Combating corruption in the private sector. Framework Decision. Initiative Denmark

2002/0817(CNS) - 18/06/2007 - Follow-up document

The Counciladopted the Council Framework Decision 2003/568/JHA on combating corruption in the private sectorpursuant to Title VI of the Treaty on European Union. The principal requirement of the legislation is that Member Statescriminalise two types of conduct, which may 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.

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, and records the Declarations made by Member States under Articles 2 and 7. Member States were required to take the necessary measures to comply with the provisions of the Framework Decision before 22 July 2005, and to transmit to the Council and the Commission the text of the provisions transposing into national law the obligations imposed on them. Two Member States (the Netherlands and Finland) issued their responses 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. 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. The Articles presenting the most problems are as follows:

Article 1 – Definitions: few Member States gave even a partial response to this Article. 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: this 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 main difficulties relate to the requirement on Member States to establish **criminal offences of active and passive corruption in relation to business activities in the private sector** as set out in Article 2 (1), and are fully described in the report. Some Member States have focused only on the active corruption offence. All 20 Member States provide for direct corruption, but some have either omitted intermediaries or changed the focus of the offence to provide for the liability of the intermediary instead of the person using the intermediary. In addition, some Member States do not address intangible benefits. With regard to corruption involving **non-profit entities**, 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.

Article 2(3) of 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, but requires that it provide a Declaration to this effect. The validity of such a Declaration is limited to five years from 22 July 2005, and the Council is required to review, before22 July 2010, whether or not such

Declarations may be renewed. Such Declarations were lodged by DE, IT and PL. 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, Austria's approach goes beyond the scope of Article 2(3), and Austria is invited to reconsider its position.

Articles 5 and 6 – Liability of and penalties for 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. Only 5 Member States (LT, LU, NL, PL, SI) have fully transposed Article 5. 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.

Article 7 – Jurisdiction: 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. Member States are invited to provide outstanding information in due course, to assist in the preparation of any subsequent Report. On the basis of the information supplied, only 3 Member States (DK, DE, UK) can be said to have transposed this Article. There was a lack of information specifically with regard to offences occurring in parton the territory of a Member State. It was also 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.

The Commission takes this opportunity to draw attention to two issues which will need to be addressed: - **'Reformattage':** the Commission Communication on the implications of the Court's Judgement of 13 September 2005 (Case C-176/03 Commission v Council) (see COM(2005)0583), indicates that the Council Framework Decision is one of the instruments which is affected by this judgement. The latter would indicate that the legal base of the Council Framework Decision requires amendment. The approach to be adopted will be addressed at a future date.

- **Review of Article 2 by Council:** Member States' Declarations made under Article 2 (3), are due to expire on 21 July 2010, and the Council must decide whether to renew them.