



COMMISSION OF THE EUROPEAN COMMUNITIES

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COM(2001) 259 final

2001/0114 (CNS)

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**

(presented by the Commission)

## EXPLANATORY MEMORANDUM

### INTRODUCTION

Drugs affect the social, economic and organisational fabric of our society in countless ways, posing a direct or indirect threat to public and individual health and safety and undermining people's quality of life. They are a major source of concern for Europe's citizens.

Since 1990, the European Union has recognised the need for a comprehensive, multidisciplinary and integrated strategy for tackling drugs, based on four main elements: (i) reducing demand, (ii) reducing supply and combating illegal trafficking, (iii) international cooperation and (iv) coordination at national and EU level.

This Commission initiative to tackle illicit drug trafficking is thus part of a comprehensive anti-drugs strategy, based on an approach that balances measures to cut demand and supply and combat illicit trafficking.

The aim of the proposed instrument is to target illicit trafficking, the source of supplies of narcotic drugs and psychotropic substances in our societies.

Member States have a crucial responsibility for combating illicit drug trafficking. Illicit drug trafficking often involves several Member States, so action by the European Union can contribute real added value to national policies.

The Commission believes that close cooperation is needed between the various judicial, police and customs authorities in the Member States to tackle the problem of illicit drug trafficking. If it is to be effective, such cooperation must be based on a common set of principles and aims, so that illicit drug trafficking is recognised as a criminal offence and is the subject of effective, proportionate and dissuasive penalties in all Member States.

The need to adopt a common and clearly-defined approach to this problem should also be seen in the context of the future enlargement of the European Union.

Both the Vienna Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice<sup>1</sup> and the Conclusions of the Tampere European Council refer to the need to adopt additional legislation at European level to counter illicit drug trafficking.

The European Parliament has also urged the Council and the Member States to introduce new legislation to combat illicit drug trafficking.

The European Union's anti-drugs strategy (2000-2004) calls for the gradual adoption of measures to introduce minimum rules on the constituent elements of criminal acts and the penalties applicable in the field of illicit drug trafficking. The European Union's Action Plan on Drugs (2000-2004) explicitly calls on the Commission to propose measures aimed at introducing minimum rules on the constituent elements of and penalties for trafficking in illegal drugs.

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<sup>1</sup> OJ C 19, 23.1.1999.

The Commission has decided to propose this framework decision in order to lay down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking. This legislative initiative also features in the Commission's Work Programme for 2001<sup>2</sup> and its Scoreboard to review progress on the creation of an area of freedom, security and justice in the European Union<sup>3</sup>.

By way of preparation for this initiative, the Commission carried out a study of the definitions used and penalties applied in the field of illicit drug trafficking, based on the replies provided by Member States to a questionnaire sent out in July 2000. This study has now been published.

The aims of this framework decision cannot be achieved by the Member States, given the transnational dimension of the offence, and can therefore best be attained by the European Union, in accordance with the principles of subsidiarity and proportionality. This framework decision is confined to the minimum necessary to achieve these aims and does not go beyond what is required for this purpose.

Reference may be made to the Charter of Fundamental Rights of the European Union and in particular Chapter VI, which lays down the principles of the right to justice, given that the instrument proposed is entirely in keeping with the principles expounded.

## **1. LEGAL CONTEXT**

Article 29 of the Treaty on European Union seeks to provide citizens with a high level of safety within an "area of freedom, security and justice". This objective is to be achieved, among other things, by preventing and combating illicit drug trafficking.

Point (e) of Article 31 provides for the progressive adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in fields including illicit drug trafficking. A declaration on this Article<sup>4</sup> specifies that these provisions do not have the consequence of obliging a Member State whose legal system does not provide for minimum sentences to adopt them.

As regards the choice of legal instrument, the framework decision provided for in point (b) of Article 34(2) serves to approximate the laws and regulations of the Member States. It is a means of enabling Member States to proceed further on certain aspects of criminal law and judicial cooperation.

## **2. EXISTING INSTRUMENTS IN THE FIGHT AGAINST ILLICIT DRUG TRAFFICKING**

The principle of formal cooperation between certain Member States, which was aimed among other things at combating illicit drug trafficking, was expounded for the first time in the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. Chapter 6, Article 71(2), of this Convention<sup>5</sup> states that the Contracting Parties undertake

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<sup>2</sup> COM(2001) 28 final.

<sup>3</sup> COM(2000) 167 final, 24.3.2000.

<sup>4</sup> Declaration No 8 on Article K.3(e) of the Treaty on European Union.

<sup>5</sup> OJ L 239, 22.9.2000.

*"to prevent and punish by administrative and penal measures the illegal export of narcotic drugs and psychotropic substances, including cannabis, as well as the sale, supply and handing over of such products and substances"*. This framework of cooperation will of course continue to apply, particularly as it includes the prevention aspect and the adoption of administrative measures, two aspects which are not covered by the present framework decision.

This proposal represents a further development of the law enforcement side of the Schengen *acquis*. Because Article 71 of the Schengen Convention is covered by Annex A to the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway, the proposal for a framework decision must be dealt with under the procedures provided for in this Agreement. By Decision 2000/365/EC of 29 May 2000<sup>6</sup>, the Council authorised the United Kingdom to take part in some of the provisions of the Schengen *acquis*, notably Article 71 of the Schengen Convention. Under Article 8(2) of this Decision, the United Kingdom is deemed irrevocably to have notified the President of the Council under Article 5 of the Schengen Protocol that it wishes to take part in all proposals and initiatives which build upon the Schengen *acquis* and in which it has been authorised to participate.

On 17 December 1996, the Council adopted Joint Action 96/750/JHA based on Article K.3 of the Treaty on European Union concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking<sup>7</sup>. Article 1 of this Joint Action states that the Member States *"shall endeavour to approximate their laws to make them mutually compatible to the extent necessary to prevent and combat illegal drug trafficking in the Union"*. Article 4, moreover, commits the Member States to ensuring that *"under their legal systems the penalties imposed for serious drug trafficking are among the most severe penalties available for crimes of comparable gravity"*. This framework decision is entirely in keeping with the spirit of the Joint Action and represents an important step forward in the prevention of illicit drug trafficking. Taking as its basis the provisions of the Treaty on European Union, and in particular point (e) of Article 31 and Article 34(2)(b), this initiative makes it possible to establish minimum rules relating to the constituent elements of criminal acts and to penalties in fields including illicit drug trafficking. The Commission does not believe that the Joint Action will become obsolete when the framework decision is adopted, given that it covers numerous other aspects connected with developing cooperation between the police, the customs services and the judicial authorities with a view to combating illicit drug trafficking more effectively.

The Council adopted another important instrument in 1996: the Resolution of 20 December 1996 on sentencing for serious illicit drug trafficking<sup>8</sup>. This calls on the Member States to ensure that *"their national laws provide for the possibility of custodial sentences for serious illicit trafficking in drugs which are within the range of the most severe custodial penalties imposed by their respective criminal law for crimes of comparable gravity"*. The framework decision being proposed here by the Commission is a legal instrument that goes well beyond the political significance of the Council Resolution. The Commission believes that when this framework decision is adopted the Council Resolution of 20 December 1996 will become obsolete.

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<sup>6</sup> OJ L 131, 1.6.2000, p. 43.

<sup>7</sup> OJ L 342, 31.12.1996.

<sup>8</sup> OJ C 10, 11.1.1997.

In order to intensify the fight against money laundering linked to illicit drug trafficking, the Council adopted on 10 June 1991 a Directive on the prevention of the use of the financial system for the purpose of money laundering<sup>9</sup>. Work is currently in hand in order to extend and update this Directive. Moreover, a reinforcement of cooperation between Member States in this field is foreseen by the Joint Action of the Council of 3 December 1998 adopted on the bases of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime<sup>10</sup>. This Joint Action covers in particular activities linked to illicit drug trafficking.

### **3. THE FRAMEWORK DECISION: COMMENTARY ON INDIVIDUAL ARTICLES**

#### **Article 1 – Definitions**

The first Article contains definitions of the terms used for the purposes of the framework decision.

1. Paragraph 1 defines illicit drug trafficking as 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 and for profit, of receiving, acquiring and possessing narcotic drugs or psychotropic substances.

This definition embraces the key elements of part of the definition of trafficking used in the 1988 United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances. It also takes into account the national provisions defining the offences connected with illicit drug trafficking analysed as part of the study carried out by the Commission, prior to proposing this framework decision, on the definitions, sanctions and practical implementation of the legislation on illicit drug trafficking in the Member States. This study shows that no national legislation includes a legal definition of illicit drug trafficking as a particular offense. Some acts are forbidden by national law. The main punishable offenses included in the national legislations are: the production, cultivation, extraction, fabrication, acquisition, possession, importation, exportation, transport, sale, offer to sell, and the illegal transfer of ownership of drugs. The study has also shown that there is a significant difference between the national legislation and their application in practice: in the majority of Member States, a drug addict who sells drugs is in principle considered in the law as much a drug trafficker as any other drug seller. However, in practice, in all the Member States, a drug addict is less severely punished if he made the sales to finance his own addiction.

The Commission underlines that it proposes a common definition which covers the acts that are classified as offences in all Member States. Essential criteria in this definition are the notions of acting "for profit" and "without authorisation".

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<sup>9</sup> OJ L 166, 28.6.1991.

<sup>10</sup> OJ L 333, 9.12.1998.

Furthermore, in line with the practice in all the Member States, the Commission proposes to exclude from the scope of the present framework decision (i) simple users who illegally produce, acquire and/or possess narcotics for personal use and (ii) users who sell narcotics without the intention of making a profit (for example, someone who passes on narcotics to their friends without making a profit).

This definition, by contrast, covers (i) dealers selling illegally for profit; these will be people involved in neighbourhood dealing or a small-scale network, (ii) local traffickers, who in principle will use local dealers or will sell to individuals who then deal on their own account, and (iii) international traffickers who are involved in trafficking or organise or control trafficking on an international scale, or who import and export large quantities of narcotics.

The definition used by the framework decision thus targets illicit drug trafficking and in particular transnational trafficking and actions undertaken for the purpose of transferring ownership for profit. The definition does not specify the medium of communication used (i.e. telephone, fax, Internet) and, as consequence, embraces illicit drug trafficking via information and communication technologies, and particularly the Internet. The importance of making the necessary provision for effectively fighting computer-related drugs crime was underlined in the Commission Communication entitled "Creating a Safer Information Society by Improving the Security of Information Infrastructures and Combating Computer-related Crime"<sup>11</sup>.

2. Paragraph 2 defines drugs. This definition covers all the substances referred to by the United Nations Conventions of 1961 (as amended by the 1972 protocol), 1971 and 1988. It thus includes chemical precursors. The substances subject to controls under Joint Action 97/396/JHA of 16 June 1997 on the basis of Article K.3 of the Treaty on European Union concerning the information exchange, risk assessment and control of new synthetic drugs<sup>12</sup> or within the framework of national measures, are also covered.
3. Paragraph 3 defines natural persons. The wording is taken from several other instruments concluded at European Union level, such as the Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests<sup>13</sup>, in particular Article 1(d).

## **Article 2 – Criminalisation of illicit drug trafficking**

Article 2 requires the Member States to make illicit drug trafficking, as defined in Article 1, a criminal offence.

## **Article 3 – Incitement, aiding and abetting and attempt**

Article 3 requires the Member States to 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. The wording is taken from several earlier instruments adopted at European Union level.

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<sup>11</sup> COM(2000) 890 final.

<sup>12</sup> OJ L 167, 25.6.1997.

<sup>13</sup> OJ C 221, 19.7.1997.

## Article 4 – Penalties

1. Paragraph 1 requires the Member States to take the necessary measures to ensure that the offences defined in Articles 2 and 3 are punishable by effective, proportionate and dissuasive penalties<sup>14</sup>, including custodial sentences with a maximum term of imprisonment of no less than five years in serious cases.

By virtue of this paragraph, the Member States are required to lay down penalties commensurate with the gravity of the offence and consisting of custodial sentences for serious offences.

In keeping with the nature of all framework decisions, which are binding on the Member States as regards the result to be achieved, but leave the choice of form and means to their discretion, the Member States retain some degree of flexibility to adapt their legislation to these rules and to determine the severity of the penalties that apply, within the limits imposed by the framework decision.

The Commission would stress that it is for the Member States to decide the criteria for determining the gravity of an offence, on the basis of their respective legal systems. In assessing the gravity of the offence factors such as the scale of the trafficking, its frequency, the nature of the narcotics concerned and the amount of revenue derived from the trafficking are to be taken into account. Punishment need not always take the form of imprisonment. In the most serious cases only (for example involving large-scale transnational trafficking), the maximum sentence may not be less than five years. This will ensure that the court has the power to impose a sufficiently severe sentence in the case of serious offences. This level fits into the margins of custodial sentences foreseen by a large number of national legislations.

It is also worth noting that a minimum of at least four years is being proposed at European level for the maximum sentence for the offence of money-laundering. Given that laundering the proceeds of illicit drug trafficking is an offence which flows from the main offence of illicit drug trafficking, it would seem to be proportionate to envisage a minimum level for this instrument that is higher than that proposed for the offence of money-laundering.

2. Paragraph 2 requires the Member States to provide for the confiscation of the substances that were being trafficked, the instrumentalities and property used in trafficking and the proceeds and advantages directly or indirectly derived from this trafficking. The terms 'confiscation', 'property' and 'proceeds' are used here in the sense defined in Article 1 of the Council of Europe's 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

The Commission believes that the confiscation of the revenue derived from illicit drug trafficking could be complemented by national measures allowing all or some of this money to be used for measures to combat drug trafficking or for prevention and rehabilitation programmes for addicts and schemes to help their families. The European Parliament has supported this idea on several occasions, for example in its

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<sup>14</sup> The phrase is taken from the Judgment given by the Court of Justice on 21 September 1989 in Case 68/88 [1989] ECR 2965.

Resolution of 19 November 1999 on the Commission's Communication on a European Union Action Plan to combat drugs (2000-2004)<sup>15</sup>.

Paragraph 3 provides for the possibility for Member States to impose fines in addition to or as an alternative to custodial sentences, in line with their respective traditions and legal systems.

### **Article 5 – Aggravating circumstances**

This Article provides for Member States to increase the penalties defined in Article 4 under certain circumstances. If one of the conditions listed is fulfilled, the maximum term of imprisonment may not be less than seven years.

The Commission would stress that the list of aggravating circumstances provided in this Article is without prejudice to any other circumstances regarded as aggravating in Member States' legislation. This list takes into account the aggravating circumstances described in the national provisions notified by the Member States in their replies to the questionnaire sent out by the Commission when preparing the proposal for this framework decision. This list also takes up the main elements of the Council Resolution of 20 December 1996 on sentencing for serious illicit drug trafficking<sup>16</sup>. In this Resolution, the Council held that *"factors which might be taken into account regarding the custodial penalties that might be applicable in relation to serious drug trafficking could for example include, among other factors: (i) the extent of the trafficking, (ii) the extent to which the person concerned has profited from the illicit traffic, (iii) the involvement in the offence of an organised criminal group to which the offender belongs, (iv) the extent to which the offender has control of the illicit drug-trafficking organisation, (v) the victimisation or use of minors"*.

It is for the Member States to decide the criteria for determining the nature and gravity of the aggravating circumstances, on the basis of their respective legal systems. Only where the offences defined in Articles 2 and 3 are considered as serious and at least one of the aggravating circumstances referred to in this Article is present must the maximum term of imprisonment be no less than seven years. The Article thus sets a minimum term for the maximum sentence. The minimum level of the maximum sentence is raised by two years compared with the sentence provided for in Article 4 for serious offences, in order to ensure that the courts have the power to impose a sufficiently severe sentence in the case of serious offences with one or more aggravating circumstances. This two-year differential would appear to be proportionate. According to the Member States, the basic sentences are increased by a factor of anywhere between a third and double when there are aggravating circumstances.

The following should be considered as aggravating circumstances to be taken into account:

1. The person committing the offence referred to in Articles 2 or 3 has an important role in organising illicit drug trafficking, either by virtue of the power exercised directly or indirectly or because of the profit derived from the trafficking. The offender's membership of a criminal organisation will also be regarded as an aggravating circumstance. The term "criminal organisation" is taken from Article 1 of the

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<sup>15</sup> A5-0063/1999.

<sup>16</sup> OJ C 10, 11.1.1997.



Joint Action of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union<sup>17</sup>.

2. The offence involves violence or the use of weapons. It is for the Member States to define these terms more precisely.
3. The offence led to minors or persons who are unable to exercise their free will. It is for the Member States to define the concept of a minor on the basis of their respective legal systems. Persons unable to exercise their free will include, for example, the mentally handicapped.
4. The offence took place in or near schools, youth clubs or leisure centres, or institutions for the treatment and rehabilitation of drug addicts.
5. The offender is a doctor, pharmacist, court official, police officer, customs officer, prison officer, probation officer, teacher, instructor or other employee in an educational establishment and committed the offence by abusing this position. Obviously the definition of illicit drug trafficking given in Article 1 of the framework decision applies specifically to unauthorised activity. The provisions do not apply to those acting with authorisation.
6. The offender has been convicted of one or more similar offences by a final judgment in a Member State of the European Union. This is the principle of recidivism, which takes account of any convictions obtained in other Member States.

#### **Article 6 – Mitigating circumstances**

This Article states that each Member State will take the necessary measures to ensure that the penalties provided for in Article 4 of the framework decision can be reduced if the condition set out below is fulfilled, without prejudice to any other mitigating circumstances provided for in the national legislation of the Member States.

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. The Commission would refer to the principle of cooperation as defined in Council Resolution of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organised crime<sup>18</sup>. It is for the competent authorities to define the criteria for determining what constitutes valuable information and to decide the amount by which the sentence will be reduced or even, depending on the circumstances, to waive the punishment altogether. Such provisions exist in most Member States.

It does not appear appropriate to include as an attenuating circumstance under Article 6 a parallel disposition to that foreseen in Article 5 in the form, this time, of a reduction in the level of the minimum of the maximum penalty.

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<sup>17</sup> OJ L 351, 29.12.1998.

<sup>18</sup> OJ C 10, 11.1.1997.

## **Article 7 – Liability of legal persons**

It is also necessary to deal with situations in which legal persons are involved in the trafficking of narcotic drugs or psychotropic substances or chemical precursors. Article 7 therefore provides for the possibility of holding a legal person liable for the offences referred to in Articles 2 and 3 committed on its behalf by any person acting individually or as a member of an organ of the legal person in question. Such provisions exist in the legal systems of most Member States.

In addition, paragraph 2 states that a legal person may also be held liable if lack of supervision or control on the part of a person entitled to exercise such control made possible the commission of the offences for the benefit of the legal person in question. Paragraph 3 provides that legal proceedings against a legal person do not preclude parallel legal proceedings against the natural person who played a part in the commission of the offence for which the legal person is being held liable.

## **Article 8 – Penalties for legal persons**

Article 8 places Member States under an obligation to impose penalties on legal persons. It requires the imposition of effective, proportionate and dissuasive sanctions, including fines. It also indicates the other types of penalty that may be imposed on legal persons.

## **Article 9 – Jurisdiction and prosecution**

The international nature of illicit drug trafficking means that an effective legal response requires procedural provisions on jurisdiction and extradition which should be clear and far-reaching at the European Union level, to ensure that offenders cannot escape prosecution.

Paragraph 1 sets out a series of criteria for conferring jurisdiction on national judicial authorities to prosecute and investigate cases involving the offences referred to in this framework decision. A Member State will establish its jurisdiction in three situations:

- (a) where the offence is committed in whole or in part on its territory, irrespective of the status of the legal person or the nationality of the natural person involved (territoriality principle);
- (b) where the offender is a national of that Member State (active personality principle). Member States that make no provision for extradition are responsible for prosecuting their own nationals who have committed offences abroad;
- (c) where the offence is committed for the benefit of a legal person established in the territory of that Member State.

Given that not all Member States' legal traditions recognise extraterritorial jurisdiction for all types of criminal offence, the first subparagraph of paragraph 2 allows them not to apply the rules on jurisdiction set out in paragraph 1 as regards the situations covered by paragraph 1(b) and (c), provided that the offence was committed outside the territory of the Member State concerned.

The second subparagraph of paragraph 2 states that Member States are to inform the Council's General Secretariat and the Commission where they decide to apply this paragraph.

Paragraph 3 takes account of the fact that certain Member States do not extradite their own nationals and seeks to ensure that persons suspected of having trafficked in illicit drugs do not escape prosecution because extradition is refused on the grounds that they are nationals of one of these States to which an application for extradition has been made. A Member State which does not extradite its own nationals must, in accordance with paragraph 3, take the necessary measures to establish its jurisdiction over and, where appropriate, prosecute the offences concerned when committed by its own nationals outside its territory.

#### **Article 10 – Cooperation between Member States**

The purpose of Article 10 is to take advantage of the international instruments on judicial cooperation to which Member States are parties and which should apply to the matters covered in this framework decision. For instance, arrangements on mutual legal assistance and extradition are contained in a number of bilateral and multilateral agreements as well as conventions of the European Union. This Article also seeks to facilitate the exchange of information.

Paragraph 1 calls on the Member States to lend each other every possible assistance in matters of judicial and police procedure relating to illicit drug trafficking. Paragraph 2 states that if several Member States have jurisdiction, they will consult one another with a view to coordinating action and, where appropriate, to bringing effective prosecutions. The paragraph also points out that full use should be made of existing cooperation mechanisms, judicial or otherwise, such as Europol<sup>19</sup>, the exchange of liaison magistrates<sup>20</sup>, the European Judicial Network<sup>21</sup> and the Provisional Judicial Cooperation Unit<sup>22</sup>.

#### **Article 11 – Implementation and reports**

Article 11 concerns the implementation and follow-up of this framework decision. Paragraph 1 requires the Member States to take the necessary measures to comply with this framework decision not later than 30 June 2003. It also states that the Member States will immediately transmit to the General Secretariat of the Council and to the Commission the provisions transposing the obligations imposed on them under this framework decision into national law. The Commission will ensure coordination between, on the one hand, the follow-up and analysis of the impact of the mechanism proposed in this framework decision, and on the other the European Monitoring Centre for Drugs and Drug Addiction's Legal Information System, adopted by its Management Board in 1998. Paragraph 2 requires the Member States to submit a brief report on the implementation of this framework decision every five years and for the first time by 31 December 2006, to enable an overall evaluation to be made of the instrument and, if necessary, changes to be proposed. On the basis of the information referred to in paragraphs 1 and 2 of this Article, the Commission will report to the Council on the application by the Member States of the provisions of this framework decision every five years and for the first time by 30 June 2007.

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<sup>19</sup> OJ C 316, 27.11.1995.

<sup>20</sup> OJ L 105, 27.4.1996.

<sup>21</sup> OJ L 191, 7.7.1998.

<sup>22</sup> OJ L 324, 21.12.2000.

## **Article 12 – Entry into force**

Article 12 states that the framework decision will enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

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**

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<sup>1</sup>,

Having regard to the Opinion of the European Parliament<sup>2</sup>,

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<sup>3</sup>; 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.

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<sup>1</sup> OJ C

<sup>2</sup> OJ C

<sup>3</sup> OJ C 19, 23.1.1999, p. 1.

- (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<sup>4</sup>.
- (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.
- (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,

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<sup>4</sup> OJ L 176, 10.7.1999, p. 36.

HAS DECIDED AS FOLLOWS:

### *Article 1*

#### **Definitions**

For the purposes of this framework decision:

- (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;
- (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<sup>5</sup> or within the framework of national measures;
- (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.

### *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.

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<sup>5</sup> OJ L 167, 25.6.1997, p. 1.

#### *Article 4*

##### **Penalties**

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.
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.
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**

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



## *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 multilateral 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*.

Done at Brussels,

*For the Council*  
*The President*