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Annex to the

REPORT FROM THE COMMISSION

**based on Article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on
combating corruption in the private sector**

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1. INTRODUCTION

The Council¹ adopted the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector² pursuant to Title VI of the Treaty on European Union. As stated at paragraph (10) of the Preamble:

“The aim of this Framework Decision is in particular to ensure that both active and passive corruption in the private sector are criminal offences in all Member States, that legal persons may also be held responsible for such offences, and that these offences incur effective, proportionate and dissuasive penalties.”

The purpose of this Annex (staff working paper) to the Report on the transposition of the Framework Decision to the Council pursuant to Article 9 of the Framework Decision is to set out in detail the information and analysis which underpin the Report itself. Article 9 of the Framework Decision required Member States³ to take the necessary steps to comply with its provisions before 22 July 2005 and to transmit to the General Secretariat of the Council and the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision by the same date. Accordingly, the Report considers whether and to what extent Member States have met this obligation.

Although Article 9 of the Framework Decision foresaw that the Commission’s report would be submitted to the Council prior to 22 October 2005, unfortunately it was not possible for the Commission to meet this deadline. The enlargement process meant that the number of Member States to be considered had increased from 15 to 25. While only 2 MS (NL, FI) met the original deadline for submission of the details of their transposition of the Framework Decision, as of October, 2006 a further 21 replies have been received. Many of these contributions required translation. Furthermore, the larger membership has of course increased the complexity of the analytical exercise which was required for the preparation of this report.

BACKGROUND

The prevention of and fight against corruption has long been a priority of the EC. A number of legal instruments dealing with corruption were adopted by the EC prior to giving attention to corruption in the private sector. These earlier instruments were as follows:

- Convention on the Protection of the European Communities' Financial Interests, 1995 and its associated Protocols⁴
- Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, 1997⁵

¹ 2524th Meeting of the Council of the European Union (Agriculture and Fisheries) held in Brussels on 22 July 2003

² OJ L 192/54 of 31.7.2003

³ Throughout this staff working paper, the term "Member States" will be taken to refer to the EU-25; Romania and Bulgaria will be invited to contribute to any subsequent Report which may be prepared

⁴ OJ 95/C 316/03 27.11.95)

⁵ OJ 97/C 195/01 25.06.97)

The current basis for addressing Third Pillar aspects of corruption is Article 29, Treaty on European Union which declares that:

"Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters...That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular...corruption..."

Joint Action on corruption in the Private Sector 1998

Subsequently, attention turned to the private sector, and a Joint Action (Joint Action of 22 December 1998 (98/742/JHA))⁶ was developed. This Joint Action sought to address the impact of corruption on the internal market and in international trade, as well as ensuring that the concept of "breach of duties" was sufficiently addressed in national law (Preamble refers).⁷ The Joint Action called on Member States to establish both passive (Article 2) and active corruption (Article 3) as criminal offences, at least, in both instances, with regard to

"...conduct which involves, or could involve, the distortion of competition, as a minimum within the common market, and which results, or might result, in economic damage to others by the improper award or improper execution of a contract."

Identical wording was used in both instances (Articles 2 (2) and 3 (2) respectively refer).

Secondly, the Joint Action called on Member States to establish the liability of legal persons in relation to an offence of active corruption, of the type described at Article 3 of the instrument, where the offence had been committed on its behalf in the circumstances set out in the Joint Action (Article 5). The Joint Action also calls on Member States to provide that a legal person would be punishable by effective, proportionate and dissuasive sanctions, in relation to the circumstances at Articles 5 (1) and 5 (2) respectively (Article 6 refers). The standard provisions regarding jurisdiction were provided at Article 7.

The Joint Action provided for a future assessment by the Council of Member States' fulfilment of their obligations within three years after its entry into force. In effect, this assessment was due to take place by 31/12/2001 but instead it appears that such an assessment was overtaken by events.

The Danish Initiative

In July 2002 Denmark presented an Initiative for a Framework Directive⁸, following the adoption of which, the Joint Action would be repealed.

⁶ Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector (98/742/JHA) OJ 31.12.98 L 358/2 - 358/4

⁷ "Whereas corruption distorts fair competition and undermines the principles of openness and freedom of markets, and in particular the smooth functioning of the internal market, and also militates against transparency and openness in international trade; whereas for the purpose of this Joint Action, it is of importance that the concept of "breach of duties" is covered in a sufficiently broad way by national law of Member States" (Preamble, paragraphs 10-11, 98/742/JHA)

⁸ Initiative of the Kingdom of Denmark with a view to the adoption of Council Framework Decision on combating corruption in the private sector (2000/C 184/04)

The Initiative set a broader context than previously by including a specific reference to the threat which corruption posed to "a law-abiding society" as well as its distortion of "competition" and impeding of "sound economic development" (Paragraph 7, Preamble). The Initiative stated that the aim of the Framework Decision was

"...in particular to ensure that both active and passive corruption in the private sector is a criminal offence in all Member States, that legal persons may also be held responsible for such offences, and that the offences incur effective, proportionate and dissuasive penalties." (Paragraph 8, Preamble).

Comparison of the Council Framework Decision and the previous Joint Action

Article 1 - Definitions

Article 1 of the 1998 Joint Action contained three definitions – the first of which, a definition of "person", was not included separately within the Framework Decision, but incorporated into the definition of "breach of duty" – see below.

- "legal person"

This definition is identical to that in the earlier Joint Action.

- "breach of duty"

The definition of "breach of duty" in the Framework Decision incorporates a definition of "person" which closely reflects the inclusive approach taken in the 1998 Joint Action but deletes the time-related aspect of the definition, by now referring to a person "who in any capacity directs or works for a private sector entity" (FD) rather than to a person "when directing or working in any capacity for or on behalf of a natural or legal person operating in the private sector" (JA).

Article 2 – Active and passive corruption in the private sector

Article 2 is a significant Article of the 2003 Framework Decision (FD) which not only combines the definitions and offences relating to active and passive corruption respectively, formerly dealt with in separate Articles (Articles 2 and 3) of the 1998 Joint Action (JA), but weakens the limitation on the scope of the offences which were previously linked to the internal market.

With certain minor changes, such as removal of the flexibility to provide for other types of penalties in relation to minor cases of active and passive corruption and changes in word order, Article 2 (1) of the FD repeats the elements of the offences of active and passive corruption and the contextual link to "business activities", previously contained in the JA.

The FD then explicitly states that the scope of Article 2 (1) includes business activities in both profit and non-profit entities, reflecting the general move away from the JA's economic focus on the internal market.

A key development in the FD comes at Article 2 (3). Where previously the JA (at Article 3 (2)) had provided that Member States' measures "shall at least cover such conduct which involves, or could involve, the distortion of competition, as a minimum within the common market, and which results, or might result, in economic damage to others by the improper

award or improper execution of a contract", the FD partially removes this facility. At Article 2 (3), the FD provides that a Member State may limit the scope of the criminal offences of active and passive corruption to conduct involving a distortion of competition but requires that it provide a declaration to this effect, and Article 2 (4) of the FD not only provides for the communication of such a declaration to the Council when the FD is adopted, but limits their validity to five years from 22 July 2005, while Article 2 (5) requires the Council, before that deadline expires, to review whether or not such declaration(s) may be renewed.

With regard to the phrase in Article 2.1 that the conduct be carried out "in the course of business activities" in order to constitute an offence, Germany stated for entry in the record of the Council meeting at which the FD was adopted that this phrase was to be interpreted as referring to activities relating to the purchase of goods or commercial services.

Article 3 – Instigation, aiding and abetting

This Article is new to the Framework Decision. Previously, this issue was embedded in the Articles on penalties (JA Article 4(1)) and Liability of Legal Persons (JA Article 5(3)).

Article 4 – Penalties and other sanctions

This Article of the Framework Decision is more extensive than the equivalent Article of the Joint Action. In addition to repeating the earlier requirements that offences should be punishable by criminal penalties which are "effective, proportionate and dissuasive", it requires Member States to have in place a "minimum-maximum" range of at least one and three years imprisonment as a penalty for the offences of active and passive corruption, and omits any reference to the provision of other kinds of penalties for minor cases of active or passive corruption. Article 4 (3) is innovative in that it sets out a requirement that Member States, in accordance with their constitutional rules and principles, provide in certain circumstances for the temporary prohibition of natural persons from carrying on that particular or comparable business activity in a similar position or capacity.

Article 5 – Liability of legal persons

Whereas the Joint Action provided for the liability of legal persons in relation to active corruption, the Framework Decision extends this provision to include passive corruption.

Article 6 – Penalties for legal persons

This Article of the Framework Decision repeats its predecessor in the Joint Action (the one difference is the replacement of the word "sanctions (JA)" with "penalties" (FD)).

Article 7 – Jurisdiction

This is a standard feature of such instruments, and any differences reflect developments in language between 1998 and 2003.

Adoption of the Framework Decision

As recorded in the minutes of the Council meeting where the Framework Decision was adopted (see footnote (1) above), three MS (DE, IE, IT) entered statements in the minutes. These statements were as follows:

- Germany made two statements:

(1) "Germany declares that the term "in course of business activities" in Article 2(1) of the Framework Decision on combating corruption in the private sector is interpreted in the sense that reference is made to activities in relation to the purchase of goods or commercial services."

(2) "Pursuant to Article 2 (3) of the Framework Decision, Germany declares that it will limit the scope of paragraph 1 of that Article to conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or commercial services."

- Statement by Ireland:

"Ireland declares that the definition of "breach of duty" in Article 1 of the Framework Decision on combating corruption in the private sector, which refers to "disloyal behaviour", does not encompass "whistle-blowing activities"."

- Statement by Italy:

"Pursuant to Article 2(3) of the Framework Decision, Italy declares that it will limit the scope the paragraph 1 of that Article to conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or commercial services."

Method

Although the Framework Decision was adopted in 2003, that is prior to the 2004 enlargement, all 25 Member States come within the scope of the report.

Two Member States (NL, FI) met the transposition deadline of 22 July 2005 set out at Article 9 of the Framework Decision. Nevertheless, reflecting the large number of replies subsequently received, the report also takes into account the replies from a total of 23 Member States. Two Member States have not replied to date, namely CY and MT. Furthermore, 3 MS which replied either provided a copy of their draft legislation (CZ), an analysis of which is provided at section 2.2 of this Report, or simply stated that draft legislation was in preparation (EL and ES).

The Report concentrates on Articles 1 to 7 (with a brief reference to Article 10 where relevant), and records the Declarations made by Member States under Articles 2 and 7. It does not discuss Articles 8, 9 nor 11 as these provisions do not require implementation.

The evaluation criteria adopted by the Commission for this Report are the general criteria adopted in 2001⁹ to evaluate the implementation of framework decisions (practical effectiveness, clarity and legal certainty, full application and compliance with the time limit for transposition). Secondly, criteria specific to this Framework Decision are also used, and further details are provided in the context of the analysis of the individual Articles at Section 2.

⁹ COM(2001) 771, 13.12.2001, point 1.2.2

2. ANALYSIS OF NATIONAL MEASURES TAKEN TO COMPLY WITH THE FRAMEWORK DECISION (FD)

2.1 National Measures

Setting the scene: compliance with Article 9(2)

Article 9(1), Framework Decision required Member States to take the necessary measures to comply with the provisions of this Framework Decision before 22 July 2005. Article 9 (2) required them to transmit to the General Secretariat of the Council and the Commission the text of the provisions transposing into national law the obligations imposed on them under this Framework Decision.

Two (NL, FI) MS issued their responses and supplied their legislation to the Commission before the due date, and indeed NL was the first to reply, forwarding its details as early as September 2003. A further 21 MS (AT, BE, CZ, DE, DK, EE, EL, ES, FR, HU, IE, IT, LT, LU, LV, NL, PL, PT, SK, SI, UK) have subsequently responded.

Of all respondents to date, 16 MS (BE, DE, DK, EE, FI, FR, HU, LT, LU, LV, NL, PL, PT, SE, SI, UK) had either developed the view that their existing legislation was sufficiently comprehensive in this regard, or had put in place additional measures for this purpose. Of course, the question of whether or not the legislation which MS either already had in place or introduced actually meets the requirements of the FD is the subject of this report.

A further 7 respondents (AT, CZ, EL, ES, IE, IT, SK) stated that they were in the process of putting full or partial measures in place. EL's response was in the form of a brief letter, informing the Commission that the Minister for Justice had established a special legislative preparatory committee which expected to complete its task by the end of September 2005. ES's response was also brief, indicating that it was preparing the relevant modifications to its penal code. The Commission notes with concern that neither EL nor ES have provided any further information to date.

CZ forwarded to the Commission draft legislation in respect of all Articles, except Articles 5 and 6, FD. It stated that:

"On 2 November 2004 the Chamber of Deputies of the Czech Republic rejected the Government Draft Act on criminal liability of legal persons, aiming to introduce into Czech legislation the concept of liability of legal persons for criminal offences. This Act was meant to be part of the recodification of the criminal substantive law. At present another way of addressing the issue of criminal liability of legal persons is being sought."

It is noteworthy that the gap in the transposition of the FD identified by 3 of the other 4 MS (AT, IT, SK) is in respect of meeting the requirements of the same Articles, Articles 5 and 6, which CZ mentioned. AT informed the Commission that "A Bill to regulate the liability of legal persons underwent the expert scrutiny procedure in autumn 2004. A Bill is expected to be laid before the Nationalrat this year for the constitutional and parliamentary review and adoption procedures." IT stated that it had no provisions to address Articles 5 and 6, but did not provide any further information. SK informed the Commission that the Slovak National Assembly did not approve the proposals in this area and that its Ministry of Justice was currently drafting a separate act on the matter.

The remaining MS, IE, informed the Commission that it would require new national measures to meet one aspect of Article 2 – to introduce the concept of corruptly offering "advantage"; and to meet Articles 5.2 and Article 7 (1) (c). These issues would be addressed in a forthcoming Criminal Justice (Miscellaneous Provisions) Bill, which was currently being drafted.

It is noted that 2 MS (CY MT) have not yet responded. While the overall response rate is comparatively high, yet it is a matter for concern that these MS have not yet provided any information on their situation to the Commission, despite the obligation set out in Article 9 of the FD.

Table showing Date of notification by MS

MS	Date on letter of notification from MS	Legislation	Met transposition date? Y=yes
AT	05 August 2005	- Text of legislation received did not indicate date of enactment. - Legislation to meet requirements of Articles 5 and 6 under preparation	
BE	19 September 2005	Takes the view that its legislation was already in conformity	
CZ	05 September 2005	Draft legislation supplied for all Articles except Articles 5 and 6	
DE	18 August 2005	Takes the view that its legislation was already in conformity	
DK	26 July 2005	Takes the view that its legislation was already in conformity	
EE	28 December 2005	Text of legislation received did not indicate date of enactment	
EL	05 September 2005	Legislation is at an early stage of preparation	
ES	06 December 2005	Legislation is under preparation	
FI	20 July 2005	Legislation addressed all Articles of FD	Y
FR	06 September 2005	Updated its legislation with Law No. 2005-750 of 4 July 2005	
HU	02 October 2006	Takes the view that its legislation was fully in place before 22 July 2005	
IE	12 September 2005	- Takes the view that its legislation conformed with most Articles of FD - Legislation to meet requirements of	

		Articles 2 (one aspect), 5 and 6 under preparation	
IT	21 November 2005	Legislation in place to meet all Articles except Articles 5 and 6, FD	
LT	05 September 2005	Text of legislation received did not indicate date of enactment	
LU	15 September 2005	Updated its legislation by law of 23 May 2005	
LV	16 September 2005	Updated its legislation to meet requirements of FD	
NL	04 September 2003	Takes the view that its legislation conformed with the FD	
PL	7 September 2005 (and notification of declaration received separately, dated 21 September 2005)	Text of legislation received did not indicate date of enactment	
PT	2 September 2005	Updated its legislation by law of 28 November 2001	
SE	19 July 2005	Takes the view that its legislation conformed with the FD	Y
SK	22 July 2005	Updated its legislation, except Articles 5 and 6, FD	
SI	13 September 2005	Text of legislation received did not indicate date of enactment	
UK	05 December 2005	Takes the view that its legislation conformed with the FD	

Article 9 (2), FD required Member States to transmit to the General Secretariat of the Council and the Commission the text of the provisions transposing into their national law the obligations imposed on them under the FD. Many Member States provided some form of cover note in which they drew attention to any Declarations they wished to make, others used the opportunity of supplying a cover note and concordance table in which they explained the general and particular approach taken in their legislation, supported by relevant legislative references. As regards the obligation to transmit the text of their transposing provisions, DK did not provide any text to support what was nevertheless a very detailed commentary, while a number of other MS made partial omissions. These are indicated in more detail when the relevant measures are discussed.

The following general comments are also of note:

- AT stated that "the legislation on corruption will be adapted in the months ahead to transpose other international commitments flowing from the Council of Europe Criminal Law Convention on Corruption (ETS 173), the Additional Protocol to that Convention (ETS 191) and the UN Convention against Corruption."

- DK informed the Commission that it had already amended its legislation to meet the terms of a number of international instruments on corruption and of the 1998 Joint Action. These amendments were incorporated into section 299(2) of the Danish Criminal Code. Consequently, DK took the view that it was unnecessary for it to further amend its national law and that it had thereby met the requirement to transpose the FD by the due date. DK had, of course, provided the initiative for the FD.

- LU informed the Commission that it had met the conditions of the FD by introducing new legislation, the Act of 23.05.2005. However, while the net effect of the new law is to enable LU to do so, it is noted that the Act itself does not mention the FD within the list of those instruments which it approves. The instruments listed in the Act are:

- Convention on the Fight against Corruption involving Officials of the European Communities or officials of Member States of the European Union, 1997 (OJ C 195 of 25.06.1997)

- Second Protocol to the Convention on the Protection of the Communities' Financial Interests, 1997 (OJ C 221 of 19.07.1997)

- Council of Europe Criminal Law Convention on Corruption, 1999 (ETS No. 173)

- additional Protocol to the Council of Europe Criminal Law Convention on Corruption, 2003 (ETS No. 191).

- FI confirmed that its national legislation automatically applied in the province of Åland. It should be noted that in some instances, FI supplied multiple versions of certain sections of legislation, dating from different years. In those instances, this analysis has been confined to the most recent version of such sections.

- PT stated that corruption in the private sector was made a criminal offence, and the relevant penalties laid down, in specific criminal legislation, which was inserted into Decree-Law No 28/84 of 20 January 1984 on offences against the economy and public health by Law No 108/2001 of 28 November 2001, that is, in advance of the adoption of the FD.

- The UK informed the Commission that UK law met all the mandatory requirements of the FD. Unless otherwise stated, references to law should be taken as references to the law as applicable in England, Wales, Scotland and Northern Ireland. Otherwise, an explicit reference is given to the application of a law, eg "... (Scotland) Act...".

Article 10, FD

With reference to Article 10, the UK stated that Gibraltar "intends to transpose this measure as soon as legislative time allows" but has not to date supplied the text of the enacted legislation.

Article 1 - Definitions

General Comments

Only 8 MS (EE, HU, IE, IT, LT, PL, PT, SL) gave even a partial response to this Article. Some other MS expressed the view that it was unnecessary to respond to it. However, the

Commission's view is that information on the application of these definitions in national legislation would be extremely useful in order to have clarity on how these concepts are handled in national legislation. In the absence of such information, it is not possible for the Commission to be certain that the FD has been correctly transposed – for example, information on the definition of a "legal person" is essential in relation to analysing the transposition of Article 5.

"Legal person"

Six MS (EE, IE, IT, PL, PT, SL) addressed this definition by supplying direct information. Thirteen MS (AT, BE, DE, DK, FI, FR, LT, LU, LV, NL, SE, SK, UK) did not supply any material. However, where information relevant to this definition was supplied by a MS (BE, DK, FI, HU, LT, UK) for use in the analysis of a later Article of the FD, it has been discussed in this section of the Report.

This definition is identical to that in the earlier Joint Action.

Summary table of the transposition

MS	Legislation	Comments
AT	No specific provision has been forwarded.	
BE	No specific provision has been forwarded in respect of the definition in this Article, but in its commentary on Article 5, FD BE refers to Article 5, Criminal Code which defines legal entities as follows: "1° les associations momentanées et les associations en participation 2° les sociétés visées à l'article 2, alinéa 3, des lois coordonnées sur les sociétés commerciales, ainsi que les sociétés commerciales en formation 3° les sociétés civiles qui n'ont pas pris la forme d'une société commerciale."	BE meets the requirements of this definition
DE	No specific provision has been forwarded	
DK	No specific provision has been forwarded, but within the context of its reply relating to Article 5, Denmark informs the Commission that Section 26, Criminal Code, provides that all legal persons can be held liable for offences, including joint stock companies, private companies, cooperatives, partnerships, associations, funds, estates, local authorities and state authorities.	DK meets the requirements of this definition.
EE	Section 24, Civil Code Act, divides legal persons into legal persons in private law and legal persons in public law. Section 25, Civil Code Act, elaborates on this. In particular, subsection (1) provides that a "legal person founded in private interests and pursuant to an Act...General partnerships, limited partnerships,	EE meets the requirements of this definition.

	public limited companies, commercial associations, foundations and non-profit associations are legal persons in private law" and subsection (3) provides that the provisions concerning legal persons apply to the State and the local governments insofar as not otherwise provided by law.	
FI	FI did not comment on Article 1 in the concordance table which it supplied. However, it is noted that within the legislation texts supplied, Section 1 of Chapter 9, Criminal Code, which deals with the scope of the legislation on corporate criminal liability, refers to "a corporation, foundation or other legal entity".	FI meets the requirements of this definition
FR	No specific provision has been forwarded.	
HU	No specific provision has been forwarded. However, within the context of its reply relating to Article 2, HU referred to "budgetary agency, economic organization or non-governmental organization" (Articles 251, 252, 254 Criminal Code).	HU meets the requirements of this definition.
IE	<p>The relevant legislation is section 11(c), Interpretation Act 1937 definition of "person" and section 9, Prevention of Corruption (Amendment) Act 2001.</p> <p>The Interpretation Act 1937 defines certain terms for legislative purposes. Section 11(c) provides that the term "person" shall, unless legislation provides otherwise, be construed as meaning a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of person as well as individuals. Section 9, Prevention of Corruption (Amendment) Act 2001 deals with the liability of legal persons in relation to the Prevention of Corruption Acts, 1889 to 2001.</p>	IE meets the requirements of this definition
IT	<p>IT informed the Commission that the relevant legislation is section 1, Legislative Decree 231 of 8.6.2001, and sections 12 and 13 of the Civil Code.</p> <p>Section 1, Legislative Decree 231 of 8.6.2001, provides for the liability of legal persons, including companies and private associations not enjoying legal personality, in respect of offences by their employees. Section 12, Civil Code describes how associations, foundations and other private bodies acquire legal personality, while section 13, Civil Code states that companies shall be governed by Book V (sections 2247 onwards).</p>	<p>IT also provided details of the legislation relating to public legal persons, which however is not relevant to this FD.</p> <p>IT meets the requirements of this definition</p>
LT	LT informed the Commission that the definition of "legal person" was provided in Book II of the Civil Code, but without supplying	LT meets the requirements of this definition.

	the relevant text. It did however supply the text of Article 20(5) of its Criminal Code, which excludes the State, municipalities and public international organisations.	
LU	No specific provision has been forwarded.	
LV	No specific provision has been forwarded.	
NL	No specific provision has been forwarded.	
PL	States that it has transposed this Article by means of Article 2, Criminal Liability of Bodies Corporate Act of 28 October 2002. Article 2 (1), Criminal Liability of Bodies Corporate Act of 28 October 2002 defines a body corporate within the meaning of the Act as including a legal person and an entity without legal personality which is accorded legal capacity by separate provisions but excludes the State Treasury, local government bodies and their associations.	PL meets the requirements of this definition.
PT	PT informed the Commission that Portuguese law does not contain a separate definition of "legal person", but that legal person is accordingly defined by way of Articles 157 and 158, Civil Code which specify which entities have legal personality. Article 157 deals with associations which do not have for their object the profit of the partners, to social foundations and similar bodies, while Article 158 deals with the acquisition of legal personality. In addition, Article 5, Commercial Companies Code provides that companies shall enjoy legal personality from the date of the final registration of their formation agreement.	PT meets the requirements of this definition
SE	No specific provision has been forwarded.	
SK	No specific provision has been forwarded.	
SI	SI informed the Commission that the definition of legal person is not contained in one single regulation but is defined in various sectoral laws for specific legal spheres. Accordingly, the Criminal Liability of Legal Entities Act (OJ RS No. 98/04 – official consolidated text does not provide a single definition of "legal person". For this reason, with regard to the liability of legal persons for criminal offences, any entity having the status or condition of "legal person" under law in any sphere is treated as a "legal person". Article 2 (b), Criminal Liability of Legal Entities Act provides that, with the exception of the Republic of Slovenia and local self-governing communities, "the statute may stipulate that for a specific criminal offence all or only certain types of legal person are liable, thereby enabling the stipulation of "delicta propria" for	SI meets the requirements of this definition.

	legal persons too". SI states that liability for a criminal offence can never be prescribed by citing individual legal persons but by defining a narrow circle of legal persons with regard to type in such a way that the law applies equally to all legal persons from this narrow circle. As of September 2005, no sectoral law yet contained such provisions.	
UK	No specific provision has been forwarded. However, in its response in relation to Art. 5, FD the UK informed the Commission that the word "person" in a statute is to be construed as including a "body of persons, corporate or incorporate" (Schedule 1, Interpretation Act 1978).	The UK meets the requirements of this definition.

"Breach of duty"

Article 1 of the 1998 Joint Action contained three definitions – the first of which, a definition of "person", was not included separately within the Framework Decision, but incorporated into the definition of "breach of duty" – see below.

The definition of "breach of duty" in the Framework Decision incorporates a definition of "person" which closely reflects the inclusive approach taken in the 1998 Joint Action but deletes the time-related aspect of the definition, by now referring to a person "who in any capacity directs or works for a private sector entity" (FD) rather than to a person "when directing or working in any capacity for or on behalf of a natural or legal person operating in the private sector" (JA).

Seven MS (EE, HU, IE, LT, PL, PT, SI) provided either a definition or commentary on this definition. However, information relevant to this definition was supplied by 3 MS (BE, FR, NL) in respect of another Article, and has been included in this analysis.

IE entered a Declaration in the minutes of the Council (see footnote (1) above), as follows: "Ireland declares that the definition of "breach of duty" in Article 1 of the Framework Decision on combating corruption in the private sector, which refers to "disloyal behaviour", does not encompass "whistle-blowing activities".

Summary table of the transposition

MS	Legislation	Comments
AT	No specific provision has been forwarded.	
BE	No specific provision has been forwarded in respect of the definition in this Article, but in its commentary on Article 2, FD BE refers to Article 504bis §1 and §2, Criminal Code which use the following definition ""à l'insu et sans l'autorisation, selon le cas, du Conseil d'administration ou de l'Assemblée générale, du mandant ou de l'employeur."	BE meets the requirements of this definition

DE	No specific provision has been forwarded.	
DK	No specific provision has been forwarded.	
EE	EE informs the Commission that its legislation covers any lawful or unlawful act or omission by an official (as defined in Section 288 Criminal Code and thereby including certain persons in a legal person in private law – for further elaboration see Article 2 below) committed by taking advantage of his or her official position if it is done in exchange for a bribe or gratuity (or promise/offer of such).	EE does not provide any text nor any reference to legislation to support this information. EE appears to meet the requirements of this definition
FI	No specific provision has been forwarded.	
FR	No specific provision has been forwarded. However, at Article 445-1, Criminal Code the phrase "en violation de ses obligations légales, contractuelles ou professionnelles" is used.	FR meets the requirements of the definition
HU	HU commented that in its criminal law, "breach of duty is not a precondition for determining the liability of a legal person".	It is noted that the information supplied does not define "breach of duty" nor indicate how it relates to the liability of a natural person. HU did not supply sufficient information for an assessment of whether it meets the requirements of this definition.
IE	The relevant legislation is section 1(2), Prevention of Corruption (Amendment) Act 2001 together with section 1(1) to 1(3) of the Prevention of Corruption Act 1906, as inserted by section 2 of the Prevention of Corruption (Amendment) Act, 2001. Section 1(2), Prevention of Corruption (Amendment) Act 2001 provides that references in the legislation to an act include references to an omission and references to the doing of an act include references to the making of an omission. Section 1(1) and 1(2) of the Prevention of Corruption Act 1906, as inserted by section 2 of the Prevention of Corruption (Amendment) Act, 2001 are the sections which provide for the offences of passive and active corruption respectively, while section 1(3) creates the offence of intentionally giving or using a false or erroneous document with a view to misleading the principal, including an	IE's Declaration is noted. IE meets the requirements of the definition

	<p>employer.</p> <p>In sections 1(1) and 1(2), the concept of "breach of duty" is addressed by the phrase "doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business". In section 1(3), it is addressed by the phrases "with intent to deceive his or her principal" and "is intended to mislead the principal".</p> <p>IE entered a Declaration in the Council minutes, that the phrase "disloyal behaviour" does not encompass "whistle-blowing activities".</p>	
IT	No specific provision has been forwarded.	
LT	LT informed the Commission that it considers that its formulation "for the performance of any lawful act or omission in the execution of his/her powers" (eg Section 225 (1) Criminal Code refers) (Note: "unlawful act" is mentioned at Section 225 (1) Criminal Code) is sufficiently broad to meet the scope of the definition of "breach of duty".	LT meets the requirements of the definition
LU	No specific provision has been forwarded.	
LV	No specific provision has been forwarded.	
NL	No specific provision has been forwarded. Later, in relation to Article 2 (1) however, NL informed the Commission that its use of the concept "concealment constituting a breach of trust", as used at section 328b (2), Criminal Code, is the equivalent under national law of the concept of "breach of duty".	NL meets the requirements of this definition.
PL	<p>States that it has transposed this Article by means of Article 296a, Criminal Code.</p> <p>Article 296a, Criminal Code, which is the Article which penalises active and passive corruption, addresses this concept by the use of the terms "act of unfair competition" and "inadmissible preferential action".</p>	PL meets the requirements of this definition.
PT	PT informed the Commission that Portuguese law does not contain a separate definition of "breach of duty", but that it can be assumed that there is a breach of duty whenever the official duties of each activity or profession as laid down by law or by statutes are breached. Examples are given from 121(1) (d) and (2), Labour Code and Articles 36 and 37, Criminal Code. Article 121(1) (d), Labour Code is framed in broad terms,	PT meets the requirements of this definition.

	requiring workers to carry out orders and instructions from their employer in all aspects relating to the performance and discipline of their work, except where contrary to their rights and privileges, with subsection (2) clarifying that such orders and instructions may be given either directly by the employer or by the worker's superior. Articles 36 and 37, Criminal Code address conflicts of duties, disobedience to an order or instruction where it would lead to a crime being committed, and non-liability where one carries out an order without realising it will lead to the commission of a crime.	
SE	No specific provision has been forwarded.	
SK	No specific provision has been forwarded.	
SI	SI informs the Commission that breaches of duty are defined in sectoral laws. In relation to corruption, it points out that breach of duty is an element of the criminal offence of unlawfully accepting gifts (Article 247, Criminal Code) and of unlawful giving of gifts (Article 248, Criminal Code) respectively.	SI does not provide supporting text from its sectoral laws, nor in its comments does it provide further information about these definitions. There is insufficient information to assess whether or not SI meets the requirements of this definition.
UK	No specific provision has been forwarded.	

Article 2 – Active and passive corruption in the private sector

General comments

Article 2 is a significant Article of the 2003 Framework Decision (FD) which not only combines the definitions and offences relating to active and passive corruption respectively, formerly dealt with in separate Articles (Articles 2 and 3) of the 1998 Joint Action (JA), but weakens the limitation on the scope of the offences which were previously linked to the internal market.

With certain minor changes, such as removal of the flexibility to provide for other types of penalties in relation to minor cases of active and passive corruption and changes in word order, Article 2 (1) of the FD repeats the elements of the offences of active and passive corruption and the contextual link to "business activities", previously contained in the JA.

The FD then at Article 2 (2) explicitly states that the scope of application of Article 2 (1) includes business activities in both profit and non-profit entities, reflecting the general expansion of scope beyond the JA's economic focus on the internal market.

A key development in the FD comes at Article 2 (3). Where previously the JA (at Article 3 (2)) had provided that Member States' measures "shall at least cover such conduct which involves, or could involve, the distortion of competition, as a minimum within the common market, and which results, or might result, in economic damage to others by the improper award or improper execution of a contract", the FD partially removes this facility. At Article 2 (3), the FD provides that a Member State may limit the scope of the criminal offences of active and passive corruption to conduct involving a distortion of competition but requires that it provide a declaration to this effect, and Article 2 (4) of the FD not only provides for the communication of such a declaration to the Council when the FD is adopted, but limits their validity to five years from 22 July 2005, while Article 2 (5) requires the Council, before that deadline expires, to review whether or not such declaration(s) may be renewed.

Summary table of transposing legislation adopted by Member States

MS	Legislation	Measures which appeared relevant to Commission's analysis (where different to MS' citations)
AT	- Section 10, Federal Act against Unfair Competition, 1984 - sections 153, 153a, 304-308, Code of Criminal Procedure	- Section 10, Federal Act against Unfair Competition, 1984 - sections 153a, 309, Code of Criminal Procedure
BE	- Article 504bis, §1 and §2, Criminal Code	
DE	- section 299, Criminal Code	
DK	- section 299(2), Criminal Code	
EE	- sections 288, 293-298, Criminal Code	
FI	- sections 7 and 8, Chapter 30, Criminal Code	- section 7, Chapter 30, Criminal Code as inserted by Act No. 769, 1990 - section 8, Chapter 30, Criminal Code as inserted by Act No 769, 1990 and amended by Act No. 604, 2002
FR	- Articles 445-1 and 445-2, Criminal Code, inserted by Law No. 2005-750 of 4 July 2005	
HU	- sections 251-254, 256 of Act IV of 1978, Criminal Code	- sections 251, 252, 254, 256 of Act IV of 1978, Criminal Code
IE	- section 1, Prevention of Corruption Act 1906, as inserted by section 2, Prevention of Corruption (Amendment) Act 2001	
IT	- section 2635, Civil Code	
LT	- Articles 225-227, and 230 Criminal Code	

LU	- Articles 310 and 310-1, Criminal Code	
LV	- Chapter XIX, Special Part "Criminal Offences of an Economic Nature", Criminal Code	- sections 198 and 199, Chapter XIX, Criminal Code
NL	- sections 46a and 328b, Criminal Code	
PL	- Articles 115 and 296a, Criminal Code	
PT	- Articles 41b and 41c of Decree-Law No. 28/84 as amended by Law No. 108/2001	
SE	- Chapter 17 – section 7 and Chapter 20-section 2, Criminal Code	
SK	- sections 160-162, Criminal Code	
SI	- Articles 126, 247 and 248, Criminal Code	
UK	- section 1, Prevention of Corruption Act, 1906	

Methodology for the analysis of Articles 2 (1) (a) and 2 (1) (b), FD

The most complex and detailed analysis of the FD centred on Articles 2 (1) (a) and 2 (1) (b), FD. The chapeau gives the general context that the conduct must be intentional, and that it must have taken place in the course of business activities. Then paragraphs (a) and (b) were broken down into 7 constituent elements for analysis:

Article 2 1 (a) active corruption

- "promising, offering or giving"
- "directly or through an intermediary"
- "a person who in any capacity directs or works"
- "private-sector entity"
- "an undue advantage of any kind"
- "for that person or for a third party"
- "perform or refrain from performing any act, in breach of that person's duties"

Article 2 1 (b) passive corruption

- "directly or through an intermediary"
- "requesting or receiving...or accepting the promise of"
- "an undue advantage of any kind"

- "for oneself or for a third party"
- "while in any capacity directing or working"
- "private-sector entity"
- "perform or refrain from performing any act, in breach of that person's duties"

It was considered that analysing MS' national measures against this yardstick would balance the nature of Framework Decisions (Article 34 (2) (b), TEC refers), which leave to MS the choice of form and methods, with the necessity to have a clear framework for assessing the comprehensiveness and accuracy of the transposition.

With regard to non-profit entities, even where a MS did not refer to a specific measure, if relevant material could be found elsewhere, eg in relation to Article 5 on liability of legal persons, this was used.

Where MS had lodged Declarations, either formally at Council or by letter with their transposition material, these have been taken into account.

Summary account of the transposition

Article 2 proved highly problematic for MS. Only 2 MS (BE and the UK) correctly transposed every element of Article 2. As can be seen from the Tables which conclude this section, a large proportion of MS had difficulty in fully meeting each of the individual elements of Article 2.1.

There was a particular difficulty for MS in comprehending the meaning of the phrases "directly or through an intermediary" and "for that person or for a third party". National measures either omitted to refer to intermediaries (10 MS – AT, DE, EE, FI, HU, IT, NL, PL, SE, SI) or to third parties (6 MS – AT, EE, FR, HU, IT, NL) or changed the focus of the offence to provide for the liability of the intermediary (2 MS – EE, FI). It is of course open to MS to provide for such additional liabilities, but they also need to provide for the requirements of the Article itself.

Taking the example of active corruption under Article 2 1 (a), a simplified version of the offence would provide for the liability of person "A" who promises an undue advantage to person "B"

- by promising the undue advantage directly to person "B" for person "B"'s own use
- by promising the undue advantage through an intermediary (person X) to person "B" for person "B"'s own use
- by promising the undue advantage directly to person "B" for someone else's use (person "Y")
- by promising the undue advantage through an intermediary (person X) to person "B" for someone else's use (person "Y")

Article 2 1 (a) of the FD requires MS to ensure that person "A" is liable, and the offence of passive corruption under Article 2 1 (b) requires MS to ensure that person "B" is liable. A MS

which provides for the liability of persons "X" or "Y" is exercising their right to go beyond the requirements of the FD to provide for additional offences.

There were also problems with Article 2.2, in particular a lack of information on which to base any analysis.

Article 2.1(a)

The requirement on Member States to establish **criminal offences of active and passive corruption in relation to business activities in the private sector** is set out in Article 2 (1). To facilitate analysis, legislation was considered against a framework of the 7 elements of the description under Article 2 1 (a) (active corruption) and 2 1 (b) (passive corruption) respectively. As most Member States' legislation was very similar for both, the following comments focus only on the active corruption offence (Article 2 1 (a)).

- "promising, offering or giving"

Eleven Member States met this requirement, but 7 (EE, HU, IT, NL, PL, PT, SK) omitted "offering", LU omitted "giving" and LV omitted "promising".

- "directly or through an intermediary"

All 20 Member States provide for direct corruption. But 8 Member States either omitted intermediaries (AT, DE, FI, IT, NL, PL, SE, SI) or changed the focus of the offence to provide for the liability of the intermediary (EE) instead of the person using the intermediary.

- "a person who in any capacity directs or works"

Certain Member States did not address the full scope of "directs" (AT, DE, LV, SE) or "works" (IT, LU, LV, PL) while EE did not provide information on this point.

- "private-sector entity"

This was clearly addressed by 18 Member States, but EE did not supply information while LU did not supply a definition of the term "legal entity".

- "an undue advantage of any kind"

Fourteen Member States meet this requirement. But 5 (DE, EE, FI, LT, NL) do not address intangible benefits. IE indicated that it was preparing legislation on this point.

- "for that person or for a third party"

While FR and EE did not provide information on this point, 16 Member States criminalise giving etc an advantage for a person or for a third party, but IT and NL omit the element of the third party from their legislation.

- "perform or refrain from performing any act, in breach of that person's duties"

Thirteen Member States meet this requirement. Four Member States (HU, PL, SE, SI) did not address "refrain", while DE and LT do not address the element "in breach of that person's duties". EE did not provide information on this point.

With regard to individual MS, the Commission draws particular attention to the following situations, which in its view unduly narrow the scope of the FD:

- Italian legislation takes a narrower approach than the FD in the following two respects:

the overall context of the offences of both active and passive corruption is that the act or omission causes a loss to the company of the directors etc. making the act or omission

in relation to both active and passive corruption, section 2635 (3), Civil Code confines the taking of proceedings to situations where the person who sustains the loss makes a claim.

- LT in addition to providing exemption from criminal liability in the case of a bribe promised or paid with the knowledge of a law-enforcement body, provides two further exemptions which are problematic:

where the person was required or provoked into paying a bribe

where the person has offered, promised or paid a bribe, but forthwith informed a law-enforcement agency (Article 227, Criminal Code refers).

- NL requires that, for the offence to take place, the person who receives the gift must have concealed it from his employer or mandator;

- PL links the offence to the concept of causing material loss to one's business organisation, which does not appear to fully address the situations envisaged under its Declaration and the terms of Article 2(3), FD as distortion of competition could cause a gain to one's business organisation, not just a loss;

- SE legislation provides that a prosecution may only be taken in respect of active corruption in the private sector "if the crime is reported for prosecution by the employer or principal of the person exposed to bribery or if prosecution is called for in the public interest". A similar provision does not exist in respect of passive corruption in the private sector. Nevertheless, the Commission considers that the existence of such a provision is a limitation on the scope of the FD.

Furthermore, a particular difficulty was experienced in attempting to analyse EE's legislation by virtue of its brevity. The two offences of active corruption are described as follows:

"Granting or promising a gratuity is punishable..."(section 297, Criminal Code)

"Giving or promising a bribe is punishable..." (section 298, Criminal Code)

In the absence of further information either in the legislation or by means of an accompanying commentary (none was provided) it was impossible to carry out a full analysis of EE's transposing legislation in respect of Article 2 1 (a).

Finally, attention is drawn to an additional offence provided for by FR. FR provides that it is an offence for a person to give a bribe to someone who requests it (Article 445-1 2nd paragraph, Criminal Code)

Tables providing details of the transposition of Article 2 (1) (a) active corruption

(A) AT - FR

	AT	BE	DE	DK	EE	FI	FR
	Dec	Dec	Dec				
promising offering or giving	Y	Y	Y	Y	Partly Does not address "offering"	Y	Y
directly or through an intermediary	Partly Does not address "through an intermediary"	Y	Partly Does not address "through an intermediary"	Y	Partly Appears to place a liability on the intermediary rather than on the person acting through the intermediary	Partly Does not address "through an intermediary"	Y
a person who in any capacity directs or works	Partly Does not meet "directs"	Y	Partly Does not meet "directs"	Y	N No information supplied	Y	Y
private-sector entity	Y	Y	Y	Y	N No information supplied	Y	Y
an undue advantage of any kind	Y	Y	Partly Does not appear to fully meet "an undue advantage of any kind"	Y	Partly Does not appear to fully meet "undue advantage of any kind"	Partly Not clear that intangible benefits are included, does not appear to fully meet "undue advantage of any kind"	Y
for that person or for a third party	Y	Y	Y	Y	N No information supplied	Y	N No information supplied

perform or refrain from performing any act, in breach of that person's duties	Y	Y	Partly Unclear whether term "unfair manner" fully meets "in breach of that person's duties"	Y	N No information supplied	Y	Y
	Fully meets 5 requirements	Fully meets 7 requirements	Fully meets 3 requirements	Fully meets 7 requirements (legn not supplied)	Fully meets 0 requirements	Fully meets 5 requirements	Fully meets 5 requirements

(B) HU - NL

	HU	IE	IT	LT	LU	LV	NL
promising offering or giving	Partly Does not address "offering"	Y	Partly Does not address "offering"	Y	Partly Does not address "giving"	Partly Does not address "promising"	Partly Does not address "offering"
directly or through an intermediary	Y	Y	Partly Does not address "through an intermediary"	Y	Y	Y	Partly Does not address "through an intermediary"
a person who in any capacity directs or works	Y	Y	Partly Does not fully address "works"	Y	Partly Does not address "works"	Partly Does not fully address "directs" or "works"	Y
private-sector entity	Y	Y	Y	Y	Partly Lacks definition of "legal entity"	Y	Y
an undue advantage of any kind	Y	Partly (IE is preparing legn on this point)	Y	Partly Not clear that intangible benefits are included	Y	Y	Partly Not clear that intangible benefits are included

for that person or for a third party	Y	Y	Partly Does not address "third party"	Y	Y	Y	Partly Does not address "third party"
perform or refrain from performing any act, in breach of that person's duties	Partly Unclear if "refrain" is included	Y	Y	Partly Does not appear to include acts or omissions, in breach of that person's duties	Y	Y	Y
	Fully meets 5 requirements	Fully meets 6 requirements	Fully meets 3 requirements	Fully meets 5 requirements	Fully meets 4 requirements	Fully meets 5 requirements	Fully meets 3 requirements

(C) PL – UK

	PL Dec	PT	SE	SK	SI	UK
promising offering or giving	Partly Does not address "offering"	Partly Does not address "offering"	Y	Partly Does not address "offering"	Y	Y
directly or through an intermediary	Partly Does not address "through an intermediary"	Y	Partly Does not address "through an intermediary"	Y	Partly Does not address "through an intermediary"	Y
a person who in any capacity directs or works	Partly Does not address "works"	Y	Partly Does not fully meet "direct"	Y	Y	Y
private-sector entity	Y	Y	Y	Y	Y	Y
an undue advantage of any kind	Y	Y	Y	Y	Y	Y

for that person or for a third party	Y	Y	Y	Y	Y	Y
perform or refrain from performing any act, in breach of that person's duties	Partly Does not address "refrain"	Y	Partly Does not address "refrain"	Y	Partly Does not address "refrain" in Art. 248(2)	Y
	Fully meets 3 requirements	Fully meets 6 requirements	Fully meets 4 requirements	Fully meets 6 requirements	Fully meets 5 requirements	Fully meets 7 requirements

Article 2.1(b)

In addition to the situations mentioned under Article 2.1 (a) above, the Commission draws particular attention to the following situations:

- AT provides for two offences of passive corruption, one of which relates to a person who exercises powers conferred by administrative decision, and is limited by the possibility of renouncing one's corrupt act (section 153a, Code of Criminal Procedure). There is no provision for such a limitation in Article 2, FD.

- HU provides for an additional offence, that of an employee or member of a body "who agrees with the party requesting or accepting the advantage" (Articles 251(1) and 252(1), Criminal Code, refer). It would appear that this offence addresses those situations where a colleague collaborates with the person who is in receipt of the undue advantage.

Tables providing details of the transposition of Article 2 (1) (b) passive corruption

(A) AT - FR

	AT	BE	DE	DK	EE	FI	FR
	Dec		Dec				
directly or through an intermediary	Partly Does not address "through an intermediary"	Y	Partly Does not address "through an intermediary"	Partly Does not address liability of person seeking the bribe through an intermediary	Partly Appears to place a liability on the intermediary rather than on the person acting through the	Partly Appears to place a liability on the intermediary rather than on the person acting through the	Y

					intermediary	intermediary	
requesting or receiving...or accepting the promise of	Partly Does not include "receiving"	Y	Y	Partly Does not include "accepting the promise of"	Partly Does not address "requesting"	Partly Does not address "accepting the promise of"	Y
an undue advantage of any kind	partly One of the two relevant sections, s153a, only refers to financial advantage	Y	Partly Not clear that it fully addresses "undue advantage of any kind"	Y	Partly Does not fully address "undue advantage of any kind"	Partly Does not fully address "undue advantage of any kind"	Y
for oneself or for a third party	Partly Does not address element of "third party"	Y	Y	Y	Partly Does not address "third party"	Y	N No information supplied
while in any capacity directing or working	Partly Does not include element of "directing"	Y	Partly Does not include element of "directing"	Y	Partly Definition does not appear to fully address "working"	Y	Y
private-sector entity	Partly One of the two relevant sections, s153a, does not define "whoever...powers conferred on him by administrative decision"	Y	Y	Y	Y	Y	Y
perform or refrain from performing any act, in breach of that person's duties	Partly One of the two relevant sections, s153a, does not address element of "breach of duty"	Y	Partly Unclear whether term "unfair manner" fully meets "in breach of that person's duties"	Y	Partly Does not fully meet "any act"	Y	Y
	Fully meets 0 requirements	Fully meets 7 requirements	Fully meets 3 requirements	Fully meets 5 requirements	Fully meets 1 requirement	Fully meets 4 requirements	Fully meets 6 requirements

				(legn not supplied)			
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(B) HU – NL

	HU	IE	IT	LT	LU	LV	NL
directly or through an intermediary	Partly Does not address "through an intermediary"	Y	Partly Does not address "through an intermediary"	Y	Y	Y	Partly Does not address "through an intermediary"
requesting or receiving...or accepting the promise of	Y	Y	Y	Y	Y	Partly Does not address "requesting"	Partly Does not address "requesting" or "receiving"
an undue advantage of any kind	Y	Y	Y	Partly Not clear that intangible benefits are included	Y	Y	Partly Not clear that intangible benefits are included
for oneself or for a third party	Partly Does not address "third party"	Y	Partly Does not address "third party"	Y	Y	Y	Partly Does not address "third party"
while in any capacity directing or working	Y	Y	Partly Does not fully address "work"	Y	Partly Does not address "works"	Partly Does not address "directing" nor fully address "working"	Y
private-sector entity	Y	Y	Y	Y	Partly Lacks definition of "legal entity"	Y	Y
perform or refrain from performing any act, in	Partly Does not address	Y	Y	Partly Does not appear to	Y	Y	Partly Offence is limited to

breach of that person's duties	"omission			include unlawful act or omission			receipt of gift etc AFTER the act or omission (unlike active corruption which covers gift etc both before and after)
	Fully meets 4 requirements	Fully meets 7 requirements	Fully meets 4 requirements	Fully meets 5 requirements	Fully meets 5 requirements	Fully meets 5 requirements	Fully meets 2 requirements

(C) PL - UK

	PL Dec	PT	SE	SK	SI	UK
directly or through an intermediary	Partly Does not address "through an intermediary"	Y	Partly Does not address "intermediary"	Y	Partly Does not address "through an intermediary"	Y
requesting or receiving...or accepting the promise of	Partly Does not include "requesting"	Y	Y	Partly Does not address "receiving"	Partly Does not address "offer", while section 247(3) also omits "promise"	Y
an undue advantage of any kind	Y	Y	Y	Y	Y	Y
for oneself or for a third party	Y	Y	Y	Y	Y	Y
while in any capacity directing or working	Partly Does not address "working"	Y	Partly Does not address "directing"	Y	Y	Y
private-sector entity	Y	Y	Y	Y	Y	Y

perform or refrain from performing any act, in breach of that person's duties	Partly Does not address "refrain"	Y	Partly Does not address "refrain"	Y	Partly Section 247 does not address "refrain"	Y
	Fully meets 3 requirements	Fully meets 7 requirements	Fully meets 4 requirements	Fully meets 6 requirements	Fully meets 4 requirements	Fully meets 7 requirements

Article 2.2

MS took different approaches to this Article. Some made explicit reference to the inclusion of non-profit entities within the scope of their legislation, while others worded their legislation in such a broad way that non-profit entities were not excluded.

SI took the approach of describing the offences of active and passive corruption in the context of the performance of a "commercial activity", which was then defined in a separate Article of its Criminal Code.

Article 2.3

With regard to the possibility of making a Declaration under Article 2.3, only 4 MS (AT, DE, IT, PL) did so.

AT informed the Commission that "In as far as Article 2 is not transposed by those provisions, the exception clause of paragraph 3 is used." It is the Commission's view that this is a very vague Declaration, which seems entirely inadequate given the doubts expressed in the analysis of its transposition of Article 2.1(a) and 2.1(b), in particular as the legislation cited by AT in its response concerning those Articles does not appear to provide for a criminal offence of active and passive corruption even for conduct in the private sector which "involves or could involve, a distortion of competition in relation to the purchase of goods or commercial services, that is, AT does not appear to have even met the standards of the JA.

Summary table of the transposition of Article 2

MS	Article 2 (1) (a)	Article 2 (1) (b)	Article 2.2	Article 2.3	Comments
AT	AT meets 5 requirements	AT does not fully meet any requirement, on the basis of the information supplied	AT does not supply sufficient information to assess whether it meets the requirements.	AT makes a Declaration: "In as far as Article 2 is not transposed by those provisions, the exception clause of paragraph 3 is used.	AT's Declaration is noted. AT has not fully transposed

					Article 2 within the parameters of its Declaration
BE	BE meets the requirements	BE meets the requirements	BE meets the requirements	BE does not make a Declaration	BE has fully transposed Article 2
DE	DE makes a Declaration concerning the term "in the course of business activities" DE meets 3 requirements	DE meets 3 requirements	DE does not meet the requirements	DE makes a Declaration: "Pursuant to Article 2(3) of the Framework Decision, Germany declares that it will limit the scope of paragraph 1 of that Article to conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or commercial services."	Both Declarations by DE are noted. DE has not fully transposed Article 2 within the parameters of its Declarations.
DK	DK meets 7 requirements	DK meets 5 requirements	DK meets the requirements	DK does not make a Declaration	DK has not fully transposed Article 2 Note: The conclusion in relation to DK is tentative, based on a detailed commentary, pending sight of the relevant legislation
EE	EE does not fully meet any requirement, on the basis of the information	EE meets 1 requirement	EE meets the requirements	EE does not make a Declaration	EE has not fully transposed Article 2

	supplied				
FI	FI meets 5 requirements	FI meets 4 requirements	FI does not supply sufficient information to assess whether it meets the requirements.	FI does not make a Declaration	FI has not fully transposed Article 2
FR	FR meets 5 requirements	FR meets 6 requirements	FR does not explicitly address this issue. As discussed in relation to Article 2 1, FD FR does not refer to the entity but to the person who is the bribee, as being in the private sector and has a certain role or exercises certain duties. The wording of the legislation appears to take a sufficiently broad approach so as to include business activities in both profit and non-profit entities. FR meets the requirements.	FR does not make a Declaration	FR has not fully transposed Article 2
HU	HU meets 5 requirements	HU meets 4 requirements	HU does not supply sufficient information to assess whether it meets the requirements.	HU does not make a Declaration	HU has not fully transposed Article 2
IE	IE meets 6 of the requirements. IE has stated that future legislation will address the full scope of "an undue advantage of any kind" FD	IE meets the requirements	IE meets the requirements	IE does not make a Declaration.	IE has not fully transposed Article 2

IT	IT meets 3 requirements	IT meets 4 requirements	IT provides insufficient information assessment for	IT makes a Declaration: "Pursuant to Article 2(3) of the Framework Decision, Italy declares that it will limit the scope of paragraph 1 of that Article to conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or commercial services."	IT's Declaration is noted. IT has not fully transposed Article 2
LT	LT meets 5 requirements	LT meets 5 requirements	LT provides insufficient information assessment for	LT does not make a Declaration	LT has not fully transposed Article 2
LU	LU meets 4 of the requirements, insufficient information for assessment of 2 requirements.	LU meets 5 requirements; insufficient information for assessment of 2 requirements	LU provides insufficient information assessment for	LU does not make a Declaration.	LU has not fully transposed Article 2
LV	LV meets 5 requirements	LV meets 5 requirements	LV provides insufficient information assessment for	LV does not make a Declaration.	LV has not fully transposed Article 2
NL	NL meets 3 requirements	NL meets 2 requirements	NL meets the requirements.	NL does not make a Declaration	NL has not fully transposed Article 2
PL	PL meets 3 requirements	PL meets 3 requirements	PL provides insufficient information assessment for	PL makes a Declaration: "...Article 2 (1)(a) and (b) apply to cases of conduct which could inflict losses on a business entity, acts of unfair	PL's declaration is noted. PL has not fully transposed Article 2

				competition or inadmissible preferential action for a purchaser or recipient of goods, services or benefits."	
PT	PT meets 6 requirements	PT meets 7 requirements	PT meets the requirements	PT does not make a Declaration	PT has not fully transposed Article 2
SE	SE meets 4 requirements	SE meets 4 requirements	There is insufficient information to assess whether SE meets the requirements	SE does not make a Declaration	SE has not fully transposed Article 2
SK	SK meets 6 requirements	SK meets 6 requirements	There is insufficient information to assess whether SK meets the requirements.	SK does not make a Declaration	SK has not fully transposed Article 2
SI	SI meets 5 requirements	SI meets 4 requirements	SI meets the requirements.	SI does not make a Declaration	SI has not fully transposed Article 2
UK	UK meets 7 requirements	UK meets 7 requirements	UK meets the requirements	UK does not make a Declaration	UK has fully transposed Article 2

Analysis of Member States

Austria

States that it has transposed this Article by means of section 10, Federal Act against Unfair Competition, 1984 and by sections 153, 153a, 304 to 308, Code of Criminal Procedure.

The Commission offers the following comments in relation to those sections of the Code of Criminal Procedure to which AT refers:

Section 153 refers to breaches of trust by people exercising powers conferred by statute, administrative decision, power of attorney, but does not mention whether the breach of trust involves corruption (as opposed to fraud or other sources of motivation) nor does AT describe such a connection, and accordingly will not be analysed for the purposes of this FD.

Section 153a refers to the acceptance of a "non-negligible financial advantage" by a person in return for exercising powers conferred by statute, administrative decision, power of attorney. This offence contains a specific reference to passive corruption and in the absence of a

definition of "administrative decision" may refer to a private sector, as well as a public sector, context. It will therefore be analysed for the purposes of this FD. .

Section 304 refers to gifts accepted by civil servants, and falls outside the scope of this FD.

Section 305 refers to gifts accepted by senior managers in public enterprises. The term "public enterprise" is defined by section 309(1), Code of Criminal Procedure as "any enterprise which is run direct by one or more territorial units or in which one or more territorial units has a holding of at least 50%..." Therefore section 305 falls outside the scope of this FD.

Section 306 refers to gifts accepted by experts designated by the courts, and falls outside the scope of this FD.

Section 306a refers to gifts accepted by employees and consultants attached to public enterprises, to which the comments made at section 305 above apply. Therefore section 306a falls outside the scope of this FD.

Section 307 text is not supplied

Section 307a refers to active corruption to the categories of person listed in sections 304-306a, and falls outside the scope of this FD.

Section 308 refers to influencing any of the categories of person listed in sections 304-306a, and falls outside the scope of this FD.

Note: AT explains that "the concept of Amtsgeschäft (official business) referred to in sections 304 and 307, Code of Criminal Procedure is interpreted in a broad sense to include a civil servant's private administrative activities." The relevance of this explanation is unclear. The FD focuses on situations where both parties are in the private sector. However, it is possible that AT's explanation addresses those situations where one of the parties is a civil servant who may also have private business interests. In any event, since those sections appear to be outside the scope of the FD, this information about Amtsgeschäft would need to provide a clearer link to the private sector in order to come within the scope of the analysis of the FD.

Article 2 1 (a) active corruption

Section 10 (1), Federal Act against Unfair Competition provides for an offence of active corruption

- "offers, promises or gives" meets: "promising, offering or giving" FD

- the element of "through an intermediary" is not addressed; partly meets: "directly or through an intermediary" FD

- "to a firm's employee or agent" does not appear to address the element of "directs"; partly meets: "a person who in any capacity directs or works" FD

- "a firm"; meets: "private-sector entity" FD

- "gifts or other advantages" appears sufficiently broad to meet the scope of the FD; meets: "an undue advantage of any kind" FD

- "for himself or for a third party" meets: "for that person or for a third party" FD
- "by reason of the unconscionable conduct" appears sufficiently broad to meet the scope of the FD; meets: "perform or refrain from performing any act, in breach of that person's duties" FD

AT partly meets the requirements of Article 2 1 (a), FD.

Article 2 1 (b) passive corruption

Section 10(2), Federal Act against Unfair Competition and section 153a, Code of Criminal Procedure provide for offences of passive corruption.

- neither section 10(2) nor section 153a addresses the element of "through an intermediary"; partly meets: "directly or through an intermediary" FD
- "demands...be offered or given or accepts" (section 10(2)) does not include element of "receiving", "accepts" (section 153a) does not include elements of "requesting or receiving"; partly meets: "requesting or receiving...or accepting the promise of" FD
- "gifts or other advantages" (section 10(2)) appears sufficiently broad to meet the scope of the FD, "non-negligible financial advantage" (section 153a) is too limited because it concentrates only on financial advantage, and the FD does not provide for any threshold level; partly meets: "an undue advantage of any kind" FD
- neither section 10(2) nor section 153a addresses the element of a third party; partly meets: "for oneself or for a third party" FD
- "an employee or agent" (section 10(2)) does not include element of directing, "whoever...powers conferred on him by ...administrative decision..."(section 153a) the meaning depends on the definition of "administrative decision", which is not supplied; partly meets: "while in any capacity directing or working" FD
- "a firm" (section 10(2)) meets the scope of the FD, "whoever... powers conferred on him by ...administrative decision..."(section 153a) the meaning depends on the definition of "administrative decision", which is not supplied; partly meets: "private-sector entity" FD
- "with a view to giving an advantage in the supply of goods or services" (section 10(2)), meets scope of FD within constraints of AT's Declaration, "for exercising powers...to dispose of the assets of others or impose obligations on others" is too specific to meet the full scope of the FD, nor does it address the element of breach of duty; partly meets: "perform or refrain from performing any act, in breach of that person's duties" FD

Note: Section 153a, Code of Criminal Procedure provides for an offence of passive corruption which is limited by the possibility of renouncing one's corrupt act. There is no provision for such a limitation in Article 2, FD.

AT partly meets the requirements of Article 2 1 (b), FD.

Article 2.2

In the absence of a specific reference, it is unclear whether persons employed in non-profit entities come within the scope of AT's legislation.

There is insufficient information to assess whether AT meets the requirements of Article 2.2, FD.

Article 2.3

- AT makes a declaration.

AT in its covering letter says that "In as far as Article 2 is not transposed by those provisions, the exception clause of paragraph 3 is used." However, Article 2.3 FD states that a MS may declare that "it will limit the scope of paragraph 1 to such conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or services". It is noted that AT, in the description of the offences of active and passive corruption at section 10, Federal Act against Unfair Competition, 1984 already limits the offences to the context "in the course of business, for competitive purposes." The impact of the particular wording of this Declaration is therefore unclear.

Belgium:

States that it has transposed this Article by means of Article 504bis, §1 and §2, Criminal Code.

Article 2 1 (a) active corruption

Article 504bis §2, Criminal Code criminalises active corruption.

- "de proposer...une offre, une promesse ou un avantage" meets: "promising, offering or giving" FD

- "directement ou par interposition de personnes" meets: "directly or through an intermediary" FD

- "à une personne qui a la qualité d'administrateur ou de gérant d'une personne morale, de mandataire ou de préposé d'une personne morale ou physique" meets: "a person who in any capacity directs or works" FD

- "Est constitutif de corruption privée... d'une personne morale" meets: "private-sector entity" FD

- "une offre, une promesse ou un avantage de toute nature" meets: "an undue advantage of any kind" FD

- "pour elle-même ou pour un tiers" meets: "for that person or for a third party" FD

- "pour faire ou s'abstenir de faire un acte de sa fonction ou facilité par sa fonction, à l'insu et sans l'autorisation, selon le cas, du Conseil d'administration ou de l'Assemblée générale, du mandant ou de l'employeur" meets: "perform or refrain from performing any act, in breach of that person's duties" FD

BE meets the requirements of Article 2 1 (a), FD.

Article 2 1 (b) passive corruption

Article 504bis §2, Criminal Code criminalises passive corruption

- "directement ou par interposition de personnes" meets: "directly or through an intermediary" FD

- "de solliciter ou d'accepter...une offre, une promesse ou un avantage" meets: "requesting or receiving...or accepting the promise of" FD

- "une offre, une promesse ou un avantage de toute nature" meets: "an undue advantage of any kind" FD

- "pour elle-même ou pour un tiers" meets: "for oneself or for a third party" FD

- "une personne qui a la qualité d'administrateur ou de gérant d'une personne morale, de mandataire ou de préposé d'une personne morale ou physique" meets: "while in any capacity directing or working" FD

- "Est constitutive de corruption privée...d'une personne morale" meets: "private-sector entity" FD

- "pour faire ou s'abstenir de faire un acte de sa fonction ou facilité par sa fonction, à l'insu et sans l'autorisation, selon le cas, du Conseil d'administration ou de l'Assemblée générale, du mandant ou de l'employeur" meets: "perform or refrain from performing any act, in breach of that person's duties" FD

BE meets the requirements of Article 2 1 (b), FD.

Article 2.2:

States that it has transposed this Article by means of Article 504bis, §1 and §2, Criminal Code.

BE meets the requirements of Article 2.2, FD.

Article 2.3

BE does not make a Declaration

Denmark:

States that it has transposed this Article by means of Section 299(2), Criminal Code (text not supplied). Note: The conclusion in relation to DK is tentative, based on a detailed commentary, pending sight of the relevant legislation.

Article 2.1 (a) active corruption

Section 299(2), Criminal Code (text not supplied), criminalises active corruption:

- DK states that section 299(2), Criminal Code addresses "to give, promise or offer"; meets: "promising, offering or giving" FD

- DK states that "under Danish law it is irrelevant whether the person engaging in active corruption is the principal or a third party"; meets: "directly or through an intermediary" FD

- DK states that the provisions "typically apply ...where a person employed or in some other way linked to a company..."; meets: "a person who in any capacity directs or works" FD

- DK states that section 299(2), Criminal Code refers to "a company"; meets: "private-sector entity" FD

- DK states that section 299(2), Criminal Code refers to "gifts...or other advantages" and informs the Commission that the provisions extend to gifts of a non-financial nature, eg promises of reciprocation (supported by comments it supplies on section 1 (a) of the Bill No. L 15 of 6 October 1999 – however the text of the Bill was not supplied). This approach appears sufficiently broad to meet the scope of the FD; meets "an undue advantage of any kind" FD

- DK states that under Danish law, it is "irrelevant whether the person potentially benefiting from the bribery is the person who deals with the affairs or another person"; meets: "for that person or for a third party" FD

- DK states that section 299(2), Criminal Code refers to "dealing improperly with another person's assets.", which appears sufficiently broad to address both performing and refraining from performing, as well as the lawful/unlawful nature of the act; meets: "perform or refrain from performing any act, in breach of that person's duties" FD

DK, on the basis of the information supplied in its commentary, meets the requirements of Article 2 1 (a), FD.

Article 2 1 (b) passive corruption

Section 299 (2), Criminal Code (text not supplied), criminalises passive corruption.

- DK states that "under Danish law it is irrelevant whether the person engaging in active corruption is the principal or third party" and that "...irrelevant whether the person potentially benefiting from the bribery is the person who deals with the affairs or a third party" but neither of these statements appear to address the liability of the person seeking the bribe through an intermediary; partly meets: "directly or through an intermediary" FD

- DK states that section 299(2), Criminal Code addresses "receiving, encouraging or allowing gifts" which does not fully meet the element of accepting the promise of; partly meets: "requesting or receiving...or accepting the promise of" FD

- DK states that section 299(2), Criminal Code refers to "gifts...or other advantages" and informs the Commission that the provisions extend to gifts of a non-financial nature, eg promises of reciprocation (supported by comments it supplies on section 1 (a) of the Bill No. L 15 of 6 October 1999 – however the text of the Bill was not supplied). This approach appears sufficiently broad to meet the scope of the FD; meets: "an undue advantage of any kind" FD

- DK states that under Danish law, it is "irrelevant whether the person potentially benefiting from the bribery is the person who deals with the affairs or another person"; meets: "for that person or for a third party" FD

- DK states that under Danish law, it is "irrelevant whether the person potentially benefiting from the bribery is the person who deals with the affairs or another person"; meets: "while in any capacity directing or working" FD

- DK states that section 299(2), Criminal Code refers to "a company"; meets: "private-sector entity" FD

- DK states that section 299(2), Criminal Code refers to "dealing improperly with another person's affairs.", which appears sufficiently broad to address both performing and refraining from performing, as well as the lawful/unlawful nature of the act; meets: "perform or refrain from performing any act, in breach of that person's duties" FD

DK, on the basis of the information supplied in its commentary, partly meets the requirements of Article 2.1 (b), FD.

Article 2.2

Denmark informs the Commission that Section 299(2) Criminal Code applies to business activities within profit and non-profit entities.

DK, on the basis of the information supplied in its commentary, meets the requirements of Article 2.2, FD.

Article 2.3

DK does not make a Declaration.

Estonia:

States that it has transposed this Article by means of sections 288 and 293-298, Criminal Code.

Art. 2.1 (a) active corruption

Section 297, Criminal Code, provides for the offence of giving or promising a gratuity and section 298, Criminal Code, provides for the same offence in respect of a bribe.

- EE's legislation does not refer explicitly to "offering" a bribe or gratuity, only to "promising" and "granting/giving"; partly meets: "promising, offering or giving" FD

- Sections 297 and 298, Criminal Code are very succinctly phrased but appear only to cover direct active corruption. It is not clear whether the separate offences of arranging receipt of gratuities or bribes (sections 295 and 296, Criminal Code respectively) could be interpreted to extend to active corruption. Even if they could be so interpreted, rather than creating an offence where a person promises etc a gratuity or bribe through an intermediary, instead these sections appear to place a liability on the person who is the intermediary. Accordingly, the legislation does not meet the "intermediary" element as set out in the FD; partly meets:

"directly or through an intermediary" FD

- sections 297 and 298, Criminal Code provide no information as to whom the gratuity or bribe is promised etc; does not meet: "a person who in any capacity directs or works" FD

- sections 297 and 298, Criminal Code provide no information on where the person who receives etc the gratuity or bribe is working, therefore it is not explicitly clear that these are given in a private sector context; does not meet: "private-sector entity" FD

- "a gratuity" (section 297, Criminal Code) "a bribe" (section 298, Criminal Code) in the absence of definitions or further information appear not to address the full scope of the FD; partly meet: "an undue advantage of any kind" FD

- sections 297 and 298, Criminal Code do not address these elements explicitly; does not meet: "for that person or for a third party" FD

- sections 297 and 298, Criminal Code do not address these elements explicitly; does not meet: "perform or refrain from performing any act, in breach of that person's duties" FD

Note: In sections 297-298, Criminal Code, EE distinguishes between the concept of "gratuity" and "bribe", with the former attracting a lesser penalty, but does not provide definitions of these terms. It is therefore not clear whether these terms fully address the FD's concept "an undue advantage of any kind".

Note: There are separate offences of "arranging (intermediating)" receipt of gratuities and bribes (sections 295 and 296, Criminal Code refer). It is unclear from the information provided whether giving or promising a gratuity or a bribe through an intermediary is an offence for the person who gives or promises the gratuity or bribe. Instead, it would appear that sections 295 and 296, Criminal Code, make it an offence for a person to act as an intermediary for a gratuity or bribe respectively.

EE partly meets the requirements of Article 2 1 (a), FD.

Art. 2.1. (b) passive corruption

Sections 293 and 294, Criminal Code criminalise passive corruption with regard to gratuities and bribes respectively. The offences are described in these sections in considerably more detail than in the sections dealing with the corresponding offences of active corruption. Also relevant is section 288, Criminal Code.

- Both sections 293 and 294, Criminal Code deal with direct passive corruption. It would appear that the separate offences of arranging receipt of gratuities or bribes (sections 295 and 296, Criminal Code respectively) do not create an offence where a person promises etc a gratuity or bribe through an intermediary, instead these sections appear to place a liability on the person who is the intermediary. Accordingly, the legislation does not meet the "intermediary" element as set out in the FD; partly meets: "directly or through an intermediary" FD

- "consents to a promise...accepts" (sections 293 and 294, Criminal Code) does not address the element "requesting"; partly meets : "requesting or receiving...or accepting the promise of" FD

- "property or other benefits" (sections 293 and 294, Criminal Code) does not make it clear that it covers the intangible aspects of "undue advantage", "gratuity" (section 293) and "bribe" (section 294) are used respectively, with the former attracting a lesser maximum penalty, but EE does not provide definitions of these terms; partly meets: "an undue advantage of any kind" FD

- neither Section 293 nor 294, Criminal Code deal with the element of "third party"; partly meets: "for oneself or for a third party" FD

- Both sections 293 and 294, Criminal Code refer to "an official". EE supplies the text of Section 288, Criminal Code which defines official as not only a person in the public sector, but also as a person "who holds office...in a legal person in public or private law, and to whom administrative, supervisory or managerial functions, or functions relating to the organisation of movement of assets...have been assigned." From this definition, while the directing element appears to be covered, the definition does not appear to cover all employees; partly meets: "while in any capacity directing or working" FD

- By virtue of the definition of "official" in section 288, Criminal Code, the term relates to legal persons in the public and private sectors and in this context, section 25(1) Civil Code Act which defines a legal person in private law as including general partnerships, limited partnerships, private limited companies, public limited companies, commercial associations, foundations and non-profit associations; meets: "private-sector entity" FD

- "in return for a lawful act which he or she has committed or which there is reason to believe that he or she will commit, or for a lawful omission which he or she has committed or which there is reason to believe that he or she will commit, takes advantage of his or her official position" (sections 293 and 294, Criminal Code) does not meet the full scope of "any act" since it refers only to "lawful act/omission"; partly meets: "perform or refrain from performing any act, in breach of that person's duties" FD

EE partly meets the requirements of Article 2.1 (b), FD.

Article 2.2:

The definition of legal person in private law, provided by section 25(1), Civil Code Act, includes non-profit organisations.

EE meets the requirements of Article 2.2, FD.

Article 2.3

EE does not make a Declaration.

Finland:

States that it has transposed this Article by means of sections 7 and 8, Chapter 30, Criminal Code (39/1889). However, the concordance table does not mention that Finland supplied two versions of section 8 (first version is that of Act No. 769, 1990 and second version is that of Act No. 604, 2002). This analysis is based on the version of 2002.

Article 2.1 (a) active corruption

Section 7, Chapter 30, Criminal Code (Act No. 769, 1990) criminalises active corruption as follows:

- "promises, offers or gives" meets: "promising, offering or giving" FD

- "favour the briber or another person" this phrase deals with direct corruption accurately but does not address the question of an intermediary accurately. The FD requires that the offence cover situations where the briber makes the promise etc through another person, instead FI's legislation appears to criminalise the action of the person who provides a bribe on another person's behalf; partly meets: "directly or through an intermediary" FD

- "(1) a person in the service of a businessman, (2) a member of the administrative board or Board of Directors, the managing director, auditor or receiver of a legal person or (3) a person carrying out a duty on behalf of a business" items (2) and (3) satisfy the requirements of "directs", while item (1) is very broad and would cover "works"; meets: "a person who in any capacity directs or works" FD

- "...in the service of a businessman", "...of a corporation or of a foundation engaged in business", "on behalf of a business" meets: "private-sector entity" FD

- The term "unlawful benefit" is supplemented by the term "bribe" in brackets, but it is not clear if these terms cover the full scope of the FD especially in relation to intangible benefits; partly meets: "an undue advantage of any kind" FD

- "intended for the recipient or for another" meets: "for that person or for a third party" FD

- "in order to have the bribed person, in his or her function or duties, favour the briber or another person" is sufficiently broad to include both the elements of performing and omitting; meets: "perform or refrain from performing any act, in breach of that person's duties" FD

FI partly meets the requirements of Article 2.1(a), FD.

Article 2.1 (b) passive corruption

Section 8, Chapter 30, Criminal Code (Act No.604, 2002) criminalises passive corruption.

- "favour the briber or another person" this phrase deals with direct corruption accurately but does not address the question of an intermediary accurately. The FD requires that the offence cover situations where the briber makes the promise etc through another person, instead FI's legislation appears to criminalise the action of the person who provides a bribe on another person's behalf; partly meets: "directly or through an intermediary" FD

- "demands, accepts or receives a bribe...or otherwise takes an initiative towards receiving such a bribe" the term "accepts" is limited to accepting a bribe (tangible) rather than the promise of a bribe (intangible); since the phrase "takes an initiative towards receiving" implies the bribee taking the first step in the corruption, it does not fill the lacuna regarding accepting a promise; partly meets: "requesting or receiving...or accepting the promise of" FD

- unlike section 7, Chapter 30 Criminal Code Act No. 769, 1990 where both the terms "unlawful benefit (bribe)" are used, in section 8, Chapter 30 Criminal Code Act No. 604, 2002 only the term "bribe" is used, and it is considered that this is not sufficiently broad to meet the full scope of the FD; partly meets: "an undue advantage of any kind" FD

- "a bribe for him or herself or another" meets: "for oneself or for a third party" FD

- "a person in the service of a businessman, a member of the administrative board or Board of Directors, the managing director, auditor or receiver of a legal person or a person carrying out a duty on behalf of a business" meets : "while in any capacity directing or working" FD

- "...in the service of a business" (not "businessman" as in section 7, Chapter 30 Criminal Code Act No. 1990), "...of a corporation or of a foundation engaged in business", "on behalf of a business" meets: "private-sector entity" FD

- "for favouring...such favouring, in his or her functions or duties, the briber or another" meets: "perform or refrain from performing any act, in breach of that person's duties" FD

Note: FI provided 2 versions of this Section, that contained in No 769 Act on the Amendment of the Criminal Code (1990) and that contained in No. 604 Act on the Amendment of the Criminal Code (2002). The 2002 version contains the additional phrase/concept "or otherwise takes an initiative towards receiving such a bribe".

FI partly meets the requirements of Article 2.1 (b), FD.

Article 2.2

In the absence of an explicit reference, and given that the references which are provided all refer to "business", it is unclear whether Finnish legislation extends to non-profit entities.

There is insufficient information to assess whether FI meets the requirements of Article 2.2, FD.

Article 2.3

FI does not make a Declaration.

France:

States that it has transposed this Article by means of Articles 445-1 and 445-2, Criminal Code. It informed the Commission that these are new Articles inserted by Law No. 2005-750 of 4 July 2005, within the new Chapter V (Book IV) entitled "De la corruption des personnes n'exerçant pas une fonction publique". It stated that the principle effect of these Articles, in comparison with Article L152-6 of the Labour Code, was to enlarge the scope of incrimination beyond the employee-employer relationship, and to remove the condition relating to the secret character of the payment received by the corrupt employee.

Article 2 1 (a) active corruption

Article 445- 1, Criminal Code criminalises active corruption.

- "le fait de proposer...des offres, des promesses, des dons, des présents ou des avantages quelconques" meets: "promising, offering or giving" FD

- "directement ou indirectement" meets: "directly or through an intermediary" FD

- "d'une personne qui...exerce, dans le cadre d'une activité professionnelle ou sociale, une fonction de direction ou un travail pour un personne physique ou morale" meets: "a person who in any capacity directs or works" FD

- the French legislation addresses this by placing the natural person in the private sector, rather than by stating that the legal person is in the private sector "d'une personne qui, sans être dépositaire de l'autorité publique ou chargée d'une mission de service public"; while this is not strictly a direct reproduction of the FD its net effect is the same and therefore can be accepted => meets: "private-sector entity" FD

- "des offres, des promesses, des dons, des présents ou des avantages quelconques" meets: "an undue advantage of any kind" FD

- FR does not address this element; does not meet: "for that person or for a third party" FD

- "qu'elle accomplisse ou s'abstienne d'accomplir un acte de son activité ou de sa fonction ou facilité par son activité ou sa fonction, en violation de ses obligations légales, contractuelles ou professionnelles." meets: "perform or refrain from performing any act, in breach of that person's duties" FD

Furthermore, FR also provides that it is an offence for a person to give a bribe to someone who requests one (Article 445-1 (2nd paragraph), which goes beyond the scope of the FD but is an interesting contrast of approach to those MS which provide for circumstances in which such an individual would not be culpable, in particular where they subsequently bring the transaction to the attention of the relevant authorities.

FR partly meets the requirements of Article 2 1 (a), FD.

Article 2.1 (b) passive corruption

Article 445-2, Criminal Code criminalises passive corruption.

- "directement ou indirectement" meets: "directly or through an intermediary" FD

- "...le fait...de solliciter ou d'agréer...des offres, des promesses, des dons, des présents ou des avantages quelconques" meets: "requesting or receiving...or accepting the promise of" FD

- "des offres, des promesses, des présents ou des avantages quelconques" meets: "an undue advantage of any kind" FD

- France does not address this element, does not meet: "for oneself or for a third party" FD

- "par une personne qui...exerce, dans le cadre d'une activité professionnelle ou sociale, une fonction de direction ou un travail pour une personne physique ou morale, ou un organisme quelconque" meets: "while in any capacity directing or working" FD

- the French legislation addresses this by placing the natural person in the private sector, rather than by stating that the legal person is in the private sector "d'une personne qui, sans être dépositaire de l'autorité publique ou chargée d'une mission de service public"; while this is not strictly a direct reproduction of the FD its net effect is the same and therefore can be accepted => meets: "private-sector entity" FD

- "pour accomplir ou s'abstenir d'accomplir un acte de son activité ou de sa fonction, ou facilité par son activité ou sa fonction, en violation de ses obligations légales, contractuelles ou professionnelles" meets: "perform or refrain from performing any act, in breach of that person's duties" FD

FR partly meets the requirements of Article 2.1 (b), FD.

Article 2.2

FR does not explicitly address this issue. As discussed in relation to Article 2 1, FD FR does not refer to the entity but to the person who is the bribee, as being in the private sector and has a certain role or exercises certain duties. The full description of the bribee in both Article 445-1 and Article 445-2 is "une personne qui, sans être dépositaire de l'autorité publique ou chargée d'une mission de service public, exerce, dans le cadre d'une activité professionnelle ou sociale, une fonction de direction ou un travail pour une personne physique ou morale, ou un organisme quelconque". This appears a sufficiently broad approach to include business activities in both profit and non-profit entities.

FR meets the requirements of Article 2.2, FD.

Article 2.3

FR does not make a Declaration

Germany:

States that it has transposed this Article by means of Section 299 Criminal Code (StGB).

Article 2.1

Germany entered two statements in the minutes of the Council meeting where the Framework Decision was adopted (see footnote (1) above), one of which relates to the chapeau of Article 2 (1):

"Germany declares that the term "in course of business activities" in Article 2(1) of the Framework Decision on combating corruption in the private sector is interpreted in the sense that reference is made to activities in relation to the purchase of goods or commercial services."

Article 2.1 (a) active corruption

Section 299(2), Criminal Code penalises whoever, for competitive purposes, offers, promises or grants an employee or agent of a business a benefit for himself or for a third person in a business transaction as consideration for his giving him or another a preference in an unfair manner in the purchase of goods or commercial services, while section 299(3), Criminal code extends this to action taken in competitive transactions abroad.

- "offers, promises or grants" meets: "offering, promising or giving" FD

- "Whoever...offers..." does not address the element of that person offering, promising or giving the undue advantage through an intermediary, partly meets: "directly or through an intermediary" FD

- "an employee or agent of a business" does not appear to extend to the element of "directs"; partly meets "a person who in any capacity directs or works" FD

- "for himself or for a third person" meets "for that person or for a third party" FD

- "of a business...business transaction" is broad enough to include a private sector entity as a subset; meets: "private-sector entity" FD

- "a benefit" it is not clear that the scope of the word "benefit" is sufficiently broad to include an intangible advantage; partly meets: "an undue advantage of any kind" FD

- "giving... a preference in an unfair manner" is sufficiently broad to include the two elements of performing or refraining from performing, but there is insufficient information on the meaning of the phrase "unfair manner" to assess the criteria on which a court would judge the concept of "unfair manner" and whether in this regard it is the equivalent of the concept "in breach of that person's duties" partly meets: "perform or refrain from performing any act in breach of that person's duties" FD

Concerning the restriction to "competitive purposes", DE points out that it has lodged a declaration in this regard, as permitted under Article 2(3), FD.

DE, within the parameters of its Declaration, partly meets the requirements of Article 2.1 (a), FD.

Article 2.1 (b) passive corruption

Section 299(1), Criminal Code penalises whoever, as an employee or agent of a business, demands, allows himself to be promised, or accepts a benefit for himself or another in a business transaction as consideration for giving a preference in an unfair manner to another in the competitive purchase of goods or commercial services.

- there is no reference to demanding etc through an intermediary; partly meets: "directly or through an intermediary" FD

- "demands, allows himself to be promised, or accepts" meets: "requesting or receiving...or accepting the promise of" FD

- "a benefit" it is not clear that the scope of the word "benefit" is sufficiently broad to include an intangible advantage; partly meets: "an undue advantage of any kind" FD

- "for himself or another" meets: "for oneself or for a third party" FD

- "an employee or agent of a business" does not appear to extend to the element of "directs"; partly meets "while in any capacity directs or works" FD

- "of a business ...business transaction" is broad enough to include a private sector entity as a subset; meets: "private-sector entity" FD

- "giving a preference in an unfair manner to another in the competitive purchase of goods or commercial services" is sufficiently broad to include the two elements of performing or refraining from performing, but there is insufficient information on the meaning of the phrase "unfair manner" to assess the criteria on which a court would judge the concept of "unfair manner" and whether in this regard it is the equivalent of the concept "in breach of that person's duties" partly meets meets: "to perform or refrain from performing" FD

Concerning the restriction to "competitive purposes", DE points out that it has lodged a declaration in this regard, as permitted under Article 2(3), FD.

DE partly meets the requirements of Article 2.1 (b), FD.

Article 2.2

DE does not refer to this Article in its concordance table.

Section 299, Criminal Code refers to "business", "business transaction" and "competitive purchase of goods or commercial services". It does not refer explicitly to non-profit entities but given that the context for the offences is "distortion of competition" it seems unlikely on the basis of this information that German legislation covers business activities by non-profit entities.

DE does not meet the requirements of Article 2.2. FD

Article 2.3

DE entered two statements in the minutes of the Council meeting where the Framework Decision was adopted (see footnote (1) above), the second of which is a Declaration as permitted under Article 2 (3):

"Pursuant to Article 2 (3) of the Framework Decision, Germany declares that it will limit the scope of paragraph 1 of that Article to conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or commercial services."

Hungary:

States that it has transposed this Article by means of Sections 251-254, 256 of Act IV of 1978 on the Criminal Code. However, section 253 appears to address corruption where one of the parties is in the public sector, and is therefore outside the scope of this FD.

Article 2 1 (a) active corruption

Section 254, Criminal Code, criminalises active corruption.

- HU legislation does not include element of "offering" partly meets: "promising, offering or giving" FD

- "to an employee or member of...or to another person on account of such employee or member" meets: "directly or through an intermediary" FD

- "to an employee or member of a budgetary agency, economic organization or non-governmental organization" meets: "to a person who in any capacity directs or works for a private sector entity" FD

- "unlawful advantage" meets: "an undue advantage of any kind" FD

- "to an employee...or to another person on account of such employee or member" meets "for that person or for a third party" FD

- the phrase used here "to induce him to breach his duties" is extremely broad and it is therefore unclear whether HU intends that this phrase would cover an omission; in this context, information from HU on the meaning of "breach of duty" would have been of

assistance in assessing this phrase's meaning; party meets: "should perform or refrain from performing any act, in breach of one's duties" FD

Note: the phrase "to an employee...or to another person *on account of* such employee or member" appears sufficiently flexible to address two elements of Article 2 1 (a), as indicated above.

HU partly meets the requirements of Article 2 1 (a), FD.

Article 2.1 (b) passive corruption

Sections 251 and 252, Criminal Code, criminalise passive corruption. Section 251 refers to passive corruption by an employee or a member of a budgetary agency etc, while section 252 refers to passive corruption by an employee or member who is authorised to act on behalf of the budgetary agency etc, and carries relatively higher penalties.

- "who requests" (sections 251 (1) and 252 (1)) these phrases only address direct corruption and do not address situations where the request is made through an intermediary; partly meets: "directly or through an intermediary" FD

- "who requests...accepts such advantage or promise" meets: "requesting or receiving...or accepting the promise of" FD

- "an unlawful advantage... or a promise" meets: "an undue advantage of any kind" FD

- "in connection with his actions" (sections 251 (1) and 252 (1)) "for violating his responsibilities" here the phrases focus on advantage as having a direct connection to the person's own actions rather than also being requested for a third party; partly meet: "for oneself or for a third party" FD

- "Any employee or member of a budgetary agency, economic organization or non-governmental organization" (section 251(1)) "Any employee or member of a budgetary agency, economic organization or non-governmental organization" meets: "while in any capacity directing or working for a private sector entity" FD

- "in connection with his actions in an official capacity" (sections 251 (1) and 252 (1)), "in exchange for violating his responsibilities" (252 (1)) does not address the element of omission; partly meets: "in order to perform or refrain from performing any act, in breach of one's duties" FD

Note: HU provides what appears to be an extra offence with the phrasing "who agrees with the party requesting or accepting the advantage" (Sections 251 (1) and 252 (1)) which is embedded in the overall offence of passive corruption in both sections. This offence would appear to be aimed at addressing a situation where a colleague collaborates with the person who is in receipt of an undue advantage.

HU partly meets the requirements of Article 2 1 (b), FD.

Article 2.2

HU legislation does not explicitly address the question of non profit entities. In the absence of any definition for the elements within the phrase used in place of "legal person" namely

"budgetary agency, economic organization or non-governmental organization" it is not possible to assess whether these terms encompass non profit entities.

There is insufficient information to assess whether HU meets the requirements of Article 2.2, FD.

Article 2.3

HU does not make a Declaration.

Ireland:

States that it has transposed this Article by means of Section 1, Prevention of Corruption Act 1906, as inserted by section 2, Prevention of Corruption (Amendment) Act 2001. Ireland informed the Commission that an amendment to this section of the 2001 Act, to be included in a Criminal Justice (Miscellaneous Provisions) Bill currently being drafted, will introduce the concept of corruptly offering "advantage".

Article 2.1 (a) active corruption

Section 1 (2), Prevention of Corruption Act 1906, as inserted by section 2, Prevention of Corruption (Amendment) Act 2001 criminalises active corruption:

- provides for giving, agreeing to give and offering meets: all 3 elements of FD
- "to an agent or any other person" meets: "directly or through an intermediary" FD
- Section 1(5) provides the definition of the term "agent" which includes, in addition to definitions relevant to the public sector "any person employed by or acting for another" (subsection 1 (5) (a) refers) and meets: "a person who in any capacity directs or works" FD as well as "private-sector entity" FD
- "whether for the benefit of that agent, person or another person" meets "for that person or for another person" FD
- doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business meets: "perform or refrain from performing any act, in breach of that person's duties" FD (Note: the term "principal" is defined as including an employer (section 1, Prevention of Corruption Act1906, as inserted by section 2, Prevention of Corruption (Amendment) Act 2001 refers)).
- "any gift or consideration" does not fully meet: "an undue advantage of any kind" FD (in section 1(1) of the 2001 Act the word advantage is also present, so it is not clear what the effect of its omission here would be. Ireland has informed the Commission that an amendment to this section of the 2001 Act, to be included in a Criminal Justice (Miscellaneous Provisions) Bill currently being drafted, will introduce the concept of corruptly offering "advantage". (Note: the term "consideration" is defined as including a valuable consideration of any kind (section 1, Prevention of Corruption Act1906, as inserted by section 2, Prevention of Corruption (Amendment) Act 2001 refers)).

IE partly meets the requirements of Article 2 (1) (a), FD.

Article 2.1 (b) passive corruption

Section 1 (1) Prevention of Corruption Act 1906, as inserted by section 2, Prevention of Corruption (Amendment) Act 2001 criminalises passive corruption:

- uses the terms "corruptly accepts or obtains" and "corruptly agrees to accept or attempts to obtain" meets: requesting or receiving...or accepting the promise of" FD

- "An agent or any other person...for himself or herself, or for any other person" meets: "directly or through an intermediary" FD

- "any gift, consideration or advantage" meets: "an undue advantage of any kind" FD (Note: the term "consideration" is defined as including a valuable consideration of any kind (section 1, Prevention of Corruption Act1906, as inserted by section 2, Prevention of Corruption (Amendment) Act 2001 refers)).

- "for himself or herself, or for any other person" meets: "for oneself or for a third party" FD

- Section 1 (5) provides the definition of the term "agent" which includes, in addition to definitions relevant to the public sector "any person employed by or acting for another" (subsection 1 (5) (a) refers) and meets: "while in any capacity directing or working for a private-sector entity" FD

- "doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business" meets: "in order to perform or refrain from performing any act in breach of one's duties" FD (Note: the term "principal" is defined as including an employer (section 1, Prevention of Corruption Act1906, as inserted by section 2, Prevention of Corruption (Amendment) Act 2001 refers)).

IE meets the requirements of Article 2.1 (b), FD.

Article 2.2

By virtue of the definition of the term "agent" which includes, in addition to definitions relevant to the public sector "any person employed by or acting for another" (subsection 1 (5) (a) Prevention of Corruption Act 1906, as inserted by section 2, Prevention of Corruption (Amendment) Act 2001 refers), Ireland provides for the criminalisation of corruption in relation to any entity, whether profit or non-profit.

IE meets the requirements of Article 2.2, FD

Article 2.3

IE does not make a Declaration.

Italy:

The relevant legislation is section 2635, Civil Code, which is inserted in Chapter IV (Offences, mitigating circumstances and measures securing assets) of Title XI (Criminal Provisions in relation to companies) of Book V (Labour) of the Civil Code.

Note: It is a feature of the Italian legal system that provision can be made for criminal offences in the Civil Code.

Article 2 1 (a): active corruption

Section 2635 (2), Civil Code criminalises active corruption by referring to the preceding subsection (section 2635 (1) – which deals with passive corruption):

- "giving or promising" omits reference to the element of offering, partly meets: "promising, offering or giving" FD

The relevant elements of section 2635 (1), Civil Code are as follows:

- the legislation does not address the element of 'through an intermediary'; partly meets: "directly or through an intermediary" FD

- "directors, general managers, administrators, liquidators and auditors" while addressing the elements of "directs" and senior employees, in the absence of a definition of "administrators", is not sufficiently wide to encompass the full scope of the FD; partly meets: "who in any capacity directs or works for" FD

- "a company" appears broad enough to meet: "private-sector entity" FD

- the legislation uses the terms "gifts" and "a benefit"; meets: "an undue advantage of any kind" FD

- the legislation does not include reference to a third party; partly meets: "for that person or for a third party" FD

- "do or omit actions contrary to the obligations inherent in their function" meets: "perform or refrain from performing any act, in breach of one's duties" FD

Note:

The Italian legislation takes a narrower approach than the FD in the following two respects:

- the overall context of the offence is that the act or omission causes a loss to the company of the directors etc. making the act or omission

- section 2635 (3), Civil Code confines the taking of proceedings to situations where the person who sustains the loss makes a claim.

IT partly meets the requirements of Article 2 1 (a), FD.

Article 2.1. (b): passive corruption

Section 2635 (1), Civil Code criminalises passive corruption as follows:

- the legislation does not address the element of 'through an intermediary'; partly meets: "directly or through an intermediary" FD

- "in return for...or the promise of" is sufficiently broad to meet: "requesting or receiving...or accepting the promise of" FD

- the legislation uses the terms "gifts" and "a benefit"; meets: "an undue advantage of any kind" FD

- the legislation does not include reference to a third party; partly meets: "for oneself or for a third party" FD

- "directors, general managers, administrators, liquidators and auditors" while addressing the elements of "directs" and senior employees, in the absence of a definition of "administrators", is not sufficiently wide to encompass the full scope of the FD; partly meets: "while in any capacity directing or working" FD

- "a company" appears broad enough to meet: "private-sector entity" FD

- "do or omit actions contrary to the obligations inherent in their function" meets: "perform or refrain from performing any act, in breach of that person's duties" FD

Note:

The Italian legislation takes a narrower approach than the FD in the following two respects:

- the overall context of the offence is that the act or omission causes a loss to the company of the directors etc. making the act or omission

- section 2635 (3), Civil Code confines the taking of proceedings to situations where the person who sustains the loss makes a claim.

IT partly meets the requirements of Article 2.1 (b), FD.

Article 2.2

IT states that the relevant legislation is section 2635, Civil Code. This section uses the term "company". As indicated by the Commission in the analysis of Article 2.1, FD, this term appears broad enough to refer to a "private-sector entity". However, in the absence of further information, it is not clear whether it is sufficiently broad to specifically include non-profit entities.

There is insufficient information to assess whether IT meets the requirements of Article 2.2, FD.

Article 2.3

IT makes a Declaration: "Pursuant to Article 2(3) of the Framework Decision, Italy declares that it will limit the scope of paragraph 1 of that Article to conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or commercial services."

Latvia:

States that it has transposed this Article by means of its legislation in Chapter XIX of the Special Part "Criminal Offences of an Economic Nature", Criminal Code. In fact, only two sections are relevant, namely section 198 "Unauthorised receipt of benefits" and section 199 "Commercial Bribery".

Article 2 1 (a) active corruption

Section 199, Criminal Code criminalises active corruption but only in limited circumstances ie where the bribe has been accepted. This is not sufficiently wide to meet the requirements of the FD.

- "offering or giving" omits "element of promising"; partly meets: "promising, offering or giving" FD
- "personally or through intermediaries" meets: "directly or through an intermediary" FD
- "a responsible employee...or a person authorised..." does not include all employees and does not appear to fully meet the scope of "directs"; partly meets: "a person who in any capacity directs or works" FD
- "an undertaking (company) or organisation" meets: "private-sector entity" FD
- "material value, property or benefits of another nature" meets: "an undue advantage of any kind" FD
- "to a responsible employee...or a person authorised...irrespective of whether the material value, property or benefits of another nature is intended for this or any other person" meets: "for that person or for a third party" FD
- "using his or her authority in bad faith, performs or fails to perform some act in the interests of the giver of the benefit or the proposer" meets: "perform or refrain from performing any act, in breach of that person's duties" FD

LV partly meets the requirements of Article 2 1 (a), FD.

Article 2 1 (b) passive corruption

Section 198, Criminal Code criminalises passive corruption.

- "For a person who knowingly commits...himself or herself or an intermediary" meets: "directly or through an intermediary" FD
- "knowingly commits illegally receiving the offer of..." does not address the element of "requesting"; partly meets: "requesting or receiving...or accepting the promise of" FD
- "the offer of material value, property or benefits of another nature" meets : "an undue advantage of any kind" FD
- "irrespective of whether the material value, property or benefits of another nature is intended for this or any other person" meets: "for oneself or for a third party" FD
- "a responsible employee of an undertaking (company) or organisation, or a person similarly authorised by an undertaking (company) or organisation" is not sufficiently broad – all employees are not covered, nor is the concept of "directing" addressed; partly meets: "while in any capacity directing or working" FD
- "an undertaking (company) or organisation" meets: "private-sector entity" FD

- "for performing or failing to perform some act, in the interests of the giver of the benefit or the proposer, using his or her authority in bad faith" meets: "perform or refrain from performing any act, in breach of that person's duties" FD

LV partly meets the requirements of Article 2.1 (b), FD.

Article 2.2

In the absence of a specific reference, it is unclear whether non-profit entities come within the scope of Latvia's legislation.

There is insufficient information to assess whether LV meets the requirements of Article 2.2, FD.

Article 2.3

LV does not make a Declaration.

Lithuania:

States that it has transposed this Article by means of its legislation in Chapter XXXIII of the Special Provisions of the Criminal Code "Crimes and Criminal Offences against the civil services and public interests". Articles 225 – 227 provide for offences of active and passive corruption involving "any civil servant or person assimilated thereto", which is in turn defined at Article 230 (3) as follows:

"Persons assimilated to civil servants shall also be persons who work in any state, non-state, or private body, firm or organisation or exercise professional activities and have corresponding administrative powers or are entitled to act on behalf of such bodies, firms or organisations, or provide public services."

In this way its legislation is also applicable to corruption within the private sector.

Article 2.1 (a) active corruption

Active corruption is criminalised by Article 227, Criminal Code.

- "has offered, promised or paid" meets: "promising, offering or giving" FD

- "directly or indirectly" meets "directly or through an intermediary" FD

- "a civil servant or person assimilated thereto" (see details above about Article 230 (3), Criminal Code) meets: "a person who in any capacity directs or works" FD

- Article 227, Criminal Code, does not refer explicitly to a private-sector entity but the definition of an assimilated person at Article 230(3) includes reference to working in a "private body, firm or organisation" meets: "private-sector entity" FD

- "a bribe" when used on its own could be regarded as only referring to a tangible benefit and not conveying the full scope of the FD's phrase; partly meets: "an undue advantage of any kind" FD

- "to incite that person...or to an intermediary with a view to achieving the same result" meets: "for that person or for a third party" FD

- "to perform a desired lawful act or omission" while this phrase provides for both an act or omission, it fails to address situations where the act or omission would be unlawful; partly meets: "perform or refrain from performing any act, in breach of that person's duties" FD

Note: Article 227 (4), Criminal Code, in addition to providing exemption from criminal liability in the case of a bribe promised or paid with the knowledge of a law-enforcement body, provides two further exemptions which are problematic:

- where the person was required or provoked into paying a bribe

- where the person has offered, promised or paid a bribe, but forthwith informed a law-enforcement agency.

LT partly meets the requirements of Article 2 1 (a), FD.

Article 2 1 (b) passive corruption

Passive corruption is criminalised by two Articles of the Criminal Code. Article 225 provides for the offence of passive corruption, including the performance or failure to perform an act.

Article 226 provides for the liability of a person who seeks etc an advantage in order to influence a legal person or person to commit a lawful or an unlawful act or omission.

- "has directly or indirectly" (section 225, Criminal Code) meets: "directly or through an intermediary" FD

- "accepted, offered or agreed to accept...or has required or provoked..." meets: "requesting or receiving...or accepting the promise of" FD

- "a bribe" when used on its own could be regarded as only referring to a tangible benefit and not conveying the full scope of the FD's phrase; partly meets: "an undue advantage of any kind" FD

- "for his/her own or others' benefit" meets: "for oneself or for a third party" FD

- "a civil servant or person assimilated thereto" (see details above about Article 230 (3), Criminal Code) meets: "while in any capacity directing or working" FD

- Article 227, Criminal Code, does not refer explicitly to a private-sector entity but the definition of an assimilated person at Article 230(3) includes reference to working in a "private body, firm or organisation" meets : "private-sector entity" FD

- "for the performance of any lawful act or omission in the execution of his/her powers" while this phrase provides for both an act or omission, it fails to address situations where the act or omission would be unlawful; partly meets: "perform or refrain from performing any act, in breach of that person's duties" FD

Note: In its legislation, LT deals separately with the element of passive corruption by a third party in relation to influencing etc the actions of another person, an approach which does not in itself create any difficulty in relation to transposing the FD.

LT partly meets the requirements of Article 2.1 (b), FD.

Article 2.2

In the absence of a specific reference, it is unclear whether persons employed in non-profit entities come within the scope of Article 230 (3).

There is insufficient information to assess whether or not LT meets the requirements of Article 2.2, FD.

Article 2.3

LT does not make a Declaration.

Luxembourg:

States that it has transposed this Article by means of Articles 310 and 310-1, Criminal Code inserted by Article 3, Act of 23.05.2005.

Article 2.1 (a) active corruption

Article 310-1, Criminal Code criminalises active corruption.

- "de proposer...une offre, une promesse ou un avantage de toute nature..." does not include the element of "giving" partly meets: "promising, offering or giving" FD

- "directement ou par interposition de personnes" meets: "directly or through an intermediary" FD

- "à une personne qui a la qualité d'administrateur ou de gérant d'une personne morale, de mandataire ou de préposé d'une personne morale ou physique" while this description is broad, it does not appear to be sufficiently comprehensive to cover the element of "works" partly meets: "a person who in any capacity directs or works" FD

- the Luxembourg legislation does not explicitly refer to either the public or the private sector in this Article; by its use of general terms such as legal person, employer it is possible to consider that private-sector entities are within the scope of the legislation but in the absence of a definition of "legal entity" one cannot be fully certain; there is insufficient information to assess whether or not LU meets: "private-sector entity" FD

- "une offre, une promesse ou un avantage de toute nature" meets: "an undue advantage of any kind" FD

- "pour elle-même ou pour un tiers" meets: "for that person or for a third party" FD

- "pour faire ou s'abstenir de faire un acte de sa fonction ou facilité par sa fonction, à l'insu et sans l'autorisation, selon le cas, du conseil d'administration ou de l'assemblée générale, du

mandant ou de l'employeur" meets: "perform or refrain from performing any act, in breach of that person's duties" FD

LU partly meets the requirements of Article 2.1 (a), FD.

Article 2.1 (b) passive corruption

Article 310, Criminal Code criminalises passive corruption

- "directement ou par interposition de personnes" meets: "directly or through an intermediary" FD

- "de solliciter ou d'accepter...une offre, une promesse ou un avantage de toute nature" meets: "requesting or receiving...or accepting the promise of" FD

- "une offre, une promesse ou un avantage de toute nature" meets: "an undue advantage of any kind" FD

- "pour elle-même ou pour un tiers" meets: "for oneself or for a third party" FD

- "une personne qui a la qualité d'administrateur ou de gérant d'une personne morale, de mandataire ou de préposé d'une personne morale ou physique" while this description is broad, it does not appear to be sufficiently comprehensive to cover the element of "works" partly meets: "while in any capacity directing or working" FD

- the Luxembourg legislation does not explicitly refer to either the public or the private sector in this Article; by its use of general terms such as legal person, employer it is possible to consider that private-sector entities are within the scope of the legislation but in the absence of a definition of "legal entity" there is insufficient information to assess whether or not LU fully meets "private-sector entity" FD

- "pour faire ou s'abstenir de faire un acte de sa fonction ou facilité par sa fonction, à l'insu et sans l'autorisation, selon le cas, du conseil d'administration ou de l'assemblée générale, du mandant ou de l'employeur" meets: "perform or refrain from performing any act, in breach of that person's duties" FD

LU partly meets the requirements of Article 2.1 (b), FD

Article 2.2

LU does not provide specific information in regard to this Article. As already mentioned in the discussion on Articles 2.1 (a) and (b), the Luxembourg legislation does not explicitly refer to either the public or the private sector in this Article; by its use of general terms such as legal person, employer it is possible to consider that private-sector entities are within the scope of the legislation but in the absence of a definition of "legal entity" one cannot be fully certain; it follows from this, that there is also a lack of information as to whether or not the legislation covers business activities within non-profit entities. Accordingly, it is not possible to be certain as to whether or not the legislation meets the requirements of this Article.

There is insufficient information to assess whether LU meets the requirements of Article 2.2, FD.

Article 2.3

LU does not make a Declaration.

The Netherlands:

States that it has transposed this Article by means of sections 46a and 328b, Criminal Code.

Article 2.1 (a) active corruption

Section 328b (2), Criminal Code criminalises active corruption.

- "gives a gift or makes a promise" does not include the element of offering and does not fully meet: "promising, offering or giving" FD

- there is no reference to "through an intermediary" does not meet: "directly or through an intermediary" FD

- "to a person in employment or acting as a mandator" meets: "a person who in any capacity directs or works" FD

- "other than a civil servant" indicates that it includes, although may not be confined to, a person in the private sector and the Netherlands informs the Commission that the section applies to profit and non-profit entities, meets: "private-sector entity" FD

- the terms used are "gift" and "promise" which may still be slightly too narrow to fully meet the scope of: "an undue advantage of any kind" FD

- the law provides that the gift be given or promise be made "to a person...what that person has done...or will do" does not meet the element of a third party: "for that person or for a third party" FD

- "has done or refrained from doing or will do or refrain from doing in the future in connection with his occupation or in the performance of his duties" meets: "perform or refrain from performing any act, in breach of that person's duties" FD

Note: under national law, a necessary element of the offence is the linkage to the concept that the person who receives the gift conceals it from his employer or mandator. This is too narrow, because the FD does not provide for any such limitation, also it ignores the likely scenario of accepting such a gift with the agreement of the employer or mandatory which could still be corrupt behaviour.

NL does not fully meet the requirements of Article 2.1 (a), FD.

Article 2.1 (b) passive corruption

Section 328b (1), Criminal Code criminalises passive corruption.

- there is no reference to 'through an intermediary', does not meet: "directly or through an intermediary" FD

- only the element of accepting is present, the element of requesting (which would be v important) or receiving are absent, so it does not meet : "requesting or receiving...or accepting the promise of" FD
- the terms used are "gift" and "promise" which may still be slightly too narrow to fully meet the scope of: "an undue advantage of any kind" FD
- the law provides that the gift be given or promise be made to "a person who...what he has done or refrained from doing" and does not provide for the element of a third party: "for oneself or for a third party" FD
- "A person who, in a capacity other than that of a civil servant, an employed person or a person acting as mandator" meets: "while in any capacity directing or working" FD
- "other than a civil servant" indicates that it includes, although may not be confined to, a person in the private sector and the Netherlands informs the Commission that the section applies to profit and non-profit entities, meets: "private-sector entity" FD
- while the national law includes the concept of the future doing or omission in respect of the offence of active corruption, in the passive corruption offence the future tense is absent, and this limits the offence to a situation where the gift or promise happens AFTER the related act or omission, and does not meet: "perform or refrain from performing any act, in breach of that person's duties" FD

Note: under national law, a necessary element of the offence is the linkage to the concept that the person who receives the gift conceals it from his employer or mandator. This is too narrow, because the FD does not provide for any such limitation, also it ignores the likely scenario of accepting such a gift with the agreement of the employer or mandatory which could still be corrupt behaviour.

NL does not fully meet the requirements of Article 2.1 (b), FD.

Article 2.2

NL informs the Commission that section 328b, Criminal Code, which provides for the offences of active and passive corruption, applies to business activities within profit and non-profit entities.

NL meets the requirements of Article 2.2, FD.

Article 2.3

NL does not make a Declaration.

Poland:

States that it transposes this Article by means of Articles 115 and 296a, Criminal Code.

Article 2.1 (a) active corruption

Article 296a (2), Criminal Code criminalises active corruption.

- "provide or promise to provide" omits offering => does not fully meet: "promising, offering or giving" FD

- the intermediary is not mentioned, => does not meet: "directly or through an intermediary" FD

- "persons who carry out a leading function...or who have, by virtue of their position or function, a crucial influence on decisions concerning the activities of the organisation" seems to set the threshold too high, in particular with the word *crucial* => does not fully meet: "a person who in any capacity directs or works" FD

- "a business organisation" meets: "private-sector entity" FD

- "material or personal benefits" meets: "an undue advantage of any kind" FD

- Article 115 (4), Criminal Code provides that "material or personal benefits shall comprise both benefits for the person concerned and benefits for other persons" meets: "for that person or for a third party" FD

- "implementing activities which may cause material losses to that organisation, an act of unfair competition or inadmissible preferential action for a purchaser or recipient of good or services" meets, in view of Poland's declaration under Article 2(3), FD the performance element, but does not appear to meet the element of refraining from performing => does not fully meet: "perform or refrain from performing any act, in breach of that person's duties" FD

Note: the offence is tied into the concept of causing a material loss to one's business organisation, and hence does not cover a situation where a gain is caused to one's business organisation.

PL partially meets the requirements of Article 2.1. (a), FD.

Article 2.1. (b), FD passive corruption

Article 296a(1) Criminal Code criminalises passive corruption.

- the intermediary is not mentioned, => does not fully meet: "directly or through an intermediary" FD

- "receive...or a promise to provide" does not include the element of requesting, => does not fully meet: "requesting or receiving...or accepting the promise of" FD

- "material or personal benefits" meets: "an undue advantage of any kind" FD

- Article 115 (4), Criminal Code provides that "material or personal benefits shall comprise both benefits for the person concerned and benefits for other persons" meets: "for oneself or for a third party" FD

- "persons who carry out a leading function...or who have, by virtue of their position or function, a crucial influence on decisions concerning the activities of the organisation" seems to set the threshold too high, in particular with the word *crucial* => does not fully meet: "while in any capacity directing or working" FD

- "a business organisation" meets: "private-sector entity" FD

- "implementing activities which may cause material losses to that organisation, an act of unfair competition or inadmissible preferential action for a purchaser or recipient of good or services" meets, in view of Poland's declaration under Article 2(3), FD the performance element, but does not appear to meet the element of refraining from performing => does not fully meet: "perform or refrain from performing any act, in breach of one's duties" FD

Note: the offence is tied into the concept of causing a material loss to one's business organisation, and hence does not cover a situation where a gain is caused to one's business organisation.

PL partially meets the requirements of Article 2.1 (a), FD.

Art. 2.2.

Article 296a (1) and (2) uses the term "business organisation". This is not defined by PL but does not explicitly exclude non-profit organisations.

PL provides insufficient information for assessment of whether or not it meets the requirements of Article 2.2, FD

Article 2.3

- PL makes a declaration. It states that pursuant to Article 2(3), FD, Articles 2(1)(a) and (b), FD apply to cases of conduct which could inflict losses on a business entity, acts of unfair competition or inadmissible preferential action for a purchaser or recipient of goods, services or benefits. However, Article 296a only refers to losses sustained by the bribee's organisation, rather than to both that organisation and other organisations. Therefore, who is going to have reason to bring a case to court, if only the bribee's organisation can do so, and the act of the bribee may not have caused a loss but a profit to it?

Portugal:

PT states that it has transposed this Article by means of Articles 41b and 41c of Decree-Law No. 28/84 of 20 January 1984 as amended by Law No. 108/2001 of 28 November 2001.

Article 2.1 (a) active corruption

Article 41c, Decree-Law No.28/84 criminalises active corruption, with cross-references to Article 41b, Decree-Law No. 28/84.

- "gives or promises" omits "offers" does not meet: "promising, offering or giving" FD

- "on his own behalf or through an intermediary acting with his consent or endorsement" meets: "directly or through an intermediary" FD

- "to the persons specified in Article 41b" that is "whoever, in the exercise of his duties, including as a member of the management" appears sufficiently broad to meet: "a person who in any capacity directs or works" FD

- "to the persons specified in Article 41b" that is "whoever... for any private-sector entity" meets: "private-sector entity" FD

- "a pecuniary or non-pecuniary advantage" meets: "an undue advantage of any kind" FD

- "to the persons...or to a third party with the knowledge of those persons" meets: "for that person or for a third party" FD

- Article 41c cross-references to Article 41b "in return for acting or omitting to act in breach of his official duties" and meets: "perform or refrain from performing any act, in breach of that person's duties" FD

PT partially meets the requirements of Article 2.1 (a), FD.

Article 2.1 (b) passive corruption

Article 41b, Decree-Law No. 28/84 criminalises passive corruption.

- "on his own behalf or through an intermediary" meets: "directly or through an intermediary" FD

- "requests or accepts...or accepts the promise of" meets: "requesting or receiving...or accepting the promise of" FD

- "a pecuniary or non-pecuniary advantage" meets: "an undue advantage of any kind" FD

- "for himself or for a third party" meets: "for oneself or for a third party" FD

- "whoever, in the exercise of his duties, including as a member of the management" appears sufficiently broad to meet: "while in any capacity directing or working" FD

- "whoever... for any private-sector entity" meets: "private-sector entity" FD

- "in return for acting or omitting to act in breach of his official duties" meets: "perform or refrain from performing any act, in breach of that person's duties" FD

PT meets the requirements of Article 2.1 (b), FD.

Article 2.2

In the context of Article 1, FD PT informed the Commission that Portuguese law does not contain a separate definition of "legal person", but that legal person is defined by a number of Articles, including Article 157, Civil Code which provides for associations which do not have for their object the profit of the partners, social foundations and similar bodies.

In addition, the offences of active and passive corruption are described as relating to "any private-sector entity" (Article 41b, Decree-Law No. 28/84).

PT meets the requirements of Article 2.2, FD.

Article 2.3

- PT does not make a declaration.

Slovak Republic:

States that the relevant legislation is sections 160 - 162, Criminal Code. As the national legislation creates a number of additional offences to the classic "active" and "passive" corruption offences, all of these are listed below for ease of reference:

Passive corruption:

- Section 160 deals with passive corruption as addressed in the Framework Decision. Within section 160, there are two subsections: subsection (1) creates an offence of passive corruption in respect of abusing one's employment, occupation, standing or position to provide an advantage to someone or give him unwarranted preferential treatment, and subsection (2) does likewise in respect of action or inaction constituting a breach of duty stemming from one's employment etc.
- Section 160a deals with passive corruption in connection with the procurement of an item of general interest¹⁰.
- Section 162(1) deals with passive corruption whereby a person seeks a bribe to use, or having used, his influence to affect the exercise of powers by a person specified under sections 160 or 160a etc.

Active corruption:

- Section 161 deals with active corruption as addressed in the Framework Decision. Within section 161, there are two subsections: subsection (1) creates an offence of active corruption in respect of bribing a person to abuse his employment, occupation, standing or position in order to gain an advantage or unwarranted preferential treatment, and subsection (2) does likewise in respect of action or inaction constituting a breach of duty stemming from the person's employment etc.
- Section 161a deals with active corruption in connection with the procurement of an item of general interest.
- Section 162(2) deals with active corruption whereby a person is given a bribe to use, or having used, his influence to affect the exercise of powers by a person specified under sections 161 or 161a etc.

However, for the purposes of this analysis, the focus shall be on sections 161 and 160 respectively.

Article 2.1 (a) active corruption

Section 161, Criminal Code criminalises passive corruption:

- "provides...or makes the promise thereof"(sections 161 (1) and (2) refer) lacks the element of "offers", partially meets: "promising, offering or giving" FD

¹⁰ It has been confirmed that the phrase "general interest" does not relate to public procurement

- "directly or through an intermediary" (sections 161 (1) and (2)), meets: "directly or through an intermediary" FD
- "to another person" and "abuses his employment, occupation, standing or position"(sections 161 (1) and (2)) meets: "a person who in any capacity directs or works" FD
- "employment, occupation, standing or position" (section 161(1), 161 (2),) meets: "private-sector entity" FD
- "bribe or other undue advantage" (sections 161 (1) and (2)) meets: "an undue advantage of any kind" FD
- "to another person...or...to a third party" (section 161(1) and (2)) meets: "for that person or for a third party" FD
- "abuses his employment, occupation, standing or position to provide an advantage to a certain person or to give this person unwarranted preferential treatment over others" (section 161 (1), "in return for action or non-action constituting a breach of this other person's duties stemming from his employment, occupation, standing or position" (section 161 (2)) meets: "perform or refrain from performing any act, in breach of that person's duties" FD

SK partially meets the requirements of Article 2.1. (a), FD.

Article 2.1 (b) passive corruption

Section 160, Criminal Code, criminalises passive corruption:

- "directly or through an intermediary" (sections 160(2), 160a (1)) meets: "directly or through an intermediary" FD
- "seeks or has ...promised" (sections 160(2)) lacks the element of "receiving" partially meets: "requesting or receiving...or accepting the promise of" FD
- "a bribe or other undue advantage" (sections 160(1), 160 (2)) meets: "an undue advantage of any kind" FD
- "for himself or for a third party" (sections 160 (1), 160 (2)) meets: "for oneself or for a third party" FD
- "his employment, occupation, standing or position" (section 160 (1) and 160 (2)) meets: "while in any capacity directing or working" FD
- "employment, occupation, standing or position" (sections 160 (1), 160 (2),) meets: "private-sector entity" FD
- "abuses his employment, occupation, standing or position" (section 160 (1)), "action or non-action constituting a breach of his duties stemming from his employment, occupation, standing or position" (section 160 (2)) meets: "perform or refrain from performing any act, in breach of that person's duties" FD

SK partially meets the requirements of Article 2.1. (b), FD.

Art. 2.2

SK did not furnish a definition of "legal person" under Article 1, FD. However, sections 160 – 162, Criminal Code do not distinguish between profit and non-profit entities.

There is insufficient information to assess whether SK meets the requirements of Article 2.2, FD.

Article 2.3

SK does not make a declaration.

Slovenia:

States that it has transposed this Article by means of Articles 126, 247 and 248, Criminal Code.

Article 2.1 (a) active corruption

Article 248, Criminal Code criminalises active corruption. It divides active corruption, in the context of a commercial activity, into two subsets:

- where the bribe's purpose is to obtain any undue advantage in a transaction or service (Article 248 (1), Criminal Code)

- where the bribe's purpose is to conclude a transaction or to have a service performed (Article 248 (2), Criminal Code):

 - contains all 3 elements, meets: "promising, offering or giving" FD

 - although promising, offering or giving to a person is covered, there does not appear to be any coverage of the element "through an intermediary" partially meets: "directly or through an intermediary" FD

 - "a person performing a commercial activity" is sufficiently broad to meet: "a person who in any capacity directs or works" FD

 - "commercial activity" is sufficiently wide to include the private sector, although it would not appear to exclude commercial activities carried out by the public sector also; meets: "private-sector entity" FD

 - "an unlawful reward, gift or other benefit" present in both Articles 248(1) and 248(2) meets: "an undue advantage of any kind" FD

 - "for this person or for a third party" meets: "for that person or for a third party" FD

 - "obtaining...any undue advantage in the transaction or service..." (Article 248 (2), Criminal Code) and "in exchange for the conclusion of a transaction or the performance of a service" (Article 248 (2), Criminal Code) are the phrases used in Slovenia's legislation. While Article 248(2) clearly requires the performing of an act, Article 248(1) is more ambiguous and could imply that the undue advantage was obtained by either an act or an omission; partly meets: "perform or refrain from performing any act, in breach of that person's duties" FD

Note: SI had stated in its cover note that "breach of duty" was an element of Article 248, Criminal Code. However, in Article 248(1), only the word "undue" in the phrase "obtaining an undue advantage" in subsection 1, appears to address this element. Article 248(2), Criminal Code does not contain this element at all. While Slovenia refers to this phrase in its commentary, in the Commission's view it is not a strong enough phrase to convey on its own the concept of breach of duty in the context of active corruption.

SI partially meets the requirements of Article 2.1 (a).

Article 2.1 (b) passive corruption

Article 247, Criminal Code criminalises passive corruption. It divides passive corruption, in the context of a commercial activity, into 3 subsets:

- where the bribee neglects the interests of or causes damage to his organisation or other natural persons when concluding a transaction or performing a service (Article 247 (1), Criminal Code)

- where the bribee concludes a transaction or performs a service (Article 247 (2), Criminal Code)

- where the reward etc is requested etc after the transaction is concluded or the service performed (Article 247(3), Criminal Code):

- there is no indication in the legislation that the request etc can be made indirectly, partly meets: "directly or through an intermediary" FD

- "requests or accepts...or promise or offer of" (Article 247(1); "requests or agrees to accept...a promise" (Article 247(2) which is narrower than subsection (1) because it omits an offer; "requests or agrees to accept" (Article 247(3) which is narrower than subsections (1) and (2) because it omits both promise and offer; partly meets: "requesting or receiving...or accepting the promise of" FD

- "an unlawful reward, gift or other benefit" (Article 247 (1), (2) (3)) meets: "an undue advantage of any kind" FD

- "for himself or for a third person" (Article 247 (1)); "for himself or for any third person" (Article 247(2) and (3)) meets: "for oneself or for a third party" FD

- "whoever in the performance of a commercial activity" (Article 247(1); "the perpetrator of the offence under [Article 247(1)]" (Article 247(2) and (3)) meets: "while in any capacity directing or working for a private sector entity" FD

- "in the performance of a commercial activity" (Article 247(1); "the perpetrator of the offence under [Article 247(1)]" (Article 247(2) and (3)) meets: "a private sector entity" FD

- because of the length of the descriptions in SL's legislation, this discussion is divided into two parts:

- (1) "when concluding an action or performing a service" (Article 247 (1)); "for concluding an action or performing a service" (Article 247 (2)); "after concluding an action or performing a service" (Article 247 (3)) all meet the positive element of doing but do not address the

element of refraining from an action, therefore only partly meets: "in order to perform or refrain from performing any act" FD

(2) "neglecting the interests of his organisation or other natural persons or causing damage to the same (Article 247(1)) meets: "in breach of that person's duties" FD

SI partly meets the requirements of Article 2.1 (b) FD.

Article 2.2

Both Article 247 (passive corruption) and 248 (active corruption), Criminal Code provide for their respective offences in the context that they take place in the performance of "a commercial activity". Accordingly, Article 126(5), Criminal Code becomes relevant because it defines the term "commercial activity". Commercial activity means:

"1) the production and trade of goods, the performance of market services, banking and other operations

2) the performance of an activity, profession or functions for which payment is prescribed or agreed"

3) management services and participation in the management, representation and supervision of the activities stated above". While this provision does not address the question of whether the relevant entity is a profit or non-profit organisation, the latter is not excluded.

SI meets the requirements of Article 2.2, FD.

Article 2.3

- SI does not make a declaration.

Sweden:

States that this Article is transposed by means of Chapter 17 – Section 7 and Chapter 20 – Section 2 of the Criminal Code, and that in its view, as the "Swedish provisions on what constitutes a crime are not limited to acts which are in breach of the person's duties the Swedish legislation goes further than the FD.

Article 2.1 (a) active corruption

Chapter 17 – Section 7, Criminal Code criminalises active corruption.

- "gives, promises or offers" meets: "promising, offering or giving" FD

- does not address element of "through an intermediary" partially meets: "directly or through an intermediary" FD

- "to an employee or other person defined in Chapter 20, section 2". In turn, this section provides that the provisions relating to an employee also apply, apart from public sector posts, to a person who exercises an assignment regulated by statute (section 2 (2)) and a person who otherwise by reason of a position of trust has been given the task of managing another's legal or financial affairs, conducting a scientific investigation, independently handling an

assignment requiring qualified technical knowledge or exercising supervision over the management of such affairs or assignment (section 2 (5)) partly meets – it's not clear if it would fully meet the "direct" element eg the owner of a business, a member of the board of directors etc.: "a person who in any capacity directs or works" FD

- there is no explicit reference to this, but given the use of the term "employee" at Chapter 17 section 7 and the structuring of the definitions of "other person" at Chapter 20, section 2, this appears to be implicit in the legislation, meets: "private-sector entity" FD

- "a bribe or other improper reward" meets: "an undue advantage of any kind" FD

- "for that person or for anyone else" meets: "for that person or for a third party" FD

- "for the exercise of official duties" does not explicitly make clear that the element of refraining from an act is also covered, nor is it clear in what way the term "official duties" as used in this section differs from the term "duties" as used at Chapter 20 – section 2, in the absence of clarity it opens the question of whether in fact this offence is confined to active corruption in the public sector and is thereby outside the scope of FD. However, Chapter 17 section 17 (text not supplied by Sweden) discusses the prosecution of cases which relate to the private sector and thereby implies that section 7 does apply also to the private sector;

may partly meet: "perform or refrain from performing any act, in breach of that person's duties" FD

Note: Chapter 17 – section 17 (text not supplied by SE) provides that a prosecution may only be taken in respect of active corruption in the private sector "if the crime is reported for prosecution by the employer or principal of the person exposed to bribery or if prosecution is called for in the public interest." There is no provision for such a limitation in the FD.

Note: SE informed the Commission that it considers its legislation goes further than the FD, because the "Swedish provisions on what constitutes a crime are not limited to acts which are in breach of the person's duties" Yet, the text of Chapter 17 – Section 7 refers to active corruption "...for the exercise of official duties" and the text of Chapter 20 – section 2 refers to passive corruption "...for the performance of his duties", and does not appear to provide for other circumstances, so that the basis for SE's statement is unclear.

SE partly meets the requirements of Article 2.1 (a), FD.

Article 2.1 (b) passive corruption

Chapter 20 – Section 2, Criminal Code criminalises passive corruption

- does not address element of "through an intermediary" partially meets: "directly or through an intermediary" FD

- "receives, accepts a promise of or demands" meets: "requesting or receiving...or accepting the promise of" FD

- "a bribe or other improper reward" meets: "an undue advantage of any kind" FD

- "for himself or herself or for anyone else" meets: "for oneself or for a third party" FD

- "an employee". In addition, the section provides that the provisions relating to an employee also apply, apart from public sector posts, to a person who exercises an assignment regulated by statute (section 2 (2)) and a person who otherwise by reason of a position of trust has been given the task of managing another's legal or financial affairs, conducting a scientific investigation, independently handling an assignment requiring qualified technical knowledge or exercising supervision over the management of such affairs or assignment (section 2 (5)) partly meets – it's not clear if it would fully meet the "direct" element e.g. the owner of a business, a member of the board of directors etc.: "while in any capacity directing or working" FD

- there is no explicit reference to this, but given the use of the term "employee" and the structuring of the definitions of "other person", this appears to be implicit in the legislation, meets: "private-sector entity" FD

- "for the exercise of official duties" does not explicitly make clear that the element of refraining from an act is also covered, partly meets: "perform or refrain from performing any act, in breach of that person's duties" FD

Note: In addition, Chapter 20 – Section 2, Criminal Code provides that an employee etc shall be liable if the offence was committed before obtaining the post or after leaving it. (This is broader than the FD).

Note: SE informed the Commission that it considers its legislation goes further than the FD, because the "Swedish provisions on what constitutes a crime are not limited to acts which are in breach of the person's duties" Yet, the text of Chapter 17 – Section 7 refers to active corruption "...for the exercise of official duties" and the text of Chapter 20 – section 2 refers to passive corruption "...for the performance of his duties", and does not appear to provide for other circumstances, so that the basis for SE's statement is unclear.

SE partly meets the requirements of Article 2.1 (b), FD.

Art. 2.2

In the context of Article 1, FD SE did not provide any information on how its law defines "legal person". The offence of active corruption (Chapter 17 – section 7) refers to "official duties", although as discussed at Article 2 1 (a) this may extend to the private sector in view of Chapter 17 – section 17) while the offence of passive corruption refers to "duties" (Chapter 20 – section 2). Further, both sections use the term "employee", and their provisions also extend to such persons as, apart from public sector posts, to a person who exercises an assignment regulated by statute (Chapter 20 - section 2 (2)) and a person who otherwise by reason of a position of trust has been given the task of managing another's legal or financial affairs, conducting a scientific investigation, independently handling an assignment requiring qualified technical knowledge or exercising supervision over the management of such affairs or assignment (Chapter 20 - section 2 (5)) without any reference to a limitation as to whether the employer is a profit or non-profit entity.

There is insufficient information to assess whether or not SE meets the requirements of Article 2.2, FD.

Article 2.3

- SE does not make a declaration.

United Kingdom:

States that it has transposed this Article by means of Section 1, Prevention of Corruption Act, 1906.

Article 2 1 (a) active corruption

The 2nd paragraph of section 1 (1), Prevention of Corruption Act, 1906 criminalises active corruption:

- "corruptly gives or agrees to give or offers" meets: "promising, offering or giving" FD

- although there is no direct reference to an intermediary, the UK points out that it could be expected that an intermediary, who was not an innocent intermediary, would be jointly charged with the principal party and that in other instances an intermediary could be charged as an aider and abettor; this explanation thus clarifies that both the intermediary and also the person who uses an intermediary, would be liable to prosecution meets: "directly or through an intermediary" FD

- the term "agent" is defined as including "any person employed by or acting for another" (section 1 (2), Prevention of Corruption Act, 1906 meets: "a person who in any capacity directs or works" FD

- given that the term "agent" is defined as including "any person employed by or acting for another" (section 1 (2), Prevention of Corruption Act, 1906 refers) meets: "private-sector entity" FD

- "any gift or consideration...as an inducement or reward" meets: "an undue advantage of any kind" FD

- "to any person" meets: "for that person or for a third party" FD

- "for doing or forbearing to do...any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business", with the term "principal" being defined as "includes an employer" (section 1 (2), Prevention of Corruption Act, 1906 refers) meets: "perform or refrain from performing any act, in breach of that person's duties" FD

UK fully meets the requirements of Article 2.1 (a), FD.

Article 2.1 (b) passive corruption

The 1st paragraph of section 1 (1), Prevention of Corruption Act, 1906 criminalises passive corruption:

- although there is no direct reference to an intermediary, the UK points out that it could be expected that an intermediary, who was not an innocent intermediary, would be jointly charged with the principal party and that in other instances an intermediary could be charged as an aider and abettor; this explanation thus clarifies that both the intermediary and also the

person who uses an intermediary, would be liable to prosecution meets: "directly or through an intermediary" FD

- "corruptly accepts or obtains, or agrees to accept or obtain or attempts to obtain" meets: "requesting or receiving...or accepting the promise of" FD

- "any gift or consideration...as an inducement or reward" meets: "an undue advantage of any kind" FD

- "for himself or for any other person" meets: "for oneself or for a third party" FD

- the term "agent" is defined as including "any person employed by or acting for another" (section 1 (2), Prevention of Corruption Act, 1906 meets: "while in any capacity directing or working" FD

- given that the term "agent" is defined as including "any person employed by or acting for another" (section 1 (2), Prevention of Corruption Act, 1906 refers) meets: "private-sector entity" FD

- "for doing or forbearing to do...any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business", with the term "principal" being defined as "includes an employer" (section 1 (2), Prevention of Corruption Act, 1906 refers) meets: "perform or refrain from performing any act, in breach of that person's duties" FD

UK fully meets the requirements of Article 2.1 (b), FD

Article 2.2

The UK informed the Commission that, in view of the definitions of the terms "agent" and "principal" section 1, Prevention of Corruption Act, 1906 applies to both profit and non-profit entities.

UK meets the requirements of Article 2.2, FD.

Article 2.3

- UK does not make a declaration.

Article 3 – Instigation, aiding and abetting

General comments:

This Article focuses on secondary participation in corruption through instigation, aiding and abetting. It does not address attempted offences. Previously, the Joint Action addressed secondary participation within its Articles on penalties and liability of legal persons.

Summary table of the transposing legislation adopted by Member States

MS	Legislation	Measures which appeared relevant to Commission's analysis (where different to

		MS' citations)
AT	- sections 12 ,15, Code of Criminal Procedure	- section 12, Code of Criminal Procedure
BE	- Articles 66-69, Criminal Code	- Articles 66, 67 Criminal Code
DE	- sections 26, 27, Criminal Code	
DK	- sections 23 and 299(2), Criminal Code	
EE	- sections 22, 24 and 60, Criminal Code	
FI	- sections 5, 6, Chapter 5, Criminal Code Act No 515 2003	
FR	- Articles 121-6, 121-7, Criminal Code	
HU	- sections 19 and 21, Act IV, Criminal Code	
IE	- sections 1(1) to 1(3), Prevention of Corruption Act 1906, as inserted by section 2, Prevention of Corruption (Amendment) Act, 2001, in conjunction with section 7(1), Criminal Law Act 1997 and section 22, Petty Sessions Act, 1851	
IT	- sections 110, 115 and 378, Criminal Code	- sections 110, 115 Criminal Code
LT	-Articles 22, 24, 25 and 26, Criminal Code	- Articles 24 and 26, Criminal Code
LU	- Articles 66, 67 Criminal Code	
LV	- Chapter 1 and Chapter II of the General Part "Criminal Offences"	- sections 15, 17-20 Chapter II of the General Part "Criminal Offences"
NL	- sections 47, 48, 48a, Criminal Code	
PL	- Article 18, Criminal Code	
PT	- Article 1, Decree-Law No. 28/84 as amended by Law No.108/2001 - Articles 26, 27, Criminal Code	
SE	- Chapter 23, Chapter 4, Criminal Code	
SK	- sections 8, 9, 10 and 164, Criminal Code	- sections 10 and 164, Criminal Code
SI	- Articles 25-29, Criminal Code	- Articles 26-28, Criminal Code
UK	[A] In respect of England, Wales and Northern Ireland:	

	<p>- section 8, Accessories and Abettors Act, 1861 (text not supplied)</p> <p>[B] In respect of Scotland:</p> <p>- Criminal Procedure (Scotland) Act, 1995 (neither commentary nor text supplied)</p>	
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Summary account of the transposition

The overall level of transposition was very high – of the 20 MS analysed here, 18 meet the requirements of Article 3. A number of MS omitted to supply the text of their legislation in respect of this Article, but usually at least supplied some form of commentary. In the case of France and UK (Scotland), there was insufficient information on which to base an assessment.

Summary table of the transposition

MS	Comments
AT	AT meets the requirements
BE	BE meets the requirements
DE	DE meets the requirements
DK	DK meets the requirements
EE	EE meets the requirements
FI	FI meets the requirements
FR	There is insufficient information to assess whether FR meets the requirements
HU	HU meets the requirements
IE	IE meets the requirements
IT	IT meets the requirements
LT	LT meets the requirements
LU	LU meets the requirements
LV	LV meets the requirements
NL	NL meets the requirements
PL	PL meets the requirements
PT	PT meets the requirements

SE	SE meets the requirements
SK	SK meets the requirements
SI	SI meets the requirements
UK	(1) England, Wales and Northern Ireland: appears to meet the requirements (2) Scotland: there is insufficient information to assess whether it meets the requirements

Analysis of Member States

Austria:

* Sections 12 and 15, Code of Criminal Procedure

Section 12 provides that anyone who instigates or otherwise contributes to an offence is also punishable, while section 15 deals with attempts to commit an offence and all forms of participation in the attempt, therefore only section 12 is relevant to this analysis. In section 12, the broadness of the description "or otherwise contributes to an offence" is sufficiently wide to cover aiding and abetting.

AT meets the requirements of Article 3.

Belgium:

States that it has transposed this Article by means of Articles 66 – 69, Criminal Code. However, Articles 68 and 69 are not relevant to this analysis as the former deals with violent crime and the latter with penalties.

Article 66, Criminal Code provides that persons, including the following, would be liable for the same penalty as if they had been the perpetrator of the offence:

- "Ceux qui, par un fait quelconque, auront prêté pour l'exécution une aide telle que, sans leur assistance, le crime ou le délit n'eût pu être commis"
- "Ceux qui, par dons, promesses, menaces, abus d'autorité ou de pouvoir, machinations ou artifices coupables, aurait directement provoqué à ce crime ou à ce délit"

Article 67, Criminal Code provides that persons, including the following, would be liable as accomplices to the offence:

- "Ceux qui auront donné des instructions pour le commettre"
- "Ceux qui auront procuré...ou tout autre moyen qui a servi au crime ou au délit..."
- "Ceux qui...auront...aidé ou assisté l'auteur...du crime ou du délit..."

BE fully meets the requirements of Article 3, FD.

Denmark:

States that it has transposed this Article by means of Section 299(2) and Section 23, Criminal Code.

Section 23, Criminal Code, relates to anyone instigating, advising or acting in such a manner as to aid the committing of an offence. Instigation may involve someone inviting, encouraging or enticing someone by word or deed to commit a criminal act. Advice includes instruction or suggestion, whereas deeds involve participation in committing the offence.

For a person to be guilty of aiding and abetting under section 23 they must have intended the offence to be committed (where the offence requires premeditation). Furthermore, aiding and abetting is punishable only where it is directed towards the committing of a specific offence. Section 23 of the Criminal Code does not provide a legal basis in itself; it extends the scope of the offence within the individual criminal law provisions.

DK informed the Commission that Danish law makes no distinction between ringleaders and co-offenders, and therefore the criminal liability of anyone aiding and abetting an offence does not depend on whether the person who committed the actual act can actually be prosecuted.

DK appears to meet the requirements of Article 3, FD.

Estonia:

States that it has transposed this Article by means of sections 22, 24 and 60, Criminal Code.

Section 22 deals with aiding and abetting, with the definition of an abettor being sufficiently broad to also cover the element of instigation. As sections 24 and 60 deal with penalties, it appears more relevant to discuss them in the context of Article 4 below.

EE meets the requirements of Article 3, FD.

Finland:

States that it has transposed Article 3 by means of sections 5 and 6, Chapter 5 Criminal Code, No.515 Act on the amendment of the Criminal Code (2003).

Section 5 provides that a person who intentionally persuades another person to commit an intentional offence or to make a punishable attempt at such an act is punishable as an offender; and section 6 provides that a person who, before or during the commission of an offence, intentionally furthers the commission by another of an intentional act or of its punishable attempt, through advice, action or otherwise, is punishable on the same basis as the offender.

FI meets the requirements of Article 3, FD.

France:

Informs the Commission that the relevant legislation is Articles 121-6 and 121-7, Criminal Code, but does not supply the texts.

There is insufficient information to determine whether FR meets the requirements of Article 3, FD.

Germany:

States that it has transposed this Article by means of sections 26 and 27, Criminal Code (not supplied by Germany; but obtained at www.iuscomp.org/gla/statutes/StGB.html#26 and ditto #27).

Section 26 provides that whoever intentionally induces another to intentionally commit an unlawful act, shall, as an inciter, be punished the same as a perpetrator. Section 27(1) provides that whoever intentionally renders aid to another in that person's intentional commission of an unlawful act shall be punished as an accessory.

DE appears to meet the requirements of Article 3, FD.

Hungary:

States that it has transposed this Article by means of sections 19 and 21, Act IV, Criminal Code.

Section 19 defines the terms perpetrators and coperpetrators, to include abettor and accessories. Section 21(1) defines an abettor as a person who intentionally persuades another to perpetrate a crime, section 21(2) defines an accessory as a person who intentionally grants assistance for the perpetration of a crime.

In view of these definitions, HU's national measures meet the requirements of Article 3, FD.

Ireland:

IE informs the Commission that the relevant legislation is sections 1(1) to 1 (3), Prevention of Corruption Act 1906, as inserted by section 2 of the Prevention of Corruption (Amendment) Act 2001. Taken in conjunction with section 7(1), Criminal Law Act 1997, which provides that any person who aids, abets, counsels or procures the commission of an indictable offence is liable to be indicted, tried and punished in the same way as the principal offender", and with section 22, Petty Sessions (Ireland) Act, 1851 which makes a similar provision for petty offences, this addresses Article 3, FD.

IE meets the requirements of Article 3, FD.

Italy:

States that the relevant legislation is sections 110, 115 and 378, Criminal Code.

Section 110 provides that where several persons are jointly involved in the commission of an offence, each of them shall be liable to the penalty, unless as otherwise provided. This appears to relate to aiding and abetting, a concept which can include being present at the scene of the crime. Section 115 (1), Criminal Code, provides that agreeing to commit an offence, which is then not carried out, is not punishable; similarly for instigation of an offence which is not carried out (subsection (2)) but an instigation which is not communicated, but was an instigation to commit an offence, leaves the instigator liable to security measures. However,

section 378, Criminal Code, deals with assisting the offender after the offence has been committed, and is not relevant to this Article.

This Article of the FD requires MS to "take the necessary measures to ensure that instigating, aiding and abetting the conduct referred to in Article 2 constitute criminal offences. "While it does not provide for limitations to the offences of instigation, aiding and abetting, does not explicitly preclude a MS from providing such limitations.

IT meets the requirements of Article 3, FD.

Latvia:

States that it has transposed this Article by means of its legislation in Chapter I of the General Part "General Provisions" and under Chapter II of the General Part "Criminal Offences".

Chapter I is very general in nature and does not appear directly relevant to Article 3, FD.

Section 15 (Chapter II: General Part "Criminal Offences") deals with completed and uncompleted criminal offences. Subsection (2) provides that preparation for a crime and an attempted crime are uncompleted criminal offences; subsection (3) addresses the meaning of "preparation for a crime" and subsection (4) that of "attempt", while subsection (5) provides that liability for these shall apply on the same basis as that of the provision relating to the specific offence.

Sections 17-20 (Chapter II: General Part "Criminal Offences") deal with the perpetration and joint perpetration of an offence. In particular, Section 20 addresses joint participation (subsection (1)), organising or directing the commission of an offence (subsection (2)), inducing another person to commit an offence (subsection (3)) and advising or providing practical or other forms of assistance (subsection (4)).

LV appears to meet the requirements of Article 3 that instigation, aiding and abetting the offences described at Article 2 be a criminal offence.

Lithuania:

States that it has transposed this Article by means of its legislation in Articles 22, 24, 25 and 26 of the General Provisions of the Criminal Code.

Article 22, Criminal Code deals with attempt, Article 24 with complicity, including instigation (subsection 5) and with assisting (subsection 6) and Article 26 provides for the liability and penalties applicable to the various types of accomplices defined at Article 24. Article 25 expands on the notion of complicity, focusing on organised groups.

LT meets the requirements of Article 3, FD.

Luxembourg:

States that the relevant legislation is Articles 66 and 67, Criminal Code.

Article 66, Criminal Code provides that persons, including the following, would be liable for the same penalty as if they had been the perpetrator of the offence:

- "Ceux qui, par un fait quelconque, auront prêté pour l'exécution une aide telle que, sans leur assistance, le crime ou le délit n'eût pu être commis"

- "Ceux qui, par dons, promesses, menaces, abus d'autorité ou de pouvoir, machinations ou artifices coupables, aurait directement provoqué à ce crime ou à ce délit"

Article 67, Criminal Code provides that persons, including the following, would be liable as accomplices to the offence:

- "Ceux qui auront donné des instructions pour le commettre"

- "Ceux qui auront procuré...ou tout autre moyen qui a servi au crime ou au délit..."

- "Ceux qui...auront...aidé ou assisté l'auteur...du crime ou du délit..."

LU meets the requirements of Article 3, FD.

The Netherlands:

States that the relevant legislation is sections 47, 48 and 48a, Criminal Code which are general provisions under its criminal law that make participation a criminal offence.

Section 47, Criminal Code provides that those who aid or abet a criminal offence on purpose or who encourage the commission of the offence, shall be punished as perpetrators, and section 48, Criminal Code provides that those who assist with the commission of the offence, provide the necessary opportunity, means or information for the commission of the offence, shall be punished as accomplices. Section 48a, Criminal Code provides for attempts to induce another person to commit a criminal offence.

NL meets the requirements of Article 3, FD.

Poland:

States that it has transposed this Article by means of Article 18, Criminal Code.

The offence of instigating a crime is provided for by Article 18 (1), Criminal Code, instigation by subsection (2) and aiding and abetting the commission of an offence by subsection (3).

PL meets the requirements of Article 3, FD.

Portugal:

States that it has transposed this Article by means of Article 1, Decree-Law No. 28/84 of 20 January 1984 as amended by Law No. 108/2001 of 28 November 2001 and by Articles 26 and 27, Criminal Code.

Article 1, Decree-Law No. 28/84 of 20 January 1984 as amended by Law No. 108/2001 of 28 November 2001 provides that the Criminal Code, the Code of Criminal Procedure and complementary legislation shall apply, wherever no specific provision is laid down in this Decree-Law, to the crimes governed by the Decree-Law.

The offence of instigation is provided for by Article 26, Criminal Code which covers "anyone who maliciously induces someone else to carry out the act..." Aiding and abetting is provided for by Article 27, Criminal Code which deals with maliciously affording practical assistance or moral support to the perpetrator by another of a malicious act.

Note: there may be a translation problem with the use of the word "maliciously". Normally, that would imply that the person was instigating, aiding or abetting an act in a malicious manner i.e. to do harm to the perpetrator. But here, because the term "malicious act" is used, it may be that the original Portuguese is closer to "wrongful".

PT meets the requirements of Article 3, FD.

Slovak Republic:

States that it has transposed this Article by means of Sections 8, 9, 10 and 164, Criminal Code. However, section 8, Criminal Code deals with the offence of attempt, section 9 deals with joint conduct and participation, and therefore these sections are not relevant to this Article of the FD.

Section 10 (1), Criminal Code provides, in relation to an offence or attempted offence, for the offences of:

- engineering or managing the perpetration of the offence (subsection (a))
- abetting another (subsection (b))
- aiding another person in the perpetration of an offence, especially by purchasing equipment, removing obstacles, providing advice, strengthening the resolve of the perpetrator, promising to contribute after the criminal offence (subsection (c)).

Section 164, Criminal Code addresses the instigation of a criminal offence or breach of public order or collective non-fulfilment of an important obligation imposed under the law.

SK meets the requirements of Article 3, FD.

Slovenia:

States that it has transposed the Article by means of Articles 25-29, Criminal Code and confirms that it addresses the prosecution of a person for instigation, aiding or abetting a person in connection with the offences of passive or active corruption under Articles 247 and 248, Criminal Code respectively.

Article 25, Criminal Code deals with joint perpetration, Article 26 with instigation and Article 27 with aiding and abetting. Article 28 deals with instigation, aiding and abetting an attempted crime, while Article 29 deals with limitations of criminal liability. Accordingly, for the purposes of Article 3, FD only Articles 26-28, Criminal Code are relevant.

SI meets the requirements of Article 3, FD.

Sweden:

States that it has transposed this Article by means of Chapter 23, Section 4, Criminal Code.

Chapter 23 – Section 4, Criminal Code provides for the offences of furthering a criminal act (whether under the Criminal Code or another law or statutory instrument) "by advice or deed", of instigation and of aiding.

SE meets the requirements of Article 3, FD.

United Kingdom:

The UK informs the Commission that, in respect of England, Wales and Northern Ireland, it has transposed this Article by means of the Accessories and Abettors Act, 1861 and in respect of Scotland, by means of the Criminal Procedure (Scotland) Act, 1995, the texts of which are not supplied.

The UK states that section 8, Accessories and Abettors Act, 1861 (text not supplied) provides that any person who aids, abets, counsels, or procures an indictable offence, (which includes the offences created by the 1906 Act), may be prosecuted and punished as a principal (here the term "principal" means the actual perpetrator of the crime) and that the terms "counsel" and "procure" cover the concept of "instigation"). Furthermore, an accessory will, in most instances, be able to be charged with the full offence as a secondary party (which requires proof that an offence has been committed), and incitement to commit a crime is also a separate offence in common law, quite apart from the statutory provision.

Neither a commentary nor the text of the Criminal Procedure (Scotland) Act, 1995 are supplied.

The UK appears to meet the requirements of Article 3, FD at least in respect of England, Wales and Northern Ireland, but there is insufficient information regarding the situation in Scotland.

Article 4 – Penalties and other sanctions

General Comments:

This Article of the Framework Decision is more extensive than the equivalent Article of the Joint Action. In addition to repeating the earlier requirements that offences should be punishable by criminal penalties which are "effective, proportionate and dissuasive", it requires MS to have in place a "minimum-maximum" range of at least one and three years imprisonment as a penalty for the offences of active and passive corruption, and omits any reference to the provision of other kinds of penalties for minor cases of active or passive corruption. Article 4 (3) is innovative in that it sets out a requirement that MS, in accordance with their constitutional rules and principles, provide in certain circumstances for the temporary prohibition of natural persons from carrying on that particular or comparable business activity in a similar position or capacity.

It is noted that a number of MS, in the information they provided for Article 4.1 overlooked the penalties provided under Article 3. Where possible, these have been inserted on the basis of information supplied for Article 3 itself.

Summary table of the transposing legislation adopted by Member States

MS	Legislation	Measures which appeared relevant to
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		Commission's analysis (where different to MS' citations)
AT	- Section 10, Federal Act against Unfair Competition, 1984 - Section 12, Code of Criminal Procedure	
BE	- Article 504bis §1 and §2, Criminal Code.	- Articles 69, 504bis §1 and §2, Criminal Code.
DE	Sections 26, 27(2), 299 (2), Criminal Code	
DK	Sections 23, 299 Criminal Code	
EE	Sections 22, 24, 44, 293, 294, 297, 298 Criminal Code	
FI	- has transposed Article 4 (1) and 4 (2) by means of sections 7 and 8, chapter 30, Criminal Code and - Article 4 (3) by means of sections 2, 3 and 4 of the Ban on Business Operations Act (1059/1985).	- sections 7 and 8, chapter 30, Criminal Code, sections 2, 3 and 4 of the Ban on Business Operations Act (1059/1985). - Also relevant, although not listed by FI, are sections 5 and 6, Chapter 5, Criminal Code and Chapter 6, Criminal Code (No 515 Act on the amendment of the criminal code, 2003).
FR	- Article 445-1 – 445 – 3, Criminal Code.	- Article 445-1 – 445 – 3, Criminal Code. - Although FR does not mention penalties concerning instigation, aiding and abetting, the relevant legislation would appear to be Articles 121-6 and 121-7, Criminal Code (text not supplied)
HU	Sections 56, 57, 251-254, Criminal Code	
IE	- section 1(4), Prevention of Corruption Act 1906, as inserted by section 2, Prevention of Corruption (Amendment) Act 2001	
IT	- section 2635, Civil Code and sections 32bis, 35bis and 378, Criminal Code.	- section 2635, Civil Code and sections 32bis, 35bis and 378, Criminal Code. - It omits to mention sections 110 and 115, Criminal Code, on which it provided information in relation to

		Article 3.
LT	Sections 24, 225, 226, 227 Criminal Code	Sections 26, 225, 226, 227 Criminal Code
LU	- Articles 310 and 310-1, Criminal Code, in association with Articles 1, 14 and 15, Criminal Code, and of Article 69, Criminal Code.	
LV	- Chapter XIX of the Special Part "Criminal Offences of an Economic Nature".	
NL	- sections 47, 48, 48a, 328b (1) and (2), and 339(1), Criminal Code	
PL	- Articles 19, 41 and 296a, Criminal Code	
PT	- Articles 41b and 41c, Decree-Law No. 28/84 - Articles 26, 27 Criminal Code	
SE	- Chapter 17 – section 7 and Chapter 20 – section 2 of the Criminal Code, and the Trading Prohibition Act (1986:436).	- Chapter 17 – section 7 and Chapter 20 – section 2 of the Criminal Code, and the Trading Prohibition Act (1986:436). - Chapter 23 - Section 4 Criminal Code is also relevant
SK	- Sections 160 – 162, Criminal Code, but also relevant is section 10, Criminal Code.	- Sections 160 – 162, Criminal Code, - also relevant is section 10, Criminal Code.
SI	- Articles 247 and 248, Criminal Code.	
UK	- the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906.	

Summary account of the transposition

Eleven MS (DE, DK, EE, FI, IE, IT, LT, LU, NL, PL, SE) have fully transposed Article 4.

As regards Article 4(1):

- on the penalties for offences under Article 2, FD AT did not meet the requirements while SI only met them in relation to passive corruption.

- on the penalties under Article 3, FD insufficient information came from 5 MS (AT, FR, HU, LV and UK(Scotland))

Article 4 (2): There was a significantly high transposition rate here: 20 MS met the requirements. AT did not meet them as the maximum level of imprisonment available was less than 1 year, and there was insufficient information from BE.

Article 4 (3): LV did not meet the requirements, while AT and SK only partly met them and BE, PT and UK gave insufficient information.

Summary table of the transposition

MS	Article 4 (1) re Article 2	Article 4(1) re Article 3	Article 4 (2)	Article 4 (3)	Comments
AT	AT has not meet the requirements	There is insufficient information to assess whether AT meets the requirements	AT has not meet the requirements	AT partly meets the requirements	AT has not fully transposed Article 4
BE	There is insufficient information to assess whether BE meets the requirements	Meets requirements	There is insufficient information to assess whether BE meets the requirements	There is insufficient information to assess whether BE meets the requirements	There is insufficient information to assess whether BE has transposed Article 4
DE	Meets requirements	Meets requirements	Meets requirements	Meets requirements	DE has fully transposed Article 4
DK	Appears to meet the requirements	Appears to meet the requirements	Appears to meet the requirements	Appears to meet the requirements	DK has fully transposed Article 4 (tentative pending receipt of text)
EE	Meets requirements	Meets requirements	Meets requirements	Meets requirements	EE has fully transposed Article 4
FI	Meets requirements	Meets requirements	Meets requirements	Meets requirements	FI has fully transposed Article 4
FR	Meets	There is insufficient	Meets	Meets	FR has partly transposed

	requirements	information to assess whether FR meets the requirements	requirements	requirements	Article 4
HU	Meets requirements	There is insufficient information to assess whether HU meets the requirements	Meets requirements	Meets requirements	HU has partly transposed Article 4
IE	Meets requirements	Meets requirements	Meets requirements	Meets requirements	IE has fully transposed Article 4
IT	Meets requirements	Meets requirements	Meets requirements	Meets requirements	IT has fully transposed Article 4
LT	Meets requirements	Meets requirements	Meets requirements	Meets requirements	LT has fully transposed Article 4
LU	Meets requirements	Meets requirements	Meets requirements	Meets requirements	LU has fully transposed Article 4
LV	Meets requirements	There is insufficient information to assess whether LV meets the requirements	Meets requirements	LV has not met the requirements	LV has partly transposed Article 4
NL	Meets requirements	Meets requirements	Meets requirements	Meets requirements	NL has fully transposed Article 4
PL	Meets requirements	Meets requirements	Meets requirements	Meets requirements	PL has fully transposed Article 4
PT	Meets requirements	Meets requirements	Meets requirements	There is insufficient information to assess whether PT has met the requirements	PT has partly transposed Article 4
SE	Meets requirements	Meets requirements	Meets requirements	Meets requirements	SE has fully transposed Article 4

SK	Meets requirements	Meets requirements	Meets requirements	SK partly meets the requirements	SK has partly transposed Article 4
SI	Meets requirements only in relation to passive corruption	Meets requirements	Meets requirements	Meets requirements	SI has partly transposed Article 4
UK	Meets requirements	(1) England, Wales and Northern Ireland: appears to meet the requirements (2) Scotland: there is insufficient information to assess whether it meets the requirements	Meets requirements	There is insufficient information to assess whether UK has met the requirements	UK has partly transposed Article 4

Article 4(1) Analysis of Member States

Austria:

(Article 2)

The penalties are as follows:

- Imprisonment for up to 3 months or a fine of up to 180 daily units (section 10(1) Federal Act against Unfair Competition 1984) (active corruption).
- Imprisonment for up to 3 months or a fine of up to 180 daily units (section 10(2) Federal Act against Unfair Competition 1984) (passive corruption).
- Imprisonment for up to 1 year is provided by section 153a, Criminal Code (passive corruption of a non-negligible financial advantage)

The penalty of imprisonment under section 10, Federal Act against Unfair Competition 1984 is at a relatively low level, and since, in the absence of a definition of "exercising powers conferred...by administrative decision" it is not certain that 153a applies, it is considered that

AT does not meet the requirements of Article 4.1 FD with regard to Article 2.

(Article 3)

The penalties are not stated explicitly but given that an instigator or contributor is also deemed to have committed the intentional act, it could be assumed that the same level of

penalty is available (section 12, Code of Criminal Procedure). AT also refers to section 15 in this context, but this section only refers to attempts and is therefore outside the scope of the FD.

There is insufficient information to assess whether AT meets the requirements of Article 4.1, FD with regard to Article 3.

Belgium:

(Article 2)

In relation to Article 4.1, FD the Belgian authorities refer the Commission to Article 504bis, Criminal Code. However, the material provided does not include details of the penalties which may be imposed on those who commit active or passive corruption, and hence such information is not available in respect of Article 66, Criminal Code.

There is insufficient information to assess whether BE meets the requirements of Article 4.1, FD with regard to Article 2.

(Article 3)

With regard to instigation, aiding and abetting, Article 69, Criminal Code provides that they would be subject to a penalty which is less than that for a perpetrator of a serious crime and not exceeding two thirds of that for a less serious offence.

BE meets the requirements of Article 4.1, FD with regard to Article 3.

Denmark:

(Article 2)

The offences of active and passive corruption under section 299(2) Criminal Code are punishable by a fine or imprisonment for a period not exceeding 18 months.

In the absence of the text of the legislation, DK appears to meet the requirements of Article 4.1 FD with regard to Article 2.

(Article 3)

The offence of instigating, aiding and abetting under section 23 Criminal Code carries the same range of penalties as the main offence, therefore in this case by a fine or imprisonment for a period not exceeding 18 months.

In the absence of the text of the legislation, DK appears to meet the requirements of Article 4.1 FD with regard to Article 3.

Estonia:

(Article 2)

Under section 297, Criminal Code, (active corruption – gratuity) the penalty for a natural person is a fine or imprisonment for a period not exceeding 3 years; where the offence is

committed twice or more often, the penalty is imprisonment for a period of between 1 to 5 years (no fine provided).

Under section 298, Criminal Code, (active corruption – bribe) the penalty for a natural person is imprisonment (no fine provided) for a period of between 1 to 5 years; where the offence is committed twice or more often, the penalty is imprisonment (no fine provided) for a period of between 2 to 10 years.

Under section 293, Criminal Code (passive corruption – gratuity) the penalty for accepting a gratuity is a fine or imprisonment for a period not exceeding 3 years. Where the offence is committed twice or more often, or if the gratuity has been demanded, or involved a group, or is on a large-scale basis, the penalty is imprisonment (no fine provided) for a period not exceeding 5 years.

Under section 294, Criminal Code (passive corruption –bribe) the penalty for accepting a bribe is imprisonment for a period of between 1 to 5 years (no fine provided/no provision for a fine). Where the offence is committed twice or more often, or if the bribe has been demanded, or involved a group, or is on a large-scale basis, the penalty is imprisonment (no fine provided) for a period of between 2 to 10 years.

With regard to fines, EE's legislation provides for a daily rate basis (section 44, Criminal Code refers). For a criminal offence, a fine of between 30 to 500 daily rates can be imposed on a natural person over 18 years of age.

EE meets the requirements of Article 4.1 FD with regard to Article 2.

(Article 3)

With regard to instigation, aiding and abetting, section 22 (4), Criminal Code provides that, unless section 24 is applicable, a punishment shall be imposed on an accomplice pursuant to the same provision of law which prescribes the liability of the principal offender. Section 24 Criminal Code deals with "special personal characteristics" that is/in other words certain circumstances which are a necessary part of an offence. Section 24 (2), Criminal Code provides that if an accomplice lacks such characteristics then section 60, Criminal Code, which deals with mitigation of penalties, may apply.

Section 22 (5), Criminal Code provides that in the case of an aider, the court may apply the provisions of section 60, Criminal Code, which deals with mitigation of penalties.

EE meets the requirements of Article 4 (1), FD with regard to Article 3.

Finland:

(Article 2)

The penalty in respect of active corruption (section 7, chapter 30, Criminal Code) and passive corruption (section 8, chapter 30, Criminal Code) is a fine or imprisonment for a period not exceeding 2 years. With regard to Article 3 FD offences, sections 5 and 6, Chapter 5, Criminal Code provide that these offences are punishable as if the person were guilty of the main offence.

Chapter 6, Criminal Code deals with sentencing, including mitigating factors. Of particular relevance is section 1 which states, inter alia, that the general punishments are summary penal fine, fine, conditional imprisonment, community service and unconditional imprisonment.

FI meets the requirements of Article 4.1, FD with regard to Article 2.

(Article 3)

The offence of instigation carries the same penalty as the main offence (section 5, Chapter V, Act No. 515 of 2003). The same applies in respect of aiding and abetting (section 6, Chapter V Act No. 515 of 2003) except that this is open to mitigation by virtue of section 8, Chapter VI of the same Act.

FI meets the requirements of Article 4.1 FD with regard to Article 3.

France:

(Article 2)

The same penalties are provided for both active and passive corruption (Article 445-1 and 445-2), namely imprisonment for 5 years and a fine of 75,000 euros.

FR meets the requirements of Article 4.1 FD with regard to Article 2.

(Article 3)

With regard to penalties concerning instigation, aiding and abetting, FR did not supply the relevant text (Articles 121-6 and 121-7, Criminal Code).

There is insufficient information to assess whether FR meets the requirements of Article 4.1, FD with regard to Article 3.

Germany:

(Article 2)

With regard to active corruption, section 299(2), Criminal Code provides for a penalty of a fine or imprisonment for a period not exceeding 3 years. However, the maximum penalty increases to a period ranging from 3 months to 5 years where the act relates to a benefit of considerable size; or the perpetrator acted professionally or as a member of a gang formed for the continued commission of such acts (section 300 Criminal Code refers).

With regard to passive corruption, section 299(1), Criminal Code provides for a penalty of a fine or imprisonment for a period not exceeding 3 years. However, the maximum penalty increases to a period ranging from 3 months to 5 years where the act relates to a benefit of considerable size; or the perpetrator acted professionally or as a member of a gang formed for the continued commission of such acts (section 300 Criminal Code refers).

DE meets the requirements of Article 4.1 FD with regard to Article 2.

(Article 3)

With regard to offences under Article 3, both sections 26 and 27 (2), Criminal Code provide that the punishment would correspond to that for the perpetrator. The punishment for the accessory corresponds to the punishment threatened for the perpetrator. The latter includes a further provision that punishment shall be mitigated pursuant to Section 49 subsection (1), Criminal Code.

DE meets the requirements of Article 4.1 FD with regard to Article 3.

Hungary:

(Article 2)

The penalty for an offence of active corruption (section 254, Criminal Code) is:

- imprisonment for a period up to 2 years, where the bribee is an employee or member of a budgetary agency, economic organisation or non-governmental organisation, or to another person on the bribee's account
- imprisonment for a period up to 3 years, where the bribee is an employee or member who is authorised to act in the name and on behalf of a budgetary agency, economic organisation or non-governmental organisation, or to another person on the bribee's account.

There is no reference to a fine.

The penalty for an offence of passive corruption is:

- imprisonment for a period up to 2 years, where the person seeking the bribe is an employee or member of a budgetary agency, economic organisation or non-governmental organisation (section 251(1), Criminal Code); if guilty of a felony the period is 1 to 5 years or, if guilty of a pattern of criminal profiteering, criminal conspiracy or involves a matter of greater importance, between 2 and 8 years.

There is no reference to a fine.

HU meets the requirements of Article 4.1 FD with regard to Article 2.

(Article 3)

HU does not provide information on the penalties available in respect of offences of instigating, aiding and abetting.

There is insufficient information to assess whether HU meets the requirements of Article 4.1 FD with regard to Article 3.

Ireland:

(Article 2)

Section 1(4), Prevention of Corruption Act 1906 as inserted by section 2, Prevention of Corruption (Amendment) Act 2001 provides for penalties in respect of active and passive corruption of a fine or imprisonment for a period not exceeding 10 years, or to both.

Ireland meets the requirements of Article 4.1, FD with regard to Article 2.

(Article 3)

By virtue of section 7(1), Criminal Law Act 1997, which provides that any person who aids, abets, counsels or procures the commission of an indictable offence is liable to be indicted, tried and punished in the same way as the principal offender", and of section 22, Petty Sessions (Ireland) Act, 1851 which makes a similar provision for petty offences, the penalties under section 1(4) are applicable also in relation to the offences of instigating, aiding and abetting.

IE meets the requirements of Article 4.1, FD with regard to Article 3.

Italy:

(Article 2)

IT provides for the offence of active corruption at section 2635(2), Civil Code and the penalty for this offence is imprisonment for a period not exceeding 3 years. There is no mention of whether or not a fine can be imposed as a penalty.

IT provides for the offence of passive corruption at section 2635 (1), Civil Code and the penalty for this offence is imprisonment for a period not exceeding 3 years. There is no mention of whether or not a fine can be imposed as a penalty.

IT meets the requirements of Article 4.1, FD with regard to Article 2.

(Article 3)

IT provides for the offences of instigating, aiding and abetting at States at sections 110 and 115, Criminal Code, although the latter focuses on the limitations on liability for the offence. The penalty provided under section 110, Criminal Code is the penalty available for the main offence, in this case a period of imprisonment not exceeding 3 years. As mentioned previously (under Article 3), section 378, Criminal Code, is not relevant to this analysis as it refers to assisting the offender after the offence has been committed.

IT meets the requirements of Article 4 1, FD with regard to Article 3.

Latvia:

(Article 2)

Section 196: The penalty in respect of an offence under subsection (1) to use or exceed one's authority in bad faith, the penalty is imprisonment for a period not exceeding 3 years, or confiscation of property, or community service, or a fine not exceeding 40 times the minimum monthly wage. The penalty in respect of an offence under subsection (2), for the same offence as in subsection (1) but committed for the purpose of obtaining property, certain elements of the applicable penalty are higher, namely imprisonment for a period not exceeding 5 years, or confiscation of property, or community service, or a fine not exceeding 120 times the minimum monthly wage.

Section 199: The penalty for offering or giving an advantage, if the offer is accepted, is imprisonment for a term not exceeding 3 years, or custodial arrest, or community service, or a fine not exceeding 50 times the minimum monthly wage (subsection (1)); where the offence is repeated or on a larger scale, the penalty is imprisonment for a period not exceeding 5 years, or community service, or a fine not exceeding 100 times the minimum monthly wage (subsection (2)).

LV meets the requirements of Article 4.1 FD with regard to Article 2.

(Article 3)

With regard to instigation, aiding and abetting, offences under section 15, Chapter II, Criminal Code, dealing with preparation of an offence, are penalised on the same basis as that of the main offence. However, section 20, Chapter II, Criminal Code, dealing with instigators and accessories, focuses on questions of liability rather than on the penalties.

There is insufficient information to assess whether LV meets the requirements of Article 4.1, FD with regard to Article 3.

Lithuania:

(Article 2)

Under Article 225 (passive corruption), where the amount of the bribe is less than the minimum subsistence amount, the penalties provided are the removal of the right to work in a certain job or to exercise a certain activity. Imprisonment is not an applicable penalty (subsection 4). However, in respect of other offences of passive corruption, the penalties are the removal of the right to work in a certain job or to exercise a certain activity or imprisonment, the length of the term varying with the offence. Where the offence is passive corruption involving performance of a lawful act or omission, the penalty of imprisonment is for a period not exceeding 3 years (subsection (1)); where it involves performance of an unlawful act or omission it is for a period not exceeding 5 years (subsection (2)) and where it involves a bribe greater than 250 times the minimum subsistence amount, it is for a period between 2 and 8 years.

Under Article 226 (corruption on the part of an intermediary) the penalty is arrest or imprisonment for a period not exceeding 3 years (subsection 1), or in the case of a bribe of minor value, the penalty is a fine or arrest.

Under Article 227 (active corruption) the penalty, whether for a bribe to a person or an intermediary involving a lawful act or omission, is a restriction of freedom, a fine, arrest or imprisonment for a period not exceeding 2 years (subsection (1)); if the amount of the bribe is greater than 250 times the minimum subsistence amount or involves an unlawful act or omission, the penalty is imprisonment for a period not exceeding 4 years (subsection (2)); in the case of a bribe which is less than the subsistence amount, the penalty is restriction of freedom, a fine or arrest (subsection (3)).

LT meets the requirements of Article 4.1 FD with regard to Article 2.

(Article 3)

Article 24, Criminal Code, deals with different forms of complicity, including instigation and assisting. However, it is confined to giving definitions and does not include information regarding penalties. Instead, it is Article 26, Criminal Code which sets out the penalties applicable to accomplices, namely to the various categories defined at Article 24. Article 26 provides that accomplices are generally liable on the same basis as perpetrators.

LT meets the requirements of Article 4.1 FD with regard to Article 3.

Luxembourg:

(Article 2)

With regard to active and passive corruption, Articles 310-1 and 310 respectively, provide for identical penalties, namely imprisonment for a period of between one month and 5 years and a fine of between 251 euros and 30,000 euros. LU informs the Commission that these offences are also ones to which Articles 1, 14 and 15, Criminal Code apply. Article 14, Criminal Code lists the various types of penalty available while Article 15 defines the duration of certain terms of imprisonment (the text of Article 1 is not supplied).

LU meets the requirements of Article 4.1 FD with regard to Article 2.

(Article 3)

With regard to the offences of instigation, aiding and abetting under Articles 66 and 67, Criminal Code, Article 69, Criminal Code provides that accomplices to an offence are punishable at a level either directly lower than that applicable to the perpetrators under the scale set out at Article 52, Penal Code (text not supplied) or two thirds of that applicable to the perpetrator.

LU meets the requirements of Article 4 (1), FD with regard to Article 3.

The Netherlands:

(Article 2)

With regard to active corruption, the penalty is either a fine of the fifth category (which is stated to be a maximum of 45,000 euro - section 23(4), Criminal Code refers) or imprisonment for a period of up to 1 year. The same penalty is provided in respect of passive corruption.

NL meets the requirements of Article 4.1, FD with regard to Article 2.

(Article 3)

NL informs the Commission that the potential penalty for instigation, aiding and abetting is the same as for the actual commission of the offence (sections 47, 48 and 48a, Criminal Code refer).

NL meets the requirements of Article 4.1, FD with regard to Article 3.

Poland:

(Article 2)

The same level of penalty is available for offences of either active or passive corruption in respect of an offence causing material losses or in less serious cases.

The penalty for causing material losses to one's organisation is imprisonment for a term of between 3 months and 5 years (Article 296a (1) and (2)), while in less serious cases it is a fine, non-custodial measures or imprisonment of up to 2 years (Article 296a (3)). However, in relation to passive corruption, where serious material losses are caused, the person is liable to imprisonment for a period between 6 months and 8 years (Article 296a (4)).

Furthermore, a person who has committed active corruption has the possibility to avoid liability to punishment where he or she, following the other person's acceptance of the material or other benefits, brings the full details of the matter to the attention of the appropriate authorities before such authorities become aware of the situation (Article 296a (5) refers).

PL meets the requirements of Article 4.1, FD with regard to Article 2.

(Article 3)

Section 19, Criminal Code provides that the penalties for instigating, aiding and abetting are those which apply within the limits of the penalties provided for the offences, but may in exceptional cases be lighter for persons convicted of aiding and abetting.

PL meets the requirements of Article 4.1, FD with regard to Article 3.

Portugal:

(Article 2)

The penalty for active and passive corruption is a fine or imprisonment for a period of up to 3 years (Articles 41b and 41c, Decree-Law No. 28/84 refer).

PT meets the requirements of Article 4 1, FD with regard to Article 2.

(Article 3)

The penalty for instigating is the same as for carrying out the offence (Article 26, Criminal Code refers). The penalty for aiding and abetting is stated to be the same as that for carrying out the offence, but specifically reduced (Article 27, Criminal Code refers). PT does not provide further information in this regard.

PT meets the requirements of Article 4 1, FD with regard to Article 3.

Slovak Republic:

(Article 2)

The penalty for passive corruption (sections 160 (1) and (2), Criminal Code) is a fine or imprisonment for a period not exceeding 3 years. Imprisonment for a period of between 1 and 5 years is provided for under section 160 (3) where a person, by virtue of acting as described

at sections 160 (1) or (2), causes large-scale damage or obtains a large-scale benefit for himself or a third party (subsection (a)), or breaches a separate duty required of him under the law, or an important duty required of him by his employment, occupation, standing or position or a duty the fulfilment of which he has assumed separately (subsection (b)). Where the offence of passive corruption is committed in connection with the procurement of an item of general interest, it is punishable by a fine, a prohibition of activity, or imprisonment for a period of between 1 and 5 years (section 160a (1), Criminal Code).

The penalty for active corruption (sections 161 (1) and (2), Criminal Code) is a fine or imprisonment for a period of up to 2 years. Imprisonment for a period of between 1 and 5 years is provided for under section 161 (3) where a person, by virtue of acting as described at sections 161 (1) or (2), causes large-scale damage or obtains a large-scale benefit for himself or a third party (subsection (a)), or breaches a separate duty required of him under the law, or an important duty required of him by his employment, occupation, standing or position or a duty the fulfilment of which he has assumed separately (subsection (b)). Where the offence of active corruption is committed in connection with the procurement of an item of general interest, it is punishable by a fine, a prohibition of activity, or imprisonment for a period of up to 3 years (section 161a (1)).

SK meets the requirements of Article 4.1 FD with regard to Article 2.

The penalty for indirect active corruption (section 162 (2), Criminal Code) is a fine or imprisonment for a period of up to 2 years, while the penalty for indirect passive corruption (section 162 (1), Criminal Code) is a fine or imprisonment for a period of up to 3 years.

(Article 3)

With regard to instigation, aiding and abetting, section 10 (2), Criminal Code the penalty applicable is that available for perpetration of the offence, unless otherwise provided by the Criminal Code. As there is no such provision mentioned in relation to sections 160-162, it would appear that organising, aiding and abetting are punishable as for perpetration. Section 164, which deals with instigation of a criminal offence or breach of public order or collective non-fulfilment of an important obligation imposed under the law, provides for a penalty of a fine or imprisonment for a period of up to 2 years.

SK meets the requirements of Article 4.1, FD with regard to Article 3.

Slovenia:

(Article 2)

The penalties for **active corruption** are as follows:

- where the bribe's purpose is to obtain any undue advantage in a transaction or service, the penalty is imprisonment for a period of 6 months to 5 years (there is no mention of a fine) (Article 248(1), Criminal Code)

- where the bribe's purpose is to conclude a transaction or to have a service performed, the penalty is imprisonment for a period of up to 3 years (there is no mention of a fine) (248(2), Criminal Code).

There is also provision (Article 248(3), Criminal Code) to remit the penalty where a perpetrator who declares the offence either before it has been detected or before he knows of its detection. This appears to bring Slovenia below the threshold of persuasive, proportionate and dissuasive penalties as the FD does not provide for such an exception.

Article 248(3), Criminal Code also provides that the rewards, gifts or other benefits given are confiscated but they may be returned to the giver in the circumstances addressed at Article 248 (3), Criminal Code.

The penalties for **passive corruption** are as follows:

- where the bribee neglects the interests of or causes damage to his organisation or other natural persons when concluding a transaction or performing a service, the penalty is imprisonment for a period of 6 months to 5 years (there is no mention of a fine) (Article 247(1), Criminal Code refers)

- where the bribee concludes a transaction or performs a service, the penalty is imprisonment for a period of 3 months to 5 years (there is no mention of a fine) (Article 247(2), Criminal Code refers)

- where the reward etc is requested etc after the transaction is concluded or service performed, the penalty is imprisonment for a period of up to 2 years (Article 247(3), Criminal Code refers).

- there is also provision for the confiscation of the reward, gift or other benefit where this was accepted (Article 247(4), Criminal Code refers).

SI does not meet the requirements of Article 4.1, FD in relation to active corruption, but meets them in relation to passive corruption, therefore only partly meets its requirements in relation to Article 2.

(Article 3)

With regard to instigation, aiding and abetting:

- instigation is punishable as for the main offence (Article 26, Criminal Code refers)

- aiding or abetting is punishable as per the main offence but a more lenient penalty may be imposed (Article 27, Criminal Code refers)

- Article 29, Criminal Code sets out a range of limitations to liability:

1) those instigating, aiding and abetting are liable within the limits of their intent

2) if an instigator, aider or abettor has voluntarily prevented the commission of the offence, his penalty may be remitted

3) limiting or aggravating factors may only be taken into account with regard to the person to whom they relate directly.

SI meets the requirements of Article 4.1, FD in relation to Article 3.

Sweden:

(Article 2)

The penalty for active corruption is a fine or imprisonment for a period not exceeding 2 years (Chapter 17 – section 7).

The penalty for passive corruption is a fine or imprisonment for a period not exceeding 2 years. However, if the offence is gross (but no definition is supplied for this term), imprisonment for a period not exceeding 6 years shall be imposed (Chapter 20 – section 2, Criminal Code).

SE meets the requirements of Article 4.1 FD with regard to Article 2.

(Article 3)

According to Chapter 23 - Section 4 Criminal Code, the penalties for instigation, aiding and abetting are those which are provided in respect of the main offence.

SE meets the requirements of Article 4.1, FD, with regard to Article 3.

United Kingdom:

(Article 2)

The penalty for the offences of active or passive corruption is:

- on summary conviction, imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum, or to both (section 1 (1) (a), Prevention of Corruption Act, 1906)
- on conviction on indictment, imprisonment for a term not exceeding 7 years or a fine, or to both (section 1 (1) (b), Prevention of Corruption Act, 1906)

The UK meets the requirements of Article 4 (1) FD with regard to Article 2.

(Article 3)

The UK states that in respect of England, Wales and Northern Ireland, Section 8, Accessories and Abettors Act, 1861 (text not supplied) provides that any person who aids, abets, counsels, or procures an indictable offence, (which includes the offences created by the 1906 Act), may be prosecuted and punished as a principal (here the term "principal" means the actual perpetrator of the crime). Therefore the penalties available for these offences are the same as for the offences of active and passive corruption.

Neither a commentary nor the text of the Criminal Procedure (Scotland) Act, 1995 are supplied.

The UK appears to meet the requirements of Article 4.1, FD at least in respect of England, Wales and Northern Ireland, but there is insufficient information regarding the situation in Scotland, with regard to Article 3.

Article 4 (2) comments

With reference to the material presented in Article 4.1, 16 MS fully met the requirements of Article 4 (2) FD. The exceptions are AT, where the maximum period of imprisonment is less than the minimum of the range provided under Article 4.2 FD; BE which did not supply sufficient information and DK, where the information supplied in the commentary needs to be supported by supplying the text of the legislation.

With regard to SK, in its cover note, it states that a maximum penalty of 7 years is available "if the statutory conditions are fulfilled as regards the facts of the case" but it is not clear where this provision is set out in the Criminal Code. SK is invited to supply further information on this point.

Table of penalties

MS	maximum length of imprisonment for offences under Article 2	Comments
AT	3 months	AT has not transposed Article 4.2
BE	BE does not supply sufficient information to assess whether it meets the requirements	Assessment not possible
DE	3 years	DE has fully transposed Article 4.2
DK	18 months	DK meets the requirements (tentative pending text)
EE	3 years (gratuity) 5 years (bribe)	EE has fully transposed Article 4.2
FI	2 years	FI has fully transposed Article 4.2
FR	5 years	FR has fully transposed Article 4.2
HU	- active corruption: 3 years - 8 years	HU has fully transposed Article 4.2
IE	10 years	IE has fully transposed Article 4.2
IT	3 years	IT has fully transposed Article 4.2
LT	8 years (passive corruption) 4 years (active corruption)	LT has fully transposed Article 4.2
LU	5 years	LU has fully transposed

		Article 4.2
LV	3 years	LV has fully transposed Article 4.2
NL	1 year	NL has fully transposed Article 4.2
PL	8 years	PL has fully transposed Article 4.2
PT	3 years	PT has fully transposed Article 4.2
SE	2 years (active/passive corruption) 5 years (gross passive corruption)	SE has fully transposed Article 4.2
SK	5 years (direct active/passive corruption) 2 years (indirect active corruption) 3 years (indirect passive corruption)	SK has fully transposed Article 4.2
SI	5 years	SI has fully transposed Article 4.2
UK	7 years	UK has fully transposed Article 4.2

Article 4 (3) Analysis of Member States

The majority of MS met the requirements of Article 4.3. There were a number of exceptions however. AT provided for a temporary prohibition in respect of certain professions and SK provided for a prohibition only in respect of offences under sections 160a(1) and 161a(1), Criminal Code.

BE, LV did not supply information with regard to Article 4.3. Although PT supplied the text of its legislation (section 8(d) Decree-Law No. 28/84, this text in itself did not indicate anything about the circumstances pertaining to the prohibition. DK, FR provided commentary but did not supply the text of their measures. The UK named the relevant legislation, but supplied neither commentary nor text.

Given the multiplicity of approaches, a country by country analysis is provided below.

Austria:

* Sections 13(1) and 87(1) Trade, Commerce and Industry Act 1994

Section 13(1)1.(b) provides for the exclusion of a natural person from exercising a business where the person has been convicted by a court of any offence (apart from fraud which is addressed separately) punishable by a term of imprisonment of more than 3 months or a fine of more than 180 daily units. There is no indication that such an exclusion would be temporary. Section 87(1) provides for the withdrawal of an authorisation to pursue a business activity where the grounds for exclusion under section 13 (1) are applicable.

* Sections 6(1)(a), 11(3)(1), 117a(3) and 159(1), Notaries Act

Section 6(1)(a) provides that applicants for notarial office shall be of "honourable character", section 11(3)(1) that one of the criteria for assessing an applicant's suitability for appointment is "trustworthiness" and section 117a(3) provides that entry to the register of Notaries may be withheld for serious reasons, such as the person's untrustworthiness. With regard to penalising misconduct, section 159(1) provides that any penalty should be proportionate to the offence, and this would take into account the degree of intention and the impact of the breach of duty. The extract of legislation provided does not provide further details of the relevant procedures nor of the extent to which a criminal conviction would impact on a decision to prohibit a notary from practising, temporarily or otherwise.

* Sections 5(2) and 30(3), Advocates Act

Section 5(2) and section 30(3) provide for the withholding of entry to the Register of Advocates and Register of Aspirant Advocates respectively, where the applicant's past conduct renders him untrustworthy.

* Section 18, Advocates and Aspirant Advocates Disciplinary Regulations

Section 18 provides for a minimum period of removal from the Register of 3 years, and potentially for longer if section 5(2), Advocates Act, applied.

* Sections 2(2) (1) (e), 10(1)(1) and 14, Expert Witnesses and Interpreters Act

Trustworthiness is also a criterion under section 2(2) (1) (e) for entry to the register of court-certified experts and interpreters. Entry can be withdrawn subsequently if the person did not meet this or other criteria, or ceased to meet it (section 10(1) (1) (e). Section 14 extends these provisions to interpreters.

Note: The legislation cited by AT refers to specific professions and does not extend to the generality of persons involved in private sector activities.

Accordingly, AT appears to only partly meet the requirements of Article 4(3).

Belgium:

BE has not provided any information in relation to Article 4.3, FD.

Denmark:

DK states that it has transposed this Article by means of sections 78 and 79, Criminal Code.

Where a person with a previous conviction applies for a special authorisation or certificate with a view to pursuing a business activity, under section 78(2) Criminal Code, the administrative authorities may refuse to grant a special authorisation or certificate where the applicant has been convicted of an offence that gives reason to believe that there is a clear risk that the position or office in question could be abused.

Where a person is already engaged in a business activity, and is subsequently convicted of a criminal offence, section 79(1) provides that the person may be disqualified from pursuing the business activities in question or from pursuing them in a certain manner, where the offence gives reason to believe that there is a clear risk that the position could be abused. A person engaged in business activities for which no special authorisation or certificate is required who

has been convicted of a criminal offence may be disqualified from pursuing the business activities in question or from pursuing them in a certain manner, where the offence and specific circumstances give reason to believe that there is a clear risk that the post could be abused.

DK does not limit these measures to persons having a leading position in a company nor does it indicate if there is a time limit on such prohibitions.

DK appears to meet the requirements of Article 4(3), FD.

Estonia:

Section 49, Criminal Code, provides that a court may deprive a convicted offender of the right to work in a certain position or operate in a certain area of activity for up to 3 years if the person is convicted of a criminal offence relating to abuse of professional or official status or violation of official duties.

EE meets the requirements of Article 4.3, FD.

Finland:

Note: Although FI cites the 1985 Act in its concordance table, the legislation submitted is an amending Act, No. 1220 dated 1997.

Section 2 sets out a number of categories of person to whom a prohibition may be extended, which essentially cover persons in a leading position within an entity. Among the preconditions for a prohibition order identified in section 3 is a conviction for criminal activity in his or her business that cannot be deemed insignificant and where his/her activities, when assessed as a whole, "are deemed to be harmful from the perspective of...the public economy or healthy and functioning economic competition".

This seems to echo the provision in Article 2 (3) FD permitting a MS to limit the offence of active or passive corruption to conduct which distorts competition in relation to the purchase of goods or commercial services. However, FI did not limit these offences in that manner. Instead, it would be possible to interpret its legislation as reflecting the flexibility permitted to MS by means of the phrase "where appropriate" contained at Article 4 (3), FD.

The form of prohibition is set out in section 4, of the 1997 Act and its duration, of between 3 to 7 years, at section 5, of the 1997 Act.

FI meets the requirements of Article 4 (3), FD.

France:

FR informs the Commission that the further measures applicable to offences under Articles 445-1 and 445-2, Criminal Code are set out at Article 445-3, Criminal Code, although it does not supply the text of the further legislation to which Article 445-3 makes reference:

L'interdiction, suivant les modalités prévues par l'article 131-26, des droits civiques, civils et de famille;

L'interdiction, pour une durée de cinq ans au plus, d'exercer une fonction publique ou d'exercer l'activité professionnelle ou sociale dans l'exercice ou à l'occasion de laquelle l'infraction a été commise;

La confiscation, suivant les modalités prévues par l'article 131-21, de la chose qui a servi ou était destinée à commettre l'infraction ou de la chose qui en est le produit, à l'exception des objets susceptibles de restitution;

L'affichage ou la diffusion de la décision prononcée dans les conditions prévues par l'article 131-35.

Subsection 2 directly addresses the FD's requirement in relation to a temporary prohibition on carrying out that particular or comparable business activity, and also provides for additional punitive measures. The imposition of these measures is not limited, but can be applied to any bribee whether or not s/he has a leading position within the legal person.

FR meets the requirements of Article 4.3, FD.

Germany:

Section 70, Criminal Code prohibits a person from engaging in a profession where a person has been convicted of a crime committed in abuse of his profession or trade or in gross violation of the duties associated therewith, or is not convicted only because his criminal incapacity has been proven or may not be ruled out. This follows a comprehensive evaluation of the perpetrator and the act, revealing that, by further engaging in the profession, branch of profession, trade or branch of trade, he will commit serious unlawful acts of the type indicated.

The period of prohibition is for a period of between 1 and 5 years. The prohibition is normally temporary, but can be made permanent in certain circumstances (where the statutory maximum term is deemed insufficient to avert the danger posed by the perpetrator).

The law is broader than the FD in that it does not limit the application of the prohibition to persons who had a leading position in a company within the business concerned.

DE meets the requirements of Art 4.3, FD

Hungary:

Section 56, Criminal Code provides that a person may be prohibited from practising his profession if he has violated the rules of his profession, and the term profession includes people of senior status in an organisation such as a member or director of a body exercising general control of an organisation or a member of a board of directors. Section 57, Criminal Code sets out the conditions which apply to the prohibition, which can either be temporary (for a period of 1 to 10 years) or permanent.

HU meets the requirements of Article 4.3, FD.

Ireland:

Ireland informs the Commission that acts of corruption under section 1, Prevention of Corruption Act, 1906 as amended, are indictable offences. Therefore, where such offences

have been committed in relation to a company or involve fraud or dishonesty, they would be predicate offences for the purposes of section 160 of the Companies Act 1990, which relates to disqualification (not supplied).

Section 160, Companies Act, 1990 provides that where a person is convicted on indictment of any indictable offence in relation to a company, or involving fraud or dishonesty, then during the period of 5 years from the date of conviction or such other period as the court, on the application of the prosecutor and having regard to the circumstances of the case, may order that he or she may not be appointed or act as an auditor, director or other officer, receiver, liquidator or examiner or be in any other way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company. In addition, he or she is subject to a disqualification for that period (subsection (1) refers). Where a court is satisfied in any proceedings or as a result of an application under the section that a person has been convicted of an offence as described, where a promoter, officer, auditor or otherwise of a company, of an offence such as fraud in relation to the company, involving any breach of duty and that the conduct makes him/her unfit to be involved in the management of the company, the court may of its own motion or as a result of an application, make a disqualification order for such period as it sees fit (subsection (2) refers). It is discretionary for the court to decide the disqualification. Further penalties are provided where a person fails to observe such a disqualification order.

Apart from the Companies Act, 1990 a variety of sanctions can be imposed depending on the circumstances (e.g. where specific provision is made under the Companies Acts 1963-2001 or under public procurement procedures).

IE meets the requirements of Article 4(3), FD.

Italy:

Section 35bis, Criminal Code provides that for the imposition of a suspension on a person, following any conviction for an offence of abuse of power or breach of duty in relation to the material office. It also provides that persons who are suspended from managerial functions in bodies corporate or companies may not, for the duration of the suspension, exercise the office of director, auditor, liquidator or managing director or any other office conferring the power to represent the body corporate or company. The period of suspension is between 15 days and 2 years. A disqualification, which carries the same conditions as a suspension, shall be ordered following conviction and sentencing to a term of imprisonment of at least 6 months for such an offence. The legislation does not indicate whether there is an upper limit to the period of disqualification.

IT meets the requirements of Article 4.3, FD.

Latvia:

Neither Chapter XIX nor the other legislation supplied by LV would appear to contain any provisions relating to Article 4.3 FD.

LV does not meet requirements of Art 4.3 FD

Lithuania:

The penalties set out under Article 225 (passive corruption) and Article 227 (active corruption) provide for the removal of the right to work in a certain job or to exercise a certain activity, although there is no reference to the length of time for which these rights may be removed. In addition, LT informed the Commission that its legislation also provides for a general prohibition from exercising a certain activity in respect of persons who have been convicted of a particular criminal act.

LT meets the requirements of Article 4.3 FD.

Luxembourg:

Article 14, Criminal Code lists the various types of penalty available and these are applicable to the offences of active and passive corruption provided for by Articles 310-1 and 310, Criminal Code respectively. Apart from imprisonment or a fine, the penalties provided by Article 14, Criminal Code includes a prohibition on exercising certain professional activities, although there is no information as to the maximum period for which this might be imposed.

LU meets the requirements of Article 4 (3), FD.

The Netherlands:

Section 339(1), Criminal Code provides for the exclusion of persons guilty of offences, including corruption in the private sector, from the occupation through which they have committed such an offence.

NL meets the requirements of Article 4.3, FD.

Poland:

Article 41, Criminal Code provides that the courts may issue a banning order in relation to a particular position or profession (subsection (1)) and a business activity (subsection (2)) respectively, if the offender abused his position or profession to commit an offence or if it transpires that it would not be in the public good, as enshrined in law, for him to continue in that position, profession or business activity.

The provision is broader than the FD in that it does not limit the person to being one who has a leading position in a legal person, nor does it provide a time limit for the duration of the banning order.

PL meets the requirements of Article 4.3., FD.

Portugal:

Article 8 (d), Decree-Law No. 28/84 provides for a temporary prohibition on the exercise of certain activities or professions. However, PT does not provide further information to indicate the circumstances in which such a prohibition may be made, nor the period for which it is valid.

It is therefore not clear to what extent PT meets the requirements of Article 4.3., FD.

Slovak Republic:

SK does not provide information in relation to whether or not such penalties are available in relation to offences of active or passive corruption, or of indirect active or passive corruption (sections 160 - 162, Criminal Code).

However, with regard to the offences of active or passive corruption committed in connection with the procurement of an item of general interest, there is provision for the imposition of a prohibition of activity (sections 160a (1) and 161a (1), Criminal Code). The relevant legislation is sections 49 and 50, Criminal Code, which is reproduced in its cover note rather than the concordance table. The prohibition may be imposed by a court if the offender has committed a criminal offence in connection with that activity (section 49 (1), Criminal Code refers, and may last from 1 to 10 years, exclusive of a period of imprisonment (sections 49 (1) and (3), Criminal Code refer). The prohibition prohibits the offender from engaging in a specific employment, occupation or post or activity for which special authorisation is required or performance of which is regulated by separate provisions (section 50 (1), Criminal Code refers).

While there is no limit on the position or capacity of the person and the duration is longer than that required under Article 4.3, FD, at the same time the restriction set out at section 50 (1), Criminal Code appears too narrow.

SK does not fully meet the requirements of Article 4.3, FD.

Slovenia:

SL informed the Commission that a number of such measures may be imposed by a court on the perpetrator of criminal offences, when the conditions for them are met, but only gives details of one such measure, disqualification from the practice of a profession (Article 67, Criminal Code refers). However, Article 67 (1) is broader in scope as it does not refer only to a profession, but also to an "autonomous activity or function". The disqualification may be imposed for a period of 1 to 5 years (Article 67 (2), Criminal Code) but may be repealed by the court 2 years after the disqualification commences (Article 67(4), Criminal Code).

SL meets the requirements of Article 4.3, FD.

Sweden:

The Trading Prohibition Act (1986:436) provides for the imposition of an injunction against trading, in addition to instances of non-payment of taxes, customs duties or related fees (section 1a) and of bankruptcy (section 2):

- when a sole trader has "grossly neglected his obligations in the course of conducting business activities and is, thereby, guilty of criminal acts which are not insignificant", and where the injunction is necessitated in the public interest (section 1)

- where business activities have been conducted by a legal entity and the person's status is as follows:

In respect of limited partnerships, against general partners

In respect of other partnerships, against partners

In respect of limited liability companies and insurance companies, against members and alternate members of the board of directors, the managing director and the deputy managing director

In respect of banking companies, savings banks and economic associations, against members and alternate members of the board of directors

In respect of European Economic Interest Groupings which have their registered office in Sweden, against the chief executive officer

In respect of European companies which have their registered office in Sweden, against members and alternate members of the managerial, administrative or supervisory organ, the managing director and the deputy managing director

provided such person committed the crime in respect of business activities" (section 4)

The injunction may be imposed for a period of 3 to 10 years.

Details of the scope of the injunction are provided at section 6, and include a prohibition on conducting business activities and being a partner, board member or otherwise of specified entities.

SE meets the requirements of Article 4.3, FD.

United Kingdom:

The UK states that the relevant legislation is the Company Directors Disqualification Act, 1986 but does not supply the text nor any further details in its commentary.

There is insufficient information to assess whether the UK meets the requirements of Article 4.3, FD.

Article 5 – Liability of legal persons

General Comments:

Whereas the Joint Action provided for the liability of legal persons in relation to active corruption, the Framework Decision extends this provision to include passive corruption. The issue of legal persons' liability remains a difficult one for certain MS, however. Three MS (AT, IT, SK) which were otherwise in a position to reply on other Articles, either have yet to complete legislation on this topic or such legislation has been rejected by Parliament, in the case of SK, and hence have failed to transpose both Articles 5 and 6, FD. Furthermore, IE is preparing legislation to specifically address Article 5(2).

Summary table of the transposing legislation adopted by Member States

MS	Legislation	Measures which appeared relevant to Commission's analysis (where different to MS' citations)
AT	Bill to be laid before Parliament	

BE	Article 5, Criminal Code	
DE	Section 30, Administrative Offences Act	
DK	Sections 26, 27, 306 Criminal Code	
EE	Section 14, Criminal Code	
FI	- Chapter 9, Criminal Code (Act unspecified) - section 13, Chapter 30 Criminal Code (Act No. 465 of 2005)	- Chapter 9, Criminal Code (Act No. 743 of 1995 and Act No. 61 of 2003) - section 13, Chapter 30 Criminal Code (Act No. 465 of 2005)
FR	Article 445-4, Criminal Code	- Article 445-4, Criminal Code, and the legislation to which cross-reference is made: Articles 121 and 131, Criminal Code (text not supplied)
HU	Section 2, Act CIV of 2001 on measures applicable to legal persons (text not supplied)	
IE	- Interpretation Act 1937 - Section 9, Prevention of Corruption (Amendment) Act 2001 - legislation to meet Article 5 (2) FD is under preparation	
IT	No provisions to address this Article	
LT	Articles 20, 225(5), 227(5), Criminal Code	
LU	Article 203, Amended Act of 10 August 1915	
LV	Chapter VIII, Criminal Code	
NL	Section 51, Criminal Code	
PL	Articles 3, 5, 6, 16 Criminal Liability of Bodies Corporate Act of 28 October 2002	
PT	Articles 2, 3, 11 Decree-Law No. 28/84 as amended by Law No. 108/2001	
SE	Chapter 36 section 7, Criminal Code	
SK	SK's National Council did not approve its proposals, and new legislation is	

	under preparation	
SI	Articles 1, 4, 5, 24 and 25, Criminal Liability of Legal Entities Act	
UK	- Interpretation Act 1978 - civil law of negligence - Proceeds of Crime Act 2002 (text not supplied)	

Summary account of the transposition

On the positive side, 5 MS (LT, LU, NL, PL, SI) have fully transposed Article 5. As many as 13 MS transposed Article 5(1), with the results somewhat lower in respect of Article 5(2) (6 MS) and Article 5(3) (10 MS). The particular difficulty faced here in the analysis was a lack of information from the MS, which was especially evident in relation to Articles 5(2) and 5(3). Given that, as previously mentioned, 3 MS have yet to put legislation in place to address Article 5, it is considered that Article 5 warrants detailed scrutiny in subsequent reports. Further details of MS' responses are provided in the country by country analysis which follows after this Table.

Attention is drawn to the following issues in relation to MS' transposition of Article 5(2):

- FI's legislation places a limitation on the scope of Article 5(2) FD. According to section 2, chapter 9, No 743 Act (1995), as amended by Act No. 61 (2003), no corporate fine shall be imposed for a complainant offence that is not reported by the injured party so as to have charges brought, unless it is extremely important to public interest that charges be brought." It is the Commission's view that this is a significant limitation on the prosecution of a legal person, as it appears to preclude investigation and punishment of an offence where the offence comes to light on any other basis.

- The UK's civil law of negligence provides the possibility for a plaintiff to sue a legal person on the basis that the legal person owed him a duty of care, had failed to fulfil it, and that this had resulted in damage to the plaintiff. If s/he could show these things, the court would award damages to him/her, which the legal person would have to pay. The UK bases this position on the Explanatory Report to the Second Protocol of the Convention on the Protection of the European Communities' Financial Interests (PIF) (OJ C 221 19 July 1997). It points out that the Explanatory Report states "while the measures to be taken under Article 3 (2) and 4 (2) [of the Protocol] *may be* criminal sanctions, administrative and civil law measures *are possible as well [italics inserted]*" (Section 4.3, Explanatory Report refers OJ C 091 31 March 1999). Secondly, the UK informed the Commission that the Proceeds of Crime Act, 2002 (text not supplied) provides that where a benefit accrues to a legal person as a result of a crime (not only corruption, and not only because of an act or omission by an employee etc.), the proceeds could be recovered by a civil action taken by the relevant authorities under this Act. A direct link between the corrupt act and the enrichment of the company, of which the latter would in effect be a side effect of the former, would be necessary to prove liability.

The Commission's view here is that the liability is a criminal liability, which must be matched by a criminal sanction and that such a criminal sanction may be supplemented by other measures which are administrative or civil in nature. The Commission does not consider that administrative or civil sanctions alone are sufficient.

Summary table of the transposition

MS	Article 5(1)	Article 5(2)	Article 5(3)	Comments
AT	---	---	---	AT has not transposed Article 5
BE	Meets requirements	There is insufficient information to assess whether BE meets the requirements	Meets requirements	BE has partly transposed Article 5
DE	Meets requirements	Meets requirements	There is insufficient information to assess whether DE meets the requirements	DE has partly transposed Article 5
DK	Appears to meet requirements	Appears to meet requirements	There is insufficient information to assess whether DE meets the requirements	DK has partly transposed Article 5 (tentative pending receipt of text)
EE	Meets requirements	No information	Meets requirements in respect of Article 5 (1) FD, but not Article 5(2) FD	EE has partly transposed Article 5
FI	Meets requirements	Partly meets the requirements	There is insufficient information to assess whether DE meets the requirements	FI has partly transposed Article 5
FR	There is insufficient information to assess whether FR meets the requirements	There is insufficient information to assess whether FR meets the requirements	There is insufficient information to assess whether FR meets the requirements	FR has partly transposed Article 5
HU	There is insufficient information to assess whether HU meets the requirements	There is insufficient information to assess whether HU meets the requirements	There is insufficient information to assess whether HU meets the requirements	There is insufficient information to assess whether HU has transposed Article 5 (in the absence of both text and commentary)

IE	Meets requirements	Legislation under preparation	Meets requirements	IE has partly transposed Article 5
IT	---	---	---	IT has not transposed Article 5
LT	Meets requirements	Meets requirements	Meets requirements	LT has transposed Article 5
LU	Meets requirements	Meets requirements	Meets requirements	LU has transposed Article 5
LV	Meets requirements	There is insufficient information to assess whether LV meets the requirements	Meets requirements	LV has partly transposed Article 5
NL	Meets requirements	Meets requirements	Meets requirements	NL has transposed Article 5
PL	Meets requirements	Meets requirements	Meets requirements	PL has transposed Article 5
PT	Meets requirements	There is insufficient information to assess whether PT meets the requirements	Meets requirements	PT has partly transposed Article 5
SE	SE partly meets the requirements	SE partly meets the requirements	Meets requirements	SE has partly transposed Article 5
SK	---	---	---	SK has not transposed Article 5
SI	Meets requirements	Meets requirements	Meets requirements	SI has transposed Article 5
UK	Meets requirements	UK partly meets the requirements	Appears to meet requirements	UK has partly transposed Article 5

Article 5.1 Analysis of Member States

Belgium:

Article 5, FD provides that every legal person is criminally responsible "des infractions qui sont intrinsèquement liées à la réalisation de son objet ou à la défense de ses intérêts, ou de celles dont les faits concrets démontrent qu'elles ont été commises pour son compte." The Article then describes the balance between their respective liability as follows: "Lorsque la responsabilité de la personne morale est engagée exclusivement en raison de l'intervention

d'une personne physique identifiée, seule la personne qui a commis la faute la plus grave peut être condamnée."

This provision takes advantage of the flexibility of the phrasing "can be held liable" by limiting the circumstances of that liability in cases where the natural person carries the greater fault.

BE meets the requirements of Article 5 (1), FD.

Denmark:

DK discussed Article 5 1. (a), (b) and (c) together.

Section 27(1), Criminal Code, provides that a legal person can be held criminally liable where an offence has been committed on its behalf that can be attributed to one or more persons connected with the legal person or to the legal person as such. Denmark informed the Commission that under section 304, Criminal Code, legal persons may be held liable for offences of active and passive corruption under section 299(2), Criminal Code, and that its legislation goes further than the requirements of the FD as it is not necessary for the offence to have been committed for the benefit of the legal person. Section 306, Criminal Code, also covers instigation, aiding and abetting in conjunction with section 23, Criminal Code.

DK meets the requirements of Article 5.1, FD.

Estonia:

Section 14, Criminal Code provides for a legal person to be responsible for an act committed on its behalf by a body or senior official.

EE meets the requirements of Article 5.1, FD.

Finland:

Section 13, chapter 30, Criminal Code as amended by No. 465 Act 2005 provides for corporate criminal liability in respect of bribery in business (i.e. active corruption, section 7, chapter 30 Criminal Code) and of the acceptance of a bribe in business (i.e. passive corruption, section 8, chapter 30, Criminal Code).

The reference to the person acting as an accomplice to the commission of the offence appears to address Article 3, FD.

Section 3, Chapter 9, No 743 Act (not amended by No 61 Act 2003) is also relevant here as it expands on the connection between the offender and the corporation, providing for the latter's liability where "the offender has acted on behalf or for the benefit of the corporation, and belongs to its leadership or is in a service or employment relationship with it or has been commissioned by a representative of the corporation."

FI meets the requirements of Article 5 (1).

France:

The chapeau of Article 445-4 provides explicitly for the liability of legal persons in respect of the offences at Articles 445-1 and 445-2, subject to the conditions foreseen at Article 121-2, the text of which was not supplied.

There is insufficient information to assess whether FR meets the requirements of Article 5.1, FD.

Germany:

States that the relevant provision is section 30, Administrative Offences Act.

Section 30, Administrative Offences Act provides for the liability of a legal person where an administrative or criminal offence is committed by certain bodies or categories of natural person, including a partner or executive manager, or anyone else with responsibility for directing the business, including supervising the conduct of its business or otherwise exercising powers of control in a management position. This appears to meet the requirement to cover "a leading person" FD. The offence in question should involve a breach of duties incumbent on the legal person or its enrichment.

DE meets the requirements of Article 5(1), FD.

Hungary:

HU supplied neither the text of the relevant provision (section 2, Act CIV of 2001 on Measures Applicable to Legal Persons) nor a commentary. However, section 3 (relevant to Article 6, FD) was supplied and this shows that liability of a legal person is dependent on the conviction of the natural person unless the perpetrator is not punishable due to mental illness or death.

There is insufficient information to assess whether HU meets the requirements of Article 5(1), FD.

Ireland:

The relevant legislation is section 11(c), Interpretation Act 1937 definition of "person" and section 9, Prevention of Corruption (Amendment) Act 2001.

The Interpretation Act 1937 defines certain terms for legislative purposes. Section 11(c) provides that the term "person" shall, unless legislation provides otherwise, be construed as meaning a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons as well as individuals. Section 9, Prevention of Corruption (Amendment) Act, 2001 deals with the liability of legal persons in relation to the Prevention of Corruption Acts, 1889 to 2001. Section 9(1) provides that where an offence under those Acts has been committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any wilful neglect on the part of a person who is a director, manager, secretary or other officer of the body corporate, or a person who was purporting to act in any such capacity, that person as well as the body corporate shall be guilty of an offence and be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence. Section 9(2) provides that where the affairs of a body corporate are managed by its members, subsection (1) shall apply in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director or manager of the body corporate.

With regard to instigation, aiding and abetting, the penalty applicable to a legal person is the same as that for the main offence, namely a fine (unlimited).

IE meets the requirements of Article 5(1), FD.

Latvia:

Section 70(1) provides the basis for the application of coercive measures to a legal person in the private sector for those criminal offences provided for in the Special Part of the Law, and thereby includes offences under Sections 196 and 199 of Chapter XIX Special Part. Among the factors which a court shall take into consideration, in applying coercive measures, is the status of the natural person within the legal person.

LV meets the requirements of Article 5(1).

Lithuania:

The wording of Article 20 (2), Criminal Code, closely reflects that of Article 5(1), FD. It provides that a legal person would be liable for criminal acts committed by a natural person only where the natural person committed the criminal act for the benefit and in the interests of the legal person, whether having acted individually or on the legal person's behalf, and where the natural person occupies a managerial position within the legal person and is entitled:

- 1) to represent the legal person, or
- 2) to take decisions on behalf of the legal person, or
- 3) to exercise control within the legal person.

In addition, legal persons are liable for the offences of passive and active corruption by virtue of Articles 225 (5) and 227 (5), and for the offence of acting as an intermediary, by virtue of Article 226 (3).

LT meets the requirements of Article 5(1), FD.

Luxembourg:

Article 203 (1) of the Amended Act of 10 August 1915 provides for the dissolution and liquidation of every legal person registered under LU law which commits a criminal offence. This is not limited by linking it to an act committed for the legal person's benefit by a person as described at Article 5 (1), FD and is therefore broader in scope than the FD.

LU meets the requirements of Article 5 (1), FD.

The Netherlands:

Section 51, Criminal Code provides that criminal offences can be committed by both natural and legal persons (subsection 1). This is stated in such broad terms that it goes beyond the criteria set out in Article 5.1, FD.

NL meets the requirements of Article 5(1), FD.

Poland:

Article 16 (3), Criminal Liability of Bodies Corporate Act of 28 October 2002 provides for the liability of a body corporate where the person (as described at Article 3) has committed certain offences, including corruption as defined in Article 296a, Criminal Code. Article 16(3) does not require that the person committed the offence for the benefit of the body corporate.

Article 3, Criminal Liability of Bodies Corporate Act of 28 October 2002 provides for the liability of a body corporate where the offence is committed by a natural person who acts on its behalf or in its interests by virtue of being authorised or required to represent the body, taking decisions on its behalf or carrying out internal checks or in the event of exceeding their powers or failing to fulfil their duty (subsection (1) refers), or a person who is authorised to act by virtue of the fact that the person mentioned in subsection (1) exceeded their powers or failed to fulfil their duty (subsection (2) refers), or a person acting on behalf of or in the interests of the body corporate, with the agreement or knowledge of the person mentioned in subsection (1) (subsection (3) refers).

PL meets the requirements of Article 5 1, FD.

Portugal:

PT informs the Commission that Article 11, Decree-Law No. 28/84 states that, except where otherwise stipulated, in principle only natural persons may be held liable for criminal offences. However it points out that Article 3 (1), Decree-Law No. 28/84 provides for the liability of legal persons, undertakings and de facto associations, in respect of offences specified in that law where committed by their management bodies or representatives on their behalf and in the collective interest. Active and passive corruption are specified in that Decree-Law; both the management bodies and the entity's representatives are covered which is sufficiently broad to address the idea of having a leading position; and the concept of "in the collective interest" addresses the idea of "for their benefit", FD.

PT meets the requirements of Article 5.1., FD.

Slovenia Article 5.1:

Article 1, Criminal Liability of Legal Entities Act provides for the liability of a legal person and penalties to be imposed in accordance with that Act. Among the Criminal Code Articles listed at Article 25, Criminal Liability of Legal Entities Act are Articles 247 (passive corruption) and 248 (active corruption) but *not* Article 26-28, Criminal Code which deal with *instigation, aiding and abetting*.

Articles 4 and 5, Criminal Liability of Legal Entities Act address the liability of a legal person where the perpetrator has acted in its name, on its behalf or in its favour. They do not limit liability on the basis of the perpetrator's status within the legal person or relationship to the legal person.

SI partly meets the requirements of Article 5.1, FD.

Sweden Art 5.1:

Chapter 36 - section 7, Criminal Code provides for a penalty of a fine where a crime has been committed by a legal person in the exercise of business activities, provided that the crime

entailed gross disregard for the special obligations associated with the business activities or is otherwise of a serious kind, and that the legal person has not done what could reasonably be required of it to prevent the crime. Chapter 36 - Sections 8 – 10, Criminal Code give further details about the fine which may be imposed.

Chapter 36 - section 7, Criminal Code provides only for situations where there has been "gross disregard...or is otherwise of a serious kind" which implies that the offence can only be prosecuted and the penalty applied once the situation exceeds a certain threshold of culpability. The FD makes no such provision however.

SE does not fully meet the requirements of Article 5.1, FD

United Kingdom:

Article 5.1

The UK informed the Commission that the word "person" in a statute is to be construed as including a "body of persons, corporate or incorporate" (Schedule 1, Interpretation Act 1978). As the offence of corruption involves "mens rea", "attribution of responsibility to the legal person depends on finding someone with an appropriate level of authority within the organisation who has the mental state in question. It states that in the UK, corporate liability is based on the third alternative in Article 5.1, namely "an authority to exercise control within the legal person". Accordingly, the provisions of the Prevention of Corruption Act, 1906 apply to legal persons.

The UK meets the requirements of Article 5.1, FD.

Article 5(2): Analysis of Member States

Belgium:

Article 5, Criminal Code provides that every legal person is criminally responsible "des infractions qui sont intrinsèquement liées à la réalisation de son objet ou à la défense de ses intérêts, ou de celles dont les faits concrets démontrent qu'elles ont été commises pour son compte." The Article then describes the balance between their respective liability as follows: "Lorsque la responsabilité de la personne morale est engagée exclusivement en raison de l'intervention d'une personne physique identifiée, seule la personne qui a commis la faute la plus grave peut être condamnée." While this does not explicitly address the requirement that the legal person would be liable in situations where there has been a lack of supervision or control, the wording appears sufficiently wide to encompass this possibility.

BE is invited to provide further commentary on this point.

There is insufficient information to assess whether BE meets the requirements of Article 5 (2), FD.

Denmark:

Section 306, Criminal Code is written in sufficiently broad terms to also cover the requirements of Article 5.2; and DK informs the Commission that its legislation goes further than the requirements of the FD as it is not necessary for the offence to have been committed for the benefit of the legal person.

DK meets the requirements of Article 5(2), FD

Estonia:

EE's legislation does not seem to deal with this aspect.

EE does not meet the requirements of Article 5.2, FD.

Finland:

Liability in respect of a lack of control or supervision is provided by means of section 2, chapter 9, Criminal Code No 743 Act (1995) as amended by No. 61 Act 2003 which uses the phrase "or allowed the commission of the offence or if the care and diligence necessary for the prevention of the offence has not been observed in the activities of the corporation".

Note: According to section 2, chapter 9, No 743 Act (1995), as amended by Act No. 61 (2003), no corporate fine shall be imposed for a complainant offence that is not reported by the injured party so as to have charges brought, unless it is extremely important to public interest that charges be brought." This is a significant limitation on the prosecution of a legal person, as it appears to preclude investigation and punishment of an offence where the offence comes to light on any other basis.

FI partly meets the requirements of Article 5 (2), FD

France:

The chapeau of Article 445-4 provides explicitly for the liability of legal persons in respect of the offences at Articles 445-1 and 445-2, subject to the conditions foreseen at Article 121-2, the text of which was not supplied. It is unclear whether the situation described at Article 5.2 FD is covered by the broad approach taken in the text of the chapeau or whether any of the conditions in Article 121-2 might limit the scope of Article 445-4 in such a way as to have the effect that the requirements of Article 5.2 FD are not met.

There is insufficient information to assess whether FR meets the requirements of Article 5.2, FD.

Germany:

States that the relevant provisions are sections 30 and 130, Administrative Offences Act.

Section 30, Administrative Offences Act provides for the liability of a legal person where an administrative or criminal offence is committed by certain bodies or categories of natural person, including a partner or executive manager, or anyone else with responsibility for directing the business, including supervising the conduct of its business or otherwise exercising powers of control in a management position. This is expanded by section 130, Administrative Offences Act which addresses the failure of supervision, whether intentionally or by negligence, to prevent, within the business or company, breaches of duties incumbent on the proprietor, which is made an administrative offence.

DE meets the requirements of Article 5(2), FD.

Hungary:

HU supplied neither the text of the relevant provision (section 2, Act CIV of 2001 on Measures Applicable to Legal Persons) nor a commentary.

There is insufficient information to assess whether HU meets the requirements of Article 5(1), FD.

Ireland:

IE informs the Commission that it is preparing legislation, the Criminal Justice (Miscellaneous Provisions) Bill, to address the requirements of Article 5 (2).

IE does not at present meet the requirements of Article 5(2), FD.

Latvia:

This is not directly addressed in Chapter VIII. While there is a reference in Section 70(8) to the Court, in applying coercive measures, observing certain conditions such as the nature and consequences of the acts of the legal person (subsection (2) 3), it is unclear whether a court could thereby hold a legal person liable where its lack of supervision or control has made possible the commission of the offence, as required by Article 5(2).

There is insufficient information to assess whether LV meets the requirements of Article 5(2).

Lithuania:

The wording of Article 20 (3), Criminal Code, closely reflects that of Article 5(2), FD.

LT meets the requirements of Article 5(2).

Luxembourg:

LU informs the Commission that legal persons are liable for the criminal acts of active and passive corruption without any limiting requirement as to the absence of supervision or control. Its approach is broader than the FD.

LU meets the requirements of Article 5(2), FD.

The Netherlands:

Section 51, Criminal Code provides that criminal offences can be committed by both natural and legal persons (subsection 1). This is stated in such broad terms that it goes beyond the criteria set out in Article 5.2, FD.

NL meets the requirements of Article 5(2), FD.

Poland:

Article 5, Criminal Liability of Bodies Corporate Act of 28 October 2002 provides for the liability of a body corporate where it has failed to exercise the requisite care when selecting the natural person, or has failed to supervise appropriately the natural person, who is authorised to act by virtue of the fact that the person mentioned in Article 3 (1) exceeded their powers or failed to fulfil their duty (subsection (2) refers), or a person acting on behalf of or in

the interests of the body corporate, with the agreement or knowledge of the person mentioned in Article 3 (1) (subsection (3) refers).

PL meets the requirements of Article 5(2), FD.

Portugal:

Article 3 (1), Decree-Law No. 28/84 provides for the liability of legal persons, undertakings and de facto associations, in respect of offences specified in that law where committed by their management bodies or representatives on their behalf and in the collective interest. However, no reference is made to liability in a situation where the lack of supervision or control has made possible the commission of an offence.

There is insufficient information to assess whether PT meets the requirements of Article 5(2), FD.

Slovenia:

The issue of lack of supervision or control is addressed at Article 4 (2), Criminal Liability of Legal Entities Act, which includes the element of enabling the perpetrator to commit the offence and Article 4(4) which provides for situations where the legal person's "management or supervisory bodies have omitted obligatory supervision of the legality of the actions of employees subordinate to them."

SL meets the requirements of Article 5.2, FD.

Sweden:

Chapter 36 - section 7, Criminal Code provides for a penalty of a fine where a crime has been committed by a legal person in the exercise of business activities. One of the two conditions to be met is a requirement that the legal person has not done what could reasonably be required of it to prevent the crime, which appears broad enough to meet the intention of Article 5.2, FD that MS provide for liability of legal persons "where the lack of supervision or control by a person referred to in Article 5.1, FD 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".

However, this condition can not be separated from the other necessary condition set out at Chapter 36 - section 7, Criminal Code, namely that the situation must be one where there has been "gross disregard...or is otherwise of a serious kind" which implies that the offence can only be prosecuted and the penalty applied once the situation exceeds a certain threshold of culpability. The FD makes no such provision however.

SE partly meets the requirements of Article 5.2, FD

United Kingdom:

The UK informed the Commission that it addresses this measure in two ways. Firstly, the civil law of negligence provides the possibility for a plaintiff to sue a legal person on the basis that the legal person owed him a duty of care, had failed to fulfil it, and that this had resulted in damage to the plaintiff. If s/he could show these things, the court would award damages to him/her, which the legal person would have to pay.

The UK supports this position by referring to the equivalent Article (Article 3 (2), Second Protocol of the Convention on the Protection of the European Communities' Financial Interests (PIF) (OJ C 221 19 July 1997). It points out that the Explanatory Report to that Protocol (OJ C 091 31 March 1999) states "while the measures to be taken under Article 3 (2) and 4 (2) [of the Protocol] *may be* criminal sanctions, administrative and civil law measures *are possible as well [italics inserted]*" (Section 4.3, Explanatory Report refers).

However, if the UK is going to invoke this Explanatory Report, it should also in relation to Article 5.1 FD apply the Explanatory Report's statement (at section 3.2) that, in order to implement the Second Protocol, MS will have to insert all three elements in their domestic legislation as alternatives on which the leading position may be based. In this regard, the UK has stated that it only used the 3rd element.

Secondly, the UK informed the Commission that the Proceeds of Crime Act, 2002 (text not supplied) provides that where a benefit accrues to a legal person as a result of a crime (not only corruption, and not only because of an act or omission by an employee etc.), the proceeds could be recovered by a civil action taken by the relevant authorities under this Act. A direct link between the corrupt act and the enrichment of the company, of which the latter would in effect be a side effect of the former, would be necessary to prove liability.

This discussion would appear more relevant to Article 6, which addresses penalties for legal persons. Insofar as it is relevant to Article 5, it fails to address the question of the legal person's criminal liability. The Commission's view here is that the liability is a criminal liability, which must be matched by a criminal sanction and that such a criminal sanction may be supplemented by other measures which are administrative or civil in nature. The Commission does not consider that administrative or civil sanctions alone are sufficient.

UK does not meet the requirements of Article 5.2, FD.

Article 5(3): Analysis of Member States

Belgium:

Article 5, Criminal Code provides that: "Si la personne physique identifiée a commis la faute sciemment et volontairement, elle peut être condamnée en même temps que la personne morale responsable."

BE meets the requirements of Article 5 (3), FD.

Denmark:

In its covering note DK makes no reference to whether or not liability of a legal person excludes criminal proceedings against natural persons involved as perpetrators, instigators or accessories in offences under Articles 2 and 3, FD.

There is insufficient information to assess whether DK meets the requirements of Article 5(3), FD.

Estonia:

This is addressed by section 14(2) Criminal Code which provides that prosecution of a legal person does not preclude prosecution of the natural person who committed the offence.

EE meets the requirements of Article 5(3), FD in respect of Article 5(1) but not of 5 (2).

Finland:

FI provides no information in this regard.

France:

FR provides no information in this regard.

Germany:

DE provides no information in this regard.

Hungary:

HU supplied neither the text of the relevant provision (section 2, Act CIV of 2001 on Measures Applicable to Legal Persons) nor a commentary.

There is insufficient information to assess whether HU meets the requirements of Article 5(1), FD.

Ireland:

IE informs the Commission that criminal proceedings against natural persons in respect of such offences are not precluded under Irish law. Indeed, section 9, Prevention of Corruption (Amendment) Act, 2001 which deals with the liability of legal persons in relation to the Prevention of Corruption Acts, 1889 to 2001 provides that where an offence under those Acts has been committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any wilful neglect on the part of a person who is a director, manager, secretary or other officer of the body corporate, or a person who was purporting to act in any such capacity, that person as well as the body corporate shall be guilty of an offence and be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence.

IE meets the requirements of Article 5(3), FD.

Latvia:

Section 12, Chapter I General Part provides for the criminal liability of a natural person who has committed a criminal offence, even where in the service of a legal person.

LV meets the requirements of Article 5(3).

Lithuania:

The wording of Article 20 (4), Criminal Code, closely reflects that of Article 5(3), FD.

LT meets the requirements of Article 5(3).

Luxembourg:

LU informs the Commission that the liability of legal persons does not preclude the taking of a criminal prosecution against any natural person who is a perpetrator, instigator or accomplice in the offence.

LU meets the requirements of Article 5(3), FD.

The Netherlands:

Section 51, Criminal Code provides that where a criminal offence is committed by a legal person, the penalty can be imposed either on the legal person, the relevant natural person(s) or both, as appropriate (subsection 2).

NL meets the requirements of Article 5(3), FD.

Poland:

Article 6, Criminal Liability of Bodies Corporate Act of 28 October 2002 provides that criminal liability, or lack thereof, shall not exclude individual legal liability of the offender.

PL meets the requirements of Article 5 3, FD.

Portugal:

Article 2, Decree-Law No. 28/84 provides that a person representing a legal person is themselves liable for an offence undertaken on the legal person's behalf, while Article 3(3) provides that even if the legal person is liable, this does not preclude the liability of the individual perpetrator(s).

PT meets the requirements of Article 5 3, FD.

Slovenia:

Article 5(2), Criminal Liability of Legal Entities Act provides that the "liability of a legal person does not preclude the criminal liability of natural persons or responsible persons for the committed criminal offence."

SI meets the requirements of Article 5.3, FD.

Sweden:

The legislation supplied by SE does not appear to include a specific provision in this regard. However, it is noted that Chapter 36 - Section 10 sets out a number of criteria for remission or reduction of the corporate penalty, one of which is where the relevant natural person has received a penalty. This would seem to imply that liability of the legal person does not exclude criminal proceedings against natural persons.

SE meets the requirements of 5.3, FD.

United Kingdom:

The UK informs the Commission that the liability of a legal person does not preclude criminal proceedings against natural persons who are involved in the commission of an offence of the

type referred to in Articles 2 and 3. However, no reference is provided to support this statement.

The UK appears to meet the requirements of Article 5.3, FD.

Article 6 – Penalties for legal persons

General comments:

This Article of the Framework Decision repeats its predecessor in the Joint Action (the one minor difference is the replacement of the word "sanctions (JA)" with "penalties" (FD)). As mentioned in relation to Article 5, 3 MS (AT, IT, SK) do not have legislation in place to transpose either Articles 5 or 6. LU has indicated that it is preparing legislation to provide for the possibility of fines for legal persons.

Summary table of the transposing legislation adopted by Member States

MS	Legislation	Measures which appeared relevant to Commission's analysis (where different to MS' citations)
AT	Bill to be laid before Parliament	
BE	Articles 7bis and 41bis, Criminal Code	Articles 7bis, 41bis, 66, 67, 69Criminal Code
DE	Sections 30 and 130, Administrative Offences Act	
DK	Section 25, Criminal Code	
EE	Sections 44, 46, 293-298, Criminal Code	
FI	Chapter 9, Criminal Code	It is presumed that this refers to Chapter 9, Criminal Code (Act No. 743 of 1995 as amended by Act No. 61 of 2003)
FR	Article 445-4, Criminal Code	Articles 121-2 (text not supplied), 445-4, Criminal Code and the legislation to which cross reference is made Articles 131-21, 131-35, 131-38, 131-39, (text not supplied)
HU	Section 3, Act CIV of 2001 on Measures Applicable to Legal Persons	Sections 3 - 6, Act CIV of 2001 on Measures Applicable to Legal Persons
IE	Section 9, Prevention of Corruption (Amendment) Act 2001	
IT	No provision to address this Article	
LT	Articles 43, 47, 52 and 53, Criminal Code	

LU	Article 203, Amended Act of 10 August 1915; draft legislation to provide for the penalty of fines is under preparation	
LV	Chapter VIII	
NL	Sections 23, 51 Criminal Code as well as the provisions cited in relation to Articles 2 and 3, FD	
PL	Article 7-9, Criminal Liability of Bodies Corporate Act 2002	
PT	Articles 7-8, Decree-Law No. 28/84	
SE	Chapter 36 Sections 8-10, Criminal Code, and section 4, Trading Prohibition Act (1986:436).	
SK	SK's National Council did not approve its proposals, and new legislation is under preparation	
SI	Articles 12, 18, 20, 21 and 26, Criminal Liability of Legal Entities Act	
UK	- The Interpretation Act 1978 - Prevention of Corruption Act 1906	

Summary account of the transposition

Because both Articles 5 and 6 deal with legal persons, the difficulties and gaps in MS' legislation, or in the information they supplied, also impacted on the rate of transposition of Article 6. Five MS (DK, LT, NL, PL, SI) transposed the Article fully. Further information is required from a number of MS in order to assess their position.

In those instances where MS (BE, FI) provided the level of penalty only in pre-euro currency, they are invited to forward the up-to-date penalty levels in euro for assessment.

With regard to Article 6.1, FD the Commission notes that FI's national legislation provides a number of grounds on which either the bringing of charges against a legal person or the imposition of a fine may be waived. FI is invited to provide clarification of these waivers and any further information which may be relevant.

Summary table of the transposition

MS	Article 6(1)	Article 6(2)	Comments
AT	---	---	AT has not transposed Article 6

BE	There is insufficient information to assess whether BE meets the requirements	There is insufficient information to assess whether BE meets the requirements	There is insufficient information to assess whether BE has transposed Article 6
DE	There is insufficient information to assess whether DE meets requirements	Meets requirements	DE has partly transposed Article 6
DK	Appears to meet requirements	Appears to meet requirements	DK has transposed Article 6 (tentative pending receipt of text)
EE	Meets requirements	Does not meet the requirements	EE has partly transposed Article 6
FI	Does not meet the requirements	FI meets the requirements	FI has partly transposed Article 6
FR	There is insufficient information to assess whether FR meets requirements	There is insufficient information to assess whether FR meets requirements	There is insufficient information to assess whether FR has transposed Article 6
HU	Meets requirements	There is insufficient information to assess whether HU meets requirements	HU has partly transposed Article 6
IE	Meets requirements	--- (since it is currently preparing legislation to meet requirements of Article 5(2) FD)	IE has partly transposed Article 6
IT	---	---	IT has not transposed Article 6
LT	Meets requirements	Meets requirements	LT has transposed Article 6
LU	Partly meets requirements	Meets requirements	LU has partly transposed Article 6
LV	Meets requirements	Does not meet the requirements	LV has partly transposed Article 6
NL	Meets requirements	Meets requirements	NL has transposed Article 6
PL	Meets requirements	Meets requirements	PL has transposed Article 6
PT	Meets requirements	Partly meets the requirements	PT has partly transposed Article 6
SE	Meets requirements	Partly meets the requirements	SE has partly transposed

			Article 6
SK	---	---	SK has not transposed Article 6
SI	Meets requirements	Meets requirements	SI has transposed Article 6
UK	(1) UK (England, Wales and Northern Ireland) meets requirements (2) UK (Scotland) there is insufficient information to assess whether UK meets the requirements	Does not meet the requirements	UK has partly transposed Article 6

Article 6(1) Analysis of Member States

Belgium:

Article 7bis, Criminal Code provides that a fine can be imposed on a legal entity which is convicted of an offence, including a criminal offence, and Article 41bis, Criminal Code provides further information on the level of such fines. The fine's level is dependent on the sanction available under the individual Article which creates the offence.

As discussed in respect of Article 4.1, FD the material provided does not include details of the penalties which may be imposed on those who commit active or passive corruption, nor is such information available in respect of Article 66, Criminal Code. With regard to the offences which are addressed at Article 67, Criminal Code, Article 69 (accomplices), Criminal Code provides that they would be subject to a penalty which is less than that for a perpetrator of a serious crime and not exceeding two thirds of that for a less serious offence.

Accordingly, it is not possible to assess whether the level of fine available for legal persons in respect of offences under Articles 2 and 3, FD is effective, proportionate and dissuasive.

Note: The legislative extract (Article 41bis, Criminal Code) describes the penalties in Belgian Francs. As Belgium is now in the euro zone, it is invited to provide information on the level of the relevant penalties in euro.

There is insufficient information to assess whether or not BE meets the requirements of Article 6.1, FD.

Denmark:

Section 25, Criminal Code, provides that a legal person may be fined where this is determined by or pursuant to the law. DK does not supply information as to whether other types of penalties may also be imposed.

DK meets requirements of Article 6(1), FD.

Estonia:

With regard to active corruption, the penalty in respect of a legal person which grants or promises a gratuity is a fine (section 297(3), Criminal Code). The penalty in respect of a legal person which grants or promises a bribe is a fine (section 298 (3), Criminal Code) and, if committed at least twice, is a fine or compulsory dissolution (section 298 (4), Criminal Code).

With regard to passive corruption, the penalty in respect of a legal person, which accepts a gratuity, whether committed once, twice or more often, whether the gratuity was demanded, whether it was accepted by a group or on a large-scale basis, is a fine (section 293, Criminal Code). The penalty in respect of a legal person which accepts a bribe is punishable by a fine (section 294(3), Criminal Code). If committed two or more times, if demanded, if accepted by a group or on a large-scale basis, is punishable by a fine or compulsory dissolution (section 294 (4), Criminal Code).

Further details about these penalties are set out in sections 44 and 46, Criminal Code. Section 44(8), Criminal Code provides that the fine may range from 50,000 Kroons (which EE indicated was equivalent to 3,205 euro in December 2005) to 250 million Kroons (equivalent to 1.6 million euro) and that a fine may be imposed in addition to compulsory dissolution. Section 46, Criminal Code provides that a court may impose compulsory dissolution on a legal person which has committed a criminal offence if commission of criminal offences has become part of its activities.

EE provides for criminal fines and also provides for winding up a legal person (an option under Article 6 1. (d), FD, and meets the requirements of Article 6.1, FD.

EE meets the requirements of Article 6.1, FD.

Finland:

A corporate fine may be imposed on a legal person (section 2, chapter 9, No. 61 Act 2003 refers) but there are several grounds for waiving of punishment (section 4, No. 61 Act 2003) or of the bringing of charges (section 7, No. 61 Act 2003). These are not confined to situations of minor damage resulting from the corrupt act but extend for example to situations where a member of the leadership of the corporation is convicted "and the corporation is small, the offender owns a large share of the corporation or his or her personal liability for the liabilities of the corporation is significant." (section 4 (3) No. 61 Act 2003).

FI is invited to provide further clarification of these limitations on corporate liability.

Note: neither version of Chapter 9, Criminal Code, appears to address the provision of other forms of penalty for a legal person. These are, however, a discretionary element of Article 6.1, FD.

FI does not meet the requirements of Article 6.1, FD.

France:

Article 445-4 provides for penalties for a legal person convicted of active or passive corruption which, FR informs the Commission, is a fine of 5 times that for a natural person, namely 375,000 euros (Article 121-2, Criminal Code also refers – text not supplied).

The full description of further measures is as follows:

L'amende suivant les modalités prévues par l'article 131-38;

Pour une durée de cinq ans au plus, les peines mentionnées aux 2°, 3°, 4°, 5°, 6° et 7° de l'article 131-39; L'interdiction mentionnée au 2° de l'article 131-39 porte sur l'activité dans l'exercice ou à l'occasion de laquelle l'infraction a été commise;

La confiscation, suivant les modalités prévues par l'article 131-21, de la chose qui a servi ou était destinée à commettre l'infraction ou de la chose qui en est le produit, à l'exception des objets susceptibles de restitution;

L'affichage ou la diffusion de la décision dans les conditions prévues par l'article 131-35.

However, FR does not supply the texts of any of the Articles to which cross-reference is made.

Furthermore, FR informs the Commission that its legislation provides, for a maximum of 5 years, the placing of the legal entity under judicial surveillance and its exclusion from competing for public procurement contracts.

FR is invited to supply the text of all Articles mentioned above.

There is insufficient information to assess whether FR meets the requirements of Article 6.1, FD.

Germany:

Only section 30, Administrative Offences Act is relevant to Article 6(1), and the penalty it provides is a maximum fine of 1 million euro, for an intentional criminal offence, or of 500,000 euro, for a criminal offence committed by negligence (subsection (2) refers).

DE does not indicate if other forms of penalty may be imposed.

There is insufficient information to assess whether DE meets the requirements of Article 6.1, FD.

Hungary:

Section 3, Act CIV of 2001 on Measures Applicable to Legal Persons provides that a fine may be imposed on a legal person. Section 6 of that Act provides that the fine would be at least 500,000 Hungarian Forint (HUF) (1,900 euro – informal conversion as of October '06) up to a maximum of 3 times the financial advantage gained or intended to be gained by the offence. Other penalties may also be imposed such as winding up the legal entity or limiting its activity (section 3, Act CIV of 2001). Further information is provided at sections 4 and 5 respectively of that Act.

HU meets the requirements of Article 6(1), FD.

Ireland:

Section 9, Prevention of Corruption (Amendment) Act 2001 provides that a body corporate would be proceeded against and punished in accordance with the penalties laid down in the Prevention of Corruption Acts, 1889 to 2001 which in effect means it would be liable to a fine

without a predetermined maximum level. IE does not provide information as to whether or not other types of penalties are available.

IE meets the requirements of Article 6(1), FD.

Latvia:

Section 70(2)(3) provides that only a monetary levy may be applied to a legal person which has committed an offence under the Special Part of this Law (thereby including the offences listed at sections 196 and 199 of Chapter XIX Special Part), where that offence is at the level of a *criminal violation* (which carries a term of imprisonment of less than 2 years) (section 7(2), Chapter II, Criminal Offences) or of a *less serious crime* (which carries a term of imprisonment exceeding 2 years) (section 7(3), Chapter II, Criminal Offences). In the case of *serious crimes* and *especially serious crimes*, there is provision for a range of penalties: liquidation, limitation of rights, confiscation of property or the application of a monetary levy (section 7(4), Chapter II, Criminal Offences).

LV meets the requirements of Article 6(1) FD.

Lithuania:

A legal person's liability in respect of employees etc as described at Article 20(2) gives rise to the types of penalty specified at Article 43.

Article 43 sets out the framework of penalties in respect of a legal person, further details on which are provided by Articles 47, 52 and 53. Article 43 provides that a legal person may be subjected to a fine, up to a maximum of 10,000 times the minimum subsistence amount (Article 47(4)); to a restriction of its activities, which could involve a prohibition to practice a certain activity or the closure of a certain department of the legal person for a period of between 1 and 5 years (Article 52); liquidation of the legal person, defined as ceasing all economic, commercial, financial or professional activity and closing all its departments (Article 53).

Article 43 (4) confirms that the penalties for the offences set out in the Special Provisions of the Code (which thereby includes Articles 225 passive corruption, 226 corruption on the part of an intermediary, and 227 active corruption) will be those provided under Article 43.

Article 43 also contains a provision that only one penalty may be imposed on a legal person for one criminal act (subsection (3)). This appears to imply that for example if a legal person were fined in respect of a particular offence, other penalties could not also be imposed. However, given that a penalty of a fine is available in the legislation, and that the provision of other forms of penalty is not mandatory, this would not seem to prevent LT meeting the requirements of Art. 6 (1).

LT meets the requirements of Article 6(1) FD.

Luxembourg:

Article 203, Amended Act of 10 August 1915, provides for the dissolution and liquidation of every legal person registered under LU law which commits a criminal offence. This is not limited by linking it to an act committed for the legal person's benefit by a person as described at Article 5 (1), FD and is therefore broader in scope than the FD.

LU also drew the Commission's attention to the preparation of draft legislation which would provide for the possibility of fining a legal person. There is no further information concerning progress with the draft. However, Article 6 (1), FD requires MS to have in place a penalty of criminal or non-criminal fines, with other sanctions being optional. Until the draft legislation is in place, LU fails to meet this requirement.

LU partly meets the requirements of Article 6 (1), FD.

The Netherlands:

NL informs the Commission that legal persons are, as far as possible, subject to the same penalties as natural persons. The level of fine payable would therefore appear to be a fine of the fifth category, that is a maximum of 45,000 euro (section 23 (2), Criminal Code refers). However, section 23 (7) and (8) provide that, in respect of a legal person (and a company without legal personality, partnership or assets) if the category of fine available for the offence does not allow a suitable penalty to be imposed, a fine shall be imposed up to the amount corresponding to the next highest category, which in this case would be a fine of the sixth category, carrying a maximum of 450,000 euro.

NL does not provide information as to whether or not other types of penalties, as suggested at Article 6(1), FD may also be imposed on a legal person.

NL meets the requirements of Article 6(1), FD.

Poland:

Article 7 (1), Criminal Liability of Bodies Corporate Act of 28 October 2002 provides for the imposition on a body corporate of a fine ranging from one thousand to 20 million PLN (ZLOTY) (*maximum is approx. 5 million euro – informal calculation Oct 06*), provided that such a fine does not exceed 10% of its revenue in the financial year during which the offence was committed.

Articles 8 and 9, Criminal Liability of Bodies Corporate Act of 28 October 2002 respectively, provide for various other penalties including confiscation orders and orders prohibiting them from carrying out certain activities and/or receiving state aid and/or competing for public tenders etc. Prohibition orders are issued for a period of 1 to 5 years (Article 9 (2) refers).

PL meets the requirements of Article 6 (1), FD.

Portugal:

Article 7, Decree-Law No. 28/84 provides as penalties, a warning, a fine and a dissolution for criminal offences under the Decree-Law. Article 8 sets out a list of additional penalties:

- confiscation of property,
- guarantee of good conduct,
- injunction,
- temporary ban on carrying on certain activities or professions,

- temporary loss of the right to take part in public procurement procedures
- loss of the right to subsidies or grants awarded by public entities or departments
- loss of the right to take part in trade fairs or markets
- loss of the right to be supplied via civil-service or public-sector entities
- temporary closure of the establishment
- permanent closure of the establishment
- publication of the conviction.

PT meets the requirements of Article 6(1), FD.

Slovenia:

The penalties which may be imposed on a legal person in relation to a criminal offence are: a fine, confiscation of property and a judicial winding-up order (Article 12, Criminal Liability of Legal Entities Act).

With regard to offences listed at Article 25, Criminal Liability of Legal Entities Act, which includes active and passive corruption but not instigation, aiding and abetting (see also discussion under Article 5, FD), Article 26, Criminal Liability of Legal Entities Act provides for the possibility of a judicial winding-up order (Article 26 (3), Criminal Liability of Legal Entities Act) and a level of fine related to the level of imprisonment available for the main offence:

- if the main offence carries a period of imprisonment of up to 3 years, the maximum fine is 75 million Tolars (*0.31 million euro - informal conversion Oct '06*) or up to 100 times the amount of damage caused or property gained through the criminal offence (Article 26(1)(1), Criminal Liability of Legal Entities Act)
- if the main offence carries a penalty of imprisonment of up to 5 years, a fine is at least 2.5 million Tolars or up to a maximum of 200 times the damage caused or illegal gain obtained (Article 26 (1) (2), Criminal Liability of Legal Entities Act)
- where the penalty is imprisonment of more than 5 years, a judicial winding up order is not available (Article 26(3), Criminal Liability of Legal Entities Act) but a penalty of confiscation of property may be applied instead of a fine (maximum level of fine is not specified – Article 26 (2), Criminal Liability of Legal Entities Act refers).

Additional types of penalties may be imposed, including disqualification from a specific commercial activity (Articles 18 and 20, Criminal Liability of Legal Entities Act) or from activity based on licences etc granted by state bodies (Article 21, Criminal Liability of Legal Entities Act).

SI meets the requirement of Article 6.1, FD.

Sweden:

Chapter 36 - Section 8, Criminal Code provides for a range of fine of between 10,000 Swedish crowns and 3 million Swedish crowns, the amount of which, according to section 9, is determined by the nature and extent of the crime and its relation to the business activity. Section 10 sets out a number of criteria for remission or reduction of the penalty, one of which is where the relevant natural person has received a penalty.

Section 4, Trading Prohibition Act (1986:436) provides for the issue of an injunction against trading against natural persons of a specified status, where business activities have been conducted by a legal entity and provided such persons committed the crime in respect of business activities. The injunction may be imposed for a period of 3 to 10 years. Details of its scope are provided at section 6, and include a prohibition on conducting business activities.

SE meets the requirements of Article 6.1, FD.

United Kingdom:

In view of the necessary construction of the word "person" in a statute as including a "body of persons, corporate or incorporate" (Schedule 1, Interpretation Act 1978), the provisions of the Prevention of Corruption Act, 1906 apply to legal persons. Accordingly, the available penalties are

- on summary conviction, a fine not exceeding the statutory maximum (section 1 (1) (a), Prevention of Corruption Act, 1906)

- on conviction on indictment, a fine (which it explains is an unlimited fine) (section 1 (1) (b), Prevention of Corruption Act, 1906)

The UK states that in respect of England, Wales and Northern Ireland, Section 8, Accessories and Abettors Act, 1861 (text not supplied) provides that any person who aids, abets, counsels, or procures an indictable offence, (which includes the offences created by the 1906 Act), may be prosecuted and punished as a principal (here the term "principal" means the actual perpetrator of the crime). Therefore the penalties available for these offences are the same as for the offences of active and passive corruption.

Neither a commentary nor the text of the Criminal Procedure (Scotland) Act, 1995 are supplied.

The UK does not indicate whether other types of penalty such as those listed at (a) – (d) of Article 6.1, FD are available (these are not mandatory, of course).

The UK meets the requirements of Article 6.1, FD at least in respect of England, Wales and Northern Ireland, but there is insufficient information regarding the situation in Scotland.

Article 6(2) Analysis of Member States:

Belgium:

In view of the discussion at Article 5(2), FD where the Commission invites BE to provide further commentary on the extent to which its legislation (Article 5, Criminal Code) addresses the requirement that the legal person would be liable in situations where there has been a lack of supervision or control, it is not possible to assess whether or not BE meets the requirements of Article 5 (2), FD.

There is insufficient information to assess whether BE meets the requirements of Article 5.2, FD.

Denmark:

Section 25, Criminal Code, does not set an upper limit on the level of fine which may be imposed on a legal person.

DK appears to meet the requirements of Article 6.2, FD.

Estonia:

As EE does not provide for this situation in its legislation and does not meet the requirements of Article 5(2) FD it cannot meet the requirements of Article 6.2, FD.

Finland:

Details about corporate fines, including their method of calculation, are provided at section 5-9, chapter 9, No. 743 Act (1995). The maximum level of corporate fine is 5 million Finnish Markka (FIM) (section 5, No. 743 Act 1995).

Note: As FI is now in the euro zone, it is invited to provide information on the level of the relevant penalties in euro.

FI meets the requirements of Article 6.2, FD.

France:

As discussed in relation to Article 5.2, FD, in the absence of the text of Article 121-2, Criminal Code, it is unclear whether the situation described at Article 5.2 FD is covered by the broad approach taken in the text of the chapeau or whether any of the conditions in Article 121-2 might limit the scope of Article 445-4 in such a way as to have the effect that the requirements of Article 5.2 FD are not met.

Given that there is insufficient information to assess whether FR meets the requirements of Article 5.2, FD, it is not possible to assess the situation in regard to Article 6.2, FD.

Germany:

Both sections 30 and 130, Administrative Offences Act are relevant to Article 5(2). Section 30 provides for a penalty of a maximum fine of 1 million euro, for an intentional criminal offence, or of 500,000 euro, for a criminal offence committed by negligence (subsection (2) refers). Section 130 (3) provides that, where the breach of duty carries a penalty, the administrative offence is punishable by a maximum fine of 1 million euro, and that where the breach of duty carries a fine, or both a penalty and a fine (if the maximum fine applicable exceeds 1 million euro), then the size of the fine is to be determined with reference to the maximum fine applicable to the breach of duty.

DE meets the requirements of Article 6(2), FD.

Hungary:

Given that HU supplied insufficient information in respect of Article 5(2), FD there is also insufficient information available to assess whether it meets the requirements of Article 6(2).

Ireland:

IE informs the Commission that it is preparing legislation, the Criminal Justice (Miscellaneous Provisions) Bill, to address the requirements of Article 5 (2). Accordingly, Irish legislation does not yet make provision for the relevant penalties.

IE does not at present meet the requirements of Article 6(2), FD.

Latvia:

As stated earlier, LV did not appear to meet the requirements of Article 5(2), since it was unclear from its legislation whether, under Section 70(8) of Chapter VIII, a court could hold a legal person liable where its lack of supervision or control has made possible the commission of the offence, as required by Article 5(2).

Accordingly, LV does not appear to meet the requirements of Article 6(2) FD.

Lithuania:

Article 20 (3), Criminal Code, provides that a legal person would be liable for criminal acts committed for its benefit by an employee or legal representative as a result of inadequate supervision or control by a person, as described, and closely reflects that of Article 5(2), FD.

Article 43 sets out the framework of penalties in respect of a legal person, further details on which are provided by Articles 47, 52 and 53. Article 43 provides that a legal person may be subjected to a fine, up to a maximum of 10,000 times the minimum subsistence amount (Article 47(4)); to a restriction of its activities, which could involve a prohibition to practice a certain activity or the closure of a certain department of the legal person for a period of between 1 and 5 years (Article 52); liquidation of the legal person, defined as ceasing all economic, commercial, financial or professional activity and closing all its departments (Article 53). Article 43 also contains a provision that only one penalty may be imposed on a legal person for one criminal act (subsection (3)). This appears to imply that for example if a legal person were fined in respect of a particular offence, other penalties could not also be imposed. However, given that a penalty of a fine is available in the legislation, and that the provision of other forms of penalty is not mandatory, this would seem to meet the criterion that the penalties be "effective, proportionate and dissuasive".

LT meets the requirements of Art. 6(2), FD.

Luxembourg:

As discussed in relation to Article 5 (2), FD, LU informs the Commission that legal persons are liable for the criminal acts of active and passive corruption without any limiting requirement as to the absence of supervision or control. Article 6 (2), FD does not specify that a MS must impose a criminal or non-criminal fine on a legal person which is convicted of corruption, and therefore the LU approach of dissolving and liquidating every legal person registered under LU law which commits a criminal offence (Article 203, Amended Act of 10 August 1915 refers) is acceptable in relation to Article 6 (2), FD.

LU meets the requirements of Article 6 (2), FD.

The Netherlands:

As indicated already in relation to Article 5.2, FD Section 51, Criminal Code provides that criminal offences can be committed by both natural and legal persons (subsection 1). This is stated in such broad terms that it goes beyond the criteria set out in Article 5.2, FD. In addition, NL informs the Commission that legal persons are, as far as possible, subject to the same penalties as natural persons. The level of fine payable would therefore appear to be a fine of the fifth category, that is a maximum of 45,000 euro (section 23 (2), Criminal Code refers). However, section 23 (7) and (8) provide that, in respect of a legal person (and a company without legal personality, partnership or assets) if the category of fine available for the offence does not allow a suitable penalty to be imposed, a fine shall be imposed up to the amount corresponding to the next highest category, which in this case would be a fine of the sixth category, carrying a maximum of 450,000 euro.

NL meets the requirements of Article 6(2), FD.

Poland:

Article 5, Criminal Liability of Bodies Corporate Act of 28 October 2002 which is the Article transposing Article 5(2), FD does not itself mention the penalty to be imposed on a legal body. It would appear therefore that the terms of Article 7, Criminal Liability of Bodies Corporate Act of 28 October 2002 relating to the calculation of fines, would apply.

PL meets the requirements of Article 6 (2), FD

Portugal:

The relevant Article in Portuguese law is Article 3 (1), Decree-Law No. 28/84, which provides for the liability of legal persons, undertakings and de facto associations, in respect of offences specified in that law where committed by their management bodies or representatives on their behalf and in their collective interest. As Article 3(1) is within the same Decree-Law as Article 7 and 8, Decree-Law No. 28/84, then the terms of those Articles 7 and 8, are applicable. Article 7, Decree-Law No. 28/84 provides as penalties, a warning, a fine and a dissolution for criminal offences under the Decree-Law. Article 8 sets out a list of additional penalties:

- confiscation of property,
- guarantee of good conduct,
- injunction,
- temporary ban on carrying on certain activities or professions,
- temporary loss of the right to take part in public procurement procedures
- loss of the right to subsidies or grants awarded by public entities or departments
- loss of the right to take part in trade fairs or markets

- loss of the right to be supplied via civil-service or public-sector entities
- temporary closure of the establishment
- permanent closure of the establishment
- publication of the conviction.

However, as discussed under Article 5(2), FD the terms of Article 3 (1), Decree-Law No. 28/84, do not appear to fully meet the requirements of Article 5 (2), FD, and therefore PT's measures cited in relation to Article 6(2) FD do not appear to fully meet the requirements of that Article.

PT partly meets the requirements of Article 6(2), FD.

Slovenia:

The offence is provided for at Articles 4(2) and (4), Criminal Liability of Legal Entities Act which does not however specify the level of penalty for these offences. It would appear that for that information, one must refer to the offence carried out by the perpetrator, and that the penalty which may be imposed on the legal person will vary accordingly.

SI meets the requirements of Article 6.2, FD.

Sweden:

The penalty available in respect of an offence of active or passive corruption arising from lack of supervision is the imposition of a corporate fine (Chapter 36 - section 7, Criminal Code) ranging from 10,000 Swedish crowns to 3 million Swedish crowns (Chapter 36 - section 8, Criminal Code), which may be remitted or reduced in certain circumstances (Chapter 36 - section 10, Criminal Code), and an injunction against trading (section 4, Trading Prohibition Act 1986:436)

As discussed at Article 5.2, FD, SE does not fully meet the requirements of that Article because one of the two conditions which are necessary for the application of Chapter 36 - section 7, Criminal Code, which provides for a penalty of a fine where a crime has been committed by a legal person in the exercise of business activities, is that the situation must be one where there has been "gross disregard...or is otherwise of a serious kind" which implies that the offence can only be prosecuted and the penalty applied once the situation exceeds a certain threshold of culpability. The FD makes no such provision however. Accordingly, although Swedish law provides a penalty for a legal person which has not done what could reasonably be required of it to prevent the crime, the full scope of Article 5.2 is not met.

Accordingly, SE partly meets the requirements of Article 6.2, FD

United Kingdom:

Given the discussion in relation to the UK's transposition of Article 5.2, FD and the view taken that it did not meet the requirements of that Article, it is not in a position to meet the requirements of Article 6.2, FD.

Article 7 – Jurisdiction

General comments

While the Commission recognises that jurisdiction measures are a standard feature of Framework Decisions, nevertheless it urges MS to provide the same level of information when responding to such Articles as they do in relation to those Articles which are subject-specific. Due to the unevenness of the MS' replies in relation to this Article, only an incomplete picture of its transposition could be prepared by the Commission at this stage. MS are invited to provide all other relevant information in due course, to assist in the preparation of any subsequent Report.

Article 7(1) Summary table of the transposing legislation

MS	Legislation	Comments by Commission
AT	Sections 62 and 67, Code of Criminal Procedure	
BE	Articles 3 and 5, Criminal Code and Article 7 de la loi du 17 avril 1878 contenant le Titre préliminaire du Code de procedure penal.	
DE	Sections 3, 7, 9 Criminal Code	
DK	Sections 6 – 9, Criminal Code.	
EE	sections 6 and 7, Criminal Code	
FI	sections 1 and 6, chapter 1, Criminal Code (texts not supplied)	
FR	Texts not supplied	
HU	Section 3, Act IV of 1978 on the Criminal Code	
IE	IE informs the Commission that the relevant legislation is sections 6 and 7, Prevention of Corruption (Amendment) Act 2001.	It is noted that, as the scope of the provisions of section 7 is confined to those persons listed at subsection 5(b) of section 1, Prevention of Corruption Act, 1906 as inserted by section 2, Prevention of Corruption (Amendment) Act 2001, who are persons in the <i>public sector</i> , this is not relevant to the current analysis.
IT	Sections 6 – 9, Criminal Code	Section 8 is not relevant as it deals with political offences.
LT	Articles 4 and 5, Criminal Code	
LU	Article 5, Code of Criminal Procedure	
LV	Sections 2-4, Chapter I, General Provisions.	

NL	Sections 2 5(1) part 2, Criminal Code.	
PL	Articles 5, 109, 112 (14) (5) and 113, Criminal Code.	
PT	As Decree-Law No. 28/84 stipulates that the Criminal Code applies wherever no specific provision is laid down in the Decree-Law itself, the question of jurisdiction is addressed at Articles 4 and 5, Criminal Code.	
SE	Chapter 2, Criminal Code	
SK	Sections 17 and 18, Criminal Code	
SI	Articles 120-125, Criminal Code and Article 3, Criminal Liability of Legal Entities Act	However, Article 121 relates to specific offences which do not include active (Article 248, Criminal Code) or passive corruption (Article 247, Criminal Code), and is therefore not relevant to the analysis of the FD's transposition
UK	States that it has not needed any specific provision for its implementation.	

Article 7(1) Summary account of the transposition

As mentioned previously, Article 7, although important to the effectiveness of the FD, was somewhat overlooked by MS in terms of providing their transposition details to the Commission. This was one of the contributory factors to the low level of transposition – on the basis of the information supplied, only 3 MS (DE, DK, UK) can be said to have transposed this Article. The second main contributory factor was a lack of information specifically with regard to offences occurring *in part* on the territory of a MS (Article 7 (1) (a) FD refers). It is of course possible that MS' legislation makes the assumption that a reference to jurisdiction over offences occurring on the territory includes this element, but without an explicit reference either in the text of the legislation or in the accompanying commentary, this assumption could not be made in the analysis. Finally, it was clear that many MS have not addressed in their legislation the option at Article 7 (1) (c) of taking jurisdiction over offences committed for the benefit of a legal person that has its head office in its territory and have either furnished a Declaration opting out of this sub-Article or have not provided information at all within their reply.

Article 7(1): Summary table of the transposition

MS	Article 7 (1) (a)	Article 7 (1) (b)	Article 7 (1) (c)	Comments
AT	AT has not provided information	Section 65, Code of Criminal Procedure and otherwise the exception clause of Article 7(2) is	"There is no express provision in Austrian law for offences committed abroad for the benefit of a legal	There is insufficient information to assess whether AT has

		used	person established in Austrian territory, and the exception clause of Article 7(2) is used accordingly".	transposed Article 7 (1)
BE	<p>Article 3, Criminal Code provides for BE jurisdiction where the offence takes place on BE territory. It does not mention explicitly offences which take place <i>partly</i> on BE territory.</p> <p>BE partly meets the requirements</p>	<p>Article 7 de la loi du 17 avril 1878 contenant le Titre préliminaire du Code de procédure pénale provides for jurisdiction on the basis of nationality, provided that dual criminality can be invoked.</p> <p>BE meets the requirements</p>	<p>Article 3, Criminal Code provides for BE jurisdiction where the offence takes place on BE territory. It does not mention explicitly offences which take place <i>partly</i> on BE territory. Article 5, Criminal Code provides for criminal liability of legal persons. It does not explicitly refer to legal persons which have their head office on BE territory.</p> <p>BE is invited to provide further information on both these points.</p> <p>There is insufficient information to assess whether BE meets the requirements</p>	BE has partly transposed Article 7 (1)
DE	<p>This is addressed by section 3 in conjunction with section 9, Criminal Code.</p> <p>DE meets the requirements</p>	<p>This is addressed by sections 7(2) (1) and 299(3), Criminal Code. DE states that under its law, acts committed abroad by Germans are punishable if, at the time of their commission, they are punishable at the place of their commission or are not subject to any criminal jurisdiction there (section 7(2)(1) Criminal Code refers) and that the definition of the conduct constituting a criminal offence pursuant to section 299 also</p>	<p>DE does not apply the jurisdiction rule in Art 7(1)(c) in respect of cases in which an offence has been committed for the benefit of a legal person which has its head office in the territory of the relevant Member State.</p>	DE has transposed Article 7 (1)

		expressly covers offences relating to competition abroad (section 299(3) refers).		
DK	<p>Section 6 (1), Criminal Code, provides for DK jurisdiction where an offence takes place fully or partly in DK. Attempts and participatory acts committed in DK territory also fall under DK jurisdiction under this provision even if the relevant offence is carried out or intended to be carried out abroad. In addition, Section 8, Criminal Code, provides that, under certain circumstances, acts committed abroad come under DK jurisdiction irrespective of where the offender resides.</p> <p>Meets requirements</p>	<p>DK notified the Commission that it has opted to make jurisdiction conditional on the offence being punishable in the country in which it was committed (dual criminality). DK also states that acts committed outside DK by a person holding DK citizenship, resident in DK or a person holding the citizenship of or right of residence in another Nordic country who is staying in DK, come under DK jurisdiction where the offence is punishable under legislation regarding the place of the crime.</p> <p>Meets requirements</p>	DK has opted not to apply this rule.	DK has transposed Article 7 (1)
EE	There is insufficient information to assess whether EE meets the requirements	<p>Section 7, Criminal Code</p> <p>Meets requirements</p>	As permitted under Article 7.2, FD EE declares that it will not apply this jurisdiction rule when offences are committed outside its territory and other grounds for jurisdiction set out in its criminal law do not apply.	There is insufficient information to assess whether EE has transposed Article 7 (1)
FI	FI states that this Article is transposed by section 1, chapter 1, Criminal Code, the text of which is not supplied. Instead, section 11, chapter 1 No. 604 Act on the Amendment of the Criminal Code 2002 is supplied. However, section 11 of the 2002	<p>Although FI states that the relevant text is section 6, chapter 1, Criminal Code, this has not been supplied.</p> <p>FI's Declaration is noted.</p>	<p>FI states that under Article 7 (2) and in accordance with Article 7(4), it will not apply Article 7 (1) (c) as the sole basis for jurisdiction.</p> <p>FI's declaration is</p>	There is insufficient information to assess whether FI has transposed Article 7 (1)

	<p>Act deals with dual criminality but is not relevant to offences of active or passive corruption under sections 7 and 8, chapter 30, Criminal Code.</p> <p>Note: the only offences about bribery which are listed in section 11 of the 2002 Act are offences of passive corruption of public sector persons from chapter 40, Criminal Code, which is outside the scope of the FD.</p> <p>There is insufficient information to assess whether FI meets the requirements</p>		noted.	
FR	Does not supply details of its legislation.	FR's Declaration is noted.	Does not supply any information in relation to this Article.	There is insufficient information to assess whether FR has transposed Article 7 (1)
HU	Does not indicate if it has jurisdiction over offences partly committed on its territory	HU has jurisdiction over crimes committed by HU citizens abroad, once they are crimes in accordance with HU law.	HU Declaration	HU has partly transposed Article 7 (1)
IE	Section 6, Prevention of Corruption (Amendment) Act, 2001 provides that a person may be tried in the State in relation to an offence of corruption if any of the acts alleged to constitute the offence was committed in the State notwithstanding that other acts constituting the offence	IE informs the Commission that the relevant legislation is sections 6 and 7, Prevention of Corruption (Amendment) Act 2001. However, it is noted that: <ul style="list-style-type: none"> - section 6 does not deal with nationality aspects of jurisdiction, and - the scope of the 	IE informs the Commission that it is preparing legislation, the Criminal Justice (Miscellaneous Provisions) Bill, to address the requirements of Article 7 (1) (c). IE does not at present	IE has partly transposed Article 7(1)

	<p>were committed outside the State.</p> <p>Ireland meets the requirements</p>	<p>provisions of section 7 is confined to those persons listed at subsection 5(b) of section 1, Prevention of Corruption Act, 1906 as inserted by section 2, Prevention of Corruption (Amendment) Act 2001, who are persons in the public sector</p> <p>It would therefore appear that neither of these sections is relevant to the analysis of Article 7 (1) (b).</p> <p>IE does not meet the requirements</p>	<p>meet the requirements.</p>	
IT	<p>Section 6, Criminal Code provides that an offence is considered to have been committed in IT territory if the act or omission constituting it occurred there in whole or in part or the effects of the act or omission were felt and recorded there.</p> <p>IT meets the requirements</p>	<p>Section 9, Criminal Code provides for jurisdiction in relation to offences against ordinary law committed outside IT by an IT citizen, including offences where the penalty is a period of imprisonment of 3 years or more. As the penalty under section 2635, Civil Code is for a period "not exceeding 3 years" this penalty appears to just barely meet this criterion, and in this case the penalty can be imposed if the person is found in Italian territory.</p> <p>Where a lesser custodial penalty has been imposed, section 9, Criminal Code provides that the person be sentenced either on application by the Ministry of Justice or on a complaint from the victim of the offence.</p>	<p>Has supplied no provisions in this regard, nor has it informed the Commission that it has taken a decision not to apply Article 7 (1) (c), in accordance with Articles 7 (2) and 7 (4).</p> <p>There is insufficient information to assess whether IT meets the requirements</p>	<p>IT has partly transposed Article 7 (1)</p>

		In view of these limitations, IT does not meet the requirements		
LT	There is insufficient information to assess whether LT meets the requirements	LT states that the rules relating to jurisdiction referred to in Article 7(1)(a) and 7(1)(b), FD, are laid down by Articles 4 and 5 of its Criminal Code. There is insufficient information to assess whether LT meets the requirements	LT states that the rules relating to jurisdiction referred to in Article 7(1)(a) and 7(1)(b), FD, are laid down by Articles 4 and 5 of its Criminal Code. With regard to Article 7(1)(c), LT claims a derogation.	There is insufficient information to assess whether LT has transposed Article 7 (1)
LU	LU informs the Commission that its courts are competent to try criminal cases whether the offence took place in whole or in part in its territory. LU meets the requirements	Luxembourg informs the Commission that, by virtue of Article 5, Code of Criminal Procedure, it has jurisdiction, on the basis of dual criminality, over all Luxembourg nationals who commit an offence. LU meets the requirements	LU informs the Commission that, by virtue of Article 5, Code of Criminal Procedure, it has jurisdiction over every company which is registered under LU law (Article 203, Amended Act of 10 August 1915 refers). However, LU does not mention Article 203-1 of this Act, the text of which it has supplied, which provides that a LU court may close a foreign company which is convicted of a criminal offence. LU is invited to indicate the extent to which it considers Article 203-1 addresses the requirements of Article 7 (1) (c). There is insufficient information to assess whether LU meets the requirements	LU has partly met the requirements

<p>LV</p>	<p>Section 2, Criminal Code provides for the principle of territoriality but with no reference to offences occurring <i>in part</i> on LV territory.</p> <p>LV partly meets requirements</p>	<p>Section 4, Criminal Code provides for jurisdiction over LV citizens or non-citizens who hold a residence permit for LV.</p> <p>LV meets requirements</p>	<p>LV does not provide information with regard to this.</p> <p>There is insufficient information to assess whether LV meets the requirements</p>	<p>LV has partly transposed Article 7(1)</p>
<p>NL</p>	<p>Section 2, Criminal Code sets out the principle of territoriality in NL law.</p> <p>NL meets the requirements</p>	<p>Section 5(1) part 2, Criminal Code confers jurisdiction over NL citizens (but not clear if this extends to "nationals") as regards offences committed outside NL, subject to dual criminality.</p> <p>NL partly meets the requirements</p>	<p>NL's Declaration is noted</p>	<p>NL has partly transposed Article 7(1)</p>
<p>PL</p>	<p>Article 5, Criminal code provides for jurisdiction in respect of persons who commit offences in PL. It is not clear whether this provision also covers offences committed partly in PL.</p> <p>There is insufficient information to assess whether PL meets the requirements</p>	<p>Article 109, Criminal Code provides for jurisdiction in respect of PL citizens who commit offences abroad. Article 112 (14) (5), Criminal Code provides that, without a requirement of dual criminality, PL criminal law shall apply to PL citizens and foreigners who commit an offence from which they have received, even indirectly, material benefits in PL, while Article 113, Criminal Code provides that, without a requirement of dual criminality, PL Criminal law shall apply to PL citizens and foreigners whom it has decided not to extradite and who have committed, outside PL, an offence which PL is bound to pursue by virtue of international agreements.</p>	<p>PL provides no information</p> <p>There is insufficient information to assess whether PL meets the requirements</p>	<p>PL has partly transposed Article 7(1)</p>

		PL meets the requirements		
PT	<p>Article 4, Criminal Code provides that PT criminal law applies to acts committed on its territory, but it is not clear whether this provision also covers offences committed <i>partly</i> in PT.</p> <p>PT partly meets the requirements</p>	<p>Article 5 (c), Criminal Code provides that PT criminal law shall apply to acts committed outside its national territory by PT nationals subject to three conditions:</p> <p>(i) the perpetrators are found in PT</p> <p>(ii) the acts are also punishable under the law of the place where they were committed, unless there is no criminal jurisdiction there; and</p> <p>(iii) the acts constitute extraditable offences, but extradition cannot be authorised.</p> <p>PT meets the requirements</p>	PT does not provide any information in relation to Article 7 (1) (c), FD.	PT has partly transposed Article 7 (1)
SE	<p>Chapter 2 – section 1, Criminal Code provides for jurisdiction where the crime was committed, or can be assumed to have been committed, within the Realm, and section 4, Criminal Code states that a crime is deemed to have been committed where the criminal act was perpetrated and where it was completed, which would therefore appear to address the aspect of being partially committed in the territory.</p> <p>SE meets the requirements</p>	<p>Chapter 2 – section 2 provides for jurisdiction where a crime is committed by a SE national outside the realm.</p> <p>SE meets the requirements</p>	SE informed the Commission that it would not apply the jurisdiction rule in Article 7 (1) (c). It is therefore not clear how SE addresses those provisions of section 4, the Trading Prohibition Act (1986:436) which state that injunctions against trading can be imposed against the chief executive officer of such entities as European Economic Interest Groupings which have their registered office in SE and against members and alternate members of the managerial, administrative or supervisory organ, the managing director and	SE has partly transposed Article 7 (1)

			<p>the deputy managing director of European companies which have their registered office in SE.</p> <p>Sweden is invited to clarify its position in respect of Article 7 1 (c), FD.</p> <p>There is insufficient information to assess whether SE meets the requirements</p>	
SK	<p>Section 17, Criminal Code provides for jurisdiction in relation to offences which take place in whole or in part on SK territory.</p> <p>SK meets the requirements</p>	<p>Section 18, Criminal Code provides for jurisdiction in relation to offences which take place outside SK and are committed by a citizen of SK or a person without citizenship who has permanent residence in SK, or a foreign national who has permanent residence in SK.</p> <p>SK meets the requirements</p>	<p>SK has not provided either a text or commentary.</p> <p>There is insufficient information to assess whether SE meets the requirements</p>	SK has partly transposed Article 7 (1)
SI	<p>Article 120, Criminal Code provides for jurisdiction in respect of offences committed in the territory of SI, on domestic vessels and flights etc regardless of location. However, this does not appear to extend to offences committed partly on its territory.</p> <p>SI partly meets the requirements</p>	<p>With regard to offences committed by a national, SI has jurisdiction where:</p> <p>- the offence is committed abroad by any of its citizens.....and s/he has been apprehended in or extradited to SI (Article 122, Criminal Code), unless certain conditions are fulfilled, including that s/he has served the full sentence imposed in that country, has been returned to SI to serve</p>	<p>Article 3, Criminal Liability of Legal Entities Act, provides for the liability of both national and foreign legal persons in respect of offences committed in SI (subsection (1)), and for offences committed abroad against SI, a citizen thereof or a domestic legal person, if the legal person has its registered office in the territory of SI (subsection (2)).</p>	SI has partly transposed Article 7 (1)

		<p>the remainder of a sentence or has been acquitted by a foreign court (Article 124, Criminal Code) and credit is given for time served in detention abroad (Article 125, Criminal Code).</p> <p>SI meets the requirements</p>	SI meets the requirements	
UK	<p>The UK informed the Commission that, having regard to the general principles of its criminal law, the courts have held that the Prevention of Corruption Act 1906 can apply to offences committed in whole or in part in its jurisdiction.</p> <p>The UK meets the requirements</p>	<p>With effect from 14 February, 2002 section 109, Anti-Terrorism, Crime and Security Act 2001 (text supplied) extended the normal jurisdiction of the courts in cases of corruption, including active and passive corruption under section 1 (1) of the Act, to cover offences by UK nationals which take place outside the UK, without a dual criminality requirement.</p> <p>The UK meets the requirements</p>	<p>The UK makes a declaration that Article 7 (1) (c) will not be applied in full in the UK.</p> <p>It states that section 109, Anti-terrorism, Crime and Security Act 2001 extends UK jurisdiction to cover offences committed outside the UK by bodies incorporated under UK law, which it anticipates would cover most of the cases likely to arise under this Article. However, it explains that the concept of jurisdiction based on the issue of who benefits from a crime is alien to the UK system and a jurisdiction based on the location of a head office would in some cases give a different result to that based on incorporation under UK law.</p> <p>UK Declaration is noted.</p>	The UK has transposed Article 7 (1)

Article 7(2) Table of Declarations under Article 7 (2)

MS	Article which Declaration relates to	Terms of Declaration
AT	7 (1) (c)	"There is no express provision in Austrian law for offences committed abroad for the benefit of a legal person established in Austrian territory, and the exception clause of Article 7(2) is used accordingly".
DE	7 (1) (c)	Has decided not to apply the jurisdiction rules
DK	7 (1) (c)	Has decided not to apply the jurisdiction rules
EE	7 (1) (c)	Has decided not to apply the jurisdiction rules
FI	- 7 (1) (b) - 7 (1) (c)	- FI may require a charge or dual criminality by the Prosecutor General unless, in the latter case, the offence seriously infringes or endangers Finland's national, military or financial rights or interests under Article 7(2). - FI will not apply this as the sole basis for jurisdiction
FR	7 (1) (b)	"Conformément aux dispositions des paragraphes 2 et 4 de l'article 7, la République française déclare qu'elle n'établira sa compétence, dans le cas visé au paragraphe 1 point b) de l'article 7, que dans les cas ou conditions suivants: - lorsque les faits sont punis par la législation du pays où ils ont été commis et - lorsqu'ils ont fait l'objet d'une plainte de la victime ou de ses ayants droit, ou d'une dénonciation officielle par l'autorité du pays où ils ont été commis."
HU	7 (1) (c)	HU will not apply Article 7 (1) (c) which does not exist in HU criminal law
LT	7 (1) (c)	Has decided not to apply the jurisdiction rules
NL	7 (1) (b) and (c)	Will only apply where the offences mentioned in Articles 2 and 3, FD are punishable under the law of the country where they were committed.
PL	7 (1) (c)	Provides no information with regard to Article 7 (1) (c), therefore it is unclear whether it wishes to make a Declaration
SE	7 (1) (c)	Has decided not to apply the jurisdiction rules However, the Commission wonders how SE intends to address those provisions of section 4, the Trading Prohibition Act (1986:436) which state that injunctions against trading can be imposed against the chief executive officer of such entities as European Economic Interest Groupings which have their registered office in Sweden and against members and alternate members of the managerial, administrative or supervisory organ, the managing director and the deputy managing director of European companies which have their registered office in Sweden.

UK	7 (1) (c)	<p>The UK makes a declaration that Article 7 (1) (c) will not be applied in full in the UK.</p> <p>It states that section 109, Anti-terrorism, Crime and Security Act 2001 extends UK jurisdiction to cover offences committed outside the UK by bodies incorporated under UK law, which it anticipates would cover most of the cases likely to arise under this Article. However, it explains that the concept of jurisdiction based on the issue of who benefits from a crime is alien to the UK system and a jurisdiction based on the location of a head office would in some cases give a different result to that based on incorporation under UK law.</p>
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Article 7(3) Table of Member States' comments

A small number of MS provided information in relation to Article 7(3), as summarised in the following Table:

MS	Comments
DK	DK states that it extradites its own nationals under Danish law where certain conditions are met (Act No. 378 of 6 June 2002 refers). Denmark has also updated its legislation to make provision for the European Arrest Warrant and the surrender procedures between MS (Act No. 433 of 10 June 2003 refers).
IT	IT refers the Commission to its ratification of the European Extradition Convention of 13 December 1957.
LT	LT states that it implements Article 7(3), FD, by means of national legal acts relating to the surrender of persons, including nationals of the Republic of Lithuania, in accordance with a European Arrest Warrant.
NL	NL informed the Commission that under Dutch law, legal persons are presumed guilty for reasons including the fact that the crime confers an advantage on them. Dutch legal persons are classed as Dutch citizens within the meaning of section 5, Criminal Code. The Netherlands can however, only exercise jurisdiction where the offences mentioned in Articles 2 and 3, FD are punishable under the law of the country where they were committed.
PT	Portugal informs the Commission that jurisdiction outside its territory is also governed by the rules of the European Arrest Warrant in the context of the European Union and Article 32(5) of Law No. 144/91 as regards international jurisdiction outside the EU, pursuant to which, where extradition is refused, criminal proceedings are instituted in respect of the acts on which the request is based, with the requesting State asked to provide the necessary facts.

Article 10, Territorial Application

This Article applies to Gibraltar alone.

Gibraltar

With reference to Article 10, the UK stated that Gibraltar "intends to transpose this measure as soon as legislative time allows" but has not to date informed the Commission as to whether that legislation has been enacted, nor if enacted, supplied the text.

2.2 Analysis of legislation in progress – Czech Republic

The Czech Republic provided a covering letter and a comparative table which includes the text of the relevant sections of its draft criminal code. Apart from Articles 5 and 6, the Czech Republic informed the Commission that its draft legislation was compatible with the provisions of the FD. However, CZ has not subsequently informed the Commission of the progress with this draft legislation and accordingly, as it would appear that the text is still subject to amendment within the context of the parliamentary procedures, the Commission only offers its general comments.

Article 1 – Definitions

- "legal person"

No specific provision has been forwarded, but given discussion under Article 5, below, it would appear that CZ's draft legislation does not provide for this definition.

CZ's draft legislation does not appear to meet the requirements of this definition in Article 1, FD.

- "breach of duty"

The draft legislation provides that "arranging a matter of public interest shall also include respecting a statutory or contractual duty, the aim of which... of persons engaged in business relations or persons acting on their behalf" (draft section 162a (3)). Reference to "statutory duty" meets that aspect of the FD definition. With regard to contractual duty, its scope is clearly within the private sector and it would appear to extend also to the inclusion of professional regulations or instructions. Furthermore, respecting a duty could include performing an act and/or refraining from performing an act.

CZ's draft legislation would appear to meet the requirements of this definition in Article 1, FD.

Article 2 – Active and passive corruption in the private sector

CZ states that the relevant legislation is draft sections 160, 161 and 162 of Act No. 140/1961 Coll., Criminal Code.

Article 2 1. (a) active corruption

The relevant draft sections of the criminal code are sections 161 and 162(2), with 162a (3). Draft section 161(a) criminalises active corruption directly to a person and draft section 162(2) provides for indirect active corruption. As discussed under Article 1, CZ's definition of its term "arranging a matter of public interest" is broad and could potentially extend to the private sector. In the absence of a definition of the term "arranging a matter of public interest" the question arises as to whether it is possible that this draft provision only refers to the public sector, and hence does not meet the requirements of the FD.

The term "bribe" is used in the draft legislation but it is not defined and therefore it is unclear whether it is sufficiently broad to meet the scope of the FD's term "an undue advantage of any kind."

CZ's draft legislation would not appear to meet the requirements of Article 2 (1) (a), FD

Article 2.1 (b) passive corruption

The relevant draft sections of the criminal code are sections 160 with 162a (3).

Draft section 160 criminalises passive corruption. Subsection (1) provides for an offence of acceptance of a bribe or permitting another person to promise a bribe, and subsection (2) provides for an offence of requesting a bribe.

CZ's inclusion of draft section 162(1) here in relation to the requirements of Article 2.1 (b) "through an intermediary" is incorrect as the said draft section refers only to situations where one of the parties is a public official, and therefore does not come within the FD's scope. However, the provisions in draft section 160(3)(a) which refer to passive corruption with the intent of obtaining a *substantial* benefit "for another person", and in draft section 160(4)(a) which refers to passive corruption with the intent of obtaining a *major* benefit "for another person" address this requirement. Nevertheless, it is noted that these sections appear to refer only to circumstances where the bribe exceeds a certain value threshold, but that the FD does not envisage any such threshold.

CZ's draft legislation would not appear to meet the requirements of Article 2.1 (b) FD.

Article 2.2

CZ states that the relevant draft section of the criminal code is section 162a (3) of Act No. 140/1961 Coll., which provides the definition of the term "arranging a matter of public interest". This definition does not refer explicitly to the nature of the entity. In this regard, CZ informs the Commission that "In terms of accomplishing the constituent elements of a criminal act, it is irrelevant whether the entity is a profit or non-profit entity."

CZ's draft legislation would appear to meet the requirements of Article 2.2

Articles 2.3; 2.4 and 2.5

CZ has not made such a Declaration.

Article 3 – Instigation, aiding and abetting

CZ states that it will transpose this Article by means of draft section 10 of Act No. 140/1961 Coll., Criminal Code.

Section 10(1) provides that, where a criminal offence has either been completed or attempted, a participant is either a person who a) organises or directs the commission of the offence, b) instigates another person to commit the offence or c) aids another person to commit the offence, in particular with providing the means for committing such an offence, removing obstacles, giving advice, strengthening the person's intent, or promising.

CZ's draft legislation would appear to meet the requirements of Article 3, FD.

Article 4 – Penalties and other sanctions

CZ states that it will transpose Articles 4.1 and 4.2 by means of draft sections 160, 161 and 162, of Act No. 140/1961 Coll., Criminal Code.

Article 4.1

The penalty for active corruption (draft section 161(1)) is a fine or imprisonment for a period not exceeding 1 year. Where the intention is to obtain a substantial benefit for himself or for another person or to inflict substantial damage or another particularly serious consequence on another person, the penalty is a fine or imprisonment for a period of between 1 and 5 years (draft section 161(2)(a)).

The penalty for accepting a bribe or letting another person promise him a bribe is imprisonment for a period not exceeding 2 years or prohibition on engaging in a specific activity (draft section 160 (1)). There is no option of a fine. Where the person asks for the bribe, the term of imprisonment is between 6 months and 3 years, with no option of a fine (draft section 160(2)).

Where the intention is to obtain a *substantial* benefit for himself or another person, the penalty is imprisonment for a period of between 1 and 5 years (draft section 160(3) (a) or in the case of a *major* benefit, the penalty is imprisonment for a period of between 2 to 8 years (draft section 160(4)(a)).

The penalties for instigation, aiding and abetting are, according to draft section 10(2), Criminal Code, governed by provisions on the offender's criminal liability and punishability, unless the code provides otherwise.

CZ's draft legislation would appear to meet the requirements of Article 4.1, FD.

Article 4.2

The maximum period of imprisonment available under draft sections 161(1) and 162(a) is 1 year and 5 years respectively, and therefore falls within the requirements of Article 4.2 FD.

The maximum period of imprisonment available under draft section 160(1) is 2 years, under draft section 160(2) is 3 years, under draft section 160(3)(a) is 5 years and under draft section 160(4)(a) is 8 years, and therefore falls within the requirements of Article 4(2) FD.

Article 4.3

CZ states that section 49 "Prohibition of a Specific Activity" is the relevant draft section of its criminal code. This provides that a Court may order prohibition of a specific activity for a period of 1 to 10 years if the offender has committed a criminal offence in connection with such an activity. This is a broader measure than that required under the FD.

CZ's draft legislation would appear to meet the requirements of Article 4.3 FD.

Article 5 – Liability of legal persons and Article 6 - Penalties for legal persons

CZ informed the Commission that it does not have compatible legislation in its draft proposals. It stated: "On 2 November 2004 the Chamber of Deputies of the Czech Republic rejected the Government Draft Act on criminal liability of legal persons, aiming to introduce into Czech legislation the concept of liability of legal persons for criminal offences. This Act

was meant to be part of the recodification of the criminal substantive law. At present, another way of addressing the issue of criminal liability of legal persons is being sought."

To date, CZ has not informed the Commission of any further developments in this regard.

CZ does not meet the requirements of Articles 5 and 6, FD.

Article 7 – Jurisdiction

It is not clear from CZ's material whether the national measures relating to jurisdiction are part of its draft legislation, or were already in existence. However, in the circumstances, they have been treated as draft legislation.

Article 7.1 (a)

CZ states that the relevant draft legislation is draft section 17 of Act No. 140/1961 Coll., Criminal Code. This enables CZ to establish its jurisdiction in respect of an act committed, or committed in part, within its territory (draft section 17 (2)(a)); violated, or violated in part, an interest protected under the Criminal Code (draft section 17(2)(b)).

CZ's draft legislation would appear to meet the requirements of Article 7.1 (a), FD.

Article 7.1 (b)

CZ states that the relevant draft legislation is draft section 18 of Act No. 140/1961 Coll., Criminal Code. This enables CZ to establish its jurisdiction in respect of an act committed abroad by nationals of the Czech Republic or stateless persons permanently resident in CZ.

CZ's draft legislation would meet the requirements of Article 7.1 (a), FD

Article 7.1(c)

CZ states that the relevant draft legislation is draft section 20(2) of Act No 140/1961 Coll., Criminal Code. This enables CZ to establish its jurisdiction where an act is committed abroad by a foreign national or a stateless person who is not permanently resident in the Czech Republic, if the act concerned was committed for the benefit of a legal person or another organisation having its registered office, establishment, organisational branch or business premises within CZ. This provision is broader than Article 7 (1) (c) which only refers to benefiting a legal person which has its head office in the Member States' territory. CZ's draft legislation would meet the requirements of Article 7(1)(c), FD.

Article 7.2

CZ has not adopted such a Declaration.

Article 7.3

CZ states that the relevant draft legislation is section 21 of Act No. 140/1961 Coll., Criminal Code, subsection 2 of which provides for the surrender of a CZ national to another MS only on the basis of a European Arrest Warrant. However, also relevant is draft section 18 of Act No. 140/1961 Coll., Criminal Code, since this provides that the punishability of CZ nationals shall be judged in accordance with CZ law.

3. Next Steps for the Framework Decision

The Commission takes this opportunity to draw attention to two issues which will need to be addressed in the coming years:

- **'Reformattage'**

As indicated by the Commission in its Communication "On the Implications of the Court's Judgement of 13 September 2005 (Case C-176/03 Commission v Council) (COM(2005) 583 final/2 Brussels 24.11.2005), the Council Framework Decision on Combating Corruption in the Private Sector is one of the instruments which is affected by this judgement. The judgement would indicate that the legal base of the Council Framework Decision requires amendment. The precise implications for the Council Framework Decision, and the approach to be adopted, will be addressed at a future date.

- **Review of Article 2 by Council, as provided by Article 2(5)**

By virtue of Article 2 (4), FD MS' Declarations made under Article 2 (3), are due to expire on 21 July 2010. Prior to that date, the Council is required by Article 2 (5) to review Article 2 "with a view to considering whether it shall be possible to renew Declarations made under paragraph 3." Four MS (AT, DE, IT, PL) have made such Declarations.

4. Conclusions

General comments

It should be noted that, by their nature, framework decisions¹¹ are binding upon the Member States as to the results to be achieved, but it is a matter for the national authorities to choose the form and method of implementation. Framework decisions do not entail direct effect. As the Commission has no authority under the Third Pillar to initiate an infringement procedure against a Member State, the nature and purpose of this report is limited to a factual evaluation of the transposition measures taken by 22 MS (although in effect this is 21 MS since EL simply informed the Commission that it was preparing legislation but did not provide a draft text).

Summary table showing extent of transposition by Member States

Transposition of this Council Framework Decision is still at an early stage among MS.

I = no/insufficient information N = not transposed P = partly transposed T = fully transposed

MS	Article 1	Article 2	Article 3	Article 4	Article 5	Article 6	Article 7 (1)
AT	I (LP) I (BofD)	P	T	P	N	N	I

¹¹ Article 34 (2)(b), Treaty on European Union

BE	T (LP) T (BofD)	T	T	I	P	I	P
DE	I (LP) I (BofD)	P	T	T	P	P	T
DK	T (LP) I (BofD)	P	T	T	P	T	T
EE	T (LP) T (BofD)	P	T	T	P	P	I
FI	T (LP) I (BofD)	P	T	T	P	P	I
FR	I (LP) T (BofD)	P	I	P	P	I	I
HU	T (LP) I (BofD)	P	T	P	I	P	P
IE	T (LP) T (BofD)	P	T	T	P	P	P
IT	I (LP) I (BofD)	P	T	T	N	N	P
LT	T (LP) T (BofD)	P	T	T	T	T	I
LU	I (LP) I (BofD)	P	T	T	T	P	P
LV	I (LP) I (BofD)	P	T	P	P	P	P
NL	I (LP)	P	T	T	T	T	P

	T (BofD)						
PL	T (LP) T (BofD)	P	T	T	T	T	P
PT	T (LP) T (BofD)	P	T	P	P	P	P
SE	I (LP) I (BofD)	P	T	T	P	P	P
SK	I (LP) I (BofD)	P	T	P	N	N	P
SI	T (LP) I (BofD)	P	T	P	T	T	P
UK	T (LP) I (BofD)	T	T (England, Wales & NI) I (Scotland)	P	P	P	T
Total transpositions	10 (LP) 8 (BofD)	2	18	11	5	5	3

(LP) = Legal Person BofD = Breach of Duty

Concluding Remarks

It is a source of concern to the Commission that transposition of this Council Framework Decision is still at an early stage among Member States. The Commission reminds Member States of the importance they have attached to the fight against private sector corruption¹². Furthermore, the Commission notes that this importance is also reflected in the Council of Europe Criminal Law Convention against Corruption 1996, and in the UN Convention against Corruption 2003. Strong, comprehensive legislation at national level is the foundation for effective protection of the private sector against this economic threat.

The Commission warmly invites all MS to review this Report and to take the opportunity to provide all further relevant information to the Commission and Council Secretariat, in order to complete the fulfilment of their obligations under Article 9, FD. In addition, the Commission encourages those MS which have signalled that they are preparing relevant

¹² Paragraph (9) of the Framework Decision Preamble

legislation, to enact these national measures as soon as possible and to provide the texts to the Council Secretariat and to the Commission for analysis. This call is particularly made to EL and ES, which indicated in 2005 that they were preparing draft legislation, but have not provided any further information to date. Finally, the Commission notes with concern that two MS have not yet replied (CY and MT) in contravention of Article 9, FD and urges them to furnish the full details of their transposition of this Council Framework Decision without further delay.