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REPORT FROM THE COMMISSION

based on Article 6 of the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.

{SEC(2004)383}

TABLE OF CONTENTS

1.	INTRODUCTION	3
1.1.	Background	3
1.2.	Method and criteria for evaluation for this Framework-Decision	4
1.2.1.	Framework-Decisions ex-Article 34, paragraph (2), point b) of the Treaty on European Union	4
1.2.2.	Evaluation criteria	4
1.2.3.	Context of evaluation	5
1.3.	General purpose of the Framework-Decision	6
1.4.	General purpose of the report.....	6
2.	ANALYSIS OF NATIONAL MEASURES TAKEN TO COMPLY WITH THE FRAMEWORK DECISION	6
2.1.	Article 1: Reservations in respect of the 1990 Convention.....	6
2.1.1.	Article 1 Paragraph (a): Reservations under Article 2 of the 1990 Convention	7
2.1.2.	Article 1 Paragraph (b): Reservations under Article 6 of the 1990 Convention.....	10
2.2.	Article 2: Penalties	13
2.3.	Article 3: Value confiscation	14
2.3.1.	Domestic proceedings:	15
2.3.2.	External requests:	17
2.4.	Article 4: Processing of requests for mutual assistance	19
2.5.	Article 7: Territorial application	20
3.	CONCLUSIONS.....	20

1. INTRODUCTION

1.1. Background

Under Article 6 of the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime¹ (hereafter ‘the Framework Decision’), the Commission has to establish a written report on the measures taken by the Member States to comply with this Framework Decision.

Paragraph (1) of that Article obliges the Member States to take the necessary measures to comply with the provisions of the Framework Decision by 31 December 2002. According to paragraph (2), by 1 March 2003 Member States should forward to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations arising for them from this Framework Decision and, when appropriate, the notifications made pursuant to Article 40(2) of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (hereafter ‘the 1990 Convention’). The Council should ascertain, by 31 December 2003, on the basis of this information and the written report by the Commission, to what extent Member States have taken the necessary measures to comply with the Framework Decision.

The value of this report depends therefore largely on the quality and punctuality of the national information received by the Commission. The Commission reminded Member States of their obligation by means of two letters sent the 9 December 2002 and the 21 February 2003. By 1 March 2003, however, only six Member States (France, Finland, Germany, Netherlands, Sweden and United Kingdom) had notified the Commission of the measures taken to implement the Framework Decision. By June 2003, twelve Member States (the aforementioned plus Belgium, Denmark, Greece, Spain, Ireland and Luxembourg) had provided the Commission with information on implementation and, finally, Italy was the thirteenth Member State to reply, the 31 October 2003.

However, the information the Commission has received varies considerably especially as far as the aspect of completeness is concerned. This is reflected in the annexed table {SEC(2004)383} that contains the information provided by Member States. Not all of them identified and transmitted the text of the implementing provisions or the text of the notifications to the 1990 Convention, as required by the Framework Decision. Some just referred to new draft legislation. As far as possible, missing information has been completed with the useful aid provided by the contact persons designated by most Member States.

It should be also noted that some Member States, such as Denmark, had to amend certain internal provisions in order to comply with the Framework Decision. Others, like Spain, Italy and Luxembourg, are preparing legislation that has not yet entered into force. Greece announced that a special legislative drafting committee was currently producing national transposing provisions, although no text was provided. Sweden is currently examining whether new legislation is necessary to comply with the Framework Decision, as regards reservations to the 1990 Convention. France explicitly mentioned that existing legislation already complied with the Framework Decision. This could be implicitly applied to the rest of Member States that have not drawn our attention to specific implementing provisions. The

¹ OJ L182, 05.07.2001,p. 1.

United Kingdom has introduced new legislation on the matter although they understand that previous legislation already complied with the Framework Decision.

Finally, by 1 November 2003, the Commission had received no information from Austria and Portugal. Therefore, when analysing implementation measures, the report will not refer to these Member States with the exception of the implementation of Article 1, as further explained.

1.2. Method and criteria for evaluation for this Framework-Decision

1.2.1. Framework-Decisions ex-Article 34, paragraph (2), point b) of the Treaty on European Union

This Framework Decision is based on the Treaty of the European Union (TEU), and in particular Article 31 (a), (c) and (e) and Article 34(2) (b) thereof.

Framework decisions can best be compared with the legal instrument of a directive². Both instruments are binding upon Member States as to the result to be achieved but leave to the national authorities the choice of form and methods. However, framework decisions shall not entail direct effect. The Commission has no legal action before the Court of Justice – at least in the current state of development of European Law- to enforce transposition legislation for a Framework Decision. Nonetheless, the Court of Justice can rule on any dispute between Member States regarding the interpretation or the application (including the transposition) of the aforementioned instrument³. The possible exercise of this right requires solid factual bases that the Commission's report, based on transmitted information, can help to build up.

1.2.2. Evaluation criteria

To be able to evaluate on the basis of objective criteria whether a framework decision has been fully implemented by a Member State, some general criteria are developed with respect to directives which should be applied *mutatis mutandis* to framework decisions, such as:

1. form and methods of implementation of the result to be achieved must be chosen in a manner which ensures that the directive functions effectively with account being taken of its aims⁴;
2. each Member State is obliged to implement directives in a manner which satisfies the requirements of clarity and legal certainty and thus to transpose the provisions of the directive into national provisions having binding force⁵,
3. transposition need not necessarily require enactment in precisely the same words in an express legal provision; thus a general legal context (such as appropriate already existing measures) may be sufficient, as long as the full

² Article 249 EC Treaty.

³ Article 35, paragraph (7), TEU

⁴ See relevant case law on the implementation of directives: Case 48/75 *Royer* [1976 ECR 497 at 518].

⁵ See relevant case law on the implementation of directives: Case 239/85 *Commission v. Belgium* [1986] ECR 3645 at 3659. See also Case 300/81 *Commission v. Italy* [1983] ECR 449 at 456.

application of the directive is assured in a sufficiently clear and precise manner⁶;

4. directives must be implemented within the period prescribed therein⁷.

Both instruments are binding ‘as to the results to be achieved’. That may be defined as a legal or factual situation, which does justice to the interest, which in accordance with the Treaty the instrument is to ensure⁸.

The general assessment provided for in Article 6, of the extent to which the Member States have complied with the Framework Decision, is -where possible- based on the criteria mentioned above.

1.2.3. *Context of evaluation*

A first preliminary observation concerns the (legal) context and follow up of the evaluation report. As already mentioned, the Commission has within the first pillar the possibility to start against a Member State an infringement procedure. Since this possibility does not exist within the TEU, the nature and purpose of this report differ, of course, from a report on the implementation of a first pillar directive by Member States. Nevertheless, as the Commission fully participates in third pillar matters⁹, it is coherent to confer on it a task of a factual evaluation of the implementation measures enabling the Council to assess the extent to which Member States have taken the necessary measures in order to comply with this Framework Decision.

A second preliminary observation concerns the specific nature of the field being regulated. The Framework Decision aims at enhancing the fight against money laundering and introducing a minimum harmonisation of penalties. Though the majority of systems seem to be convergent, there still exist, especially concerning confiscation of the proceeds of crime, divergences among Member States. The evaluation of the extent to which Member States have taken measures to comply with these issues shall take, as far as appropriate, account of the general criminal legal background of the Member States.

Another specific feature of this Framework Decision, that must be kept in mind when defining the scope of the evaluation, is the link between this instrument and the 1990 Convention, to which Articles 1,2 and, to a lesser extent, Article 3, refer. The Commission limits the scope of this report to the withdrawal of reservations without entering into the substance of the obligations deriving from Articles 2 and 6 of the 1990 Convention. Therefore, specially as regards Article 2, the report will not try to assess if the offences referred to in Article 6(1)(a) and (b) of the Convention are reflected in national legislation, but only if the national provisions that allegedly comply with such Articles set up the maximum minimum penalties that the Framework Decision requires.

⁶ See relevant case law on the implementation of directives for instance Case 29/84 *Commission v. Germany* [1985] ECR 1661 at 1673.

⁷ See substantial case law on the implementation of directives, for example : Case 52/75 *Commission v. Italy* [1976] ECR 277 at 284, See, generally, the Commission annual reports on monitoring the application of Community law, for instance COM (2001) 309 final.

⁸ See PJG Kapteyn and P. Verloren van Themaat ‘Introduction to the Law of the European Communities’, third edition, 1998, p. 328.

⁹ Article 36 (2) Treaty on European Union.

Finally, it must be noted that, since the entry into force of the Framework Decision, further consideration has been given to the issue of confiscation of the proceeds of crime and to the enforcement of freezing and confiscation orders, from the new view point of mutual recognition. Some of the provisions of this Framework Decision, (especially Article 4 which refers to the processing of requests for mutual assistance), must therefore be considered in the light of the new and future instruments.

1.3. General purpose of the Framework-Decision

On 3 December 1998, the Council adopted a Joint Action on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime¹⁰. The Tampere European Council, in October 1999, asked for further measures to make action against money laundering more effective, such as the approximation of definitions, incriminations and sanctions or full mutual legal assistance in the investigation and prosecution of this type of crime.

Thus, the general purpose of this framework decision was to respond to the Conclusions of the Tampere Council by:

- Using this instrument to give a more binding form to some of Member States' commitments under the Joint Action, (specially as regards reservations in respect of the 1990 Convention, value confiscation and processing of requests for mutual assistance); and
- Making further progress in some areas as compared with the 1998 Joint Action, (for example, by introducing a minimum harmonisation of penalties).

1.4. General purpose of the report

This report should enable the Council to assess the extent to which the Member States have taken the necessary measures to comply with the Framework Decision.

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

2.1. Article 1: Reservations in respect of the 1990 Convention

Considering the commitment of Member States to the principles of the 1990 Convention, Article 1(1) of the 1998 Joint Action already invited Member States to ratify the Convention in a uniform manner. Article 1 of the Framework Decision replaced this Article while introducing some drafting adjustments to make the wording appropriate for the new binding nature of the provision. Still, the aim of the Article is to limit Member State's reservations regarding confiscation of the instrumentalities and proceeds of crime (Art.2 of the 1990 Convention) and the incrimination of laundering offences (Art.6 of the 1990 Convention).

This implies, on the one hand, the obligation to expand the applicability of confiscation measures to a wide scope of offences, with a limited possibility to exclude confiscation of the proceeds of tax offences. On the other hand, it means that Member States have committed themselves to make all serious offences, as defined in the Framework Decision, predicate

¹⁰ OJ L333, 9.12.1998, p.1.

offences for the purpose of the criminalisation of money laundering. This trend of widening the definition of money laundering by broadening the range of underlying offences is also reflected in the Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering¹¹. This covers the laundering of proceeds from a wide range of “serious crimes”, that however are more limited than those defined in the Framework Decision. Alignment on the Framework Decision’s definition of “serious crimes” is envisaged in the Directive by 15 December 2004, on the basis of a Commission proposal¹².

Only some Member States (Denmark, Ireland, Spain, Netherlands and United Kingdom) have actually provided the Commission with the ratification instruments or the text of the reservations. In this particular case, however, it has been possible for the Commission to gather such information from a public and reliable source as is the online Treaty Office of the Council of Europe¹³. Therefore, the analysis of national measures taken to comply with this Article, will also cover, as far as possible, those Member States from which the Commission has received no information.

2.1.1. Article 1 Paragraph (a): Reservations under Article 2 of the 1990 Convention

According to this paragraph, Member States must take the necessary steps not to make or to uphold reservations to Article 2 of the 1990 Convention¹⁴, “in so far as the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year”. The same paragraph establishes an exception by allowing the retention of reservations on this Article “in respect of the confiscation of the proceeds from tax offences for the sole purpose of their being able to confiscate such proceeds, both nationally and through international cooperation, under national, Community and international tax-debt recovery legislation.”

From the information provided to or gathered by the Commission, it results that nine Member States (Belgium, Denmark, Germany, Spain, France, Italy, Austria, Portugal, and Finland) have never made a reservation in respect of this Article. One, (United Kingdom), withdrew an existing reservation on 16 September 1999. The remaining five (Greece, Ireland, Luxembourg, Netherlands, and Sweden) still uphold reservations, so whether they meet the terms of the framework decision must be further examined.

On 22 June 1999, Greece introduced a reservation that limits the application of article 2 to a list of 22 types of offences¹⁵. Such limitation not being linked to the exceptions set out in

¹¹ OJ L344, 28.12.2001, p.76

¹² See Directive 2001/97/EC Article 1(1)(E)

¹³ <http://conventions.coe.int>

¹⁴ Art.2 Confiscation measures (1) Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds. (2) Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies only to offences or categories of offences specified in such declaration.

¹⁵ Greece: Reservation contained in a Note Verbale handed over to the Secretary General at the time of deposit of the instrument of ratification, on 22 June 1999 - Or. Fr.

Article 2, paragraph 1, of the Convention shall apply only to the following offences:

1. Crimes provided for in the law on fight against the spread of drugs:

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- 1.a. Importing drugs into the country, exporting drugs out of the country or transiting drugs through the country.
- 1.b) Selling, purchasing, offering, making available or distributing to third parties by any means, storing or keeping drugs, or acting as intermediary in the commission of any of these offences.
- 1.c) Introducing drugs or contriving to facilitate their introduction into camps, police cells for all categories of under-age prisoners, collective workplaces or housing, hospitals or health centres.
- 1.d) Contriving in any manner to mix drugs with food products, drinks or other items intended for human consumption or that are likely to be consumed.
- 1.e) Preparing articles belonging to the category of controlled drugs or soporific substances, or illegally importing, supplying, producing, preparing, selling, making available, transporting, possessing or distributing precursor substances or apparatus or equipment, where it is known that they are used or will be used for the purposes of illegal production, cultivation or preparation of drugs, or, generally, for purposes other than that which originally justified the import, export, transport or processing of these precursors.
- 1.f) Cultivating or harvesting any plant of the Indian hemp family, the opium poppy, any plant species of the Brazilwood family, or any other plant from which narcotic substances are derived.
- 1.g) Possessing or transporting drugs by whatever manner or means, whether within the country's territory, by navigating along the territorial zone or crossing territorial waters, or by flying in Greek air space.
- 1.h) Knowingly sending or receiving parcels, samples without commercial value or letters containing any sort of drug, or authorising a third party to send or receive such items.
- 1.i) Making available premises of any kind to a third party for the use of drugs, or communicating the address of a shop where drugs are systematically used, or being aware of such use as an employee of such a shop.
- 1.j) Contributing by any means to the spread of drug use.
- 1.k) Adulterating or selling adulterated articles from the list of controlled drugs.
- 1.l) Forging a medical prescription, falsifying or using a forged or falsified prescription in order to obtain narcotic substances for the purposes of trafficking in them.
- 1.m) Organising, financing, advising or supervising the commission of any of the aforementioned offences in any manner or giving instructions or authorisation in respect of them.
- 1.n) Facilitating or concealing the commission of other crimes by committing the above-mentioned offences.
- 1.o) Commission of the above crimes by a person who deals with drugs in the course of his or her duties and, in particular, is responsible for their safekeeping or for prosecuting persons who have committed these crimes, or where the offence is linked to his or her functions.
- 1.p) Introducing drugs or facilitating their introduction or trafficking in schools at any level and in educational establishments or other educational training or practical instruction units, save for the purpose of a specific research or training programme.
- 1.q) Introducing drugs or facilitating their introduction or trafficking in sports premises, camping grounds, orphanages, institutions or premises intended for the provision of social services or for accommodation of the armed forces, or premises where pupils or students meet for educational, sports or social activities.
- 1.r) Selling, making available or distributing drugs to third parties by whatever means, in premises directly adjoining the above-mentioned premises, or acting as an intermediary in the commission of any of these offences.
- 1.s) The issuing of a prescription for the supply of drugs by a doctor who is aware that there is no real, precise medical indication, or supply by a physician of medicines containing narcotics in one form or another, in the knowledge that they will be used for the purpose of preparing drugs.
- 1.t) Supply of drugs without the legally required medical prescription or on the basis of an invalid prescription or in amounts exceeding that prescribed, by a pharmacist or in general by a pharmaceutical trader, the manager or employee of a pharmacy or another person in the pharmacy.
- 1.u) Supplying substances intended to act as substitutes for dependency-inducing drugs.
- 1.v) Committing the above-mentioned crimes repeatedly or habitually or by way of an occupation, or acting in a manner intended to encourage drug use by under-age persons, or using weapons in committing the above-mentioned crimes or for the purpose of enabling the perpetrator to escape.
- 1.x) Inciting or inviting a third party to use drugs illegally, advertising them, supplying information concerning their manufacture or supply for the purpose of spreading their use, or assisting the commission of the aforementioned crimes.

Article 1(a), the Commission must conclude that the reservation does not comply with the Framework Decision, and should therefore be withdrawn or reformulated. This is also the case of Luxembourg¹⁶, which limits the application of Article 2 of the 1990 Convention to some specific offences.

Sweden's reservation to Article 2¹⁷ is more limited in scope, as confiscation applies to offences ruled by the Penal Code, the Narcotic Drugs Penal Act or the Act Prohibiting Certain Doping Substances. Swedish legislation on Smuggling was also replaced on 1 January 2001 to provide for the forfeiture of related proceeds.¹⁸ Nevertheless, the Swedish authorities are aware of the possible need to further restrict this declaration and subsequently introduce new

2. Crimes covered by Article 15 (1) of Law No. 2168/93, on "weapons, munitions... etc": importing, possessing, producing, processing, assembling, dealing in, delivering, supplying or transporting military rifles, automatic machine guns, pistols or other articles of military hardware, for the purposes of making them available to a third party in order to commit a crime, or for the purpose of illegally supplying groups, organisations, associations or unions of persons, or receiving, concealing or accepting in any way the above objects for the same purposes.

3. Banditry.

4. Blackmail.

5. Abduction.

6. Stealing particularly valuable goods, or aggravated theft.

7. Misappropriating a particularly valuable object, or misappropriation giving rise to an abuse of trust.

8. Fraud, if resulting in particularly heavy losses, or if the offender carries out fraudulent activities habitually or occupationally, or if the circumstances in which the offence was committed show that the perpetrator's character is especially dangerous.

9. Illegal trade in antique objects.

10. Theft of a particularly valuable cargo.

11. Acting as an intermediary by receiving consideration for the removal of tissues or organs, or acquiring tissues or organs with the intention of reselling them.

12. Economic crimes and offences against the State or legal entities in the public sector in the broad sense.

13. Aggravated smuggling.

14. Violations of the laws on ionising radiation.

15. Procuring.

16. Breaches of the laws on games of chance or other games.

17. Corruption.

18. Usury.

19. Illegal immigration.

20. Smuggling of nuclear materials.

21. Corruption of a public official from another country (ratification of the OECD Convention for combating the bribery of foreign public officials in international business transactions).

22.a) Passive or active corruption of a public official.

b) Fraudulent actions prejudicial to the financial interests of the European Communities.

c) Fabricating and delivering false declarations or documents (ratification- application of the Convention on the protection of the European Communities' financial interests and appended Protocols).

The Greek Government reserves the right to add other categories of criminal activities.

¹⁶ In accordance with Article 2, paragraph 2, and Article 6, paragraph 4, of the Convention, Article 2, paragraph 1, and Article 6, paragraph 1, of the Convention shall apply only to the offences mentioned in Article 8-1, item 1), of the Law of 19 February 1973 concerning the sale of medicinal substances and the fight against drug addiction, and in Article 506-1, item 1), of the Penal Code.

¹⁷ In accordance with Article 2, paragraph 2, Sweden declares that, for Sweden's part, the provision in Article 2, paragraph 1, shall be applicable to such proceeds of crime and such instrumentalities which have been used in the commission of an offence as may be confiscated under the provisions of the Penal Code, the Narcotic Drugs Penal Act (1968:64) or the Act Prohibiting Certain Doping Substances (1991:1969). Regarding other offences, Sweden reserves the right, where justified in view of the type of offence, to prescribe confiscation to a more limited extent.

¹⁸ Law on Penalties for Smuggling(2000:1225)

legislation. The Swedish Ministry of Justice is currently analysing the recommendations of a special Confiscation Committee that have not yet given rise to any legislation.

The Irish reservation limits the application of Article 2¹⁹, to drug trafficking offences and other offences triable on indictment. In the information provided, Ireland asserted the latter are offences punishable by deprivation of liberty or a detention order for a maximum of more than one year. In that case the reservation would come within the terms of the exemption provided by Article 1 (a) of the Framework Decision.

Similarly, the reservation still upheld by the Netherlands²⁰ is covered by the exemption provided by the Framework Decision in respect of the confiscation of the proceeds from tax offences. The Explanatory Memorandum of the Law of 10 March 1993 authorising the ratification of the 1990 Convention gives the reasons for this reservation, which are also in line with the purpose of the exemption, as described in the Framework Decision.

In conclusion, a large majority of Member States (twelve) comply with Article 1(a) of the Framework Decision, whereas the other three (Greece, Luxembourg and probably Sweden) will have to withdraw or redraft their reservations to Article 2 of the 1990 Convention, in order to meet the obligation arising for them from Article 1(a) of the Framework Decision.

2.1.2. Article 1 Paragraph (b): Reservations under Article 6 of the 1990 Convention

According to this paragraph, Member States must take the necessary steps not to make or to uphold reservations to Article 6 of the 1990 Convention²¹, “in so far as serious offences are

¹⁹ In accordance with Article 2, paragraph 2, Ireland declares that Article 2, paragraph 1, shall apply only to drug trafficking offences as defined in its domestic legislation and other offences triable on indictment.

²⁰ In accordance with Article 2, paragraph 2, of the Convention, the Kingdom of the Netherlands declares that it reserves the right not to apply Article 2, paragraph 1, of the Convention with regard to the confiscation of the proceeds from offences punishable under legislation on taxation or on customs and excise.

²¹ Article 6 – Laundering offences

1 Each Party shall adopt such legislative and other measures as may be necessary to establish as offences under its domestic law, when committed intentionally:

a the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions

b the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds; and, subject to its constitutional principles and the basic concepts of its legal system;

c the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds;

d participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2 For the purposes of implementing or applying paragraph 1 of this article:

a it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party;

b it may be provided that the offences set forth in that paragraph do not apply to the persons who committed the predicate offence;

c knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances.

3 Each Party may adopt such measures as it considers necessary to establish also as offences under its domestic law all or some of the acts referred to in paragraph 1 of this article, in any or all of the following cases where the offender:

concerned. Such offences shall in any event include offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which have a minimum threshold for offences in their legal system, offences punishable by deprivation of liberty or a detention order for a minimum of more than six months”.

From the information provided to or gathered by the Commission, it results that five Member States (Belgium, Spain, France, Ireland, and Finland) have never made a reservation in respect of this Article. Nevertheless, as pointed out in the information provided by Spain, the current definition of money laundering in the Spanish Criminal Code requires the predicate offence to be a “serious offence”, that is, according to Spanish legislation, an offence punished with more than three years’ imprisonment. Spain is currently in the process of amending its Criminal Code in order to suppress this requirement and fully comply with the Framework Decision.

Three Member States have withdrawn existing reservations. Denmark withdrew its reservation with effect from the 6th July 2001. At the same time, a general provision that made “receiving” punishable in respect of all offences was introduced in the Danish Penal Code. Sweden withdrew its reservation with effect from the 1st July 1999, whilst amending legislation on money laundering to extend the range of predicate offences and introducing a new crime of “receiving stolen money”. Finally, with effect from the 1st September 1995, United Kingdom withdrew the reservation that limited the application of article 6(1) of the Convention to drug trafficking offences.

The remaining seven (Germany, Greece, Italy, Luxembourg, Netherlands, Austria, and Portugal) still uphold reservations, so whether they meet the terms of the Framework Decision must be further examined.

However, out of these seven Member States, only two (Netherlands and Germany) provided the Commission with specific information on this issue. The reservation upheld by the Netherlands²² complies with the Framework Decision. It derives from the reservation that Article 6 of the Convention applies to “crimes”, which, in internal legislation, meet the definition of “serious offences” set in the Framework Decision. The same can be said of the reservation upheld by Germany²³, as the Convention applies to “crimes”, defined in Article

a ought to have assumed that the property was proceeds;

b acted for the purpose of making profit;

c acted for the purpose of promoting the carrying on of further criminal activity.

4 Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by declaration addressed to the Secretary General of the Council of Europe declare that paragraph 1 of this article applies only to predicate offences or categories of such offences specified in such declaration.

²² In accordance with Article 6, paragraph 4, of the Convention, the Kingdom of the Netherlands declares that Article 6, paragraph 1, of the Convention will only be applied to predicate offences that qualify as “*misdrijven*” (crimes) under the domestic law of the Netherlands (the Kingdom in Europe).

²³ Article 6, paragraph 1, applies only to the following predicate offences or categories of such offences: crimes (Article 12, paragraph 1, of the German Criminal Code - StGB), ie offences punishable with imprisonment of not less than one year; misdemeanours of receiving bribes (Article 332 paragraph 1, also in combination with paragraph 3 of the StGB) and bribery (Article 334 of the StGB); misdemeanours under Article 29, paragraph 1, sentence 1, No. 1, of the Narcotics Act (Betäubungsmittelgesetz) or under Article 29, paragraph 1, No. 1, of the Raw Materials Surveillance Act (Grundstoffüberwachungsgesetz);

12(1) of the German Criminal Code as offences punishable with imprisonment of not less than one year.

As regards the rest of the aforementioned Member States, Austria made a reservation²⁴ that limits the application of Article 6 of the 1990 Convention to predicate offences considered “crimes” under internal legislation, that is, to offences punishable with life imprisonment or with more than three years’ imprisonment²⁵. Therefore, it does not meet the terms of the Framework Decision, which sets a lower limit of one years’ imprisonment to consider an offence as “serious”. Greece also entered a reservation by which Article 6 (1) of the 1990 Convention shall only apply to a list of offences, identical to those listed in the previous reservation to Article 2²⁶. The limited number of the listed offences and the lack of a generic clause to ensure that the reservation is not maintained in respect of “serious offences”, imply that this reservation does not meet the required terms. This is also applicable to Luxembourg²⁷ and Portugal²⁸, which limit the scope of predicate offences. Finally, Italy introduced a reservation by which Article 6 applies to all “delitti” excluding those that are not deliberate²⁹, which seems to comply with the Framework Decision, although Italy did not provide specific information on this issue.

In conclusion, eight Member States (Belgium, Denmark, Spain, France, Ireland, Finland, Sweden and United Kingdom) have not made or upheld reservations to Article 6 of the

misdemeanours of organised smuggling committed by a gang with the use of violence (Article 373 of the German Tax Code - Abgabenordnung) or with the handling for gain of property obtained through tax fraud (Article 374 of the Tax Code), each in combination with Article 12, paragraph 1 of the Common Market Organisations Implementation Act (Gesetz zur Durchführung der Gemeinsamen Marktorganisationen);

misdemeanours committed for gain or by a member of a gang formed for the purpose of repeatedly carrying out one of the following acts constituting the elements of one of the following offences: traffic in human beings (Article 180b of the StGB), procuring (Article 181a of the StGB), theft (Article 242 of the StGB), embezzlement (Article 246 of the StGB), extortion (Article 253 of the StGB), handling of stolen goods (Article 259 of the StGB), fraud (Article 263 of the StGB), computer fraud (Article 263a of the StGB), fraudulently obtaining subsidies (Article 264 of the StGB), breach of trust (Article 266 of the StGB), falsification of documents (Article 267 of the StGB), falsification of evidence (Article 269 of the StGB), illegal organisation of gambling (Article 284 of the StGB), illegal handling of dangerous waste (Article 326, paragraphs 1, 2 and 4, of the StGB), illegal handling of radioactive substances or other dangerous substances and goods (Article 328, paragraphs 1, 2 and 4, of the StGB), incitement to make an improper application for asylum (Section 84 of the Asylum Procedure Act - AsylVfG), smuggling of aliens (Section 92a of the Aliens Act - AuslG);

misdemeanours committed by a member of a criminal organisation (Article 129 of the StGB).

(Misdemeanours - Vergehen - are offences for which the minimum penalty is imprisonment of less than one year or a fine - cf Article 12, paragraph 2, of the StGB).

²⁴ The Republic of Austria declares in accordance with Article 6, paragraph 4, that Article 6, paragraph 1, will apply only to predicate offences which are crimes (“*Verbrechen*”) under Austrian penal legislation (paragraph 17 of the Austrian Penal Code).

²⁵ Cf paragraph 17 (1) of the Penal Code

²⁶ Cf note 14

²⁷ Cf note 15 and Article 506-1 of the Penal Code.

²⁸ For the purposes of Article 6 of the Convention, punishment of laundering shall be limited to cases of drug-trafficking as well as an illegal activity relating to terrorism, arms trafficking, extortion, abduction, incitement to prostitution (Lenocinio), corruption, embezzlement (Peculato) and financial participation in a business, harmful administration of a public sector business unit, fraudulent procurement or conversion of a subsidy, grant or loan, economic and financial offences committed in an organised manner using information technology, and economic and financial offences committed on an international scale and involving any kind of co-participation, as defined in domestic legislation;

²⁹ Under the terms of Article 6, paragraph 4, of the Convention, the Italian Republic declares that paragraph 1 of this article applies only to predicate offences which constitute “delitti” under Italian law, excluding “delitti” which are not deliberate.

Convention. One of them, Spain, is however still in the process of amending its national provisions to fully comply in substance with the Framework Decision. As regards the Member States that still uphold reservations, the reservations made by Netherlands and Germany comply with the Framework Decision. Finally, it seems the reservation made by Italy might also comply with the Framework Decision, whereas those made by Austria, Greece, Luxembourg and Portugal do not seem to meet the required terms. The lack of information from these Member States prevents the Commission from being more conclusive at this point.

2.2. Article 2: Penalties

Article 2 of the Framework Decision³⁰, for which there was no precedent in the 1998 Joint Action, aims at ensuring a minimum harmonisation of penalties for some of the money laundering offences established in the 1990 Convention. It is not the aim of this report to assess the way Member States have implemented the Convention, but to check if the minimum-maximum sanction established in the Framework Decision has been respected. Nonetheless, it must be kept in mind that Article 2 covers the offences referred to in Article 6(1)(a) and (b) of the 1990 Convention “as they result from the Article 1(b) of this framework Decision”. Therefore, what was said in the previous section must also be taken into account.

In a broad sense it can be said that most Member States have succeeded in meeting the obligation imposed by Article 2: money laundering offences to be punishable by terms of imprisonment, the maximum being not less than 4 years. However, the implementation itself is quite heterogeneous, and in this sense, two basic systems can be distinguished: those that fully comply with this requirement, and those that comply with the required penalty only in cases of aggravated or serious money laundering.

The issue of approximation of penalties is indeed a difficult one, and Article 2 gives some discretion to Member States by explicitly referring to consistency to their system of penalties and by defining the required penalty as a minimum-maximum. However it seems clear that the last system allows for a wider margin of judicial discretion, to assess the seriousness of the offence or to decide whether to impose deprivation. The practice of sentencing by the judiciary in these Member States will have an important impact in the practical implementation of the minimum-maximum penalty required in Article 2.

As regards Member States that fully comply with this provision, in Belgium, Article 505 of the Criminal Code punishes money laundering with a maximum of 5 years’ imprisonment (the minimum being 15 days) together with a fine, or just one of the two sanctions. In France, the basic conduct of money laundering is punished with 5 years’ imprisonment and a fine. Both penalties can be raised in case of aggravated money laundering. Germany provides for a penalty of imprisonment from 3 months to 5 years. The maximum rises to 10 years in especially serious cases, amongst which is included as a general rule that the perpetrator acts professionally or as a member of an organisation formed for the continued commission of money laundering. The Spanish Criminal Code punishes money laundering with deprivation of liberty for from 6 months to 6 years and a fine (proportional to the value of the proceeds). As previously mentioned, legislation to extend the scope of predicate offences as required by the Framework Decision is still in process of national adoption. In Ireland, a person guilty of

³⁰ Article 2 **Penalties**: “Each Member State shall take the necessary steps consistent with its system of penalties to ensure that the offences, referred to in Article 6(1)(a) and (b) of the 1990 convention, as they result from the Article 1(b) of this framework Decision, are punishable by deprivation of liberty for a maximum of not less than 4 years”.

money laundering shall be liable, on conviction on indictment, to a fine or to imprisonment for a term not exceeding 14 years or to both. Luxembourg punishes money laundering with imprisonment between 1 to 5 years and a fine or just one of those penalties. The maximum can be doubled in case of recidivism and is raised to 20 years if the conduct implies participating in a criminal organisation. The Netherlands punishes basic money laundering with a maximum of 4 years' imprisonment or, alternatively, with a fine. In the United Kingdom, a person guilty of a "money laundering" offence is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, or to a fine, or both.

Denmark, Finland and Sweden also meet the terms of Article 2 by punishing "serious" money laundering with deprivation of liberty for a maximum of not less than 4 years. In Denmark (where there is no "nomen iuris" for money laundering, which is punished as receiving) only if the act of receiving is of a particularly serious nature or when receiving has been for commercial gain is the penalty a fine or imprisonment for up to 6 years. The basic offence is punished with a fine or with imprisonment for no more than 18 months. By means of the Money Laundering Offences Reform Act N°61/2003, which entered into force on 31 April 2003, Finland has introduced a new specific offence of money laundering (which was previously punishable as an offence of concealment). It has also raised the maximum penalty from 4 to 6 years' imprisonment for cases of "aggravated" money laundering. The basic offence, however, is punished with a fine or with imprisonment for at most 2 years. In the Swedish Criminal Code, money-laundering acts are punishable as offences of "receiving" or "receiving stolen money". In both cases the maximum penalty is of 2 years' imprisonment, but if the offence is considered as "gross" or "serious" the penalty is imprisonment for at least 6 months and at most 6 years. However, no indication was given to explain why a four years level as a minimum for the maximum penalty would be inconsistent with the Danish, Finnish and Swedish system of penalties if provided for all cases.

As a conclusion, the eleven Member States that have provided the Commission with information on the implementation of this Article (Belgium, Denmark, Germany, Spain, France, Ireland, Luxembourg, Netherlands, Finland, Sweden and the United Kingdom) meet the terms of the Framework-decision. Greece and Italy did not notify the provisions concerning this Article.

2.3. Article 3: Value confiscation

A preliminary observation can be made as to the two basic systems of confiscation of proceeds: property confiscation, that is, the confiscation of specific items of property that constitute the proceeds of an offence; and value confiscation, which consists on the requirement to pay a sum of money based on the assessment of the value of the proceeds.

The aim of Article 3 of the Framework Decision³¹, based on previous Article 1(2) of the Joint Action, is to introduce value confiscation, at least as an alternative measure, also in those

³¹

Article 3 Value confiscation:

Each Member State shall take the necessary steps to ensure that its legislation and procedures on the confiscation of the proceeds of crime also allow, at least in cases where these proceeds can not be seized, for the confiscation of property the value of which corresponds to such proceeds, both in purely domestic proceedings and in proceedings instituted at the request of another Member State, including requests for the enforcement of foreign confiscation orders. However, Member States may exclude the confiscation of property the value of which corresponds to the proceeds of crime in cases in which that value would be less than EUR 4 000.

The words 'property', 'proceeds' and 'confiscation' shall have the same meaning as in Article 1 of the 1990 Convention.

Member States with a property-based confiscation system. Member States that follow a value-based system would a fortiori meet this requirement. This possibility must also be provided in proceedings instituted at the request of another Member State.

None of the Member States referred explicitly to the provisions that might have transposed the possibility to exclude value confiscation when the assessed value of the proceeds is less than 4000 Euro, as allowed by the Framework Decision. Therefore it cannot be ascertained whether this exemption might be applied, or whether the implicit limitations that seem to appear in some of the provided legal texts³² exceed or not what is allowed in this framework Decision.

2.3.1. Domestic proceedings:

From the information provided it derives that value confiscation of the proceeds of crime is possible, to different extents, in the domestic proceedings of nine Member States (Belgium, Denmark, Germany, France, Ireland, Netherlands, Finland, Sweden and United Kingdom). Greece did not forward any transposing provision. Spain will introduce this possibility by means of a draft bill that has not yet entered into force. In Luxembourg value confiscation is currently limited to the proceeds of certain offences and will be extended through new legislation, not yet adopted. This also appears to be the case of Italy, that has forwarded existing and draft provisions, which provide for value confiscation in relation to certain types of offences.

Belgium provides for value confiscation when criminal proceeds can not be found in the sentenced person's estate. In this case the judge shall proceed with their monetary evaluation and the confiscation will concern an equivalent sum of money.

In Denmark the proceeds of crime or an amount of money equal to their value can be confiscated in part or full. If the information necessary in order to establish the size of the sum is lacking, an amount deemed to correspond to the proceeds gained can be confiscated. Moreover full or partial confiscation of assets belonging to a person who is found guilty of a crime can be made when the offence is of such nature that it can yield considerable proceeds and is punished with 6 years' imprisonment or more. In this case, there is a reversal of the burden of proof as regards the licit origin of the assets, and value confiscation is also allowed.

In Germany, the proceeds from crime are obligatorily forfeited. Value confiscation applies when the forfeiture of a particular object, acquired as a result of an offence, is impossible, in which case the court shall order the forfeiture of a sum of money that corresponds to the value of that which was acquired.

Spain follows a property-based confiscation system that does not provide for value confiscation. However, Spain is currently in the process of adopting new legislation in order to transpose this Article. It has provided the text of a new provision that will enable to confiscate any other property belonging to the convicted person, the value of which corresponds to the proceeds, if for any circumstance confiscation of the proceeds of crime is not possible.

³² For example, cf. Section 10 chapter 10 Finnish Criminal Code ("Forfeiture need not be ordered if: (1) the proceeds of crime are, or the value of the object or property is, insignificant.") or Article 10 of French Law 96-392 that allows to reject an external request "if the importance of the case does not justify that the requested measure should be taken")

French legislation provides, as a general rule, for the confiscation of the proceeds of crime and for value confiscation. Under the Criminal Code when the goods to be confiscated cannot be seized or are no longer available, value confiscation shall be ordered. In particular, French legislation also provides for the confiscation of the proceeds of money laundering offences of which either natural or legal persons have been found guilty. In the first case, apart from confiscation of the proceeds of the offence, total or partial confiscation of the offender's property can be imposed as a complementary penalty.

Ireland allows for the confiscation of both the proceeds of drug trafficking and the proceeds of other offences. In the first case the amount to be recovered under the confiscation order shall be equal to the amount assessed by the court to be the value of the defendants proceeds of drug trafficking. In the case of other offences the confiscation order will require the person concerned to pay such a sum as the court thinks fit. To make a confiscation order it is necessary that the person has been convicted and has benefited from the offence.

Italy provides for obligatory confiscation of the proceeds of certain crimes, primarily corruption, committed by public officials against the Administration. Draft legislation not yet in force will amend the Criminal Code so as to introduce other special cases of compulsory forfeiture and value confiscation. However, the Commission has not received enough information to ascertain whether value confiscation is possible as a general rule, although this seems to be the case when it comes to cases of liability of legal persons.³³

In Luxembourg current legislation provides for value confiscation of the proceeds of drug trafficking and money laundering offences. However, Luxembourg has provided a draft bill on confiscation that will generalise the possibility of value confiscation. Under the new provision that has not yet entered into force, when goods or property that constitute the proceeds of crime cannot be found confiscation shall apply to other goods of equivalent value pertaining to the sentenced person.

In the Netherlands, in addition to confiscation of objects, forfeiture may be imposed as a separate penalty. The Criminal Code allows an obligation to pay a sum of money to the State to be imposed by a separate judicial decision on the convicted person in order to deprive that person of the illegally obtained gains. In this case the judge shall assess the amount to be confiscated.

In Finland, as a general rule, the proceeds of crime shall be ordered forfeit to the State. If there is no evidence to the amount of the proceeds of crime, or such evidence is difficult to present, the proceeds shall be estimated taking into account the nature of the offence, the extent of the criminal activity and the other circumstances. Instruments of crime and, under some circumstances, objects or property produced, manufactured or brought about by way of an offence, or to which an offence has been directed may also be forfeited. In this case, alternative value confiscation is possible if the object or property cannot be ordered forfeit or have been hidden or are otherwise inaccessible.

In Sweden, the proceeds of a crime, as defined in the Penal Code, shall be declared forfeited unless this is manifestly unreasonable. The same applies to anything a person has received as payment for costs incurred in conjunction with a crime, provided that such receipt constitutes an offence under the Criminal Code. The value of the article received may be declared

³³ cf. Art. 19 Legislative decree (Decreto Legislativo) n.231, 8 June 2001.

forfeited instead of the article itself. Valued confiscation is also provided in relation to offences covered by special penal laws on narcotics, smuggling and doping agents.

In United Kingdom the applicable provisions are those contained in the Proceeds of Crime Act 2002, which abolishes the previous distinction between drug trafficking offences and other crimes. The new confiscation regime is based on the concept of “criminal lifestyle”, which the defendant will be deemed to have if convicted of one of the offences listed in Schedule 2 to the Act. These are acquisitive offences such as drug trafficking, money laundering or counterfeiting. The defendant is also deemed to have a criminal lifestyle if he has been convicted of any other offence that forms part of a course of criminal activity, or that was committed over a period of at least 6 months, and has obtained relevant benefit of not less than £5000. The court must decide whether the defendant has a criminal lifestyle and has benefited from his general criminal conduct or whether he does not have a criminal lifestyle but has benefited from his particular criminal conduct. In both cases if it decides that the defendant has benefited from the conduct referred to it must decide the recoverable amount and make a confiscation order requiring him to pay that amount. The recoverable amount is defined as an amount equal to the defendant’s benefit from the conduct concerned unless the defendant shows that the available amount is less than the benefit. But if the defendant is deemed to have a criminal lifestyle, then all his property (and the property acquired in the previous six years) is assumed to represent his benefit from crime, and is liable to confiscation unless the defendant can show he acquired it legitimately.

2.3.2. *External requests:*

All Member States have ratified the 1990 Convention, which obliges State Parties to adopt the necessary measures to enable them to comply with foreign requests for confiscation of sums of money corresponding to the value of proceeds. Responses provided to the Commission in relation to the implementation of Article 3, as regards external requests, have been in general quite vague. Most Member States just referred in general to internal legislation on international co-operation without identifying specific provisions. Greece and Spain did not forward specific information. However it appears that at least nine Member States (Belgium, Denmark, France, Ireland, Italy, Netherlands, Finland, Sweden and United Kingdom) are able, to different extents, to comply with foreign requests for value confiscation. Germany claimed it also complies with this requirement but provided scarce legal basis. Luxembourg provided the Commission with a draft bill that has not yet entered into force.

Belgium forwarded the Law of May 20th 1997. This provides for the confiscation of a sum of money corresponding to the value of proceeds, when it is requested by a foreign State. However it is necessary that the requested sum does not exceed the assessed value of the proceeds and that the requesting State declares that such proceeds, or other goods through which it could recover its credit, do not exist in its territory.

In Denmark, decisions on confiscation covered by UN convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the European Convention on Laundering, search, seizure and Confiscation of the Proceeds of Crime, can be executed according to Chapter 3 of the 1986 Act on International Enforcement of Criminal Law when the Convention’s conditions are fulfilled.

Germany asserted that the same provisions apply to foreign and domestic requests and that the concept of confiscation applied in the provisions governing international judicial assistance, such as Section 48 of the Act on International Judicial Assistance in Criminal Matters, is interpreted in a broad sense to include the concept of replacement of value. The

aforementioned section reads “Judicial assistance may be ordered for proceedings in criminal matters by way of enforcement of a penalty lawfully imposed abroad”.

French legislation, specifically enacted to comply with the 1990 Convention, provides for value confiscation. The foreign confiscation order to be enforced can refer to an item of property (determined or not) that exists in French territory, or can consist of the obligation of paying a sum of money that corresponds to the value of such property. If the foreign order provides for value confiscation, once its execution is authorised, the French State is debtor of the obligation to pay the correspondent sum, and is able to recover its debt over whatever property available to this end.

Ireland just referred to the Criminal Justice Act as containing the system of mutual legal assistance. This seems to provide, under certain conditions, for the enforcement of external orders, whether they were issued for the confiscation of specific property or for the recovery of a sum of money.

The Italian Code of Criminal Procedure provides that the rules on the execution of financial penalties shall apply when enforcing a foreign confiscation order consisting of the obligation to pay a sum of money that corresponds to the value of the proceeds of a crime.

In the draft bill provided by Luxembourg there is a specific provision according to which when the foreign request refers to goods pertaining to the sentenced person whose value corresponds to the proceeds of crime, it will only be enforced if the requesting State declares it is not possible to enforce confiscation over goods located in its own territory.

In the Netherlands the Act on the Enforcement of Criminal Judgements generally provides that once the Court authorises the execution of a foreign decision, it will, with due respect to the relevant provisions of the applicable Convention, impose the sanction or measure that would be imposed for the corresponding act according to Dutch law. It also allows the enforcement of a foreign decision containing an obligation to pay a sum of money to the State to deprive a person of illegally obtained gains.

Finland generally asserted that it is possible to enforce external confiscation orders in accordance with the provisions of the Act on International Co-operation or, as appropriate, in accordance with the Act on Nordic co-operation in criminal matters. The first Act stipulates that the court shall convert a confiscation order made in a foreign State into a confiscation order provided for by Finnish law. It refers both to property and value confiscation, provided that the latter could also be possible under Finnish law and that the foreign State has requested or agreed to such an order. The Act on Nordic co-operation allows the enforcement of a decision by a court of Iceland, Norway, Sweden or Denmark by which a person has been sentenced to the forfeiture of a certain object, other property or amount of money.

Sweden provided the text of the Act on International Co-operation in the enforcement of Criminal Judgements, according to which it is possible to enforce forfeiture imposed by a foreign country whether it refers to an object, a certain amount of money, or the value of certain property. Property or its value so forfeited shall fall to the State, and can be in full or in part transferred to the foreign State if so requested.

The United Kingdom asserted it is possible to enforce foreign confiscation orders whether value or property-based, and is currently in the process of making the required orders to give effect to foreign decisions under the Section 444 of the new Proceeds of Crime Act. In the meantime previous legislation still applies.

Finally, it should be noted as a general comment that some of the aforementioned laws, include conditions for enforcement of external orders, such as subsidiarity or procedures to “convert” or “authorise” the execution of a foreign decision, that might be challenged by future instruments on confiscation based on the principle of mutual recognition.

2.4. Article 4: Processing of requests for mutual assistance

According to this Article, requests for mutual assistance from other Member States which relate to asset identification, tracing, freezing or seizing and confiscation of the proceeds must be processed with the same priority as is given to such measures in domestic proceedings. It therefore imposes an obligation to assimilate internal and external measures as far as the priority to deal with them is concerned.

In general, Member States have not notified specific provisions transposing this article. Most of them, as the table shows, referred in general to internal legislation dealing with international co-operation or mutual assistance in the matter and supplied a copy of the legal texts. Greece, Italy and Netherlands did not provide any information on this point. Luxembourg provided a draft bill that contains provisions on the “*exequatur*” of foreign confiscation decisions. Some included additional explanations.

In this sense, Denmark explained that it is “accepted legal practice” to conduct requested investigative measures “irrespective of whether the proposal or treatment of the other aspects of the request are covered by an agreement between Denmark and the requesting State”. Finland stated that decisions issued in other Member States are acted on in accordance with Finnish law without being treated any better or any worse. Ireland acknowledged there were certain procedural differences for foreign confiscation orders under the mutual assistance process regulated in the provided Criminal Justice Act as compared with domestic orders, but understood they were not disadvantaged by such procedural differences. The United Kingdom confirmed that their authorities treat all requests for the restraint and confiscation of assets with the same priority, regardless of whether they relate to domestic cases or to requests from overseas. France asserted that this provision did not imply internal transposition and that requests from other Member States were executed with all due diligence. And Spain explained it had decided to postpone the transposition of this provision until the entry into force of the new European Union instruments on the matter.

Only two countries pointed out specific provisions. After stating that requests for judicial assistance are always treated as urgent, priority cases, Germany mentioned that this principle was laid out in sections 19(1) and 22(1) of the Directives for International Co-operation in criminal matters. These provide that requests for judicial assistance received directly by an enforcing authority shall be transmitted forthwith to the authority empowered to approve it and, once approved, shall be executed by the enforcing authority in accordance with the same provisions that would have applied if the request had been made by a German authority, unless otherwise provided by statute or agreement. However, these Directives do not have the force of law. Regarding investigative measures, Sweden referred to Section 10 of the Law on International judicial co-operation in criminal matters, according to which requests for legal assistance shall be executed promptly and, unless otherwise prescribed by this Act, the same procedure shall be applied as is applied when a corresponding measure is taken in connection with a Swedish preliminary investigation or trial.

In most cases external requests for mutual assistance are subject to previous examination and approval when none of the internal grounds for refusal are applicable. In some cases this examination or the execution of the request corresponds to a different body than in internal

cases. However, it is not possible to assess assimilation as regards priority of the request itself unless there is a specific rule on the matter, in similar terms as the Framework Decision. In this sense the provisions pointed out by Germany do not have the force of law and the provision pointed out by Sweden only partially covers the scope of Article 4. The Commission therefore has not received enough information to consider that this provision has been specifically transposed. In any case, the issue has lost part of its relevance in the light of the new European instruments in the field of freezing and confiscation, recently adopted or currently under discussion³⁴ which, going beyond mutual assistance, are based on the principle of mutual recognition.

2.5. Article 7: Territorial application

This provision stipulates that the Framework Decision shall apply to Gibraltar as soon as the application of the 1990 Convention is extended to it. The United Kingdom has not provided information making it possible to conclude that this provision was transposed.

3. CONCLUSIONS

In conclusion, not all Member States have timely transmitted to the Commission all relevant texts of their implementing provisions. The factual assessment and subsequently drawn conclusions are therefore sometimes based on incomplete information. The Commission received no information from Austria and Portugal. This being said, the situation regarding transposal of the specific provisions in the Member States is as follows:

Article 1: A large majority of Member States (twelve) seem to comply with Article 1(a), whereas Greece, Luxembourg and probably Sweden will have to uphold or redraft their reservations to Article 2 of the 1990 Convention. Similarly, a majority of Member States (ten) seem to comply with Article 1(b), whereas Austria, Greece, Luxembourg and Portugal do not seem to meet the required terms and Spain is in process of amending its national legislation to fully comply in substance with the Framework Decision.

Article 2: Eleven Member States (Belgium, Denmark, Germany, Spain, France, Ireland, Luxembourg, Netherlands, Finland, Sweden and the United Kingdom) provided the Commission with information demonstrating that they comply in a broad sense with this Article. However, in some cases the minimum-maximum penalty is only provided if the crime is considered serious.

Article 3: Value confiscation seems to be possible to different extents, but at least as an alternative measure (even if sometimes limited to specific cases or to certain types of offences or property), in the domestic proceedings of eleven Member States (Belgium, Denmark, Germany, France, Ireland, Italy, Luxembourg, Netherlands, Finland, Sweden and United Kingdom) and in at least nine Member States (Belgium, Denmark, France, Ireland, Italy, Netherlands, Finland, Sweden and United Kingdom, plus probably Germany) as regards foreign requests. Spain and Luxembourg have prepared legislation to further comply with this

³⁴ Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, (OJ L196, 2.8.2003, p 45), and the two Danish initiatives for a draft Framework Decision on the execution in the European Union of confiscation orders and on confiscation of crime-related proceeds, instrumentalities and property (OJ C184, 2.8.2002, p 3 and 8). The latter was politically agreed the 19 December 2002.

Article. Some of the conditions applied to the enforcement of external orders are likely to be challenged by future instruments on confiscation.

Article 4: The Commission has not received enough information to consider that this provision has been specifically transposed.

Article 7: The Commission has no evidence to conclude that this provision was transposed by the Member State concerned.

In view of the foregoing, the Commission invites the Member States to ensure a rapid and complete transposal of the Framework Decision and to inform it of this immediately, and no later than the 1st of September 2004, providing a description of the measures taken with the text of the statutory or administration provisions in force in support.