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REPORT FROM THE COMMISSION TO THE COUNCIL

**based on Article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on
combating corruption in the private sector**

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1. INTRODUCTION

The Council¹ adopted the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector² pursuant to Title VI of the Treaty on European Union. As stated at paragraph (10) of the Preamble, its aim is:

“...to ensure that both active and passive corruption in the private sector are criminal offences in all Member States, that legal persons may also be held responsible for such offences, and that these offences incur effective, proportionate and dissuasive penalties.”

At its heart is the requirement that Member States³ criminalise two types of conduct, which can be summarised as follows (Article 2 of the Framework Decision refers):

- promising, offering or giving a bribe to a person in the private sector in order that he or she do something or refrain from doing something, in breach of that person's duties
- requesting or receiving a bribe, or the promise of such, while working in the private sector, in order to do something, or refrain from doing something, in breach of one's duties.

The Commission considers that it is vitally important to address corruption wherever it occurs. Corruption in the private sector has a direct impact on competitiveness and economic development. By tackling private sector corruption, Member States will reinforce the internal market and strengthen their economies. Furthermore, these measures will have a positive impact on relations with the European Community's external trade partners.

The development of instruments

The prevention of and fight against corruption has long been a priority of the EC. A number of legal instruments dealing with corruption were adopted by the EC from 1995 onwards, prior to the adoption of the Joint Action on corruption in the private sector. These earlier instruments were as follows:

- Convention on the Protection of the European Communities' Financial Interests, 1995 and its associated Protocols⁴

¹ 2524th Meeting of the Council of the European Union (Agriculture and Fisheries) held in Brussels on 22 July 2003

² OJ L 192, 31.7.2003, p. 54

³ Throughout this Report, the term "Member States" will be taken to refer to the EU-25; Romania and Bulgaria will be invited to contribute to any subsequent Report which may be prepared

⁴ OJ C 316, 27.11.1995, p. 3

- Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, 1997⁵

Attention then turned to the private sector, and the Joint Action on corruption in the private sector (Joint Action of 22 December 1998 (98/742/JHA))⁶ was developed. This Joint Action was seen as a first step in addressing the impact of corruption on the internal market and in international trade. It called on Member States to establish:

- both passive and active corruption in the private sector as criminal offences, at least where this conduct led to distortion of competition in relation to the awarding of contracts
- the liability of legal persons in relation to active corruption.

Instruments relating to corruption in the private sector by other bodies

It should be noted that during the late 1990's the Council of Europe also developed a range of measures and instruments to address various aspects of corruption, among which was its Criminal Law Convention against Corruption⁷. The Convention included Articles on private sector corruption (active bribery - Article 7 and passive bribery – Article 8). These were broader than the approach taken in the Joint Action, and subsequently in the Framework Decision, because they did not provide for any restriction to conduct involving a distortion of competition. It also included a provision on corporate liability (Article 18), which is narrower than that in the Framework Decision, as it does not extend to passive bribery. While both the Framework Decision and the Convention provide that the term "legal person" is based on the definition of that term in the applicable national law, the context is potentially broader under the Framework Decision, because it specifically extends the scope of the offences of passive and active corruption to business activities within profit and non-profit entities.

To date, the Council of Europe Criminal Law Convention has been signed by all Member States but only ratified by 19⁸. Certain Member States, as permitted by the ratification process, have made reservations relating to one or more of the Articles mentioned previously.⁹ Although the second evaluation round (2003-2005) carried out by the Council of Europe mechanism, GRECO, included Article 18 Corporate Liability within its scope, its focus did not extend to Articles 7 and 8 on corruption in the private sector. Accordingly, the current Report does not contain cross-references to Council of Europe evaluations.

The United Nations has also addressed private sector corruption. Article 12 of the UN Convention against Corruption (UNCAC), 2003 does not require State Parties to establish criminal offences in relation to private sector corruption. Its scope is primarily limited to encouraging States Parties to take measures to prevent private sector corruption, enhance accounting and auditing standards and encourage transparency and to put in place civil, administrative or criminal penalties for failure to comply with them.

⁵ OJ C 195, 25.6.1997, p. 1.

⁶ Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector (98/742/JHA) OJ L 358, 31.12.1998, p. 2-4.

⁷ Criminal Law Convention against Corruption (ETS No. 173 Strasbourg 27.1.1999) <http://conventions.coe.int/Treaty>

⁸ The exceptions are Austria, France, Germany, Greece, Italy and Spain.

⁹ Belgium, Czech Republic, Poland – Articles 7, 8; United Kingdom – Article 7; Hungary – Article 8.

The Danish Initiative

In July 2002 Denmark presented an Initiative for a Framework Directive¹⁰, following the adoption of which, the Joint Action would be repealed.

The Initiative set a broader context than previously by including a specific reference to the threat which corruption posed to "a law-abiding society" as well as its distortion of "competition" and impeding of "sound economic development" (Paragraph 7, Preamble). The Initiative stated that the aim of the Framework Decision was

"...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." (Paragraph 8, Preamble).

Adoption of the Framework Decision

As recorded in the minutes of the adopting Council meeting¹, three Member States (Germany, Ireland and Italy) entered statements in the minutes. Ireland declared that the definition of "breach of duty" (Article 1) which refers to "disloyal behaviour" did not encompass "whistle-blowing activities". Germany declared that the term "in course of business activities" (Article 2(1)) be interpreted in the sense that reference is made to activities in relation to the purchase of goods or commercial services. Both Germany and Italy declared a limit on the scope of Article 2(1) to conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or commercial services (Article 2(3)).

2. PURPOSE OF THE REPORT AND METHOD OF EVALUATION

Council Framework Decisions are binding upon the Member States as to the result to be achieved, but leave to national authorities the choice of form and methods. They do not entail direct effect.

As the Commission has no authority under the Third Pillar to initiate an infringement procedure against a Member State, the nature and purpose of this report is limited to a factual evaluation of the implementation measures taken.

The Report concentrates on Articles 1 to 7 (with a brief reference to Article 10 where relevant), and records the Declarations made by Member States under Articles 2 and 7. It does not discuss Articles 8, 9 nor 11 as these provisions do not require implementation.

The evaluation criteria adopted by the Commission for this Report are the general criteria adopted in 2001¹¹ to evaluate the implementation of framework decisions (practical effectiveness, clarity and legal certainty, full application and compliance with the time limit for transposition). Secondly, criteria specific to this Framework Decision are also used, and further details are provided in the context of the analysis of the individual Articles which follows.

¹⁰ 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).

¹¹ COM(2001) 771, 13.12.2001, point 1.2.2

Article 9(1), Framework Decision required Member States to take the necessary measures to comply with the provisions of this Framework Decision before 22 July 2005. Article 9 (2) required them to transmit to the General Secretariat of the Council and the Commission the text of the provisions transposing into national law the obligations imposed on them under this Framework Decision.

Two Member States (NL, FI) issued their responses and supplied their legislation to the Commission before the due date. A further 21 have subsequently responded, of which Czech Republic supplied its draft legislation (except Articles 5 and 6), while Greece and Spain stated that they had legislation under preparation but without supplying any text to date. Cyprus and Malta have not responded to date.

Many Member States provided some form of cover note in which they drew attention to any Declarations they wished to make, others used the opportunity of supplying a cover note and concordance table in which they explained the general and particular approach taken in their legislation, supported by relevant legislative references. As regards the obligation to transmit the text of their transposing provisions, Denmark did not provide any text to support what was nevertheless a very detailed commentary, while a number of other Member States made partial omissions. These are indicated in more detail when the relevant measures are discussed.

The Report therefore provides an analysis of the transposition commentaries and legislation provided by 20 Member States, and some comments on the draft legislation submitted by the Czech Republic.

Article 1 - Definitions

Few Member States gave even a partial response to this Article. Some other Member States expressed the view that it was unnecessary to respond to it. However, the Commission's view is that information on the application of these definitions in national legislation would be extremely useful in order to have clarity on how these concepts are handled in national legislation. In the absence of such information, it is not possible for the Commission to be certain that the Framework Decision has been correctly transposed – for example, information on the definition of a "legal person" is essential in relation to analysing the transposition of Article 5.

Article 2 – Active and passive corruption in the private sector

Article 2 is the key Article of the 2003 Framework Decision. It not only combines the definitions and offences relating to active and passive corruption respectively, but broadens the scope of the offences beyond the internal market, unless a Member State explicitly makes a Declaration retaining such a limit.

Article 2 proved highly problematic for most of the 20 Member States. Only two (BE, UK) correctly transposed all its elements. However, with the exception of one requirement within Article 2(1), PT and IE otherwise did so too. While it can be said that Member States have to some extent criminalised active and passive corruption in the private sector, there are a number of issues which States failed to address adequately. This is a grave concern, as the omitted elements mean that the legislation could be easily circumvented. Member States are requested to address these gaps as a matter of urgency.

The requirement on Member States to establish **criminal offences of active and passive corruption in relation to business activities in the private sector** is set out in Article 2 (1). To facilitate analysis, legislation was considered against a framework of the 7 elements of the description under Article 2 1 (a) (active corruption) and 2 1 (b) (passive corruption) respectively. As most Member States' legislation was very similar for both, the following comments focus only on the active corruption offence (Article 2 1 (a)).

- "promising, offering or giving"

Eleven Member States met this requirement, but 7 (EE, HU, IT, NL, PL, PT, SK) omitted "offering", LU omitted "giving" and LV omitted "promising".

- "directly or through an intermediary"

All 20 Member States provide for direct corruption. But 8 Member States either omitted intermediaries (AT, DE, FI, IT, NL, PL, SE, SI) or changed the focus of the offence to provide for the liability of the intermediary (EE) instead of the person using the intermediary.

- "a person who in any capacity directs or works"

Certain Member States did not address the full scope of "directs" (AT, DE, LV, SE) or "works" (IT, LU, LV, PL) while EE did not provide information on this point.

- "private-sector entity"

This was clearly addressed by 18 Member States, but EE did not supply information while LU did not supply a definition of the term "legal entity".

- "an undue advantage of any kind"

Fourteen Member States meet this requirement. But 5 (DE, EE, FI, LT, NL) do not address intangible benefits. IE indicated that it was preparing legislation on this point.

- "for that person or for a third party"

While FR and EE did not provide information on this point, 16 Member States criminalise giving etc an advantage for a person or for a third party, but IT and NL omit the element of the third party from their legislation.

- "perform or refrain from performing any act, in breach of that person's duties"

Thirteen Member States meet this requirement. Four Member States (HU, PL, SE, SI) did not address "refrain", while DE and LT do not address the element "in breach of that person's duties". EE did not provide information on this point.

With regard to corruption involving **non-profit entities** (Article 2 (2)), there was often a lack of information on which to base any analysis. Where possible, if relevant material could be found elsewhere, eg in relation to Article 5 on liability of legal persons, this was used. Nevertheless, the situation in 10 Member States (AT, FI, HU, IT, LT, LU, LV, PL, SE, SK) remains unclear.

The Framework Decision provides that a Member State may limit the scope of the criminal offences of active and passive corruption to conduct involving a distortion of competition (Article 2 (3)), but requires that it provide a Declaration to this effect. Article 2 (4) of the Framework Decision not only provides for the communication of such a Declaration to the Council when it is adopted, but limits their validity to five years from 22 July 2005, while Article 2 (5) requires the Council, before that deadline expires, to review whether or not such Declaration(s) may be renewed. Where Member States had lodged Declarations (Article 2 (3)), either formally at Council or by letter with their transposition material, these were taken into account. Such Declarations were lodged by DE, IT and PL. Whether or not these Declarations may be renewed is a matter for the Council to consider before 22 July 2010 (Article 2 (5)). A Declaration was also lodged by AT, to the effect that it availed of the exception clause under Article 2 (3) in respect of any aspect of Article 2 which it had not transposed. In the Commission's view, AT's approach goes beyond the scope of Article 2(3), and AT is invited to reconsider its position.

Article 3 – Instigation, aiding and abetting

This Article focuses on secondary participation in corruption through instigation, aiding and abetting. It does not address attempted offences.

The overall level of transposition was very high – 18 Member States (AT, BE, DK, EE, FI, DE, HU, IE, IT, LT, LU, LV, NL, PL, PT, SE, SK, SL), met the requirements of Article 3 as did the UK (except Scotland).

Article 4 – Penalties and other sanctions

In addition to requiring, at Article 4 (1), that offences should be punishable by criminal penalties which are "effective, proportionate and dissuasive", Article 4 (2) requires Member States to have in place a "minimum-maximum" range of at least one and three years imprisonment as a penalty for the offences of active and passive corruption, and omits any reference to the provision of other kinds of penalties for minor cases of active or passive corruption. Article 4 (3) is innovative in that it sets out a requirement that Member States, in accordance with their constitutional rules and principles, provide in certain circumstances for the temporary prohibition of natural persons from carrying on that particular or comparable business activity in a similar position or capacity.

It is noted that a number of Member States, in the information they provided for Article 4 (1), overlooked the penalties provided under Article 3. Where possible, these were inserted on the basis of information supplied for Article 3 itself.

Eleven Member States (DK, EE, FI, DE, IE, IT, LT, LU, NL, PL, SE) have fully transposed Article 4.

It is noted that AT provides for a maximum period of imprisonment which is less than the minimum of the range provided under Article 4.2 Framework Decision.

The majority of Member States met the requirements of Article 4 (3).

Article 5 – Liability of legal persons

The issue of legal persons' liability remains a difficult one for certain Member States. Three Member States (AT, IT, SK) , either have yet to complete legislation on this topic or such

legislation has been rejected by Parliament, in the case of the Slovak Republic, and hence have failed to transpose both Articles 5 and 6, Framework Decision. Furthermore, Ireland is preparing legislation to specifically address Article 5(2).

Only 5 Member States (LT, LU, NL, PL, SI) have fully transposed Article 5. As many as 13 transposed Article 5(1), with the results somewhat lower in respect of Article 5(2), (6 MS) and Article 5(3), (10 MS). The particular difficulty faced here in the analysis was a lack of information from the Member States, which was especially evident in relation to Articles 5(2) and 5(3). Given that, as previously mentioned, 3 Member States have yet to enact legislation to address Article 5, it is considered that Article 5 warrants detailed scrutiny in any subsequent reports.

Article 6 – Penalties for legal persons

As mentioned in relation to Article 5, 3 Member States (AT, IT, SK) do not have legislation in place to transpose either Articles 5 or 6. Luxembourg has indicated that it is preparing legislation to provide for the possibility of fines for legal persons.

Because both Articles 5 and 6 deal with legal persons, the difficulties and gaps in Member States' legislation, or in the information they supplied for Article 5 impacted on the rate of transposition of Article 6. Five Member States (DK, LT, NL, PL, SI) transposed the Article fully. Further information is required from a number of Member States in order to assess their position.

In those instances where Member States (BE, FI) provided the level of penalty only in pre-euro currency, they are invited to forward the penalty levels in euro for assessment.

Article 7 – Jurisdiction

While the Commission recognises that jurisdiction measures are a standard feature of Framework Decisions, nevertheless it urges Member States to provide the same level of information when responding to such Articles as they do in relation to those Articles which are subject-specific. Due to the unevenness of Member States' replies in relation to this Article, only an incomplete picture of its transposition could be prepared by the Commission at this stage. Member States are invited to provide outstanding information in due course, to assist in the preparation of any subsequent Report.

This lack of information contributed to the low level of transposition – on the basis of the information supplied, only 3 Member States (DK, DE, UK) can be said to have transposed this Article. The second main contributory factor was a lack of information specifically with regard to offences occurring *in part* on the territory of a Member State (Article 7 (1) (a) refers). It is of course possible that Member States' legislation makes the assumption that a reference to jurisdiction over offences occurring on the territory includes this element, but without an explicit reference either in the text of the legislation or in the accompanying commentary, this assumption could not be made in the analysis. Finally, it was clear that many Member States have not addressed in their legislation the option at Article 7 (1) (c) of taking jurisdiction over offences committed for the benefit of a legal person that has its head office in its territory and have either furnished a Declaration opting out or have not provided information at all within their reply.

Article 10 - Territorial Application

With reference to Article 10, the UK stated that Gibraltar "intends to transpose this measure as soon as legislative time allows" but has not to date supplied the text of the enacted legislation.

Legislation in progress – Czech Republic

The Czech Republic provided a covering letter and a comparative table which includes the text of the relevant sections of its draft criminal code. Apart from Articles 5 and 6, it informed the Commission that its draft legislation was compatible with the provisions of the Framework Decision. However, it has not subsequently informed the Commission of the progress with this draft legislation and accordingly, as it would appear that the text is still subject to amendment within the context of the parliamentary procedures, the Commission only offers its general comments in the Annex to this Report.

3. NEXT STEPS FOR THE FRAMEWORK DECISION

The Commission takes this opportunity to draw attention to two issues which will need to be addressed in the coming years:

- 'Reformatage'

As indicated by the Commission in its Communication "On the Implications of the Court's Judgement of 13 September 2005" (Case C-176/03 Commission v Council) (COM(2005) 583 final/2 Brussels 24.11.2005), the Council Framework Decision on Combating Corruption in the Private Sector is one of the instruments which is affected by this judgement. The judgement would indicate that the legal base of the Council Framework Decision requires amendment. The implications for the Council Framework Decision, and the approach to be adopted, will be addressed at a future date.

- Review of Article 2 by Council, as provided by Article 2(5)

By virtue of Article 2 (4), Member States' Declarations made under Article 2 (3), are due to expire on 21 July 2010. By that date, the Council is required by Article 2 (5) to review Article 2 "with a view to considering whether it shall be possible to renew Declarations made under paragraph 3." Four Member States (AT, DE, IT, PL) have made Declarations.

4. CONCLUSIONS

It should be noted that, by their nature, framework decisions¹² are binding upon the Member States as to the results to be achieved, but it is a matter for the national authorities to choose the form and method of implementation. Framework decisions do not entail direct effect. As the Commission has no authority under the Third Pillar to initiate an infringement procedure against a Member State, the nature and purpose of this report is limited to a factual evaluation of the transposition measures taken by 23 Member States (effectively twenty for the reasons given earlier).

¹² Article 34 (2)(b), Treaty on European Union

Summary table showing extent of transposition by 20 Member States

I = no/insufficient information N = not transposed P = partly transposed T = fully transposed

MS	Article 1	Article 2	Article 3	Article 4	Article 5	Article 6	Article 7 (1)
AT	I (LP) I (BofD)	P	T	P	N	N	I
BE	T (LP) T (BofD)	T	T	I	P	I	P
DE	I (LP) I (BofD)	P	T	T	P	P	T
DK	T (LP) I (BofD)	P	T	T	P	T	T
EE	T (LP) T (BofD)	P	T	T	P	P	I
FI	T (LP) I (BofD)	P	T	T	P	P	I
FR	I (LP) T (BofD)	P	I	P	P	I	I
HU	T (LP) I (BofD)	P	T	P	I	P	P
IE	T (LP) T (BofD)	P	T	T	P	P	P
IT	I (LP) I (BofD)	P	T	T	N	N	P

LT	T (LP) T (BofD)	P	T	T	T	T	I
LU	I (LP) I (BofD)	P	T	T	T	P	P
LV	I (LP) I (BofD)	P	T	P	P	P	P
NL	I (LP) T (BofD)	P	T	T	T	T	P
PL	T (LP) T (BofD)	P	T	T	T	T	P
PT	T (LP) T (BofD)	P	T	P	P	P	P
SE	I (LP) I (BofD)	P	T	T	P	P	P
SK	I (LP) I (BofD)	P	T	P	N	N	P
SI	T (LP) I (BofD)	P	T	P	T	T	P
UK	T (LP) I (BofD)	T	T (England, Wales & NI) I (Scotland)	P	P	P	T
Total transpositions	10 (LP) 8 (BofD)	2	18	11	5	5	3

(LP) = Legal Person BofD = Breach of Duty

Concluding Remarks

It is a source of concern to the Commission that transposition of this Council Framework Decision is still at an early stage among Member States. The Commission reminds Member States of the importance they have attached to the fight against private sector corruption¹³. Furthermore, the Commission notes that this importance is also reflected in the Council of Europe Criminal Law Convention against Corruption 1999, and in the UN Convention against Corruption 2003. Strong, comprehensive legislation at national level is the foundation for effective protection of the private sector against this economic threat.

The Commission invites all Member States to consider this Report and to take the opportunity to provide all further relevant information to the Commission and Council Secretariat, in order to complete the fulfilment of their obligations under Article 9, Framework Decision. In addition, the Commission encourages those Member States which have signalled that they are preparing relevant legislation, to enact these national measures as soon as possible and to provide the texts to the Council Secretariat and to the Commission for analysis. This call is particularly made to Greece and Spain, which indicated in 2005 that they were preparing draft legislation, but have not provided any further information. Finally, the Commission notes with concern that 2 Member States have not replied to date (CY, MT), contrary to Article 9, and urges them to furnish the full details of their transposition without further delay.

The annexed staff working paper provides a more detailed analysis of the Member States' national measures, on which the Commission's analysis is based.

¹³ (paragraph (9) of the Framework Decision Preamble)