

(Acts adopted pursuant to Title VI of the Treaty on European Union)

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)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles K.1(7) and K.3(2)(b) thereof,

Having regard to the report of the High-level Group on Organised Crime, which was approved by the European Council meeting in Amsterdam on 16 and 17 June 1997, and more particularly Recommendation No 6 of the Action Plan to combat organised crime of 28 April 1997⁽¹⁾, which provides for the development of a comprehensive policy against corruption,

Whereas the Member States attach particular importance to combating corruption in the private sector on an international level;

Having regard to the conclusions of the Conference on achieving a corruption free environment - the EU Contribution (Brussels, April 1998),

Having regard to the Council Resolution of 21 December 1998 on the prevention of organised crime with reference to the establishment of a comprehensive strategy for combating it⁽²⁾,

Whereas the Member States stress the fact that prevention is no less important than repression in an integrated approach to corruption in the private sector;

Having regard to the Protocol, adopted by the Council on 27 September 1996, to the Convention on the protection of the European Communities' financial interests⁽³⁾, to the Second Protocol, adopted by the Council on 19 June 1997, to the Convention on the protection of the European Communities' financial interests⁽⁴⁾ and to the Convention on the fight against corruption involving officials of the European Communities or officials of

Member States of the European Union, adopted by the Council on 26 May 1997⁽⁵⁾;

Whereas this Joint Action is not aimed at corruption already covered by the instruments referred to;

Having regard to the communication of 21 May 1997 from the Commission to the European Parliament and the Council on a Union policy against corruption,

Whereas corruption distorts fair competition and undermines the principles of openness and freedom of markets, and in particular the smooth functioning of the internal market, and also militates against transparency and openness in international trade;

Whereas, for the purpose of this Joint Action, it is of importance that the concept of 'breach of duties' is covered in a sufficiently broad way by national law of Member States;

Having examined the views of the European Parliament⁽⁶⁾, following consultation carried out by the Presidency in accordance with Article K.6 of the Treaty,

HAS ADOPTED THIS JOINT ACTION:

Article 1

Definitions

For the purposes of this Joint Action:

- 'person' means any employee or other person when directing or working in any capacity for or on behalf of a natural or legal person operating in the private sector,
- 'legal person' means any entity having such status under the applicable national law, except for States or other public bodies acting in the exercise of State authority and for public international organisations,

⁽¹⁾ OJ C 251, 15. 8. 1997, p. 1.

⁽²⁾ OJ C 408, 29. 12. 1998, p. 1.

⁽³⁾ OJ C 313, 23. 10. 1996, p. 2.

⁽⁴⁾ OJ C 221, 19. 7. 1997, p. 11.

⁽⁵⁾ OJ C 195, 25. 6. 1997, p. 2.

⁽⁶⁾ OJ C 371, 8. 12. 1997, p. 193.

— 'breach of duty' shall be understood in accordance with national law. The concept of breach of duty in national law should cover as a minimum any disloyal behaviour constituting a breach of a statutory duty, or, as the case may be, a breach of professional regulations or instructions, which apply within the business of a 'person' as defined in the first indent.

Article 2

Passive corruption in the private sector

1. For the purposes of this Joint Action, the deliberate action of a person who, in the course of his business activities, directly or through an intermediary, requests or receives an undue advantage of any kind whatsoever, or accepts the promise of such an advantage, for himself or for a third party, for him to perform or refrain from performing an act, in breach of his duties, shall constitute passive corruption in the private sector.

2. Subject to Article 4(2), each Member State shall take the necessary measures to ensure that conduct of the type referred to in paragraph 1 is made a criminal offence. These measures shall at least cover such conduct which involves, or could involve, the distortion of competition, as a minimum within the common market, and which results, or might result, in economic damage to others by the improper award or improper execution of a contract.

Article 3

Active corruption in the private sector

1. For the purposes of this Joint Action, the deliberate action of whosoever promises, offers or gives, directly or through an intermediary, an undue advantage of any kind whatsoever to a person, for himself or for a third party, in the course of the business activities of that person in order that the person should perform or refrain from performing an act, in breach of his duties, shall constitute active corruption in the private sector.

2. Subject to Article 4(2), each Member State shall take the necessary measures to ensure that conduct of the type referred to in paragraph 1 is made a criminal offence. These measures shall at least cover such conduct which involves, or could involve, the distortion of competition, as a minimum within the common market, and which results, or might result, in economic damage to others by the improper award or improper execution of a contract.

Article 4

Penalties

1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 2 and 3, and the acting as an accessory in or instigator of such conduct, 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.

2. However, for minor cases of active or passive corruption, in the private sector, a Member State may provide for penalties of a different kind from those referred to in paragraph 1.

Article 5

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for active corruption of the type referred to in Article 3 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 or instigators in the commission of such an offence.

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 an act of active corruption of the type referred to in Article 3 for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are involved as perpetrators, instigators or accessories in the active corruption.

Article 6

Sanctions for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;
- (d) a judicial winding-up order.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

Article 7

Jurisdiction

1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in Articles 2 and 3 where the offence has been committed:

- (a) in whole or in part within its territory; or
- (b) by one of its nationals, provided that the law of that Member State may require the conduct to be punishable also in the country where it occurred; or
- (c) for the benefit of a legal person operating in the private sector that has its head office in the territory of that Member State.

2. Any Member State may decide that it will not apply, or will apply only in specific cases or circumstances, the jurisdiction rule set out in:

- paragraph 1(b),
- paragraph 1(c).

3. Member States shall inform the General Secretariat of the Council accordingly where they decide to apply paragraph 2, where appropriate with an indication of the

specific cases or circumstances in which the decision applies.

4. Any Member State which, under its law, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in Articles 2 and 3, when committed by its own nationals outside its territory.

Article 8

Implementation of the Joint Action

1. Each Member State shall, within two years after the entry into force of this Joint Action, bring forward appropriate proposals to implement this Joint Action for consideration by the competent authorities with a view to their adoption.

2. The Council will assess, on the basis of appropriate information, the fulfilment by Member States of their obligations under this Joint Action within three years after its entry into force.

Article 9

This Joint Action shall be published in the Official Journal.

Article 10

This Joint Action shall enter into force on the date of its publication in the Official Journal.

Done at Brussels, 22 December 1998.

For the Council

The President

C. EINEM