EUROPEAN UNION
THE COUNCIL

Brussels, 29 March 1999
(OR. d)

6946/99

LIMITE

TRANSLATION SUPPLIED BY
THE PRESIDENCY

JUSTPEN 16
CK4 16

NOTE

from : Presidency

to : K.4 Committee

Subject: Draft joint action on criminal law protection against fraudulent or unfair anti-competitive conduct on the award of public contracts in the common market

Following the announcement in the work programme for the K4 Committee during the German EU Council Presidency (Document 14414/98 CK4 54) and the work programme for the Working Party on Criminal and Community Law (Document 14298/98 JUSTPEN 118) Delegations will find attached a draft joint action on criminal law protection against fraudulent or unfair anti-competitive conduct on the award of public contracts in the common market (after entry into force of the Amsterdam Treaty: framework decision).

The Presidency will present the proposal at the meeting of the K4 Committee on 30 March 1999. The proposal is to be referred for discussion to the Working Party on Criminal and Community Law (after entry into force of the Amsterdam Treaty: Working Party on Substantive Criminal Law). The Presidency also intends to forward the draft immediately for a hearing before the European Parliament.

DRAFT JOINT ACTION[1]

- ADOPTED BY THE COUNCIL ON THE BASIS OF ARTICLE K.3[2] OF THE TREATY ON EUROPEAN UNION -

ON CRIMINAL LAW PROTECTION
AGAINST FRAUDULENT OR UNFAIR ANTI-COMPETITIVE CONDUCT
ON THE AWARD OF PUBLIC CONTRACTS
IN THE COMMON MARKET

THE COUNCIL OF THE EUROPEAN UNION -

Having regard to the Treaty on European Union, and in particular Articles K.1(5,7) and K.3(2)(b) thereof,[3]

Desiring to strengthen both the protection of fair competition and the financial interests of contracting entities on the award of public contracts,

In view of the fact that contracts concluded in Member States by public entities, including entities operating in the water, energy, transport and telecommunications sectors, are awarded above certain thresholds based on requirements under Community law,

Convinced that the enforcement of Community law on the award of contracts must be secured by effective sanctions that also have to be of a criminal law nature in respect of fraudulent or unfair anti-competitive conduct,

---

(1) After entry into force of the Amsterdam Treaty: of a framework decision.
(2) After entry into force of the Amsterdam Treaty: Article 34.
(3) After entry into force of the Amsterdam Treaty: Article 31(e) and Article 34(2)(b).

Realizing that the general offences of fraud in Member States have only a limited effect in this field,

Bearing in mind that in practice the provisions of Community law on procurement are applied mutatis mutandis to the awarding of contracts by Community institutions and that their protection by the criminal law will therefore also serve to safeguard the financial interests of the European Communities,

HAS ADOPTED THIS JOINT ACTION[4]:

ARTICLE 1

DEFINITIONS

For the purpose of this Joint Action:

a) "public contract" shall mean a supply, works, or service contract falling within the scope of the Directives of the Council of the European Communities coordinating procurement procedures for such contracts so far as their value is not less than, or exceeds, the thresholds designated in each of these Directives; it shall cover a corresponding contract awarded by the European Communities or by the institutions set up in accordance with the Treaties establishing the European Communities;

b) "undertaking" shall mean a tenderer or candidate pursuant to the Directives of the Council of the European Communities coordinating procurement procedures for the award of public contracts;

c) "legal person" shall mean 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.

---

[4] After entry into force of the Amsterdam Treaty: following framework decision.

ARTICLE 2

FRAUDULENT OR UNFAIR ANTI-COMPETITIVE CONDUCT ON THE AWARD OF PUBLIC CONTRACTS IN THE COMMON MARKET

(1) For the purposes of this Joint Action the offence of fraudulent or unfair anti-competitive conduct on 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 between undertakings aimed at causing the contracting entity to accept a particular offer

- 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.

(2) Every Member State shall take the necessary measures to ensure that the conduct referred to in paragraph 1 shall be a criminal offence.

ARTICLE 3
PENALTIES

Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 2, and the acting as an accessory to, 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.

ARTICLE 4
LIABILITY OF LEGAL PERSONS

(1) Each Member State shall take the necessary measures to ensure that legal persons can be held liable, pursuant to Article 5(2), for a criminal offence pursuant to Article 2 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.

(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, pursuant to Article 5(2), where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of a criminal offence pursuant to Article 2 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 or instigators of, or accessories to, a criminal offence pursuant to Article 2.

ARTICLE 5
PENALTIES FOR LEGAL PERSONS

(1) Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 4(1) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties such as:

a) exclusion from entitlement to public 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 4(1) is punishable by effective, proportionate and dissuasive penalties and measures.

ARTICLE 6
SUBSIDIARITY
OF ARTICLES 4 AND 5

Articles 4 and 5 shall not apply to the extent that provisions under the law of the European Communities concerning the liability of legal persons and penalties for legal persons apply to a criminal offence pursuant to Article 2.

ARTICLE 7
JURISDICTION

(1) Each Member State shall take the necessary measures to establish its jurisdiction with regard to the criminal offence pursuant to Article 2 where the criminal 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 offence to be punishable also in the country where it occurred; or

c) for the benefit of a legal person 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 rule set out in paragraph 1(b) and 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 criminal offences referred to in Article 2, when committed by its own nationals outside its territory.

ARTICLE 8
IMPLEMENTATION OF THE JOINT ACTION[5]

(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
PUBLICATION

This Joint Action[6] shall be published in the Official Journal.

---

[5] After entry into force of the Amsterdam Treaty to be adjusted to the legal form of the framework decision.

[6] After entry into force of the Amsterdam Treaty: This framework decision.

ARTICLE 10

ENTRY INTO FORCE

This Joint Action[7] shall enter into force on the date of its publication in the Official Journal.

Done at Brussels,

For the Council

The President

---

[7] After entry into force of the Amsterdam Treaty: This framework decision.