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24 Mai 2002

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## **REPORT**

on the initiative by the Federal Republic of Germany with a view to the adoption of a Council Framework Decision on criminal law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the Common Market  
(9230/00 – C5-0416/2000 – 2000/0812(CNS))

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

Rapporteur: Ingo Schmitt

### ***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.

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## PROCEDURAL PAGE

By letter of 26 July 2000 the Council consulted Parliament, pursuant to Article 39(1) of the EU Treaty, on the initiative by the Federal Republic of Germany with a view to the adoption of a Council Framework Decision on criminal law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the Common Market (9230/00 – 2000/0812(CNS)).

At the sitting of 4 September 2000 the President of Parliament announced that he had referred the initiative to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible and to the Committee on Economic and Monetary Affairs and the Committee on Legal Affairs and the Internal Market for their opinions (C5-0416/2000).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Ingo Schmitt rapporteur at its meeting of 14 May 2002, to replace Rodi Kratsa-Tsagaropoulou (appointed on 3 September 2001), who replaced Giorgos Dimitrakopoulos (appointed on 10 October 2000).

By letter of 3 May 2001 the Committee on Legal Affairs and the Internal Market notified the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs that it had decided to deliver an opinion on the initiative's legal basis under Rule 63(3).

It considered the initiative by the Federal Republic of Germany and the draft report at its meetings of 6 February, 20 March 2001 and 23 May 2002.

At the latter/last meeting it adopted the draft legislative resolution unanimously.

The following were present for the vote: Robert J.E. Evans acting chairman; Lousewies van der Laan and Giacomo Santini, vice-chairmen; Ingo Schmitt (for Timothy Kirkhope), rapporteur; Niall Andrews, Christian Ulrik von Boetticher, Kathalijne Maria Buitenweg (for Patsy Sörensen), Marco Cappato (for Maurizio Turco), Charlotte Cederschiöld, Ozan Ceyhun, Carlos Coelho, Gérard M.J. Deprez, Francesco Fiori (for Marcello Dell'Utri, pursuant to Rule 153(2)), Evelynne Gebhardt (for Michael Cashman), Marie-Thérèse Hermange (for Thierry Cornillet), Jorge Salvador Hernández Mollar, Anna Karamanou (for Sérgio Sousa Pinto), Eva Klant, Alain Krivine (for Giuseppe Di Lello Finuoli), Hartmut Nassauer, William Francis Newton Dunn, Arie M. Oostlander (for The Lord Bethell), Elena Ornella Paciotti, Hubert Pirker, Bernd Posselt, Martine Roure, Gerhard Schmid, Ilka Schröder, Miet Smet (for Giuseppe Brienza), The Earl of Stockton (for Ana Palacio Vallelersundi), Joke Swiebel, Anna Terrón i Cusí, Gianni Vattimo (for Adeline Hazan) and Christos Zacharakis (for Mary Elizabeth Banotti).

The opinion of the Committee on Legal Affairs and the Internal Market and its opinion on the legal basis are attached; the Committee on Economic and Monetary Affairs decided on 2 October 2000 not to deliver an opinion.

The report was tabled on 24 May 2002.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant

part-session.

## LEGISLATIVE PROPOSAL

**Initiative by the Federal Republic of Germany with a view to the adoption of a Council Framework Decision on criminal law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the Common Market (9230/00 – C5-0416/2000 – 2000/0812(CNS))**

The initiative is rejected.

## DRAFT LEGISLATIVE RESOLUTION

**European Parliament legislative resolution on the initiative by the Federal Republic of Germany with a view to the adoption of a Council Framework Decision on criminal law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the Common Market (9230/00 – C5-0416/2000 – 2000/0812(CNS))**

### **(Consultation procedure)**

*The European Parliament,*

- having regard to the initiative by the Federal Republic of Germany (9230/00<sup>1</sup>),
  - having regard to Article 34(2)(b) of the EU Treaty,
  - having been consulted by the Council pursuant to Article 39(1) of the EU Treaty (C5-0416/2000),
  - having regard to Rules 106 and 67 of its Rules of Procedure,
  - having regard to the opinion of the Committee on Legal Affairs and the Internal Markets on the proposed legal basis,
  - 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 (A5-0184/2002),
1. Rejects the initiative of the Federal Republic of Germany;
  2. Calls on the Federal Republic of Germany to withdraw its initiative;
  3. Calls on the Commission to examine the need for, and if appropriate, to present a proposal for a complementary legislative measure, following the adoption of the existing Commission proposals<sup>2</sup> on public procurement, to meet the objective of the initiative of the Federal Republic of Germany;

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<sup>1</sup> OJ C 253 ,4.9.2000, p.3.

<sup>2</sup> OJ C 29 E, 30.01.2001, p. 11 and p. 112.

4. Instructs its President to forward its position to the Council and Commission, and the government of the Federal Republic of Germany.

## **EXPLANATORY STATEMENT**

### **1. General information on procedure**

At the Council meeting of 23 March 1999, the Federal Republic of Germany submitted a draft common action on criminal law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the common market (Council document 6946/99 JUSTPEN 16 CK4 16). When the Treaty of Amsterdam came into force (1 May 1999), the legal form of this proposal had to be changed. In addition to making adjustments in respect of the legal form, a number of editorial changes were also made. The final document was forwarded to Parliament for consultation in the form of a framework decision pursuant to Article 31(e) and Article 34(2)(b). In April 2000, Parliament's Committee on Legal Affairs and the Internal Market, simultaneously with Parliament's Legal Service, delivered an opinion on the legal basis. The view of the Committee on Legal Affairs and the Internal Market is that there is no legal basis either in the EC Treaty or the EU Treaty for the framework decision in its current form.

The rapporteurs appointed by Parliament so far have not produced any opinions on the draft framework decision on the grounds that a general reform of European rules on the procedure for awarding public contracts is in progress (Zappala report). Your rapporteur has taken note of this fact but takes the view that there is no justification for further delay before Parliament delivers an opinion

### **2. Remarks on the substance of the framework decision**

The rapporteur expressly welcomes the proposals made by the Federal Republic of Germany. Uniform, far-reaching and effective means of combating fraud in the award of public contracts is genuinely desirable; many of these contracts are awarded by way of a European invitation to tender. The rapporteur endorses all the proposed provisions but would welcome additional measures. In principle, your rapporteur takes the view that firms proved to have acted fraudulently in obtaining public contracts must in general, at least for a certain duration, be barred from tendering. As regards civil servants involved in illegal activity, steps should be taken to ensure that they take no part in future in awarding public contracts. Your rapporteur proposes a public European register of firms and individuals found guilty of fraud. This register must be accessible via the Internet. Another shortcoming is the lack of protective measures for (natural or legal) persons who have helped uncover cases of fraud.

Your rapporteur takes the view that the EC legal provisions ultimately adopted must expressly relate to contracts which have been put out to tender throughout the EU beforehand. The rapporteur's reasoning on this point is that EU rules relate to the internal market and situations which are already regulated at European level. As regards invitations to tender which do not fall within the scope of European rules, a flexibility clause could be inserted enabling Member States also to apply EC rules to purely national tenders.



### 3. On the legal basis

The Federal Republic of Germany gave Articles 31(e) and 34(2)(b) of the EU Treaty as the legal basis for its proposal.

Article 34(2)(b) of the EU Treaty concerns decision-making rules in the Council; Article 31(e) relates to cooperation between the judicial authorities. Article 31(e) reads: ‘progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking’. It appears that the wording of Article 31(e) does not make a distinction between ‘the constituent elements of criminal acts’ and ‘penalties in the fields of organised crime, terrorism and illicit drug trafficking’. It therefore follows that the proposal for a framework decision must relate to combating organised crime, terrorism or illicit drug trafficking. Even though fraud in the award of public contracts may be a serious offence, there is not usually a connection with terrorist activities or illicit drug trafficking. The first constituent element of acts listed in Article 31(e), organised crime, would therefore only apply in exceptional cases. It therefore appears obvious to your rapporteur that the Federal Republic of Germany has chosen an erroneous legal basis for its proposal.

The consequences of applying the EU Treaty would be, inter alia:

- the framework decision would not be directly applicable, i.e. it would have to be transposed into national law to ensure that it was valid within a Member State; if the decision were not transposed into national law, individuals would not be able (in contrast to the *Cassis de Dijon* case-law etc.) to bring legal proceedings because there would be no effect vis-à-vis individuals,
- the customary judicial remedies before the Court of Justice would not be applicable; Article 35 of the EU Treaty lays down the sole judicial remedy available (preliminary ruling), and therefore only the Commission and the Member States have the right to bring proceedings,
- the European Parliament would only be consulted and its opinion would not be binding on the Council.

However, it must be pointed out that the EC Treaty allows proceedings to be brought before the Court of Justice in cases where an EC legal base takes precedence and incorrectly an EU legal base has been used.

It must also be mentioned that Article 95(ex-100a) of the EC Treaty was used as the legal basis for Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures in the award of public supply and public works contracts. Under Article 95, the codecision procedure is used (Article 251) together with qualified majority voting in the Council. This directive requires the Member States to take every measure to ensure that adequate procedures exist to permit the setting-aside of decisions taken unlawfully and compensation of persons harmed by an infringement. The purpose of Article 95 (ex-100a) is also ‘the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.’ A directive on criminal law protection against fraudulent or other unfair anti-competitive conduct in relation

to the award of public contracts in the common market should be regarded as a protective measure safeguarding the freedom to provide services in the internal market. The core objective of such a directive is not the approximation of national legal provisions but to ensure that the internal market functions in accordance with basic EU principles. The approximation of national legal provisions is only the method of achieving the objective. In contrast to the opinion of the Committee on Legal Affairs and the Internal Market, your rapporteur believes that there is, in principle, no apparent reason why this legal basis cannot be used in the case under consideration here.

#### **4. Conclusion**

Although agreeing in principle with the objective of the proposal for a framework decision, it must be rejected because of the incorrect legal basis. The rapporteur therefore calls on the Federal Republic of Germany to withdraw its proposal for a framework decision. At the same time, the rapporteur urges the Commission to submit a proposal on the basis of the EC Treaty which takes over the substance of the present proposal by the Federal Republic of Germany and improves on it by incorporating the points made above.

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

Committee on Legal Affairs and the Internal Market  
The Chairman

Mr Graham R. Watson  
Chairman  
Committee on Citizens' Freedoms and Rights, Justice and  
Home Affairs  
BRUSSELS

Subject: Legal basis of the Initiative of the Federal Republic of Germany with a view to the adoption of a Council Framework Decision on criminal law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the Common Market

Dear Mr Watson,

At its meeting of 6 March 2001 the Committee on Legal Affairs and the Internal Market decided, on its own initiative, under Rule 63(3), to consider the validity and appropriateness of the legal basis for the above initiative.

The Committee on Legal Affairs and the Internal Market considered the above question at its meetings of 6 March and 23 April 2001. Parliament's Legal Service also gave its opinion at the latter meeting.

The arguments and considerations presented, both by the members of the committee and the Jurisconsult, may be summarised as follows:

The Federal Republic of Germany based its draft Framework Decision on Articles 31(e) and 34(2)(b) of the Treaty on European Union. The question is whether the legal basis is appropriate and/or whether the measure envisaged comes within the competence of the Union. If it does not, the Framework Decision will be liable to be in breach of Article 47 of the EU Treaty, read in conjunction with Article 29 of the EU Treaty.

Article 31(e) referred to above concerns measures establishing rules relating to the constituent elements of criminal acts and to penalties under criminal law, but only in the fields of 'organised crime, terrorism and illicit drug trafficking'.

It is apparent from this provision that the explicit intention of the authors was to provide for such common action in respect only of serious crime. It is true that Article 31 contains the

words 'shall include', nevertheless, these words do not refer to the three types of criminal activity provided for in paragraph (e) but refer instead to the 'common action'. The list of common actions is therefore certainly not exhaustive, but if an action is aimed at the harmonisation of the rules on the constituent elements of criminal acts and to penalties, it must be restricted to the three types of criminal activity referred to.

In the case under consideration, the draft Framework Decision is aimed at establishing the constituent elements of 'fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts'. But neither the preamble nor the text contains a reference to 'organised crime', 'terrorism' or 'illicit drug trafficking'. The aim of the proposal is essentially to improve the protection of the financial interests of the awarding authorities and to ensure fair conditions of competition.

Although it is the case that one cannot rule out the involvement of terrorist organisations or organised crime in fraudulent or unfair conduct, the subject and aim of the draft Framework Decision as it stands are not the fight against these phenomena.

As it currently stands the possibility of finding a legal basis for the German initiative under the first pillar must also be rejected.

The Committee on Legal Affairs and the Internal Market therefore concluded unanimously<sup>1</sup>, at its meeting of 23 April 2001, that there is no appropriate legal basis for the draft Framework Decision.

Yours sincerely,

(sgd) Ana Palacio Vallelersundi

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<sup>1</sup> The following were present for the vote: Ana Palacio Vallelersundi, chairman; Rainer Wieland, vice-chairman; Diana Wallis, rapporteur; Gerhard Hager, The Lord Inglewood, Klaus-Heiner Lehne, Manuel Medina Ortega, Ria G.H.C. Oomen-Ruijten (for Janelly Fourtou), Elena Ornella Paciotti (for Enrico Boselli) and Felekna Uca.

7 March 2001

## **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 initiative of the Federal Republic of Germany with a view to the adoption of a Council framework decision on criminal law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the common market (9230/00 – C5-0416/2000 – 2000/0812(CNS))

Draftsman: Luis Berenguer Fuster

### **PROCEDURE**

The Committee on Legal Affairs and the Internal Market appointed Luis Berenguer Fuster draftsman at its meeting of 17 October 2000.

It considered the draft opinion at its meetings of 25 January, 5 February and 6 March 2001.

At the last meeting it adopted the following amendments unanimously.

The following were present for the vote: Ana Palacio Vallelersundi.(chairman), Willi Rothley and Ward Beysen (vice-chairmen), Luis Berenguer Fuster (draftsman), Maria Berger, Jean-Maurice Dehousse, Bert Doorn, Francesco Fiori (for Antonio Tajani, pursuant to Rule 153(2)), Evelyne Gebhardt, Malcolm Harbour, The Lord Inglewood, Kurt Lechner, Klaus-Heiner Lehne, Toine Manders, Luís Marinho, Manuel Medina Ortega, Bill Miller, Ria G.H.C. Oomen-Ruijten (for Guido Viceconte), Gary Titley (for Arlene McCarthy), Felekna Uca, Matti Wuori (for Heidi Anneli Hautala) and Stefano Zappalà.

## AMENDMENTS

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 incorporate the following amendments in its report:

Text proposed by the Commission<sup>1</sup>

Amendments by Parliament

### (Amendment 1)

#### Recital 1

(1) It is necessary to strengthen the protection of both the financial interests of contracting entities and of fair competition.

(1) It is necessary to strengthen the protection of both the financial interests of contracting entities and of **free and** fair competition.

*Justification:*

*Same objective as amendment to Article 2.*

### (Amendment 2)

#### Recital 1a (new)

**(1a) Bid-rigging among the various tenderers is one of the most serious violations of the rules of competition and undermines the functioning of the market and the public interest.**

*Justification:*

*This refers to one of the most serious violations undermining the objectives of tendering procedures.*

### (Amendment 3)

#### Recital 5

Not applicable to the English version.

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<sup>1</sup> Publication in OJ pending.

(Amendment 4)

Article 2

Fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the Common Market

1. 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:

- (a) 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
- (b) as a result of other collusive combination with the person responsible for the award of the contract, or
- (c) by concealing *such* an agreement

to accept a particular offer.

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

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- (a) 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
- (b) as a result of other collusive combination with the person responsible for the award of the contract, or
- (c) by concealing an *illegal* agreement or *concerted practice*,

*(d) as a result of an agreement to fix prices or other conditions, or*

- (d) *as a result of an offer or grant of advantages to other tenderers, to persuade them not to take part in the tender or to withdraw their offer*

to accept a particular offer.

2. Every Member State shall take the necessary measures to ensure that the conduct referred to in paragraph 1 shall be a criminal offence, *without it being necessary to establish that genuine material damage has been caused.*

*Justification:*

*Agreements to thwart the objectives of tenders undermine the functioning of the market and free competition.*

*The new conditions refer to two of the methods most frequently used to pervert the award of public contracts, namely bid-rigging and making payments to other bidders to withdraw their offers.*

*The amendment to paragraph 2 removes the requirement to prove that material damage has been caused.*

(Amendment 5)  
Article 4(1)

Technical amendment applicable only to Spanish version.

(Amendment 6)  
Article 6

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.

Articles 4 and 5 shall not apply to the extent that penalties ***provided for by other*** 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.

*Justification:*

*The aim is to improve the clarity of the text.*