



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14.09.1999
COM(1999) 438 final

99/0190 (CNS)

Proposal for a

COUNCIL FRAMEWORK DECISION

on combating fraud and counterfeiting of non-cash means of payment

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. INTRODUCTION

The Communication "A Framework for Action on Combating Fraud and Counterfeiting of Non-cash Means of Payment"¹ was adopted by the Commission on 1 July 1998 and transmitted to the European Parliament and the Council. The European Parliament analysed the Communication in the months following the transmission of the Communication, and the Council has been deliberating upon the proposal made in Annex 1 of the Communication since the transmission. Annex 1 contains a Draft Joint Action on Combating Fraud and Counterfeiting of Non-cash Means of Payment, a type of instrument provided for under the Maastricht Treaty.

With the entry into force of the Amsterdam Treaty, Joint Actions are no longer available as legal instruments; Framework Decisions are introduced as new relevant instruments at the Council's disposal. The main purpose of this Communication is to replace the Draft Joint Action on Combating Fraud and Counterfeiting of Non-cash Means of Payment, with a reformatted Framework Decision Combating Fraud and Counterfeiting of Non-cash Means of Payment, using the format provided for in Article 34 in the Treaty on European Union. The purpose is also to reflect legislative developments at Council that have taken place since the previous Communication was adopted.

The aim of the proposed instrument remains to ensure that fraud involving all forms of non-cash means of payment is recognised as a criminal offence and is punishable by effective, proportionate and dissuasive sanctions in all EU Member States, and that appropriate mechanisms of cooperation are put in place in order to prosecute these offences efficiently. This is without prejudice to the faculty for Member States to incriminate additional forms of e.g. computer crime, like the mere unauthorised access to an information technology-based payment system.

The Framework Decision deliberately avoids the use of strictly defined qualifications under existing criminal law because they do not cover the same elements everywhere. The approach taken instead is to describe the various types of behaviour which should be criminal offences throughout the Union in a way which does not limit the Framework Decision's application to particular types of non-cash payment instruments. In order to do so, the list of Article 2 is drawn up on the basis of the direct aim pursued by the offender. It looks at the immediate target of the fraudster: whether the attack is directed at the payment instrument or at the making of payment instruments, or whether it is directed at one or more payment transactions, or at the system itself for ordering, collecting, processing, clearing, and settling the payment transactions.

¹ COM(1998) 395 final, 1.7.1998.

2. THE FRAMEWORK DECISION: ARTICLES

Article 1

Article 1 has not been modified, but is taken over from the Draft Joint Action text. It contains definitions of terms used in the Framework Decision. These definitions are without prejudice to more specific definitions in the Member States.

1. Points (a) and (b) contain core definitions for the Framework Decision. Point (a) defines “*(non-cash) payment instrument*”, i.e. including all payment instruments with the exception of bank notes and coins.
2. Point (b) defines “*payment transaction*” as any transaction for obtaining of money or value, making or receiving of payment in respect of goods, services and any other thing of value and/or the issuing of an order involving transfer of funds, through a payment instrument.
3. The definitions include software and are linked to Article 2(j) which lists prohibited activities related to device-making equipment.
4. The definition of “*legal person*” is taken from the Second Protocol to the Convention on the protection of the European Communities' financial interests².
5. “*Money laundering*” is defined as in the Council Directive 91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering.
6. The term “*national*” is to be understood in accordance with declarations made by Member States to Article 6(1) (b) of the European Convention on Extradition of 13 December 1957. The Extradition Convention will apply to serious cases under this Framework Decision as referred to in Article 3.3.a.

Article 2

Article 2 describes the different types of behaviour which the Framework Decision proposes should be incriminated in all Member States, if it is not yet the case, and made subject to the provisions set out in Articles 3, 4, 5 and 6. The behaviour listed in Art. 2 do not cover mere breaches of contractual obligations. A modification made in this article is the introduction of the word "intentional" in the opening paragraph, making that qualification applicable to all subsequent points of the article. The article has been split up into two paragraphs, the first of which consists of points (a) to (j).

² OJ C 221, 19.7.1997 p. 11.

The first paragraph:

- (a) typically corresponds to the theft of cheques or cards;
- (b) covers, e.g. the creation of completely false cards, as well as the forging of existing ones;
- (c) corresponds to the selling, transmitting, etc., of payment instruments, false or falsified, as well as of genuine instruments, but without authorisation of the legitimate holder;
- (d) covers the knowing possession of a payment instruments falling under (a) or (b) and targets the actual use of a payment instrument falling under (a) or (b);
- (e) deals with the case where a merchant or a service provider knowingly accepts a payment made under the circumstances described under (d).

Points (f) to (i) cover acts that are typically but not exclusively committed in a cyber-environment, and are intended to cover the same area described by Council of Europe Recommendation No R (89) 9 on computer-related crime (pages 37-38; guidelines for national legislatures), while recognising that there are other situations where these behaviours may also be relevant:

- (f) addresses cases where for instance genuine card identification data are used without the authorisation of the legitimate holder to make a payment by phone;
- (g) covers the case where completely false data are used for the same purpose; it is not to be understood as prohibiting pseudonyms as identification by the legitimate holder;
- (h) concerns the situation where, for instance, the information circulated within the processing system is intentionally modified so as to direct the order to the benefit of an account, other than the legitimate beneficiary of the order;
- (i) deals with the case where identification data are transmitted to a person who is not entitled to that information and would or could use them to obtain value or pecuniary advantage.

Point (j) relates to the means for preparing or carrying on one of the criminal behaviours described before, and also covers the case for instance of possession of specially designed holograms or papers for printing cheques.

The second paragraph applies to all types of behaviour, and outlines the accessory forms of criminal behaviours, extending incrimination to anyone who would assist or instigate any of the behaviours previously described or who knowingly benefits therefrom.

Article 3

This is the operative article, and in paragraph 1, it requires Member States to classify the behaviours described in Article 2 as criminal offences.

Paragraph 2 provides that legal persons should be held liable for the offences envisaged by paragraph 1, committed for their benefit by any person, acting either individually or as a part of the organ of the legal person in accordance with the modalities of Article 3 of the Second protocol to the Convention on the protection of the European Communities' financial interests.

Paragraph 3 puts an onus on Member States to provide for appropriate punishment of offences. In so far as natural persons are concerned, the provisions are modeled on provisions contained in the Convention on the protection of the European Communities' financial interests, the Protocol to that Convention and the Convention on the fight against corruption involving officials of the European Communities or officials of the Member States of the EU. Penalties must be effective, proportionate and dissuasive³.

In complying with this ruling, the Member States have some discretion in determining the nature and severity of the penalties which may be provided for. These need not always necessarily involve deprivation of liberty. Fines might be imposed in addition or as an alternative to imprisonment .

The article does, however, require Member States to provide for penalties involving deprivation of liberty, which can give rise to extradition, in the most serious cases. It will be for the Member States to decide what criteria determine the seriousness of an offence in the light of their respective legal traditions.

As far as legal persons are concerned, in some jurisdictions the concept of criminal liability of legal persons does not exist. This fact is recognised in Article 4 of the Second Protocol to the Convention on the protection of the European Communities' financial interests, on the basis of which this paragraph is modeled. The requirement is for effective, proportionate and dissuasive sanctions, the minimum obligation is to impose criminal or non-criminal fines.

To ensure a uniform approach to the money laundering aspects of the crimes described in the Framework Decision, paragraph 4 subsumes the offences described in paragraph one under the same application of the 1998 Joint Action on money laundering, establishing fraud and counterfeiting of non-cash means of payment as a predicate offence to money laundering.

³ The expression is taken over from a judgment of the Court of Justice of the European Communities (Case 68/88, Judgment of 21.9.1989, ECR 2965) expressed as follows: (the Members States) “must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive”.

Article 4

The international nature of fraud to non-cash means of payment means that to combat it effectively rules on jurisdiction and on extradition need to be clear and to be as progressive as national legal systems will allow to guard against persons evading prosecution. For that reason the provisions in paragraphs 1 and 2 are modeled on provisions used for forms of crime with particular international dimensions. The models used are the jurisdiction provisions of the Convention on the protection of the European Communities' financial interests, the Protocol to that Convention and the Convention on the fight against Corruption involving officials of the Communities or officials of Member States of the European Union.

Paragraph 1 establishes a series of criteria conferring jurisdiction to prosecute cases involving the offences covered by the Framework Decision on national enforcement and judicial authorities.

A Member State shall establish its jurisdiction in two situations:

- (a) where the offence is committed in whole or in part in its territory, irrespective of the status or the nationality of the person involved (territoriality principle);
- (b) where the offender is a national (active personality principle). The criteria of their status means that jurisdiction can be established regardless of the *lex locus delicti*. It is up to Member States to prosecute for offences committed abroad. This is particularly important for Member States which do not extradite their own nationals.

However, as not all Member States' legal traditions recognise extraterritorial jurisdiction, Member States may, subject to the obligation under paragraph 2, limit their jurisdictions to the first of these two situations. In addition if they do not do so they can still make the jurisdiction rule in the second situation subject to specific situations or conditions.

Paragraph 2 takes account of the fact that some Member States do not extradite their nationals and seeks to ensure that persons suspected to have committed fraud to non-cash means of payment do not evade prosecution because extradition is refused in principle on nationality grounds.

A Member State which does not extradite its own nationals must take the necessary measures to establish its jurisdiction over the offences concerned when committed by its own nationals outside its territory. The offences may have been committed in another Member State or in a third country. In such circumstances the requested Member State must submit the case to its legal authorities for the purpose of prosecution. The provision is not intended to affect national rules regarding criminal proceedings. The requesting Member State must transmit the files, information and exhibits relating to the offence to the Member State which is to prosecute the offence. The requesting Member State shall be informed of the prosecution initiated and of its outcome.

Article 5

The purpose of Article 5 is to provide for cooperation between public and private bodies and bodies involved in the control of payment systems and the authorities responsible for investigation and punishment of the offences envisaged by the Framework Decision. Paragraph 1 states that each Member State must take the necessary measures, to ensure that the bodies concerned advise the relevant authorities where there is reasonable ground for suspecting that an offence has been committed as well as providing all relevant information. This article is modeled on the provisions of the Joint Action concerning action to combat trafficking in human beings and sexual exploitation of children⁴.

The purpose of paragraph 2 is to clarify that each Member State must ensure that the obligations as they arise from Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data are also met in relation to the processing of personal data provided for in this article. The proposed wording is made pending a forthcoming general discussion of the issue of data protection in Title VI matters.

Article 6

The purpose of this Article is to augment instruments on international cooperation to which Member States are a party and which will apply to this Framework Decision.

International cooperation between judicial authorities in criminal matters is mainly effected by providing mutual legal assistance and through extradition arrangements.

Mutual Assistance arrangements are contained in a number of bilateral and multilateral agreements, notably the 1959 European Convention on Mutual Assistance and its 1978 Protocol, the 1990 Convention on the Schengen Agreement and the Benelux Treaty. EU Member States are at present working on a draft European Convention and a Protocol to supplement the provisions of the 1959 European Convention on Mutual Assistance and its Protocol.

Extradition arrangements are provided in the 1957 European Convention on Extradition and its protocols as well as in the Schengen Convention and the Benelux Treaty. Member States adopted in 1995 an EU Convention on Simplified Extradition Procedures which provides for a simplified procedure for persons who consent to extradition. A Convention signed in 1996 relating to Extradition further improves the conditions applying to extradition between Member States. Both these instruments will enter into force following completion of the national ratification procedures.

⁴ OJ L 63, 4.3.1997, p. 2.

Other EU instruments agreed, or planned to deal with organised crime will impact on the fight against fraud to non-cash means of payment. Examples are the Joint Action on the establishment of a Judicial Network to facilitate judicial cooperation between Member States and the Joint Action making it a criminal offence to participate in a criminal organisation.

Paragraph 1 requires Member States to afford each other the widest measure of mutual assistance in respect of investigation, prosecution and carrying out the punishment imposed, relating to offences provided for in this Framework Decision.

When a positive conflict of jurisdiction occurs, paragraph 2 establishes that Member States shall conduct one another with a view to coordinating their action to prosecute effectively.

Article 7

This article refers to the implementation and follow-up of this Framework Decision. It establishes that the Commission will make a report to the Council on the fulfillment by Member States of their obligations not later than two years after its adoption. On the basis of such a report, the Commission could make suggestions for the implementation of the Framework Decision, and the Council could, just as is provided for in the Joint Action of 5 December 1997 establishing a mechanism for evaluation⁵, address recommendations to the Member State concerned and invite it to report back to the Council on the progress it has made by a deadline set by the Council.

Articles 8 and 9

These have been added and contain final provisions.

⁵ Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application at national level of international undertakings in the fight against organized crime, OJ L 344, 15.12.1997.

Proposal for a

COUNCIL FRAMEWORK DECISION

combating fraud and counterfeiting of non-cash means of payment

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the initiative of the Commission¹,

Having regard to the opinion of the European Parliament²,

Whereas:

- (1) Fraud and counterfeiting of non-cash means of payment often operate on an international scale.
- (2) The work developed by various international organisations (i.e. the Council of Europe, the Group of Eight, the OECD, Interpol and the UN) is important, but needs to be complemented by action of the European Union.
- (3) The Council considers that the seriousness and development of certain forms of fraud regarding non-cash means of payment require comprehensive solutions; Recommendation No 18 of the Action Plan to combat organised crime³, approved by the Amsterdam European Council on 16 and 17 June 1997, as well as point 46 of the Action Plan of the Council and the Commission on how to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice⁴, approved by the Vienna European Council on 11 and 12 December 1998, call for an action on this subject.
- (4) In accordance with the principles of subsidiarity and proportionality, the objectives of this Framework Decision, namely to ensure that fraud and counterfeiting involving all forms of non-cash means of payment are recognised as criminal offences and are subject to effective, proportionate and dissuasive sanctions in all Member States cannot be sufficiently achieved by the Member States in view of the international dimension of those offences and can

¹ OJ C

² OJ C

³ OJ C 251, 15.8.1997, p. 1.

⁴ OJ C 19, 23.1.1999, p. 1.

therefore be better achieved by the European Union; this Framework Decision confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.

- (5) This Framework Decision should assist in the fight against fraud and counterfeiting involving non-cash means of payment together with other instruments already agreed by the Council such as Joint Action 98/428/JHA⁵ on the creation of a European Judicial Network, Joint Action 98/733/JHA⁶ on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, Joint Action 98/699/JHA⁷ on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime, as well as the Decision of 29 April 1999 extending Europol's mandate to deal with forgery of money and means of payment⁸.
- (6) The Commission submitted to the Council, on 1 July 1998, the Communication entitled "A framework for action combating fraud and counterfeit of non-cash means of payment"⁹ which advocates a Union Policy covering both preventive and repressive aspects of the problem.
- (7) The Communication contains a Draft Joint Action which is one element of that comprehensive approach, and constitutes the starting point for this Framework Decision.
- (8) It is necessary that a description of the different forms of behaviour requiring criminalisation in relation to fraud and counterfeiting of non-cash means of payment should cover the whole range of activities that together constitute the menace of organised crime in this regard.
- (9) It is necessary that these forms of behaviour be classified as criminal offences in all Member States, and that effective, proportionate and dissuasive sanctions be provided for natural and legal persons having committed or being liable for such offences, and that the offences in question be regarded as falling under the legislation directed against money laundering.
- (10) It is necessary that Member States consult each other when two or more Member States have jurisdiction over the same offence.
- (11) It is also necessary that Member States establish effective cooperation with the private services and bodies having responsibilities in the functioning and monitoring of the payment systems, and that the Member States afford each other the widest measure of mutual assistance,

⁵ OJ L 191, 7.7.1998, p. 4.

⁶ OJ L 351, 29.12.1998, p. 1.

⁷ OJ L 333, 9.12.,1998, p. 1.

⁸ OJ C 149, 28.5.1999, p. 16.

⁹ COM(1998) 395 final.

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Definitions

1. For the purposes of this Framework Decision, and without prejudice to more specific definitions in the Member States' legislation:
 - (a) "*Payment instrument*" or "*non-cash payment instrument*" means an instrument other than legal tender (bank notes and coins) enabling, alone or in conjunction with another (payment) instrument, the legitimate holder or payer, to obtain money or valuable consideration, to make or receive payments in respect of goods, services or any other thing of value, or to issue an order or message requesting or otherwise authorising the transfer of funds (in the form of a monetary claim on a party) to the order of a payee;
 - (b) "*Payment transaction*" means the obtaining of money or valuable consideration, the making or receiving of payments in respect of goods, services or any other thing of value, or the issuing of an order or message requesting or otherwise authorising the transfer of funds (in the form of a monetary claim on a party) to the order of a payee, through a payment instrument;
 - (c) "*Device-making equipment*" means any equipment (including software) designed or adapted for the access, manufacture or alteration of any, or part of any, payment instrument or payment transaction and shall include equipment designed or adapted to change or alter any information or data carried on or in any payment instrument or payment transaction;
 - (d) "*Legal person*" means any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organisations;
 - (e) "*Money laundering*" means the conduct as defined in the third indent of Article 1 of Council Directive 91/308/EEC¹⁰.
2. For the purpose of this Framework Decision, a "*national*" of a Member State shall be construed in accordance with any declaration made by that State under Article 6(1)(b) of the European Convention on Extradition of 13 December 1957.

¹⁰ OJ L 166, 28.6.1991, p. 77.

Article 2

Description of behaviour

The measures set out in Articles 3 to 6 relate to the following types of intentional behaviour:

- (a) misappropriation of a payment instrument;
- (b) counterfeiting or falsification of a payment instrument;
- (c) knowingly handling a payment instrument, without the holder's authorisation;
- (d) knowingly possessing a misappropriated, counterfeited or falsified payment instrument;
- (e) knowingly using a misappropriated, counterfeited or falsified payment instrument; or knowingly accepting a payment made in such circumstances;
- (f) knowingly using unauthorised identification data for initiating or processing a payment transaction;
- (g) knowingly using fictitious identification data for initiating or processing a payment transaction;
- (h) manipulation of relevant data including account information, or other identification data, for initiating or processing a payment transaction;
- (i) unauthorised transmission of identification data for initiating or processing a payment transaction;
- (j) unauthorised making, handling, possession or use of specifically adapted equipment or elements of payment instruments for the purpose of:
 - manufacturing or altering any payment instrument or part thereof;
 - committing the fraudulent acts described in points (f) to (i).

The measures set out in Articles 3 to 6 also relate to involvement as accessory or instigator in the acts described in paragraph 1 or knowingly obtaining valuable consideration or a pecuniary advantage from any such acts.

Article 3

Measures to be taken at national level

1. Member States shall classify the types of behaviour set out in Article 2 as criminal offences.

2. Member States shall provide that legal persons can be held liable for the offences provided for in paragraph 1 committed for their benefit by any person, whether acting individually or as part of an organ of the legal person, who holds a leading position within the legal person, on the basis of:
 - (a) a power of representation of the legal person, or
 - (b) an authority to take decisions on behalf of the legal person, or
 - (c) an authority to exercise control within the legal person.
3. Member States shall provide that the penalties for the offences referred to in paragraph 1 shall:
 - (a) in so far as natural persons are concerned, be effective, proportionate and dissuasive criminal sanctions entailing, at least in serious cases, penalties involving privation of liberty and capable of giving rise to extradition;
 - (b) in so far as legal persons are concerned, be effective, proportionate and dissuasive sanctions which shall include criminal or non-criminal fines and may entail other sanctions such as:
 - (i) exclusion from entitlement to public benefits or aid;
 - (ii) temporary or permanent disqualification from the practice of commercial activities;
 - (iii) placing under judicial supervision;
 - (iv) a judicial winding-up order.
4. The offences referred to in paragraph 1 shall be considered serious crimes for the purpose of the application of Joint Action 98/699/JHA.

Article 4

Jurisdiction

1. Each Member State shall establish its jurisdiction over the offences provided for in Article 3 where:
 - (a) the offence is committed in whole or in part within its territory;
 - (b) the offender is one of its nationals.

Subject to the provisions of paragraph 2, any Member State may limit the application of its jurisdiction to the circumstances laid down in point (a). A Member State which does not apply such a limitation may nevertheless assume jurisdiction in the circumstances laid down in point (b) only in specific cases or subject to special conditions.

2. Where a Member State does not extradite its nationals, it shall establish its jurisdiction over the offences set out in Article 3 when these are committed by its own nationals outside its territory.

Each Member State shall, when one of its nationals is suspected of having committed in another Member State one of the offences provided for in Article 3 but it does not extradite that person to that other Member State solely on the grounds of his nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate.

In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be transmitted in accordance with the procedures laid down in Article 6 of the European Convention on Extradition of 13 December 1957.

The requesting Member State shall be informed of the prosecution initiated and of its outcome.

Article 5

Cooperation from public and private services or bodies

1. Each Member State shall take the necessary measures to ensure that the public and private services and bodies engaged in managing, monitoring and overseeing the payment systems, will cooperate with the authorities responsible for investigation and punishment of the offences established by this Framework Decision.

In particular, the services and bodies shall:

- (a) advise those authorities on their own initiative, where there are reasonable grounds for considering that one of the offences has been committed;
 - (b) provide those authorities with all relevant information either on request or on their own initiative.
2. As regards the processing of personal data, paragraph 1 shall be implemented so as to ensure a level of protection equivalent to the protection required by European Parliament and Council Directive 95/46/EC¹¹. Data shall be used only for the purposes for which it has been transmitted.

¹¹ OJ L 281, 23.11.1995, p. 31.

Article 6

Cooperation between Member States

1. In accordance with the applicable conventions, multilateral or bilateral agreements or arrangements Member States shall afford each other the widest measure of mutual assistance in respect of proceedings relating to the offences provided for in this Framework Decision.
2. Where several Member States have jurisdiction in respect of offences envisaged by this Framework Decision, those States shall consult one another with a view to coordinating their action in order to prosecute effectively.

Article 7

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Framework Decision on 31 December 2000 at the latest. They shall forthwith inform the Commission thereof and provide it with copies of the measures through which the Framework Decision is implemented.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. The Commission shall submit a report to the Council on the fulfilment by Member States of their obligations under this Framework Decision, not later than two years after its entry into force.

Article 8

Entry into force

This Framework Decision shall enter into force on the date of its publication in the *Official Journal of the European Communities*.

Article 9

Addressees

This Framework Decision is addressed to the Member States.

Done at Brussels,

For the Council
The President