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REPORT FROM THE COMMISSION

based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence

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1. INTRODUCTION

1.1. Background

Under Article 9(2) of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (hereinafter “the Framework Decision”) the Commission has to establish a written report on the measures taken by the Member States to comply with the Framework Decision¹.

Paragraph (1) of that Article obliges the Member States to take the necessary measures to comply with the provisions of the Framework Decision by 5 December 2004. According to paragraph (2), Member States should forward to the General Secretariat of the Council and to the Commission by the same day the text of the provisions transposing into their national law the obligations arising from the Framework Decision. On the basis of a written report by the Commission, the Council should, by 5 June 2005, assess the extent to which Member States have complied with this Framework Decision. As regards Iceland and Norway, as well as the United Kingdom and Ireland, it has to be taken into account that the Framework Decision constitutes a development of the Schengen acquis. Therefore, compliance with this Framework Decision by Iceland and Norway is assessed in a specific procedure agreed with these States. Norway has notified that the constitutional requirements have been fulfilled in accordance with Article 8 (2) (c) of the Agreement and the said Council Directive and Council Framework Decision can become binding on Norway. On the other hand, Norway has not yet sent the text of relevant national legislation to the Commission.

The value of this report therefore depends to a large extent on the quality and punctuality of the national information received by the Commission. The Commission reminded Member States of their obligation by means of a letter sent on 7 December 2004.

Finally, by the end of March 2006, the Commission had received no information regarding the implementation of the Framework Decision from five Member States, namely Austria, Cyprus, Greece, Luxembourg and Portugal. The information submitted by four Member States - Estonia, Malta, Spain and Sweden - was either only preliminary or not specific enough, and therefore does not provide an appropriate basis for an in-depth assessment.

Although 5 December 2004 was the deadline for forwarding the text of the implementing provisions, as far as possible information provided up to March 2006 has been taken into account in the Report.

A departmental working paper associated with this Report contains a detailed analysis of the national measures taken by Member States in order to comply with the Framework Decision.

¹ OJ L 328/1 – 5 December 2002

Ireland communicated that in accordance with Art 6(3) of Decision 2002/192/EC, the implementation by Ireland of measures building on the Schengen acquis would take place when the "acquis" is implemented by virtue of a decision under Article 4(1) of that Decision. On that basis, the Framework Decision of November 2002 (2002/946/JHA) would not yet be due for implementation by Ireland. The United Kingdom, on the other hand, submitted information concerning the implementation of the Framework Decision.

2. METHOD AND CRITERIA FOR EVALUATION OF THE CONFORMITY OF MEMBER STATES' LEGISLATION WITH THIS FRAMEWORK DECISION

This Framework Decision is based on the Treaty of the European Union (TEU), and in particular Articles 29, 31 (e) and 34(2) (b) thereof.

A directive is the legal instrument that is most comparable to a framework decision². 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 method for implementation. However, framework decisions do not have direct effect. The Commission has no legal action before the Court of Justice - at least in the current state of development of European Law - to enforce transposition legislation for a framework decision. Nonetheless, the Court of Justice can rule on any dispute between Member States regarding the interpretation or the application (including the transposition) of the Framework Decision. The possible exercise of this right requires a solid factual basis, which the Commission's Report can help to establish.

2.1. Evaluation criteria

In order to be able to evaluate objectively whether a framework decision has been fully implemented by a Member State, some general criteria have been developed with respect to directives which should be applied *mutatis mutandis* to framework decisions:

1. The form and methods of implementation of the result to be achieved must be chosen in a manner which ensures an effective functioning, with account being taken of the aims³;
2. Each Member State is obliged to choose a way of implementation which satisfies the requirements of clarity and legal certainty, and thus ensures a transposition into national provisions which have binding force⁴,

2 Article 249 EC Treaty.

3 See relevant case law re the implementation of directives: e.g. Case 48/75 Royer [1976 ECR 497 at 518

4 See relevant case law re the implementation of directives: e.g. Case 239/85 Commission v. Belgium [1986] ECR 3645 at 3659. See also Case 300/81 Commission v. Italy [1983] ECR 449 at 456.

3. Transposition into national law does not necessarily require enactment in precisely the same words which means that, for example, appropriate and pre-existing national measures may be sufficient, as long as the full application is assured in a sufficiently clear and precise manner⁵;
4. If a time limit has been fixed, transposition has to be completed within this deadline.⁶

Both types of 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 envisaged result that the Treaty instrument in question was intended to ensure⁷.

The general assessment provided of the extent to which the Member States have complied with the Framework Decision is, where possible, based on the criteria outlined above.

2.2. Context of evaluation

A preliminary observation concerns the legal context, in particular of the follow up of the evaluation report. As already mentioned, within the TUE, the Commission does not have the ability to start infringement procedures against Member States. Nevertheless, the legal evaluation conducted by the Commission of Framework Decisions and Directives imposing on Member States objectives of the same nature is based on the same principle and methods.

A second preliminary observation concerns the specific nature of the field being regulated. The Framework Decision is one of the instruments adopted in order to combat illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children; its purpose is to strengthen the penal framework to prevent the facilitation of unauthorised entry, transit and residence. It supplements Directive 2002/90/EC⁸ (hereinafter "the Directive") which is not covered by this report and will be subject to a separate evaluation.

As regards penalties, the Framework Decision stipulates that each Member State shall take the measures necessary to ensure that the infringements defined in the Directive are punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition⁹. Such penalties may be accompanied by confiscation of the means of transport used to commit the offence, or a prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the offence was committed, or deportation. Furthermore, the penalties shall be custodial sentences with the maximum sentence not less than 8 years when the offences are committed for financial gain and either involved a/the criminal organization or endangered the lives of the persons who are subject of the offence.

5 See relevant case law re the implementation of directives, e.g. Case 29/84 Commission v. Germany [1985] ECR 1661-to 1673.

6 See substantial case law re the implementation of directives, for example: e.g. Case 52/75 Commission v. Italy [1976] ECR 277 to 284, See, in general, the Commission's annual reports on monitoring the application of Community law, for example COM (2001) 309 final.

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

8 OJ L 328/1 – 5/12/2002, p. 17

9 In essence, this means that Member States should provide for a custodial sentence or a detention order for a maximum period of at least one year.

On 13 September 2005 the European Court of Justice annulled the Council Framework Decision on the protection of the environment through criminal law because this instrument was adopted outside the European Community framework (case C-176/03), i.e. in breach of Community competences. This judgment clarifies the distribution of powers between the Community and the Union as regards provisions of criminal law. An evaluation of the impact and possible shortcomings of the so-called 'facilitators package', consisting of Directive 2002/90/EC and Council Framework Decision 2002/946/JHA to define whether there is a need to improve the substance of this legislation, will also take into account the impact of the judgment with a view to replacing these instruments by a single directive.

2.3. General purpose of the report

This report assesses the extent to which Member States have complied with the Framework Decision.

3. ASSESSMENT

The objective of the Framework Decision is to approximate the laws of the Member States in the area of combating illegal immigration in order to strengthen the penal framework to prevent and prosecute the facilitation of unauthorised entry, transit and residence.

Furthermore, it introduced measures to be taken to combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings. To that end it has been considered essential to approximate existing legal provisions, in particular the precise definition of the infringement in question, on the one hand, and the cases of exemption, which is the subject of the Council Directive and on the other hand, minimum rules for penalties, liability of legal persons and jurisdiction, which is subject of this Framework Decision.

However, the information the Commission has received varies considerably, especially in terms of its completeness. This is reflected in the Annex to this report that contains the information provided by Member States. In this regard, not all Member States have sent the Commission all the relevant texts of their implementing provisions. The factual assessment and subsequent conclusions are therefore sometimes based on incomplete information.

Article 1: Penalties

Member States are required to take the measures necessary to ensure that the offences defined by the Directive on the facilitation of unauthorised entry, movement and residence are punishable by effective, proportionate and dissuasive criminal penalties, including custodial sentences, which may entail extradition and, where appropriate, other penalties. In particular this means that Member States must respect the definitions set out in Article 1(a) (intentional assistance to illegally enter or transit across the territory of the Member States) and Article 1.b (intentional assistance, for financial gain, to illegally reside within the territory of the MS). On the other hand, account must be taken of Article 1(2) of the Directive which stipulates that Member States may decide not to impose sanctions with regard to the behaviour defined in Article 1(1)(a), where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

In most of the notified legislations the facilitation of illegal entry, transit and residence, i.e. intentional assistance either to enter or to transit across the territory of the Member States or, for financial gain, to reside within the territory of the Member States in breach of the relevant laws, is punishable under criminal law. The same can be concluded for instigating, participating and attempting. On the other hand, there is still a considerable variety of penalties. They range from fines as minimum penalties to imprisonment of up to 15 years as maximum penalties in aggravating circumstances. However, this is not contrary to the Framework Decision, since it only provides for minimum approximation.

Furthermore, although this is not an obligation under the Framework Decision, but merely an option, most Member States have provisions at their disposal concerning confiscation of means of transport and the prohibition of the exercise of specific occupations or activities, as well as deportation.

Most of the notified legislation establishes that, in accordance with Article 1(3) of the Framework Decision, crimes committed for financial gain or as activities of criminal organization or while endangering the lives of the smuggled persons are considered to be committed under aggravating circumstances involving severe penalties. This is an obligation under the Framework Decision.

Article 2 and 3: Liability of and sanctions against legal persons

The Framework Decision introduces the concept of liability of legal persons in parallel with that of natural persons, obliging Member States to ensure that legal persons can be held liable for offences referred to in Article 1 and 2 committed for their benefit by any person with a certain leading position within the legal person. It is not required that such liability be exclusively criminal. Sanctions against legal persons shall be "*effective, proportionate and dissuasive*".

In any case, as regards the information on national systems submitted to the Commission, the legislation of most of the Member States provides for the possibility of taking sanctions against legal persons at least by means of administrative measures.

According to the legislation of the Czech Republic, Latvia and the Slovak Republic, legal persons cannot be held liable for criminal offences.

Article 4: Jurisdiction

Article 4 of the Framework Decision sets out the cases in which Member States are obliged to establish jurisdiction over the offences referred to in Article 1. The main rule is the territoriality principle, according to which each Member State must establish its jurisdiction over offences committed in whole or in part in its territory. All Member States that provided information comply with this principle.

Furthermore Member States have to established jurisdiction for offences committed by one of their nationals or for the benefit of legal persons established in their territory, unless they decided to make use of the opt out options provided in Article 4 paragraph 2 in accordance with the procedural requirements set out in Article 4 paragraph 3. So far the Commission is not aware of information sent by the Member States to the Secretary General of the Council in accordance with Article 4 paragraph 3.

Article 5: Extradition and prosecution

This article has been largely superseded by the Decision on the European Arrest Warrant¹⁰. Since the further applicability of Article 5 requires an in-depth analysis of the European Arrest Warrant, e.g. Article 33, and of the subsequent implementation problems, for e.g. annulment of the transposition law in one Member State, this question shall be addressed in the context of the further development regarding the EAW.

Article 6: International law on refugees

The Commission is not able to take a final position on the implementation of this provision due to the lack of information provided by Member States. However, the Commission has no indication that international law on refugees has been violated as a result of the implementation of this Framework Decision.

Article 7: Communication of information between Member States

In general, Member States have not provided information concerning the transposition of Article 7; the exceptions are the United Kingdom, Belgium, Latvia and Denmark.

Article 8: Territorial application

This provision stipulates that the Framework Decision shall apply to Gibraltar. The United Kingdom provided specific information on transposition in Gibraltar.

4. CONCLUSIONS

Not all Member States have transmitted to the Commission in a timely manner all the relevant texts of their implementing provisions. By the end of March 2006, the Commission had received no information from five Member States regarding the implementation of the Framework Decision. Those Member States are Austria, Cyprus, Greece, Luxembourg and Portugal. Only preliminary or unspecified information was submitted by Estonia, Malta, Spain and Sweden; this information does not provide an appropriate basis for an in-depth assessment.

The legal assessment and the conclusions drawn from it are therefore sometimes based on incomplete information.

On one hand, one of the consequences of the Framework Decision is that in the majority of Member States there are provisions of criminal law which impose penalties on the facilitation of illegal transit and residence. On the other hand, the range of these penalties still seems to be very wide; there may therefore be a case for thinking in terms of an EU instrument that aims at a higher level of harmonization. Moreover, it appears that the criminal laws of some Member States (e.g. Spain and the Netherlands) do not make a clear distinction between human trafficking and migrant smuggling. The two Framework Decisions aimed at combating these forms of crime are based on different definitions which seems to exclude that the same criminal law provisions could cover both forms of crime. Therefore, doubts arise about the

¹⁰ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

proper implementation and application of the relevant Council Framework Decision without distinguishing between human trafficking and migrant smuggling.

Furthermore, the Commission has been unable to obtain statistical information showing the practical impact of the Framework Decision on illegal immigration. Against that background a more practice-oriented evaluation by the Commission of the so-called *facilitator package* consisting of the Framework Decision and Directive 2002/90/EC will take place in 2006/2007, also with a view to transforming these acts into a single directive following the judgment of the European Court of Justice in case C-176/03.

These first EU level instruments on unlawful assistance to illegal entry and stay should be complemented by measures to specifically target employment of illegally staying third-country nationals, given that the possibility of finding such illegal employment is an important pull-factor for illegal immigration into the EU. The Commission will therefore propose, in the first half of 2007, binding rules on sanctions for employers who employ illegally staying third-country nationals.

The Commission stresses the importance of a harmonious relationship between the relevant provisions of criminal law and the protection of refugees and asylum seekers. Furthermore, the Commission underlines the usefulness of continued cooperation, including the communication of relevant information between the Member States. However, in that regard, further evaluation on the basis of more reliable information may be necessary.