



COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism

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1. BACKGROUND

Under Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism¹ (hereafter ‘the Framework Decision’), the Commission has to establish a written report on the measures taken by the Member States to comply with this instrument.

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 that same date 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 imposed on them under this Framework Decision. The Council should assess, 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 quality and timeliness of the national information received by the Commission inevitably influences the value and the punctuality of this report. The Commission reminded Member States of their obligation by means of a letter sent the 9 December 2002. By 31 December 2002, however, only five Member States (Austria, Germany, Ireland, Italy and Portugal) had provided the Commission with information on implementation and only two of them actually included the relevant transposing provisions. A document drawn up on this basis would have been virtually meaningless, so the Commission has had to admit late replies and gather complementary information from the contact persons, when designated by Member States. By February 2003, seven more Member States (Belgium, Denmark, France, Finland, Greece, Spain, and the United Kingdom) had responded although two of them just referred to new draft legislation. Sweden was the thirteenth Member State to reply, on 5 November 2003. Luxembourg and the Netherlands did not reply.

Therefore, although the deadline for forwarding the text of implementing provisions, as set in Article 11(2) of the Framework Decision, was the 31 December 2002, additional information provided until the cut-off date of 15 February 2004 has been taken into account. This report thus takes stock of the transposal situation deriving from the legislation that had been forwarded to the Commission by that reference date. A Commission staff working paper associated with this report contains a detailed analysis of national measures taken to comply with the Framework Decision, as well as a table specifying, in accordance with the information received by the Commission, the national provisions transposing each of the Articles. The Commission will, in a supplementary report, take into account the information supplied after that date and update, the case being, the information on national legislation.

¹ OJ L164, 22.6.2002,p. 3.

2. METHOD AND CRITERIA FOR EVALUATION FOR THIS FRAMEWORK-DECISION

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

This Framework Decision is based on the Treaty establishing the European Union (TEU), and in particular Articles 29, 31 (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.

2.1.2. *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 aims³;
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 force⁴,
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 application of the directive is assured in a sufficiently clear and precise manner⁵;
4. directives must be implemented within the period prescribed therein⁶.

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 ensure⁷.

² Article 249 EC Treaty.

³ See relevant case law on the implementation of directives: Case 48/75 *Royer* [1976 ECR 497 at 518].

⁴ 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.

⁵ See relevant case law on the implementation of directives for instance Case 29/84 *Commission v. Germany* [1985] ECR 1661 at 1673.

⁶ 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.

⁷ See PJG Kapteyn and P. Verloren van Themaat ‘Introduction to the Law of the European Communities’, third edition, 1998, p. 328.

The general assessment provided for in Article 11, of the extent to which the Member States have complied with the Framework Decision, is -where possible- based on the criteria mentioned above.

2.1.3. Context of evaluation

A first preliminary observation concerns the (legal) context and follow up of the evaluation report. Whereas the Commission has within the first pillar the authority to start an infringement procedure against a Member State this possibility does not exist within the TEU. The nature and purpose of this report differ, therefore, from a report on the implementation of a first pillar directive by Member States. Nevertheless, as the Commission fully participates in third pillar matters⁸, 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.

Secondly, the Framework Decision must not be regarded as a series of fragmentary provisions, but as a whole: a global system whose elements are inevitably intertwined. Basically, it requires Member States to incorporate the qualified concept of “terrorist offences” to their legal systems and, in particular, to incorporate the specific terrorist intent, which is also implicit in Articles 2 (“Offences relating to a terrorist group”) and 3 (“Offences linked to terrorist activities”). This requirement derives from the obligation, set up in Article 5(2), to punish terrorist offences with heavier custodial sentences than those imposed under national law for the correspondent “common” offences. Additionally, the obligations set up in Article 9 which provides for extended extraterritorial jurisdiction without the possibility of making declarations and establishes a mechanism of priority factors to be taken into account in case of positive conflicts of competence, also go beyond the obligations ordinarily imposed by framework decisions. Although structurally similar to other instruments aimed at the harmonisation of a particular field of criminal law, this Framework Decision thus differs from those that do not require the incorporation of “specific offences” as long as the conduct to be criminalised is already covered by a generic incrimination⁹. In these cases, obligations regarding penalties can also be respected by applying the general rules on the matter.

Therefore although the evaluation can and will refer to each article these can not be contemplated separately. Partial or inexistent implementation of an article or part of an article will also reflect on linked provisions that considered independently might seem to comply with the requirements of the Framework Decision and will affect the system as a whole. Nonetheless, as divergences still exist the evaluation shall take, as far as appropriate, account of the general criminal legal background of the Member States.

⁸ Article 36 (2) Treaty on European Union.

⁹ For example the “theft of a credit card”, to which Article 2(a) of the Council Framework Decision of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment refers could be covered by the general provision on theft in the Criminal Code.

3. ASSESSMENT

Very few Member States have made a timely transmission to the Commission of all relevant texts of their implementing provisions. The factual assessment and subsequent conclusions drawn are therefore sometimes based on incomplete information. The Commission received no information from Luxembourg and Netherlands and no specific information from Greece. This being said, the situation regarding transposal of the specific provisions in the twelve other Member States is as follows:

Article 1: Eight Member States have specifically incriminated terrorist offences as a separate category of crimes, although there are differences as to the extent and method of implementation while Ireland is in the process of amending their legislation to this end. Italy and the United Kingdom provide only for a limited number of specific terrorist offences and then qualify common offences by a terrorist intent either as an aggravating circumstance (in Italy) or by applying a general definition of terrorism (United Kingdom). Germany appears not to have transposed this provision as required.

Article 2: Most Member States have or will have legislation that separately incriminates terrorist acts committed in relation to terrorist groups. In Sweden and in Denmark (except certain acts of participation) terrorist groups and directing or participating in their activities have not been specifically incriminated, although in some cases those who carry out such conducts may still be punished as principal or secondary parties to the relevant terrorist offence.

Article 3: Only four Member States appear to have legislation that fully complies with the obligations under this Article. Ireland should be able to comply after its new legislation enters into force. The rest of Member States which provided information to the Commission will be able to comply only partially with this provision.

Article 4: Although only some Member States have specific provisions on the matter, it appears that by applying general rules on complicity and inchoate offences they will be able to comply implicitly with this Article, provided the preceding articles have been fully implemented.

Article 5: Although only two Member States expressly referred to it in the information provided to the Commission, it appears they all will be able to meet the terms of paragraph (1). Eight Member States have or will have succeeded in meeting the obligation imposed by paragraph (2). For Germany, Spain, Ireland and the United Kingdom it cannot be concluded that enhanced penalties will be provided for all the relevant offences. As regards paragraph (3), when it comes to directing a terrorist group, seven Member States provide for the required penalties and three more, in which this conduct is not specifically incriminated, would also comply partially with this provision. Spain only complies with this provision as regards directing a terrorist group that merely threatens to commit terrorist acts. When it comes to participating in the activities of a terrorist group eight Member States fully meet the required terms, which can be considered as partially met in four more Member States.

Article 6: National legislation in six Member States specifically envisages the particular circumstances set up in this Article, whereas the rest have not referred to specific measures to implement this optional provision.

Article 7: Eight Member States have or will have, after completing their legislative procedure, legislation ensuring that legal persons can be held liable for terrorist offences. From these, however, only four have provided enough information to demonstrate that they will be able to comply with Article 7(2). Spain, Austria, Sweden and the United Kingdom did not provide enough information to allow this Article to be considered fully implemented.

Article 8: Seven Member States provide or will provide for criminal or non-criminal fines for legal persons. Most of them also apply all or some of the optional penalties indicated in this provision.

Article 9: All Member States will presumably be able to comply with this Article as regards the application of the territoriality principle in Articles 9(1)(a), 9(1)(b) and 9(4). As regards extra-territorial jurisdiction, a majority of Member States have or will have rules which to different extents cover the principles of active and passive personality, as required in Article 9(1)(c) and (e). Article 9(1)(d) has only been expressly transposed in Austria and will be in Ireland, although it appears that Italy, Portugal and Finland would also be in line with this provision. Eight Member States have or will have legislation complying with Article 9(3) and other three will be able to comply partially with this provision. Finally, whilst Ireland will partially transpose Article 9(2), none of the Member States appear to have incorporated in their national legislations the criteria for solving positive conflicts of jurisdiction referred to in this provision.

Article 10: Only Austria provided enough information to demonstrate compliance with Article 10(1) although it seems likely that terrorist offences are in all Member States treated as public offences for the purposes of investigation and prosecution. Eight Member States provided information on additional measures to assist terrorist victim's families, to which Article 10(2) refers.

Article 12: The Commission has not received specific information on transposition in Gibraltar.

In view of the foregoing, the Commission invites the Member States which have not yet done so to ensure a rapid and complete transposition of the Framework Decision into their national law and to inform it immediately of the measures taken with the text of the statutory or administration provisions in force in support.