

Proposal for a Council framework decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking

(2001/C 304 E/03)

COM(2001) 259 final — 2001/0114(CNS)

(Submitted by the Commission on 27 June 2001)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31, point (e) and Article 34(2), point (b), thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Whereas:

- (1) Illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the European Union, and to the legal economy, the stability and the security of the Member States.
- (2) The need for legislative action to tackle illicit drug trafficking has been recognised in particular in the Action Plan of the Council and the Commission, adopted by the Justice and Home Affairs Council in Vienna on 3 December 1998, on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice⁽¹⁾; the conclusions of the Tampere European Council of 15 and 16 October 1999, in particular point 48 thereof, the European Union's Drugs Strategy (2000-2004) adopted at the Helsinki European Council from 10 to 12 December 1999 and the European Union's Action Plan on Drugs (2000-2004) endorsed by the European Council in Santa Maria da Feira on 19 and 20 June 2000.
- (3) It is necessary to adopt a common definition of illicit drug trafficking, which will allow a common approach at the Union level to the fight against such trafficking and specifically against trans-national trafficking and activities carried out for the purpose of transferring for profit. The key elements of the definitions contained in the national provisions and international instruments should therefore be taken up.
- (4) It is also necessary to adopt a common approach to the constituent elements of criminal offences by providing for a common offence of illicit drug trafficking.
- (5) Penalties provided for by the Member States should be effective, proportionate and dissuasive, including custodial sentences. To assess the degree of seriousness, factual elements such as the scale of the trafficking, its frequency, the type of narcotic drugs involved and the amount of money made from the trafficking should be taken into account. For offences considered as serious on the basis of national legal systems involving for example transnational trafficking, the maximum custodial sentence should not be lower than five years. This will ensure that a sufficiently severe sentence is available to the court in the case of serious offences.
- (6) It is necessary, on the one hand, to provide for more severe penalties when certain circumstances accompany the illicit drug trafficking and make it an even greater threat to society, for example when trafficking is carried out by a criminal organisation. On the other hand, provision should be made for reducing the penalties when the offender has supplied the competent authorities with valuable information, in particular by helping to identify drug-dealing networks.
- (7) It is necessary to take measures to enable the confiscation of the proceeds of the offences referred to in this framework decision.
- (8) Measures should be taken to enable legal persons to be held liable for the criminal offences referred to by this act which are committed for their benefit.
- (9) Measures should also be foreseen for the purposes of cooperation between Member States with a view to ensuring effective action against illicit drug trafficking.
- (10) As regards the Republic of Iceland and the Kingdom of Norway, this framework decision represents a development of the Schengen *acquis* within the meaning of the Agreement concluded on 17 May 1999 by the Council of the European Union and those two States⁽²⁾.
- (11) The effectiveness of the efforts made to tackle illicit drug trafficking depends essentially on the harmonisation of the national measures implementing this framework decision.

⁽¹⁾ OJ C 19, 23.1.1999, p. 1.

⁽²⁾ OJ L 176, 10.7.1999, p. 36.

(12) This framework decision respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and specifically Chapter VI — Justice thereof,

Article 4

Penalties

HAS DECIDED AS FOLLOWS:

1. Member States shall take the necessary measures to ensure that the offences referred to in Articles 2 and 3 are punishable by effective, proportionate and dissuasive penalties, including custodial sentences with a maximum term of imprisonment of no less than five years in serious cases.

Article 1

Definitions

For the purposes of this framework decision:

2. Member States shall provide for the measures necessary to ensure the confiscation of the substances that have been trafficked, the instrumentalities and property used in trafficking and the proceeds and advantages directly or indirectly derived from that trafficking.

1. 'illicit drug trafficking' means the act, without authorisation, of selling and marketing as well as, for profit, of cultivating, producing, manufacturing, importing, exporting, distributing, offering, transporting or sending or, for the purpose of transferring for profit, of receiving, acquiring and possessing drugs;

3. Member States shall provide for the possibility of imposing fines in addition to or as an alternative to custodial sentences.

Article 5

Aggravating circumstances

2. 'drugs' means any of the substances covered by the following United Nations Conventions: (a) the 1961 Single Convention on Narcotic Drugs of 1961 (as amended by the 1972 protocol); (b) the 1971 Vienna Convention on Psychotropic Substances; (c) the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. It also includes the substances subject to controls under Joint Action 97/396/JHA of 16 June 1997 adopted on the basis of Article K.3 of the Treaty on European Union concerning the information exchange, risk assessment and the control of new synthetic drugs⁽¹⁾ or within the framework of national measures;

1. Without prejudice to any other aggravating circumstances defined in their national legislation, Member States shall provide for the following aggravating circumstances in respect of the offences referred to in Articles 2 and 3:

3. 'legal person' means any entity having this status by virtue of the applicable national law, with the exception of States or other public bodies exercising their public service mandate and international public organisations.

(a) the offender has an important role in the organisation of the drug trafficking, or the offence was committed by a criminal organisation;

(b) the offence involves violence or the use of weapons;

(c) the offence involves minors or persons who are unable to exercise their free will;

(d) the offence was committed in or near schools, youth clubs and leisure centres, or institutions for the treatment and rehabilitation of drug addicts;

(e) the offender is a doctor, pharmacist, court official, police officer, customs officer, prison officer, probation officer, teacher, instructor or works in an educational establishment and abused this position to commit the offence;

(f) the offender has been convicted of one or more similar offences by a final judgment in a Member State of the Union.

Article 2

Criminalisation of illicit drug trafficking

Member States shall take the necessary measures to make illicit drug trafficking a criminal offence.

Article 3

Incitement, aiding and abetting and attempt

Member States shall take the necessary measures to make incitement to commit, aiding and abetting or attempting to commit the offence referred to in Article 2 a criminal offence.

2. If one of the conditions listed in paragraph 1 is fulfilled, the maximum term of imprisonment may not be less than seven years.

⁽¹⁾ OJ L 167, 25.6.1997, p. 1.

*Article 6***Mitigating circumstances**

Without prejudice to any other mitigating circumstances defined in their national legislation, Member States shall take the necessary measures to ensure that the penalties referred to in Article 4 can be reduced if the offender has supplied the competent authorities with valuable information for the enquiry or the collection of evidence about the identity of other offenders, or has helped to identify drug-dealing networks.

*Article 7***Liability of legal persons**

1. Member States shall take the necessary measures to ensure that legal persons can be held liable for the criminal offences referred to in Articles 2 and 3 where those offences are committed for their benefit by any person acting individually or as a member of an organ of the legal person in question who has:

- (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.

2. Member States shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by that legal person made possible the commission of an offence referred to in Article 2 or 3 by an employee or subordinate for the benefit of that legal person.

3. The liability of the legal person pursuant to paragraphs 1 and 2 shall not exclude the criminal liability of the natural persons who committed, or incited or aided and abetted the commission of, the offences referred to in Articles 2 and 3.

*Article 8***Penalties for legal persons**

Member States shall take the necessary measures to ensure that any legal person found to be liable pursuant to Article 7(1) and (2) are subject to effective, proportionate and dissuasive sanctions, including fines and other penalties, such as:

- (a) exclusion from entitlement to tax relief or other benefits or public aid;
- (b) temporary or permanent disqualification from the pursuit of commercial activities;
- (c) placement under judicial supervision;

(d) a judicial winding-up order;

- (e) temporary or permanent closure of establishments used for committing the offence;
- (f) the confiscation of property that was the object of the offence and the proceeds and advantages derived directly or indirectly from the offence.

*Article 9***Jurisdiction and prosecution**

1. Member States shall take the necessary measures to establish their jurisdiction as regards the offences referred to in Articles 2 and 3 where:

- (a) the offence was committed entirely or partly within their territory;
- (b) the offender is one of their nationals;
- (c) the offence was committed for the benefit of a legal person established in their territory.

2. Member States may decide not to apply or to apply only in specific cases or circumstances the rules on jurisdiction set out in paragraph 1(b) and (c), if the offence in question was committed outside their territory.

The Member States shall inform the General Secretariat of the Council and the Commission of their decision to apply the first subparagraph, where necessary indicating the specific cases or circumstances in which the decision will apply.

3. Member States which, by virtue of their legislation, do not extradite their nationals, shall take the necessary measures to enable them to establish their jurisdiction in respect of the offences referred to in Articles 2 and 3, where these are committed by one of their nationals outside their territory.

*Article 10***Cooperation between Member States**

1. In accordance with the conventions, bilateral and multi-lateral agreements and other arrangements in force, the Member States shall lend each other every possible assistance in the procedures relating to the offences referred to in Articles 2 and 3.

2. If several Member States have jurisdiction over an offence referred to in Article 2 or 3, they shall consult one another with a view to coordinating their action and, where appropriate, to bringing a prosecution. They shall make full use of judicial cooperation and other mechanisms.

*Article 11***Implementation and reports**

1. Member States shall take the necessary measures to comply with this framework decision by 30 June 2003 at the latest.

They shall immediately send the Commission and the General Secretariat of the Council the text of the provisions transposing the obligations imposed upon them by this framework decision.

2. Member States shall submit a brief report to the Commission on the implementation of this framework decision for the first time by 31 December 2006 at the latest, and every five years thereafter.

3. On the basis of the information referred to in paragraphs 1 and 2, the Commission shall draw up a report evaluating the application of the provisions of this framework decision by the Member States for the first time by 30 June 2007 at the latest, and every five years thereafter. This report shall be sent to the European Parliament and to the Council, where necessary accompanied by proposals for the amendment of this framework decision.

*Article 12***Entry into force**

This framework decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.