



**COUNCIL OF
THE EUROPEAN UNION**

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10321/1/02

REV 1

LIMITE

**DROIPEN 42
CORDROGUE 47**

NOTE

from :	Presidency
to :	Coreper/Council

No. prev. doc. : 9718/1/02 DROIPEN 37 CORDROGUE 45 REV 1

No. Cion prop. : COM(2001) 259 final (10372/01 DROIPEN 60 CORDROGUE 45 COMIX 494)

Subject : Proposal for a Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking

I INTRODUCTION

At its meeting on 13 June 2002 the Council examined the draft Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking on the basis of document 9718/1/02 DROIPEN 37 CORDROGUE 45 REV 1.

The discussion focused on Article 4(6) of DROIPEN 37 REV 1 which allowed Member States to impose penalties lower than those laid down in Article 4(1) for certain conduct, where only small quantities of drugs were involved, in accordance with national law and subject to certain conditions.

The text of Article 4(6) as set out in DROIPEN 37 REV 1 was acceptable to the Netherlands delegation, which referred to the principle of subsidiarity and made it clear that its "coffee shop" policy would remain unchanged.

A number of delegations, including the French, Belgian, Spanish and Swedish delegations, stated their opposition to the principle set out in this provision and pointed out that Article 2(2) already contains an exemption for certain conduct committed by its perpetrators exclusively for their own personal consumption as defined by national law.

An alternative text proposed by the Spanish Presidency is included as a footnote in the Annex. The proposal did not receive any support.

At the Council meeting on 13 June 2002 the Presidency concluded that the outstanding issue with regards to the penalty level to be applied in cases involving small quantities of drugs remains unresolved.

The text resulting from these proceedings is set out in the Annex together with delegations' comments in footnotes to the text.

As the Commission's original proposal has undergone substantial changes as a result of negotiations, a re-consultation of the European Parliament is foreseen. Due to this, the European Parliament's Opinion, delivered on 25 April 2002, has not been examined.

The recitals have been examined by the JHA Counsellors on 27 September 2002, and several changes have been introduced to the recitals in order to bring them in line with the text of the Articles. Apart from the recitals, the text in the Annex remains unchanged as compared to document 10321/02 DROIPEN 42 CORDROGUE 47.

II OUTSTANDING QUESTIONS

1. GENERAL RESERVATIONS

- Parliamentary scrutiny reservations by the Irish, Danish, Swedish and Netherlands delegations.
- General scrutiny reservation by the Netherlands and Austrian delegations.

2. ARTICLE 4(6)

At its meeting in Laeken on 14 and 15 December 2001, the European Council underlined the importance of intensifying the fight against illegal drug trafficking and adopting the Commission's initiative on this subject before the end of May 2002.

For the purposes of reaching an agreement on the Draft Framework Decision on laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking, the Presidency has drafted a compromise proposal for a new Article 4(6) and (7) and a draft Council declaration.

The compromise proposal is based on the wording of Article 4(6) as set out in 9718/1/02 DROIPEN 37 CORDROGUE 45 REV 1, which was accepted by the Netherlands delegation at the Council meeting on 25 and 26 April 2002. However, as opposed to the wording set out in 9718/1/02 DROIPEN 37 CORDROGUE 45 REV 1, the Presidency's compromise proposal obliges Member States to make a declaration if they wish to apply Article 4(6). Furthermore, the compromise proposal contains a revision clause, which obliges Member States, which have made a declaration pursuant to Article 4(6), to review and, if they so wish, to renew their declaration every 3 years.

The draft Council declaration underlines the importance of ensuring that legislation relating to drug trafficking in one Member State does not undermine legislation relating to drug trafficking in other Member States. Furthermore the draft Council declaration indicates that the Framework Decision is only the first step in the fight against drug trafficking.

To be inserted in Article 4:

6. For the offences included in Article 2(1), a Member State may declare that it will establish lower penalties than those referred to in Article 4(1) as far as small quantities of drugs other than those referred to in paragraph 2(b) are concerned in accordance with its national law. This does not apply where the offence is committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA of 21 December 1998.
7. Declarations referred to in paragraph 6 shall be valid for 3 years from the implementation deadline for the Framework Decision. However, such a declaration may be renewed for successive periods of the same duration.

Council declaration:

“The Council declares that:

Drug trafficking is a heinous crime, which the Council is determined to fight with all possible means.

For this reason the Council underlines the importance of taking a strong stance against drug trafficking at all levels and emphasises the need for a trans-national and coherent approach in combating drug trafficking. In this connection the Council stresses the importance of ensuring that legislation relating to drug trafficking in one Member State does not undermine legislation relating to drug trafficking in other Member States.

Furthermore, the Council finds it imperative that Member States intensify operational co-operation both multilaterally and bilaterally since this is a vital element in the fight against drug trafficking. In order to ensure the continued efficiency of this co-operation Member States shall report to the General Secretariat of the Council on the nature and results of their bilateral co-operation every two years.

The Council condemns all forms of drug trafficking and sees this Framework Decision as a first and very important step in the intensified fight against drug trafficking.”

III CONCLUSIONS

Coreper is invited to examine the Presidency’s compromise proposal as set out under point II with a view to reaching an agreement on Article 4. In this connection Member States are reminded of the conclusions of the European Council’s meeting in Laeken on 14 and 15 December 2001.

Furthermore, in the light of fact that the Commissions’ original proposal has undergone substantial changes as a result of the negotiations Coreper is invited to agree to re-consult the European Parliament on the draft Framework Decision.

Proposal for a

COUNCIL FRAMEWORK DECISION

**laying down minimum provisions on the constituent elements
of criminal acts and penalties in the field of illicit drug trafficking**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31(e) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission ¹,

Having regard to the Opinion of the European Parliament ²,

Whereas:

- (1) Illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the European Union, and to the legal economy, stability and security of the Member States.

¹ OJ C 304 E, 30.10.2001, p. 172.

² OJ C [...], [...], p. [...].

- (2) The need for legislative action to tackle illicit drug trafficking has been recognised in particular in the Action Plan of the Council and the Commission, adopted by the Justice and Home Affairs Council in Vienna on 3 December 1998, on how best to implement the provisions of the Amsterdam on an area of freedom, security and justice ¹, the conclusions of the Tampere European Council of 15 and 16 October 1999, in particular point 48 thereof, the European Union's Drugs Strategy (2000-2004) endorsed by the Helsinki European Council from 10 to 12 December 1999 and the European Union's Action Plan on Drugs (2000-2004) endorsed by the European Council in Santa Maria da Feira on 19 and 20 June 2000.
- (3) It is necessary to adopt minimum rules relating to the constituent elements of the offences of illicit trafficking in drugs and precursors which will allow a common approach at Union level to the fight against such trafficking (...).
- (4) (...) By virtue of the principle of subsidiarity, European Union action should focus on the most serious types of drug offence. The exclusion of certain types of behaviour as regards personal consumption from the scope of the Framework Decision does not constitute a Council guideline on how Member States should deal with these other cases in their national legislation.
- (5) Penalties provided for by the Member States should be effective, proportionate and dissuasive, and include custodial sentences. To determine the level of penalties, factual elements such as (...) the quantities and the type of drugs trafficked (...), and whether the offence was committed within the framework of a criminal organisation (...) should be taken into account. (...)
- (6) (...) Member States should be allowed to make provision for reducing the penalties when the offender has supplied the competent authorities with valuable information (...).

¹ OJ C 19, 23.1.1999, p. 1.

- (7) It is necessary to take measures to enable the confiscation of the proceeds of the offences referred to in this Framework Decision.
- (8) Measures should be taken to ensure that legal persons can be held liable for the criminal offences referred to by this act which are committed for their benefit.
- (9) (...)
- (10) The effectiveness of the efforts made to tackle illicit drug trafficking depends essentially on the harmonisation of the national measures implementing this Framework Decision,
- (11) (...) ¹

HAS DECIDED AS FOLLOWS:

Article 1

Definitions

For the purposes of this Framework Decision:

1. "drugs" shall mean any of the substances covered by the following United Nations Conventions:
 - (a) the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol);

¹ COM would have preferred to maintain this recital.

- (b) the 1971 Vienna Convention on Psychotropic Substances. It shall also include the substances subject to controls under Joint Action 97/396/JHA of 16 June 1997 adopted on the basis of Article K.3 of the Treaty on European Union concerning the exchange of information, risk assessment and the control of new synthetic drugs;
2. "precursors" shall mean any substance scheduled in the Community legislation giving effect to the obligations deriving from Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988;
3. "legal person" shall mean any legal entity having such status under the applicable national law, except for States or other public bodies acting in the exercise of their sovereign rights and for public international organisations.

Article 2

Crimes linked to trafficking in drugs and precursors

1. Each Member State shall take the necessary measures to ensure that the following intentional conduct when committed without right is punishable:
- (a) the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs;
- (b) the cultivation of opium poppy, coca bush or cannabis plant;
- (c) the possession or purchase of drugs with a view to conducting one of the activities listed in (a) above;

(d) the manufacture, transport or distribution of precursors, knowing that they are to be used in or for the illicit production or manufacture of drugs .

2. The conduct described in paragraph 1 shall not be included in the scope of this Framework Decision when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law.

Article 3

Incitement, aiding and abetting and attempt

1. Each Member State shall take the necessary measures to make incitement to commit, aiding and abetting or attempting one of the offences referred to in Article 2 a criminal offence.

2. A Member State may exempt from criminal liability the attempt to offer or prepare drugs referred to in Article 2(1)(a) and the attempt to possess drugs referred to in Article 2(1)(c).

Article 4

Penalties

1. Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 2 and 3 are punishable by criminal penalties of a maximum of at least between 1 and 3 years of imprisonment.

2. Each Member State shall take the necessary measures to ensure that the offences referred to in Article 2(1)(a), (b) and (c) are punishable by criminal penalties of a maximum of at least between 5 and 10 years of imprisonment in each of the following circumstances:

(a) the offence involves large quantities of drugs;

- (b) the offence either involves those drugs which cause the most harm to health, or has resulted in significant damage to the health of a number of persons.

3. (...)

4. Each Member State shall take the necessary measures to ensure that the offences referred to in paragraph 2 are punishable by criminal penalties of a maximum of at least 10 years of deprivation of liberty, where the offence was committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA of 21 December 1998.

4a. Each Member State shall take the necessary measures to ensure that the offences referred to in Article 2(1)(d) are punishable by criminal penalties of a maximum of at least between 5 and 10 years of deprivation of liberty, where the offence was committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA of 21 December 1998, and the precursors are intended to be used in or for the production or manufacture of drugs under the circumstances referred to in paragraphs 2(a) or (b).

5. Without prejudice to the rights of victims and of other bona fide third parties, each Member State shall take the necessary measures to enable the confiscation of substances which are the object of offences referred to in Articles 2 and 3, instrumentalities used or intended to be used for these offences and proceeds from these offences or the confiscation of property the value of which corresponds to that of such proceeds, substances or instrumentalities.

The terms "confiscation", "instrumentalities", "proceeds" and "property" shall have the same meaning as in Article 1 of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

6. (...) ¹

Article 5

Aggravating circumstances

(...)

Article 6

Particular circumstances

Notwithstanding Article 4, each Member State may take the necessary measures to ensure that the penalties referred to in Article 4 may be reduced if the offender:

- (a) renounces criminal activity relating to trafficking in drugs and precursors and

¹ Paragraph 6 has been deleted. It read as follows: "For the offences included in Article 2(1), Member States may establish lower penalties than those referred to in Article 4(1) as far as small quantities of drugs other than those referred to in paragraph 2(b) are concerned, in accordance with their national laws, except if the offence is committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA of 21 December 1998." NL could accept that text but all the other delegations wanted it deleted. The Presidency proposed adding the following new paragraph 3 to Article 11:

"3. Notwithstanding paragraph 1, the Member States, whose legal system establishes lower penalties than those referred to in Article 4(1) for the offences referred to in Article 2(1) as far as they concern the delivery of quantities of drugs for personal consumption as defined in their national law, excluding those referred to in Article 4(2)(b) and except if the offence is committed within the framework of a criminal organisation as defined in the Joint Action 98/733/JAI of 21 December 1998, shall adopt the necessary measures to implement this Framework Decision before the end of 2006."

- (b) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to:
 - (i) prevent or mitigate the effects of the offence,
 - (ii) identify or bring to justice the other offenders,
 - (iii) find evidence or
 - (iv) prevent further offences referred to in Articles 2 and 3.

Article 7

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for any of the criminal offences referred to in Articles 2 and 3 committed for their benefit by any person, acting either individually or as a member of an organ of the legal person in question, who has a leading position within the legal person, based on one of the following:

- (a) a power of representation of the legal person;
- (b) an authority to take decisions on behalf of the legal person;
- (c) an authority to exercise control within the legal person.

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that legal persons 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 any of the offences referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.

3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in any of the offences referred to in Articles 2 and 3.

Article 8

Penalties for legal persons

1. Member States shall take the measures necessary to ensure that a legal person held liable pursuant to Article 7(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 tax relief or other benefits or public aid;
- (b) temporary or permanent disqualification from the pursuit of commercial activities;
- (c) placing under judicial supervision;
- (d) a judicial winding-up order;
- (e) temporary or permanent closure of establishments used for committing the offence;
- (f) in accordance with Article 4(5), the confiscation of substances which are the object of offences referred to in Articles 2 and 3, instrumentalities used or intended to be used for these offences and proceeds from these offences or the confiscation of property the value of which corresponds to that of such proceeds, substances or instrumentalities.

2. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 7(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

Article 9

Jurisdiction and prosecution

1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 2 and 3 where:
 - (a) the offence is committed in whole or in part within its territory;
 - (b) the offender is one of its nationals; or
 - (c) the offence is committed for the benefit of a legal person established in the territory of that Member State.
2. A Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in paragraphs 1(b) and 1(c) where the offence is committed outside its territory.
3. A Member State which, under its laws, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, an offence referred to in Articles 2 and 3 when it is committed by one of its own nationals outside its territory.
4. Member States shall inform the General Secretariat of the Council and the Commission when they decide to apply paragraph 2, where appropriate with an indication of the specific cases or circumstances in which the decision applies.

Article 10

Cooperation between Member States

(...)

Article 11

Implementation and reports

1. Member States shall take the necessary measures to comply with this Framework Decision by 30 June 2004 at the latest.

2. By the same deadline, 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 by the Commission from that information, the Council shall assess, by 30 June 2005 at the latest, whether Member States have taken the necessary measures to comply with this Framework Decision.

Article 11a

Territorial application

This Framework Decision shall apply to Gibraltar.

Article 12

Entry into force

This Framework Decision shall enter into force on the [...] day following that of its publication in the *Official Journal of the European Communities*.

Done at Brussels,

For the Council
The President