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REPORT FROM THE COMMISSION

based on Article 11 of the Council's framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro

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INTRODUCTION

1.1. Introduction

1.1.1. *Protection of the euro against counterfeiting*

Under Article 11 of the Council's framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro¹ (hereafter 'the framework Decision') and with reference to the conclusions of the joint ECOFIN/JHA Council on 16 October 2001², the Commission has to establish a written report on the measures taken by the Member States to comply with this framework Decision.

Euro banknotes and coins will be put into circulation in the Member States which have adopted the euro on 1 January 2002³. The world-wide importance of the euro means that it will be particularly open to the risk of counterfeiting. It should be ensured that the euro is protected in an appropriate way in all Member States -inter alia- by efficient criminal law measures, even before the currency starts to be put into circulation, in order to defend the necessary credibility of the new currency and thereby avoid serious economic consequences. The Commission's communication of 22 July 1998 entitled "Protection of the euro - combating counterfeiting", the resolution of the European Parliament of 17 November 1998 on the Commission's communication and the recommendation of the European Central Bank of 7 July 1998⁴, all emphasise the importance of an equivalent level of criminal law protection of the euro against counterfeiting in the Union. The European Council also stated

¹ OJ L 140, 14.06.2000, p. 1.

² The joint ECOFIN/JHA Council on 16 October 2001 concluded that 'a report on the implementation by the Member States of the Council Framework Decision of 29 May 2000 will be submitted to the Council in the near future' (Part B Policy debate on the protection of the euro against counterfeiting, No 3, doc. 12225/01).

³ See Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro, OJ L 139 of 11.5.1998, p. 2. Article 12 of this Regulation obliges the participating Member States to ensure adequate sanctions against counterfeiting and falsification of euro banknotes and coins.

⁴ (1) the communication of the Commission of 22 July 1998 to the Council, the European Parliament and the European Central Bank entitled "Protection of the euro - combating counterfeiting" (COM (98) 474 def);

(2) the resolution of the European Parliament of 17 November 1998 concerning the Commission communication to the Council, the European Parliament and the European Central Bank entitled "Protection of the euro - combating counterfeiting" (OJ C 379, 7.12.1998, p. 39) ;

(3) the recommendation of the European Central Bank of 7 July 1998 regarding the adoption of certain measures to enhance the legal protection of euro banknotes and coins (OJ C 11, 15.1.1999, p. 13).

that «an effective system to protect the euro against counterfeiting must be adopted as soon as possible in 2001»⁵.

In order to achieve an equivalent and increased protection by criminal law of the euro throughout the Union, the Council has adopted the framework Decision of 29 May 2000.

The protection of the euro by criminal law against counterfeiting forms part of a package of legal, law enforcement and technical measures, identified in the Commission's communication. Based on a proposal by the Commission, the Council adopted on 28 June 2001 two parallel Regulations concerning the protection of the euro against counterfeiting. The first Regulation⁶ establishes the procedures for collecting, storing and exchanging information on counterfeits and counterfeiting. The second Regulation⁷ extends the effects of the first Regulation to Member States that have not adopted the euro. In April 1999 the Council adopted a Decision⁸ extending Europol's terms of reference to deal with forgery of money and means of payment, which will be amended on the basis of a Swedish initiative⁹. Based upon an initiative of the French Republic¹⁰, the Council is expected still in 2001 to adopt a Decision on the protection of the euro against counterfeiting. This Decision aims to complete the two parallel Regulations¹¹.

Sweden has initiated an amendment of the framework Decision of 29 May 2000 concerning an additional provision (Article 9a) on the recognition of previous convictions¹², which is expected still this year to be adopted by the Council.

1.1.2. The obligation of an evaluation report

Article 11 of the framework Decision of 29 May 2000 obliges the Member States to take the necessary measures to comply with its provisions not later than 29 May 2001, except for Article 5(a) which should have already been complied with by 31 December 2000. By the same dates, the Member States should have transmitted to the General Secretariat of the Council, the Commission and the European Central Bank the text of the provisions transposing into their national law the obligations imposed on them under the framework Decision. The Council should have, by 30 June 2001 at the latest, on the basis of a report established on the basis of this information and a written report by the Commission, assessed the extent to which

⁵ At its meeting held in Nice from 7 to 9 December 2000, conclusion No 34 SN 400/1/00.

⁶ Council Regulation EC 1338/2001 of 28 June 2001 laying down measures necessary for the protection of the euro against counterfeiting - OJ L 181/6, 04.07.2001.

⁷ Council Regulation EC 1339/2001 of 28 June 2001 extending the effects of Regulation 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting to those Member States which have not adopted the euro as their single currency OJ L 181/11, 04.07.2001.

⁸ 1999/C/149/02 – OJ C 149, 28.5.1999, p. 16.

⁹ 2001/C 225/04 – OJ C 225, 10.8.2001.

¹⁰ Initiative by the Government of the French Republic with a view to adopting a Council Decision on the protection of the euro against counterfeiting (OJ C 75/1 of 07.03.2001).

¹¹ See also chapter 2.1.2 of the Commission's Communication to the European Council (COM (2001) 561 final): the Second report on the preparations for the introduction of euro notes and coins.

¹² 'Initiative of the Kingdom of Sweden with a view to the adoption of a Council Framework Decision amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro', OJ C 225 , 10.8.2001, p.9.

Member States have taken the necessary measures in order to comply with the framework Decision.

By 29 May 2001, however, only two Member States 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 of the Member States).

The reports under Article 11 of the framework Decision are the main source of information. The value of this report depends therefore largely on the quality and punctuality of the national information received by the Commission. The Commission took also into account, where appropriate, the information contained in the overview of answers by the Member States to the Questionnaire, issued under the Austrian Presidency, on criminal law measures to combat counterfeiting of the euro¹³ and the report of the ECB on the legal protection of banknotes in the European Union¹⁴.

1.2. Method of and criteria for evaluation for this framework Decision

1.2.1. Framework decisions ex Article 34 (2) (b) TEU and Directives ex 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.

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”.

At the outset it is important to underline that it is the first time the implementation of a framework decision is evaluated. There is no precedent nor standard method for the evaluation of the implementation of framework decisions.

This framework Decision can best be compared with the legal instrument of a directive¹⁵. Both instruments are binding upon Member States as to the result to be achieved but leave to the national authorities the choice of form and methods. However, framework decisions shall not entail direct effect. Many directives contain the provision obliging the Member States to submit reports on the implementation of the directive together with the obligation of the Commission to draw up a ‘consolidated’ report on the implementation of the directive¹⁶. On the basis of such reports the Institutions, such as the Council and the EP, can assess the extent to which the Member States have implemented the provisions of the directive in order

¹³ Document 5429/1/99 JUSTPEN 3.

¹⁴ European Central Bank: Report on the legal protection of banknotes in the European Union Member States, November 1999.

¹⁵ Article 249 EC Treaty.

¹⁶ 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).

to monitor the progress made in a specific area of Community interest. Harmonisation directives, in particular, are evaluated by the Commission on 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 obligations¹⁷.

On the basis of this framework Decision the Member States are particularly obliged to bring the definitions of specific offences of money counterfeiting more closely in line with each other. Furthermore the 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 the Member States to take the necessary measures -in particular- to meet the degree of approximation of the national provisions of substantive criminal law as provided for by this instrument in order to achieve an equivalent and increased protection by criminal law of the euro throughout the Union. The Commission has no legal action before the Court of Justice to enforce transposition legislation for the framework Decision.

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 are developed with respect to directives which should be applied *mutatis mutandis* to framework decisions, such as:

1. 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 aims¹⁸;
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 force¹⁹,
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 already existing measures) may be sufficient, as long as the full application of the directive is assured in a sufficiently clear and precise manner²⁰;
4. directives must be implemented within the period prescribed therein²¹.

¹⁷ Article 226 EC Treaty.

¹⁸ See relevant case law on the implementation of directives: Case 48/75 *Royer* [1976 ECR 497 at 518].

¹⁹ 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.

²⁰ See relevant case law on the implementation of directives for instance Case 29/84 *Commission v. Germany* [1985] ECR 1661 at 1673.

²¹ 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.

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 ensure²².

The general purpose of this framework Decision is to achieve and ensure an equivalent level of criminal law protection in the European Union of the euro against counterfeiting by measures to be taken by the Member States, such as defining specific punishable conduct²³ and providing effective, proportionate and dissuasive criminal penalties²⁴. They also should cooperate in deciding which Member State shall prosecute the offender or offenders with a view to centralising the prosecution in a single Member State where possible²⁵. It can be concluded that this framework Decision covers different subjects concerning national substantive criminal law and matters such as national jurisdiction.

The general assessment provided for 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 which also take account of the different subject matters which can be regulated in the legal instrument of a directive.

1.2.3. *Context of evaluation*

A preliminary observation concerns the (legal) context and follow up of the evaluation report. As already mentioned, the Commission has within the first pillar the possibility to start against a Member State an infringement procedure. Since this possibility does not exist within the TEU, the nature and purpose of this report differ, 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 matters²⁶, it is coherent to confer on it a task of a 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 this framework Decision.

A second preliminary observation concerns the specific nature of the field being regulated. The framework Decision covers substantive criminal law and concerns not only definitions of offences but also issues of general criminal law, such as individual criminal liability and criminal attempts²⁷ as well as the liability of legal persons²⁸. Though the majority of systems seem to be convergent, there still exist, especially concerning the liability of legal persons, divergences among Member States²⁹. The evaluation of the extent to which Member States have taken measures to comply with issues of general criminal law shall take, as far as appropriate, account of the general criminal legal background of the Member States.

²² See PJG Kapteyn and P. Verloren van Themaat ‘Introduction to the Law of the European Communities’, third edition, 1998, p. 328.

²³ See Article 3 (1).

²⁴ See Article 6.

²⁵ See Article 7 (3).

²⁶ Article 36 (2) Treaty on European Union.

²⁷ Article 3 (2).

²⁸ Article 8.

²⁹ See for instance: « The implementation of the Corpus Iuris in the Member States, Penal provisions for the protection of European Finances », Vol. I , Prof. M. Delmas-Marty and Prof. J.A.E. Vervaele, Intersentia Antwerpen.

1.3. Purpose of the report

This report should enable first of all 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 other Institutions, especially the European Parliament and the European Central Bank to assess the level of protection by criminal law of the euro on the basis of the measures taken by the 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 to assess the progress which at this moment has been made. Although the Commission has no 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 State³⁰. The exercise of this legal possibility requires a solid basis on facts, to which this report is meant to 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 supplement the provisions and to facilitate the application of the International Convention on the Suppression of Counterfeiting Currency of 20 April 1929³¹ (hereafter «the 1929 Convention») by the Member States in accordance with the provisions of the framework Decision³². The Convention should be considered as a minimum standard for the protection by criminal law of the euro against counterfeiting. The framework Decision should increase that protection³³.

On the basis of the framework Decision Member States should provide for six main categories of measures aimed at increasing protection by criminal law of the euro.

The first two categories concern the definition of counterfeiting. Point 3 concerns practices which are regarded as punishable in addition to the actual ‘act of counterfeiting’. Points 4 and 5 deal with the necessity of deterrent penalties respectively the establishing of jurisdiction over the offences concerned, whereas point 6 concerns the liability of legal persons.

1. Article 3 (1), (2) and (3) of the 1929 Convention describes the general fraudulent conduct of counterfeiting, such as the fraudulent making or altering of currency which constitute general offences. Above and beyond this conduct,

³⁰ Article 35 (7) TEU.

³¹ No 2623, p. 372. League of Nations Treaty Series 1931.

³² Article 2 (1) According to Article 2 (2) all Member States who have not yet done so undertake to accede to the 1929 Convention.

³³ It should be noted that for the purpose of the framework Decision "currency" means paper money (including banknotes) and metallic money, the circulation of which is legally authorised including euro banknotes and euro coins, the circulation of which is legally authorised pursuant to Regulation (EC) 974/98 (Article 1). Thus accommodating the principle envisaged in the 1929 Convention of equal protection of ‘domestic’ currency and ‘foreign’ currency.

the export and transport of counterfeit currency with the intention of putting it into circulation should be a criminal activity in all Member States (Article 3 (1) (a)- (c)).

2. Member States shall take measures to ensure that: (a) above and beyond the activities referred to in Article 3(5) of the 1929 Convention, possession, for fraudulent purposes, of means specifically intended for the counterfeiting of currency is a criminal activity; (b) above and beyond the articles referred to in Article 3(5) of the 1929 Convention³⁴ (means specifically intended for the counterfeiting of currency), all means should be covered which are specifically adapted for the counterfeiting of currency, inter alia, computer programmes; (c) the concept of 'articles' within the meaning of Article 3(5) of the 1929 Convention also includes components of currency (such as holograms) which serve to protect against counterfeiting (Article 3 (1) (d)).
3. (a) The conduct and activities referred to in points 1 and 2 in respect of currency manufactured in violation of the rights of the competent authorities to issue currency, should constitute a criminal offence in all Member States (Article 4). (b) Member States should also take measures to ensure that the conduct and activities referred to in points 1, 2 and 3 (a) are punishable if they relate to banknotes and coins which are not yet issued but are designated for circulation, and are of a currency which is legal tender (Article 5 (b)).
4. Member States should impose for all criminal activities covered by Articles 3 to 5 of the framework Decision effective, proportionate and dissuasive criminal penalties, including custodial sentences which may lead to extradition (Article 6). Member States should at least be able to extradite in the case of Articles 3 to 5 in conformity with Article 2 of the European Convention on Extradition of 1957³⁵ and provide for sanctions the maximum being not less than 8 years in the case of the offence of counterfeiting referred to in Article 3 (1) (a).
5. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in the framework Decision. At least the Member States in which the euro has been adopted shall take the appropriate measures to ensure that the prosecution of counterfeiting, at least counterfeiting of the euro, is possible, irrespective of the nationality of the offender or the place where the offence was committed. The framework Decision further addresses the issue of conflict of jurisdiction (Article 7).
6. Member States are required to take the necessary measures to ensure that legal persons can be held liable for the offences referred to in Articles 3 to 5 of the framework Decision 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 3 (1) (a) and (b) (Article 8). Member States should also ensure that the legal person held liable pursuant to Article 8 is punishable by effective, proportionate and dissuasive sanctions (Article 9).

³⁴ Article 3 (5): This paragraph concerns criminal activities related to the instruments adapted for counterfeiting.

³⁵ Paris, 13.12.1957, ETS No 024.

On the basis of the minimum standard provided for in the 1929 Convention³⁶ the framework Decision also deals with the general issues of criminal law: 'individual criminal liability' and 'criminal attempts'. The Member States are, for instance, required to take the necessary measures to ensure that participating in, instigating and attempting any fraudulent making or altering of currency are punishable (Article 3 (2)).

The Commission has emphasised the importance of putting in place all systems of protection of the euro, including enhanced protection by criminal law, by 1 January 2001³⁷. The Council has also underlined the importance of effective protection by criminal law of the euro prior to 1 January 2002. The framework Decision therefore obliges the Member States to guarantee protection by criminal law even before the currency starts to be put into circulation as from 1 January 2002. This protection should cover the criminal activities mentioned above under points 1, 2 and 3 (a) (Article 5 (a)).

2.2. Key provisions of the framework decision

The Commission has previously underlined the importance to establish generally accepted definitions which will make it easier to process information, establish judicial cooperation and apply penalties³⁸, providing equivalent protection of the euro throughout the Union. 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 the purpose of it is the approximation of laws and regulations of the Member States³⁹.

For those Member States which have ratified the 1929 Convention, it may be assumed that there is already a certain degree of homogeneity of legislation⁴⁰. However it appears that not all the Member States have yet completed the ratification of the 1929 Convention, as demonstrated in table 2. In order to provide protection of the euro above and beyond the 1929 Convention, Member States should ensure that certain practices are punishable, such as the transport of counterfeit currency or the fraudulent possession of computer programs adapted for counterfeiting of currency.

The Council and the Commission both consider the equivalent level of deterrence throughout the Union by dissuasive penalties to be a further priority. From a practical point of view attention should also be paid specifically to the issue of establishing jurisdiction in at least the Member States in which the euro has been adopted enabling the prosecution of counterfeiting of the euro, irrespective of the nationality of the offender or the place where the offence was committed.

³⁶ Article 3 (4) 1929 Convention.

³⁷ See inter alia the Commission's communication of 23 July 1998 to the Council, the European Parliament and the European Central Bank entitled "Protection of the euro - combating counterfeiting" (COM (98) 474 def).

³⁸ See the Commission's communication of 23 July 1998 to the Council, the European Parliament and the European Central Bank entitled "Protection of the euro - combating counterfeiting" (COM (98) 474 def).

³⁹ Article 34 (2) (b) TEU.

⁴⁰ According to Article 23 of the 1929 Convention ratification by a State of the Convention implies that its legislation and its administrative organisation are in conformity with the rules of the Convention.

The report therefore pays specific attention to the general description and assessment of the way in which Articles 3, 6 and 7 are complied with by the Member States.

2.2.1. *State of play concerning the implementation of the framework Decision and ratification of the 1929 Convention: Tables 1 and 2*

Table 1

Fourteen Member States⁴¹ have communicated to the Commission the text of the provisions transposing into their national law the obligations imposed on them under the framework decision. The Commission has received information from the Member States which varied considerably especially as far as the aspect of completeness is concerned. However the report is based on the information communicated to the Commission, completed where necessary and possible.

Especially in the field of the implementation of Article 8 on the involvement of legal persons as accessories or instigators in the offences referred to in Articles 3 to 5 or the attempted commission of the offences referred to in Article 3(1) (a) and (b) and the corresponding sanctions referred to in Article 9, the Commission has not received the relevant information. Furthermore not all Member States have transmitted to the Commission all the relevant texts of the provisions transposing Articles 3 (2) and 6 (1).

It should be noted that most Member States (Austria, Belgium, Denmark, Germany France, Finland, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Sweden) have initiated new legislation completing or amending existing penal legislation, especially designed to comply with the framework Decision. In the case of Ireland and Luxembourg⁴² these measures concern almost all provisions of the framework Decision, but they have not yet entered into force. France⁴³ has prepared legislation transposing Articles 3 (1) (a) and (d), 5 (b) and 7 of the framework Decision, which has not yet entered into force. Germany has prepared legislation transposing Article 3 (1) (d) and Article 8 (1) third indent, which has not yet entered into force. To the extent possible, however, this draft legislation has been taken into account in paragraphs 2.2.2. – 2.2.6. Spain and the UK have not initiated new legislation specially designed to comply with the framework Decision.

Table 2

With respect to the obligation of the Member States -that have not yet done so- to accede to the 1929 Convention, it can be noted that Sweden acceded on 1 April. Luxembourg has prepared a draft Bill to that end which is expected to enter into force before the end of 2001. All Member States have now or will very soon accede to the 1929 Convention in accordance with Article 2 (2) of the framework Decision, as is demonstrated in table 2.

⁴¹ See Table 1.

⁴² Luxembourg is in the process of preparing legislation concerning the liability of legal persons.

⁴³ France is in the process of preparing legislation concerning Article 4.

2.2.2. General offences (article 3): Table 3⁴⁴

The general concept of counterfeiting of currency described in Article 3 (1) (a) and in Article 3 (1) (b) of the framework Decision is or will very soon be transposed by all Member States in their national penal legislation, as Table 3 demonstrates. Member States use broad notions or definitions such as counterfeiting, falsifying, falsifying in order to create a higher value, the act of forgery or making a counterfeit which cover the conduct of fraudulent making or altering⁴⁵ of currency meant in Article 3 (1) (a). Belgium (only for coins), Greece, Ireland, Italy, Luxembourg and Portugal⁴⁶ have made in their legislation a specific distinction between counterfeiting, on the one hand, and altering of currency, on the other hand. Spanish criminal legislation does not provide for punishment of fraudulent altering of currency. Member States have also made punishable the fraudulent uttering of counterfeit currency, sometimes in a broader context than described in Article 3 (1) (b). Finland appears to have criminal legislating providing for a somewhat limited concept of the fraudulent uttering of counterfeit currency⁴⁷.

Six Member States (Austria, Finland, Greece, the Netherlands and Portugal and (after the legislation enters into force) Luxembourg) explicitly punish the conduct of import, export and transport as defined in Article 3 (1) (c) of the framework Decision. Ireland explicitly punishes delivery, 'import into' and 'export from' another Member State. Other Member States transpose this article of the framework Decision in more general terms or have already existing penal legislation in force which defines the relevant punishable conduct in more general terms (for example: Belgium, France, Italy, Germany, Spain, Sweden and the United Kingdom⁴⁸). Austria and Germany have qualified the conduct of transport as *assistance* to the conduct referred to in Article 3 (1) (c) of the framework Decision which has consequences for the level of penalties which can be imposed.

Austria, Finland, Greece, Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden have specifically qualified possession, for fraudulent purposes, of means specifically intended for the counterfeiting of currency as a criminal activity. Most Member States⁴⁹ make an explicit distinction between 'obtaining' and 'possession'. France, the United Kingdom and Ireland have introduced a broad notion covering 'obtaining' and 'possession'. Belgium has not specifically qualified 'possession' as a criminal activity referred to in Article 3 (1) d.

⁴⁴ Tables 3 to 7 will be presented in a separate "document de travail des services de la Commission".

⁴⁵ The legislation of Denmark, France, Austria, the Netherlands, Sweden, Finland and the United Kingdom covers altering with terms such as forging and counterfeiting. German criminal legislation covers the alteration ('verfälscht') if it creates a higher value (Article 146 (1) no 1 Penal Code).

⁴⁶ Portuguese legislation punishes altering only if it results in a higher (nominal) value (Article 262 (2)) Furthermore Portuguese legislation punishes the 'depreciation' of coins (Article 263).

⁴⁷ Finnish criminal legislation punishes (only) transfer to another person of counterfeit money (Chapter 37 Section 1 (1)).

⁴⁸ The legislation of the United Kingdom on the other hand provides for specific provisions on the importation, landing and unloading and exportation of counterfeited money.

⁴⁹ The Spanish Penal Code covers (Article 400) the «making» and the «possession» of these means and tools.

Danish criminal legislation does not specifically refer to the conduct referred to in Article 3 (1) (c) and in Article 3 (1) (d) but covers these activities by ‘qualifying’ them as an *attempt* or *accessory* to counterfeiting or to putting counterfeiting money into circulation, which might have consequences for the level of penalties which can be imposed.

Some Member States (France, Germany and Luxembourg) have proposed - under national legislative procedures - specific references in their penal legislation to computer programs as means intended for the counterfeiting of currency and to components of currency (such as holograms) which serve to protect against counterfeiting, in order to comply with Article 3 (1) (d).

Austria⁵⁰, Italy⁵¹, the Netherlands⁵² and Spain⁵³ have legislation specifically covering either one of these offences. Greek criminal legislation covers the offences referred to in Article 3 (1) (d). Other Member States, like Belgium, have introduced more general concepts or use very broad and general wording in their legislation, like the United Kingdom and Ireland, to comply with this article. Portugal, Finland and Sweden have punished the conduct defined in Article 3 (1) (d) as *preparation* of (the crime of) counterfeiting which has consequences for the level of penalties which can be imposed.

All Member States have -in so far as they have made punishable the conduct referred to in Article 3 (1)- general provisions in their penal legislation or common law on the issues of participation, instigation and attempts, as referred to in Article 3 (2). Many Member States have made references in provisions on counterfeiting of their penal (draft) legislation to general provisions on participation, instigation and attempts in their Penal Code. Some Member States have general provisions which apply (automatically) to counterfeiting offences (that is the case, for instance, with Spain or as regards Ireland which has a common law system).

It is reiterated that the purpose of a framework decision is the approximation of the laws and regulations of the Member States. The impact of this framework decision should be to go above and beyond the provisions of the 1929 Convention (see above Chapter 2, paragraph 2.1.). Article 3 (1) describes in precise and clear language the conduct which should be made punishable according to national legislation.

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 already existing measures) may be sufficient, as long as the full application of the directive is assured in a sufficiently clear and precise manner. For the purpose of clarity and preciseness those Member States who explicitly introduced in their Penal Code the conduct that should be made punishable according to Article 3 (1) (c) and (d), have beyond any doubt complied in

⁵⁰ Austria adapted its penal legislation to cover components, such as holograms, for the protection against counterfeiting; computer programs should be covered by terms like “Mittel” or “Werkzeug”.

⁵¹ Italian legislation covers with broad terms computer programs and has specifically adapted its legislation to cover components, such as holograms, for the protection against counterfeiting.

⁵² The Netherlands have adapted the Penal Code to cover computer programs; holograms were considered to be covered by existing penal legislation (Article 214).

⁵³ Spanish legislation specifically mentions computer programs and only implicitly covers instruments for protection against counterfeiting.

this respect with the framework Decision. These Member States are also in a better position to meet the requirement of legal certainty (Chapter 1, paragraph 1.2.2, criterion 2).

2.2.3. *Additional offences (Article 4) and currency not issued but designated for circulation (Article 5): Table 4*

Twelve Member States have indicated that their Penal Code ensures that illegal manufacturing of currency with legal facilities and materials, as referred to in Article 4, can be punished. Member States comply with this article either by amending their penal legislation to that end (such as Austria and Ireland) or by a broad concept of the definition of counterfeiting, including the illegal use of legal facilities to produce money. The French⁵⁴, Italian, Portuguese and Spanish criminal legislation do not provide for a specific provision making punishable the conduct referred to in Article 4.

Only a few Member States (Denmark, Germany, the Netherlands, Spain⁵⁵, Finland and - to some extent - the United Kingdom⁵⁶) have been able to meet the deadline, mentioned in Article 11 (1) and have taken measures to comply with Article 5 (a) by 31 December 2000. Most Member States have however prepared or taken measures enabling them to guarantee protection by criminal law, covering the criminal activities mentioned in Articles 3 and 4, even before the euro starts to be put into circulation.

Seven Member States (Belgium, Finland, France, Greece, the Netherlands, Portugal and Sweden) have amended their Penal Code to comply with Article 5 (b). Austria, Denmark, Germany, Spain and the United Kingdom appear to have existing legislation accommodating the requirements of Article 5 (b). Ireland and Luxembourg shall comply with this provision after their legislation has entered into force. Italian legislation has no specific provision in order to comply with Article 5 (b).

2.2.4. *Penalties (Article 6): Table 5*

Almost all Member States have succeeded⁵⁷ in meeting the obligation imposed by Article 6 (2) that the fraudulent making or altering of currency provided for in Article 3(1)(a) shall be punishable by terms of imprisonment, the maximum being not less than eight years. Since Spanish legislation does not provide for punishment of altering of currency, consequently no sanction can be imposed. Sweden provides for a maximum penalty of eight years only if the crime is *serious* (“*gross*”). Finland provides only in the case of *aggravated* counterfeiting for a minimum maximum penalty of at least eight years (in fact ten years).

Article 6 grants a certain degree of discretion to the Member States. The issue of approximation of penalties is a difficult one, as is illustrated by the Communication

⁵⁴ France is in the process of preparing new legislation in order to comply with Article 4.

⁵⁵ Spanish legislation was already in force before the adoption of the framework Decision.

⁵⁶ The United Kingdom legislation makes a distinction between notes and coins. The notes are covered - before 1.1.2002- by forgery provisions; coins by counterfeiting provisions.

⁵⁷ NB. Some Member States have legislation which is still in the process of formal national adoption, such as Luxembourg and Ireland. Portuguese legislation provides (only) in case of Article 263 Penal Coded for a lower sanction (alteration of the intrinsic value of a coin).

of the Commission on the progress made on the creation of an area of “freedom, security and justice” in the European Union⁵⁸. In this Communication the Commission identifies that with respect to approximation of criminal legislation on the basis of the Tampere demands main problems are linked to the level of sanctions⁵⁹.

As is demonstrated in Table 5, the implementation of Article 6 which applies to criminal penalties is quite heterogeneous.

Most Member States provide for maximum penalties of imprisonment (in respect of the conduct of counterfeiting in general, referred to in Article 3 (1) (a): Sweden has a maximum of 8 years imprisonment for ‘gross’ counterfeiting; the Netherlands, 9 years; Austria, Finland (for aggravated counterfeiting) the United Kingdom and Ireland have a maximum penalty of 10 years; Denmark, Italy and Portugal: 12 years; Germany and Luxembourg (banknotes): 15 years; Belgium (banknotes): 20 years; France 30 years; Greece has a system of a minimum penalty of imprisonment of 10 years; Spain provides for a penalty of imprisonment between 8 years (minimum) and 12 years (maximum)).

Six Member States provide for penalties of imprisonment. The other nine Member States have also the possibility of imposing fines.

France, Italy, Luxembourg and Spain have a system of a penalty of imprisonment combined with a fine; Belgium has a system of penalties of imprisonment, provides also for a penalty of the deprivation of one’s rights as a citizen and has combination of a fine and/or an imprisonment penalty for petty offences; the United Kingdom and Ireland have a system that allows a choice between a penalty of imprisonment or a fine or a combination of the two; Portuguese legislation punishes some conducts only with imprisonment, other conducts with imprisonment or a fine and others only with a fine. The Netherlands has a system that allows a choice between a penalty of imprisonment or a fine or a combination of the two. Fines can vary, for example, from an unlimited fine (Ireland) to 30.000,-- euro (France) in the case of Article 3 (1) (d). Fines can also be proportional to the counterfeited sum (for instance in Spain⁶⁰).

In general Member States differentiate between serious and petty offences related to counterfeiting. Greece and Finland, for instance, provide in the case of ‘petty counterfeiting’ for the possibility of lower penalties. Belgium, Spain and Portugal, for example, have established a petty offence of fraudulent uttering of counterfeit currency when the author has received the counterfeit currency in good faith. Most Member States also consider the conduct referred to in Article 3 (1) (d) punishable with lower penalties, than the conduct referred to in Article 3 (1) (a) and (b). Furthermore the sanctions that can be imposed on the conduct, referred to in Article

⁵⁸ Biannual update of the scoreboard to review progress on the creation of an area of “freedom, security and justice” in the European Union (Second half of 2001) COM (2001) 628 final.

⁵⁹ Idem p. 5.

⁶⁰ The amount of the fine can involve the counterfeited amount (minimum) up to ten times the counterfeited amount (maximum).

3 (2), are of a lower level than those imposed on the conduct referred to in Article 3 (1).

On the basis of Article 6 (1) and bearing in mind that criminal penalties should be at least proportionate, Member States should further provide for sanctions including penalties involving deprivation of liberty which can give rise to extradition. In accordance with the European Convention on Extradition of 1957 they should at least provide for a punishment by terms of imprisonment, the maximum being not less than one year⁶¹.

Almost all Member States (except Ireland and Luxembourg whose legislation has not yet entered into force and except Spain which has not made punishable the altering of currency) have in the case of Article 3 (1) (a)- provided for a punishment by terms of imprisonment, the maximum being not less than eight years and therefore enabling extradition (see Table 5). Austria, Denmark, Finland, the Netherlands, Luxembourg⁶², Spain and the United Kingdom have legislation enabling extradition in the case of offences referred to in Articles 3 (1) b, 3 (1) (c), 3 (1) (d), 3 (2), 4 and 5. France and Germany in the case of Article 3 (1) (d) and Ireland in the case of the Article 3 to 5 have legislation which has not yet entered into force. Italy did not cover in its legislation Article 4 and consequently did not provide for a sanction. Italian legislation does -only on this point- not enable extradition. Portuguese legislation does not provide for extradition in the case of the offence referred to in the Article 3 (1) (d). Belgian, Spanish, Greek and Portuguese criminal laws also have penalties for certain petty crimes which do not lead to extradition.

The appreciation as to whether the criminal penalties which can be imposed in Member States are sufficiently dissuasive, could in a preliminary stage be answered in the affirmative, given the fact that almost all Member States have for the conduct of counterfeiting in general, as referred to in Article 3 (1) (a), provided for a (maximum) penalty of imprisonment of at least 8 years and -sometimes much- more. 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 are really considered dissuasive and effective.

It should be noted that a proposal for a Framework Decision on the European Arrest Warrant is expected still this year to be adopted by the Council, which is aimed at replacing extradition procedures between the Member States.

⁶¹ “Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting Party, the punishment awarded must have been for a period of at least four months.» (Article 2 (1)) European Convention on Extradition). Some Member States (Denmark, Finland, Sweden and Portugal) have made reservations to the Convention according to which extradition is only authorised when the penalty is superior to one year’s imprisonment (France: 2 years). National legislation on extradition -in almost all cases- could not be taken into account except for those (very few) Member State (s) who have communicated to the Commission the relevant provisions under Article 11 of the framework Decision.

⁶² idem.

2.2.5. *Jurisdiction (Article 7): Table 6*

All Member States appear to comply with the obligations under Article 7 (1). Whereas at least nine Member States in which the euro has been adopted have legislation in force which complies with Article 7 (2), three Member States (Ireland, France and Luxembourg) in which the euro has been adopted have legislation prepared in order to be able to comply fully with Article 7 (2) which has not yet entered into force.

2.2.6. *Liability of and sanctions for legal persons (Articles 8 and 9): Table 7*

Articles 8 and 9 are -except for the offences they cover- drafted in similar words to Articles 3 and 4 of the Second Protocol of 19 June 1997 to the Convention on the protection of the European Communities' financial interests⁶³. 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 declaration⁶⁴ that it will fulfil its obligations under Articles 8 and 9 of the framework Decision within the same period. Austria has therefore not yet transposed these articles into national legislation. Luxembourg is still in the process of preparing draft legislation to introduce the principle of liability of legal persons. Ireland has legislation to comply especially with Articles 8 and 9 which has not yet entered into force. Germany is preparing legislation to comply fully with Article 8 (1). The United Kingdom does not seem to provide for the liability of and sanctions for legal persons, as referred to in the Articles 8 (2) and 9. Portugal and Spain have not yet implemented Articles 8 and 9.

Nine Member States (Belgium, Denmark, Germany⁶⁵, Greece, France, Italy, the Netherlands, Sweden and Finland) have legislation ensuring that legal persons can be held liable for the offences referred to in Articles 3 to 5 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 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 3 to 5.

The eight Member States, whose legislation is in force, have provided the possibility to impose administrative or criminal fines and (sometimes) other measures varying from a judicial winding up order to administrative sanctions and commercial law sanctions. In table 7 this wide variety of administrative, civil and criminal sanctions or measures is demonstrated.

Belgium has a system of criminal fines and special confiscation measures, including a judicial dissolution of the legal person. Denmark only appears to provide for criminal fines. France also provides for the possibility of a criminal fine, various (criminal) measures, such as placing under judicial supervision for at least 5 years and a specific criminal confiscation measure. 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

⁶³ OJ C 221, 19.7.1997, p. 11.

⁶⁴ See OJ L 140, 14.6.2000, p. 3.

⁶⁵ Germany is preparing an amendment which should transpose Article 8 (1), third indent, by completing Article 30 «Gesetz über Ordnungswidrigkeiten» which deals with the liability of legal persons.

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 1 million NLG (€454.545,45) 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 (€319.829,42). Finland provides for a corporate fine and various administrative measures. The above mentioned Member States appear to comply with Article 9 (1) which leaves it to the discretion of a Member State to decide to impose, apart from fines, specific measures. In this respect table 7 also demonstrates that these Member States have taken the necessary measures to ensure that a legal person held liable pursuant to Article 8(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

3. CONCLUSIONS

3.1. General

- The 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 this framework Decision. The factual assessment and subsequently drawn conclusions are therefore sometimes based on incomplete information.
- For the protection of the euro by criminal law it is particularly important in view of putting the euro into circulation as from 1 January 2000 that Member States have taken in time the necessary measures to comply with this framework Decision.

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.

Five Member States (Austria, Denmark, the Netherlands, Finland and Sweden) have been able to meet the deadline of Article 11 (1) to take all measures to comply fully with the provisions of the framework Decision (with the exception of Article 5 (a) which should be complied with before 31.12.2000) by 29 May 2001. Four Member States (Belgium, Greece, Italy and Portugal) have adopted after this deadline measures transposing the framework Decision.

Four Member States (Germany, France, Ireland and Luxembourg) have taken measures which have not yet entered into force. In the case of Germany and France these measures concern a few provisions of the framework Decision. Two Member States (Spain and the United Kingdom) appear to have taken not yet all measures to comply fully with the framework Decision.

- In order to transpose Articles 3 to 7 of the framework Decision, Member States adapt their national criminal legislation or Penal Code (or Code of Penal Procedure), having binding force. Ireland and the United Kingdom provide also for protection on the basis of their common law.

- The implementation of Article 11 (2) should be improved first of all by providing the Institutions on a standardised basis and on time with the texts which transpose the obligations imposed under the framework Decision.

3.2. Specific

Article 2

All Member States have now (Sweden) or will very soon (Luxembourg) have acceded to the 1929 Convention in accordance with Article 2 (2) of the framework Decision.

Article 3

Most Member States have legislation complying with Article 3 (1) (a) and (b). The Spanish criminal legislation does not provide for punishment of fraudulent altering of currency. Finland appears to have criminal legislating providing for a somewhat limited concept of the fraudulent uttering of counterfeit currency. Ireland and Luxembourg have prepared specific legislation to comply with these provisions.

Those Member States which have explicitly introduced in their Penal Code the conduct that should be made punishable especially according to Article 3 (1) (c) and Article 3 (1) (d), have -in terms of clarity and preciseness- beyond any doubt complied in this respect with the framework Decision.

Luxembourg has prepared legislation to that end. France, Germany and Luxembourg have in preparation specific references in their penal legislation to computer programs as means intended for the counterfeiting of currency and to components of currency (such as holograms) which serve to protect against counterfeiting, in order to comply with Article 3 (1) (d).

Austria and Germany have qualified the conduct of transport as *assistance* to the conduct referred to in Article 3 (1) (c) of the framework Decision. Denmark covers the conduct referred to in Article 3 (1) (c) and in Article 3 (1) (d) by punishing that conduct as an *attempt* or *accessory* to counterfeiting or to putting counterfeiting money into circulation. Portugal, Finland and Sweden have punished the conduct defined in Article 3 (1) (d) as *preparation* of (the crime of) counterfeiting. These qualifications might have consequences for the level of penalties which can be imposed.

Article 4

The majority of Member States comply either explicitly or -in most cases- implicitly with Article 4. Italy, Portugal and Spain appear not to have transposed the obligations under Article 4. France is preparing a specific measure to comply with this Article.

Article 5

Only six Member States (Denmark, Germany, the Netherlands, Spain, Finland and the United Kingdom - to some extent) have been able to meet the deadline, mentioned in Article 11 (1) and have taken measures to comply with Article 5 (a) by 31 December 2000.

Most Member States appear to have legislation complying with Article 5 (b). Ireland and Luxembourg have prepared legislation to this end. Italian legislation has no specific provision in order to comply with Article 5 (b).

Article 6

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

Almost all Member States have, or will have when their legislation on this point enters into force, succeeded in meeting the obligation imposed by Article 6 (2) that the fraudulent making or altering of currency provided for in Article 3 (1) (a) shall be punishable by terms of imprisonment, the maximum being not less than eight years. Since Spanish legislation does not provide for punishment of altering of currency, consequently no sanction can be imposed nor would extradition be possible. Sweden and Finland provide only if the crime is serious for a maximum penalty of respectively eight and ten years.

The appreciation as to whether or not the criminal penalties which can be imposed in Member States are sufficiently dissuasive, could -on the face of it- be answered in the affirmative, given the fact that all Member States have in respect to the conduct of counterfeiting in general, as referred to in Article 3 (1) (a), provided for a (maximum) penalty of imprisonment of at least 8 years and - sometimes much - more. 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 are really 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 Articles 3 (1) b, 3 (1) (c), 3 (1) (d), 3 (2), 4 and 5.

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.

Article 7

All Member States appear to comply with the obligations under Article 7 (1). Luxembourg should be able to comply after its new legislation enters into force. Nine Member States, in which the euro has been adopted, comply with Article 7 (2). France, Ireland and Luxembourg have prepared legislation to comply with Article 7 (2).

Article 8 and 9

Nine Member States comply in general with the provisions on liability of legal persons.

Apart from Ireland which legislation has not yet entered into force and Luxembourg which is drafting new legislation, Spain, Portugal and the UK have not taken the necessary measures to comply with the Articles 8 and 9 of the framework Decision. Austria has confirmed its declaration that it will fulfil its obligations under Articles 8 and 9 of the framework Decision not later than 19 June 2002.

No conclusions can be drawn because the relevant information in respect of Article 8 on the involvement as accessories or instigators in the offences referred to in Articles 3 to 5 or the attempted commission of the offences referred to in Article 3 (1) (a) and (b) and the corresponding sanctions referred to in Article 9 has not been transmitted to the Commission.

Article 10

Article 10 has not yet been complied with (a draft Ordinance implementing the framework Decision is in an advanced state of preparation in Gibraltar).

Annex

Table 1 : Overview of contributions received from Member States

Austria	30.4.2001
Denmark	3.4.2001 and 25.7.2001
Netherlands	14.6.2001
Ireland	15.6.2001
Luxembourg	4.7.2001
France	13.7.2001
Germany	13.8.2001
Sweden	14.9.2001
Greece	22.8.2001
Belgium	28.9.2001
Finland	1.10.2001
Spain	11.10.2001
United Kingdom	18.10.2001
Italy	23.10.2001

Table 2 : State of accession to the International Convention of 20 April 1929 for the
Suppression of Counterfeiting Currency and its Protocol⁶⁶

Member State	Ratification completed (without reservations)	procedure (without)	State of preparation of accession/ other remarks
Austria	+		
Belgium	+		
Denmark	+		
Finland	+		
France	+		
Germany	+		

⁶⁶ No 2623, p. 372. League of Nations Treaty Series 1931.

Greece	+	
Ireland	+	
Italy	+	
Luxembourg		bill No 4785 (in the process of adoption)
Netherlands	+	
Portugal	+	
Spain	+	
Sweden	+	Sweden will ratify the convention when the changes to the law take effect (on 1 April 2001 the amendments of the Swedish legislation have entered into force)
United Kingdom	+	accession applies also to most overseas territories, including Gibraltar (Article 10 FD)