COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.02.2006
COM(2006) 72 final

REPORT FROM THE COMMISSION

Second Commission report based on Article 6 of the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.

{SEC(2006) 219}

1. INTRODUCTION

This second evaluation follows on from the Commission Report of 5 April 2004[1] established on the basis of Article 6 of the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime[2]. The Council, at its meeting on 25 and 26 October 2004, took note of the Commission report and called on the Member States which had not yet fully complied with the Framework Decision to do so as soon as possible and provide information on the progress achieved. It decided that there should be a second evaluation report and asked the new Member States, which had not, of course, been covered by the first evaluation, to transmit the relevant information relating to the transposal of the instrument into their respective legal orders.

The deadline for supplying the information was set at 31 December 2004, but even so the Member States were not all able to answer within the time allowed. The Commission sent a reminder by letter dated 4 March 2005, followed by a final reminder by e-mail in June, so that by the end of July 2005, only one of the new Member States (MT) had not sent the information to the Commission. The only two Member States (AT and PT) which had provided no information in time for the first evaluation transmitted substantial information in the meantime. Sadly, however, certain Member States which had been judged to have complied only in part with the Framework Decision or had not provided sufficient information to enable the Commission to discharge its analysis function have still not done so. The information provided by GR is particularly inadequate. Only DE, IT, SE and the UK have supplied supplementary explanations based on the remarks in the first report.

This report substantially covers the Member States not covered by the first one. The report presents a consolidated view of the situation in those which were covered by the first report but have provided explanations since then. Only the answers that reached the Commission before 30 July 2005 have been taken into account.

Given the maximum length of documents that can be translated into all the European Union languages, only a summary of the answers under Articles 2, 3 and 4 is presented in this document[3].

2. ANALYSIS OF NATIONAL MEASURES TAKEN TO COMPLY WITH THE FRAMEWORK DECISION

2.1. Article 1 Reservations in respect of the 1990 Convention

2.1.1. Article 1(a): Reservations in respect of Article 2 of the 1990 Convention

The first evaluation stated that three states (GR, LU and SE) had not complied with Article 1(a). SE supplied additional information by letters dated 30 August 2004 and 29 June 2005. The Criminal Code Amendment Act of 19 May 2005, which came into force on 1 July 2005, extends the confiscation procedure to the other offences punishable by a sentence of at

---

1 COM(2004) 230, 05.04.2004.
2 OJ L182, 05.07.2001, p.1.
3 A detailed report is available in the attached SEC document.

least one year. The reservation continues to apply for the confiscation of the proceeds from tax offences, but the Framework Decision allows such an exception.

Nine of the ten new Member States comply with Article 1(a). MT has confined the application of Article 2 to offences classified as crimes under Maltese law, by a statement deposited on 19 November 1999.

2.1.2. Article 1(b): Reservations in respect of Article 6 of the 1990 Convention

Four States (AT, GR, LU and PT) were considered in the first evaluation as having deposited reservations not complying with Article 1(b).

PT notified information to the effect that an amendment to its Criminal Code stipulates that the underlying offences include all misdemeanours punishable by a term of at least six months and a maximum of five years.

There is an AT reservation confining the underlying offences to crimes which, under the Austrian Criminal Code, incur a sentence of more than three years. AT considers that this is compatible with the wording of Article 1(b), since it regards itself as a country having a scheme of minimum penalties. These minimum sentences exist on the basis of offences punishable by a custodial sentence of at least five years. But there are also offences punishable by a three-year sentence or less (but more than one year) which do not carry a minimum penalty. Such offences are currently excluded from Article 6 of the 1990 Convention because of Austria's reservation, which means that it does not comply with Article 1(b).

GR declares that a bill currently subject to consultation would repeal the reservations in respect of Articles 2 and 6 contained in Act 2655/1998. The bill would create three categories of money-laundering precursor offences. In addition to a specific list of offences, the bill would supplement the definition of the underlying offence by including offences punishable by imprisonment (the threshold remains to be determined) and offences punishable by imprisonment, the threshold of which also remains to be determined, which have generated illicit profits in an amount exceeding a threshold not yet determined. It is not yet possible to determine whether the bill would finally remove the objections set out in the first report.

In the absence of further information, it is not possible to consider that the unfavourable remarks addressed to LU following the first evaluation can be withdrawn.

Eight of the ten new Member States comply with Article 1(b). But MT has confined the application of Article 6(1) to offences classified as crimes under Maltese law, by a statement dated 19 November 1999. HU has confined the application of Article 6(1) to the underlying offences defined in its Criminal Code by a declaration of 2 March 2000.

2.2. Article 2: Penalties

The first evaluation stated that the eleven countries which had transmitted information complied with Article 2. But DK, FI and SE legislation provided for penalties complying with Article 2 only in the event of serious or aggravated money-laundering. The basic offence remained punishable by a penalty below what the Framework Decision prescribed.

SE wished to specify that there was no real difference between its national system and those operating in most of the other countries, since sentences routinely match the seriousness

of the offence, whether the relationship between seriousness of offence and of penalty is stated in explicit terms, as in Sweden, or not, as in the other European legal systems, where the court has a greater discretion to make the punishment fit the crime. The Swedish answer therefore provides supplementary information in support of the statement that it complies with Article 2. Beyond the assessment of this segmented structure of penalties existing in these countries, only a detailed analysis of the case-law would make it possible to compare the actual degree of severity of the various European legal systems in relation to money-laundering, which would be out of place in this report. AT also mentioned that it had to take account of the consistency of legal systems to justify its sentencing guidelines inspired by similar considerations.

However, sentencing tariffs could have unexpected and undesirable effects on the implementation of Framework Decision 2005/212/JHA. In the field of money-laundering offences, the strengthened confiscation powers referred to in Article 3 apply where the offence is committed within a criminal organisation and is punishable by a maximum sentence of at least four years' imprisonment.

It would therefore be helpful to ensure that money-laundering by organised crime is systematically treated as "particularly serious or habitual" (DK) or "extensive and professional" (FI)[4]. More generally, there is the question whether the offence of (non-aggravated) money-laundering is regarded as a distinct offence from the aggravated offence[5] for the purposes of the application of Framework Decision 2005/212/JHA.

GR did not provide documentary information making it possible to assess the implementation of Article 2.

Among the nine new Member States which transmitted information:

- Hungarian legislation provides for automatic exemption from prosecution for any person who discloses facts relating to money-laundering to the police, or begins doing so. This exemption appears excessive because it also seems to be able to benefit a "brazen" launderer, i.e. one who discloses his money-laundering activities to the police to be eligible for this exemption. Moreover, it must be mentioned that under Hungarian legislation a person commits the offence of money-laundering only in the course of his professional activities, which appears unduly narrow;

- a bill adopted by the Government of the Czech Republic on 9 June 2004 raises the maximum sentence for the basic offence from two to four years, but introduces a provision whereby, in the event of concurrent sentences, the penalty incurred for the underlying offence prevails if the penalty imposed for the underlying offence is lighter than the penalty imposed for the money-laundering offence. It is difficult to evaluate the true scope of this measure, but it seems that the Czech Republic should modify this detail of its bill so that its future legislation is fully compliant.

2.3. Article 3: Value confiscation

The first evaluation determined that value confiscation was possible to varying degrees, but at least as an alternative measure (though sometimes confined to specific cases or

---

4 For example.

5 And, in Austria, recycling by third parties of the assets of criminal or terrorist organisations.

to certain types of offences or of assets) in the domestic procedures of eleven Member States (BE, DK, DE, FR, IE, IT, LU, NL, FI, SE and UK) and in at least nine Member States (BE, DK, FR, IE, IT, NL, FI, SE and UK and probably DE) as regards foreign applications.

LU and ES indicated at the time of the first evaluation that they were preparing legislation to supplement their national mechanisms in line with Article 3, but progress in their legislative procedures has not been reported.

GR stated that it complied with Article 3 but did not provide the text of the relevant provisions.

2.3.1. Domestic proceedings

The information gathered in the second exercise shows that the value confiscation procedure is widely used, at least where it is impossible to confiscate the proceeds of crime. IT, PT, LT, PL, CY, CZ, SK, SI and HU therefore appear to comply with Article 3 as regards domestic internal procedures. In Austria, Article 20 of the Criminal Code stipulates that a fine for undue enrichment can be imposed on persons having committed offences in amounts corresponding to the profits from the offence committed or received for committing it. No fine is imposed if enrichment does not exceed €21 802, which is much higher than the threshold in Article 3. Information from LV seems to suggest that there is no provision for value confiscation.

2.3.2. External requests

All the Member States have ratified Council of Europe Convention No 141, which requires the Parties to adopt the necessary measures to accede to external requests for confiscation of sums of money corresponding to the value of the crime.

The first evaluation report noted the relatively vague character of explanations given by certain Member States. The information gathered at the end of the second phase, although precious, leads to the same conclusion. A distinction is made for the proposal for amendment proposed by DE, which might help clarify its situation in relation to Article 3.

2.4. Article 4: Processing of requests for mutual assistance

According to this Article, requests for mutual assistance from other Member States which relate to asset identification, tracing, freezing or seizing and confiscation of the proceeds must be processed with the same priority as is given to such measures in domestic proceedings.

The first evaluation stressed that the Commission had not received sufficient information from the Member States to consider that this provision had been transposed specifically.

The information received since then generally refers to the application of the 1990 Council of Europe Convention (CY, CZ, SI), to legislative instruments governing the conditions for acceptance of foreign requests (AT, CY, SE, EE and HU) or to subordinate legislation guiding the judicial authorities in the acceptance of such requests (DE, PT). Without calling into question the content of the information provided, the Commission would merely repeat the same remark as it is clear that an effective evaluation of the implementation of Article 4 requires different evaluation techniques.

The new provisions contained in Council Framework Decision 2003/577/JHA of 22 July 2003, with which Member States were required to comply before 2 August 2005, fit implicitly into the prospect for better application of Article 4[6]. Work in hand on the principle of mutual recognition of confiscation decisions obeys the same logic. Rapid adoption of this Framework Decision would without doubt constitute significant progress.

2.5. Article 7: Territorial application

Article 7 provides that the Framework Decision is to enter into force in Gibraltar as soon as the 1990 Council of Europe Convention applies there. The UK pointed out that this condition is not met and that no measures are in preparation to fill the gap.

3. CONCLUSIONS

The situation concerning the transposal of the specific provisions is now as follows:

Article 1(a): Greece, Luxembourg and Malta will probably have to reformulate their reservations in respect of Article 2 of the 1990 Convention.

Article 1(b): Austria, Greece and Luxembourg still do not seem to meet the necessary conditions. Among the new Member States, the reservations entered by Malta and Hungary do not seem to comply.

Article 2: All the Member States which answered comply with this Article. But three remarks could be made:

– The Czech Republic could amend a provision of a bill on the matter to make it fully compliant;

– Hungary might have to reformulate the provision automatically exempting all those who reveal money-laundering activities and its definition of the offence of money-laundering;

– The maximum penalty complying with Article 2 is provided for only where the court convicts for the aggravated money-laundering offence (Austria, Denmark, Finland, Sweden, Czech Republic, Slovakia).

Article 3: Value confiscation seems to be available to varying degrees, but at least as an alternative measure (even if it is sometimes confined to specific cases or to certain types of offences or of assets), in the domestic procedures of most of the Member States. Latvia is the only exception and does not seem to have such a procedure. In Austria the confiscation procedure applies only above a threshold that exceeds the provisions of Article 3. Regarding foreign requests, there is little additional information to supplement the analysis from the first evaluation. The new Member States that have provided information generally stated that they complied with relevant international instruments.

Article 4: The Commission still considers that it has not received sufficient information to consider that this provision has been specifically transposed. The Commission considers that

[6] Doc. 14622/04 COPEN 135, 17.12.2004, and 14622/04 REV 1 COPEN 135, 17.1.2005.

the implementation of this article will be facilitated if on-going projects concerning the mutual recognition of confiscation decisions are brought to a conclusion .

Article 7: This provision has still not been transposed by the United Kingdom.