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from: Secretary-General of the European Commission, signed by
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to: Mr Pierre de BOISSIEU, Secretary-General of the Council of the European
Union

Subject: Report from the Commission on the implementation of Framework Decision
2004/757/JHA laying down minimum provisions on the constituent elements
of criminal acts and penalties in the field of illicit drug trafficking

Delegations will find attached Commission document COM(2009) 669 final.

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COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

on the implementation of Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking

[SEC(2009)1661]

1. METHODOLOGY

Framework Decision 2004/757/JHA¹ sets out to establish minimum rules relating to the constituent elements of the offences of illicit trafficking in drugs and precursors, so as to allow a common approach at European Union level to the fight against such trafficking².

The effectiveness of the efforts made depends essentially on the harmonisation of the national measures implementing the Framework Decision³, and the Commission is required to assess this and to submit the present report⁴. To this end, the Commission has used the evaluation criteria usually employed to analyse implementation of Framework Decisions (practical effectiveness, clarity and legal certainty, full application and compliance with the implementation deadline)⁵, as well as specific criteria such as the efficiency (practical implementation) and effectiveness (with respect to international judicial cooperation) of the Framework Decision.

By 1 June 2009, the Commission had received replies from 21 Member States⁶. This means that six Member States did not comply with the obligation in Article 9(2) of the Framework Decision to transmit information, and will not be covered in the report. These are Cyprus, Spain⁷, Greece⁸, Italy, Malta and the United Kingdom.

2. ANALYSIS OF NATIONAL IMPLEMENTING MEASURES

2.1. Definitions (Article 1)

In its definition of drugs and precursors, Article 1 refers to the United Nations Conventions of 1961, 1971 and 1988⁹, ratified by all Member States, and to directly applicable Community legislation¹⁰ regarding precursors.

In spite of the fact that certain Member States have not submitted their definitions (CZ, DE, HU, SI, BG), the Commission is able to conclude on the basis of the information received from other Member States that Article 1 does not raise any implementation problems, since appropriate national measures were already in force.

¹ OJ L 335, 11.11.2004, p. 8.

² Third recital.

³ Ninth recital.

⁴ Article 9.

⁵ See COM(2001) 771, 13.12.2001, section 1.2.2.

⁶ Bulgaria sent only a few extracts from the legal texts to which it refers in its reply, so its account may be regarded only as an indication.

⁷ Spain informed the Commission in 2006 and 2008 that the transposition measures were included in the ongoing reform of the country's Penal Code.

⁸ Greece informed the Commission in 2008 that a law implementing the Framework Decision would be debated in Parliament shortly.

⁹ The Single Convention on Narcotic Drugs of 1961 (as amended by the 1972 Protocol); the 1971 Vienna Convention on Psychotropic Substances; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988.

¹⁰ Regulations (EC) No 111/2005 and No 273/2004, see p. 7 of the working paper.

In Article 1(3), the term “legal person” uses the standard definition employed in various Framework Decisions. Seven Member States did not send any information regarding this point (CZ, DE, LU, PT, SE, SI, SK)¹¹.

2.2. Crimes linked to trafficking in drugs and precursors (Article 2)

The activities described under Article 2 are the same as those listed in Article 3 of the 1988 Convention. There is a difference in scope, however, in that the Framework Decision does not apply to activities relating to personal consumption (Article 2(2)).

With respect to drug precursors, this report limits itself to trafficking-related crimes: it does not analyse penalties for violations of the provisions of Community Regulations in this area.

2.2.1. Crimes linked to trafficking in drugs (Article 2(1) (a), (b) and c))

As a general point, the wordings of Article 2 are never incorporated into the national legislation of the Member States in their entirety. It would appear that these formal shortcomings are overcome by using generic legal wordings or broad interpretations where necessary. For example, it seems that the terms “production” and “manufacture” are in practice often interchangeable, and that acts not expressly referred to in the law are punished using provisions banning possession, which is obviously a prerequisite to all types of trafficking.

Ten Member States (AT, BE, FI, HU, IE, LV, LU, NL, PT, RO) have listed all, or most, of the activities concerned in their national legislation. Four Member States (DE, EE, FR, SE) have listed only parts, but comply with the Framework Decision through the use of generic terms. Seven Member States (BG, CZ, DK, LT, PL, SI, SK) have more ambiguous legislation¹² which does not guarantee full application of the Framework Decision in a sufficiently clear and precise manner.

2.2.2. Crimes linked to trafficking in precursors (Article 2.1(d))

Pre-existing legislation in most Member States complies with Article 2(1)(d), either in that it treats precursor trafficking and drug trafficking in the same way by penalising the same activities (BE, BG, CZ, DE, SI, SK), or in that it recognises certain offences specifically involving trafficking in precursors, which is broader in scope without being directly comparable to drug trafficking (AT, EE, FI, HU, IE, LT, LU, LV, NL, PL, PT). Import, export and possession are often included under this heading (HU, IE, LU, LV, PT).

Since the adoption of the Framework Decision, only two Member States (RO, SE) have actually amended their legislation to comply with Article 2(1)(d).

Two Member States (DK, FR) stated that trafficking in precursors is not covered *per se* in their criminal law, but can fall within the offences of drug trafficking or aiding and abetting

¹¹ BG explained that its legislation did not include a definition of a legal person.

¹² See working paper, p. 9.

drug trafficking. The Commission has serious doubts about the compliance of these systems, particularly with respect to Article 3¹³; the Commission's fear is that the absence of a separate offence of precursor trafficking will prevent this trafficking from being properly recorded, particularly with respect to attempt, incitement and aiding and abetting.

While the precursor-related activities prohibited by the Framework Decision are also prohibited in national law, therefore, it has to be acknowledged that the Framework Decision has had only marginal impact.

2.3. Incitement, aiding and abetting and attempt (Article 3)

Article 3 has not caused any major implementation problems. The Commission estimates that of the 21 Member States which sent the requested information, 18 have legislation that complies with the Framework Directive¹⁴. Of these 18 Member States, two (FI, SE) have amended their legislation to ensure compliance and two (DE, SE) have also made use of Article 3(2).

2.4. Penalties (Article 4)

2.4.1. Standard offences (Article 4(1))

The legislation of five Member States (BG, LT, LV, NL, SE) raises problems of interpretation, owing largely to a lack of information. While the one-year minimum is always respected, maximum penalties are actually much higher in most Member States. In twelve Member States (BG, FR, HU, IE, LT, LV, NL, PL, PT, RO, SI, SK), penalties are more than twice the range proposed by the Framework Decision, meaning that there are maximum penalties of six years or more – sometimes as much as twenty years – or even life imprisonment. On the whole, legislative disparities between the Member States seem to remain unchanged.

At the same time, maximum sentences are meaningful only in the context of proceedings actually initiated and penalties actually imposed by the courts. A comparison of judicial practice in each Member State would enable an assessment of the extent to which the objective of aligning national systems has been achieved in practice.

In this context, the complexity of the Dutch system and the controversies relating to coffee shops merit particular attention. The sale of soft drugs in coffee shops is the result of a policy of highly regulated tolerance of a practice which remains a criminal offence. According to the public prosecution services' guidelines, coffee-shop transactions involving 5 grammes of cannabis per person will not be prosecuted. Dutch legislation is in compliance with Article 4(1): the tolerance policy towards coffee shops rests primarily on the principle of discretionary prosecution, an area outside the Commission's remit. However, the Framework

¹³ DK specified that attempted attempt (sic) or aiding and abetting was punishable. FR did not make any comment.

¹⁴ Three Member States (BG, HU, RO) did not provide sufficient information.

Decision is concerned with the most serious crimes, and the Commission has particular concerns regarding the wider problem of the supply of such coffee shops by criminal networks.

The Commission thus concludes that all the national legislation of which it has been informed is formally compliant¹⁵, but expresses regret at the heterogeneous nature of this legislation and has concerns regarding its practical application.

2.4.2. Aggravated drug trafficking offences (Article 4(2))

Of the 21 Member States which replied, 20 comply with the level of penalties required by Article 4(2)¹⁶. However, the range of penalties runs from 10 to 15 years. Ten Member States have established maximum sentences of ten years (AT, BE, CZ, DK, EE, FI, HU, LT, LU, SE), while eight have established maximum sentences of fifteen years (BE, CZ, DK¹⁷, DE, HU, LT, LV, SK). Six Member States have even higher sentences (FR, HU, IE, LU, RO, SE), while four have maximum sentences ranging from five to eight years (AT, LT, NL, PL).

Eight Member States take the aspects of quantity and harm to health into account (AT, CZ, DK, DE, FI, NL, SK), while eight others take only one of these aspects into account (BE, EE, HU, LT, LU, LV, PL, RO). The legislation of five Member States makes no reference to this (BG, FR, IE, PT, SI). But since in these Member States the maximum penalty applying to the basic offence is already equivalent to, or exceeds, the level required by Article 4(2), this failure to make a distinction is unimportant.

The Commission considers that Article 4(2) has been satisfactorily implemented in terms of the scale of penalties. It should be noted that penalties are often higher than those set out in Article 4(2) and that thirteen Member States have not incorporated the aspects of quantity and/or harm to health into their legislation.

2.4.3. Aggravated offences committed within the framework of a criminal organisation (Article 4(3) and 4(4))

- (1) Aggravated offences involving drugs committed within the framework of a criminal organisation (Article 4(3))

Criminal law in the EU regarding drug trafficking generally takes the role of organised crime into account. Seventeen Member States (AT, BE, CZ, DE, EE, FI, FR, HU, LT, LU, LV, NL, PL, PT, RO, SI, SK) apply maximum sentences of at least 10 years for offences committed within the framework of a criminal organisation. The Netherlands has amended its narcotics legislation to expressly include offences relating to participation in a criminal organisation, in addition to the general provisions in the penal code. DK, IE and SE do not have specific provisions covering organised crime, but comply with the prescribed level of penalties. The Commission did not have enough information for three Member States (BE, LU, SI) to be able to analyse the issue of organised crime.

¹⁵ For marginal reservations with respect to BG, LT, LV and SE, please see the working paper.

¹⁶ In the absence of specific information, the situation in BG is not included.

¹⁷ 16 years.

Unlike the Framework Decision, the Member States do not require the offence to involve large quantities of drugs, or drugs that cause the most harm to health¹⁸.

In addition, a number of Member States have a range of different penalties that vary with the offender's role in the criminal organisation (such as member, leader or provider of finance). For the standard offence of membership, maximum sentences are generally more than 10 years. In eight Member States (BE, CZ, DE, LT, LV, NL, PT, SI) the maximum sentence is in fact 15 years or more, while in six (EE, FR, LU, PT, RO, SK) it is 20 years or more. Thus offences relating to drug trafficking within the framework of a criminal organisation are subject to much higher sentences than those established in the Framework Decision, and we can conclude that the penalty scales are respected.

- (2) Aggravated offences involving precursors committed within the framework of a criminal organisation (Article 4(4))

The role of organised crime is also generally taken into account in criminal law covering precursor trafficking throughout the EU, but there are wider variations than in the case of drug trafficking.

Thirteen Member States (CZ, DE, FI, HU, LT, LU, LV, NL, PL, PT, RO, SI, SK) have legislation against precursor trafficking that takes organised crime into account. The penalties are also more severe. Five Member States (CZ, FI, HU, LV, PL) have maximum penalties of between six and ten years, while eight (DE, LT, LU, NL, PT¹⁹, RO, SI, SK) have maximum penalties of 15 years or more²⁰.

It should be noted that seven Member States (AT, BE, DK, EE, FR, IE, SE) have no legislation regarding criminal organisations and precursors (or have failed to inform the Commission of such legislation)²¹. However, the maximum sentences applying to basic offences involving trafficking in precursors in the above-mentioned Member States are already at five years or more, so Article 4(4) has been satisfactorily implemented.

2.5. Confiscation (Article 4(5))

Thirteen of the 21 Member States which replied (AT, DE, DK, EE, FI, FR, LU, LV, PL, PT, RO, SK) informed the Commission of express provisions in their narcotics law regarding confiscation, while six (CZ, HU, IE, LT, NL, SI) informed the Commission of provisions in their penal codes. BE and BG have not furnished any information on such provisions. Substances which are the objects of offences are generally confiscated. For the confiscation of instrumentalities, proceeds and property of corresponding value, the Commission refers to its report²² on the implementation of Framework Decision No 2005/212/JHA²³ of the Council of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.

¹⁸ Only Estonia mentions the trafficking of large quantities of drugs.

¹⁹ Portugal increases the maximum 10-year sentence by a third, which makes it just under 15 years.

²⁰ LT, LU, NL, RO and SK provide for maximum 20-year prison sentences.

²¹ For Denmark and France, see comments on Article 2(1)(d).

²² COM(2007) 805 final, adopted on 17 December 2007.

²³ OJ L, 15.3.2005.

2.6. Particular circumstances (Article 5)

Under Article 5, Member States may have a system of reducing penalties in cases in which the offender assists the authorities. All Member States provided information on their national penalty reduction system, except BG, FI, NL and SI. In six Member States (AT, HU, LU, LV, PT, RO) a penalty reduction system for offenders cooperating with the authorities is expressly established in narcotics legislation. Several Member States make a distinction according to whether charges have already been brought, and some also provide for penalty waivers in addition to reductions. None, however, have amended their legislation as a result of the Framework Decision.

2.7. Liability of legal persons and sanctions for legal persons (Articles 6 and 7)

With respect to Article 6, the principal stumbling block is the recognition of passive liability on the part of a legal person (Article 6(2)). The legislation of ten Member States (AT, DE, DK, FI, HU, IE, LT, NL, PL, RO) complies with Article 6, but eight (BE, BG, EE, FR, LU, LV, PT, SI) did not provide enough information, particularly concerning Article 6(2). Additionally, two Member States have no legal framework establishing the liability of legal persons (CZ, SK), while Sweden's narrow interpretation of the concept of passive liability means that it does not fully comply with Article 6(2). Article 6(3) does not pose any major problems for the Member States.

As for Article 7, two Member States (CZ, SK) have stated that they do not yet have a relevant legal framework, while Luxembourg has a form of liability for legal persons which does not result in financial penalties, which is contrary to Article 7(1). Ten Member States (AT, BE, DE, FI, FR, LT, LV, PL, RO, SE) informed the Commission of legislation that formally complies with Article 7, unlike eight other Member States (BG, DK, EE, HU, IE, NL, PT, SI) which furnished no information, or insufficient information that mainly concerned the size of fines.

Only three Member States (FI, RO and SE) have amended their legislation to comply with Articles 6 and 7. The Commission draws the attention of the Member States to the lack of information received concerning implementation of the Framework Decision in respect of the liability of legal persons.

2.8. Jurisdiction and prosecution (Article 8)

All Member States accept the principle of territorial jurisdiction (Article 8(1)(a)), so the analysis will concentrate on points (b) and (c) and offences committed outside national territory. Article 8(3) no longer serves any purpose since the introduction of the European arrest warrant.

No information has been provided concerning offences committed in part on national territory, but the Commission considers, despite this, that eleven Member States (AT, CZ, DE, DK, EE, FI, FR, LT, NL, PL, SE) have legislation that is in overall compliance with Article 8. Ten Member States (BE, BG, HU, IE, LU, LV, PT, RO, SI, SK), however, did not supply the necessary information.

Six Member States (AT, DE, DK, EE, FR, SE) have informed the Commission, pursuant to Article 8(4), of their decision to apply paragraph 2, in particular stating their intention to waive or limit their jurisdiction in cases where the offence committed outside their territory was committed for the benefit of a legal person established in their territory (8(1)(c)).

Despite this, the degree of implementation remains unclear, because eight Member States (BE, BG, HU, IE, PT, RO, SI, SK) have not provided enough information concerning the implementation of paragraph 1(c), and only five (CZ, FI, LT, NL, PL) are in conformity with this paragraph.

3. OPERATION AND EFFECTS ON JUDICIAL COOPERATION

The difficulty of studying the operation of the Framework Decision and its effects on judicial cooperation lies primarily in the collection of data on judicial practice in the Member States. The Commission has relied in this respect on information from Eurojust and the European Judicial Network (EJN). On 14 November 2008, Eurojust supplied a summary of statistics on drug trafficking cases recorded by Eurojust between 1 January 2004 and 12 November 2008. The Commission also requested information from the EJN by means of a questionnaire which was sent to all its contact points²⁴.

3.1. Eurojust's input

During the above-mentioned period, the College of Eurojust recorded 771 drug trafficking cases, which showed a significant increase from 77 cases in 2004 to 207 in 2007. Drug cases account for 20% of the cases handled by Eurojust between 2004 and 2008.

The Member States that have reported the largest number of drug trafficking cases to Eurojust are Italy (81 cases), France (72) and the Netherlands (71), while the Member States with the smallest numbers are Malta (1 case), Cyprus (1), Ireland (2) and Slovakia (2).

The Member States in receipt of most applications to take action are the Netherlands (264 applications), Spain (243) and Italy (171), while the Member States in receipt of the fewest applications are Malta (3 applications), Cyprus (8), Slovakia (9), and Latvia (9).

Overall, the statistics point to the prominent role of the Netherlands, Italy, France and Germany, either as applicant countries or countries of enforcement. Sweden and Portugal notified a relatively large number of drug trafficking cases (64 and 57, respectively), while Spain and the United Kingdom received many applications from other countries (243 and 102 times, respectively). The Member States least involved, whether as applicant countries or countries of enforcement, are Malta, Cyprus, Latvia and Slovakia.

Finally, it is interesting to note that of 151 drug trafficking cases associated with one or more other crimes, 65 involved participation in a criminal organisation.

This information shows that there has been a clear increase in judicial cooperation on drug trafficking between Member States through Eurojust since 2004. However, it is at this stage

²⁴ These documents are included in the working paper.

impossible to distinguish how the Framework Decision has affected such cooperation, or to measure its impact. This question was the focus of the questionnaire to the EJM.

3.2. Input of the European Judicial Network

The contact points of the EJM in ten Member States (CZ, DE, FI, FR, HU, IE, LV, LU, PL, PT) replied to the Commission's questionnaire.

The general impression given by their data is that although specialists are familiar with the Framework Decision, they regard its importance as minor, because it has not resulted in many changes to national legislation. The question of the Framework Decision's effect on cooperation remains open, because the Framework Decision does not concern judicial cooperation directly, and because no Member State seems to have a centralised system enabling it to measure trends in judicial cooperation in drug trafficking cases. The replies often point to a degree of uncertainty amongst specialists, for example in Finland, France and Portugal.

In Finland, for example, the contact point considers that the changes that have taken place since the adoption of the Framework Decision are only minor and that they have had no impact on judicial cooperation, but also says that it is impossible to draw any objective conclusions, given the short perspective and the lack of a monitoring system that would allow any such impact to be measured.

In France, the contact point also mentions the absence of a system providing the central administration with an accurate overview of all requests for assistance concerning narcotics. The French courts are finding an overall improvement in the quality of implementation of their requests for assistance in narcotics trafficking cases, but the quality remains very variable depending on the country involved. The intervention of liaison magistrates or Eurojust representatives often permits complex coordinated action to be taken. The contact point concludes, however, that it is difficult to determine whether these improvements are the result of Member States' transposition of the Framework Decision, and that general improvements in cooperation over the past five years seem to be a result of the emergence of a "European judicial culture" amongst magistrates rather than of the transposition of the Decision.

In Portugal, according to the contact point, the Framework Decision is known but little used, since national legislation was already along the same lines. No particular changes have been noted with respect to judicial cooperation, and greater use of already existing rules in the new cooperation instruments is recommended.

4. CONCLUSION

Implementation of the Framework Decision has not been completely satisfactory. While the majority of Member States already had a number of the provisions in place, a number have also demonstrated – often in sketchy answers – that they have not always amended their existing legislation where the Framework Decision required it. Six Member States provided no information whatsoever. There has thus been little progress in the alignment of national measures in the fight against drug trafficking. The weak impact of the Framework Decision is confirmed by the EJM's input. It is difficult to establish a link between the Framework

Decision and the progress in judicial cooperation described by Eurojust. The Commission consequently invites those Member States which have submitted no information, or incomplete information, to comply with their obligations under Article 9 of the Framework Decision and furnish the Commission and the General Secretariat of the Council with all their implementing provisions very rapidly.