



COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

**pursuant to Article 6 of the Council Framework Decision of 24 February 2005 on
confiscation of crime-related proceeds, instrumentalities and property (2005/212/JHA)**

1. INTRODUCTION

Article 6 of Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property¹ (hereinafter referred to as “the Framework Decision”) requires the Commission to produce a written report on the measures taken by the Member States to comply with the Framework Decision.

Adopted on the initiative of the Kingdom of Denmark, the Framework Decision is intended “to ensure that all Member States have effective rules governing the confiscation of proceeds from crime, inter alia, in relation to the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime”. Essentially, it requires Member States to take measures to enable them to perform two types of confiscation:

- confiscation, either wholly or in part, of instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or of property the value of which corresponds to such proceeds; and
- confiscation, in whole or in part, of property belonging directly or indirectly to persons convicted of certain serious offences, in particular where the property in question has been obtained as a result of criminal activities.

The Commission considers it vital to tackle the confiscation of criminal instrumentalities, proceeds and property as an effective means of combating organised crime, by depriving criminals of their financial resources and thereby both restricting their scope for causing harm and preventing them from enjoying the property with which they surround themselves for their own comfort.

1.1. Background to the Framework Decision

Confiscating the proceeds of crime has long been regarded as an effective means of combating organised crime. The European Council action plans designed to combat organised crime invariably stress the need to deprive those involved in organised crime of their main motivation, namely financial gain.

The European Union strategy for the beginning of the new millennium² specifies that “the European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime”.

A coherent package of measures has already been put in place by the European Union. On 26 June 2001 the Council adopted Framework Decision 2001/500/JHA³ on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime. This Framework Decision allowed some progress to be made by providing for the approximation of national legislation on confiscating assets originating from organised crime. Council Framework Decision 2003/577/JHA of 22 July 2003⁴ allows the execution in the European Union of orders freezing property or evidence. The Council also adopted Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders⁵.

¹ OJ L, 15.3.2005.

² The Prevention and control of organised crime: A European Union strategy for the beginning of the new Millennium (OJ C 124, 3.5.2000, p. 1).

³ OJ L 182, 5.7.2001.

⁴ OJ L 196, 2.8.2003.

⁵ OJ L 328, 24.11.2006, p. 59.

2. PURPOSE OF THIS REPORT AND ASSESSMENT METHOD

Council Framework Decisions are binding upon the Member States as to the result to be achieved but leave to the national authorities the choice of form and methods. They do not have direct effect. As the Commission has no powers under the third pillar to launch infringement proceedings against a Member State, the nature and purpose of this report are merely to provide a factual assessment of the transposition measures adopted.

The report focuses on an assessment of Articles 2 and 3, which form the core part of the Framework Decision, and the main obligations in the light of the Decision's aims.

The assessment criteria used by the Commission for the purposes of this report are the general criteria adopted in 2001⁶ to evaluate implementation of Framework Decisions. Criteria specific to this Framework Decision were also used.

Article 6(2) of the Framework Decision stipulates that, using a report established on the basis of information provided by the Member States by 15 March 2007 and a report from the Commission, the Council must assess, by 15 June 2007, the extent to which Member States have taken the necessary measures.

At the time of writing, 16 Member States (BE, BG, CZ, DE, DK, EE, FI, FR, HU, IE, LT, MT, NL, PL, RO, SE) had submitted their legislation. Ten of them (BE, CZ, DE, DK, EE, FI, FR, HU, NL, PL) had transposed the Framework Decision almost wholesale, with the exception in many cases of Article 1 and in some cases of certain provisions that are minor compared with the general thrust of the Framework Decision, while six (BG, IE, LT, MT, RO, SE) had transposed it in part. Five Member States (EL, IT, LV, LU, PT) stated that they were in the process of preparing the relevant legislation. Six Member States (AT, CY, ES, SK, SI, UK) have not yet sent their national measures to the Commission.

Some Member States sent a memo together with a correlation table explaining the general and specific approach adopted in their national law and indicating the relevant legislative provisions. As far as the requirement to provide the text of their implementing legislation is concerned, some did not provide the text to support what were nonetheless very detailed comments, while others made partial omissions.

This report assesses the full or partial transposition measures and any accompanying comments submitted by 16 Member States and by two Member States (IT, LU) which provided information on their draft legislation.

3. ASSESSMENT OF THE MEASURES TAKEN

Article 1 – Definitions

Article 1 of the Framework Decision defines the terms “proceeds”, “property”, “instrumentalities”, “confiscation” and “legal person”. These terms are essential as their appearance in the implementing legislation indicates that concepts of the same type and with the same meaning are being used.

Some Member States (BG, CZ, FR, HU, LT, MT, SE) provided information, partial in some cases, on their transposition of this Article. Others (DE, DK, EE, FI, NL, PL) provided no information. Some Member States (FR, HU, IE, MT) stated that it was not necessary to take certain definitions into account as, while not defined in their legislation, they were familiar and did not give rise to any ambiguity. In the Commission's view, it is important for these

⁶ See COM(2001)771, 13.12.2001, section 1.2.2.

definitions to be included in the national legislation as this clarifies how the concepts are taken into account in national law. In the absence of such information, it is sometimes difficult, or even impossible, for the Commission to be sure that the provisions of the Framework Decision have been correctly transposed.

Article 2 – Basic confiscation

Article 2 contains the basic rule. The first paragraph requires Member States to take measures enabling them to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds. The threshold is the same as in Council Framework Decision 2001/500/JHA, referred to above. However, the possibility of maintaining reservations in respect of the confiscation of the proceeds from tax offences has been dropped.

Article 2(1) was the provision implemented with the least difficulty by the Member States. Some Member States require only partial confiscation depending on the circumstances. Thirteen Member States (BE, BG, CZ, DE, DK, EE, FI, LU, LT, MT, NL, PL, SE) have transposed this provision in full.

IE is preparing measures to bring it fully into line with Article 2(1). LT refers to the procedure for freezing assets as regards the application of Article 2. FR pointed out that, in accordance with recital 11 (respect for a Member State's fundamental principles), press offences cannot give rise to confiscation in France.

As regards the length of deprivation of liberty which determines the threshold for obligatory confiscation, some Member States (at least BE, CZ, DE, DK, EE, LT, MT) do not stipulate a threshold because they apply confiscation to all offences.

In accordance with Article 2(2), some Member States (BE, BG, LT) use procedures other than criminal procedures to deprive perpetrators of tax offences of the proceeds of the offence. From the texts submitted it appears that some Member States have not adopted provisions along these lines on the basis of the Framework Decision. However, this does not mean that other types of procedure do not exist in the national law of the Member States concerned.

Article 3 – Extended confiscation

Article 3, while not going as far as the initial proposal, represents the real added value of the Framework Decision. It is intended to ensure that all Member States have confiscation-related rules regarding the source of assets owned by a person convicted of an offence related to organised crime. It requires Member States to take measures to enable them to confiscate, on the basis of one of the three situations described in paragraph 2, either wholly or in part, property belonging directly or indirectly to persons convicted of certain offences.

Scope – Article 3(1)

In order to ensure that the penalty is proportional to the seriousness of the offences concerned, the Framework Decision restricts the obligation to provide for extended confiscation as follows:

- first, it applies only to a restrictive list of commonly defined offences drawn up pursuant to six Framework Decisions (on euro counterfeiting, money laundering, trafficking in human beings, unauthorised immigration, sexual exploitation of children and child pornography, and drug trafficking, plus terrorism), for which the Member States are required to lay down penalties of a maximum of at least between five and ten years of imprisonment, and at least four years of imprisonment in the case of money laundering;

- second, except as regards terrorism, the obligation to provide for extended powers of confiscation applies only to offences committed within the framework of a criminal organisation.

It should also be noted that the obligation to provide for extended confiscation applies only insofar as the offence is such as to generate financial gain.

Generally speaking, the Member States have adopted specific provisions on extended confiscation at least in the fields covered by the six Framework Decisions referred to above and the Framework Decision on combating terrorism. Offences covered by the Framework Decisions concerned are generally regarded as sufficiently serious to justify specific measures. As regards the length of penalty which determines the threshold for obligatory confiscation, where the Framework Decision distinguishes between money laundering and other offences, most Member States do not make a distinction. Many Member States have not included the requirement for the Framework Decision to apply as a minimum where the offence is such as to generate financial gain, which gives them more flexibility in applying the Framework Decision.

Some Member States (BG, DE, EE, FI, FR) apply extended confiscation without a requirement for the offences necessarily to be committed within the framework of a criminal organisation. This also seems to be the case for PL. The Member States which state that they have transposed the relevant scope of the Framework Decision in full are BE, BG, CZ, DK, FR. The document provided by LT does not appear to indicate any measures that correspond to one of the situations referred to in the Framework Decision. DE has not yet transposed the Framework Decision in respect of certain offences related to child pornography. Some Member States (EE, FI) have transposed only part of the scope of the Framework Decision.

Necessary measures – Article 3(2)

Article 3(2) appears to have posed the most problems with respect to its implementation. These problems relate primarily to legal traditions and fundamental principles, in particular as regards the administration of the burden of proof, the link usually required between the offence for which an individual has been convicted and the property confiscated, the right to a fair trial and the need for the penalty to be proportional to the facts of the case. At the same time, some Member States have gone further by allowing the courts to impose confiscation of all or part of the property of a convicted person without having to show that such property was derived from criminal activities.

The Member States should adopt extended confiscation measures corresponding to at least one of the three situations referred to respectively in subparagraphs (a), (b) and (c) of Article 3(2). In each of these cases, property derived from criminal activities not directly related to the offence of which the person has been convicted may be confiscated, i.e. there is no link between the offence of which the person has been convicted and the property which is confiscated, either as regards the nature of the property or its value. This is the principle of extended confiscation of the property of a convicted offender. Subparagraph (a) covers property derived from criminal activities during a period prior to conviction, while subparagraph (b) covers property derived from “similar” activities. Subparagraph (c) covers situations where the value of the property is disproportionate to the lawful income of the convicted person.

Given the variety of measures taken by the Member States, designed in accordance with their legal systems and characterised by differing legal concepts that do not always overlap, it is often difficult to determine which one (at least) of these provisions each Member State has complied with unless they have spelled it out. In summary:

- BG, DE, FI and PL cover, directly or indirectly, the measures specified in subparagraph (a).
- EE covers, directly or indirectly, the measures specified in subparagraph (c).
- CZ, FR, DK and NL cover, directly or indirectly, the measures specified in subparagraphs (a), (b) and (c).
- BE and BG cover, directly or indirectly, the measures specified in subparagraphs (a) and (b).

LU, IE and IT are preparing a reform designed to introduce extended powers of confiscation. At least three Member States (BG, CZ, FR) provide, as a penalty, for the confiscation of all or part of the property of a convicted person, irrespective of whether such property is proven to derive from criminal activities, in respect of all or some of the offences covered by the Framework Decision.

Scope extended to third parties – Article 3(3)

As regards the optional measure set out in Article 3(3), some Member States allow confiscation of property that may “belong” to the convicted person but is legally owned by one of his associates or by a legal person over which he has a controlling influence. They are at least, in respect of some or all of the provisions, the following: BE, BG, CZ, DK, EE, FI.

Option to deprive offenders of property by procedures other than criminal procedures – Article 3(4)

Article 3(4) provides that Member States may use procedures other than criminal procedures to deprive the perpetrator of the property in question. This is the case of SE.

The texts submitted indicate that CZ, DE, BE, FR, EE, FI, BG, NL have not adopted a provision of this type. This does not mean that other types of procedure do not exist in their national law.

Articles 4 and 5 – Legal remedies and safeguards

Effective legal remedies must ensure that the rights of persons affected by Articles 2 and 3 are protected in the Member States. The Framework Decision cannot have the effect of altering the obligation to respect fundamental rights and principles.

Most Member States did not provide precise information on the transposition of the obligations arising from Articles 4 and 5. The Commission is therefore unable to assess the extent to which the national legislation complies with the Framework Decision in this respect. Given the importance of legal remedies in ensuring that fundamental rights and principles are respected, the Commission will continue to pay close attention to the transposition of these provisions into national law.

4. CONCLUSIONS

To date, only 16 Member States have sent the text of provisions transposing the Framework Decision into national law. The Commission is concerned that so little progress has been made on transposing the Framework Decision in the Member States. It would remind the Member States of the importance that they attached to combating organised crime by means of depriving it of its financial resources and gain. The Commission would also point out that this importance is reflected in the Council of Europe Conventions of 1990 and 2005 on laundering, search, seizure and confiscation of the proceeds from crime, and in the United Nations Convention of 2000 against Transnational Organized Crime. To combat organised

crime effectively within the European Union, it is vital that solid and complete national provisions are adopted.

The Commission invites the Member States to consider this report and to use this opportunity to send it and the General Secretariat of the Council any further relevant information in order to comply with their obligations under Article 6 of the Framework Decision. The Commission would encourage those Member States which stated that they were in the process of preparing the necessary legislation to adopt it as quickly as possible and to send the text adopted to the General Secretariat of the Council and to the Commission. Lastly, the Commission regrets that six Member States have still not provided any information and invites them to send all information regarding transposition of the Framework Decision into their national law as quickly as possible.

The Commission intends to adopt a Communication on the proceeds of crime at the end of 2008, in which it will analyse measures for the confiscation and recovery of property obtained through criminal activity and will examine how to strengthen cooperation between police and judicial authorities so as to deprive criminals of their illicit gain.