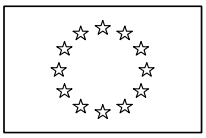

COMMISSION OF THE EUROPEAN COMMUNITIES

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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

1.1. The Council Framework Decision of 13 June 2002 on combating terrorism

The Council Framework Decision of 13 June 2002 on combating terrorism[1] (hereafter 'the Framework Decision') constitutes a key tool in the fight against terrorism.

The Framework Decision harmonizes the definition of terrorist offences in all Member States and ensures that they establish penalties and sanctions for natural and legal persons having committed or being liable for such offences which reflect their seriousness. It sets out jurisdictional rules to guarantee that terrorist offences may be effectively prosecuted and adopts specific measures with regard to victims of terrorist offences because of their vulnerability.

1.2. The first report

Under Article 11 of the Framework Decision, the Commission has to establish a written report on the measures taken by the Member States to comply with this instrument.

In accordance with that Article, a report from the Commission[2] as well as a Commission staff working paper[3] associated with this report were adopted on 8 June 2004.

Since at that time the Commission had received no information from Luxembourg and the Netherlands and no specific information from Greece, the Member States evaluated were Austria, Belgium, Denmark, France, Finland, Germany, Ireland, Italy, Portugal, Spain, Sweden and the United Kingdom.

The response of the Council to the Commission's report[4] was adopted on 25 and 26 October 2004 and concluded to:

- Invite those Member States which had not yet fully complied with the Framework Decision to do so as soon as possible and to provide information on progress made;
- Invite the Member States concerned to provide further information as asked for in the report of the Commission;
- Invite the new Member States to provide information on their implementation of the Framework Decision.

This information should have been submitted to the Council and the Commission by 31 December 2004.

1 OJ L164, 22.6.2002,p. 3

2 Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, COM(2004)409 final of 08.06.2004.

3 Commission staff working paper annex to the Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, SEC(2004) 688 of 08.06.2004.

4 Council document 11687/2/04 REV 2 DROIPEN 40, of 12.10.2004.

1.3. The present report

All Member States informed the Commission by the cut-off date of 31 December 2006. This report takes stock of the transposition situation deriving from the legislation that had been forwarded to the Commission by that reference date[5]. It has been elaborated taking into consideration all information submitted to the Commission on the implementation of the Framework Decision after the elaboration of the first report, including the opinions expressed by some Member States on the exact extent of their implementation and the assessment of the first report. 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.

2. METHOD AND CRITERIA FOR EVALUATION OF THE FRAMEWORK-DECISION

The evaluation criteria applied to elaborate the present report do not differ from those followed in the establishment of the first report and described therein[6].

As regard the context of evaluation, it is essentially the same described in the first evaluation report[7]. However, an additional circumstance must be taken into consideration: the present evaluation is influenced by the existence of a previous evaluation report. It distinguishes between Member States which were already assessed in the said report and Member States evaluated for the first time. The former are examined on the basis of the findings of the previous report and the complementary information they have provided. Regarding the latter, a full and original evaluation is required. But even in this case, the present assessment respects and builds on the interpretation of the provisions of the Framework Decision provided for in the first report, referring to it on numerous occasions.

Finally, with reference to Article 1(2) of the Framework Decision, the Commission recalls that antiterrorist measures such as implementing legislation must be applied with full respect for fundamental rights and the principle of the rule of law. The Commission will continue to pay particular attention to this aspect. The firmer the guarantees that the EU and the Member States shall respect fundamental rights when implementing Union law, the better the Union's chances of making effective advances in the fight against terrorism.

3. ASSESSMENT

3.1. Member States evaluated for the first time

This group of Member States includes those which were Members of the EU preceding the enlargement of 1 May 2004 but which were not evaluated under the first report (Greece, Luxemburg and the Netherlands)[8] and all those that joined the Union on 1 May 2004. Few of

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5 Except for the entry into force or progress of relevant legislatives amendments or bills of which the Commission had been previously informed. Thus, the report takes stock of the entry into force of the Estonian amendments to the Criminal Code on 15/03/07 as well as of the submission for approval to the House of Representatives of the Cypriot "2006 Terrorism and related matters Bill".

6 Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, COM(2004)409 final of 08.06.2004, pp. 4-5.

7 Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, COM(2004)409 final of 08.06.2004, pp. 4-5.

8 See "Commission Staff Working Paper – Annex to the Report from the commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating Terrorism" (SEC(2004) 688 final), p. 4, referred to as first evaluation report (Commission Staff working paper) in the following. No information was

these provided for a timely transmission of all relevant texts of their implementing provisions to the Commission. The factual assessment and subsequent conclusions drawn are therefore sometimes based on incomplete information. Having evaluated the information provided by the thirteen Member States, the situation regarding the implementation of the Framework Decision is as follows:

Article 1: The Czech Republic, Estonia, Greece, Hungary, Latvia, Malta, the Netherlands and Slovakia had correctly implemented Article 1 in the sense that they have incriminated terrorist offences as a separate category of crimes, while Cyprus is in the process of amending its legislation to that end. In the other Member States considered here, the technique used to define terrorist offences raises some concerns: Luxembourg does not foresee a catalogue of terrorist offences, Slovenia uses only a general definition of terrorist offences, Lithuania appears to lack a complete definition and Poland only defines terrorist intent. Furthermore, it appears that Lithuania, Poland and Slovenia lack a provision either linking these ordinary offences to the definitions of terrorism or qualifying them as terrorist offences in the case of terrorist intent.

Article 2: Estonia, Greece, Luxembourg, Malta, the Netherlands, Poland and Slovakia have implemented this Article correctly by specific provisions that separately incriminate acts committed in relation to terrorist groups. The Cypriot Bill will also introduce concrete provisions to that end. Lithuania employs a mixed formula where general provisions on criminal alliances complement the limited scope of the provision specifically dealing with terrorist groups. This provision, however, appears to fail to cover the direction of a terrorist group. Similarly, Hungary does not incriminate the direction of a terrorist group. In the Czech Republic, terrorist groups as such, and directing or participating in their activities, are not specifically incriminated - but the support to commit terrorist offences is. In Latvia, the leadership of a terrorist group is incriminated while the participation seems to be punishable only when linked to the commission of specific terrorist offences. However, both countries rely on general provisions which criminalise participation in a criminal organisation or in organised groups. Similarly, Slovenian law does not contain any specific provision dealing with terrorist groups – under that law such notion should be subsumed in the wider concept of "criminal association".

Article 3: Only Greece, Malta and the Netherlands have fully implemented this Article on terrorist related offences - Cyprus is still in the process of amending its legislation. The rest of the Member States will be able to achieve, in some cases, similar results by treating these offences as acts of collaboration with a terrorist group or as participation in specific terrorist offences, partially complying with the obligations under this Article.

Article 4: The Czech Republic, Estonia, Greece, Hungary, Malta, the Netherlands, Poland, Slovakia, Latvia, Lithuania and Slovenia have referred to general rules on participation and inchoate offences under their criminal systems that would implicitly enable their legislation to comply with this Article. The Czech Republic, Estonia, Hungary, Lithuania and Malta have, additionally, adopted specific provisions in relation to terrorism. In Cyprus modifications will link the general rules on complicity and inchoate offences to terrorist intent.

Article 5: Although only the legislative modifications foreseen by Cyprus refer explicitly to extradition for terrorist offences, it appears that all Member States are able to meet the terms of paragraph (1), obliging Member States to ensure that the offences referred to in Articles 1 to 4 are punishable by effective, proportionate and dissuasive criminal penalties that may

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received from Luxembourg and the Netherlands whereas Greece limited itself to announce that the FD had already been incorporated in the national legal system without providing further information or legal texts.

entail extradition. Greece, Estonia, Hungary, Luxembourg, Malta, the Netherlands and Poland have implemented paragraph (2) properly – the Cypriot draft Bill would also do so, while the other evaluated Member States have not introduced specific aggravating provisions nor have they identified equivalent ordinary offences which would allow the comparison of sanctions and therefore the assessment of the implementation. As regards paragraph (3), when it comes to participation in a terrorist group, all Member States but Slovenia have adequately implemented or will implement the provision. Concerning the direction of a terrorist group, most Member States have correctly implemented this provision. However, Hungary and Slovenia have not respected the required minimum penalties and Greece and Poland have chosen a formula that does not exclude the imposition of a custodial sentence of up to fifteen years but does not guarantee it either.

Article 6: Only Greece, Hungary and Luxembourg have and Cyprus will have, after completing its legislative procedure, specific mitigating circumstances for the penalty imposed for terrorist crimes, taking account of some of the particular circumstances set up in this Article. The Czech Republic, Estonia, Latvia, Lithuania, Poland, Slovakia and Slovenia have referred to more general rules containing mitigating circumstances, whereas the rest of the Member States concerned have not submitted any legislation implementing this optional provision.

Article 7: The Czech Republic, Latvia and Slovakia have failed to foresee the liability of legal persons for terrorist offences as requested in paragraph 1 and Luxembourg has not transmitted the relevant provisions. The other Member States evaluated have correctly implemented paragraph 1. Their provisions often go beyond the minimum level required by the Framework Decision through either setting more than one criterion or retaining wider criteria. Only Greece, Hungary, Lithuania, Malta, Poland and Slovenia have provided rules that explicitly implement paragraph 2, including the lack of supervision or control as a source of liability for legal persons. However, in some of the other Member States, the paragraph may be interpreted as being covered by more general formulations. Cyprus, Estonia, Latvia, Lithuania, the Netherlands and Slovenia have all implemented paragraph 3, ensuring that the liability of legal persons does not exclude criminal proceedings against natural persons who are perpetrators.

Article 8: Apart from the Czech Republic, Luxemburg and Slovakia, all Member States submitted legislation or draft legislation providing for penalties for legal persons and fulfilling the minimum obligation of Article 8 to provide for criminal or non-criminal fines. However, Latvian implementation of Article 8 is hindered by its incorrect transposition of Article 7. Most Member States also apply all or some of the optional penalties indicated in this provision and some foresee additional penalties, not mentioned in the Framework Decision.

Article 9: The legislation of 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 cover- at least partially – the principles of active and passive personality laid down in Article 9(1)(c) and (e). Article 9(1)(d) has only been expressly transposed by Malta, while the Netherlands and Slovenia referred to rules that partly cover this paragraph. Article 9(3) has been expressly implemented by Estonia, Luxembourg, Malta, the Netherlands, Slovakia and Slovenia. The clauses of universal jurisdiction in the Greek, Lithuanian, Polish, Slovakian and Slovenian legislation as well as in the Cypriot Bill may enable these Member States to comply, at least partially, with paragraphs 1 and 3 in absence of explicit implementation. Finally, while Lithuania has partly transposed Article 9(2), none of the other Member States appear to have incorporated in their national legislation the criteria for solving positive conflicts of jurisdiction referred to in this provision.

Article 10: Although only Estonia, Poland and Slovakia referred to specific articles setting out the principle of the prosecution "ex officio" it seems likely that terrorist offences are in all Member States treated as public offences for the purposes of investigation and prosecution. Only Estonia and Slovenia provided concrete provisions concerning the assistance for the families of the victims, to which paragraph 2 refers.

3.2. Member States evaluated for the second time

Article 1: The first evaluation report concluded that Austria, Belgium, Denmark, France, Finland, Portugal, Spain and Sweden had correctly implemented Article 1 in the sense that they had specifically incriminated terrorist offences as a separate category of crimes - while Ireland was in the process of amending its legislation to this end. It stated that Italy and the United Kingdom provided only for a limited number of specific terrorist offences and then qualified common offences by a terrorist intent either as an aggravating circumstance (in Italy) or by applying a general definition of terrorism (United Kingdom). The report concluded that German legislation did not comply with Article 1 of the Framework Decision.[9]

The further information provided by Member States allows the Commission to take note of a higher level of compliance with Article 1. However, none of the submitted comments entirely dispels the doubts expressed by the Commission in the said report. Only the Irish provisions - which have in the meantime entered into force - confirm that Ireland's legal system complies with Article 1.

Article 2: The first evaluation report concluded that most Member States had or would have legislation that separately incriminated terrorist acts committed in relation to terrorist groups. Only in Denmark and Sweden, directing or participating in the activities of terrorist groups were not specifically incriminated, although in some cases those who carry out such forms of conduct might still be punished as principal or secondary parties to the relevant terrorist offence.[10]

The Commission must clarify that although it remains true that directing a terrorist group and participating in its activities are not specifically incriminated in Sweden, its widely formulated provisions on attempt, preparation, conspiracy and complicity may allow the prosecution of both leaders and participants in a terrorist group. Concerning Denmark, the Commission considers that its specific legislation on assistance to terrorist groups, rather than its general provisions on complicity, could also cover all behaviours incriminated under Article 2(2). The lack of separate incrimination of collaboration with a terrorist group in Sweden and of leadership of a terrorist group in both Sweden and Denmark does not automatically exclude that the results sought by the Framework Decision cannot be achieved but may disrupt the systematic and political aim of this instrument and the clarity of implementation, and can hinder full implementation of related provisions. Therefore, it must be sustained that Sweden and Denmark have not fully implemented Article 2.

Article 3: This provision requires Member States to include certain acts as terrorist related offences. The first evaluation concluded that only Finland, France, Portugal and Spain appeared to have legislation that fully complied with the obligations under this Article and that Ireland's legal system should be able to comply after its new legislation had entered into force. The rest of the Member States' legislation only partially complied with this Article.[11]

9 See first evaluation report (summary), p. 7.

10 See first evaluation report (summary), p. 6.

11 See first evaluation report (summary), p. 6.

Austria, Italy and Sweden as well as Belgium and Denmark have submitted further explanations on the implementation of this provision; however, only Denmark has been able to demonstrate full compliance of its legislation with Article 3 of the Framework Decision.

Article 4: As the first evaluation concluded,[12] although only some Member States have specific provisions implementing Article 4, it appears that by applying general rules on complicity and inchoate offences most Member States have implicitly implemented Article 4, provided the preceding articles have been fully implemented. However, there remain some concerns with respect to the implementation of the element "attempt" in France and Belgium, as well as in Portugal.

Article 5: Concerning Article 5(1) of the Framework Decision, the first evaluation assumed that all Member States would be able to meet the terms of paragraph (1), obliging Member States to ensure that the offences referred to in Articles 1 to 4 are punishable by effective, proportionate and dissuasive criminal penalties that may entail extradition.[13]

Austria, Belgium, Denmark, Finland, France, Italy, Portugal as well as Sweden have correctly implemented Article 5(2).[14] Unfortunately, despite the additional information sent by the Member States, for Germany, Spain, Ireland and the United Kingdom, the same can still not be concluded.

As regards paragraph (3), when it comes to directing a terrorist group, according to the first evaluation report the legislation of Austria, Belgium, Germany, Ireland, Italy, Portugal and the United Kingdom complied or would comply with the Framework Decision. The legal systems of Denmark, France and Sweden would only comply partially with this provision. Spanish legislation only complied with this provision as regards directing a terrorist group that only threatens to commit terrorist acts.[15] Now, it can be concluded that French legislation also complies completely with this Article.

Concerning participation in the activities of a terrorist group, the first evaluation report stated that Austria, Belgium, Finland, France, Ireland, Portugal, Spain and the United Kingdom correctly implemented this provision, which could be considered as partially transposed in Germany, Denmark, Italy and Sweden.[16] Unfortunately, none of these countries provided information convincing the Commission of full compliance on this point.

Article 6: No additional comments have been submitted concerning Article 6. Therefore, it is presumed that still only Austria, France, Germany, Italy, Portugal and Spain specifically envisage the particular circumstances mentioned in this article, whereas the rest have not referred to specific measures to implement this optional provision.[17]

Article 7: The first evaluation report concluded that Belgium, Denmark, Finland, France, Germany, Ireland, Italy and Portugal had implemented or would implement legislation ensuring that legal persons could be held liable for the offences mentioned in the framework decision. Of these Member States, however, only Finland, Ireland, Italy and Portugal had provided enough information to consider that paragraph 2 was also covered.[18]

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12 See "Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism" (COM 2004 409 final), p. 6 – in the following referred to as first evaluation report (summary).

13 See first evaluation report (summary), p. 6.

14 See first evaluation report (summary), p. 6.

15 See first evaluation report (Commission Staff working paper), p. 22, 23.

16 See first evaluation report (Commission Staff working paper), p. 22, 23.

17 See first evaluation report (summary), p. 6.

18 See first evaluation report (Commission Staff working paper), p. 30.

Taking into consideration the new comments and information on new provisions submitted, it can now be concluded that also the Austrian and Swedish legal systems comply with Article 7(1), so that only Spain and the United Kingdom have still not implemented this provision. Concerning Article 7(2) of the Framework Decision, Austria, Belgium and Denmark have provided further information confirming compliance..

Article 8: The first evaluation report concluded that Belgium, Denmark, Germany, France, Italy, Portugal and Finland fulfilled the minimum obligation provided for in Article 8 to impose criminal or non-criminal fines for legal persons.[19] Now Austria and Sweden can be added to the list of Member States whose legislation complies with Article 8.

Article 9: The first evaluation report presumed that the legislation of all Member States complied with Article 9(1)(a), (b) and (4), as territoriality is the primary basis for criminal jurisdiction.[20] Austria, Belgium, Denmark, Finland, France, Germany, Italy, Ireland, Portugal, Spain, Sweden and the United Kingdom have rules which to different extents cover the principle of active personality in 9(1)(c), although some did not generally cover residents (Germany, France, Italy and the United Kingdom) or referred to additional requisites such as double criminality not included in this subparagraph (Denmark). The same was said in relation to the principle of passive personality in 9(1)(e), although in some cases the scope of the provision is reduced by referring only to protected persons or premises or by requiring the offender to be in the territory of the Member State. Also, only five Member States explicitly cover offences against European Union institutions or bodies. Article 9(1)(d) has only been expressly transposed by Austria and Ireland although it seemed at the time that Finland, Italy and Portugal would also be in line with this provision.[21] As regards Article 9(3) it was concluded that Austria, Germany, Ireland, Italy and Portugal explicitly provide for the possibility of prosecuting an offender who has committed a terrorist crime abroad and cannot be extradited.

From the information provided it appears that Belgian legislation also covers Articles 9(1)(d) and 9(3) and German legislation additionally complies with Articles 9(1)(d) and (e) of the Framework Decision. Denmark has referred to its obligation to prosecute in all cases established in Framework Decisions. Sweden may be considered as having universal jurisdiction for terrorist offences. The French amendment in order to implement Article 9(3) failed to change the Commission's prior conclusion on this paragraph.

The situation concerning Article 9(2) has not improved since the elaboration of the first evaluation report and Ireland continues to be the only Member State that has transposed this provision (even if partially) in its Criminal Justice (Terrorist Offences) Act 2005, which has entered into force in the meantime.

Article 10: At the time of the first evaluation, only Austria had provided enough information to demonstrate compliance of its legal system with Article 10(1) although it seemed likely that terrorist offences were treated in all Member States as public offences for the purposes of investigation and prosecution.[22] The Belgian, Danish, French and Swedish comments on the implementation of Article 10(1) reinforce the Commission's assumption that in all Member States terrorist offences are subject to public prosecution.

Concerning Article 10(2), the first evaluation report focussed on measures to assist terrorist victims' families, as the implementation of the Council Framework Decision on the standing

19 See first evaluation report (Commission Staff working paper), p. 30.

20 See first evaluation report (Commission Staff working paper), p. 31.

21 See first evaluation report (Commission Staff working paper), p. 34.

22 See first evaluation report (summary), p. 7.

of victims in criminal proceedings[23] is the subject of an independent report. Austria, Belgium, France, Germany, Ireland, Italy, Spain and the United Kingdom had provided specific information on this matter.[24] Only Portugal submitted further details on the assistance to terrorist victims' families.

4. CONCLUSIONS

The Commission notes that most Member States evaluated for the first time have satisfactory achieved the implementation of the main provisions contained in the Framework Decision. Nevertheless, some major issues stand out. Concerning the Member States evaluated for the second time, the additional information they have sent has allowed the Commission to generally conclude a higher level of compliance. However, most of the main deficiencies identified in the first evaluation report remain unchanged.

The main concerns of the Commission are:

- the deficient implementation of Article 1 in Germany, Italy, Lithuania, Luxemburg, Poland, Slovenia and the United Kingdom. This provision is of crucial importance not only for the Framework Decision but for counter-terrorism policy in general. A common definition of terrorism constitutes the basis on which all other provisions in the Framework Decision are built and allows for the use of law enforcement co-operation instruments;
- the deficient implementation of Article 5(3) on harmonisation of penalties for offences related to a terrorist group affecting Denmark, Germany, Hungary, Italy, Slovenia and Sweden, since this is also a key aspect of the Framework Decision;
- the deficient implementation of Article 7 in the Czech Republic, Latvia, Slovakia, Spain and the United Kingdom. Harmonised criminal liability of legal persons for terrorist offences is also of the utmost importance in the fight against terrorism.

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, supported by the text of the statutory or administration provisions in force.

Done at Brussels, […]

For the Commission
Franco Frattini
Vice-President of the Commission

23 OJ L 82, 22.3.2001, p.1.

24 See first evaluation report (Commission Staff working paper), p. 35.