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**DROIPEN 3
CORDROGUE 16**

NOTE

from : Presidency
to : Working Party on Substantive Criminal Law

No. prev. doc. : 10372/01 DROIPEN 60 CORDROGUE 45 COMIX 494
5297/02 DROIPEN 1 CORDROGUE 9

No. Cion prop. : COM(2001) 259 final

Subject : Proposal for a Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking

At its meeting on 23 January 2002, the Working Party on Substantive Criminal Law continued examining the abovementioned draft Framework Decision on the basis of 10372/01 DROIPEN 60 CORDROGUE 45 COMIX 494 and 5297/02 DROIPEN 1 CORDROGUE 9.

The Irish, United Kingdom and Danish delegations entered parliamentary scrutiny reservations.

The Netherlands delegation entered a general scrutiny reservation and a linguistic scrutiny reservation.

The Austrian delegation entered a general scrutiny reservation.

The German, Austrian and Netherlands delegations thought that the scope of the instrument should be limited to large-scale or international trafficking.

The Finnish and Austrian delegations stressed the need to lay down penalties for precursors other than those which applied to drugs.

With a view to further examination of the draft, the Presidency has drawn up the text set out in the Annex in the light of the Working Party's discussions. The delegations' points of view are given in the footnotes.

Article 1

Definitions

For the purposes of this Framework Decision:

1. "drugs" means any of the substances covered by the following United Nations Conventions: (a) the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 protocol); (b) the 1971 Vienna Convention on Psychotropic Substances. It also includes the substances subject to controls under Joint Action 97/396/JHA of 16 June 1997 adopted on the basis of Article K.3 of the Treaty on European Union concerning the exchange of information, risk assessment and the control of new synthetic drugs;
2. "precursors" means any scheduled substance in accordance with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 [or] referred to in Council Regulation No 3677/90 of 13 December 1990 and Council Directive 92/109 of 14 December 1992, including mixtures containing those substances; ¹
3. "legal person" means 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.

¹ This new wording is intended to reconcile the delegations' diverging points of view on whether to refer to the United Nations Convention or European legislation.

Article 2

Crimes linked to trafficking in drugs and precursors¹

1. Each Member State shall take the necessary measures to punish the following intentional conduct when committed unlawfully²:
- (a) the production, manufacture, extraction, preparation, offer, offering for sale, distribution, sale, supply under any circumstances, brokerage, dispatch, dispatch in transit, transportation, import or export of drugs;
 - (b) the cultivation of opium poppies, coca bushes or cannabis plants for the purpose of drug production;
 - (c) the possession or purchase of drugs with a view to conducting one of the activities listed in paragraph (a) above;
 - (d) the manufacture, transportation, distribution of equipment, materials or precursors, where the person involved knows that they are to be used in or for the illicit cultivation, production or manufacture of drugs^{3 4 5}.

¹ The German delegation regretted deletion of the requirement that the intention be to make them available to a third party.

² The Commission, backed by Italy, proposed replacing the word "unlawfully" by "without authorisation".

³ Reservations by Germany, Austria, the United Kingdom and the Commission, and scrutiny reservation by the Netherlands regarding the inclusion of material and equipment.

⁴ The Commission proposed the following wording: "the production, manufacture, preparation, offer, offering for sale, distribution, sale, supply under any circumstances, brokerage, dispatch in transit, transportation, import or export of (...) precursors, where the person involved knows that they are to be used in or for the illicit cultivation, production or manufacture of drugs."

⁵ The French delegation, with the support of the Swedish and Greek delegations, proposed dealing with these matters under Article 3. The French delegation also said that it was not in favour of including precursors, but that if they were included, the list should be extended to any legal substance to be used in or for the illicit cultivation, production or manufacture of drugs.

2. Each Member State may choose not to punish the conduct described in 1(b) and (c) where committed for personal consumption as defined by national law ¹.

Article 3

Incitement, aiding and abetting and attempt

1. Each Member State shall take the necessary measures to make incitement to commit, aiding and abetting or attempting one of the offences referred to in Article 2 a criminal offence ².

[2. A Member State may exempt from criminal liability the attempt to offer or prepare drugs referred to in Article 2(a) and the attempt to possess drugs referred to in Article 2(c).]

Article 4

Penalties ³

1. Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 2 and 3 are punishable by effective, proportionate and dissuasive penalties, which may lead to extradition.

2. [The Presidency will put forward a revised text on the basis of the conclusions of the JHA Council in February 2002].

¹ Wording proposed by the Presidency to cater for comments by several delegations which considered the last wording of Article 2 too broad.

² The Swedish, Danish, German, Austrian and Finnish delegations would like the reference to Article 2(d) to be excluded from this Article.

³ Several delegations said that it might be necessary to create more distinctions between the offences referred to in Article 2 in order to make it easier to lay down different penalties depending on the seriousness of the offence.

3. Member States shall also lay down the necessary measures to ensure confiscation of the substances used in the unlawful trafficking of drugs and precursors, the instrumentalities and property used in trafficking and the proceeds and advantages directly or indirectly derived from such trafficking, or property the value of which corresponds to those products, substances, instrumentalities, property and advantages.

4. Member States may also provide for the possibility of imposing fines in addition [or as an alternative] to custodial sentences.

Article 5

Aggravating circumstances¹

Without prejudice to any other aggravating circumstances defined in their national legislation, Member States shall provide for the following aggravating circumstances in respect of the offences referred to in Articles 2 and 3:

- (a) the offence was committed by a criminal organisation;
- (b) the offence involved violence or the use of weapons;
- (c) the offence involved minors or persons unable to exercise their free will;
- (d) the offence was committed in schools, penitentiary institutions, youth clubs or leisure centres for young persons, or institutions for the treatment and rehabilitation of drug addicts;

¹ Several delegations were against the principle of aggravating circumstances on the grounds that their legislation provides that they should be determined by the court. Germany and Portugal considered that aggravating circumstances should not be dealt with under Article 5 nor as a separate category.

- (e) the offender is a doctor, pharmacist, court official, police officer, customs officer, prison officer, probation officer, teacher, instructor or works in an educational establishment and abused his position to commit the offence;
- (f) the offender has been convicted of one or more similar offences by a final judgment in a Member State of the Union.

Article 6

Mitigating circumstances

Without prejudice to any other mitigating circumstances defined in their national legislation, Member States shall take the necessary measures to ensure that the penalties referred to in Article 4 can be reduced if the offender has supplied the competent authorities with valuable information for the enquiry or the collection of evidence about the identity of other offenders, or has helped to identify drug-dealing networks.

Article 7

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for one of the criminal offences referred to in Articles 2 and 3 where those offences are committed for their benefit by any person acting individually or as a member of an organ of the legal person in question, 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.

2. Apart from the cases already 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 one of the offences referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority¹.

3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal prosecutions against natural persons who are perpetrators, instigators or accomplices in the offences referred to in Articles 2 and 3.

*Article 8*²

Penalties for legal persons

Member States shall take the necessary measures to ensure that any legal person found to be liable pursuant to Article 7(1) and (2) is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other penalties, such as:

- (a) exclusion from entitlement to tax relief or other benefits or public aid;
- (b) temporary or permanent disqualification from the pursuit of commercial activities;
- (c) placement under judicial supervision;
- (d) a judicial winding-up order;
- (e) temporary or permanent closure of establishments used for committing the offence;
- (f) the confiscation of property that was the object of the offence and the proceeds and advantages derived directly or indirectly from the offence.

¹ Reservation by the United Kingdom.

² Reservation by the United Kingdom since Article 8 does not distinguish between Article 7(1) and (2).

*Article 9*¹

Jurisdiction and prosecution

1. Member States shall take the necessary measures to establish their jurisdiction as regards the offences referred to in Articles 2 and 3 where:

- (a) the offence was committed entirely or partly within their territory;
- (b) the offence was committed on board a vessel flying its flag or an aircraft registered there;
- (c) the offender is one of their nationals [or residents];
- (d) the offence was committed for the benefit of a legal person established in their territory.

2. Where an offence falls within the jurisdiction of more than one Member State and when any of the States concerned can validly bring a prosecution on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders with the aim, if possible, of centralising prosecution in a single Member State. To that end, the Member States may have recourse to any body or mechanism established within the European Union in order to facilitate cooperation between their judicial authorities and the coordination of their action. Sequential account will be taken of the following factors:

- being the Member State in the territory of which the acts have been committed;
- being the Member State of which the perpetrator is a national or resident;
- being the Member State in which the perpetrator has been found.

¹ The Presidency proposal takes into account the reservations expressed by most of the delegations as to the possibility of aligning this text on that of the Framework Decision on combating terrorism (14845/1/01 REV 1 DROIEN 103 CATS 49).

3. Each Member State shall take the necessary measures also to establish its jurisdiction over the offences referred to in Articles 2 and 3 in cases where it refuses to hand over or extradite a person suspected or convicted of such an offence to another Member State or to a third state.

Article 10

Cooperation between Member States

[If several Member States have jurisdiction over an offence referred to in Articles 2 and 3, they shall consult one another with a view to coordinating their action and, where appropriate, to bringing a prosecution. They shall make full use of judicial cooperation and other mechanisms.]

Article 11

Implementation and reports

1. Member States shall take the necessary measures to comply with this framework decision by 30 June 2003 at the latest.

They shall immediately send the Commission and the General Secretariat of the Council the text of the provisions transposing the obligations imposed upon them by this framework decision.

2. Member States shall submit a brief report to the Commission on the implementation of this framework decision for the first time by 31 December 2006 at the latest, and every five years thereafter.

3. On the basis of the information referred to in paragraphs 1 and 2, the Commission shall draw up a report evaluating the application of the provisions of this framework decision by the Member States for the first time by 30 June 2007 at the latest, and every five years thereafter. This report shall be sent to the European Parliament and to the Council, where necessary accompanied by proposals for the amendment of this framework decision.

Article 12
Entry into force

This framework decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

Done at Brussels,

For the Council

The President
