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THE EUROPEAN UNION**

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| from : | Presidency |
| to : | Coreper |
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| Subject : | Proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings |
| | - Outstanding issues |

Introduction

On 26/27 February 2009, the Council (Justice and Home Affairs) reached agreement "in principle" on conclusions in respect of some selected issues, as set out in 6417/1/09 REV 1 COPEN 32.

In the light of this agreement, the Article 36 Committee, the Working Party on Cooperation in Criminal Matters, the Friends of the Presidency Group and the JHA Counsellors continued their work on the text of the Framework Decision. The text resulting from the JHA Counsellors meeting on 25 March 2009, as elaborated by the Presidency, is set out in the Annex to this note.

All Member States have a general scrutiny reservation on the text; FR, IE, NL and UK also have a Parliamentary scrutiny reservation.

The Presidency considers that it is appropriate to bring this file to the Council with a view to reaching a general approach on the text of the draft Framework Decision. Therefore, the Presidency calls upon Coreper to solve the last outstanding issues, which can be identified as follows:

Outstanding issues

A. Article 12(2): Cooperation with Eurojust

Article 12(2) currently reads as follows:

“Where it has not been possible to reach consensus in accordance with Article 10, the matter shall [, where appropriate,] be referred to Eurojust by any competent authority of the Member States involved, if Eurojust is competent to act under Article 4(1) of the Eurojust Decision.”

At the meeting of CATS on 24 March 2009, many delegations and the Commission expressed the wish to keep the provision as it stands, without the words “where appropriate”. They underlined that the Framework Decision, in view of its restricted scope, only applies to a very limited number of cases. These are however serious cases, in which there is a "bis-in-idem" risk; it would be highly undesirable if these cases would be left unattended and without solution in a situation where the competent authorities could not find consensus. Some delegations also questioned what the words “where appropriate” would exactly mean.

However, some delegations opposed an unqualified obligation to refer an unresolved case of conflict of jurisdiction with a “bis in idem” risk to Eurojust. They therefore wanted to keep the words “where appropriate” in the provision. The main argument they advanced was that they did not wish to extend the competences of Eurojust, which were just recently revised during the negotiations on the amended Eurojust Decision.

The Presidency holds that the Framework Decision would be deprived of an essential element of added value if the words “where appropriate” were inserted. Moreover, in the view of Presidency, this obligatory referral should be considered only as the reinforced link to Eurojust within the framework of already existing competences in the amended Eurojust Decision. The newly inserted obligation would concern only the referral; the procedure of dealing with a case in Eurojust, however, would remain unaffected, including the legal nature of the opinion of Eurojust.

In this respect and given the fact that there was a majority who agreed with the new obligation, the Presidency suggests to leave the text unchanged.

However, as a way of compromise between the two groups, the Presidency is willing to consider the insertion of the words “where possible”, instead of “where appropriate”. A corresponding recital to this wording “where possible” might also be considered, if necessary, to describe the situations, where it would apply under objective considerations, e.g. “the competent authorities should refer the case to Eurojust unless objective circumstances don't allow to do so.”

Such a provision in Article 12(2) would then read as follows:

“Where it has not been possible to reach consensus in accordance with Article 10, the matter shall, where possible, be referred to Eurojust by any competent authority of the Member States involved, if Eurojust is competent to act under Article 4(1) of the Eurojust Decision.”

COREPER is invited to confirm the text of Article 12 (2), without the insertion of the words “where appropriate possible” or alternatively, with the phrase “where possible” instead of “where appropriate.”

B. Article 2(2): Application of European Community Competition Law

Article 2(2) in previous document read as follows:

“This Framework Decision shall not apply to any proceedings which [...] have as their object the application of European Community Competition Law”

This provision was originally inserted due to the fact that the Council regulation 1/2003 foresees a system of parallel competences between the competition authorities and the Commission, where however the initiation of proceedings by the Commission ends the competence of the national authorities for any given case. The competition enforcement regime, where the procedures and sanctions are applied by the national competition authorities in respect of infringements of Article 81 and 82 EC Treaty, is qualified in some Member States as “administrative” and in some Member States as “criminal (notably the Irish and Danish system).

The Commission maintains that if the Framework Decision does not have a provision clarifying that the procedures for the enforcement of the EC competitions rules are not covered, it could be invoked for certain competition enforcement regimes in the EU. The authorities concerned could thereby find themselves in two overlapping regimes. In this respect the Commission suggests a provision which clarifies that this Framework Decision shall not apply to proceedings for application of Articles 81 and 82 of the EC Treaty.

At the meeting of the JHA Counsellors on 25 March, DK indicated that it would rather see an explicit reference to Council regulation 1/2003 in the Article, or have the paragraph deleted. No Member States opposed the latter suggestion, apart from NL who entered a reservation on the deletion and Council Legal Service who suggested keeping this provision.

The Presidency is flexible concerning this issue.

COREPER is invited to decide whether the deletion will be kept or whether the provision should be returned into the text.

C. Article 16: Implementation

Two items:

- a) NL has a reservation on the implementation period of 24 months and suggests prolonging the period to 36 month.

The issue was discussed at the JHA Counsellors meeting on 25 March. Some Member States supported the suggestion of NL, while a majority of Member States and the Commission preferred keeping a period of 24 months. The Presidency suggests keeping the 24 months period, since it is not convinced that implementation of such an important measure should be delayed. The said deadline is also a “standard” period ensuring the gradual progress of enactment the EU legislation.

- b) Obligation to provide a correlation table.

A vast majority of the Member States strongly opposed the request of the Commission of inserting an obligation relating to the submission by Member States a correlation table in the text. The Council Legal Service could also accept that a requirement to provide a correlation table would not be inserted in the text. The Presidency suggests therefore not to follow the suggestion of the Commission.

COREPER is invited to confirm the current text of Article 16.

Concluding remarks

The Presidency invites Coreper to solve the above mentioned outstanding issues with a view to allowing the April JHA Council to reach a general approach on the text, awaiting the opinion of the European Parliament. The general approach shall relate to the operative part of the text only, thus excluding the recitals, except for recital 9, where it should be confirmed that the examples of criteria are listed therein. However, the exact wording, as well as which criteria should be included, will be the subject of further examination in the COPEN Working Party.

Subsequent to the April JHA Council, the Presidency will propose a solution regarding a declaration/recommendation/ conclusions for the other than *ne-bis-in-idem* cases, in line with the conclusions of the February JHA Council.

After the general approach has been reached and the text of the recitals has been agreed, the Presidency suggests submitting the text as modified to the European Parliament through the official channels, with a view to allowing the European Parliament to take account of this new text in the course of the current procedure of delivering an opinion. Unless Coreper advises otherwise, it is assumed that Coreper agrees with this suggestion.

Proposal for a

COUNCIL FRAMEWORK DECISION 2009/.../JHA

of

on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31(1)(c) and (d) and Article 34(2)(b) thereof,

Having regard to the initiative of the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden,

Having regard to the Opinion of the European Parliament ¹,

Whereas ²:

- (1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice.

¹ Opinion of ... (not yet published in the Official Journal).

² The recitals have not yet been examined.

- (2) The Hague Programme on strengthening freedom, security and justice in the European Union requires Member States to consider legislation on conflicts of jurisdiction, with a view to increasing the efficiency of prosecutions while guaranteeing the proper administration of justice, so as to complete the comprehensive programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters.
- (3) The measures provided for in this Framework Decision should aim to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, which might lead to the final disposal of those proceedings in two or more Member States. The Framework Decision therefore seeks to promote the application of the "ne-bis-in-idem" principle, as set out in Article 54 of 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 (OJ L 239, 22.9.2000, p. 19) as interpreted by the European Court of Justice.
- (4) Direct consultations should lead to consensus on any effective solution aimed at avoiding the adverse consequences arising from parallel proceedings. Such effective solution, which could notably consist in the concentration of the criminal proceedings in one Member State (for example through the transfer of criminal proceedings) or in any other efficient and reasonable allocation in time of those proceedings (where for example a referral of the case to Eurojust should also be considered as an effective solution, when competent authorities are not able to reach consensus), should avoid waste of time and resources of the competent authorities concerned. In this respect, specific attention should be paid to the issue of gathering the evidence which can be influenced by the parallel proceedings being conducted.

- (5) When a competent authority in a Member State has reasonable grounds to believe that parallel criminal proceedings are being conducted in another Member State in respect of the same facts involving the same person(s), which could lead to the final disposal of those proceedings in two or more Member States, it should contact the competent authority of that other Member State. The question whether or not reasonable grounds exist is examined solely by the contacting authority. Reasonable grounds could, inter alia, include cases where the suspected or accused person invokes, supported by relevant elements of proof, that he/she is subject to parallel criminal proceedings in respect of the same facts in another Member State, or in case a relevant request for mutual legal assistance by a competent authority in another Member State reveals the possible existence of such parallel criminal proceedings, or in case police authorities provide information to this effect.
- (6) The process of contact and response between competent authorities should be based upon the obligatory exchange of a specific minimum set of information, which should always be provided. The information concerned should notably facilitate the process of ensuring the proper identification of the persons concerned and the nature/stage of the respective parallel proceedings.
- (7) A competent authority which has been contacted by a competent authority of another Member State should have a general obligation to reply to a request submitted by that authority. The contacting authority is encouraged to set a deadline within which the contacted authority should respond, if possible. The specific situation of the persons deprived from liberty should be fully taken into account by the competent authorities throughout the procedure of taking contact.

- (8) Direct contact between competent authorities should be the leading principle of cooperation established under the Framework Decision. Member States should have discretion to decide which authorities should be competent to act in accordance with this Framework Decision, in compliance with the principle of national procedural autonomy, provided that such authorities should have competence to intervene and decide accordingly with its provisions.
- (9) When striving to reach consensus on any effective solution aimed at avoiding the adverse consequences arising from parallel proceedings being conducted in two or more Member States, the competent authorities should bear in mind that each case is specific and that all its facts and merits should be taken into account. In order to reach consensus, the competent authorities should consider relevant criteria, including those set out in the Guidelines which were published in the Eurojust Annual Report 2003 and which were drawn up for the needs of practitioners, such as for example the place where the major part of the criminality occurred, the place where the majority of the loss was sustained, the location of the suspected or accused persons and possibilities for securing their surrender or extradition to other jurisdictions, the nationality or residence of the suspected or accused persons, significant interests of the suspected or accused persons, significant interests of victims and witnesses, the admissibility of evidence or any delays that may occur.
- (10) No Member State should be obliged to surrender or to exercise jurisdiction unless it wishes to do so. If consensus cannot be reached, the Member States should retain their right to initiate or continue criminal proceedings for any criminal offence which falls within their national jurisdiction. Where consensus has been reached on the concentration of criminal proceedings in one Member State, the competent authorities in the other Member State should act in a way that is compatible with that consensus.
- (11) The very aim of this Framework Decision is to prevent unnecessary parallel criminal proceedings, its application should not give rise to a conflict of jurisdiction which would not occur otherwise. In the common area of security, freedom and justice the principle of mandatory prosecution should be understood and applied in a way that it is deemed to be fulfilled when any Member State ensures the effective criminal prosecution for the same criminal offence.

- (12) This Framework Decision is without prejudice to proceedings under the European Convention on the Transfer of Proceedings in Criminal Matters, signed in Strasbourg on 15 May 1972, as well as any other arrangements concerning the transfer of proceedings in criminal matters between the Member States.
- (13) In the situation where competent authorities become aware that the facts which are the subject of ongoing criminal proceedings in one Member State were the subject of proceedings which have been finally disposed of in another Member State (ne bis in idem situation which prevents further proceedings in first Member State), an exchange of information to enable the authorities of each Member State to consider the position in relation to its proceedings should be encouraged. The purpose of that exchange of information should be to provide the competent authorities of the Member State where the proceedings have been finally disposed of with information and evidence enabling them to possibly reopen the proceedings in accordance with their national law.
- (14) This Framework Decision should not lead to undue bureaucracy in cases where for the problems addressed more suitable options are readily available. Thus in situations where more flexible instruments or arrangements are in place between Member States, those should prevail over this Framework Decision.
- (15) This Framework Decision is limited to establishing provisions on direct contact and direct consultations between the competent authorities of the Member States and therefore leaves the question whether or not individuals shall have the right to argue that they should be prosecuted in their own or in another jurisdiction a matter of national law of the Member States.
- (16) Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters¹ should apply to the protection of personal data provided under this Framework Decision.

¹ OJ L 350, 30.12.2008, p. 60.

- (17) When making a declaration concerning the language regime, Member States are encouraged to include at least one language which is commonly used in the European Union other than their official language.
- (18) This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union,

HAS ADOPTED THIS FRAMEWORK DECISION:

CHAPTER 1

GENERAL PRINCIPLES

Article 1

Objective

1. The objective of this Framework Decision is to promote a closer cooperation between the competent authorities of two or more Member States conducting criminal proceedings, with a view to improving the efficient and proper administration of justice.
2. Such closer cooperation aims to:
 - a) prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, which might lead to the final disposal of the proceedings in two or more Member States thereby constituting an infringement of the principle of "ne-bis-in-idem"; and
 - (b) reach consensus on any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings.

Article 2

Subject matter and scope

1. With a view to achieving the objective set out in Article 1, this Framework Decision establishes a framework
 - a) on a procedure for establishing contact between the competent authorities of Member States, with a view to confirming the existence of parallel criminal proceedings in respect of the same facts involving the same person(s),
 - b) on the exchange of information, through direct consultations, between the competent authorities of two or more Member States conducting parallel criminal proceedings in respect of the same facts involving the same person(s), in case they already have knowledge of the existence of parallel criminal proceedings, with a view to reaching consensus on any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings.
2. (deleted)

Article 3
Definitions

For the purposes of this Framework Decision:

- (a) "parallel proceedings" means criminal proceedings, including both the pre-trial and the trial phase, which are conducted in two or more Member States concerning the same facts involving the same person(s);
- (b) "competent authority" means a judicial authority or another authority, which is competent, under the law of the Member State to which it belongs, to carry out the acts envisaged by Article 2(1) of this Framework Decision;
- (c) "contacting authority" means a competent authority of a Member State, which takes contact with a competent authority in another Member State with a view to confirming the existence of parallel proceedings;
- (d) "contacted authority" means the competent authority which is asked by a contacting authority to confirm the existence of parallel criminal proceedings.

Article 4

Determination of competent authorities

1. Member States shall determine the competent authorities in a way that promotes the principle of direct contact between authorities.
2. In accordance with paragraph 1, each Member State shall inform the General Secretariat of the Council which authorities under its national law are competent to act in accordance with this Framework Decision.
3. Notwithstanding paragraphs 1 and 2, each Member State may designate, if it is necessary as a result of the organisation of its internal system, one or more central authorities responsible for the administrative transmission and reception of requests for information according to Article 5 and/or for the purpose of assisting the competent authorities in the consultation process. Member States wishing to make use of the possibility to designate a central authority or authorities shall communicate this information to the General Secretariat of the Council.
4. The General Secretariat of the Council shall make the information received under this Article available to all Member States and to the Commission.

CHAPTER 2

EXCHANGE OF INFORMATION

Article 5

Obligation to contact

1. When a competent authority in a Member State has reasonable grounds to believe that parallel proceedings are being conducted in another Member State, it shall contact the competent authority of that other Member State to confirm the existence of such parallel proceedings, with a view to initiating direct consultations as provided in Article 10.
2. If a contacting authority does not know the identity of the competent authority to be contacted, it shall make all necessary inquiries, including via the contact points of the European Judicial Network, in order to obtain the details of that competent authority.
3. The procedure of taking contact does not apply when the competent authorities conducting parallel proceedings have already been [...] informed of the existence of these proceedings by any other means.

Article 6

Obligation to reply

1. The contacted authority shall reply to a request submitted in accordance with Article 5(1) within the reasonable deadline indicated by the contacting authority, or, if no deadline has been indicated, without undue delay, and inform the contacting authority whether parallel proceedings are taking place in its Member State. In cases where the contacting authority has informed the contacted authority that the suspected or accused person is held in provisional detention or custody, the latter authority shall treat the request as a matter of urgency.
2. If the contacted authority cannot provide a reply within the deadline set by the contacting authority, it shall promptly inform the contacting authority of the reasons thereof and indicate the deadline within which it shall provide the requested information.
3. If the authority which has been contacted by a contacting authority is not the competent authority under Article 4, it shall without undue delay transmit the request for information to the competent authority and shall inform the contacting authority accordingly.

Article 7

Means of communication

The contacting and contacted authorities shall communicate by any means whereby a written record can be produced.

Article 8

Minimum information to be provided in the request

1. When submitting a request in accordance with Article 5, the contacting authority shall provide the following information:
 - (a) contact details of the competent authority;
 - (b) a description of the facts and circumstances that are the subject of the criminal proceedings concerned;
 - (c) all relevant details about the identity of the suspected and accused person and about the victims, if applicable;
 - (d) the stage that has been reached in the criminal proceedings; and
 - (e) information about provisional detention or custody of the suspected or accused person, if applicable.

2. The contacting authority may provide relevant additional information relating to the criminal proceedings that are being conducted in its Member State, e.g. relating to any difficulties which are being encountered in that State.

Article 9

Minimum information to be provided in the response

1. The response by the contacted authority in accordance with Article 6 shall contain the following information:
 - (a) whether criminal proceedings are being or were conducted in respect of some or all of the same facts as those which are subject of the criminal proceedings referred to in the request for information submitted by the contacting authority, and whether the same persons(s), or at least some of them, are involved;

in case of a positive answer under (a):
 - (b) contact details of the competent authority;
 - (c) the stage of these proceedings, or, where appropriate, the nature of the final decision.
2. The contacted authority may provide relevant additional information relating to the criminal proceedings that are being or were conducted in its Member State, in particular concerning any related facts which are the subject of the criminal proceedings in that State.

CHAPTER 3

DIRECT CONSULTATIONS

Article 10

Obligation to enter into direct consultations

1. When it is established that parallel proceedings exist, the competent authorities of the Member States concerned shall enter into direct consultations in order to reach consensus on any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings, which may, where appropriate, lead to the concentration of the criminal proceedings in one Member State.

2. As long as the direct consultations are being conducted, the competent authorities concerned shall inform each other of any important procedural measures which they have taken in the proceedings.

3. In the course of the direct consultations, competent authorities involved in these consultations shall whenever reasonably possible reply to requests for information emanating from other competent authorities that are involved in these consultations. However, when a competent authority is requested by another competent authority to provide specific information which could harm essential national security interests or could jeopardise the safety of individuals, it is not required to provide that information.

Article 11

[...] Procedure of reaching consensus

When the competent authorities of Member States enter into direct consultations on a case in order to reach consensus in accordance with Article 10, they shall consider the facts and merits of the case and all the factors which they consider to be relevant.

Article 12

Cooperation with Eurojust

1. This Framework Decision shall be complementary and without prejudice to Council Decision 2009/.../JHA¹ of ... on the strengthening of Eurojust and amending Decision 2002/187/JHA ("Eurojust Decision").
2. Where it has not been possible to reach consensus in accordance with Article 10, the matter shall [, where possible,] be referred to Eurojust by any competent authority of the Member States involved, if Eurojust is competent to act under Article 4(1) of the Eurojust Decision.

Article 13

Providing information about the outcome of the proceedings

If during the course of the direct consultations in accordance with Article 10 consensus has been reached on the concentration of the criminal proceedings in one Member State, the competent authority of that Member State shall inform the competent authority of the other Member State(s) about the outcome of the proceedings.

¹ OJ: insert number, date and publication references of Decision set out in doc.14927/08.

CHAPTER 4

GENERAL AND FINAL PROVISIONS

Article 14

Languages

1. Each Member State shall state in a declaration deposited with the General Secretariat of the Council which languages, among the official languages of the institutions of the European Union, may be used in the procedure of taking contact in accordance with Chapter 2.
2. The competent authorities may agree to use any language in the course of their direct consultations in accordance with Article 10.

Article 15

Relation to legal instruments and other arrangements

1. Insofar as other legal instruments or arrangements allow the objectives of this Framework Decision to be extended or help to simplify or facilitate the procedure under which national authorities exchange information about their criminal proceedings, enter into direct consultations and try to reach consensus on any effective solution aimed at avoiding adverse consequences arising from the parallel proceedings, the Member States may:
 - (a) continue to apply bilateral or multilateral agreements or arrangements in force when this Framework Decision comes into force;
 - (b) conclude bilateral or multilateral agreements or arrangements after this Framework Decision has come into force.
2. The agreements and arrangements referred to in paragraph 1 shall in no case affect relations with Member States which are not parties to them.

Article 16

Implementation

Member States shall take the necessary measures to comply with the provisions of this Framework Decision by [24 months after publication of the FD in the OJ].

By the same date Member States shall transmit to the General Secretariat of Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.

Article 17

Report

The Commission shall, by [36 months after publication of the FD in the OJ] , submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Framework Decision, accompanied, if necessary, by legislative proposals.

Article 18

Entry into force

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

Done at Brussels,

For the Council

The President
