

## Legal instruments of the European Union relating to selected criminal offences

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*This paper provides a describing guide among the newest strategies and methods, supported by law stipulations, chosen by the European Union in order to strive against the latest kinds of criminality, which may happen to be also among the most dangerous forms of criminality.*

**Key words:** *persons traffic, genocide, drugs, crime, attacks trough informaties.*

**Cuvinte cheie:** *trafic de personae, genocid, droguri, crimă, atacuri pe canale informatice.*

**1. Introduction.** The European Union is essentially a union (superstructure) of three European economic interest communities: the European Community for Coal and Steel, the European Community for Atomic Energy and the European Economic Community. From the very creation of the Union until entry into force of the Treaty Establishing Constitution for Europe<sup>1</sup> it has been indisputably the case that the Union is only responsible for regulating those fields for which member states transfer jurisdiction to it. The regulation of other fields was left to the exclusive jurisdiction of member states. Criminal law is one such field.

With entry into force of the Treaty Establishing Constitution for Europe, European Union would get formal right to intervene in the field of criminal law. In accordance with the first paragraph of article III-271 of the Treaty, European Union could establish with European framework laws minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with cross-border dimension resulting from the nature or impact of such offences or from special need to combat them on common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime

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<sup>1</sup> In accordance with second paragraph of article IV - 446 Treaty Establishing Constitution for Europe should enter into force on 1. November 2006 if all the instruments of ratification would have been deposited, or, failing that, on the first day of the second month following the deposit of the instrument of ratification by the last signatory State to take this step. With regard to well known interlacing in connexion with ratification of this treaty, its destiny is very uncertain and it is not possible to declare when it will enter into force if at all. The National Assembly of the Republic of Slovenia has already ratified Treaty Establishing Constitution for Europe. Treaty is published in the Official Journal of the Republic of Slovenia No 15/2005, International treaties No 1.

and organised crime. On the basis of developments in crime, the Council may adopt a European decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

Although European Union had no formal power to intervene in the field of criminal law, bodies of the Union have issued some statutory documents whereby they have also intervened in the field of criminal law. It occurred in the area relating to protection of the financial interests of the Communities and cross-border crime because the nature and the impact of such offences require to combat them on common basis.

Below, I will present the documents of European Union relating to genocide, crimes against humanity and war crimes, illicit drug trafficking, attacks against information systems and protection of the environment through criminal law.

**2. Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes.** The Council of European Union has adopted Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes.<sup>2</sup> This Decision has a preamble and nine articles.

The Council among other finds in the preamble, that the Rome Statute of the International Criminal Court of 17 July 1998, which has been ratified by all Member States of the European Union, affirms that the most serious crimes of concern to the international community as a whole, in particular genocide, crimes against humanity and war crimes, must not go unpunished and that their effective prosecution must be ensured by taking measures at national level and by enhancing international cooperation.

The Rome Statute recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for such international crimes.

The Rome Statute emphasises that the International Criminal Court established under it is to be complementary to national criminal jurisdictions. Effective investigation and, as appropriate, prosecution of genocide, crimes against humanity and war crimes should be ensured without interference with the jurisdiction of the International Criminal Court.

The competent authorities of the Member States are to ensure that, where they receive information that a person who has applied for a residence permit is suspected of having committed or participated in the commission of genocide, crimes against humanity or war crimes, the relevant acts may be investigated, and, where justified, prosecuted in accordance with national law.

The successful outcome of effective investigation and prosecution of such crimes also requires close cooperation at transnational level between authorities of the States Parties to the Rome Statute, including the Member States.

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<sup>2</sup> Published in the Official Journal of the European Communities No L 118 of 14.5.2003.

The aim of this Decision is to increase cooperation between national units in order to maximise the ability of law enforcement authorities in different Member States to cooperate effectively in the field of investigation and prosecution of persons who have committed or participated in the commission of genocide, crimes against humanity or war crimes as defined in Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court of 17 July 1998.

Second paragraph of article two binds Member states to take the necessary measures to ensure that the relevant national law enforcement and immigration authorities are able to exchange the information, which they require in order to carry out their tasks effectively.

Article three regulates investigation and prosecution. Member States shall assist one another in the investigating and prosecuting the crimes referred to in Article 1 in accordance with relevant international agreements and national law.

Where, in connection with the processing of an application for a residence permit, the immigration authorities become aware of facts which give rise to a suspicion that the applicant has participated in crimes referred to in Article 1, and where it emerges that the applicant has previously sought permission to reside in another Member State, the law enforcement authorities may apply to the competent law enforcement authorities in the latter Member State with a view to obtaining relevant information, including information from the immigration authorities.

Insofar as the law enforcement authorities in a Member State become aware that a person suspected of crimes as referred to in Article 1 is in another Member State, they shall inform the competent authorities in the latter Member State of their suspicions and the basis thereof. Such information shall be provided in accordance with relevant international agreements and national law.

Article six binds Member states to comply in accordance with data protection legislation. Any kind of exchange of information or other kind of processing of personal data under this Decision shall take place in full compliance with the requirements flowing from the applicable international and domestic data protection legislation.

In accordance with article seven Member states shall take the necessary measures to comply with this Decision by 8 May 2005.

**3. Illicit Drug Trafficking.** The Council of European Union has adopted Framework Decision 2004/757/JHA of 25 October 2004 on laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking.<sup>3</sup> This Framework Decision has a preamble and eleven articles.

There are some findings and stresses in the preamble which deserve particular attention. The Council of the European Union finds that 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, stability and security of the Member States.

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<sup>3</sup> Published in the Official Journal of the European Communities No L 335 of 11.11.2004..

It is necessary to adopt minimum rules relating to the constituent elements of the offences of illicit trafficking in drugs and precursors which will allow a common approach at European Union level to the fight against such trafficking. Penalties provided for by the Member States should be effective, proportionate and dissuasive, and include custodial sentences. To determine the level of penalties, factual elements such as the quantities and the type of drugs trafficked, and whether the offence was committed within the framework of a criminal organisation, should be taken into account.

It is necessary to take measures to enable the confiscation of the proceeds of the offences referred to in this Framework Decision.

Measures should be taken to ensure that legal persons can be held liable for the criminal offences referred to by this Framework Decision which are committed for their benefit.

The first article of the Decision contains definitions of concepts. For the purposes of this Framework Decision:

1. "drugs": shall mean any of the substances covered by the following United Nations Conventions:

(a) the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol);

(b) the 1971 Vienna Convention on Psychotropic Substances. It shall also include the substances subject to controls under Joint Action 97/396/JHA of 16 June 1997 concerning the information exchange risk assessment and the control of new synthetic drugs [4];

2. "precursors": shall mean any substance scheduled in the Community legislation giving effect to the obligations deriving from Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988;

3. "legal person": shall mean any legal entity having such status under the applicable national law, except for States or other public bodies acting in the exercise of their sovereign rights and for public international organisations.

Article two determines crimes linked to trafficking in drugs and precursors. Each Member State shall take the necessary measures to ensure that the following intentional conduct when committed without right is punishable:

(a) the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs;

(b) the cultivation of opium poppy, coca bush or cannabis plant;

(c) the possession or purchase of drugs with a view to conducting one of the activities listed in (a);

(d) the manufacture, transport or distribution of precursors, knowing that they are to be used in or for the illicit production or manufacture of drugs.

The conduct described in paragraph 1 shall not be included in the scope of this Framework Decision when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law.

Article three regulates incitement, aiding and abetting and attempt. Each Member State shall take the necessary measures to make incitement to commit, aiding and abetting or attempting one of the offences referred to in Article 2 a criminal offence. A Member State may exempt from criminal liability the attempt to offer or prepare drugs referred to in Article 2(1)(a) and the attempt to possess drugs referred to in Article 2(1)(c).

Article four determines penalties and other sanctions. Each Member State shall take the measures necessary to ensure that the offences defined in Articles 2 and 3 are punishable by effective, proportionate and dissuasive criminal penalties.

Each Member State shall take the necessary measures to ensure that the offences referred to in Article 2 are punishable by criminal penalties of a maximum of at least between one and three years of imprisonment.

Each Member State shall take the necessary measures to ensure that the offences referred to in Article 2(1)(a), (b) and (c) are punishable by criminal penalties of a maximum of at least between 5 and 10 years of imprisonment in each of the following circumstances:

(a) the offence involves large quantities of drugs;

(b) the offence either involves those drugs which cause the most harm to health, or has resulted in significant damage to the health of a number of persons.

Each Member State shall take the necessary measures to ensure that the offences referred to in paragraph 2 are punishable by criminal penalties of a maximum of at least 10 years of deprivation of liberty, where the offence was committed within the framework of a criminal organisation as defined in 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 [5].

Each Member State shall take the necessary measures to ensure that the offences referred to in Article 2(1)(d) are punishable by criminal penalties of a maximum of at least between 5 and 10 years of deprivation of liberty, where the offence was committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA and the precursors are intended to be used in or for the production or manufacture of drugs under the circumstances referred to in paragraphs 2(a) or (b).

Without prejudice to the rights of victims and of other bona fide third parties, each Member State shall take the necessary measures to enable the confiscation of substances which are the object of offences referred to in Articles 2 and 3, instrumentalities used or intended to be used for these offences and proceeds from these offences or the confiscation of property the value of which corresponds to that of such proceeds, substances or instrumentalities.

The terms "confiscation", "instrumentalities", "proceeds" and "property" shall have the same meaning as in Article 1 of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

Article five regulates particular circumstances. Notwithstanding Article 4, each Member State may take the necessary measures to ensure that the penalties referred to in Article 4 may be reduced if the offender:

(a) renounces criminal activity relating to trafficking in drugs and precursors, 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 or mitigate the effects of the offence,
- (ii) identify or bring to justice the other offenders,
- (iii) find evidence, or
- (iv) prevent further offences referred to in Articles 2 and 3.

Article six determines liability of legal persons. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for any of the criminal offences referred to in Articles 2 and 3 committed for their benefit by any person, acting either individually or as a member of an organ of the legal person in question, who has 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;
- (c) an authority to exercise control within the legal person.

Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of any of the offences referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.

Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in any of the offences referred to in Articles 2 and 3.

Article seven determines sanctions for legal persons and article eight determines jurisdiction and prosecution.

In accordance with first paragraph of article nine Member states shall take the necessary measures to comply with the provisions of this Framework Decision by 12 May 2006.

**4. Attacks against Information Systems.** The Council of European Union has adopted Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems.<sup>4</sup> This Framework Decision has an extensive preamble and thirteen articles.

The Council among other finds in the preamble that the objective of this Framework Decision is to improve cooperation between judicial and other competent authorities, including the police and other specialised law enforcement services of the Member States, through approximating rules on criminal law in the Member States in the area of attacks against information systems.

There is evidence of attacks against information systems, in particular as a result of the threat from organised crime, and increasing concern at the potential of terrorist attacks against information systems which form part of the critical infrastructure of the Member States. This constitutes a threat to the achievement of

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<sup>4</sup> Published in the Official Journal of the European Communities No L 69 of 16.3.2005.

a safer information society and an area of freedom, security and justice, and therefore requires a response at the level of the European Union.

Significant gaps and differences in Member States' laws in this area may hamper the fight against organised crime and terrorism, and may complicate effective police and judicial cooperation in the area of attacks against information systems. The transnational and borderless character of modern information systems means that attacks against such systems are often trans-border in nature, thus underlining the urgent need for further action to approximate criminal laws in this area.

Criminal law in the area of attacks against information systems should be approximated in order to ensure the greatest possible police and judicial cooperation in the area of criminal offences related to attacks against information systems, and to contribute to the fight against organised crime and terrorism.

There is a need to achieve a common approach to the constituent elements of criminal offences by providing for common offences of illegal access to an information system, illegal system interference and illegal data interference. There is a need to avoid over-criminalisation, particularly of minor cases, as well as a need to avoid criminalising right-holders and authorised persons.

There is a need for Member States to provide for penalties for attacks against information systems. The penalties thus provided for shall be effective, proportionate and dissuasive.

Since the objectives of this Framework Decision, ensuring that attacks against information systems be sanctioned in all Member States by effective, proportionate and dissuasive criminal penalties and improving and encouraging judicial cooperation by removing potential complications, cannot be sufficiently achieved by the Member States, as rules have to be common and compatible, and can therefore be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the EC Treaty. In accordance with the principle of proportionality, as set out in that Article, this Framework Decision does not go beyond what is necessary in order to achieve those objectives.

The first article of the Decision contains definitions of concepts. For the purposes of this Framework Decision, the following definitions shall apply:

- (a) "information system" means any device or group of inter-connected or related devices, one or more of which, pursuant to a program, performs automatic processing of computer data, as well as computer data stored, processed, retrieved or transmitted by them for the purposes of their operation, use, protection and maintenance;
- (b) "computer data" means any representation of facts, information or concepts in a form suitable for processing in an information system, including a program suitable for causing an information system to perform a function;
- (c) "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;

(d) "without right" means access or interference not authorised by the owner, other right holder of the system or part of it, or not permitted under the national legislation.

Article two determines illegal access to information systems. Each Member State shall take the necessary measures to ensure that the intentional access without right to the whole or any part of an information system is punishable as a criminal offence, at least for cases which are not minor. Each Member State may decide that the conduct referred to in paragraph 1 is incriminated only where the offence is committed by infringing a security measure.

Article three determines illegal system interference. Each Member State shall take the necessary measures to ensure that the intentional serious hindering or interruption of the functioning of an information system by inputting, transmitting, damaging, deleting, deteriorating, altering, suppressing or rendering inaccessible computer data is punishable as a criminal offence when committed without right, at least for cases which are not minor.

Article four binds Member States to take the necessary measures to ensure that the intentional deletion, damaging, deterioration, alteration, suppression or rendering inaccessible of computer data on an information system is punishable as a criminal offence when committed without right, at least for cases which are not minor.

Article five regulates instigation, aiding and abetting and attempt. Each Member State shall ensure that the instigation of aiding and abetting an offence referred to in Articles 2, 3 and 4 is punishable as a criminal offence. Each Member State shall ensure that the attempt to commit the offences referred to in Articles 2, 3 and 4 is punishable as a criminal offence. Each Member State may decide not to apply paragraph 2 for the offences referred to in Article 2.

Article six determines penalties and other sanctions. Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 2, 3, 4 and 5 are punishable by effective, proportional and dissuasive criminal penalties. Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by criminal penalties of a maximum of at least between one and three years of imprisonment.

Article seven determines aggravating circumstances.

Article eight establishes liability of legal persons and article nine provides penalties for legal persons.

Article ten regulates jurisdiction.

In accordance with first paragraph of article twelve Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 16 March 2007.

**5. Protection of the Environment.**The Council of European Union has adopted Framework Decision 2003/80/JHA of 27 January 2003 on the protection



of the environment through criminal law.<sup>5</sup> This Framework Decision has a preamble and twelve articles.

The Council among other finds in the preamble that the Union is concerned at the rise in environmental offences and their effects, which are increasingly extending beyond the borders of the States in which the offences are committed.

Environmental offences are a problem jointly faced by Member States, which should therefore take concerted action to protect the environment under criminal law.

Member States should establish wide-ranging jurisdiction with respect to the said offences in such a way as to avoid that physical or legal persons would escape prosecution by the simple fact that the offence was not committed in their territory. The first article of the Decision contains definitions of concepts. For the purposes of this Framework Decision:

(a) "unlawful" means infringing a law, an administrative regulation or a decision taken by a competent authority, including those giving effect to binding provisions of Community law aiming at the protection of the environment;

(b) "water" means all kinds of groundwater and surface water including the water of lakes, rivers, oceans and seas;

(c) "legal person" means any legal entity having such status under the applicable national law, except for States or other public bodies acting in the exercise of their sovereign rights and for public international organisations.

Article two determines intentional offences. Each Member State shall take the necessary measures to establish as criminal offences under its domestic law:

(a) the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes death or serious injury to any person;

(b) the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes or is likely to cause their lasting or substantial deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants;

(c) the unlawful disposal, treatment, storage, transport, export or import of waste, including hazardous waste, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

(d) the unlawful operation of a plant in which a dangerous activity is carried out and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

(e) the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

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<sup>5</sup> Published in the Official Journal of the European Communities No L 29 of 5.2.2003.

(f) the unlawful possession, taking, damaging, killing or trading of or in protected wild fauna and flora species or parts thereof, at least where they are threatened with extinction as defined under national law;

(g) the unlawful trade in ozone-depleting substances;  
when committed intentionally.

Article three regulates negligent offences. Each Member State shall take the necessary measures to establish as criminal offences under its domestic law, when committed with negligence, or at least serious negligence, the offences enumerated in Article 2.

Article four regulates participation and instigation. Each Member State shall take the necessary measures to ensure that participating in or instigating the conduct referred to in Article 2 is punishable.

Article five determines penalties. Each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 2 and 3 is punishable by effective, proportionate and dissuasive penalties including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition.

The criminal penalties provided for in paragraph 1 may be accompanied by other penalties or measures, in particular the disqualification for a natural person from engaging in an activity requiring official authorisation or approval, or founding, managing or directing a company or a foundation, where the facts having led to his or her conviction show an obvious risk that the same kind of criminal activity may be pursued.

Article six establishes liability of legal persons and article seven provides penalties for legal persons.

Article eight regulates jurisdiction and article nine determines extradition and prosecution.

In accordance with first paragraph of article ten Member states shall adopt the measures necessary to comply with the provisions of this Framework Decision before 27 January 2005.

**6. Conclusion.** Despite European Union had no formal power to intervene in the field of criminal law, bodies of the Union have issued some statutory documents whereby they have also intervened in the field of criminal law. It is true that bodies of the European Union did not determine offences but they bound Member States to determine exactly defined acts as criminal offences in the national legislations. In some cases bodies of the Union in the acts determined also special minimum of penalties for specially defined offences (e.g. in the Framework decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking). Although for the incrimination of the acts enumerated in legal instruments of European Union there are in principle no hesitations, there are some solutions which are disputed from the standpoint of protection of human rights. Among such provisions are e.g. the incrimination of mere acquisition or possession of child

pornography.<sup>6</sup> From the standpoint of protection of human rights is extremely disputed also the definition of terrorist financing. In the Directive of the European Parliament and the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, "terrorist financing" is determined as the provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism. Knowledge, intent or purpose required as an element of the activities mentioned in paragraphs 2 and 4 may be inferred from objective factual circumstances.

Beside such definition of "terrorist financing" we can imagine in what situation would be a man, who would be considered as a sympathizer of the organization which would be suspected that it had executed terrorist attack like that one in London on 7. July 2005.

With entry into force of the Treaty Establishing Constitution for Europe, European Union would get formal right to intervene in the field of criminal law. On the basis of previous experiences with the acts of European Union, which intervened in the field of criminal law, we may expect that legally binding acts would provide measures which are prohibited in domestic law due to the high standards of protection of human rights. Dead-lock in the proceedings of ratification of the Treaty Establishing Constitution for Europe is good opportunity for consideration how to avoid the situation in which binding provisions of the acts of European Union would interfere on the lowering of standards of protection of human rights which were already achieved in the national law.

**Legal sources:**

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Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, published in the Official Journal of the European Communities No L 118 of 14.5.2003.

Council Framework Decision 2004/757/JHA of 25. October 2004 on laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, published in the Official Journal of the European Communities No L 335 of 11.11.2004.

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<sup>6</sup> Point d of the first paragraph of article three of Council framework decision on combating the sexual exploitation of children and child pornography.