

Proposal for a Council Framework Decision on combating fraud and counterfeiting of non-cash means of payment

(1999/C 376 E/03)

COM(1999) 438 final — 1999/0190(CNS)

(Submitted by the Commission on 15 September 1999)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 34(2)(b) thereof,

Having regard to the initiative of the Commission,

Having regard to the opinion of the European Parliament,

Whereas:

- (1) Fraud and counterfeiting of non-cash means of payment often operate on an international scale.
- (2) The work developed by various international organisations (i.e. the Council of Europe, the Group of Eight, the OECD, Interpol and the UN) is important, but needs to be complemented by action of the European Union.
- (3) The Council considers that the seriousness and development of certain forms of fraud regarding non-cash means of payment require comprehensive solutions; Recommendation No 18 of the Action Plan to combat organised crime⁽¹⁾, approved by the Amsterdam European Council on 16 and 17 June 1997, as well as point 46 of the Action Plan of the Council and the Commission on how to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice⁽²⁾, approved by the Vienna European Council on 11 and 12 December 1998, call for an action on this subject.
- (4) In accordance with the principles of subsidiarity and proportionality, the objectives of this Framework Decision, namely to ensure that fraud and counterfeiting involving all forms of non-cash means of payment are recognised as criminal offences and are subject to effective, proportionate and dissuasive sanctions in all Member States cannot be sufficiently achieved by the Member States in view of the international dimension of those offences and can therefore be better achieved by the European Union; this Framework Decision confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.

(5) This Framework Decision should assist in the fight against fraud and counterfeiting involving non-cash means of payment together with other instruments already agreed by the Council such as Joint Action 98/428/JHA⁽³⁾ on the creation of a European judicial network, Joint Action 98/733/JHA⁽⁴⁾ on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, Joint Action 98/699/JHA⁽⁵⁾ on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime, as well as the Decision of 29 April 1999 extending Europol's mandate to deal with forgery of money and means of payment⁽⁶⁾.

(6) The Commission submitted to the Council, on 1 July 1998, the Communication entitled 'A framework for action combating fraud and counterfeit of non-cash means of payment'⁽⁷⁾ which advocates a Union policy covering both preventive and repressive aspects of the problem.

(7) The Communication contains a draft Joint Action which is one element of that comprehensive approach, and constitutes the starting point for this Framework Decision.

(8) It is necessary that a description of the different forms of behaviour requiring criminalisation in relation to fraud and counterfeiting of non-cash means of payment should cover the whole range of activities that together constitute the menace of organised crime in this regard.

(9) It is necessary that these forms of behaviour be classified as criminal offences in all Member States, and that effective, proportionate and dissuasive sanctions be provided for natural and legal persons having committed or being liable for such offences, and that the offences in question be regarded as falling under the legislation directed against money laundering.

(10) It is necessary that Member States consult each other when two or more Member States have jurisdiction over the same offence.

⁽¹⁾ OJ C 251, 15.8.1997, p. 1.

⁽²⁾ OJ C 19, 23.1.1999, p. 1.

⁽³⁾ OJ L 191, 7.7.1998, p. 4.

⁽⁴⁾ OJ L 351, 29.12.1998, p. 1.

⁽⁵⁾ OJ L 333, 9.12.1998, p. 1.

⁽⁶⁾ OJ C 149, 28.5.1999, p. 16.

⁽⁷⁾ COM(1998) 395 final.

(11) It is also necessary that Member States establish effective cooperation with the private services and bodies having responsibilities in the functioning and monitoring of the payment systems, and that the Member States afford each other the widest measure of mutual assistance,

2. For the purpose of this Framework Decision, a 'national' of a Member State shall be construed in accordance with any declaration made by that State under Article 6(1)(b) of the European Convention on Extradition of 13 December 1957.

Article 2

HAS ADOPTED THIS FRAMEWORK DECISION:

Description of behaviour

The measures set out in Articles 3 to 6 relate to the following types of intentional behaviour:

Article 1 Definitions

1. For the purposes of this Framework Decision, and without prejudice to more specific definitions in the Member States' legislation:

(a) 'Payment instrument' or 'non-cash payment instrument' means an instrument other than legal tender (bank notes and coins) enabling, alone or in conjunction with another (payment) instrument, the legitimate holder or payer, to obtain money or valuable consideration, to make or receive payments in respect of goods, services or any other thing of value, or to issue an order or message requesting or otherwise authorising the transfer of funds (in the form of a monetary claim on a party) to the order of a payee;

(b) 'Payment transaction' means the obtaining of money or valuable consideration, the making or receiving of payments in respect of goods, services or any other thing of value, or the issuing of an order or message requesting or otherwise authorising the transfer of funds (in the form of a monetary claim on a party) to the order of a payee, through a payment instrument;

(c) 'Device-making equipment' means any equipment (including software) designed or adapted for the access, manufacture or alteration of any, or part of any, payment instrument or payment transaction and shall include equipment designed or adapted to change or alter any information or data carried on or in any payment instrument or payment transaction;

(d) 'Legal person' means any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organisations;

(e) 'Money laundering' means the conduct as defined in the third indent of Article 1 of Council Directive 91/308/EEC ⁽¹⁾.

(a) misappropriation of a payment instrument;

(b) counterfeiting or falsification of a payment instrument;

(c) knowingly handling a payment instrument, without the holder's authorisation;

(d) knowingly possessing a misappropriated, counterfeited or falsified payment instrument;

(e) knowingly using a misappropriated, counterfeited or falsified payment instrument; or knowingly accepting a payment made in such circumstances;

(f) knowingly using unauthorised identification data for initiating or processing a payment transaction;

(g) knowingly using fictitious identification data for initiating or processing a payment transaction;

(h) manipulation of relevant data including account information, or other identification data, for initiating or processing a payment transaction;

(i) unauthorised transmission of identification data for initiating or processing a payment transaction;

(j) unauthorised making, handling, possession or use of specifically adapted equipment or elements of payment instruments for the purpose of:

— manufacturing or altering any payment instrument or part thereof;

— committing the fraudulent acts described in points (f) to (i).

The measures set out in Articles 3 to 6 also relate to involvement as accessory or instigator in the acts described in paragraph 1 or knowingly obtaining valuable consideration or a pecuniary advantage from any such acts.

⁽¹⁾ OJ L 166, 28.6.1991, p. 77.

*Article 3***Measures to be taken at national level**

1. Member States shall classify the types of behaviour set out in Article 2 as criminal offences.

2. Member States shall provide that legal persons can be held liable for the offences provided for in paragraph 1 committed for their benefit by any person, whether acting individually or as part of an organ of the legal person, who holds a leading position within the legal person, on the basis of:

- (a) a power of representation of the legal person, or
- (b) an authority to take decisions on behalf of the legal person, or
- (c) an authority to exercise control within the legal person.

3. Member States shall provide that the penalties for the offences referred to in paragraph 1 shall:

- (a) in so far as natural persons are concerned, be effective, proportionate and dissuasive criminal sanctions entailing, at least in serious cases, penalties involving privation of liberty and capable of giving rise to extradition;
- (b) in so far as legal persons are concerned, be effective, proportionate and dissuasive sanctions which shall include criminal or non-criminal fines and may entail other sanctions such as:
 - (i) exclusion from entitlement to public benefits or aid;
 - (ii) temporary or permanent disqualification from the practice of commercial activities;
 - (iii) placing under judicial supervision;
 - (iv) a judicial winding-up order.

4. The offences referred to in paragraph 1 shall be considered serious crimes for the purpose of the application of Joint Action 98/699/JHA.

*Article 4***Jurisdiction**

1. Each Member State shall establish its jurisdiction over the offences provided for in Article 3 where:

- (a) the offence is committed in whole or in part within its territory;
- (b) the offender is one of its nationals.

Subject to the provisions of paragraph 2, any Member State may limit the application of its jurisdiction to the circumstances laid down in point (a). A Member State which does not apply such a limitation may nevertheless assume jurisdiction in the circumstances laid down in point (b) only in specific cases or subject to special conditions.

2. Where a Member State does not extradite its nationals, it shall establish its jurisdiction over the offences set out in Article 3 when these are committed by its own nationals outside its territory.

Each Member State shall, when one of its nationals is suspected of having committed in another Member State one of the offences provided for in Article 3 but it does not extradite that person to that other Member State solely on the grounds of his nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate.

In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be transmitted in accordance with the procedures laid down in Article 6 of the European Convention on Extradition of 13 December 1957.

The requesting Member State shall be informed of the prosecution initiated and of its outcome.

*Article 5***Cooperation from public and private services or bodies**

1. Each Member State shall take the necessary measures to ensure that the public and private services and bodies engaged in managing, monitoring and overseeing the payment systems, will cooperate with the authorities responsible for investigation and punishment of the offences established by this Framework Decision.

In particular, the services and bodies shall:

- (a) advise those authorities on their own initiative, where there are reasonable grounds for considering that one of the offences has been committed;
- (b) provide those authorities with all relevant information either on request or on their own initiative.

2. As regards the processing of personal data, paragraph 1 shall be implemented so as to ensure a level of protection equivalent to the protection required by European Parliament and Council Directive 95/46/EC⁽¹⁾. Data shall be used only for the purposes for which it has been transmitted.

⁽¹⁾ OJ L 281, 23.11.1995, p. 31.

*Article 6***Cooperation between Member States**

1. In accordance with the applicable conventions, multi-lateral or bilateral agreements or arrangements Member States shall afford each other the widest measure of mutual assistance in respect of proceedings relating to the offences provided for in this Framework Decision.

2. Where several Member States have jurisdiction in respect of offences envisaged by this Framework Decision, those States shall consult one another with a view to coordinating their action in order to prosecute effectively.

*Article 7***Implementation**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Framework Decision on 31 December 2000 at the latest. They shall forthwith inform the Commission thereof and provide it with copies of the measures through which the Framework Decision is implemented.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. The Commission shall submit a report to the Council on the fulfilment by Member States of their obligations under this Framework Decision, not later than two years after its entry into force.

*Article 8***Entry into force**

This Framework Decision shall enter into force on the date of its publication in the *Official Journal of the European Communities*.

*Article 9***Addressees**

This Framework Decision is addressed to the Member States.
