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

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

(2002/C 184/03)

THE COUNCIL OF THE EUROPEAN UNION,

criminal law and procedures on money laundering (e.g. tracing, freezing and confiscating funds).

Having regard to the Treaty on European Union, and in particular Articles 29, 31(c) and 34(2)(b),

Having regard to the initiative of the Kingdom of Denmark,

Having regard to the opinion of the European Parliament,

Whereas:

(1) The main motive for cross-border organised crime is financial gain. In order to be effective, therefore, any attempt to prevent and combat such crime must focus on tracing, freezing, seizing and confiscating the proceeds from crime. However, this is made difficult *inter alia* as a result of differences between Member States' legislation in this area.

(2) In the conclusions of the Vienna European Council of December 1998, the European Council called for a strengthening of EU efforts to combat international organised crime in accordance with the Council's and the Commission's action plan on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice ⁽¹⁾.

(3) Pursuant to point 50(b) of the Vienna Action Plan, within five years of the entry into force of the Treaty of Amsterdam, national provisions governing seizures and confiscation of the proceeds from crime must be improved and approximated where necessary, taking account of the rights of third parties in bona fide.

(4) Point 51 of the conclusions of the Tampere European Council of 15 and 16 October 1999 stresses that money laundering is at the very heart of organised crime, and should be rooted out wherever it occurs and that the European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds from crime. The European Council also calls in point 55 for the approximation of

(5) Pursuant to Recommendation 19 in the 2000 action plan entitled 'The prevention and control of organised crime: a European Union strategy for the beginning of the new millennium', which was approved by the Council on 27 March 2000 ⁽²⁾, an examination should be made of the possible need for an instrument which, taking into account best practice in the Member States and with due respect for fundamental legal principles, introduces the possibility of mitigating, under criminal, civil or fiscal law, as appropriate, the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime.

(6) Pursuant to Article 12 on confiscation and seizure of the United Nations' Convention of 12 December 2000 against Transnational Organised Crime, States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of judicial proceedings.

(7) All Member States have ratified the Council of Europe Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Some Member States have submitted declarations with regard to Article 2 of the Convention concerning confiscation so as to be obliged to confiscate proceeds only from a number of specified offences.

(8) The Council Framework Decision No 2001/500/JHA of 26 June 2001 ⁽³⁾ lays down provisions on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime. Under that Framework Decision, Member States are also obliged not to make or uphold reservations in respect of the provisions of the Council of Europe Convention concerning confiscation, insofar as the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year.

⁽¹⁾ OJ C 19, 23.1.1999, p. 1.

⁽²⁾ OJ C 124, 3.5.2000, p. 1.

⁽³⁾ OJ L 182, 5.7.2001, p. 1.

- (9) The existing instruments in this area have not to a sufficient extent achieved effective cross-border cooperation with regard to confiscation as there are still a number of Member States which are unable to confiscate the proceeds from all offences punishable by deprivation of liberty for more than one year.
- (10) The aim of this Framework Decision is to ensure that all Member States have effective rules governing the confiscation of proceeds from crime, *inter alia* in relation to the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime. This Framework Decision is linked to the Framework Decision on the mutual recognition within the European Union of decisions concerning the confiscation of proceeds from crime and asset-sharing,

HAS ADOPTED THE FOLLOWING FRAMEWORK DECISION:

Article 1

Definitions

For the purposes of this Framework Decision:

- 'proceeds' means any economic advantage from criminal offences. It may consist of any form of property,
- 'property' includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property,
- 'instrumentalities' means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences,
- 'confiscation' means a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property.

Article 2

Confiscation

Member States shall adopt the necessary measures to enable them to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.

Article 3

Extended powers of confiscation

1. Member States shall adopt the necessary measures to enable them to confiscate, either wholly or in part, property belonging to a person convicted of a criminal act, including property not resulting from the criminal act of which the person in question is convicted, if:

- (a) the act is of such a nature that it can generate substantial proceeds, and
- (b) the act is punishable by at least a maximum sentence of up to six years in prison.

2. Member States shall also adopt the necessary measures to enable them to confiscate, either wholly or in part, property acquired by the spouse or cohabitee of the person concerned under the conditions set out in paragraph 1. Member States may disregard cases where the property was acquired more than three years prior to the commission of the offence which forms the basis for confiscation pursuant to paragraph 1, or cases where the marriage or cohabitation did not exist at the time of acquisition.

3. Member States shall also adopt the necessary measures to enable them, in accordance with the conditions set out in paragraph 1, to confiscate, either wholly or in part, property transferred to a legal person in respect of which the person concerned, acting either alone or in conjunction with his closest relations, has a controlling influence. The same shall apply if the person concerned receives a significant part of the legal person's income. Member States may disregard cases where the property was transferred to the legal person more than three years prior to the commission of the offence which forms the basis for confiscation pursuant to paragraph 1.

4. Confiscation pursuant to paragraphs 1 to 3 may not be effected if the person concerned renders it probable that the property was acquired in a legitimate manner or by legitimately acquired means. Member States shall therefore ensure that during the criminal prosecution, the person concerned has the opportunity to present information concerning the acquisition of property.

5. Finally, Member States shall adopt the necessary measures to enable them to confiscate, in place of property as specified in paragraphs 1, 2 and 3, an amount equivalent to the value of the property or a part thereof.

*Article 4***Implementation**

1. Member States shall adopt the necessary measures to comply with this Framework Decision by [...] (*).

2. Member States shall transmit to the General Secretariat of the Council of the European Union and to the Commission of the European Communities, at the latest by the same date, the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. In accordance with a report established on the basis of this information and a written report from the Commission, the

(*) Two years after the date on which the Framework Decision is adopted.

Council shall assess, by [...] (**) at the latest, the extent to which Member States have taken the necessary measures in order to comply with this Framework Decision.

*Article 5***Entry into force**

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

Done at ...

For the Council

The President

...

(**) Three months after the date on which the Framework Decision is implemented.

Initiative of the Kingdom of Denmark with a view to the adoption of Council Framework Decision on combating corruption in the private sector

(2002/C 184/04)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 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⁾. However, a number of Member States have not yet ratified that Convention.

(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.

⁽¹⁾ OJ C 195, 25.6.1997, p. 2.

⁽²⁾ OJ L 358, 31.12.1998, p. 2.