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ADDENDUM TO INITIATIVE

from : Slovenian, French, Czech, Swedish, Slovak, United Kingdom and German delegations

dated : 14 January 2008

Subject: Draft Council Framework Decision 200.../.../JHA of... on the enforcement of judgments *in absentia* and modifying:

- Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States
- Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties
- Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders
- (Framework Decision .../.../JHA of ... on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union)

Delegations will find in the Annex an explanatory memorandum in respect of the above initiative on "*in absentia*", which was presented by the Republic of Slovenia, the French Republic, the Czech Republic, the Kingdom of Sweden, the Slovak Republic, the United Kingdom and the Federal Republic of Germany.

EXPLANATORY MEMORANDUM

to the

INITIATIVE

presented by the Republic of Slovenia, the French Republic, the Czech Republic, the Kingdom of Sweden, the Slovak Republic, the United Kingdom and the Federal Republic of Germany

for a

Council Framework Decision 200.../.../JHA of.... on the enforcement of judgments *in absentia* and modifying:

- Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States ¹
- Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties ²
- Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders ³
- (Framework Decision/.../JHA of on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union) ⁴

Introduction

This initiative for a Framework Decision aims at strengthening the rights of the citizens by providing a clear and consistent approach to the issue of recognition of decisions rendered "*in absentia*". The initiative also aims at enhancing the application of the principle of "mutual recognition" in the field of cooperation within the European Union on criminal matters.

¹ OJ L 190, 18.7.2002, p. 1.

² OJ L 76, 22.3.2005, p. 16.

³ OJ L 328, 24.11.2006, p 59.

⁴ OJ ... (last version of draft text: 9688/07 COPEN 86 + COR 1 REV 1)

Mutual recognition

The Conclusions of the Tampere European Council of 15 and 16 October 1999 established the principle of mutual recognition of judicial decisions as the cornerstone of police and judicial cooperation in the European Union. In the Hague Programme of 4-5 November 2004, the principle of mutual recognition was reiterated.

In application of the principle of mutual recognition, a judicial authority in one Member State will enforce a decision issued by a judicial authority in another Member State in accordance with the terms specified by the relevant EU legislative act. Some exceptions may apply to this rule. In the Framework Decisions adopted by the Council in the field of cooperation in criminal matters, these exceptions are notably listed in the "grounds for non-recognition". In application of such a ground for non-recognition, a judicial authority in one Member State may decide not to enforce a decision issued by a judicial authority in another Member State.

Ground for non-recognition related to decisions rendered *in absentia*

One of the grounds for non-recognition that appears in Framework Decisions on the execution of judicial decisions is related to decisions rendered *in absentia*, that means when the person concerned did not personally appear in the proceedings resulting in the decision. Such a ground for non-recognition is contained in Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States ⁵, in Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, in Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders, and in the Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (finalised but not yet adopted) ⁶.

⁵ The ground for non-recognition is legally dressed up as an obligation to give guarantees for retrial in accordance with the requirements specified by the executing State.

⁶ The Framework Decision could be further expanded by making modifications to the Framework Decision on the recognition and supervision of suspended sentences, alternative sanctions and conditional sentences ("probation"), on which the Council reached a general approach on 6/7 December 2007.

These four Framework Decisions contain, however, different solutions in respect of the issue of decisions rendered *in absentia*. For example, a confiscation order must be enforced even if the person concerned was absent during the procedure but was represented by a lawyer, whereas in the same circumstances the executing authority could refuse to execute a decision imposing a fine. A European arrest warrant must be enforced in certain cases if, despite not having been notified of the criminal procedure leading to a prison sentence, the person concerned is entitled to apply for a retrial in the issuing State. The enforcement of confiscation orders, decisions imposing a fine or a custodial sentence may not be rejected if the person did not contest the decision⁷, without specifying whether or not the person – under the law of the issuing State – had in fact a right to a retrial but did not make use of it.

Objectives of the initiative: clarifying citizens rights and enhancing mutual recognition

The above-mentioned issues relating to decisions rendered *in absentia* cause two kind of problems. Firstly it leads to an unclear situation for citizens as regards their fundamental rights. In respect notably of the Framework Decision on the European arrest warrant, there is also a problem of legal certainty, since this Framework Decision uses language that leaves considerable room for interpretation. Secondly, the divergence in the solutions for decisions rendered *in absentia* causes problems in the practical implementation of the legislative acts and impedes effective judicial cooperation.

The present initiative for a Framework Decision tries to address these problems. It aims at strengthening the rights of the citizens by clarifying and rendering more compatible the criteria for applying the ground for non-recognition related to decisions rendered *in absentia*. This provides for a higher level of protection of their fundamental rights at Union level and fosters legal certainty. At the same time, the initiative facilitates the application of the principle of mutual recognition. The initiative tries in fact to find the right balance between these two goals, while taking account of the specificities of the various national legal systems.

⁷ The precise wording of the text on this issue differs between the Framework Decisions concerned. The meaning also differs between the various language versions of each of these Framework Decisions.

Specific objective: taking more account of a right to a retrial

Although a retrial is defined in different ways in the various national legal orders, it appears that a retrial can be defined as new proceedings on the same subject-matter as the proceedings which took place *in absentia* and which are characterized by the following three elements: a) the person concerned has the right to be present, b) the merits of the case will be (re)examined, and c) the proceedings can lead to reversing the original decision rendered *in absentia*.

As briefly observed above, in the current state of affairs only the Framework Decision on the European arrest warrant contains the obligation to execute a decision rendered *in absentia* when there is an appropriate right to a retrial in the issuing State. However, the solution in the Framework Decision on the European arrest warrant is not satisfactory because it provides that the European arrest warrant must be executed only if the issuing authority can provide guarantees "deemed adequate" on the right to a retrial. This has been interpreted differently among the Member States and has in some Member States led to the executing authority determining what these guarantees should be, thus slowing down procedures.

This initiative introduces in all four Framework Decisions an exception to the ground of non-recognition related to the existence of a right to a retrial within a defined minimum timeframe. In the case of the Framework Decision on the European arrest warrant such a right to a retrial may have been granted prior to issuing the European arrest warrant or will be granted following the surrender. In the case of the other three Framework Decisions, a right to a retrial must have been available (but not exercised) before the request to enforce the judgment/decision is sent to another Member State.

Direct modification of the four Framework Decisions

In order to achieve the above mentioned objectives, the initiative proceeds by direct modification of the four Framework Decisions. This drafting technique has been adopted to maximize transparency and clarity regarding the nature and precise effect of the amendments proposed.

The initiative bears only upon cross-border cases. No harmonisation or approximation of national law is necessary in respect of domestic cases. The initiative will not lead to broadening of the scope of the four Framework decisions.

The clear and common approach to the issue of decisions rendered *in absentia* provided by this initiative for a Framework Decision should also be of assistance as a basis for future instruments at Union level.

Comments regarding specific provisions

Article 1

Article 1 defines the objective and the scope of the proposal. The Framework Decision intends to safeguard procedural standards in criminal proceedings in the context of the mutual recognition of judicial decisions between Member States.

Articles 2, 3, 4 and 5 (general)

These Articles list the modifications that should be made to the four Framework Decisions concerned.

Firstly, the Articles define the term "decision rendered *in absentia*" as a decision (sentence/order/judgment, as applicable) when the person did not personally appear in the proceedings⁸ resulting in this decision. It must be emphasised that the scope of this definition is limited to the scope of the Framework Decisions concerned. The definition is not a measure of approximation of national legislation in respect of purely domestic cases and does not affect other or more precise definitions of the term "decision rendered *in absentia*" which may exist at national level.

⁸ The exact meaning in this context of the term "proceedings" may need to be further defined.

The proposed amendment of Article 1 of the Framework Decision on financial penalties should not have any effect on the obligation for the executing State to enforce decisions pursuant to Article 1(a)(ii) of that Framework Decision, under which a decision requiring a financial penalty to be paid may also be taken by an authority other than a court, provided that the person concerned has had an opportunity to have the case tried by a court (see box g, paragraph 1, subparagraph ii, of the certificate accompanying that Framework Decision).

Secondly, the Articles introduce a consistent approach to the possibility of refusing to enforce or execute a decision rendered *in absentia*. The standard rule is that the executing judicial authority may refuse to enforce or execute a decision rendered *in absentia*. By way of derogation, however, it is provided that this possibility ceases to exist

- if the person was summoned in person or informed in accordance with the national law of the issuing State via a competent representative and in due time of the hearing which lead to the decision rendered *in absentia*, and was informed about the fact that such a decision might be handed down in case he/she did not appear for the trial; or
- after being served with the decision rendered *in absentia* and being informed about the right to a retrial and to be present at that trial, the person expressly stated that he/she did not contest the decision or did not request a retrial within a defined timeframe.

This solution has been tailor-made in all four Framework Decisions. It must however be noted that the provisions relating to decisions rendered *in absentia* in the Framework Decision on the European arrest warrant have been made more detailed than those in the other three instruments, because in the case of the European arrest warrant it is possible to take into account the fact that, although the person has not been served yet with the decision, it can be ensured that such notification will take place after the surrender and the person may thus have a right to a retrial following the surrender.

Thirdly, the Articles provide revised sections for the certificates that are included as annexes to the Framework Decisions.

Article 2

Article 2 concerns the modifications that should be introduced in Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.

The Article introduces the following modifications in the Framework Decision on the European arrest warrant:

- Article 4a(a) provides that the person should be summoned in person or informed about the hearing in accordance with the national law of the issuing State via a competent representative and in due time. The existing requirement in the Framework Decision is only that the person must have been summoned in person or otherwise informed, which is unclear. The new wording is largely taken from the Framework Decision on the mutual recognition of financial penalties. Similar wording also appears in the Framework Decision on confiscation orders;
- the new provision of Article 4a(b)(i) foresees that European arrest warrants may be executed in cases where the person, having been served with the judgment and being expressly informed about the right to a retrial and be present at that trial, expressly indicates that he/she does not contest it. At present the Framework Decision on the European arrest warrant does not specifically contain such a provision, which means that there may be uncertainty as to the execution of a European arrest warrant;
- the new provision of Article 4a(b)(ii) addresses the case where the person has been served with the judgment and was expressly informed about the right to a retrial and be present at that trial, but chose not to request such a retrial within a defined timeframe. At present these circumstances are not specifically mentioned in the Framework Decision on the European arrest warrants;

- the new provision of Article 4a(c) is related to the case where the person was not served with the judgment. It is more precise than the current version, which does not formally contain a ground for non-recognition but merely provides that the executing State may make surrender conditional on the existence of an opportunity for the person to apply for a retrial. This situation will however only apply where none of the other circumstances apply (see above). The provision also introduces new requirements to ensure that the person will be informed of his entitlement and be given a reasonable time to exercise it.

Article 3

Article 3 concerns the modifications that should be introduced in Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

At present, if the penalty results from proceedings *in absentia*, authorities can refuse to execute fines, unless the certificate states that the person was informed of the proceedings or indicated that he did not contest the decision. If the requesting authorities cannot certify these matters then the fine may not be enforceable.

In view of the above, Article 3, which keeps in line with Article 2, inserts a new provision in the Framework Decision to cover cases where the subject of the fine had an entitlement to apply for a retrial but chose not to exercise it.

To be noted that Article 3(2)(b) corresponds with the current wording of Article 7(2)(g)(ii), second indent, of the Framework Decision on financial penalties. It appears, however, that the wording of this subparagraph is different in the various language versions of the Framework Decision. It is also unclear which conditions must be met for assuming that the person "does not contest the case". It will need to be determined whether or not - and if so, with what specific meaning - this subparagraph should be retained.

Articles 4 and 5

These Articles make changes equivalent to those in Article 3 to apply to the Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (Article 4), and to the Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union which, at the time of the production of this report, is finalised but not adopted yet (Article 5).

Articles 6 and 7

The Articles on "implementation" and on "entry into force" are standard provisions.
