

EUROPEAN PARLIAMENT

1999



2004

Session document

FINAL
A5-0382/2002

7 November 2002

REPORT

on the initiative of the Kingdom of Denmark with a view to the adoption of a Council framework decision on combating corruption in the private sector (10689/2002 – C5-0376/2002 – 2002/0817(CNS))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Francesco Rutelli

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

CONTENTS

	Page
PROCEDURAL PAGE	4
DRAFT LEGISLATIVE RESOLUTION.....	5
EXPLANATORY STATEMENT	15
OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET	20

PROCEDURAL PAGE

By letter of 1 August 2002 the Council consulted Parliament, pursuant to Article 39(1) of the EU Treaty, on the initiative of the Kingdom of Denmark with a view to the adoption of a Council framework decision on combating corruption in the private sector (10689/2002 – 2002/0817(CNS)).

At the sitting of 2 September 2002 the President of Parliament announced that he had referred this proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible. At the sitting of 26 September 2002 he announced that he had referred it to the Committee on Legal Affairs and the Internal Market for its opinion (C5-0376/2002).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs had appointed Francesco Rutelli rapporteur at its meeting of 11 September 2002.

It considered the initiative of the Kingdom of Denmark and the draft report at its meetings of 11 September, October and 5 November 2002.

At the last meeting it adopted the draft legislative resolution by 28 votes to 2, with 1 abstention.

The following were present for the vote: Jorge Salvador Hernández Mollar, chairman; Lousewies van der Laan, vice-chairman; Francesco Rutelli, rapporteur; Roberta Angelilli, Mary Elizabeth Banotti, Giuseppe Brienza, Kathalijne Maria Buitenweg (for Alima Boumediene-Thiery), Michael Cashman, Carlos Coelho, Gérard M.J. Deprez, Giuseppe Di Lello Finuoli, Francesco Fiori (for Marcello Dell'Utri, pursuant to Rule 153(2)), Monica Frassoni (for Patsy Sørensen), Evelyne Gebhardt (for Robert J.E. Evans), Renzo Imbeni (for Sérgio Sousa Pinto), Pierre Jonckheer, Sylvia-Yvonne Kaufmann (for Fodé Sylla), Timothy Kirkhope, Eva Klamt, Luís Marinho (for Carmen Cerdeira Morterero), Pasqualina Napoletano (for Walter Veltroni), Marcelino Oreja Arburúa, Elena Ornella Paciotti, Martine Roure, Heide Rühle, Ole Sørensen (for Baroness Sarah Ludford), Joke Swiebel, Anna Terrón i Cusí, Maurizio Turco, Graham R. Watson (for Bill Newton Dunn) and Olga Zrihen Zaari (for Martin Schulz).

The opinion of the Committee on Legal Affairs and the Internal Market is attached.

The report was tabled on 7 November 2002.

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the initiative of the Kingdom of Denmark with a view to the adoption of a Council framework decision on combating corruption in the private sector (10689/2002 – C5-0376/2002 – 2002/0817(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the initiative of the Kingdom of Denmark (10698/2002¹),
 - having regard to Articles 30, 31 and 34(2)(c) of the EU Treaty,
 - having been consulted by the Council pursuant to Article 39(1) of the EU Treaty (C5-0376/2002),
 - having regard to Rule 67 of its Rules of Procedure,
 - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and the opinion of the Committee on Legal Affairs and the Internal Market (A5-0382/2002),
1. Approves the initiative of the Kingdom of Denmark as amended;
 2. Calls on the Council to alter its proposal accordingly;
 3. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;
 4. Asks to be consulted again if the Council intends to amend the initiative of the Kingdom of Denmark substantially;
 6. Instructs its President to forward its position to the Council and the Government of the Kingdom of Denmark.

Council initiative (10698)

Amendments by Parliament

Amendment 1
Recital 1 a (new)

(1a) On 26 July 1995 the Council adopted the Convention on the protection of the European Communities' financial interests¹. The convention entered into force on 17 October 2002 and contains

¹ OJ C 184 E, 2.8.2002, p. 5.

***definitions of and harmonised penalties
for corruption offences.***

¹ OJ C 316, 27.11.1995, p. 48.

Justification

It is important to draw a parallel between action to combat corruption in the private sector and similar action in the public sector in the European Union.

Amendment 2
Recital 3 a (new)

(3a) On 13 June 2002 the Council adopted Framework Decision 2002/584/JHA on the European arrest warrant², in which corruption is included in the list of offences coming within the scope of the European arrest warrant, in respect of which prior verification of double criminality is not required; the essential aspects of the offence should therefore be defined and the penalties applicable to it laid down at European level.

² OJ L 190, 18.7.2002, p. 1

Justification

Corruption appears on the list of 32 offences in respect of which no provision is made for prior verification of double criminality. Given, however, the substantial differences in the laws of the Member States, it would be appropriate to harmonise the essential aspects of the offence and the penalties applying to it, in accordance with Article 31 of the Treaty on European Union.

Amendment 3
Recital 7 a (new)

(7a) The offence of corruption in the private sector is already covered by the

EU Convention of 26 May 1997 and the Council of Europe Convention of 27 January 1999. These conventions should, in principle, already have been ratified by all the Member States by the time this Framework Decision enters into force so as to prevent there from being substantial differences in the definition of the offence of corruption in both the public and private sectors.

Justification

The framework decision on the European arrest warrant makes no distinction between the offence of corruption in the private and public sectors and requires immediate cooperation on the part of the requested judicial authority. It is therefore essential for the law in the requesting State and the requested State to be as far as possible equivalent, not least in view of the fact that the double criminality requirement does not apply to the offence of corruption. Harmonisation of legislation covering the offence of corruption in the public sector was, in principle, already effected prior to the entry into force of the Amsterdam Treaty, through the EU Convention of 26 May 1997. However, this will not be the case in any Member State that fails to ratify that convention by 31 December 2003.

Amendment 4
Recital 7 b (new)

(7b) The Council reserves the right to adopt a new framework decision on the offence of corruption in the public sector if not all the Member States have ratified the above conventions by 30 June 2003.

Justification

It is proposed that a new framework decision covering the offence of corruption in the public sector be adopted should any Member States fail to ratify the EU Convention of 26 May 1997 by 30 June 2003.

Amendment 5
Recital 8 a (new)

(8a) This Framework Decision should enter into force in good time for the candidate countries to be able to transpose it as part of the 'acquis' of the European Union and for the certainty of the law in force in the Member States at the time of entry into force of the Framework Decision on the European arrest warrant to be ensured. It is also necessary in the light of the current trend towards the privatisation of publicly-managed companies and the increasingly transnational nature of business.

Justification

The factors referred to in support of the adoption of the framework decision should include the need to have a common legislative framework when the candidate countries join the EU. Reference should also be made to the current trend in the European economy towards the concentration and privatisation of companies with a public service remit.

Amendment 6
Article 1

For the purposes of this Framework Decision:

– ***"Convention on corruption" means the Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union;***

– ***"Council of Europe Convention on corruption" means the Council of Europe Criminal Law Convention on Corruption of 27 January 1999;***

– "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

For the purposes of this Framework Decision:

deleted

deleted

– "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.

organisations.

– *"breach of duty": to be understood in accordance with national law to 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" directing or working in any capacity on behalf of a private sector entity.*

Justification

Reference to the convention has already been made in the recitals; a further reference in the articles is therefore unnecessary. With a view to ensuring greater legal certainty, a definition of the term 'breach of duty' would appear appropriate.

Amendment 7

Article 2, first subparagraph

Member States shall take the necessary measures to ensure that the following intentional conduct constitutes a criminal offence, when it is committed in the course of business activities:

Member States shall take the necessary measures to ensure that the following intentional conduct constitutes a criminal offence, when it is committed in the course of business activities, ***including non-profit activities***:

Justification

The amendment seeks to remove any doubt about the decision's applicability to non-profit activities.

Amendment 8

Article 3

Instigation, aiding and abetting, incitement ***and attempt***

Member States shall take the necessary measures to ensure that instigating, aiding

Instigation, aiding and abetting ***and*** incitement

Member States shall take the necessary measures to ensure that instigating, aiding

and abetting, inciting **and attempting** commission of the conduct referred to in Article 2 constitute criminal offences.

and abetting **and** inciting commission of the conduct referred to in Article 2 constitute criminal offences.

Justification

It is difficult to prove that someone is attempting to commit an act of corruption, and this is anyway already covered by 'instigation'.

Amendment 9
Article 4

1. Those Member States which have not yet ratified the Convention on corruption shall undertake to do so within one year following the entry into force of this Framework Decision. ~~deleted~~

2. Those Member States which have not yet ratified the Council of Europe Convention on corruption shall undertake to do so within one year following the entry into force of this Framework Decision.

Justification

National legislation on corruption in the public sector must be harmonised by 1 January 2004 so as to prevent problems arising in the implementation of the framework decision on the European arrest warrant. The Danish proposal paradoxically opens the way to further delays in the ratification process and to a period of serious uncertainty as regards the interpretation of the applicable law. The Member States cannot therefore be given any more time to ratify the conventions referred to, which should already have been ratified. Ratification must be tied to adoption of this framework decision, as is specified in new recitals 7a and 7b and in Article 10, as amended by amendment 15.

Amendment 10
Article 6, paragraph 2

2. Apart from the cases provided for in paragraph 1, each Member States shall take the necessary measures to ensure that a

2. Apart from the cases provided for in paragraph 1, each Member States 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 offence of the type referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.

legal person can be held liable where the lack of *the legally required degree of* supervision or control by a person referred to in paragraph 1 has made possible the commission of an offence of the type referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.

Justification

The term 'lack of supervision or control' is too broad in scope. Liability can only be based on a failure to act involving serious misconduct on the part of the persons responsible.

Amendment 11

Article 7, paragraph 1, point (d a) (new)

(da) confiscation of illicit proceeds.

Justification

The confiscation of illicit proceeds is one of the most important penalties provided for in all international anti-corruption conventions.

Amendment 12

Article 7, paragraph 2 a (new)

2a. Each year, Member States shall forward to the Commission a list of the companies found guilty of corruption by final ruling of the national courts during the previous year. This list shall be published in the Official Journal of the European Communities.

Justification

Within the internal market, where companies enjoy freedom of establishment, it is extremely important to know which companies have been found guilty of corruption and to ensure that, if they have been temporarily or permanently disqualified from the practice of commercial activities (within the meaning of Article 7(1)(b), they are unable to circumvent this ban by setting up in another Member State. To this end, the Council should draw up a list, similar to that drawn up by the World Bank, which the Member States should disseminate as widely as possible. The European Parliament already called for such an arrangement in 1995 in its resolution on combating corruption in Europe (A4-0314/1995) and, more recently, in the Howitt report on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility (A5-0159/2002).

Amendment 13
Article 8, paragraph 3

3. Any Member State which, under its domestic law, does not as yet 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. *deleted*

Justification

This provision is superfluous because corruption comes within the scope of the framework decision on the European arrest warrant, which should come into force at the same time as this decision.

Amendment 14
Article 8, paragraph 8 b (new)

1. Member States shall ensure the broadest and most effective mutual cooperation between the authorities responsible for preventing, investigating and punishing acts of corruption. To this end, they shall facilitate the exchange of information on the best practice followed,

as well as periodical meetings between the authorities responsible.

2. In negotiations with third countries and international organisations Member States shall abstain from taking any measure which could jeopardise the attainment of the objectives of this Framework Decision and, in general, of Union policy on combating corruption.

Justification

Harmonisation of the essential aspects of the offence is likely to have no practical effect in the absence of effective cooperation between the authorities responsible in the Member States. As regards international aspects, the principle of sincere cooperation between the Member States and the EU institutions should be made explicit, so as to ensure that the Union is not presented with a fait accompli and is able to take part alongside the Member States in the current negotiations on the United Nations Convention on corruption in particular.

Amendment 15 Article 10

1. Member States shall take the necessary measures to comply with this Framework Decision by [...] * at the latest.

2. By the same date, Member States shall forward to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of a report drawn up from that information and a written report from the Commission, the Council shall assess, by [...] **, whether Member States have taken the necessary measures to comply with this Framework Decision.

1. Member States shall take the necessary measures to comply with this Framework Decision by **31 December 2003** at the latest.

2. By the same date, Member States shall forward to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of a report drawn up from that information **concerning the real scope of the measures adopted** and of a written report from the Commission **to the Council and the European Parliament**, the Council shall assess, by **30 June 2003**, whether Member States have taken the necessary measures to comply with this Framework Decision **and whether all the instruments ratifying the Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of**

Member States of the European Union have been deposited. In the event of those instruments not having been deposited, the acting Council Presidency shall submit a draft Framework Decision covering corruption in the public sector. That Framework Decision should be adopted in good time for it to enter into force on 1 January 2004 alongside this Framework Decision. The European Parliament shall be kept informed of the measures taken to implement this Framework Decision.

** Date to be inserted: two years after the adoption of the Framework Decision.*

*** Date to be inserted: three months after the time limit for implementation of the Framework Decision.*

Justification

Self-explanatory.

EXPLANATORY STATEMENT

Introduction

Combating corruption has become a matter of leading political, social and economic importance at national and international level over recent years. This is why it is included among the objectives of the Treaty on European Union (Article 29).

Corruption undermines the rule of law, the social tissue and the principles of democracy because it is against the interests of all members of the public. It is also a leading cause of economic underdevelopment and, in particular, a factor which contributes to the distortion of competition within the European Union.

The crisis of confidence among the general public caused by the recent wave of financial scandals, particularly in the United States, serves as a reminder to the institutions of the need to ensure greater transparency and to combat corruption with determination in all spheres of society, thereby helping the markets to restore their credibility. Market operators are becoming increasingly aware of the need for business to be conducted in a more ethical and responsible fashion.

The European institutions have a duty to make a vigorous response to the growing need felt by the general public for transparent, simple and reliable guarantees and rules. For its part, the European Parliament has over the last decade adopted a number of important resolutions on corruption in Europe¹. The rapporteur would draw particular attention to the importance of the last of these resolutions, since the recommendations it contains are, unfortunately, still relevant today. This fact is not lost upon the Commission, which is currently preparing to submit a new communication on this alarming phenomenon, five years after its previous communication on the matter.

Combating corruption unquestionably requires the involvement of all sections of society, from the national and European authorities to the private sector, civil society and the media. It requires joint and complementary action at various levels, from the international to the local.

The entry into force on 1 January 2004 of the framework decision on the European arrest warrant will be a key factor in the success of such efforts. The decision will include the offence of corruption among the offences for which prior verification of double criminality is not required, and this should ensure that offenders are surrendered to the judicial authorities of the requesting State. This procedure will be all the more effective if the essential aspects of the offence of corruption are harmonised in the Member States. It should, however, be noted that the framework decision on the European arrest warrant makes no distinction between corruption in the public and private sectors, and national laws therefore need to be compatible in both. In theory, the ideal solution would be a framework decision covering both the public

¹ A4-0314/1995, on combating corruption in Europe;
A4-0365/1996, on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union;
A4-0348/1997, on the draft joint action on making corruption in the private sector a criminal offence;
A4-0285/1998, on the communication from the Commission to the Council and the European Parliament on a Union policy against corruption [COM(97)0192].

sector and the private sector, although this would need to be on the understanding that in the public sector what needs to be protected is first and foremost the principles of the rule of law and good governance, while in the private sector it is the financial interests of consumers or users, in addition to the smooth operation of the market.

However, this is not the arrangement which Denmark is proposing, given that the procedures for ratifying the EU Convention of 26 May 1997, harmonising national legislation on corruption in the public sector, are still in progress. Although adopted prior to the entry into force of the Amsterdam Treaty, this convention forms an integral part of the EU *acquis* and, if ratified, will be binding on the Member States in the same way as a framework decision within the meaning of Article 31 of the Treaty on European Union. Denmark therefore deemed it appropriate to confine the scope of its proposal to corruption in the private sector alone.

The rapporteur considers this approach to be rather optimistic, given that at least four States have yet to ratify the convention, which means that national laws on corruption in the public sector may well not be harmonised by 1 January 2004, and this would undoubtedly undermine legal certainty and the operability of the framework decision on the European arrest warrant.

The main amendments set out in this report seek therefore to establish an arrangement enabling the Council to adopt a further framework decision covering corruption in the public sector, should not all the instruments ratifying the 1997 convention be deposited by 30 June 2003. Lastly, one should not underestimate the importance of enacting European legislation on corruption in time for it to be transposed as part of the Union *acquis* by the candidate countries when the accession treaties are ratified.

Corruption in the private sector

As Parliament stated in its 1998 resolution, corruption in the private sector can have a corrosive impact on the fairness of free competition, the costs borne by companies and the credibility and financial conduct of businesses.

One of the most serious forms of crime in the private sector is corruption in the banking and auditing sector, which has a particularly adverse effect on the economy.

The smooth operation of international commerce is undermined by companies which use bribery and corruption as a means of gaining new market shares. The international economic interdependency fostered by today's information and communication technologies has made it possible for well-organised corruption networks based in several States to grow up and to make use of disparities in national legislation to evade prosecution. Action therefore needs to be taken at supranational level, particularly within the European Union, where there is freedom of movement and establishment.

Attention has been drawn in many fora to the need to legislate at international level to combat corruption in the private sector, including, most recently, at the 10th International Anti-Corruption Conference held in Prague from 7 to 11 October 2001. The sector's representative bodies, such as the International Chamber of Commerce (ICC), the Business and Industry

Advisory Committee to the OECD (BIAC), European associations of small and medium-sized enterprises (see the Bologna Charter of 15 June 2000), NGOs such as Transparency International and the Civicus network have repeatedly called for action. Furthermore, a large number of companies operating at international level have called for a comprehensive and consistent European strategy to combat corruption in the private sector which would seek to incorporate their own self-regulation systems (corporate codes of conduct).

The International Anti-Corruption and Good Governance Act adopted by the US administration in October 2000 is an illustration of how combating corruption has become a priority in the United States as well.

This framework decision repeals joint action 98/742/JHA of 22 December 1998 on corruption in the private sector, which was based on Article K.3 of the Maastricht Treaty. The joint action's scope was confined to corruption causing distortion of competition on the common market. Furthermore, not all the Member States have incorporated the offences of active and passive corruption into their national legislation as criminal offences incurring effective penalties, as called for in the joint action. The Danish Presidency has decided to submit a framework decision with a view to ensuring that:

- both active and passive corruption are considered criminal offences in all the Member States and, as the case may be, abroad;
- legal persons may also be held responsible for such offences;
- penalties are effective, proportionate and dissuasive and include custodial sentences.

There are currently no reliable statistics on the incidence of private-to-private corruption. This is because such offences are difficult to prove, given that it is in the interests of neither the corrupter nor the corrupted to be discovered. Criminal laws and effective penalties act as a deterrent, but are no more than a first step. What is needed is to develop throughout the European Union a culture of lawfulness and of social responsibility within companies, through codes of conduct, anti-corruption procedures and transparent accounts and financial transactions.

National sectoral associations should review the effectiveness and appropriateness of their own codes of conduct with a view to ensuring that suitable penalties are applied to any of their members found guilty of corruption.

Shareholders should raise awareness of the importance of verifying the transparency of accounts and the decision-making process, with a view to preventing abuses or corruption. The hidden cost of corruption and the risks inherent in a lack of sound management have an adverse long-term impact on share values and dividends. As recent events have once again shown, the cost of restoring the reputation of a company deemed guilty of corrupt practices is extremely high. If, furthermore, it is found that accounts have been falsified, the company's very survival may be at threat.

Another basic requirement is for the Member States and the candidate countries to ensure the independence and integrity of their judicial systems, on which the rule of law is founded and the success of action to combat corruption depends.

It is equally important for the Member States to promote public information and awareness campaigns aimed at making the general public the first line of defence against corruption, in their own interest.

European bodies which have varying degrees of responsibility for fostering cooperation between the Member States in action to prevent and punish corruption, such as Eurojust, Europol, Olaf and the European judicial network, have an important role to play as coordinators. Coordinated action by such bodies should bolster action taken by the national police and facilitate cross-border investigations by pooling the Member States' intelligence capacity.

Parliament's position

Parliament reserves the right to review the entire issue of corruption in the light of the communication the Commission is currently preparing to submit. As regards the Danish initiative, it welcomes the intention to extend the scope of action to cover acts of corruption in general, irrespective of whether they result in a distortion of competition.

The rapporteur considers this to be a particularly important point, given that what we are seeking to protect is not just the market itself but also ordinary members of the public in their capacity as consumers and users, as well as shareholders and savers.

It should also be noted that were the scope of this measure to be confined solely to preventing market disruption, the legal basis would need to be changed and a measure based on the EC Treaty and defining the disruption to the market concerned would need to be submitted. Given that it covers a framework decision based on the Treaty on Union, this proposal cannot govern aspects coming within the Community's sphere of competence (see Article 46 of the Treaty on European Union).

The key provision of the framework decision is that under which legal persons may be held responsible. This provision does not yet exist in all the Member States and must not be watered down by the Council during the final negotiations.

The rapporteur considers it necessary to insert references to the various instruments existing at European level which include combating corruption among their objectives, so as to draw attention to the need for a consistent approach in this area.

Over and above the justifications given for the various amendments, the rapporteur feels that special attention should be drawn to the following:

- as regards scope, the non-profit sector should be included in the private sector;
- the provisions on penalties should be adjusted to take account of the surrender arrangements that are to replace extradition when the framework decision on the European arrest warrant enters into force (1 January 2004, which is prior to the entry into force of the framework decision currently before us);
- cooperation between the Member States should be stepped up, since this is of crucial importance in the fight against corruption. It should be pointed out that the Member States are bound by virtue of the principle of sincere cooperation (as set out in Article 10 of the EC

Treaty, with regard to the Community's competences) to abstain from any measure which could jeopardise the attainment of the objectives of this framework decision, including during the period between the decision's entry into force and its transposition into national law;

- efforts should be made to facilitate monitoring of the measures taken by the Member States, the assessment of those measures, inter alia through the use of statistics, and the dissemination of the information gathered, which is of crucial importance to the effectiveness of action to combat corruption.

4 November 2002

**OPINION OF THE COMMITTEE ON LEGAL AFFAIRS
AND THE INTERNAL MARKET**

for the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

on the proposal for a Council decision concerning the Initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on combating corruption in the private sector
(10698/2002 – C5-0376/2002 – 2002/0817(CNS))

Draftsman: Klaus-Heiner Lehne

PROCEDURE

The Committee on Legal Affairs and the Internal Market appointed Klaus-Heiner Lehne draftsman at its meeting of 1 October 2002.

It considered the draft opinion at its meetings of 7 October and 4 November 2002.

At the latter meeting it adopted the following conclusions by 17 votes to 11.

The following were present for the vote: Giuseppe Gargani, chairman; Ioannis Koukiadis and Bill Miller, vice-chairmen; Klaus-Heiner Lehne, draftsman; Generoso Andria, Luis Berenguer Fuster (for Maria Berger), Ward Beysen, Willy C.E.H. De Clercq (for Toine Manders), Francesco Fiori, Janelly Fourtou, Marie-Françoise Garaud, Vitaliano Gemelli, José María Gil-Robles Gil-Delgado, Malcolm Harbour, Heidi Anneli Hautala, The Lord Inglewood, Carlos Lage, Kurt Lechner, Hans-Peter Mayer (for Bert Doorn), Manuel Medina Ortega, Pasqualina Napoletano, Marcelino Oreja Arburúa (for Anne-Marie Schaffner), Paolo Pastorelli, Guido Sacconi, Michel-Ange Scarbonchi, Karin Scheele, Francesco Enrico Speroni (for Alexandre Varaut), Astrid Thors (for Diana Wallis), Marianne L.P. Thyssen and Stefano Zappalà.

SHORT JUSTIFICATION

The Danish initiative, albeit inspired by the worthy intention of making the fight against corruption more effective, does not seem sufficiently well-founded legally or politically appropriate.

It should, in fact, be borne in mind that many Member States do not make provision for the crime of corruption in the private sector and hence a framework decision introducing such a concept would constitute excessive interference in national legal systems.

Furthermore, the initiative is in conflict with the principle of subsidiarity, which must be fully applied, especially in a sector such as criminal law, in which Community action is to be implemented only in cases of real need, justified by the fact that the Member States are not in a position to take satisfactory action in order to achieve the objectives laid down in the Treaty.

According to the most recent case-law of the Court of Justice¹ the need for harmonisation and the problem of distortion of competition, which are the basis for the legislative initiative, must be specifically justified in relation to the objectives of the act to be adopted.

The Court maintains that the mere finding of disparities between national rules and the risk of obstacles to fundamental freedoms or of distortions of competition liable to result therefrom is not sufficient, since this might preclude judicial review.

In this connection, the distortions of competition caused by differences in national legal systems do not seem that significant.

Furthermore, both the lack of Court of Justice case-law on the subject and the absence of effective protection for fundamental rights make the introduction of the concept of a crime as problematic as corruption in the private sector extremely risky.

The need for such an initiative is also ruled out by the Framework Decision adopted by the Council on 13 Jun 2002 concerning the European arrest warrant². In this legislative context corruption (without any distinction being made between the public and private sectors) is considered as one of the possible reasons for arrest 'without verification of the double criminality of the act'³. This leads to the conclusion that the possibility of establishing minimum elements constituting a crime in the Community context is not essential in order for the European arrest warrant to be fully operational, and it can be used to prosecute the offences of corruption currently envisaged in the individual legal systems of the Member States.

There is even a risk that a different approach in dealing with corruption in the private sector - which would be subject to the current framework decision - as opposed to corruption in the

¹ Cf. judgment of the Court of Justice of 5 October 2000 in Case C-376 – Germany v. Parliament and Council (2000) ECR I-8419

² Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/GAI); in OJ L 190E, 18.07.2002, p. 1- 20.

³ Article 2, paragraph 2.

public sector, which would be covered by the EU Convention of 26 May 1997, may create problems for the application of the European arrest warrant.

Not only that: the public good safeguarded by both the offence of corruption in the public sector and of corruption in the private sector, is in many aspects the same: the rule of law, the smooth functioning of the market and the economic interests of citizens and businesses.

What is needed, therefore, is a legislative act governing both these offences, but taking into account that the submission of a proposal by the Commission requires a comprehensive and thorough examination of the subject. This may happen in the near future, on the basis of the communication which the Commission is preparing to adopt.

For all these reasons it seems appropriate to reject the initiative under consideration.

CONCLUSIONS

The Committee on Legal Affairs and the Internal Market calls on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, as the committee responsible, to reject the proposal for a Council decision concerning the Initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on combating corruption in the private sector.