

(Preparatory acts pursuant to Title VI of the Treaty on European Union)

Initiative of the Federal Republic of Germany with a view to the adoption of a Council Framework Decision on criminal law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the common market

(2000/C 253/02)

THE COUNCIL OF THE EUROPEAN UNION,

of contracts by Community institutions and their protection by the criminal law will therefore also serve to safeguard the financial interests of the European Communities,

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

On the initiative of the Federal Republic of Germany⁽¹⁾,

HAS ADOPTED THIS FRAMEWORK DECISION:

After consultation of the European Parliament⁽²⁾,

Article 1

Whereas:

Definitions

(1) It is necessary to strengthen the protection of both the financial interests of contracting entities and of fair competition.

For the purposes of this Framework Decision:

(2) Contracts concluded in Member States by public entities, including entities operating in the water, energy, transport and telecommunications sectors, are awarded above certain thresholds in accordance with the requirements of Community law.

(a) 'public contract' shall mean a supply, works, or service contract falling within the scope of the Council Directives coordinating procurement procedures for such contracts insofar as their value is not less than the thresholds designated in each of these Directives; it shall cover a corresponding contract awarded by the European Communities or by the institutions set up in accordance with the Treaties establishing the European Communities;

(3) The general offences of fraud in Member States have only a limited effect in enforcing Community law on awarding contracts in this field.

(b) 'undertaking' shall mean a tenderer or candidate pursuant to the Council Directives coordinating procurement procedures for the award of public contracts;

(4) The established possibilities under Community law for imposing competition law sanctions are aimed only at undertakings.

(c) 'legal person' shall mean any legal entity having such status under the applicable national law, except for States or other public bodies acting in the exercise of their sovereign rights and for public international organisations.

(5) The enforcement of Community law on the award of contracts must be secured by additional effective sanctions which, in the case of fraudulent or other unfair anti-competitive conduct by natural persons, should form part of criminal law.

Article 2

(6) In practice the provisions of Community law on procurement are applied *mutatis mutandis* to the awarding

Fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the Common Market

⁽¹⁾ OJ C ...

⁽²⁾ OJ C ...

1. For the purposes of this Framework Decision the offence of fraudulent or other unfair anti-competitive conduct in

relation to the award of public contracts shall have been committed if a person acting for an undertaking intentionally makes an offer based on an unlawful agreement or concerted practice between undertakings aimed at causing the contracting entity:

- (a) as a result of a direct or indirect promise, offer or grant of an advantage to a person, for that person himself or for a third person, in return for the award of a public contract in breach of duty, or
- (b) as a result of other collusive combination with the person responsible for the award of the contract, or
- (c) by concealing such an agreement

to accept a particular offer.

2. Every Member State shall take the necessary measures to ensure that the conduct referred to in paragraph 1 shall be a criminal offence.

Article 3

Penalties

Each Member State shall take the necessary measures to ensure that the criminal offence referred to in Article 2, and the acting as an accessory to, or instigator of, such an offence, are punishable by effective, proportionate and dissuasive criminal penalties including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition.

Article 4

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable, pursuant to Article 5(2), for a criminal offence within the meaning of Article 2 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
- (b) an authority to take decisions on behalf of the legal person, or
- (c) an authority to exercise control within the legal person,

as well as for involvement as accessories to, or instigators of, the commission of such a criminal offence.

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, pursuant to Article 5(2), where the lack of supervision or control by a person referred to in paragraph 1 of this Article has made possible the commission of a criminal offence within the meaning of Article 2 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 or instigators of, or accessories to, a criminal offence within the meaning of Article 2.

Article 5

Penalties for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 4(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) measures for exclusion from entitlement to public aid;
- (b) measures for temporary or permanent disqualification from the exercise of commercial activities;
- (c) placing under judicial supervision;
- (d) a judicial winding-up order.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 4(2) is punishable by effective, proportionate and dissuasive penalties or measures.

Article 6

Subsidiarity of Articles 4 and 5

Articles 4 and 5 shall not apply to the extent that provisions under the law of the European Communities concerning the liability of legal persons and penalties for legal persons apply to a criminal offence pursuant to Article 2.

*Article 7***Jurisdiction**

1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to a criminal offence pursuant to Article 2 where the criminal offence has been committed:

- (a) in whole or in part within its territory; or
- (b) by one of its nationals, provided that the law of that Member State may require the offence to be punishable also in the country where it occurred; 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, or will apply only in specific cases or circumstances, the rule set out in paragraph 1(b) and paragraph 1(c).

3. Member States shall inform the General Secretariat of the Council where they decide to invoke paragraph 2, where appropriate with an indication of the specific cases or circumstances in which that decision applies.

4. Any Member State which, under its law, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction with regard to the criminal offences referred to in Article 2, when committed by its own nationals outside its territory.

*Article 8***Implementation of this Framework Decision**

1. Member States shall adopt the necessary measures to comply with the provisions of this framework Decision by ... (*).

2. Member States shall send the General Secretariat of the Council and the Commission of the European Communities the text of the provisions by means of which their obligations under this framework Decision have been transposed into national law.

3. The Council will assess, on the basis of appropriate information, the fulfilment by Member States of their obligations under this Framework Decision by ... (**).

*Article 9***Entry into force**

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

Done at ...

For the Council
The President

...

(*) Three years after entry into force of this Framework Decision.

(**) Four years after entry into force of this Framework Decision.