

III

(Preparatory Acts)

COUNCIL

Initiative of the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden for a Council Framework Decision 2009/.../JHA on prevention and settlement of conflicts of jurisdiction in criminal proceedings

(2009/C 39/03)

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:

- (1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice.
- (2) According to the Hague Programme for strengthening freedom, security and justice in the European Union ⁽²⁾, adopted by the European Council at its meeting on 4 and 5 November 2004, with a view to increasing the efficiency of prosecutions, while guaranteeing the proper administration of justice, particular attention should be given to possibilities of concentrating the prosecution in cross-border multilateral cases in one Member State and further attention should be given to additional proposals, including conflicts of jurisdiction 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, in particular, to prevent and resolve conflicts of jurisdiction, ensure that the jurisdiction where the proceedings take place is the most appropriate one and bring more transparency and objectivity to the choice of criminal jurisdiction in situations where the facts of a case fall within the jurisdiction of two or more Member States.
- (4) In situations where facts fall within the jurisdiction of several Member States and may lead to a conflict of jurisdiction, it cannot be guaranteed that the jurisdiction which is chosen to conduct criminal proceedings is the most appropriate one or is chosen in a transparent and objective way having regard to the specific circumstances of a case and to the characteristics of each of the possible jurisdictions. In a common European area of freedom, security and justice it is necessary to take action to ensure that national authorities are made aware, at an early stage, of facts which may give rise to a conflict of jurisdiction and that agreement is reached to concentrate, as far as possible, criminal proceedings for such facts in a single jurisdiction having regard to common and objective criteria and to transparency.
- (5) This Framework Decision should apply to two situations. In the first situation it establishes a procedure for exchange of information where competent authorities of one Member State conduct criminal proceedings for specific facts and need to find out if there are ongoing proceedings for the same facts in other Member States. In the second situation, competent authorities of one Member State conduct criminal proceedings for specific facts and become aware, by means other than notification procedure, that competent authorities of other Member States are already conducting criminal proceedings for the same facts. In such a situation the notification procedure should not apply and the respective States should enter into direct consultations.
- (6) This Framework Decision is not intended to solve negative conflicts of jurisdiction, this is where no Member State has established its jurisdiction over the criminal offence committed. The situation where a Member State has established its jurisdiction but is not willing to exercise it should be considered for the purposes of this Framework Decision as a specific category of a positive conflict of jurisdiction.

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

⁽²⁾ OJ C 53, 3.3.2005, p. 1.

- (7) None of the Member States concerned should be obliged to give up or take over jurisdiction unless it wishes to do so. If agreement cannot be reached the Member States should retain their right to initiate criminal proceedings for any criminal offence which falls within their national jurisdiction.
- (8) This Framework Decision does not affect the legality principle and opportunity principle as governed by the national law of the Member States. Nevertheless, as 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.
- (9) This Framework Decision is without prejudice to, and is not intended to regulate even indirectly, the *ne bis in idem* principle as recognised by the Convention Implementing the Schengen Agreement ⁽¹⁾ and by the relevant case-law of the Court of Justice of the European Communities.
- (10) 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.
- (11) Where the accused is a national or resident of another Member State, this should not as such be automatically regarded as a significant link.
- (12) When describing the facts which are the subject of the criminal proceedings in the notification, the notifying authority should in particular state precisely where, when and how the offence was committed, as well as the details of the suspect or person accused, in order for the responding authority to determine whether criminal proceedings for the same facts are being conducted in its Member State.
- (13) Direct consultations can be initiated by any of the Member States concerned and by whatever means of communication.
- (14) This Framework Decision states when it is mandatory for the respective authorities to enter into direct consultations. However, nothing should prevent the authorities entering voluntarily into direct consultations in order to agree on the best placed jurisdiction in any other situation.
- (15) In the situation where competent authorities become aware that the facts which are the subject of ongoing or anticipated criminal proceedings in one Member State were the subject of proceedings which have been finally disposed of in another Member State, the ensuing exchange of information 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.

- (16) 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.
- (17) This Framework Decision should be complementary and without prejudice to the Council Decision 2008/.../JHA of ... on the strengthening of Eurojust and amending Decision 2002/187/JHA ⁽²⁾ and it should make use of mechanisms already existing within Eurojust.
- (18) 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 matters ⁽³⁾ should apply to the protection of personal data provided under this Framework Decision.
- (19) 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

Subject matter and scope

1. This Framework Decision establishes:
 - (a) the procedural framework under which national authorities shall exchange information about ongoing criminal proceedings for specific facts in order to find out whether there are parallel ongoing proceedings for the same facts in other Member State(s) and under which their national authorities shall enter into direct consultations in order to reach an agreement on the best placed jurisdiction for conducting criminal proceedings for specific facts which fall within the jurisdiction of two or more Member States;
 - (b) rules and common criteria which shall be taken into account by the national authorities of two or more Member States whenever they seek agreement on the best placed jurisdiction for conducting criminal proceedings for specific facts.

⁽¹⁾ OJ L 239, 22.9.2000, p. 19.

⁽²⁾ OJ ... (not yet published in the Official Journal).

⁽³⁾ OJ L 350, 30.12.2008, p. 60.

2. This Framework Decision shall apply to the following situations:

(a) where the competent authorities of one Member State conduct criminal proceedings and discover that facts which are the subject of these proceedings demonstrate a significant link to one or more other Member States, and it is possible that the competent authorities of such other Member State(s) are conducting criminal proceedings for the same facts;

or

(b) where the competent authorities of one Member State conduct criminal proceedings and by whatever means become aware that the competent authorities of one or more other Member States conduct criminal proceedings for the same facts.

3. This Framework Decision shall not apply to situations where no Member State has established its jurisdiction over the committed criminal offence.

4. This Framework Decision shall not apply to any proceedings brought against undertakings if such proceedings have as their object the application of European Community competition law.

5. This Framework Decision does not confer any rights on a person to be invoked before the national authorities.

Article 2

Definitions

For the purposes of this Framework Decision:

- (a) 'notifying State' means the Member State whose competent authorities notify the competent authorities of another Member State or invite the competent authorities of another Member State to enter into direct consultations;
- (b) 'responding State' means the Member State whose competent authorities are notified or are invited to enter into direct consultations by the competent authorities of another Member State;
- (c) 'ongoing proceedings' means criminal proceedings, including pre-trial stage, conducted under national law by the competent authorities of a Member State for specific facts;
- (d) 'notifying authority' means an authority designated under national law to notify the authorities of another Member State about the existence of ongoing proceedings for a criminal offence, to receive responses to such notifications and to discuss and agree with a competent authority of another Member State the question of which is the best placed jurisdiction for conducting criminal proceedings for specific facts which fall within the jurisdiction of those Member States;
- (e) 'responding authority' means an authority designated under national law to receive and respond to notifications about the existence of ongoing proceedings for a criminal offence in another Member State and to consult and agree with a competent authority of another Member State the question of which is the best placed jurisdiction for conducting crim-

inal proceedings for specific facts which fall within the jurisdiction of those Member States.

Article 3

Determination of notifying and responding authorities

1. Each Member State shall inform the General Secretariat of the Council as to which authority has been designated to act as notifying authority and as responding authority. A Member State may decide to designate a single authority to act both as notifying and responding authority.

2. The General Secretariat of the Council shall make the information received available to all Member States and the Commission and publish it in the *Official Journal of the European Union*.

Article 4

Possibility of assigning the tasks of a designated authority to another national authority

1. At any stage of the procedure which is provided for in this Framework Decision, a notifying or a responding authority may decide to assign its tasks as designated authority under Article 3(1) to another national authority, for example to an authority with responsibility under national law for conducting criminal proceedings.

2. If a decision is taken in accordance with paragraph 1, it shall be immediately communicated to the notifying or responding authority of the Member State concerned together with the contact details of the assigned authority.

3. The decision referred to in paragraph 1 shall take effect as of the receipt of communication in accordance with paragraph 2.

CHAPTER 2

EXCHANGE OF INFORMATION

Article 5

Notification

1. In the event that the authorities of a Member State, which are competent under national law to conduct criminal proceedings, discover that facts which are the subject of ongoing proceedings demonstrate a significant link to one or more Member States, the notifying authority of the first Member State shall as soon as practicable notify the existence of these proceedings to the responding authority(ies) of the Member State(s) significantly linked to them in order to find out whether the responding Member State(s) is/are conducting criminal proceedings for the same facts.

2. The obligation to notify pursuant to paragraph 1 applies only to criminal offences punishable in the notifying State by a custodial sentence or a detention order for a maximum period of at least one year and as they are defined by the law of the notifying Member State.

*Article 6***Significant link**

1. A link shall always be regarded as 'significant' where the conduct or its substantial part which gives rise to the criminal offence took place in the territory of another Member State.
2. In proceedings which contain a link to another Member State, other than the one referred to in paragraph 1, the decision as to whether a certain link is to be regarded as significant shall be taken on a case-by-case basis by reference, in particular, to the common criteria listed in Article 15(2).

*Article 7***Procedure of notification**

1. The notifying authority shall notify the responding authority by any means whereby a written record can be produced to allow the responding State to establish the authenticity of notification.
2. If the responding authority is unknown, the notifying authority shall make all necessary inquiries, including via the contact points of the European Judicial Network or Eurojust, in order to obtain the details of the responding authority from the responding State.
3. If the authority in the responding State which receives the notification is not the competent responding authority under Article 3, it shall automatically transmit the notification to the competent authority and shall inform the notifying authority accordingly.

*Article 8***Form and content of the notification**

1. The notification shall contain the following information:
 - (a) details of the national authority or authorities which are dealing with the case;
 - (b) a description of the facts which are the subject of the notified ongoing proceedings, including the nature of the significant link;
 - (c) the stage that has been reached in the ongoing proceedings; and
 - (d) details about the suspect and/or accused person, if known, and about the victims, if applicable.
2. The notification may contain any other relevant additional information relating to the ongoing proceedings in the notifying State, for example as to any difficulties which are being encountered in the notifying State.
3. The notifying authority shall use Form A set out in the Annex.

*Article 9***Form and content of the response**

1. The response shall contain the following information:
 - (a) details of the national authority or authorities which are dealing or dealt with the case, if applicable;
 - (b) whether proceedings for some or all of the facts which are the subject of the notification are ongoing in the responding State and the stage that has been reached;
 - (c) whether proceedings for some or all of the facts which are the subject of the notification have been dealt with in the responding State, including the nature of the final decision;
 - (d) whether the authorities of the responding State intend to initiate their own criminal proceedings for specific facts which are the subject of the notification, if applicable.
2. The response may contain any other relevant additional information, in particular concerning any distinct but related facts which are the subject of proceedings in the responding State.
3. When responding to a notification, the responding authority shall use Form B set out in the Annex.

*Article 10***Time limits and additional information**

1. A responding authority shall respond to a notification within a period of 15 days from the date of receipt.
2. If necessary, this time limit may be extended by an additional period of up to 15 days. However, the responding authority shall notify such an extension within the time limit set out in paragraph 1.
3. If a responding authority finds the information from the notifying authority insufficient to enable it to respond, it may within the time limit set out in paragraph 1 request that the necessary additional information be furnished and may fix a reasonable time limit for the receipt thereof.
4. The time limit set out in paragraph 1 shall be renewed after the receipt of additional information.

*Article 11***Absence of a response**

If a responding authority does not respond within the time limits provided in Article 10, a notifying authority may take any measures it considers appropriate in order to bring the matter to the attention of the responding State, including notification thereof to Eurojust.

CHAPTER 3

DIRECT CONSULTATIONS*Article 12***Direct consultations**

1. When transmitting the response or following its transmission a notifying authority and a responding authority shall enter into direct consultations in order to agree on the best placed jurisdiction for conducting criminal proceedings for specific facts which may fall within the jurisdiction of both, if:

- (a) there are ongoing proceedings in a responding State for some or all of the facts which are the subject of a notification; or
- (b) the authorities of a responding State intend to initiate criminal proceedings for some or all of the facts which are the subject of a notification.

2. The national authorities shall enter into direct consultations in accordance with paragraph 1 in the event that the responding authorities of more than one Member States are notified for the same ongoing proceedings. In such an event, the relevant notifying authority shall be responsible for coordinating these consultations.

3. In the absence of a notification, two or more Member States shall enter into direct consultations, through their respective notifying or responding authorities, in order to agree on the best placed jurisdiction, if they become aware, by whatever means, that parallel criminal proceedings for the specific facts are ongoing or anticipated.

*Article 13***Providing information on important procedural acts or measures**

Notifying and responding authorities which enter into direct consultations shall inform each other of any important procedural measures they take after the commencement of consultations.

CHAPTER 4

DETERMINATION OF THE BEST PLACED JURISDICTION*Article 14***Aim of the consultations**

1. The general aim of the consultations on the best placed jurisdiction shall be to agree that the competent authorities of a single Member State will conduct criminal proceedings for all

the facts which fall within the jurisdiction of two or more Member States.

2. When there are ongoing proceedings in any Member State for facts which are related but are not identical to the facts which are the subject of the consultations on the best placed jurisdiction or when it is not practicable to conduct criminal proceedings in a single Member State in particular because of the complexity of the facts or of the number of accused persons involved, it may be more appropriate to conduct criminal proceedings in two or more Member States which would respectively cover different facts or different persons.

*Article 15***Criteria to determine the best placed jurisdiction**

1. There shall be a general presumption in favour of conducting criminal proceedings at the jurisdiction of the Member State where most of the criminality has occurred which shall be the place where most of the factual conduct performed by the persons involved occurs.

2. Where the general presumption according to paragraph 1 does not apply due to the fact that there are other sufficiently significant factors for conducting the criminal proceedings, which strongly point in favour of a different jurisdiction, the competent authorities of Member States shall consider those additional factors in order to reach an agreement on the best placed jurisdiction. Those additional factors shall include, in particular, the following:

- location of the accused person or persons after an arrest and possibilities for securing their surrender or extradition to the other possible jurisdictions,
- nationality or residence of the accused persons,
- territory of a State where most of the damage was sustained,
- significant interests of victims,
- significant interests of accused persons,
- location of important evidence,
- protection of vulnerable or intimidated witnesses whose evidence is of importance to the proceedings in question,
- the residence of the most important witnesses and their ability to travel to the Member State where most of the criminality has occurred,
- stage of proceedings reached for the facts in question,
- existence of ongoing related proceedings,
- economy of the proceedings.

*Article 16***Cooperation with Eurojust**

1. Any national authority shall be at liberty, at any stage of a national procedure, to

- (a) ask for Eurojust's advice;
- (b) take a decision to refer to Eurojust specific cases which raise the question of the best placed jurisdiction.

2. Where, in the cases which fall within the competence of Eurojust, it has not been possible to reach an agreement on the best placed Member State jurisdiction for conducting criminal proceedings for specific facts, the disagreement, as well as situations where an agreement has not been reached within 10 months after entry into direct consultations, shall be referred to Eurojust by any Member State involved.

*Article 17***Cases where an agreement has not been reached**

In those exceptional situations, where

- (a) an agreement has not been reached even after the intervention of Eurojust in accordance with Article 16;
- or
- (b) in cases which do not fall within the competence of Eurojust, the direct consultations were terminated by a disagreement or situations where an agreement has not been reached within 6 months after entry into direct consultations,

the Member States shall inform Eurojust about the reasons of the failure to reach an agreement.

CHAPTER 5

MISCELLANEOUS*Article 18***Other exchange of information**

1. Where the competent authorities of one Member State discover by whatever means that facts which are the subject of ongoing or anticipated proceedings in that Member State were the subject of proceedings which have been finally disposed of in another Member State, the notifying authority of the first Member State may inform the responding authority of the second Member State of this situation and transmit all the relevant information.

2. If the responding authority discovers, either by way of notification or by whatever other means, that the facts which were the subject of proceedings which have been finally

disposed of in its Member State are the subject of ongoing or anticipated proceedings or were the subject of ongoing proceedings in another Member State, the responding authority may consider whether it will request additional information that would enable it to duly assess the possibility of reopening the proceedings under national law.

CHAPTER 6

GENERAL AND FINAL PROVISIONS*Article 19***Languages**

Each Member State shall state in a declaration deposited with the General Secretariat of the Council the languages in which it will accept the notification referred to in Article 5 and languages in which it will respond to the notification.

*Article 20***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 ongoing proceedings, enter into direct consultations and try to reach an agreement on the best placed jurisdiction for conducting criminal proceedings for the specific facts which fall within the jurisdiction of two or more Member State, 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.

3. Member States shall, within three months from the entry into force of this Framework Decision, notify the General Secretariat of Council and the Commission of the existing agreements and arrangements referred to in paragraph 1(a) which they wish to continue applying.

Member States shall also notify the General Secretariat of Council and the Commission of any new agreement or arrangement as referred to in paragraph 1(b), within three months of signing any such arrangement or agreement.

4. This Framework Decision shall be without prejudice to Decision 2008/.../JHA.

*Article 21***Implementation**

Member States shall take the necessary measures to comply with the provisions of this Framework Decision by ...

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 22***Report**

The Commission shall, by ..., 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 23***Entry into force**

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

Done at Brussels, ...

For the Council

The President

ANNEX

NOTIFICATION

on ongoing criminal proceedings according to Art. 8 (Form A)

Notifying State:

Responding State:

Responding authority:

Notifying authority (or competent authority according to Art. 4) – contact details:

Name:

Address:

Tel. no.: (country code) (area/city code)

Fax no.: (country code) (area/city code)

Details of the person(s) to be contacted:

Name:

Position (title/grade):

File reference:

Tel. no.: (country code) (area/city code)

Fax no.: (country code) (area/city code)

E-mail (if any):

Languages that may be used for communication:

Description of facts which are subject of the notified ongoing proceedings:
(including where, when and how the alleged offence was committed):

Significant link / reasons which lead the notifying authority to believe that there could be ongoing proceedings in the responding State (if the link refers to a particular place within the responding State, please indicate as precisely as possible this place):

Stage of the proceedings that has been reached:

Details of the suspect (s) (if applicable):

Name:

Nationality:

Date of birth:

Address:

.....

Details of the victims (if applicable):

Additional information:

Signature and official stamp:

RESPONSE

to the notification according to Art. 9 (Form B)

Responding State:

Notifying State:

Notifying authority:

Response to notification (file no.):

Responding authority (or competent authority according to Art.4) – contact details:

Name:

Address:

Tel. no.: (country code) (area/city code)

Fax no.: (country code) (area/city code)

Details of the person(s) to be contacted:

Name:

Position (title/grade):

File reference:

Tel. no.: (country code) (area/city code)

Fax no.: (country code) (area/city code)

E-mail (if any):

Languages that may be used for communication:

Yes, there are ongoing proceedings in the responding State:

for some or all of the facts described in the notification, including the same person

Name:

Nationality:

Date of birth:

Address:

.....

for some or all of the facts described in the notification

for related facts to those described in the notification

Stage of the proceedings that has been reached:

Yes, there were ongoing proceedings in the responding State for some or all of the facts which are subject of the notification

Nature of the final decision:

No, there are not any ongoing criminal proceedings for the facts described in the notification

No, there are not ongoing proceedings for some or all of the facts, but the competent authorities of the responding State intend to conduct the proceedings for some or all the facts which are subject of the notification

Contact details of the competent authority (if applicable):

Name:

Address:

Tel. no.: (country code) (area/city code)

Fax no.: (country code) (area/city code)

Details of the person(s) to be contacted:

Name:

Position (title/grade):

File reference:

Tel. no.: (country code) (area/city code)

Fax no.: (country code) (area/city code)

E-mail (if any):

Languages that may be used for communication:

Additional information:

Signature and official stamp: