Public procurement: award, criminal law protection against fraudulent or unfair conduct

2000/0812(CNS) - 28/06/2000 - Legislative proposal

PURPOSE: to propose a framework on criminal law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts. CONTENT: The draft Council Framework Decision, proposed on the initiative of Germany, seeks to strengthen the protection of both the financial interest of contracting entities and of fair competition in relation to the award of public contracts. For the purposes of this Framework Decision, the offence of fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts shall have been committed if a person acting for an undertaking intentionally makes an offer based on an unlawful agreement or concerted practice between undertakings aimed at causing the contracting entity, as a result of a direct or indirect promise, offer or grant of an advantage to a person, for that person himself or for a third person, in return for the award of a public contract in breach of duty, or as a result of other collusive combination with the person responsible for the award of the contract, or by concealing such an agreement to accept a particular offer. Every Member State is required to take the necessary measures to ensure that such conduct shall be a criminal offence, and the acting as an accessory to, or instigator of, such an offence, are punishable by effective, proportionate and dissuasive criminal penalties including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition. Each Member State must take the necessary measures to ensure that legal personss can be held liable for a criminal offence committed for their benefit by any person acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: - a power of representation of the legal person, or - an authority to take decisions on behalf of the legal person, or - an authority to exercise control within the legal person, as well as for involvement as accessories to, or instigators of, the commission of such a criminal offence. There are also provisions requiring each Member State to take all necessary measures to establish its jurisdiction with regard to such a criminal offence where the criminal offence has been committed in whole or in part within its territory, or by one of its national, provided that the law of that Member State may require the offence to be punishable also in the country where it occurred, or for the benefit of a legal person that has its head office in the territory of that Member State. Derogations are provided for whereby any Member State which decides not to apply these measures shall inform the General Secretariat of the Council with an indication of the specific cases or circumstances in which that decision applies. It should be noted that, in 1999, a proposal for a Joint Action with the same objectives as this draft Framework Decision was already made (see CNS/1999/0915).