may be referred to the CJEU. Likewise, any dispute between a Member State and the Commission, which it has not been possible to settle through negotiation, may be submitted to the CJEU.

In 1996, the Member States adopted a Protocol on the interpretation of the Convention by the Court of Justice, stipulating that a Member State may declare its acceptance of the jurisdiction of the CJEU to interpret the Convention either at the time of signing of the Protocol or at any later moment. Member States accepting the CJEU's jurisdiction have two options:

- either to give the power to submit preliminary references to the CJEU only to those
national courts against whose decisions there is no remedy under national law, or
• to give such power to all courts.

Any state that joins the EU and accedes to the Convention must also accept the above Protocol.

**Accession of new Member States to the Convention**

**Accession of Romania and Bulgaria to the Convention**

All Member States acceding to the Union also sign the Convention and accept the Protocols to it. For instance, the 2005 Act of Accession provides that Bulgaria and Romania accede to the Convention and its Protocols, but the exact date of entry into force of the Convention for these countries was **determined** by the Council at a later date. At the time of their accession, the Second Protocol had not yet entered into force.

**Accession of Croatia to the Convention**

**A simplified procedure**

As regards Croatia, which has been a Member State of the EU since 2013, the entry into force of the Convention has only recently taken place. Croatia's **Accession Act** introduced a simplified system for the country's accession to the **conventions and protocols** concluded by the Member States on the basis of Article 34 TEU (previously Article K.3 TEU), including the 1995 Convention. Croatia therefore no longer needs to negotiate and conclude specific accession protocols to these conventions and protocols (which would then need to be ratified by the other Member States), since by virtue of having been ratified, the country's Accession Act provides for its automatic accession to these conventions and protocols.

**Awaiting the Council’s decision**

However, the Act of Accession provides that the Council needs to adopt a decision in order to determine the date on which the Convention shall enter into force for Croatia, as well as to adopt a Croatian language version of its text. In this procedure, the Council acts on a recommendation of the Commission, after consulting the European Parliament. The **Commission recommendation** was issued in September 2005, and the Parliament adopted a **legislative resolution** on the topic in February 2016. The procedure was completed on 17 May 2016, when the Council adopted its **Decision**, after consulting the EP. According to the Decision, the Convention and the three Protocols entered into force as regards Croatia on 1 June 2016. Furthermore, the Croatian-language versions of the Convention and Protocols became authentic under the same conditions as the other language versions.

**Further reading**


European Court of Auditors, **Gaps, overlaps and challenges: a landscape review of EU accountability and public audit arrangements**, 2014.


Sgueo, G. Institutional architecture of anti-fraud measures in the EU, EPRS in-depth analysis (forthcoming).