COUNCIL OF THE EUROPEAN UNION

Brussels, 1 October 2002

12249/1/02 REV 1

LIMITE

DROIPEN 64

NOTE

from :	Presidency
to :	Coreper/Council
No. prev. doc. :	11990/02 DROIPEN 62
Subject :	Draft Framework Decision on combating corruption in the private sector

Denmark submitted on 13 June 2002 the initiative for a Framework Decision on combating crime in the private sector set out in 9953/02 DROIPEN 39. An explanatory note by Denmark on the initiative is set out in ADD 1 to that document.

The text of the proposal established by the Legal linguist group in accordance with the usual procedure is set out in 10698/02 DROIPEN 48.

The European Parliament has been invited to give its opinion on the initiative at the latest on 21 November 2002.

Coreper examined the proposal at its meeting on 25/26 September 2002 on the basis of 12249/02 DROIPEN 64.

The text resulting from these proceedings is set out in the Annex. The following questions remain outstanding:

- General parliamentary scrutiny reservations by the French, Irish, Netherlands, Swedish and United Kingdom delegations.
- General scrutiny reservations by the French, Italian, Portuguese and Spanish delegations.
- Reservation on Article 2 (definition of corruption) by the German and Italian delegations. The two delegations have proposed to limit the scope of Article 2 to conduct which could involve distortion of the common market.
- Reservation by the Austrian delegation, and scrutiny reservation by the Irish delegation, on Article 5(3) (prohibition from carrying out activity).
- Scrutiny reservation by the Finnish delegation on Article 6 (legal persons).

Coreper/Council is invited to examine the above reservations with a view to reaching agreement on the draft.

ANNEX

Proposal for a

COUNCIL FRAMEWORK DECISION

COUNCIL FRAMEWORK DECISION No 2002/ /JHA

of

on combating corruption in the private sector

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 29, 31(e) and 34(2)(b) thereof,

Having regard to the initiative of the Kingdom of Denmark,

Having regard to the Opinion of the European Parliament,
Whereas:

(1) Along with globalisation, recent years have brought an increase in cross-border trade in goods and services. Any corruption in the private sector within a Member State is thus not just a domestic problem but also a transnational problem, most effectively tackled by means of EU joint action.

(2) On 26 May 1997 the Council approved a Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union [1].

(3) On 22 December 1998, the Council also adopted Joint Action 98/742/JHA on corruption in the private sector [2]. In connection with the adoption of that Joint Action, the Council issued a statement to the effect that it agreed that the Joint Action represents the first step at EU level towards combating such corruption, and that additional measures will be implemented at a later stage in the light of the outcome of the assessment which is to take place pursuant to Article 7(2) of the Joint Action. A report on Member States' transposition of that Joint Action into national law is not yet available.

(4) Under Article 29 of the Treaty on European Union, it is the Union's objective to provide citizens with a high level of safety within an area of freedom, security and justice, an objective to be achieved by preventing and combating crime, organised or otherwise, including corruption.

(5) According to point 48 of the conclusions of the European Council meeting in Tampere on 15 and 16 October 1999, corruption is an area of particular relevance in establishing minimum rules on what constitutes a criminal offence in Member States and the penalties applicable.

(6) An OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was approved at a negotiating conference on 21 November 1997, and the Council of Europe has also approved a Criminal Law Convention on Corruption, which opened for signature on 27 January 1999. That Convention is accompanied by an Agreement establishing the Group of States against Corruption (GRECO). Negotiations have also been opened for a UN Convention on combating corruption.

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1 OJ C 195, 25.6.1997, p. 2.

2 OJ L 358, 31.12.1998, p. 2.

(7) Member States attach particular importance to combating corruption in both the public and the private sector, in the belief that in both those sectors it poses a threat to a law-abiding society as well as distorting competition and impeding sound economic development. In that context the Member States which have not yet ratified the EU Convention of 26 May 1997 and the Council of Europe Convention of 27 January 1999 will consider how to do so as soon as possible.

(8) The aim of this Framework Decision is in particular to ensure that both active and passive corruption in the private sector is a criminal offence in all Member States, that legal persons may also be held responsible for such offences, and that the offences incur effective, proportionate and dissuasive penalties,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Definitions

For the purposes of this Framework Decision:

– "legal person" means any entity having such status under the applicable national law, except for States or other public bodies acting in the exercise of State authority and for public international organisations.

- "breach of duty" shall be understood in accordance with national law. The concept of breach of duty in national law should cover as a minimum any disloyal behaviour constituting a breach of a statutory duty, or, as the case may be, a breach of professional regulations or instructions, which apply within the business of a person, who in any capacity directs or works for a private sector entity.

Article 2

Active and passive corruption in the private sector

1. Member States shall take the necessary measures to ensure that the following intentional conduct constitutes a criminal offence, when it is carried out in the course of business activities [1]:

(a) promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity, an undue advantage of any kind, for that person or for a third party, in order that the person should perform or refrain from performing any act, in breach of that person's duties;

(b) directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties.

2. Paragraph 1 applies to business activities within profit and non-profit entities.

Article 3

Instigation, aiding and abetting

Member States shall take the necessary measures to ensure that instigating, aiding and abetting the conduct referred to in Article 2 constitute criminal offences.

[1] The German and Italian delegations wanted to limit the scope to conduct which could involve the distortion of the common market, and could agree to the text with the addition of the following words :"and could lead to a distortion of competition". Six delegations could not accept this proposal.

Article 5

Penalties and other sanctions

1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 2 and 3 is punishable by effective, proportionate and dissuasive criminal penalties.

2. Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 2 is punishable by a penalty of a maximum of at least between 1 and 3 years of imprisonment.

3. Each Member State shall take the necessary measures to ensure that where a natural person in relation to a certain business activity has been convicted of the conduct referred to in Article 2, the person may, where appropriate, at least in cases where he or she had a leading position in a company within the business concerned, be temporarily prohibited from carrying on this particular or comparable business activity in a similar position or capacity, if the facts established give reason to believe there to be a clear risk of abuse of position or of office by bribery.[1]

Article 6[2]

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for offences referred to in Articles 2 and 3 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

(a) a power of representation of the legal person, or

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[1] Reservation by the Austrian delegation an scrutiny reservation by the Irish delegation on Article 5 paragraph 3.

[2] Scrutiny reservation by the Finnish delegation.

(b) an authority to take decisions on behalf of the legal person, or

(c) an authority to exercise control within the legal person.

2. Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of an offence of the type referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are involved as perpetrators, instigators or accessories in an offence of the type referred to in Articles 2 and 3.

Article 7

Penalties for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(1) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties such as:

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

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

(c) placing under judicial supervision; or

(d) a judicial winding-up order.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(2) is punishable by penalties or measures which are effective, proportionate and dissuasive.

Article 8

Jurisdiction

1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in Articles 2 and 3, where the offence has been committed:

(a) in whole or in part within it's territory;

(b) by one of its nationals; or

(c) for the benefit of a legal person that has its head office in the territory of that Member State.

2. Any Member State may decide that it will not apply the jurisdiction rules in paragraph 1(b) and (c), or will apply them only in specific cases or circumstances, where the offence has been committed outside its territory.

3. Any Member State which, under its domestic law, does not as yet surrender its own nationals shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in Articles 2 and 3, when committed by its own nationals outside its territory.

4. Member States which decide to apply paragraph 2 shall inform the General Secretariat of the Council of the European Union ("General Secretariat of the Council") and the Commission of the European Communities ("Commission") accordingly, where appropriate with an indication of the specific cases or circumstances in which the decision applies.

Article 9

Repeal

Joint Action 98/742/JHA is hereby repealed.

Article 10

Implementation

1. Member States shall take the necessary measures to comply with this Framework Decision by [...] [1] at the latest.

2. By the same date, Member States shall forward to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of a report drawn up from that information and a written report from the Commission, the Council shall assess, by [...][2], whether Member States have taken the necessary measures to comply with this Framework Decision.

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1 Date to be inserted: two years after adoption of the Framework Decision.

2 Date to be inserted: three months after the time limit for implementation of the Framework Decision.

Article 11

Entry into force

This Framework Decision shall enter into force on the day of its publication in the Official Journal of the European Communities.

Done at

For the Council

The President