

EN

EN

EN



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.12.2008
COM(2008) 885 final

REPORT FROM THE COMMISSION

**based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003
on the execution in the European Union of orders freezing property or evidence**

REPORT FROM THE COMMISSION

based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence

1. INTRODUCTION

1.1. Background

The main objective of the Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence is to establish the rules under which a Member State shall recognise and execute in its territory an order freezing property or evidence issued by a judicial authority of another Member State in the context of criminal proceedings. The Framework Decision is based on the system of mutual recognition of judicial decisions in the pre-trial phase under which a freezing order is recognised without any formality, grounds for its refusal are strictly limited and the principle of dual criminality is partly abolished.

1.2. Notifications sent by Member States

Only seven Member States (AT, DK, FI, FR, NL, PL, SE) implemented the Framework Decision before the deadline set (2 August 2005). In the course of 2006 eight more Member States transposed the Framework Decision (BE, CY, CZ, ES, HU, SI, SK, UK) and transmitted the implementing legislation to the Commission. BG and LT transmitted the implementing laws in 2007 (BG implemented the Framework Decision upon accession on 1 January 2007). EE and LV have transposed the provisions of the Framework Decision and notified this to the Commission in 2008.

By the end of October 2008, the Commission had not received the implementing legislation from eight Member States (DE, EL, IE, IT, LU, MT, PT, RO). As a result, when analysing the implementation measures, the Report will not refer to these Member States.

1.3. Method and evaluation criteria

Article 14 of the Framework Decision provides for establishment of a Commission written report on the measures taken by Member States to comply with this instrument by 2 August 2005. The delay in preparing this Report results from the low number of notifications received at the time of the original deadline set by the Framework Decision.

By their nature, framework decisions are binding upon the Member States as to the result to be achieved, but it is a matter for the national authorities to choose the form and method of implementation (the criteria are: clarity, legal certainty, effectiveness). Framework decisions do not entail direct effect. However the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union¹. As the Commission has no authority to initiate infringement procedures against a Member State alleged of not having taken the necessary measures to comply with the provisions of a Council Framework Decision adopted under the third pillar, the nature and the purpose of this Report is limited to an evaluation of the transposition measures taken by the nineteen Member States.

¹ Judgment of the European Court of Justice, Pupino, Case-105/03 (16 June 2005), OJ C 193, 6.08.2005, p. 3

2. EVALUATION

Article 1 - Objective

The objective of the Framework Decision is to establish rules under which a Member State recognises and executes in its territory a freezing order issued by a judicial authority of another Member State in the context of criminal proceedings. Eleven Member States (BE, BG, CZ, DK, EE, ES, FI, LV, SE, SK and vaguely SI) have transposed the objective in their national laws, while the implementing law of eight Member States (AT, CY, FR, HU, LT, NL, PL, UK) did not contain this provision. Some of them explained that this provision is a general rule, therefore it does not need to be implemented.

Article 2 - Definitions

The Framework Decision defines the following terms: "issuing State", "executing State", "freezing order", "property" and "evidence". The implementing laws of Member States more or less cover the definitions in the Framework Decision, but some of them contain only part of the required elements. The majority of Member States did not find it necessary to define "issuing" and "executing State". The definition of freezing order was provided by most Member States except LV and PL. BE and FR invoked national legislation concerning the term "seizure" but provisions have not been enclosed.

Article 3 - Offences

This provision sets up a list of offences for which dual criminality checks are abolished.

A high number of Member States (BG, DK, HU, ES, FI, PL, SK, NL, UK) have implemented the list in Article 3(2) in conformity with the Framework Decision (AT, EE, LT and LV legislation has not been attached). However, BE legislation provides that abortion and euthanasia are not covered by "murder or grievous bodily harm". This is contrary to the Framework Decision since it is the law of the issuing State and not the executing State that determines whether an offence is within the list. For CY, CZ, SE and SI no implementing provision was found.

Article 4 - Transmission of freezing orders

Article 4(1) provides that the freezing order together with the certificate should be transmitted by the judicial authority which issued it directly to the competent authority for execution. According to the legislation of eight Member States (BG, CY, EE, HU, LT, LV, SI and UK), the documents have to be sent through a central authority, which is usually either the Ministry of Justice or the Prosecutor General's Office. Other Member States either provided for a clear reference to "direct" contact between the judicial authorities (FR, SK, ES, NL, SE) or the direct contact results from the list of competent authorities not a central authority (PL). For CZ the decision is sent directly to the competent judicial authority but can also be sent through the Ministry of Justice or Attorney General's Office. BE provided that decisions concerning freezing must be transmitted through the Royal Prosecutors who cannot be regarded as a "central authority" as they only have a formal role in transmitting notifications.

Article 5 - Recognition and immediate execution

In general, almost all implementing laws provide for the swift execution of freezing requests.

• "Immediate" execution (Article 5 (1))

Member States provide various time limits such as execution "without delay" (PL, FI) or "ruling sent within 24h from taking the decision for execution" (BG), "without unnecessary delay" (DK), "forthwith" (CZ, HU), "forthwith and if possible within 24h" (SE). AT, ES and

FR quoted the Framework Decision providing for "immediate" execution. BE invoked national provisions in this regard (provisions not enclosed). Some Member States have not laid down any time limits. EE did not implement the provision pointing out instead many formal obstacles for execution. Those obstacles concern *i. a.* the fact that the "judgment" which is the basis for the freezing has not entered into force, impartiality of the court, the special status of Estonian citizens. UK provided for a vague general provision concerning sending the order for execution.

- **Notification within 24 hours (Article 5 (3))**

In most cases issuing a freezing decision is carried down "immediately". AT and DK provided the time limit laid down in the Framework Decision ("as soon as possible and if possible within 24h"). Some Member States have provided a different time limit, like BE ("24h, 5 days the latest"), BG ("forthwith"), CZ ("within 24h, otherwise without undue delay"), ES and NL ("immediately, within 24h"), FR and LV ("without delay and if possible within 24h"), HU ("forthwith"), EE and LT ("within 24h"), PL ("immediately and, if possible, within one day of receiving the order"), or SK ("within 24h and if not possible - as soon as possible"). Some have not laid down any time limits concerning the issuing of a decision (FI, SE). SI has not implemented this provision at all. Some Member States have also drawn up a provision obliging the competent judicial authority to state reasons in writing why the decision has not been taken within the time limit.

As to the notification of the fact that the decision has been issued (Article 5(3)), generally Member States have not laid down time limits nor even the notification itself. Some Member States though have established time limits, such as BE ("immediately" to the Royal Prosecutor, who notifies "without delay" the issuing Member State), CZ ("forthwith"), ES ("without delay, within 24h"), FI ("without delay and if possible within 24h"), LT ("immediately"), SK ("without delay").

Article 6 - Duration of the freezing

Article 6 (1) states that "The property shall remain frozen in the executing State until that State has responded definitively to any request made under Article 10(1)(a) or (b)". In accordance with paragraph 2 most Member States also provided for the possibility of limiting that period. Paragraph 3 states that a decision lifting the freezing order taken by the judicial authority of the issuing Member State should be executed as soon as possible.

Overall, this Article has been well transposed. Some Member States have not implemented paragraph 3 (AT, EE, SI, UK), some have not laid down a time limit and some have provided a different time limit (BE: "without delay", BG: "immediate"; DK: "without unnecessary delay"; ES: "without delay", HU and SE: "forthwith"). CY only stated that a foreign order may be amended or revised only by a court or any other competent authority of the foreign country which issued the order.

AT implementing law contains a general statement in this regard and its procedure set forth in Article 58 of the law on extradition and mutual assistance (ARHG) is not in line with the provisions of the Framework Decision. Furthermore, AT has not implemented Article 6(3). SI has only implemented provisions concerning national procedures and has not mentioned the issuing State's decision nor notification in this regard. SE transposed only paragraph 3. BG has not provided any time limits in that regard. UK vaguely transposed the first paragraph only.

Article 7 – Grounds for non-recognition or non-execution

Article 7 of the Framework Decision includes four optional grounds for non-recognition or non-execution of the freezing order. Generally most of these grounds for refusal were implemented, but often Member States transposed them as obligatory grounds. A number of Member States did not provide implementing provisions, but in relation to some of them the Council of Europe Convention² will apply (e.g. for CY).

Article 7(2) concerns the possibility of specifying a deadline for the presentation, completion and correction of the certificate or acceptance of an equivalent document, or exempting the issuing judicial authority from this requirement if the information provided is considered sufficient. It has been implemented by most of the Member States (except BE, CY, DK, EE, SI and UK). Article 7(3) concerning the refusal to recognise or execute a freezing order has not been implemented by CY, EE, SI and UK (the Council of Europe Convention³ applies). Article 7(4) concerning the notification of the practical impossibility to execute the freezing order has been implemented partly by FI (only when the property cannot be located) and BG did not set any time limits nor means of notification.

In addition to the grounds for non-recognition or non-execution listed in the Framework Decision, fourteen Member States (BE, BG, CY, CZ, DK, ES, FI, FR, HU, LT, NL, SE, SK, UK) introduced additional grounds for refusal in their national legislation. This is clearly not in compliance with the Framework Decision. The additional grounds concern mainly human rights issues (BE, DK, FR), conflict with general principles of Member States (CY, CZ), or situations where a measure is prohibited by national law or execution is impossible according to national law (ES, HU, NL, UK). There were also grounds related to language regime and to national public order, security and justice interests. Unfortunately Member States referred quite often to national provisions without enclosing them.

Article 8 – Grounds for postponement of execution

Article 8 (a) concerning the possibility of damaging an ongoing criminal investigation has been transposed by most Member States (except CY, EE, SI). In the case of CY the Council of Europe Convention applies.

Many Member States have transposed the ground for postponement where the property or evidence concerned was subject to a freezing order in criminal proceedings, and that until the freezing order is lifted (except: CY, DK, FI, SI). However, only a few Member States (AT, BG, ES, FR, NL) have implemented the ground set forth in subparagraph 'c' (property already otherwise frozen). FR and UK have added additional grounds (respectively: declassification of the document or device and impossibility to remove the evidence from the UK). The overall transposition of Article 8 (2)(3)(4) is rather good (only CY, SE, SI and UK have not implemented them).

Article 9 - Certificate

Article 9(2) states that the certificate transmitted must be translated into the official language or one of the official languages of the executing State. At the same time or at a later date every Member State may declare that it accepts a translation into one or more other official languages of the European Union (Article 9(3)).

Most Member States (AT, BG, DK, ES, FR, HU, PL, UK) accept only their mother tongue as a language in which the certificate can be produced. Some of them have not given any information concerning the language regime. That implies that for the moment only

² The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990

³ *idem*

certificates translated into the national language of that Member State will be recognised (CY and SI). Some of the Member States accept English, in addition to their mother tongue (EE, LT, LV, NL). Some Member States would also accept languages other than their own on the basis of reciprocity (CZ, SK).

BE will accept certificates in French, Dutch, German and English, SE in Swedish, Danish, Norwegian and English and FI in Finnish, Swedish and English (and also in others if the competent prosecutor approves and if there are no obstacles to its being approved).

Article 10 - Subsequent treatment of the frozen property

This Article deals with issues following the freezing decision, namely transmission of requests for transfer of evidence or confiscation.

AT, BE, BG, DK, FR, HU, LT, NL, PL and SK have implemented this Article. CZ, EE, ES, FI, LV, SE, SI, UK have only partly implemented it. In paragraph 3 SK addresses only evidence, not property. CY has not implemented this Article.

Article 11- Legal remedies

Article 11 provides that Member States should ensure that any interested party (including *bona fide* third parties) have effective legal remedies without suspensive effect in order to preserve their legitimate interests in the issuing or executing State. At the same time, the substantive reasons can be challenged only in the issuing State. If the action is brought in the executing State the issuing State should be informed as to the content and the outcome of such an action.

Appeal against the execution of a freezing order is possible for interested parties in all Member States. Some Member States apply national legislation in whole or in part in this regard and that is why some of them have only partly implemented this Article (CY, DK, HU, LT, SI). Some Member States have fixed time limits for filing an appeal.

Member States usually provide for measures without suspensive effect (the exception is BE and CZ in some cases). Not all Member States implemented paragraph 4 concerning the taking of measures necessary to facilitate the exercise of the right of appeal, especially providing information to interested parties. The provision on the possibility of challenging the substantive reasons for a freezing order only in the issuing State has only been implemented by BE, BG, CZ, ES, FI, LV, NL and SK.

Article 12 – Reimbursement

Article 12 provides for a reimbursement of costs paid by the issuing State to the executing Member State for costs paid as compensation for damage for injury caused by executing the freezing order. An exception is made for situations in which the injury is exclusively the result of conduct of the executing State. This provision is without prejudice to national legislation on claims by natural or legal persons for compensation for damage.

Some Member States have not transposed this provision at all (LV, SE, SI, UK), some considered that there was no need to implement it as in such cases the State in question would have to agree bilaterally (FR, LT) or it does not have to be transposed because the provision is an obligation addressed to the government (BE). For other Member States general national provisions in that regard will apply.

BG, DK, EE, ES, FI, PL and SK have transposed this Article in whole or in part. Some Member States (CZ, ES, SK) have different sets of provisions concerning reimbursement depending if they are an issuing or executing State.

3. CONCLUSIONS

Implementation of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence in the national legislation of the Member States of the European Union is not satisfactory. This conclusion is mainly drawn from the low number of notifications, of which some implementing laws do not even refer to the Framework Decision (provisions were adopted in view of implementation of some other international law instruments). CY and UK have covered the provisions of the Framework Decision only partly (CY covered only freezing of property and the UK covered only provisions in relation to evidence). The legislation sent by SI also shows that this Member State is still using the traditional rules on mutual legal assistance as regards requests for freezing and therefore it has not implemented the principle of mutual recognition in that regard.

The nineteen national legislations received by the Commission indicate numerous omissions and misinterpretations. There is still room for improvement, especially concerning direct contact between judicial authorities, grounds for refusal to recognise or execute the freezing order and also reimbursement. However, the swift execution of freezing orders seems ensured.

The Commission invites Member States to consider this Report and to take the opportunity to provide all further relevant information to the Commission and to the Council Secretariat, in order to fulfil their obligations under Article 14 of the Framework Decision. In addition, the Commission encourages those Member State that have signalled that they are preparing relevant legislation, to enact and notify these national measures as soon as possible.