Fight against organised crime. Framework Decision

2005/0003(CNS) - 07/07/2016 - Follow-up document

The Commission presented a report based on based on Article 10 of Council Framework Decision 2008 /841/JHA of 24 October 2008 on the fight against organised crime.

The main focus of the Framework Decision is the **criminalisation of offences relating to participation in a criminal organisation (Article 2 of the Framework Decision)** based on the definitions of “criminal organisation” and “structured association”.

The scope of this instrument should therefore encompass offences which are typically committed by a criminal organisation. It should also provide for penalties corresponding to the seriousness of those offences committed by natural and legal persons.

National provisions in relation to the Framework Decision are assessed separately for the Member States that base their systems on a self-standing offence in relation to Article 2 and those that take different approaches. The Framework Decision is not applicable to the UK as of 1 December 2014, because it exercised its right to opt out of this legal instrument.

An overview of the Framework Decision’s transposition in the Member States points to a **number of divergences**, which can to a large extent be attributed to differences in the Member States’ legal traditions.

Offences relating to participation in a criminal organisation: the Commission is of the opinion that the Framework Decision does not achieve the necessary minimum degree of approximation as regards directing or participating in a criminal organisation on the basis of a single concept of such an organisation.

As such, the Commission considers that the Framework Decision enables the Member States not to introduce the concept of criminal organisation but to continue to apply existing national criminal law by having recourse to general rules on participation in and preparation of specific offences. This may have the effect of creating additional divergences in the Framework Decision’s practical implementation.

While most Member States have adopted self-standing offences in relation to participation in a criminal organisation in accordance with Article 2, two Member States have not done so (Denmark and Sweden).

All Member States that provide for a self-standing offence cover **participation** in a criminal organisation (Article 2(a)), while a few of them cover additionally the offence of conspiracy in organised crime (Article 2(b)).

No Member State has opted for criminalisation of only the offence of conspiracy in organised crime (Article 2(b)).

Many Member States have gone beyond the minimum requirements: some of them make the national provisions broader by not referring to all elements of the definition of organised crime, e.g. they do not mention the criterion of benefit or scope of predicate offences. As a result the national legal regime applies to a wider range of offences, e.g. also to offences which are not necessarily committed for benefit (or where at least the benefit does not need to be proven) or cases where the scope is extended beyond the serious offences.

In addition to the offences under Article 2, many Member States **provide for measures that are not covered at all by the Framework Decision**, e.g. parallel offences tackling specific types of organised groups defined through their objective or modus operandi.

Liability of legal persons (Article 5): all Member States (with the exception of Cyprus) make statutory provision for criminal or non-criminal liability of legal persons involved in offences relating to participation in a criminal organisation.

All Member States have relevant provisions in this regard but only fifteen of them expressly refer to liability for lack of supervision or control by a person that has made possible the commission of the offence in question.

All Member States have definitions of a legal person and they acknowledge that liability of legal persons under paragraphs 1 and 2 is without prejudice to criminal proceedings against natural persons who are perpetrators of, or accessories to, any of the offences.

Penalties: the report notes that the majority of Member States go beyond their basic obligations and provide higher penalties for aggravated conduct not regulated by the Framework Decision in relation to the main offence depending on the role of the person in an organised criminal group.

According to Article 3(2), Member States should ensure that commission of a predicate offence in the framework of organised crime may be regarded as an aggravating circumstance within their national systems. In general, all Member States' national systems are characterised by the principle of **individualised penalties**, meaning that each criminal penalty may potentially be aggravated or mitigated according to individual circumstances decided on a case-to-case basis.

The **optional provisions** have been largely transposed:

- all Member States provide for **circumstances in relation to exemption from criminal responsibility or penalty** or reduction of penalty in mitigating circumstances;
- all Member States (with the exception of Cyprus) provide for **criminal or non-criminal fines in relation to conduct of legal persons** as regards offences. All but five Member States also provide for measures other than fines, for instance: exclusion from entitlement to public benefits or aid or temporary or permanent disqualification from the practice of commercial activities.

Conclusion: the Commission considers that there are a number of issues that may require additional clarification in relation to the correct implementation of the Framework Decision.

Those issues relate mostly to: (i) the potentially restricted scope of application of the definition of a criminal organisation and; (ii) issues concerning the correct transposition of Article 5 on the liability of legal persons.

In line with the European Agenda on Security, the Commission will provide support to Member States to ensure a satisfactory level of implementation of the Framework Decision. The Commission will also **continue to monitor the compliance of the national measures** with the EU instrument.

The assessment will take into account also whether the issues identified impact on the proper implementation of the Framework Decision. The Commission will engage in **bilateral contacts with the Member States concerned**, and, where necessary, will make use of its enforcement powers under the Treaties. This report will also contribute to the assessment of the necessity and the opportunity to review the Framework Decision.