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NOTE

from : Presidency

to: Coreper/Council

No. prev. doc. : 8207/06 COPEN 40

Subject : Draft 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

I INTRODUCTION

Austria, Finland and Sweden submitted on 24 January 2005 a proposal for a 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.¹

The European Parliament has been invited to give its opinion on the proposal.

¹ See 5597/05 COPEN 13 + ADD 1, 7307/05 COPEN 54 and OJ C 150, 21.6.2005, page 1.

Following proceedings in the Working Party on cooperation in criminal matters on 14-15 March, the Article 36 Committee examined at its meeting on 11-12 April 2006 on the basis of 8207/06 COPEN 40 the question of double criminality in relation to the recognition of judgments and enforcement of sentences under the draft Framework Decision.

On the basis of these discussions, the Presidency submits the proposals set out under II below with a view to reaching agreement on the matter at the April JHA Council.

A revised version of the draft resulting from the discussions of the Working Party on other issues will be circulated in a separate document.

II DOUBLE CRIMINALITY

a. Relation to the European Arrest Warrant

The Presidency will at a later stage propose separate provisions on the procedure to follow in cases covered by Articles 4(6) and 5(3) of the Framework Decision on the European Arrest Warrant. These provisions will take as a starting point that for such cases the decision resulting in that the person concerned shall serve his or her sentence in the executing State is taken under that Framework Decision and not under the present draft Framework Decision.

The question of double criminality submitted to Coreper/Council therefore does not concern the EAW cases.

b. Presidency proposals

The original proposal provided for a derogation from double criminality for 32 offences corresponding to the derogation found in previous instruments on mutual recognition.

However, a large majority of delegations thought that in the case of transfer of sentenced persons it should be possible for the executing State to invoke double criminality.

Others (FR/SE/BE/ES/PT/DK/COM) thought that the text should contain a binding derogation from the principle of double criminality in respect of the list of 32 offences.

On the basis of comments made, the Presidency has established options A and B set out in the Annex:

- Option A provides in Article 7(1) that the executing State after having consulted the issuing State may refuse to recognise a judgment and enforce a sentence on the basis of lack of double criminality. As refusal is optional, the text allows Member States to derogate from double criminality if they wish to do so, for example for humanitarian reasons. The text in Article 7(3) in square brackets introduces the possibility for Member States to declare that they will not make use of the possibility to refuse recognition of the judgment and enforcement of the sentence for lack of double criminality in respect of the list of 32 offences.¹
- Option B provides as a starting point in Article 7(1) for a derogation from double criminality for 32 offences as in the original proposal. However, Member States may under Article 7(4) by a declaration opt out of Article 7(1). If option B is retained, it needs to be examined whether the possibility to opt out should be absolute or limited. The inclusion of the text in square brackets in Article 7(4) would imply that a declaration could only be made for specified reasons (e.g. where the derogation from double criminality would be against fundamental principles of law of the executing State or could aggravate the situation for the sentenced person). Where a declaration has been made, refusal based on lack of double criminality is possible. However, refusal in the concrete case remains optional, and the text retains the principle that the executing State must consult the issuing State before refusing (see Article 9(2)).

A Council Statement is also proposed. The Statement could be adopted irrespective of which of the options is chosen.

¹ This proposal has partly been based on the approach followed in the draft Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway.

The Presidency notes that option A is in line with the majority view. Option B on the other hand represents the view of the minority and could imply that a majority of Member States would need to make a declaration to opt out of the derogation from double criminality. It could therefore at first sight appear that option A is the best basis to work on. However, in the view of the Presidency, option B leaves more scope for continuing discussions for the purpose of finding a compromise. Therefore, in the view of the Presidency, work should continue at experts level on the basis of option B and should focus on whether the possibility under that option to opt out of the derogation from double criminality should be absolute or could be limited in some way.

Coreper/Council is invited to agree that further discussions at experts level of the question of double criminality shall be based on option B.

Presidency proposals based on text in 7724/06 COPEN 29.**OPTION A****1. Article 7 is worded as follows:**

"Article 7
Scope

1. Subject to paragraph 2 [and paragraph 3], the executing State may make recognition of judgments and enforcement of sentences subject to the condition that they relate to acts which also constitute an offence under the law of the executing State, whatever the constituent elements or however it is described.
- [2. Paragraph 1 does not apply to cases referred to in Articles 4(6) and 5(3) of the Framework Decision on the European Arrest Warrant.]¹
- [3. Each Member State may, at the time of the adoption of the Framework Decision or later, by a declaration notified to the Secretary General of the Council, declare that it, in relation to other Member States which have made the same declaration, will not apply paragraph 1 in respect of the following offences, as they are defined by the law of the issuing State, if they are punishable in the issuing State by a custodial sentence or a measure involving deprivation of liberty for a maximum period of at least three years:
 - participation in a criminal organisation,
 - terrorism,
 - trafficking in human beings,

¹ The Article 36 Committee is invited not to discuss paragraph 2 at this stage. Its inclusion or otherwise in the text will be considered in the context of future Presidency proposals in relation to the EAW cases. See point II.a of the cover note.

- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests¹,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,

¹ OJ C 316, 27.11.1995, p. 49.

- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.]

[4. Any declaration made under paragraph 3 may be withdrawn at any time. Such declarations and withdrawals shall be published in the OJ.]

2. Articles 9(1)(b) and 9(2) are maintained unchanged.

OPTION B

1. Article 7 is worded as follows:

"Article 7
Scope

1. The following offences, if they are punishable in the issuing State by a custodial sentence or a measure involving deprivation of liberty for a maximum period of at least three years, and as they are defined by the law of the issuing State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to recognition of the judgment and enforcement of the sentence imposed :

- participation in a criminal organisation,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,

- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests ¹,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,

¹ OJ C 316, 27.11.1995, p. 49.

- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

2. The Council may decide to add other categories of offences to the list in paragraph 1 at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the Treaty. The Council shall examine, in the light of the report submitted to it pursuant to Article 21(4) of this Framework Decision, whether the list should be extended or amended.

3. For offences other than those covered by paragraph 1, the executing State may make the recognition of the judgment and enforcement of the sentence subject to the condition that it relates to acts which also constitute an offence under the law of the executing State, whatever the constituent elements or however it is described.
4. Each Member State may, at the time of the adoption of the Framework Decision or later, by a declaration notified to the Secretary General of the Council declare that it will not apply paragraph 1 [for the reason that the application of that provision would be against fundamental principles of its law or could aggravate the situation for the sentenced person]. Any such declaration may be withdrawn at any time. Such declarations or withdrawals of declarations shall be published in the OJ.
- [5. The present Article does not apply to cases referred to in Articles 4(6) and 5(3) of the Framework Decision on the European Arrest Warrant.]¹

2. **In Article 9(1)(b) the reference "In a case referred to in Article 7(1)" is replaced by "In a case relating to an offence covered by Article 7(3) or (4)".**
3. **The reference to Article 9(1)(b) in Article 9(2) is maintained.**
4. **The following Council Statement is introduced^{2 3}:**

"The Council takes note that the agreement on Articles 7, 9(1)(b) and 9(2) is without prejudice to:

- the positions of the Member States in respect of solutions to be found regarding future instruments on mutual recognition in criminal matters, and
- the interpretation of existing instruments on mutual recognition in criminal matters."

¹ The Article 36 Committee is invited not to discuss paragraph 5 at this stage. Its inclusion or otherwise in the text will be considered in the context of future Presidency proposals in relation to the EAW cases. See point II.a of the cover note.

² Text based on a declaration adopted at the adoption of the Framework Decision on the application of the principle of mutual recognition to financial penalties (see page 3 of 5871/1/05 REV 1 COPEN 23).

³ The Statement could also be applied in relation to OPTION A.