



**COUNCIL OF
THE EUROPEAN UNION**

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LIMITE

**DROIPEN 9
CORDROGUE 19**

NOTE

from : The Presidency

to : Article 36 Committee

Nos prev. docs : 5733/02 DROIPEN 3 CORDROGUE 16
6056/02 DROIPEN 6 CORDROGUE 17

No. Cion prop. : COM(2001) 259 final (10372/01 DROIPEN 60 CORDROGUE 45 COMIX 494)

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

I. INTRODUCTION

At its meeting on 11 February, the Working Party on Substantive Criminal Law continued examining the draft Framework Decision. Articles 1 to 3 were examined on the basis of 10372/01 DROIPEN 60 CORDROGUE 45 COMIX 494 and 5733/02 DROIPEN 3 CORDROGUE 16. Articles 4 and 5 (penalties) were examined on the basis of 6056/02 DROIPEN 6 CORDROGUE 17. Several delegations had also made comments in writing.

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

The Netherlands and Austrian delegations maintained their general scrutiny reservations and the Netherlands delegation also had a linguistic scrutiny reservation.

The Finnish, Danish and Austrian delegations recalled that they wanted the penalties for precursors to be different from those for drugs.

The text in the annex reflects the current state of play except for Articles 4 and 5, for which a new text will be proposed in the light of the discussions of the Working Party and the informal JHA Council meeting in February 2002. Amendments to Articles 1 to 3 as worded in DROIPEN 3 are underlined.

It was considered appropriate at this stage to consult the Article 36 Committee on the following three questions.

II. QUESTIONS SUBMITTED TO THE ARTICLE 36 COMMITTEE

1. Inclusion of precursors

There is a broad consensus within the Working Party on Substantive Criminal Law that the draft Framework Decision should cover precursors (Article 2(1)(d)). However, the French delegation remains opposed to their inclusion on principle, and the Swedish delegation has entered a scrutiny reservation.

In order to meet the deadline set by the Laeken European Council, which wanted the Framework Decision to be approved by the end of May 2002, the Presidency would ask the Article 36 Committee for a final decision on the matter.

2. Definition of precursors (Article 1(2))

At the last meeting of the Working Party on Substantive Criminal Law and following lengthy discussions, the Working Party decided to define precursors by reference to the United Nations and Community instruments in the field. The Working Party has asked the Council's Legal Service to check the wording of Article 1(2) and, if necessary, submit an alternative text to the Article 36 Committee for a final decision on the matter.

3. Article 2(2)

The Working Party on Substantive Criminal Law invites the Article 36 Committee to confirm its decision not to include within the scope of the Framework Decision conduct committed for personal consumption as defined by the national law of the Member States.

III. CONCLUSIONS

The Article 36 Committee is invited to examine the questions set out under points II, 1-3 above.

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 and referred to in Council Regulation No 3677/90 of 13 December 1990 and Council Directive 92/109 of 14 December 1992;

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.

Article 2

Crimes linked to trafficking in drugs and precursors

1. Each Member State shall take the necessary measures to ensure that the following intentional conduct when committed without right is punishable¹:
 - (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 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 production or manufacture of drugs².

¹ This wording follows that of Article 3 of the draft Council Framework Decision on combating the sexual exploitation of children and child pornography (6039/02 DROIPEN 5 MIGR 7) and seeks to reconcile the diverging points of view expressed during the examination of the previous wording on the use of the words "unlawful" or "without authorisation". The French, Netherlands, Portuguese and Greek delegations entered reservations on this wording.

² The words "equipment" and "materials" were deleted. The Netherlands delegation maintained its scrutiny reservation on this question. Substantive reservation of substance by the French delegation and scrutiny reservation by the Swedish delegation on the inclusion of precursors.

2. The conduct described in paragraph 1 shall not be included in the scope of this Framework Decision when it is committed for personal consumption as defined by national law.

Article 3

Incitement, aiding and abetting and attempt¹

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

[The Presidency will put forward in a separate document a new revised text based on the Working Party's proceedings and the conclusions of the JHA Council meeting on February 2002.]

¹ Reservation by the Netherlands on making attempt a criminal offence.

² The Swedish, Danish and Finnish delegations wanted the reference to Article 2 (d) to be excluded from this Article. The Danish delegation proposed the alternative of excluding attempt from the reference to Article 2 (d), which was supported by the Swedish delegation.

Article 5

Aggravating circumstances

[The Presidency will put forward in a separate document a new revised text based on the Working Party's proceedings and the conclusions of the JHA Council on February 2002]

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;

¹ Reservation by the United Kingdom.

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

- (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.

*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:

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 DROIPEN 103 CATS 49).

- 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.

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