



COMMISSION OF THE EUROPEAN COMMUNITIES

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THIRD REPORT FROM THE COMMISSION

based on Article 11 of the Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro

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1. OBJECTIVE OF THE FRAMEWORK DECISION

In order to guarantee tighter and harmonised criminal protection for the euro throughout the European Union, the Council adopted on 29 May 2000 Framework Decision 2000/383/JHA¹ on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, which was amended by Framework Decision 2001/888/JHA on 6 December 2001² in order to introduce for the purpose of recognising repeat offences a provision concerning the mutual recognition of convictions handed down in another Member State.

Following the ratification of the Geneva Convention of 1929 on counterfeiting³ a degree of standardisation of Member State legislation had already taken place. The specific aim of the Framework Decision on the euro is to supplement the charges provided for in the Member States under the 1929 Convention by identifying practices which are to be regarded as punishable in addition to the actual act of counterfeiting.

2. PURPOSE OF THE REPORT

Under Article 11(2) of the Framework Decision the Commission adopted on 13 December 2001 a report on its implementation which set out in detail the various transposal requirements and the way in which each Member State had complied with those requirements⁴. In its conclusions on the report, the Council recognised that the Framework Decision had largely served its purpose. It nevertheless called on the Commission to draw up a second report containing the additional information still to be provided by Member States. On 3 September 2003 the Commission adopted the second report⁵. At its meeting on 25 and 26 October 2004, the Council took note of this second report and, in view of the enlargement of the European Union, called on

¹ Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ L 140, 14.6.2000, p. 1).

² Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ L 329, 14.12.2001, p. 3).

³ According to Article 23 of the 1929 Convention, ratification of the Convention by a State implies that its legislation and its administrative organisation are in conformity with the rules of the Convention.

⁴ COM(2001) 771 final.

⁵ COM(2003) 532 final.

the Commission to prepare a third report on the implementation of the Framework Decision, including Article 9a.

This report therefore looks at the state of play of transposal of the Framework Decision in the 15 Member States in the light of the conclusions of the second report, as well as at the legislative situation in the 12 new Member States. It contains a detailed evaluation of the implementation of the Framework Decision by the 27 Member States.

The Commission sent questionnaires on the individual points raised in the previous report to all Member States other than Germany, which had already provided information. In all twenty Member States sent to the Commission the text of the provisions incorporating into national law the obligations incumbent upon them under the Framework Decision. Eight Member States (Bulgaria, Ireland, Spain, Italy, Malta, the Netherlands, Romania and Finland) did not formally reply to the letter sent by the Commission. Information on the legislation of Bulgaria, Spain, Italy, Malta and the Netherlands was, however, made available to the Commission. The information that the Commission received from the Member States is very variable as regards comprehensiveness. The report was nonetheless drawn up on the basis of that information, supplemented by public sources where this was necessary and possible.

3. NATIONAL MEASURES TO IMPLEMENT THE FRAMEWORK DECISION

3.1. State of play regarding transposal of the Framework Decision by the 15 Member States (Annex – Table 1)

3.1.1. General offences – Article 3

Following the amendment of the Spanish Penal Code, all the cases covered by Article 3(1)(a), (b) and (c) of the Framework Decision are now punishable. In addition, under an explicit measure concerning counterfeiting, participation in such criminal acts constitutes an offence. Spanish legislation also contains an explicit measure to punish the fraudulent making, receiving or obtaining of instruments and other articles necessary for the counterfeiting of currency (Article 3(1)(d)).

3.1.2. Additional offences – Article 4

The Spanish Penal Code prohibits the counterfeiting of currency but makes no explicit reference to the use of legal facilities. The French Penal Code expressly prohibits the counterfeiting of currency by use of legal facilities or materials within the meaning of Article 4 of the Framework Decision.

3.1.3. Penalties – Article 6

The legislation of Finland and Sweden has not yet been amended and provides for a maximum penalty of at least eight years' imprisonment only for serious offences. Spanish legislation penalises criminal acts covered by Article 3(1)(a) of the Framework Decision with terms of 8 to 12 years.

3.1.4. *Liability of legal persons and sanctions – Articles 8 and 9*

The legislation of Spain, Luxembourg and Austria provides for general criminal liability for legal persons whenever a representative body commits an offence provided for by and punishable under national legislation. Under the laws in force in Austria, the sanctions involved are criminal fines. By contrast, the legislation of Spain and Luxembourg provides for the temporary or permanent closure of the enterprise, the liquidation of the company or the suspension of its activities. There is no provision for other sanctions. Although Portugal sent a reply about the transposal of the Framework Decision, it contained no information about progress made with the draft legislation on the criminal liability of legal persons. The United Kingdom, according to its reply, does not intend to adopt a specific act to provide for the liability of legal persons as its civil law concept of negligence would allow it to comply with Article 8(2).

3.1.5. *Territorial application – Article 10*

The United Kingdom authorities have not notified any progress with the draft legislation to implement the Framework Decision in Gibraltar.

3.2. State of play regarding transposal of the Framework Decision by the 12 Member States that joined in 2004 and 2007

3.2.1. *Ratification of the 1929 Convention – Article 2 (Annex – Table 2)*

Eight Member States (the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Poland and Slovakia) have indicated that they are already contracting parties to the Geneva Convention. According to the information received by the Commission, Bulgaria and Romania have also ratified the Geneva Convention, while Slovenia is in the process of ratifying it. No information has been received concerning Malta.

3.2.2. *General offences – Article 3 (Table 3)*

The provisions of Article 3 of the Framework Decision, which concern the constituent elements of criminal acts, have in general been transposed into the national legislation of the twelve Member States. More specifically, the legislation of five Member States (Bulgaria, Cyprus, Latvia, Hungary and Slovakia) expressly mentions all the elements that objectively and subjectively (the intentional element) constitute the offences set out in Article 3(1)(a) to (d). The legislation of the other Member States contains the following exceptions. Lithuanian legislation does not mention "uttering", but only the "sale" of counterfeit currency. The legislation of seven Member States (the Czech Republic, Estonia, Lithuania, Malta, Poland, Romania and Slovenia) does not expressly mention the import, export or obtaining of counterfeit currency with a view to uttering. The legislation of the Czech Republic and Poland punishes such behaviour by the explicit criminalisation of the transport. The legislation of Lithuania, Malta and Romania also punishes such behaviour by making an express offence of possession. The legislation of Estonia and Poland does not explicitly provide for a punishment for the fraudulent making, receiving or obtaining of instruments and other articles necessary for the counterfeiting of currency (Article 3(1)(d)).

A total of 11 Member States (Bulgaria, the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Poland, Romania, Slovenia and Slovakia) have indicated that instigating, or attempting to commit the acts defined in Article 3(1), as well as participating in such acts, are punishable under the provisions already existing in the general section of their Penal Codes. Polish law also contains a specific provision regarding assistance or cover for persons carrying out the offences mentioned in paragraph 1. No information has been received on this matter from Malta.

3.2.3. *Additional offences – Article 4 (Annex – Table 4)*

Article 4, which imposes criminal penalties on the counterfeiting of currency by use of legal facilities or materials, has been transposed in the legislation of seven Member States. More precisely, three Member States (Bulgaria, Cyprus and Lithuania) have complied with this Article by incorporating into their criminal legislation an explicit provision making it a criminal offence to manufacture notes or coins using legal facilities in violation of the rights or the conditions under which they may be issued. Six Member States (the Czech Republic, Latvia, Malta, Poland, Slovenia and Slovakia) comply with this Article by prohibiting the fraudulent manufacture of currency without reference to or distinction among the means used. The authorities of three Member States (Estonia, Hungary and Romania) have not provided any information on this point.

3.2.4. *Currency not issued but designated for circulation – Article 5 (Annex – Table 4)*

In the legislation of seven Member States (Cyprus, Latvia, Lithuania, Hungary, Malta, Poland and Slovakia), the concept of counterfeit currency expressly includes banknotes and coins which are not yet issued but are designated for circulation. In Czech legislation, the proposed amendment of the Penal Code contains a specific provision on the matter. No information has been received, however, about the adoption of the amendment. The Slovenian authorities have indicated that the offence identified in Article 5 of the Framework Decision is effective by virtue of Article 217 of the Penal Code, which covers fraud. The authorities in Bulgaria, Estonia and Romania have not provided any information on this point.

3.2.5. *Penalties – Article 6 (Annex – Table 5)*

A total of 11 Member States (Bulgaria, the Czech Republic, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Romania, Slovenia and Slovakia) have introduced maximum terms of imprisonment exceeding eight years, in line with Article 6(2) of the Framework Decision. The legislation of Lithuania, however, provides for a maximum term of at least eight years (ten years in this precise instance) only for offences involving amounts that are "large" or "of considerable value". Hungary's legislation reserves the maximum penalty of more than eight years for the counterfeiting of banknotes, the counterfeiting of coins being considered a lesser offence and thus punishable by a maximum term of imprisonment of five years. The legislation of Estonia punishes counterfeiting with a maximum term of imprisonment of six years only for repeat offences or for counterfeiting "on a large scale".

All twelve Member States provide for penalties for offences actually carried out, grouping together the various offences referred to in the Framework Decision. Eight

Member States (the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Romania, Slovenia and Slovakia) have provided for aggravating circumstances if the offence involves a large sum of money or is carried out by a criminal organisation. Seven Member States (Bulgaria, the Czech Republic, Lithuania, Malta, Poland, Slovenia and Slovakia) have introduced specific lighter punishments for uttering counterfeit currency received in good faith. This choice can be justified by the principle of proportional penalties. All the Member States have indicated that extradition is possible for such offences.

3.2.6. *Jurisdiction – Article 7*

Nine Member States (the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia) have transposed the obligation resulting from this provision, while no information is available on this point as regards three Member States (Bulgaria, Malta and Romania).

3.2.7. *Liability of legal persons and sanctions – Articles 8 and 9 (Annex – Table 6)*

Seven Member States have transposed the provisions of Articles 8 and 9 of the Framework Decision. More precisely, the legislation of three Member States (Hungary, Poland and Slovenia) has introduced general criminal liability for legal persons whenever a representative body commits an offence provided for in and punishable by a national law such as the Penal Code. The legislation of four Member States (Estonia, Cyprus, Latvia and Lithuania) has introduced criminal liability for legal persons specifically for counterfeiting offences. As for sanctions, the legislation of five Member States (Estonia, Cyprus, Latvia, Lithuania and Poland) has instituted criminal fines, forfeiture and winding-up. Hungary and Slovenia have not notified the sanctions provided for in their legislation. The authorities in the Czech Republic and Slovakia have indicated that a legislative proposal on the criminal liability of legal persons for specific conduct set out in the Penal Code is due to be adopted. The authorities in Bulgaria, Malta and Romania have not sent any relevant information on this matter.

3.3. **State of play regarding transposal of the Framework Decision by the 27 Member States regarding previous convictions – Article 9a**

Article 9a, which concerns the recognition of habitual criminality through final sentences handed down in another Member State, has been transposed in general by nineteen Member States. More specifically, five Member States (Belgium, Spain, France, Cyprus and the Netherlands) explicitly provide for recognition of sentences handed down in another Member State for counterfeiting, so that sentences may be increased in the event of repeat offences. The legislation of eight Member States (the Czech Republic, Denmark, Greece, Italy, Hungary, Austria, Portugal and Slovakia) contains a provision in the general section of the Penal Code, and one therefore that is applicable to all offences, for the explicit recognition of foreign convictions so that sentences may be increased. The legislation of five Member States (Germany, Latvia, Lithuania, Slovenia and Sweden) does not explicitly mention foreign convictions but, in general, the convicted person's past without any specific distinction so as to cover convictions of all types. The German authorities attached to their reply a series of judgments by German courts to demonstrate the established case-law in favour of their interpretation. The authorities in Estonia have indicated

that convictions by courts in other Member States are taken into account, but they have not supplied any details or the text of the applicable legislation. The authorities in Luxembourg and Poland have indicated that the provision has not yet been transposed. Six Member States (Bulgaria, Ireland, Malta, Romania, Finland and the United Kingdom) have not supplied any relevant information.

4. ASSESSMENT OF THE IMPLEMENTATION

4.1. Ratification of the 1929 Convention – Article 2

In response to the conclusions of the second report, a total of 25 Member States have adopted the 1929 Convention.

4.2. General offences – Article 3

Again in view of the conclusions of the second report, a total of 27 Member States have adopted a law expressly transposing the constituent elements of the general concept of counterfeiting of currency as defined in Article 3(1)(a) and (b). It can therefore be considered that the full effectiveness of the Framework Decision has been ensured.

The legislation of Lithuania makes a criminal offence of the "sale" – a narrower concept than the "fraudulent uttering of counterfeit currency". However, this restriction has no practical consequences since the act of uttering currency received as genuine constitutes a separate crime.

Regarding Article 3(1)(c), the legislation of the Czech Republic and Poland criminalises transport, which, being a broader concept, covers the specific concepts of import and export. The legislation of Lithuania, Malta and Romania punishes such conduct by making an offence of possession with a view to uttering, which, by implication, covers import and export. The full effectiveness of the Framework Decision is thus ensured. It should be noted, however, that the authorities in two Member States (Estonia and Slovenia) have failed to transpose Article 3(1)(c).

Also in view of the conclusions of the second report, 25 Member States have now correctly transposed the provisions of Article 3(1)(d) concerning offences relating to means peculiarly adapted for the counterfeiting of currency. The legislation of Estonia and Poland contains no provision relating to such preparatory acts, which constitutes a failure to transpose.

Likewise in view of the conclusions of the second report, general provisions on participating in and instigating the conduct in question, as well as attempting such conduct, are now in force in 26 Member States in accordance with Article 3(2) of the Framework Decision.

4.3. Additional offences – Article 4

In the light of the conclusions of the second report, 23 Member States now punish the counterfeiting of currency using legal facilities within the meaning of Article 4 of the Framework Decision. However, a large number of Member States comply with the Article by prohibiting the counterfeiting of currency without reference to or distinction between the means used.

It is desirable for all Member States to adopt explicit provisions criminalising the counterfeiting of currency by use of legal facilities. The offence referred to in Article 4 can be committed only by agents of the national authorities who have the right to use legal facilities. Under some legal systems, therefore, this conduct could also rank as abuse of authority by an official that displayed the characteristics of a "*delictum proprium*", i.e. an offence that can be committed only by a certain category of persons. As the offence clearly differs from counterfeiting, the penalties too might also differ. Although the non-differentiated nature of the national measures is satisfactory from the point of view of the transposal of Article 4 of the Framework Decision, explicit national penalties should be adopted for reasons of legal clarity.

4.4. Currency not issued but designated for circulation – Article 5

The aim of this provision is to define the objective element in counterfeiting so that currency not yet issued may also be included. The provision is no longer fully effective if the actions are described differently (as in Slovenian legislation). A total of 22 Member States now have legislation that complies with Article 5(b) of the Framework Decision.

4.5. Penalties – Article 6

Also in the light of the conclusions of the second report, a total of 26 Member States now comply with Article 6(2), pursuant to which the offences of fraudulent making or altering of currency provided for in Article 3(1)(a) must be punishable by terms of imprisonment, the maximum being not less than eight years. The legislation of Finland, Sweden and Lithuania includes a restrictive criterion for the application of the maximum penalty (seriousness of the offence), although this does not reduce the effectiveness of Article 6 of the Framework Decision. The competent national courts will pass the maximum sentence only in cases of serious offences. While this does not constitute a failure to transpose, there is a risk that with such legislation the maximum sentence might appear exceptional.

The legislation of Estonia and Hungary, where the maximum sentence provided for is six years and five years respectively (for coins), does not comply with the criteria of the Framework Decision.

Excluding these exceptions for maximum terms of imprisonment, it transpires that the offences proposed in the Framework Decision are punishable under the legislation of the 27 Member States by effective, proportionate and dissuasive criminal penalties.

4.6. Jurisdiction – Article 7

In total, 24 Member States comply with Article 7.

4.7. Liability of legal persons and sanctions – Articles 8 and 9

In the light of the conclusions of the second report, 20 Member States generally comply with the provisions concerning the liability of legal persons. The Czech Republic, Portugal and Slovakia have not adopted the measures necessary for compliance with Articles 8 and 9 of the Framework Decision. The United Kingdom has not amended its legislation despite its failure to comply with the requirement to

provide for the liability of legal persons. Although the civil law principle of fault could justify the payment of damages and interest to a civil party bringing an action, this does not constitute a sanction within the meaning of Articles 8 and 9 of the Framework Decision. Furthermore, the counterfeiting of currency harms the general interest and, in most instances, no private interest suffers.

Regarding sanctions, the legislation of Spain and Luxembourg contains no provision for fines even though they are required under Article 9. These countries provide for sanctions that are additional within the meaning of the Framework Decision, such as suspension or winding-up of the legal person.

4.8. Previous convictions – Article 9a

In Greece, foreign convictions are taken into account if there are at least three of them and the sentence was served abroad, even if only in part. These conditions are not compatible with the aim of the Framework Decision as they make recognition of previous convictions much stricter than does the text of Article 9a. In their reply, the Greek authorities indicated that amendments to the provisions in question are being drafted with a view to ensuring full compliance with Article 9a.

Regarding legislation in the Member States which refers in general to the record of convicted persons without distinction, it should be noted that such legal provisions are not at variance with the requirements of the Framework Decision. However, legal certainty (which is taken into account when assessing effective transposal) would be increased if the legislation of such Member States were amended so that such convictions could be expressly mentioned as being constitutive of habitual criminality. The absence of an explicit reference to convictions handed down in another Member State could lead, in practice, to such convictions not being taken into account.

5. CONCLUSIONS

5.1. General conclusions

The transposal of the Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro is judged to be satisfactory overall, despite some failures to transpose. The offences and penalties proposed in the Framework Decision have indeed been incorporated into the Member States' legislation. The euro is therefore protected by the efficient and effective measures called for by the Framework Decision. The Framework Decision has therefore achieved its objective and only the adoption of a small number of national measures is required for implementation to be complete.

5.2. Specific conclusions

More specifically, the Framework Decision has achieved its objectives in the most important areas. Thus the fraudulent making or altering of currency, as well as the fraudulent uttering of currency, constitute infringements under the laws of all the Member States. The import, export and transport of counterfeit currency are also expressly sanctioned in most Member States. Some legal systems criminalise such

acts by way of the concepts of transport or possession. Although varied, the penalties laid down to punish these criminal acts comply with the criteria laid down in the Framework Decision, except in the case of two Member States. In addition, most Member States have introduced the principle of the liability of legal persons. The legislation of most Member States makes provision for final convictions handed down in another Member State to be taken into account for repeat offences.

Despite this satisfactory overall conclusion, not all the Member States have incorporated all the provisions of the Framework Decision into national law, with the result that some specific transposition failures need to be reported. The following amendments to the national laws of the Member States are required for transposal of the Framework Decision to be complete. The order of presentation of the amendments needed corresponds to the order of the provisions of the Framework Decision.

Article 2

Slovenia has to ratify the International Convention for the Suppression of Counterfeiting Currency, concluded in Geneva on 20 April 1929.

Article 3

Estonia and Slovenia must make the transport, import and export of counterfeit currency criminal offences in their national law.

The fraudulent making and receipt of instruments intended for the counterfeiting of currency must be made criminal offences in the legislation of Estonia and Poland.

Article 4

The counterfeiting of currency by use of legal facilities or materials must be made a criminal offence in the legislation of Spain.

Article 5

The counterfeiting of currency not issued but designated for circulation must be made a criminal offence in the legislation of the Czech Republic and Slovenia.

Article 6

Hungary's legislation must provide for a maximum term of imprisonment of at least eight years for counterfeiting coins.

Estonia's legislation must provide for a maximum term of imprisonment of at least eight years, regardless of whether the offence is a repeat offence or a large-scale counterfeiting operation.

Articles 8 and 9

The authorities of the Czech Republic, Slovakia and the United Kingdom must take the measures necessary to introduce the principle of liability of legal persons in order to comply with Articles 8 and 9 of the Framework Decision.

The legislation of Spain and Luxembourg must introduce fines as sanctions in cases where legal persons are liable.

Article 9a

The legislation of Greece, Luxembourg and Poland must provide for recognition of convictions handed down in another Member State for establishing repeat offences.

5.3. Communication of further information

The authorities in the Member States below must send the Commission information regarding the following:

Bulgaria

Criminalisation of counterfeiting of currency not issued (Article 5), liability of legal persons (Articles 8 and 9) and international repeat offences (Article 9a).

Estonia

Criminalisation of counterfeiting of currency by use of legal facilities (Article 4) and criminalisation of counterfeiting of currency not issued (Article 5).

Ireland

International repeat offences (Article 9a).

Hungary

Criminalisation of counterfeiting of currency not issued (Article 5).

Malta

Ratification of the Geneva Convention, provision for the jurisdiction of national courts in accordance with Article 7, liability of legal persons (Articles 8 and 9) and international repeat offences (Article 9a).

Portugal

Liability of legal persons (Articles 8 and 9).

Romania

Criminalisation of counterfeiting of currency by use of legal facilities (Article 4), criminalisation of counterfeiting of currency not issued (Article 5), liability of legal persons (Articles 8 and 9) and international repeat offences (Article 9a).

Finland

International repeat offences (Article 9a).

The authorities of the United Kingdom must inform the Commission about international repeat offences (Article 9a) and the application of the Framework Decision to Gibraltar.