



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.4.2004
COM(2004) 346 final

REPORT FROM THE COMMISSION

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

{SEC(2004) 532}

TABLE OF CONTENTS

1.	Introduction	3
1.1.	Introduction	3
1.1.1.	Combating fraud and counterfeiting of non-cash means of payment	3
1.1.2.	The obligation to present an evaluation report.....	3
1.2.	Method of and criteria for evaluation of the Framework Decision.....	3
1.2.1.	Framework decisions under Article 34(2)(b) TEU and Directives under Article 249 EC Treaty	3
1.2.2.	Evaluation Criteria	5
1.2.3.	Context of evaluation	5
1.3.	Purpose of the report	6
2.	National measures taken to comply with the Framework Decision.....	6
2.1.	Impact of the Framework Decision.....	6
2.2.	Key provisions of the Framework Decision	9
2.2.1.	State of play concerning the implementation of the Framework Decision: Table 1....	9
2.2.2.	Offences related to payment instruments (article 2): Table 2	10
2.2.3.	Offences related to computers (Article 3): Table 3.....	12
2.2.4.	Offences related to specifically adapted devices (Article 4): Table 3	12
2.2.5.	Penalties (Article 6): Table 4	13
2.2.6.	Jurisdiction (Article 9): Table 5	15
2.2.7.	Liability of and sanctions for legal persons (Articles 7 and 8): Table 6.....	16
3.	Conclusions	17
3.1.	General	17
3.2.	Specific.....	18
Annex I	21

1. INTRODUCTION

1.1. Introduction

1.1.1. Combating fraud and counterfeiting of non-cash means of payment

In order to achieve an equivalent and increased protection by criminal law against the fraud and counterfeiting of non-cash means of payment throughout the Union, the Council adopted the Framework Decision of 28 May 2001.

Under Article 14 of the Council's Framework Decision of 28 May 2001¹ combating fraud and counterfeiting of non-cash means of payment, the Commission has to establish a written report on the measures taken by the Member States to comply with this Framework Decision.

1.1.2. The obligation to present an evaluation report

Article 14 of the Framework Decision of 28 May 2001 obliges the Member States to take the necessary measures to comply with its provisions no later than 2 June 2003. By the same date, the Member States should have transmitted 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 the Framework Decision. The Council should have, by 2 September 2003 at the latest, on the basis of a report established using this information and a written report by the Commission, assessed the extent to which the Member States have taken the necessary measures in order to comply with the Framework Decision.

By 2 June 2003, however, no Member State had notified the Commission of the measures taken to implement the Framework Decision. A written report in those circumstances would have been of very little meaning. The Commission has therefore considered it more appropriate to delay preparation of the report until (almost) all contributions were received (Table 1 shows the date of availability of the different contributions from the Member States).

The reports under Article 14 of the Framework Decision are the main sources of information available to the Commission. The value of this report therefore depends therefore largely on the quality and accuracy of the national information received by the Commission.

1.2. Method of and criteria for evaluation of the Framework Decision

1.2.1. Framework decisions under Article 34(2)(b) TEU and Directives under Article 249 EC Treaty

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

¹ OJ L 149, 2.6.2001, p. 1.

According to Article 34: “*Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods*”.

This Framework Decision can best be compared with a directive². Both legal instruments are binding upon the Member States as to the result to be achieved but leave to the national authorities the choice of form and methods. However, Framework Decisions do not entail direct effect. Many directives contain a provision obliging the Member States to submit reports on the implementation of the directive together with an obligation on the Commission to draw up a ‘consolidated’ report on the implementation of the directive³. On the basis of such reports the Institutions, particularly the Council and the European Parliament, can assess the extent to which the Member States have implemented the provisions of the directive in order to monitor the progress made in a specific area of Community interest. Harmonisation directives, in particular, are evaluated by the Commission as to the extent to which Member States have fulfilled their obligations. Such an evaluation might eventually lead to a Commission decision to start an infringement procedure against a Member State which did not sufficiently fulfil its obligations⁴.

The general purpose of this Framework Decision is to achieve and ensure an equivalent level of criminal law protection in the European Union of non-cash means of payment against fraud and counterfeiting by measures to be taken by the Member States, such as defining specific punishable conduct⁵ and providing effective, proportionate and dissuasive criminal penalties⁶. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in Articles 2, 3, 4, 5⁷. It can be concluded that this Framework Decision covers different subjects concerning national substantive criminal law and matters such as national jurisdiction.

On the basis of this Framework Decision Member States are particularly obliged to bring their national definitions of specific offences of fraud and counterfeiting of non-cash means of payment in line with Articles 2, 3 and 4 of the Framework Decision. Furthermore Member States are obliged to ensure the provision of effective, proportionate and dissuasive criminal penalties in order to achieve an equivalent level of deterrence. The Framework Decision obliges Member States to take the necessary measures, in particular, to meet the degree of approximation of national substantive criminal law provisions as provided for by this instrument in order to achieve an equivalent and increased protection by criminal law against fraud and counterfeiting of non-cash means of payment throughout the Union. Under the present Treaties, the Commission has no power to bring a legal action before the Court of Justice to enforce transposition legislation for the Framework Decision.

² Article 249 EC Treaty.

³ See for example the report of the Commission to the Council and the European Parliament on the implementation of Community Waste legislation : Directive 75/422/EEC on waste, Directive 91/689/EEC on hazardous waste, Directive 75/439/EEC on waste oils and Directive 86/278/EEC on sewage sludge for the period 1995-1997 (COM(1999) 752 final).

⁴ Article 226 EC Treaty.

⁵ See Article 2, 3 and 4.

⁶ See Article 6.

⁷ See Article 9.

In general a Framework Decision is the instrument ‘par excellence’ to bring the definitions of specific offences of counterfeiting more closely in line with each other, since its purpose is the approximation of laws and regulations of the Member States⁸.

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, initially developed with respect to directives, should be applied mutatis mutandis to Framework Decisions, such as:

1. the 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 aims⁹;
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 force¹⁰,
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 pre-existing measures) may be sufficient, as long as the full application of the directive is assured in a sufficiently clear and precise manner¹¹;
4. directives must be implemented within the period prescribed therein¹².

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 ensure¹³.

The general assessment provided in Chapter 2 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 preliminary observation concerns the legal context and follow-up of the evaluation report. As already mentioned, within the first pillar the Commission has the possibility to start an infringement procedure against a Member State. Since this possibility does not exist within the TEU, the nature and purpose of this report differ,

⁸ Article 34 (2) (b) TEU.

⁹ See relevant case law on the implementation of directives: Case 48/75 *Royer* [1976 ECR 497 at 518].

¹⁰ 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.

¹¹ See relevant case law on the implementation of directives for instance Case 29/84 *Commission v. Germany* [1985] ECR 1661 at 1673.

¹² 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.

¹³ See PJG Kapteyn and P. Verloren van Themaat ‘Introduction to the Law of the European Communities’, third edition, 1998, p. 328.

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 matters¹⁴, it is consistent to confer on it the task of 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 the Framework Decision.

1.3. Purpose of the report

The report should first of all enable the Council to assess the extent to which the Member States have taken the necessary measures to comply with the Framework Decision. It should also enable the other Institutions, especially the European Parliament to assess the level of protection by criminal law of non-cash means of payment on the basis of the measures taken by Member States.

With reference to the above-mentioned preliminary observations, the report has a fact-finding character concentrating on the cardinal provisions of the Framework Decision and providing the information needed to assess the progress to date. Although the Commission has no power to bring legal action before the Court of Justice to enforce transposition legislation for a Framework Decision, there is a possibility for Member States to refer to the Court an allegedly incorrect interpretation or application (i.e. also transposition) of the Framework Decision by another Member State¹⁵. The exercise of this legal possibility requires a solid factual basis, to which this report may contribute.

2. NATIONAL MEASURES TAKEN TO COMPLY WITH THE FRAMEWORK DECISION

2.1. Impact of the Framework Decision

The purpose of the Framework Decision is to ensure that fraud and counterfeiting involving all forms of non-cash means of payment are recognised as criminal offences and are subject to effective, proportionate and dissuasive sanctions in some Member States.

On the basis of the Framework Decision Member States should provide for the following main categories of measures aimed at increasing protection through criminal law of non-cash means of payment.

- (1) Article 1 contains core definitions for the Framework Decision. Point (a) defines (non-cash) “*payment instruments*” including all payment instruments with the exception of bank notes and coins. The definition of “*legal person*” repeats that used in the Second Protocol to the Convention on the protection of the European Communities’ financial interests¹⁶.
- (2) Article 2 describes the different types of behaviour which, according to the provisions of the Framework Decision, should be criminalised in all Member States as “*offences related to payment instruments*”. Each Member State shall take the necessary measures to ensure that the described forms of conduct are

¹⁴ Article 36 (2) Treaty on European Union.

¹⁵ Article 35 (7) TEU.

¹⁶ OJ C 221, 19.7.1997, p. 11.

criminal offences at least in respect of the examples of payment instruments listed in Article 1 of the Framework Decision. The word “*intentionally*” in the opening paragraph, makes this qualification applicable to all subsequent points of the article. Point (a) typically corresponds to the theft of cheques, credit cards or other cards. Point (b) covers, e.g. the creation of completely false cards, as well as the altering of existing ones in order for them to be used fraudulently. Point (c) corresponds to the receiving, selling, transmission, etc., of payment instruments, false or falsified, as well as of genuine instruments stolen or otherwise unlawfully appropriated in order to be used fraudulently. Point (d) covers the actual use of a payment instrument falling under (a) or (b).

- (3) Article 3 covers acts that are typically committed in a cyber-environment, and is intended to cover the same scope as that described by the Council of Europe Recommendation No R (89) 9 on computer-related crime (pages 37-38; guidelines for national legislatures). Such acts are criminal offences when committed intentionally
- (4) Article 4 provides for offences, committed intentionally, relating to “specifically adapted devices” for preparing or giving effect to one of the criminal behaviours described before.
- (5) The Framework Decision also extends the scope of the offences provided for in Articles 2, 3 and 4: “*individual criminal liability*” and “*criminal attempts*”. Article 5 applies to the accessory forms of criminal behaviour extending incrimination to anyone who would assist in, or instigate, any of the acts previously described. Member States are required to take the necessary measures to ensure that participating in and instigating the conduct referred to in Articles 2, 3 and 4, or attempting the conduct referred to in Article 2(a), (b) and (d) and Article 3, are punishable.
- (6) Member States should impose for all criminal activities covered by Articles 2 to 5 of the Framework Decision effective, proportionate and dissuasive criminal penalties, including custodial sentences which may lead to extradition, in the most serious cases (Article 6). In so far as natural persons are concerned, the provisions are modelled on provisions contained in the Convention on the protection of the European Communities’ financial interests¹⁷, the second Protocol to that Convention and the Convention on the fight against corruption involving officials of the European Communities or officials of the Member States of the EU¹⁸. In complying with this ruling, Member States have some discretion in determining the nature and severity of the penalties which may be provided for. These need not always necessarily involve deprivation of liberty. Fines may be imposed in addition to or as an alternative to imprisonment. It is up to Member States to decide what criteria determine the seriousness of an offence in the light of their respective legal traditions.

¹⁷ OJ C 316, 27.11.1995.

¹⁸ OJ C 195, 25.6.1997.

- (7) Member States are required to take those measures necessary to ensure that legal persons can be held liable for the offences referred to in Articles 2 to 5 of the Framework Decision, with the exception of the offence referred to in Article 2(a), committed for their benefit by persons who have a leading position within the legal person; as well as for involvement as accessories or instigators in such offences or the attempted commission of the offences referred to in Article 7(1).
- (8) Member States should also ensure that the legal persons held liable pursuant to Article 7 are punishable by effective, proportionate and dissuasive sanctions (Article 8). This Article is modelled on Article 4 of the Second Protocol to the Convention on the protection of the European Communities' financial interests¹⁹. As far as legal persons are concerned, in some jurisdictions the concept of criminal liability of legal persons does not exist. Therefore Article 8 does not impose that the sanctions, which can be fines or other measures such as those enumerated in Article 8, be of criminal nature.
- (9) The international nature of fraud of non-cash means of payment means that to combat it effectively, rules on jurisdiction and on extradition need to be clear to prevent requested persons from escaping prosecution. For that reason the provisions of Article 9 are modelled on various provisions used for different forms of crimes with particular international dimensions. The models used are the jurisdiction provisions of the Convention on the protection of the European Communities' financial interests, the second Protocol to that Convention and the Convention on the fight against Corruption involving officials of the Communities or officials of Member States of the European Union. Paragraph 1 establishes a series of criteria conferring jurisdiction to prosecute cases involving the offences covered by the Framework Decision on national enforcement and judicial authorities. A Member State shall establish its jurisdiction in three situations:
- (a) when the offence is committed in whole or in part of its territory, irrespective of the status or nationality of the person involved (territoriality principle);
 - (b) when the offender is a national (active personality principle). The criteria of their status means that jurisdiction can be established regardless of the *lex locus delicti*
 - (c) when the offence has been committed for the benefit of a legal person whose head office is based in the territory of that Member State.

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

¹⁹ On June 1997, a second protocol to the Protocol to the Convention on the Protection of the European Communities' Financial Interests (PIF Convention), adopted on 27 September 1996, was adopted, which has provisions for criminalisation of money laundering of proceeds generated by corruption and introduced liability to legal persons in cases of fraud, active corruption and money laundering, and empowering the possibility of confiscation.

Article 10 takes into account the fact that some Member States, at the time of the adoption of the Framework Decision, did not extradite their nationals and seeks to ensure that persons suspected of having committed fraud of non-cash means of payment do not evade prosecution because extradition is refused on nationality grounds.

In this context it can be noted that the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States²⁰, adopted after the Framework Decision on combating fraud and counterfeiting of non-cash means of payment, does not allow that nationality be a ground for refusal with the temporary exception of Austria.

- (10) The purpose of Article 11 is to foster co-operation and mutual legal assistance between EU Member States in order to combat fraud and counterfeiting of non-cash means of payment. The Member States have not provided information on the application of current arrangements or agreements in this field.

2.2. Key provisions of the Framework Decision

2.2.1. State of play concerning the implementation of the Framework Decision: Table 1.

Table 1

The report is based on the information communicated to the Commission, completed where necessary and possible by further exchanges with the national contact points. Information from the Member States varied considerably especially as far as the degree of completeness is concerned. Some Member States sent full national legislation without giving explanations, leaving the Commission to find out how national provisions met with the requirements of the Framework Decision; other Member States gave more details on the background and schedule of entry into force.

Austria, Belgium, Greece, Luxembourg replied to the Commission without sending legislation. Austria informed the Commission that the legislation process was expected to be completed by the end of 2003. Belgium considered that Belgian legislation does not require transposition measures because it is already in line with the Framework Decision; but did not send the Commission the relevant existing legislative texts. Greece informed the Commission that a special legal preparatory committee was expected to hand over its work in the middle of July 2003. Luxembourg declared that the draft bill should be ready by October 2003. Denmark and Portugal did not reply to the Commission.

Nine Member States (Finland, France, Germany, Ireland, Italy, the Netherlands, Spain, Sweden, the United Kingdom) have communicated to the Commission the text of the provisions transposing into their national law the obligations imposed on them under the Framework Decision. Finland communicated a note on the legal amendments which entered into force on 1 July 2003 to meet the obligations of the Framework Decision, together with extracts from its relevant legislation. France sent to the Commission a note describing new national legislation put in place specifically

²⁰ OJ L 190, 18.7.2002, p. 1.

to comply with Articles 2 to 12 of the Framework Decision plus extracts of the criminal Code for the various offences. This legislation is already in force. Germany sent the full text of the provisions transposing the obligations arising from the Framework Decision together with a short analysis of national provisions. Italy sent a short implementation table on Articles 2, 3, 4 and 7 together with extracts from the criminal code. Ireland sent to the Commission an implementation table detailing specific provisions in Irish legislation pertaining to the Articles 2, 3, 4, 5, 6, 7 and 8 of the Framework Decision. The Netherlands sent to the Commission the relevant amendments to the Criminal Code in connection with the combat against fraud and counterfeiting in connection with non-cash means of payment, plus a table of Dutch provisions pertaining to Articles 2 to 9 of the Framework Decision. This legislation is not yet in force. Spain sent a full report on its national legislation pertaining to all the Articles in the Framework Decision that need be transposed, and on the process of preparing new measures to comply with articles 2 to 7. Sweden sent to the Commission several extensive chapters of its criminal legislation (chapter 8 on theft, robbery and other crimes of stealing, chapter 9 on fraud and other dishonesty etc.) with no further explanation. The United Kingdom sent extensive legislation.

To the extent possible, however, this draft legislation has been taken into account in paragraphs 2.2.2 – 2.2.6.

Particularly in the field of the implementation of Article 7 on the involvement of legal persons as perpetrators, accessories or instigators in the offences referred to in Articles 2 to 4 or the attempted commission of the offences referred to in Article 2 (a), (b) and (d) and 3, and the corresponding sanctions referred to in Article 8, the Commission has not received the relevant information.

Furthermore not all Member States have transmitted to the Commission the relevant text of the national provisions transposing the Framework Decision: Belgium has replied there was nothing new to be done, as general provisions existed already, but did not transmit the relevant existing texts to the Commission. Germany, Ireland, Italy, Sweden, and the UK also did not see the need to initiate new legislation specially designed to comply with the Framework Decision, but did send the Commission information on the relevant existing legislation.

2.2.2. Offences related to payment instruments (article 2): Table 2

Whereas Article 1 of the Framework Decision provides definitions of payment instruments and legal persons, Article 2 states that the minimum obligation to incriminate the behaviour described applies in relation to certain types of payment instruments. Article 2 describes in precise and clear language the conduct which should be made punishable according to national legislation.

Member States use broad notions or definitions such as theft, robbery, or any misappropriation to cover Article 2 (a); Member States use counterfeiting, falsifying, and altering, in order to cover the counterfeiting or falsification of the payment instruments as per Article 2 (b). Most Member States limit the incrimination of fraud to the payment instruments listed as examples in Article 1. Italy is the only country that has added in its national legislation incrimination of fraud against payment orders, a form of payment instrument not mentioned in the list. France, Germany, Italy, Sweden and the United Kingdom make a specific distinction between counterfeiting, on the one hand, and altering, on the other hand in their national

provisions. Spanish criminal legislation does not provide for punishment of fraudulent altering of payment instruments, but only for counterfeiting.

Five Member States (France, Germany, Italy, Sweden and the United Kingdom) explicitly criminalise the conduct of receiving, obtaining, transporting, sale or transfer of payment instruments to another person or possession as defined in Article 2(c) of the Framework Decision.

Obtaining, procurement, selling or transferring to another person of counterfeit or falsified or stolen or otherwise unlawfully obtained instruments of payment are already covered under German criminal law and the transport and possession are covered by general provisions. The instrument may have been obtained as the result of a criminal offence in which case the perpetrator can be prosecuted for procurement (sections 151(5), 146(1)(2), 152a(1)(2) of the penal code), counterfeiting (sections 151(5), 146(1)(1), 152a(1)(1), 267(1), 269(1) and 270 of the criminal code), theft or misappropriation (sections 242 and 246 of the criminal code), receiving stolen property (section 259 of the criminal code) or money laundering (section 261 of the criminal code). Alternatively, the perpetrator may seek to use the payment instrument, in which case he can be prosecuted under section 263 of the criminal code, while attempts to bring instruments of payment into circulation are punishable under section 147 of the code. Where the perpetrator claims that a third party committed or intended to commit the principal offence, he or she may be prosecuted as a co-perpetrator (under section 25(2) of the criminal code) or for aiding and abetting (under section 27(1)). Furthermore, certain cases involving the transport or possession of counterfeit or falsified eurocheques, credit cards and eurocheques cards are covered by the offence of offering for sale (section 152a(1)(2) of the criminal code). According to the case law, this includes making the item clearly available for sale. In some cases, the legal qualification of the offence can be changed during the course of the trial.

Germany qualified the conduct of transport as *assistance* to the conduct referred to in Article 2(c) of the Framework Decision which has consequences for the level of penalties which can be imposed. Other Member States transpose Article 2(c) of the Framework Decision in more general terms or already have existing penal legislation in force which defines the relevant punishable conduct in more general terms (for example: Spain). Sweden qualified this conduct as assisting in the removal, or transfer.

France, Italy, Ireland, Sweden and the United Kingdom consider specifically qualified possession, for fraudulent purposes, of a stolen or a falsified payment instrument as a criminal activity. Most Member States²¹ make an explicit distinction between ‘obtaining’ and ‘possession’. France, Ireland and the United Kingdom have introduced a broad notion covering ‘obtaining’ and ‘possession’. Spain does not specifically consider ‘possession’ as a criminal activity referred to in Article 2(c).

Most Member States have also made punishable the fraudulent use of counterfeit non-cash means of payment, sometimes in a broader context than that described in Article 2(d). Fraudulent use, i.e. use intended to injure by deception is, in some

²¹ The Netherlands shall insert this (both obtaining and possessing) in their legislation (Art 226 § 2), for the moment this is a proposal.

Member States, generally punishable under legal provisions covering fraud in general and the related additional provisions: in France (*escroquerie*), in Spain (*estafa*), in Germany (*betrug*) in Italy (*truffa*). Italy also has a specific Article regarding fraudulent use of credit cards. Finland has criminal legislation providing for a broad concept of fraudulent use of counterfeit payment instruments²².

The fraudulent use provided in Article 2(d) is not covered by provisions in the Swedish penal code.

Some Member States consider that on the basis of generally worded provisions or the use of general definitions, terms or concepts their legislation complies with the Framework Decision. One of the evaluation criteria mentioned above indicates that a general legal context (such as appropriate measures already in existence) may be sufficient, as long as the full application of the instrument is assured in a sufficiently clear and precise manner. For the sake of clarity and accuracy Member States who explicitly introduced in their criminal Code the conduct that should be made punishable according to Article 2 have beyond any doubt complied in this respect with the Framework Decision.

Article 2 has been or will very soon be transposed by the majority of the Member States in their national criminal legislation, as Table 2 demonstrates.

2.2.3. *Offences related to computers (Article 3): Table 3*

France, Finland, Germany, Ireland, Italy, Spain and the United Kingdom have indicated that their respective criminal legislations ensure that offences related to computers, as referred to in Article 3, can be punished. Member States comply with this article either by amending their criminal legislation to that end (such as France, Finland and Ireland) or by a broad concept of the definition of fraud (such as Spain and Germany), including the illicit interfering with the functioning of a computer programme or system or the introducing, altering, deleting or suppressing of computer data. Swedish criminal legislation does not provide for a specific provision making punishable the conduct referred to in Article 3.

2.2.4. *Offences related to specifically adapted devices (Article 4): Table 3*

French, Finnish, German, Italian, Spanish and the United Kingdom's criminal legislation covers all the offences referred to in Article 4. Some Member States, e.g. Ireland, have introduced more general concepts, while others (e.g. Spain) use very broad and general wording in their legislation to comply with this article.

In particular, some other Member States (Finland, France, Italy) have introduced in their national legislation specific references to computer programs designed for the

²²

The act is punishable on the basis of Chapter 37, section 8(1)(1) of the penal code. The commentary to the Code states that in application of the provision, it makes no difference in principle how the means of payment has come into the possession of the user. The important thing is the use of the means of payment without the permission of its lawful possessor, or otherwise lawful right, in cases where no lawful possessor may even exist. This will be the situation for example if the means of payment is counterfeit. The provision applies therefore to the use of both a stolen and a counterfeited or falsified means of payment.

commission of any of the offences described under Article 2(b) in order to comply with Article 4.

France has amended its Penal Code to comply with Article 4. Germany and Spain²³ appear to have current legislation which meets the requirements of Article 4. The Netherlands will comply with this provision after its draft legislation has entered into force. Irish and Swedish national legislation have no specific provisions in order to comply with Article 4.

2.2.5. Penalties (Article 6): Table 4

Most Member States have succeeded²⁴ in meeting the obligation imposed by Article 6 that the conduct referred to in Articles 2 to 4 shall be 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.

The majority of Member States (except Spain which has not made the altering of payment instruments punishable) have, as regards Articles 2, 3 and 4, provided for a punishment by terms of imprisonment (see Table 4). France, Germany, Ireland, Italy, and Sweden have adapted their legislation enabling extradition in the case of offences referred to in Articles 2, 3 and 4. The United Kingdom's legislation does not provide for extradition in the case of the offences referred to in Article 4.

As is demonstrated in Table 4, the specific means of implementation of Article 6 which applies to criminal penalties is quite heterogeneous.

Eight Member States provide for maximum penalties of imprisonment in respect of the conduct referred to in Article 2: France has a maximum of 7 years imprisonment for counterfeiting, receiving and fraudulent use; Italy has a maximum penalty of 8 years for receiving; Germany has a maximum penalty of 10 years for receiving and fraudulent use of counterfeited payment instruments; Ireland provides for a maximum of 10 years imprisonment for theft, receiving, forgery and using of false instruments; the Netherlands, 7 years; Spain provides for a penalty of imprisonment between 8 years (minimum) and 12 years (maximum) for counterfeiting; Sweden has a maximum of 6 years imprisonment for 'gross' theft, falsification and receiving only if the crime is *serious* ("gross"). The United Kingdom provides for a maximum of 10 years imprisonment for forgery and handling.

Some Member States provide for imprisonment penalties, other Member States combine these with the possibility of imposing fines.

France provides for a penalty of imprisonment combined with a fine; Italy, Ireland the Netherlands and the United Kingdom allow a choice between imprisonment or a fine or a combination of both. Finland and Germany allow a choice between imprisonment or a fine. Fines can vary, for example, from an unlimited fine (Ireland) to 750.000 euros (France) for Article 2(b), (c) and (d). Fines can also be proportional

²³ The Spanish penal code covers (Article 400) the "making and the "possession" of these means and tools. No specific reference to receiving, obtaining, sale or transfer to another person of the possession of means.

²⁴ NB. Some Member States have legislation which is still partly in the process of formal national adoption, such as The Netherlands.

considering the individual characteristics of the convicted person (for instance in Spain). The traditional *amount system* has in the meantime been replaced in many countries by a so-called *day-rate system*. In the traditional *amount system* the court simply fixes a certain amount of money as punishment. The *day-rate system* requires two steps: first the court must decide on the number of days the crime would deserve if punished with the deprivation of liberty (i.e., a determination made without considering the individual characteristics of the convicted person). Second the court fixes a certain amount of money per day, depending on the daily income (and/or other available means) of the perpetrator. While some countries (such as Belgium, Italy, the Netherlands and the United Kingdom) still keep to the traditional *amount system*, the *day rate* system is gaining ground in the majority of the Member States. In a few countries the two fine systems co-exist, though occasionally for different types of crimes (such as in France, Finland and Greece). In the *amount system*, the *minimum* fine may start in some countries with low amounts of 10 euros or less (as in Belgium, France, Finland, Italy) or with rather high amounts of 720 euros (United Kingdom). Similar differences can be seen in the maximum amounts, rather low with 115 euros (Finland) and extremely high with 750.000 euros (France). In the *day-rate system* the minimum starts mostly from 5 days or less, with the exception of Sweden (30 days), whereas the maximum number of days varies from 4 to 5 months (Finland and Sweden) up to 1 year (Germany and France) and 2 years (Greece and Spain).

Some Member States differentiate between serious and petty offences related to the offences provided for in Article 2 (Spain, Sweden and Finland). Spanish legislation does not provide for punishment for altering payment instruments; consequently no sanction can be imposed. Sweden, for instance, provides in the case of ‘petty theft, falsification, fraud and receiving’ for the possibility of lower penalties. Most Member States also consider the conduct referred to in Articles 4 as punishable with lower penalties than the conduct referred to in Articles 2 and 3. Furthermore, the sanctions that can be imposed on the conduct referred to in Article 3, are of a lower level than those imposed on the conduct referred to in Article 2.

The assessment as to whether the criminal penalties which can be imposed in the Member States are sufficiently dissuasive, could in a preliminary stage be answered in positive way, given the fact that almost all the Member States have provided for the penalty of imprisonment for the conducts referred to in Article 2. The probability of detecting the criminal conduct, the type of prosecution (mandatory or facultative prosecution) and the practice of sentencing by the judiciary in each Member State, without doubt, has an impact on the perception of sanctions especially as to whether they are really considered dissuasive and effective.

All Member States have, in so far as they have made punishable the conduct referred to in Article 2, 3 and 4, general provisions in their criminal legislation on the issues of participation, instigation and attempts, as referred to in Article 5.

Preparatory acts seem to be generally punishable only in Sweden, whereas all other Member States restrict the penalisation of preparation to specific crimes. With regard to *attempt*, in the case of a felony it is generally punishable in all countries; even the attempt of *misdemeanour* is generally punishable in the majority of countries while in some others only if specially provided for. The attempt of a "contravention" (petty crime) is punishable by specific legislation in Belgium. The *punishment* for attempt is the same as for a completed crime only in France. The other Member States provide for mitigation, either obligatory (Finland, Italy and the Netherlands) or at the

discretion of the court (Germany and United Kingdom). With regard to the Member States, the *unitary model of participation* exists only in Italy. Although the other countries follow the *differentiation model between perpetrator and accessories*, they can be divided into two groups: one group holds perpetrators and accessories equally responsible while allowing differences only in sentencing (France, Italy, Finland and United Kingdom), the other group provides for mitigation at least for accomplices, which is obligatory in some countries (Belgium, Germany and Spain), whilst in others it is at the discretion of the court (Sweden).

Many Member States have made references in their national provisions on combating fraud and counterfeiting of non-cash means of payment, to general provisions on participation, instigation and attempts in their national law. Some Member States have general provisions which apply (automatically) to counterfeiting offences (that is the case, for instance, with Finland, Italy, Ireland, Spain, and the United Kingdom).

2.2.6. *Jurisdiction (Article 9): Table 5*

The majority of the Member States appear to comply with the obligations under Article 9(1)(a) and (b).

Italy complies with the obligations under Article 9(1)(a), and with some exceptions, with the obligations under Article 9(1)(b): according to Italian legislation a citizen who commits in a foreign territory a crime for which Italian law prescribes imprisonment for a minimum threshold of not less than 3 years shall be punished according to the law, provided he is within the territory of the State; with respect to crimes for which a punishment restricting personal liberty for a lesser period is prescribed, the offender shall be punished on demand of the Ministry of Justice, or on petition or complaint of the victim. Sweden and Finland have declared that they will not comply with Article 9(1)(c) and Spanish legislation does not cover it. According to the German legislation sent to the Commission, the requirements deriving from Article 9 of the Framework Decision are basically covered by section 3 *et seq.* of the criminal code; where offences are not covered by section 6(7) of the criminal code (acts against internationally protected legal interests), the jurisdiction provisions contained in Article 9(1)(c) of the Framework Decision are not to be applied (decision in accordance with paragraph 2 and 3). In accordance with the general principles of the law in the United Kingdom jurisdictions, the courts have jurisdiction over offences committed in whole or in part on the United Kingdom territory. As regards England and Wales, special statutory provisions are made in respect of the fraud and forgery offences listed in section 1 of the Criminal Justice Act 1993. Courts in England and Wales have jurisdiction over such offences if a '*relevant event*' (as defined in section 2 of the 1993 Act) takes place in England and Wales. Similar provisions are made in respect of Northern Ireland by Articles 38-41 of the Criminal Justice (Northern Ireland) Order 1996. There is no statutory equivalent in Scotland. However, under Scottish common law, Scottish courts have jurisdiction if the major elements constituting the crime or parts of the elements which complete the crime take place in Scotland. The United Kingdom has no bar on the extradition of its nationals and does not normally operate nationality jurisdiction. There is no nationality jurisdiction for such offences. Nor does the United Kingdom operate the kind of jurisdiction mentioned in Article 9(1)(c). The United Kingdom has accordingly notified the Council Secretariat under Article 9(3).

2.2.7. *Liability of and sanctions for legal persons (Articles 7 and 8): Table 6*

Articles 7 and 8 are, except for the offences they cover, drafted in similar words as Articles 3 and 4 of the Second Protocol of 19 June 1997 to the Convention on the protection of the European Communities' financial interests²⁵. With reference to the possibility afforded to it in Article 18(2) of the second Protocol, not to be bound by Articles 3 and 4 of that Protocol for five years, Austria has confirmed its declaration²⁶ that it will fulfil its obligations under Articles 7 and 8 of the Framework Decision within the same period. Irish legislation meant to comply especially with Articles 7 and 8 has not yet entered into force. Spain is preparing legislation to comply fully with Article 7. Regarding the liability of legal persons the conduct referred to Articles 2(b), (c), (d) and Articles 3 and 4 of the Framework Decision are not included in the provisions of Italian law²⁷. Six Member States (Finland, France, Germany, Ireland, the Netherlands and Sweden) have provided for such legislation ensuring that legal persons can be held liable for the offences referred to in Articles 2 to 4 committed for their benefit by persons who have a leading position within the legal person. These Member States have also made it legally possible that a legal person can be held liable where the lack of supervision or control by the management of the legal person has rendered possible the commission of an offence referred to in Articles 2 to 4.

In the United Kingdom, the general provision concerning legal persons is made under the Interpretation Act 1978 which (in Schedule 1) provides that unless the contrary is stated, the word 'person' in a statute is to be construed as including a 'body of persons, corporate or incorporate'. This provision applies to England and Wales and to Scotland, and to any Westminster legislation that applies to Northern Ireland. (Similar provision is made for Northern Ireland legislation by section 37 of the Interpretation (Northern Ireland) Act 1954). No exception is made in the statutes mentioned in the Notes and therefore legal persons can be prosecuted for these offences. However in the case of crimes such as fraud, attribution of responsibility to a legal person depends on finding someone with an appropriate level of authority within the organisation who has committed the acts and has the mental state in question. The Acts referred to in the Transposition Notes prescribe penalties for 'persons' guilty of the offences and these penalties therefore apply to legal as well as natural persons. In the case of legal persons, the appropriate penalty is a fine and fines may be imposed for all the offences mentioned. In addition, UK Courts have jurisdiction under the Company Directors Disqualification Act 1986 to make, where an individual is convicted of an indictable offence connected with a company, a disqualification order which would prevent a person from being a company director, a receiver, or from taking part in the management etc of a company.

Eight Member States (Finland, France, Germany, Ireland, Italy, the Netherlands, Sweden, and the United Kingdom) have provided for the imposition of administrative or criminal fines and (sometimes) other measures varying from a judicial winding up order to administrative sanctions and commercial law sanctions.

²⁵ OJ C 221, 19.7.1997, p. 11.

²⁶ See OJ L 140, 14.6.2000, p. 3.

²⁷ D.L. vol. 8 June 2001, n°231 provides for the liability of the legal persons only with reference to some offences: fraud, where the victim is the State, corruption and forgery of currency.

In table 6 this wide variety of administrative, civil and criminal sanctions or measures is demonstrated.

France also provides for the possibility of criminal fines, various criminal measures, such as judicial supervision for at least 5 years and a specific criminal confiscation measure. Finland provides for a corporate fine and various administrative measures. Germany uses a system of administrative sanctions which can be combined, for instance, with commercial law sanctions, such as, in serious cases, the winding up of a company. Italian criminal legislation provides for fines and for special measures such as, the exclusion from entitlement to public benefits. In the Netherlands sanctions can be imposed varying from a criminal fine up to € 454.545 to specific measures, including the deprivation of illegally obtained benefits. Sweden has the possibility to impose a criminal fine up to 3 million Swedish crowns (approximately € 319.829,42). The above mentioned Member States appear to comply with Article 8 which leaves it to the discretion of a Member State to decide to impose, apart from fines, specific measures. In this respect table 6 also demonstrates that these Member States have taken the necessary measures to ensure that a legal person held liable pursuant to Article 7(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

3. CONCLUSIONS

3.1. General

Like directives, Framework Decisions must be implemented within the period prescribed therein. National legislation necessary to comply with the Framework Decision should therefore have been adopted and entered into force.

Some Member States have not transmitted on time to the Commission all relevant texts of the provisions transposing into their national law the obligations imposed on them under the Framework Decision. The factual assessment and conclusions subsequently drawn are therefore sometimes based on incomplete information.

Five Member States (France, Germany, Italy, Ireland and the United Kingdom) have been able to meet the deadline of Article 14 (1) by taking all measures to comply with the provisions of the Framework Decision by 2 June 2003. Finland adopted measures transposing the Framework Decision after the deadline.

Belgium has stated that its national legislation already complies with the provisions of the Framework Decision and that no transposition is required, without giving further explanation on the relevant legislation. Austria and Greece have informed the Commission that they are in the process of drafting their national legislation. Austria pledged that it would be ready by end 2003. Greece informed the Commission that a special legal preparatory committee was expected to hand over its work in the middle of July 2003. Luxembourg sent an informal message to the Commission in July 2003, mentioning that its national legislation would be finalised in October 2003. None of these three Member States has transmitted anything formally so far. The Netherlands has taken measures which have not yet entered into force. Denmark and Portugal have not answered the Commission.

The implementation of Article 11 (2) should be improved first of all by providing the General Secretariat of the Council and the Commission on a standardised basis and on time with the texts which transpose the obligations imposed under the Framework Decision.

3.2. Specific

Article 2

Two Member States appear not to have taken yet all measures to comply fully with the Framework Decision: Spanish criminal legislation does not provide for punishment of fraudulent altering of payment instruments. Sweden does not comply with Article 2(d): Swedish criminal legislation does not provide for punishment of the fraudulent use of a stolen or otherwise unlawfully appropriated, or of a counterfeited or falsified, payment instrument.

The legislation of seven Member States (Finland, France, Germany, Ireland, Italy, the Netherlands, the United Kingdom) now complies with Article 2: only Finland and France have initiated new legislation especially designed to comply with the Framework Decision. Finland's criminal legislation provides for a broad concept of the fraudulent issuing of counterfeit payment instruments. France has prepared specific legislation to comply with these provisions.

Article 3

Finland, France, Germany, Ireland, Italy, the Netherlands, Spain, the United Kingdom have explicitly introduced in their criminal law the conduct that should be made punishable according to Article 3, whereas Swedish criminal legislation does not provide for a specific provision making punishable the conduct referred to in Article 3.

Article 4

The majority of Member States who have transmitted information to the Commission comply either explicitly or, in most cases, implicitly with Article 4. Sweden appears not to have transposed the obligations under Article 4. The Netherlands is preparing a specific measure to comply with this Article.

Article 5

All Member States who have replied to the Commission have introduced, in so far as they sanction the conduct referred to in Article 2, 3 and 4, general provisions in their legislation on the issues of participation, instigation and attempts, as referred to in Article 5.

Many Member States have made references in provisions on combating fraud and counterfeiting of non-cash means of payment to their general criminal law provisions on participation, instigation and attempts. Some Member States have general provisions which apply (automatically) to counterfeiting offences (that is the case, for instance, with Finland, Ireland, Italy, Spain, the United Kingdom). The French legislation mentions the hypothesis of attempt in the general provisions and also in the article of the specific offence which provides specific sanctions.

Article 6

The implementation of Article 6 which applies to criminal penalties is quite heterogeneous.

Almost all Member States who have replied to the Commission have, or will have when their legislation on this point enters into force, succeeded in meeting the obligation imposed by Article 6 that the fraudulent making or altering of currency provided for in Article from 2 to 4 shall be punishable by effective, proportionate and dissuasive criminal penalties. Since Swedish criminal legislation does not provide for punishment of the fraudulent use of a stolen or otherwise unlawfully appropriated, or of a counterfeited or falsified, payment instrument and since Spanish legislation does not provide for punishment of altering of currency, consequently no sanction can be imposed nor would extradition be possible for those offences.

The evaluation of whether or not the criminal penalties which can be imposed in Member States are sufficiently dissuasive, could on the face of it be affirmative, given the fact that all Member States who have sent information to the Commission have in respect to the conduct referred to in Article 2, provided for a (maximum) imprisonment penalty. The probability of detecting the criminal conduct, the type of prosecution (mandatory or facultative prosecution) and the practice of sentencing by the judiciary of each Member State, beyond doubt, have an impact on the perception of sanctions especially as to whether they can really be considered dissuasive and effective.

The majority of Member States have, or will have after completing their legislative procedure, legislation enabling extradition in the case of offences referred to in Article from 2 to 4.

When a Member State qualifies a certain conduct as a petty offence with corresponding lower sanctions, sometimes extradition is not possible. This might, however, be justified by the fact that sanctions should be proportionate.

Articles 7 and 8

Seven Member States (Finland, France, Germany, Ireland, the Netherlands, Sweden, and the United Kingdom) have legislation ensuring that legal persons can be held liable for the offences referred to in Articles 2 to 4 committed for their benefit by persons who have a leading position within the legal person. These Member States also have made it legally possible that a legal person can be liable where the lack of supervision or control by the management of the legal persons has rendered possible the commission of an offence referred to in Articles 2 to 4.

Six Member States (France, Finland, Germany, Ireland, Italy, Sweden) whose legislation is in force, have provided the possibility to impose administrative or criminal fines and sometimes other measures varying from judicial winding up order to administrative sanctions and commercial law sanctions.

The Dutch legislation has not yet entered into force. Spain is preparing legislation to comply fully with Article 7.

From the replies sent to the Commission, it seems as if several Member States considered that for the most part, their current legislation already corresponds to the obligations of the FD. Consequently, only certain clarifications and additions to national legislation were required. At the time of completion of this report, it is to be regretted that those Member States which had not sent legislation or which were in the process of transposing the Framework Decision, have not done so.

Annex I to

The Report of the Commission based on Article 14 of the Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non cash means of payment²⁸

Table 1 : Overview of contributions received from Member States

Austria	Reply 29.7.03, no legislation sent
Belgium	Reply 24.6.2003: transposition not needed
Denmark	No reply
Finland	4.7.2003
France	13.6.2003
Germany	12.6.2003
Greece	Reply 13.6.2003, no legislation sent.
Ireland	18.7.2003 & 25.11.2003
Italy	15.9.2003
Luxembourg	9.7.2003
Netherlands	20.6.2003
Portugal	No reply
Sweden	3.7.2003
Spain	4.7.2003
United Kingdom	8.7.2003

²⁸

OJ L 149, 2.6.2001, p. 1