

III

(Preparatory Acts)

COUNCIL

Initiative of 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 with a view to adopting a Council Framework Decision 2008/.../JHA on the enforcement of decisions rendered *in absentia* and amending Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders, and Framework Decision 2008/.../JHA 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

(2008/C 52/01)

THE COUNCIL OF THE EUROPEAN UNION,

in absentia. This diversity complicates the work of the practitioner and hampers judicial cooperation.

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

Having regard to the initiative from 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 ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Whereas:

(1) The right for an accused person to be present during hearings of the trial is a fundamental right provided in the United Nations' International Covenant on Civil and Political Rights (Article 14(3)(d)). The European Court of Human Rights declared that it is included in the right to a fair trial provided in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It also declared that such right of the accused person to be present during hearings is not absolute and that under certain conditions the accused person may waive the right to be present.

(2) The various Framework Decisions implementing the principle of mutual recognition of final judicial decisions do not deal consistently with the issue of decisions rendered

(3) Solutions provided by these Framework Decisions are not satisfactory as regards cases where the person could not be informed of the proceedings. Framework Decisions 2005/214/JHA ⁽³⁾, 2006/783/JHA ⁽⁴⁾ and 2008/.../JHA ⁽⁵⁾ allow the executing authority to refuse the execution of such judgments. Framework Decision 2002/584/JHA ⁽⁶⁾ allows the executing authority to require the issuing authority to give an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment. The adequacy of such guarantee is a matter to be decided by the executing authority and it is therefore difficult to know exactly when execution may be refused.

(4) It is therefore necessary to provide clear and common solutions which define the grounds for refusal and the discretion left to the executing authority.

(5) Such changes require amendment of the existing Framework Decisions implementing the principle of mutual recognition of final judicial decisions. The new provisions should serve as a basis for future instruments in this field.

⁽³⁾ OJ L 76, 22.3.2005, p. 16.

⁽⁴⁾ OJ L 328, 24.11.2006, p. 59.

⁽⁵⁾ OJ L ...

⁽⁶⁾ OJ L 190, 18.7.2002, p. 1.

⁽¹⁾ OJ C ...

⁽²⁾ OJ C ...

- (6) Common solutions on grounds for refusal in the relevant existing Framework Decisions should take into account the diversity of situations with regard to informing the accused person of his right to a retrial.
- (7) This Framework Decision is limited to the definition of grounds for refusal in instruments implementing the principle of mutual recognition. Therefore, provisions such as the definition of the concept of decision rendered *in absentia* or rules on the right to a retrial have a scope which is limited to the definition of these grounds for refusal. They are not designed to harmonise national legislation,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Objective and scope

1. The objective of this Framework Decision is to ensure the procedural rights of persons subject to criminal proceedings and at the same time to facilitate judicial cooperation in criminal matters and in particular to improve mutual recognition of judicial decisions between Member States.
2. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty, and any obligations incumbent upon judicial authorities in this respect shall remain unaffected.
3. The scope of this Framework Decision is to establish common rules for the recognition and/or execution of judicial decisions in one Member State (the executing Member State) issued by another Member State (the issuing Member State) following proceedings where the person was not present, according to the provisions in Article 5(1) of Framework Decision 2002/584/JHA, in Article 7(2)(g) of Framework Decision 2005/214/JHA, in Article 8(2)(e) of Framework Decision 2006/783/JHA and Article 9(1)(f) of Framework Decision 2008/.../JHA.

Article 2

Amendments to Framework Decision 2002/584/JHA

Framework Decision 2002/584/JHA is hereby amended as follows:

1. the following paragraph shall be added to Article 1:

'4. For the purpose of this Framework Decision, "decision rendered *in absentia*" shall mean a custodial sentence or a detention order when the person did not personally appear in the proceedings resulting in that decision.'

2. the following Article shall be inserted:

'Article 4a

Decisions rendered *in absentia*

The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order, if the decision was rendered *in absentia*, unless the European arrest warrant states that the person:

- (a) was summoned in person or informed in accordance with the national law of the issuing Member State through a competent representative and in due time, of the scheduled date and place of the hearing which led to the decision rendered *in absentia* and informed about the fact that such a decision may be handed down in case the person does not appear for the trial;
- (b) after being served with the decision rendered *in absentia* and being expressly informed about the right to a retrial and to be present at that trial:
- (i) expressly stated that he or she does not contest the decision rendered *in absentia*;
- or
- (ii) did not request a retrial in the applicable timeframe which was of at least [...] (*) days;
- or
- (c) was not personally served with the decision rendered *in absentia* but:
- (i) will be served with it at the latest on the fifth day after the surrender and will be expressly informed about the right to a retrial and to be present at that trial;
- and
- (ii) will have at least [...] (*) days to request a retrial.'

3. in Article 5, paragraph 1 shall be deleted;

(*) Period to be provided.

4. in the Annex (EUROPEAN ARREST WARRANT), box (d) shall be replaced by the following:

<p>‘(d) Indicate if the decision was rendered <i>in absentia</i>:</p>
<p>1. <input type="checkbox"/> No, it was not.</p>
<p>2. <input type="checkbox"/> Yes, it was. If you have answered yes, please confirm that:</p>
<p><input type="checkbox"/> 2.1. the person was summoned in person or informed in accordance with the national law of the issuing Member State through a competent representative and in due time, of the scheduled date and place of the hearing which led to the decision rendered <i>in absentia</i> and informed about the fact that such a decision may be handed down in case the person does not appear for the trial</p>
<p><i>Time and place when and where the person was summoned or otherwise informed:</i></p> <p>.....</p>
<p><i>Describe how the person was informed:</i></p> <p>.....</p>
<p>or</p>
<p><input type="checkbox"/> 2.2. the person, after being served with the decision rendered <i>in absentia</i>, expressly stated that he or she does not contest the decision rendered <i>in absentia</i></p>
<p><i>Describe when and how the person expressly stated that he or she does not contest the decision rendered in absentia:</i></p> <p>.....</p>
<p>or</p>
<p><input type="checkbox"/> 2.3. the person was entitled to a retrial under the following conditions:</p>
<p><input type="checkbox"/> 2.3.1. the person was personally served with the decision rendered <i>in absentia</i> on ... (day/month/year), and</p>
<p>— the person was expressly informed about the right to a retrial and to be present at that trial, and</p>
<p>— after being informed of this right, the person had ... days to request a retrial and he or she did not request it during this period.</p>
<p>or</p>
<p><input type="checkbox"/> 2.3.2. the person was not served with the decision rendered <i>in absentia</i>, and</p>
<p>— the person will be served with the decision rendered <i>in absentia</i> within ... days after the surrender, and</p>
<p>— when served with the decision rendered <i>in absentia</i>, the person will be expressly informed about the right to a retrial and to be present at that trial, and</p>
<p>— after being served with the decision rendered <i>in absentia</i>, the person will have ... days to request a retrial.’</p>

Article 3

Amendments to Framework Decision 2005/214/JHA

Framework Decision 2005/214/JHA is hereby amended as follows:

1. the following point shall be added to Article 1:

'(e) "Decision rendered *in absentia*" shall mean a decision as defined in (a) when the person did not personally appear in the proceedings resulting in that decision.;

2. Article 7(2) is hereby amended as follows:

(a) point (g) shall be replaced by the following:

'(g) according to the certificate provided for in Article 4, the person concerned, in case of a written procedure was not, in accordance with the law of the issuing State, informed personally or through a representative, competent according to national law, of his right to contest the case and of time limits of such a legal remedy;';

(b) the following point shall be added:

'(i) according to the certificate provided for in Article 4, the decision was rendered *in absentia*, unless the certificate states that the person:

(i) was summoned in person or informed in accordance with the national law of the issuing State through a competent representative and in due time, of the scheduled date and place of the hearing which led to the decision rendered *in absentia* and informed about the fact that such a decision may be handed down in case the person does not appear for the trial; or

(ii) expressly stated to a competent authority that he or she does not contest the case; or

(iii) 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:

— expressly stated that he or she does not contest the decision rendered *in absentia*,

or

— did not request a retrial in the applicable timeframe which was of at least [...] (*) days.;

3. in box (h) of the Annex (certificate), point 3 is replaced by the following:

'3. Indicate if the decision was rendered <i>in absentia</i> :
1. <input type="checkbox"/> No, it was not.
2. <input type="checkbox"/> Yes, it was. If you have answered yes, please confirm that:
<input type="checkbox"/> 2.1. the person was summoned in person or informed in accordance with the national law of the issuing State through a competent representative and in due time, of the scheduled date and place of the hearing which led to the decision rendered <i>in absentia</i> and informed about the fact that such a decision may be handed down in case the person does not appear for the trial
<i>Time and place when and where the person was summoned or otherwise informed:</i>
.....
<i>Describe how the person was informed:</i>
.....
or

(*) Period to be provided.

<input type="checkbox"/> 2.2.	the person, before or after being served with the decision rendered <i>in absentia</i> , expressly stated that he or she does not contest the decision rendered <i>in absentia</i>
	<i>Describe when and how the person expressly stated that he or she does not contest the decision rendered in absentia:</i>

	or
<input type="checkbox"/> 2.3.	the person was served with the decision rendered <i>in absentia</i> on ... (day/month/year) and was entitled to a retrial in the issuing State under the following conditions:
	— the person was expressly informed about the right to a retrial and to be present at that trial, and
	— after being informed of this right, the person had ... days to request a retrial and did not request it during this period.'

Article 4

Amendments to Framework Decision 2006/783/JHA

Framework Decision 2006/783/JHA is hereby amended as follows:

1. the following point shall be added to Article 2:

'(i) "Decision rendered *in absentia*" shall mean a confiscation order as defined in (c) when the person did not personally appear in the proceedings resulting in that decision.'

2. in Article 8(2), point (e) shall be replaced by the following:

'(e) according to the certificate provided for in Article 4(2), the decision was rendered *in absentia*, unless the certificate states that the person:

(i) was summoned in person or informed in accordance with the national law of the issuing State through a competent representative and in due time, of the scheduled date and place of the hearing which led to the confiscation order rendered *in absentia* and informed about the fact that such a confiscation order may be handed down in case the person does not appear for the trial;

or

(ii) after being served with the confiscation order rendered *in absentia* and being informed about the right to a retrial and to be present at that trial:

— expressly stated that he she does not contest the confiscation order,

or

— did not request a retrial in the applicable timeframe which was of at least [...] (*) days.;

(*) Period to be provided.

3. in the Annex (certificate), box (j) shall be replaced by the following:

‘(j) Indicate if the decision was rendered <i>in absentia</i> :	
1.	<input type="checkbox"/> No, it was not.
2.	<input type="checkbox"/> Yes, it was. If you have answered yes please confirm that:
<input type="checkbox"/> 2.1.	the person was summoned in person or informed in accordance with the national law of the issuing State through a competent representative and in due time, of the scheduled date and place of the hearing which led to the decision rendered <i>in absentia</i> and informed about the fact that such a decision may be handed down in case the person does not appear for the trial
<i>Time and place when and where the person was summoned or otherwise informed:</i>	
.....	
<i>Describe how the person was informed:</i>	
.....	
or	
<input type="checkbox"/> 2.2.	the person, after being served with the decision rendered <i>in absentia</i> , expressly stated that he or she does not contest the decision rendered <i>in absentia</i>
<i>Describe when and how the person expressly stated that he or she does not contest the decision rendered in absentia:</i>	
.....	
or	
<input type="checkbox"/> 2.3.	the person was served with the decision rendered <i>in absentia</i> on ... (day/month/year) and was entitled to a retrial in the issuing State under the following conditions:
—	the person was expressly informed about the right to a retrial and to be present at that trial, and
—	after being informed of this right, the person had ... days to request a retrial and did not request it during this period.’

Article 5

Amendments to Framework Decision 2008/.../JHA

Framework Decision 2008/.../JHA is hereby amended as follows:

1. the following point shall be added to Article 1:

‘(e) “Decision rendered *in absentia*” shall mean a judgment as defined in (a) when the person did not personally appear in the proceedings resulting in that decision.’;

2. in Article 9(1), point (f) shall be replaced by the following:

(f) according to the certificate provided for in Article 4, the decision was rendered *in absentia*, unless the certificate states that the person:

(i) was summoned in person or informed in accordance with the national law of the issuing State through a competent representative and in due time, of the scheduled date and place of the hearing which led to the decision rendered *in absentia* and informed about the fact that such a decision may be handed down in case the person does not appear for the trial;

or

(ii) 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:

— expressly stated that he or she does not contest the decision rendered *in absentia*,

or

— did not request a retrial in the applicable timeframe which was of at least [...] (*) days.;

3. in box (k) of the Annex (certificate), point 1 shall be replaced by the following:

1. Indicate if the decision was rendered <i>in absentia</i> :
a. <input type="checkbox"/> No, it was not.
b. <input type="checkbox"/> Yes, it was. If you have answered yes please confirm that:
<input type="checkbox"/> b.1. the person was summoned in person or informed in accordance with the national law of the issuing State through a competent representative and in due time, of the scheduled date and place of the hearing which led to the decision rendered <i>in absentia</i> and informed about the fact that such a decision may be handed down in case the person does not appear for the trial
<i>Time and place when and where the person was summoned or otherwise informed:</i>
.....
<i>Describe how the person was informed:</i>
.....
or
<input type="checkbox"/> b.2. the person, after being served with the decision rendered <i>in absentia</i> , expressly stated that he or she does not contest the decision rendered <i>in absentia</i>
<i>Describe when and how the person expressly stated that he or she does not contest the decision rendered in absentia:</i>
.....
or

(*) Period to be provided.

<input type="checkbox"/> b.3. the person was served with the decision rendered <i>in absentia</i> on ... (day/month/year) and was entitled to a retrial in the issuing State under the following conditions:
— the person was expressly informed about the right to a retrial and to be present at that trial, and
— after being informed of this right, the person had ... days to request a retrial and did not request it during this period.'

Article 6

Implementation

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by ... (*).
2. Member States shall transmit to the General Secretariat of the 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 7

Review

1. By ... (**), the Commission shall draw up a report on the basis of the information received from the Member States pursuant to Article 6.
2. On the basis of the report referred to in paragraph 1, the Council shall assess:
 - (a) the extent to which Member States have taken the necessary measures in order to comply with this Framework Decision; and
 - (b) the application of this Framework Decision.
3. The report referred to in paragraph 1 shall be accompanied, where necessary, by legislative proposals.

Article 8

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

...

(*) 18 months after the date of entry into force of this Framework Decision.
(**) Date to be provided.