



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20.02.2006
COM(2006) 65 final

REPORT FROM THE COMMISSION

**Second report based on Article 14 of the Council Framework Decision of 28 May 2001
combating fraud and counterfeiting of non-cash means of payment**

{SEC(2006) 188}

1. INTRODUCTION

The Council adopted the Framework Decision of 28 May 2001 with a view to achieving equivalent and increased protection by criminal law against fraud and the counterfeiting of non-cash means of payment throughout the Union.

Under Article 14 of the Framework Decision, the Commission, on the basis of the initial information received, presented a report to the European Parliament and the Council on the measures taken by the Member States to comply with the Framework Decision. In response to the Council conclusions of 25-26 October 2004, the Commission is now to produce a new report on the basis of the additional information it has received.

This second report is not a consolidated version of the Commission's earlier report but relates primarily to those Member States not covered at the time (AT, DK, GR, LU, NL and PT) and, secondarily, to those whose treatment in the first reports needs amplifying or amending (BE and SE). In the latter case, the report is consolidated as regards those two Member States. It was also agreed that the new Member States that acceded on 1 May 2004 should now be covered as they were not, of course, covered by the first report.

To allow the two reports to be read in parallel and compared, this second report follows the same structure and presentation as the first wherever possible. The comparative tables on transposal and the annexes also follow the same structure.

To avoid repetition, this report has been pared down, particularly by removing the general considerations (nature of a Framework Decision) and points of methodology (evaluation criteria) in the first report.

2. NATIONAL MEASURES TAKEN TO COMPLY WITH THE FRAMEWORK DECISION

2.1 State of play concerning the implementation of the Framework Decision: Table 1

The report is based on the information communicated to the Commission, supplemented where necessary and possible by further exchanges with the national contact points. The information supplied by most of the Member States that replied is quite full. All the Member States that had not supplied the Commission with information for the first report or had supplied inadequate information have notified all their national legislation, with specific explanations. LU and GR replied that legislation was still going through Parliament.

Five of the Member States that acceded on 1 May 2004 (LV, LT, PL, CZ and SK) have notified the Commission of the text of the provisions transposing the obligations imposed by the Framework Decision into their domestic law. CY has notified the Commission of partial information on the implementation of the Framework Decision. EE, HU, MT and SI have not replied to the Commission.

Paragraphs 2.2–2.7 of this report consider solely the legislation that is in force and disregard the draft legislation notified by certain Member States.

2.2 Offences related to payment instruments (Article 2): Table 2

Six Member States (BE, DK, LU, NL, PL and SE) use very general concepts or definitions of theft, aggravated theft or other forms of unlawful appropriation to cover Article 2(a). But the criminal legislation of AT, LT, LV, PT and SK expressly mentions payment instruments. CZ penalises the unlawful use of payment cards and is currently amending its legislation to incorporate a broader reference to payment instruments. LT also penalises financial losses, a legal situation not mentioned in the Framework Decision. SK's national legislation makes a distinction between the unauthorised use of payment instruments and unlawful enrichment. CY has no provisions on this.

As regards counterfeiting or falsification of payment instruments (Article 2(b)), most Member States confine the definition of the offence of fraud to the payment instruments mentioned by way of examples in Article 1.

BE and NL do not expressly mention the payment instruments include in broader categories of offence. LU replied that legislation to transpose Article 2(b), (c) and (d) was before Parliament.

Three Member States (BE, DK and PL) do not explicitly define as an offence conduct consisting in receiving, obtaining, transporting, sale or transfer to another person or possession of payment instruments, in the conditions set out in Article 2(c) of the Framework Decision. These categories of offence are within the broader concept of theft of an authentic deed.

Obtaining, procuring, selling or transferring to another person forged, falsified, stolen or unlawfully obtained payment instruments are expressly defined as an offence in the criminal law of AT, CY, CZ, LV, LT, NL and SE, which make an explicit distinction between obtaining and possession. Transport is covered by the general legislation of these countries.

Most Member State have also defined an offence of fraudulent use of false non-cash payment instruments, sometimes in a broader context than that of Article 2(d). In some of them, fraudulent use, that is to say use causing loss by deception, is penalised by provisions covering fraud in general and by related provisions.

Certain Member States (BE, DK and PL) consider that, by using general provisions, definitions, terms or concepts, their legislation complies with the Framework Decision. As was stated in the first report, the existence of general principles of law may suffice as long as the full application of the instrument is assured in a sufficiently clear and precise manner.

2.3 Offences related to computers (Article 3): Table 3

AT, BE, CZ, DK, LV, LT, NL, PL, PT, SK and SE state that their criminal legislation guarantees that offences related to computers within the meaning of Article 3 are punishable. Most Member States use a broad definition of fraud (AT,

BE, CZ, LT, NL and PL in particular), including the illicit interfering with the functioning of a computer programme or system or the introduction, alteration, deletion or suppression of computer data. CZ in particular is currently introducing clearer legislation. In three Member States (PT, SE and SK) the offences to which this Article applies are covered by general provisions concerning computer crime. LU replied that draft legislation to transpose Article 3 was still before Parliament. CY had nothing to say on the subject.

2.4 Offences related to specifically adapted devices (Article 4): Table 3

Most of the Member States that replied to the Commission have criminal legislation covering all the Article 4 offences. But certain Member States (AT, BE, CZ, DK, NL, PL, SE and SK) refer to broader, more general provisions in order to comply with this Article.

In particular, PT states that it has no specific legislation covering Article 4. The offences to which the first paragraph of Article 4 applies are covered by the section of the Criminal Code concerning acts committed in order to counterfeit or falsify national or foreign securities and guarantee or credit cards. But the second indent of Article 4 is not covered by the Portuguese legislation. Amending legislation will be brought in during the current process of criminal law reform.

LV and LT have introduced in their national legislation specific references to computer programmes specifically designed for the commission of one or other of the Article 2(b) offences applies, in order to comply with Article 4. The LU legislation does not yet contain specific provisions to comply with Article 4. CY has supplied the Commission with no information on this type of offence.

2.5 Penalties (Article 6): Table 4

Most Member States have taken the necessary steps to comply with the obligation under Article 6, viz. to ensure that offences under Articles 2 to 4 are punishable by effective, proportionate and dissuasive criminal penalties including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition.

All the Member States have made the Article 2, 3 and 4 offences punishable by imprisonment (Table 4), but, as can be seen from Table 4, widely varying techniques have been used to transpose Article 6.

Seven Member States provide for maximum penalties of imprisonment for Article 2 offences: AT provides for a maximum of five years for counterfeiting, receiving and fraudulent use; CY provides for a maximum of 14 years for counterfeiting payment instruments and seven years for using and acquiring them; DK a maximum of six years for counterfeiting and theft of payment instruments and 18 months for using them; LV ten years for the theft, acquisition and destruction of payment instruments and between 3 and 15 years for counterfeiting, fraudulent use and use of false payment instruments; LT a maximum of six years for using false instruments; NL seven years; PT penalises the acquisition of false payment instruments with three years' imprisonment, currency trafficking with a maximum of five years, using falsified bearer cheques with six months to five years and

falsification with three years (minimum) to twelve years (maximum); in SE there is a maximum of ten years for theft, falsification and receiving, only if the offence is serious (“gross”).

Five Member States provide for imprisonment for between a minimum and a maximum number of years in prison.

BE provides for between two months and life imprisonment (depending on whether there are aggravating circumstances) for theft and extortion, CZ for five to eight years for counterfeiting/falsification and two to eight years for fraudulent use, and LU for one to five years for theft. PL provides for three to five years for falsification and illegal possession and for one to twelve years for theft. In SK the production, falsification/counterfeiting and use of payment instruments attract sentences of one to five years. SK is the only Member State where unlawful enrichment attracts up to two years.

Certain Member States provide only for prison sentences; others combine prison sentences with other penalties.

PL, PT and LT provide for imprisonment plus a fine. NL and SK offer a choice between prison, a fine or a combination of the two. CZ offers a choice between prison and a fine. For Article 2(b), (c) and (d) offences, the fine varies without pre-determined limits or with up to 360 daily fines (AT).

Most of the Member States (BE, CZ, LT, NL, PT and SK) operate the conventional system, but AT has the *day-rate system*.

Most of the Member States make a distinction according to the seriousness of the offence in Article 2 cases. The legislation of certain Member State (AT, CY, CZ, LV, PT and SK) provides for aggravating circumstances such as membership of a criminal organisation as regards the Article 2 offences. Most of the Member States consider that Article 4 offences merit lighter sentences than Article 2 and 3 offences. And the penalties for Article 3 offences are themselves lighter than the penalties for Article 2 offences.

Following an evaluation, the penalties that may be imposed in the Member States would seem at first sight to be sufficiently dissuasive: all the Member States covered by this report provide for imprisonment for the Article 2 offences.

All the Member States covered by this report and those covered by the first report, where they provide for penalties for Article 2, 3 and 4 offences, have general provisions of criminal legislation covering participation, instigation and attempt within the meaning of Article 5.

In this report too, we conclude that preparatory acts are punishable generally in Sweden alone, as all the other Member States penalise such acts only for specific offences. Attempts are generally penalised in all countries as regards serious offences; attempts to commit minor offences are usually penalised in most countries, although some penalise them only for offences specifically provided for.

2.6 Jurisdiction (Article 9): Table 5

Most of the Member States comply with the obligations imposed by Article 9(1)(a) and (b). PL complies with the obligations under point (a) and, subject to one exception, with those under point (b): under Polish legislation, a national who commits abroad an offence for which national legislation provides for imprisonment of at least two years must be tried in accordance with that law if he is in national territory. Four Member States (AT, DK, LT and SE) have stated that they would not comply with Article 9(1)(c), which provides for jurisdiction where an offence is committed for the benefit of a legal person that has its head office in the territory of that Member State.

LU legislation contains no provisions designed to comply with that Article, and CY has supplied no information.

2.7 Liability of and sanctions for legal persons (Articles 7 and 8): Table 6

Five Member States (AT, LV, CZ, PT and SK) have stated that legislation to transpose Articles 7 and 8 is still before Parliament. Six Member States (BE, DK, LT, NL, PL and SE) have legislation ensuring that legal persons can be held liable for offences under Articles 2 to 4 committed for their benefit by persons who have a leading position within them. The same Member States have also taken the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by people in leading positions made the commission of those offences possible.

The same Member States have provided for administrative or criminal fines and (sometimes) other measures ranging from judicial winding-up to administrative or commercial law sanctions. Table 6 reveals how widely these administrative, civil and criminal sanctions and measures vary.

3. CONCLUSIONS

Most of the Member States that replied to the Commission in this second exercise comply explicitly or, in some cases, implicitly with the Framework Decision. This is the case for Articles 2, 3 and 5. Two Member States (GR and LU) have not yet taken all the measures required to fully transpose the Framework Decision as the legislation is still before Parliament. CY has not given the Commission adequate information for a full evaluation of the conformity of its legislation with the Framework Decision.

Article 4 has been transposed by most of the Member States, although in some of them only via very general provisions. PT in particular states that the offences under the first indent of Article 4 are covered by provisions applicable to counterfeiting and falsification of securities, and the law will need to be amended in relation to the second indent of Article 4.

The transposal of Article 6 (criminal penalties) is compliant, though far from uniform.

Virtually all the Member States that replied to the Commission comply, or will comply when their new legislation is in force, with the obligation imposed by Article 6 to ensure that the Article 2 to 4 offences are punishable by effective, proportionate and dissuasive criminal penalties.

Articles 7 and 8 have been transposed by six Member States (BE, DK, LT, NL, PL and SE), which have legislation providing for the liability of legal persons. In five Member States the legislation to transpose Articles 7 and 8 is still before Parliament.

Most of the Member States comply with the obligations imposed by Article 9(1)(a) et (b). Four (AT, DK, LT and SE) have stated that they would not comply with Article 9(1)(c).

At the time of writing, it is regrettable that seven Member States have not notified all the requisite legislation or have not completed the procedure for transposal of the Framework Decision.