

III

(Acts adopted under the EU Treaty)

ACTS ADOPTED UNDER TITLE V OF THE EU TREATY

COUNCIL FRAMEWORK DECISION 2008/841/JHA

of 24 October 2008

on the fight against organised crime

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 29, 31(1)(e) and 34(2)(b) thereof,

Having regard to the proposal of the Commission,

Having regard to the opinion of the European Parliament ⁽¹⁾,

Whereas:

(1) The objective of the Hague Programme is to improve the common capability of the Union and the Member States for the purpose, among others, of combating transnational organised crime. This objective is to be pursued by, in particular, the approximation of legislation. Closer cooperation between the Member States of the European Union is needed in order to counter the dangers and proliferation of criminal organisations and to respond effectively to citizens' expectations and Member States' own requirements. In this respect point 14 of the conclusions of the Brussels European Council of 4 and 5 November 2004 states that the citizens of Europe expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, combined approach to cross-border problems such as organised crime.

(2) In its Communication of 29 March 2004 on measures to be taken to combat terrorism and other forms of serious crime, the Commission considered that the facilities available for combating organised crime in the EU needed to be strengthened and stated that it would draw up a Framework Decision to replace Joint Action 98/733/JHA of 21 December 1998 on making it a

criminal offence to participate in a criminal organisation in the Member States of the European Union ⁽²⁾.

(3) Point 3.3.2 of the Hague Programme states that the approximation of substantive criminal law serves the purpose of facilitating mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters and concerns areas of particularly serious crime with cross-border dimensions and that priority should be given to areas of crime that are specifically mentioned in the Treaties. The definition of offences relating to participation in a criminal organisation should therefore be approximated in the Member States. Thus, this Framework Decision should encompass crimes which are typically committed in a criminal organisation. It should provide, moreover, for the imposition of penalties corresponding to the seriousness of those offences, on natural and legal persons who committed them or are responsible for their commission.

(4) The obligations arising by virtue of Article 2(a) should be without prejudice to Member States' freedom to classify other groups of persons as criminal organisations, for example, groups whose purpose is not financial or other material gain.

(5) The obligations arising by virtue of Article 2(a) should be without prejudice to the Member States' freedom to interpret the term 'criminal activities' as implying the carrying out of material acts.

(6) The European Union should build on the important work done by international organisations, in particular the United Nations Convention Against Transnational Organised Crime (the 'Palermo Convention'), which was concluded, on behalf of the European Community, by Council Decision 2004/579/EC ⁽³⁾.

⁽¹⁾ Opinion delivered following non-compulsory consultation (not yet published in the Official Journal).

⁽²⁾ OJ L 351, 29.12.1998, p. 1.

⁽³⁾ OJ L 261, 6.8.2004, p. 69.

- (7) Since the objectives of this Framework Decision cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty establishing European Community, as applied by the second paragraph of Article 2 of the Treaty on European Union. In accordance with the principle of proportionality this Framework Decision does not go beyond what is necessary to achieve those objectives.
- (8) This Framework Decision respects the fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union, and in particular Articles 6 and 49 thereof. Nothing in this Framework Decision is intended to reduce or restrict national rules relating to fundamental rights or freedoms such as due process, the right to strike, freedom of assembly, of association, of the press or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate.
- (9) Joint Action 98/733/JHA should therefore be repealed,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Definitions

For the purposes of this Framework Decision:

1. 'criminal organisation' means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit;
2. 'structured association' means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.

Article 2

Offences relating to participation in a criminal organisation

Each Member State shall take the necessary measures to ensure that one or both of the following types of conduct related to a criminal organisation are regarded as offences:

- (a) conduct by any person who, with intent and with knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in question, actively takes part in the organisation's criminal activities, including the provision of information or material means, the recruitment of new members and all forms of financing of its activities, knowing that such participation will contribute to the achievement of the organisation's criminal activities;
- (b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1, even if that person does not take part in the actual execution of the activity.

Article 3

Penalties

1. Each Member State shall take the necessary measures to ensure that:

- (a) the offence referred to in Article 2(a) is punishable by a maximum term of imprisonment of at least between two and five years; or
- (b) the offence referred to in Article 2(b) is punishable by the same maximum term of imprisonment as the offence at which the agreement is aimed, or by a maximum term of imprisonment of at least between two and five years.

2. Each Member State shall take the necessary measures to ensure that the fact that offences referred to in Article 2, as determined by this Member State, have been committed within the framework of a criminal organisation, may be regarded as an aggravating circumstance.

Article 4

Special circumstances

Each Member State may take the necessary measures to ensure that the penalties referred to in Article 3 may be reduced or that the offender may be exempted from penalties if he, for example:

- (a) renounces criminal activity; and
- (b) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to:
 - (i) prevent, end or mitigate the effects of the offence;
 - (ii) identify or bring to justice the other offenders;
 - (iii) find evidence;

- (iv) deprive the criminal organisation of illicit resources or of the proceeds of its criminal activities; or
- (v) prevent further offences referred to in Article 2 from being committed.

Article 5

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons may be held liable for any of the offences referred to in Article 2 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on one of the following:

- (a) a power of representation of the legal person;
- (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 also take the necessary measures to ensure that legal persons may be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission, by a person under its authority, of any of the offences referred to in Article 2 for the benefit of that legal person.

3. Liability of legal persons under paragraphs 1 and 2 shall be without prejudice to criminal proceedings against natural persons who are perpetrators of, or accessories to, any of the offences referred to in Article 2.

4. For the purpose of this Framework Decision 'legal person' shall mean any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.

Article 6

Penalties for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties, for example:

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;

- (c) placing under judicial supervision;
- (d) judicial winding-up;
- (e) temporary or permanent closure of establishments which have been used for committing the offence.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(2) is punishable by penalties or measures which are effective, proportionate and dissuasive.

Article 7

Jurisdiction and coordination of prosecution

1. Each Member State shall ensure that its jurisdiction covers at least the cases in which the offences referred to in Article 2 were committed:

- (a) in whole or in part within its territory, wherever the criminal organisation is based or pursues its criminal activities;
- (b) by one of its nationals; or
- (c) for the benefit of a legal person established in the territory of that Member State.

A Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in (b) and (c) where the offences referred to in Article 2 are committed outside its territory.

2. When an offence referred to in Article 2 falls within the jurisdiction of more than one Member State and when any one of the States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders, with the aim, if possible, of centralising proceedings in a single Member State. To this end, Member States may have recourse to Eurojust or any other body or mechanism established within the European Union in order to facilitate cooperation between their judicial authorities and the coordination of their action. Special account shall be taken of the following factors:

- (a) the Member State in the territory of which the acts were committed;
- (b) the Member State of which the perpetrator is a national or resident;

(c) the Member State of the origin of the victims;

Article 10

Implementation and reports

(d) the Member State in the territory of which the perpetrator was found.

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision before 11 May 2010.

3. A Member State which, under its law, does not as yet extradite or surrender its own nationals shall take the necessary measures to establish its jurisdiction over and, where appropriate, to prosecute the offence referred to in Article 2, when committed by one of its nationals outside its territory.

2. The Member States shall transmit to the General Secretariat of the Council and to the Commission, before 11 May 2010, the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of a report established using this information and a written report transmitted by the Commission, the Council shall, before 11 November 2012, assess the extent to which Member States have complied with the provisions of this Framework Decision.

4. This Article shall not exclude the exercise of jurisdiction in criminal matters as laid down by a Member State in accordance with its national legislation.

Article 8

Absence of requirement of a report or accusation by victims

Member States shall ensure that investigations into, or prosecution of, offences referred to in Article 2 are not dependent on a report or accusation made by a person subjected to the offence, at least as regards acts committed in the territory of the Member State.

Article 11

Territorial application

This Framework Decision shall apply to Gibraltar.

Article 9

Repeal of existing provisions

Joint Action 98/733/JHA is hereby repealed.

Article 12

Entry into force

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

References to participation in a criminal organisation within the meaning of Joint Action 98/733/JHA in measures adopted pursuant to Title VI of the Treaty on European Union and the Treaty establishing the European Community shall be construed as references to participation in a criminal organisation within the meaning of this Framework Decision.

Done at Luxembourg, 24 October 2008.

For the Council

The President

M. ALLIOT-MARIE