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COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

based on Article 20 of the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties

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1. INTRODUCTION

1.1. Background

Framework Decision 2005/214/JHA applies the principle of mutual recognition to financial penalties imposed by judicial or administrative authorities for the purpose of facilitating enforcement of such penalties in a Member State other than the one in which the penalties were imposed. The Council of the European Union agreed on 29 November 2000, in accordance with the Tampere conclusions, that adopting such an instrument should be given priority within the programme of measures to implement the principle of mutual recognition to decisions in criminal matters.

The Framework Decision applies to all offences in relation to which financial penalties can be imposed. Dual criminality checks were abolished in relation to 39 offences listed in the Framework Decision.

1.2. Notifications sent by Member States

By October 2008, the Commission had received notifications on the national laws transposing the provisions of the Framework Decision from the following eleven Member States: AT, CZ¹, DK, EE, FI, FR, HU, LT, LV, NL, SI². No notification had been received from the following sixteen Member States: BE, BG, CY, DE, EL, ES, IE, IT, LU, MT, PL, PT, RO, SE, SK, UK.

1.3. Method and evaluation criteria

Article 20 of the Framework Decision provides for the establishment of a Commission written report on the measures taken by Member States to comply with this instrument by 22 March 2007. 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 Union³. 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

¹ Received from the General Secretariat of the Council of the EU

² *idem*

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

purpose of this Report is limited to an evaluation of the transposition measures taken by the eleven Member States.

2. EVALUATION

Article 1 – Definitions

Article 1 defines terms such as: 'decision', 'financial penalty', 'issuing State' and 'executing State'.

CZ, HU and NL have covered all these terms but most of the Member States (AT, DK, EE, FI, FR, SI) only transposed definitions of 'decision' and 'financial penalty'. LT and LV have transposed only the definition of 'financial penalty'. A number of transposition laws lack provisions on certain elements of these definitions. The main one is non-recognition of responsibility of legal persons in the CZ national legislation⁴.

Article 2 - Determination of the competent authorities

This Article obliges Member States to notify the General Secretariat of the Council and the Commission which national authorities are competent for the purpose of the Framework Decision. 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 the decisions and to assist the competent authorities.

For some Member States the authorities competent for issuing or executing decisions are national courts (AT, CZ, HU, LT, LV, SI). In other Member States the central authority is designated as issuing or executing authority. This is the case for DK and EE (Ministry of Justice), NL (public prosecutor in Leeuwarden). In FR the Prosecution Service is the competent authority for issuing the decision and public prosecutors for the purpose of executing them.

A central authority for the purpose of transmission of documents is designated in CZ, HU, LT, LV and SI (Ministry of Justice).

FI has designated the Legal Registry Centre as competent authority under Article 2.

Article 3 - Fundamental rights

According to Article 3 the Framework Decision shall not have the effect of amending the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty.

According to several Member States this Article does not require transposition (DK, FR, NL). AT and HU implemented it as an obligatory ground for refusal of execution. Some Member States have invoked national legislation in this regard (LT, SI). FI transposed this provision by laying down a ground for refusal to execute a decision if there are reasonable grounds to

⁴ No declaration based on Article 20(2)(b) has been received so far in relation to limitation of application of provisions concerning the liability of legal persons for a period up to five years from the date of entry into force of the Framework Decision.

suspect that the guarantees of due process were violated in the proceedings leading to the decision.

Article 4 - Transmission of decisions and recourse to the central authority

According to this Article the decision in question together with a certificate may be transmitted to the competent authorities of a Member State in which the natural or legal person against whom a decision has been taken has property or income, is normally resident or, in the case of a legal person, has its registered office. The transmission of documents takes place directly between the competent authorities.

CZ, FI, HU, LT, LV and NL have transposed all elements of Article 4 in their implementing legislation. AT, DK, FR and SI have implemented this provision only partly.

In EE the penalty can be executed in relation to persons who are citizens or permanent residents of the issuing Member State, as well as in relation to persons who are present on the territory of that Member State but will not be extradited and also in relation to legal persons who are registered on the territory of the executing Member State.

Article 5 – Scope

This Article includes a list of offences that give rise to recognition and enforcement of decisions without verification of dual criminality if they are punishable in the issuing Member State. All other offences may be subject to such verification by the executing Member State. The list encompasses the 32 offences already listed in other Framework Decisions (e.g. the European Arrest Warrant) and a few more, namely:

- conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods,
- smuggling of goods,
- infringements of intellectual property rights,
- threats and acts of violence against persons, including violence during sport events,
- criminal damage,
- theft,
- offences established by the issuing State and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty.

AT, DK, EE, FI, FR, HU, LT, NL have implemented the list. In the case of CZ, LV and SI part of the list was not attached.

Article 6 - Recognition and execution of decisions

According to Article 6 the decision in question shall be recognised without any further formality being required and all the necessary measures for its execution shall be taken forthwith.

CZ, DK, FI, FR, LV and NL have implemented this provision. AT, EE, HU, LT and SI have partially transposed this provision. Generally Member States have not indicated a time limit for the execution.

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

Article 7 provides for a number of grounds that can constitute a basis for refusing recognition or execution. All grounds set out in this Article are optional.

They are as follows:

- the certificate is not produced, is incomplete or manifestly does not correspond to the decision (transposed as optional by: FI, FR, HU; transposed as obligatory by: AT, CZ, DK, LT, LV, NL, SI; EE transposed it as partly obligatory, partly optional)
- *ne bis in idem* (transposed as optional by: DK, FI; transposed as obligatory by: AT, CZ, EE, FR, HU, LT, LV, NL, SI)
- principle of dual criminality (transposed as optional by: DK, FI; transposed as obligatory by: AT, CZ, EE, FR, HU, LT, LV, NL, SI)
- the execution is statute-barred (transposed as optional by: DK, FI; transposed as obligatory by: AT, CZ, EE, FR, HU, LT, LV, NL, SI)
- principle of territoriality (transposed as optional by: FI, FR, HU, NL; transposed as obligatory by: AT, CZ, DK, LV, SI; not transposed by EE and LT)
- immunity (transposed as optional by: FI; transposed as obligatory by: AT, CZ, DK, EE, FR, HU, LT, LV, NL, SI)
- age of criminal liability (transposed as optional by: FI; transposed as obligatory by: AT, CZ, DK, EE, FR, HU, LT, LV, NL, SI)
- rights of person concerned in the case (transposed as optional by: FI; transposed as obligatory by: AT, CZ, DK, EE, FR, LT, LV, NL, SI; not transposed by HU)
- the penalty is below EUR 70 (transposed as optional by: FI, FR, NL; transposed as obligatory by: AT, CZ, EE (1000 kroon), DK, HU, LT, LV, SI)

Additional grounds laid down by six Member States:

- According to the CZ statement, as its national legislation does not recognise the responsibility of legal persons, execution of requests relating to them will be refused⁵;
- The additional grounds for EE cover: a court's decision if it has not entered into force; a decision taken by a court that is not considered independent (EE distinguishes cases of its own citizens and other citizens of the EU);

⁵ No declaration based on Article 20(2)(b) has been received so far in relation to limitation of application of provisions concerning the liability of legal persons for a period up to five years from the date of entry into force of the Framework Decision.

- FI has added an additional obligatory ground: if there are reasonable grounds to suspect that the guarantees of due process have been violated in the proceedings leading to the decision;
- HU mentioned a few additional obligatory grounds: the criminal offence on which the Member State decision is based falls under Hungarian jurisdiction (Articles 3 and 4 of the Criminal Code); and the criminal offence is covered by an amnesty under Hungarian law. Other circumstances are those when one year has passed since the entry into force of the foreign decision and if the limitation period has already passed. This shall not be a barrier to execution that commenced during the limitation period;
- LV has added as obligatory grounds: reasons to believe that the penalty has been imposed to punish on grounds related to race, religious affiliation, ethnicity, gender or political opinions and also when it is not possible to enforce the decision in LV;
- SI has added two additional grounds: if there are reasons to believe that the penalty has been imposed to punish on grounds related to race, sex, political or religious views and also when enforcement would be in conflict with the Slovenian constitution.

Article 8 – Determination of the amount to be paid

This Article relates to a situation where acts referred to in the decision were not committed on the territory of the issuing Member State. In such a case the executing State may decide to reduce the amount of the penalty enforced to the maximum amount provided for acts of the same kind under the national law of the executing State, when the acts fall within the jurisdiction of that State. If necessary the competent authority of the executing State shall convert the penalty into the currency of the executing State at the rate of exchange obtaining at the time when the penalty was imposed.

AT, CZ, DK, FI, FR, HU, LT, NL, SI have implemented this provision. EE has not. LV referred only to the conversion of currency.

Article 9 - Law governing enforcement

According to Article 9 the enforcement of the decision shall be governed by the law of the executing State in the same way as a financial penalty of the executing State. In cases when the penalty has been paid in whole or in part it shall be deducted in full from the amount which is to be enforced in the executing State.

In any case a financial penalty imposed on a legal person shall be enforced even if the executing State does not recognise the principle of criminal liability of legal persons.

AT, FI, FR, NL and SI have implemented this Article. DK, EE, HU, LT and LV have done it only partly.

The partial implementation of this Article was the result of non transposition of paragraph 3 concerning the legal persons. Some Member States invoked the national legislation in this

regard (AT, FR, NL). In CZ national legislation does not recognise responsibility of legal persons⁶.

Article 10 - Imprisonment or other alternative sanctions by way of substitution for non-recovery of the financial penalty

Where it is not possible to enforce a decision, either totally or in part, alternative sanctions, including custodial sanctions, may be applied by the executing State if its laws so provide in such cases and the issuing State has allowed for the application of such alternative sanctions in the certificate referred to in Article 4. The severity of the alternative sanction shall be determined in accordance with the law of the executing State, but shall not exceed any maximum level stated in the certificate transmitted by the issuing State.

AT, CZ, HU, LT and SI have transposed this provision. In the case of LV some of the provisions are not enclosed. EE has provided for conversion of the financial penalty into imprisonment or community service.

Certain Member States stated that there was no possibility of applying alternative penalties under their national system either on their territory or abroad (FI, FR), or only on their territory (DK). NL transposed this provision. The Dutch judge may allow imprisonment under the following circumstances: the competent authority that imposed the financial penalty has also indicated in its decision that imprisonment is possible if the sanction is not executed; the financial penalty is not paid by the convicted person and there are no other ways to execute the penalty; and the issuing authority has agreed with imprisonment as a possible alternative to the financial penalty.

Article 11 - Amnesty, pardon, review of sentence

According to this Article both amnesty and pardon may be granted by the issuing State as well as the executing State but only the issuing State may determine application for review of the decision.

Certain Member States implemented this Article (FI, NL). CZ's and DK's implementing provisions relate only to granting pardon on its territory. LT has transposed this provision as to amnesty and pardon but no reference to review has been made. According to EE legislation amnesty, pardon and review of the decision shall be done in the issuing State. LV referred to the situation in which amnesty and pardon decided in the issuing Member State are binding on LV. AT and SI have transposed the provision relating to amnesty and pardon as an obligatory ground for refusal (furthermore SI invoked national law in this regard). As to the review AT declared that this provision does not need transposition.

HU has not transposed this Article. Neither has FR but relevant provisions existing in national legislation have been invoked.

Article 12 – Termination of enforcement

⁶ No declaration based on Article 20(2)(b) has been received so far in relation to limitation of application of provisions concerning the liability of legal persons for a period up to five years from the date of entry into force of the Framework Decision.

This Article provides for the obligation to inform the competent authority forthwith of the executing State of any decision or measure as a result of which the decision ceases to be enforceable or is withdrawn from the executing State for any other reason. As a result of such information the executing State is obliged to terminate enforcement of the decision.

AT, CZ, DK, FI, FR, HU, LT, LV, NL and SI have transposed this provision entirely. EE has not implemented this Article.

Article 13 - Accrual of monies obtained from enforcement of decisions

This Article states that monies obtained from the enforcement of decisions shall accrue to the executing State unless otherwise agreed, especially in cases where there are victims that are not parties to civil proceedings.

This Article has been implemented by AT, CZ, DK, FI, FR, HU, LT, NL, SI. EE and LV have not implemented this provision.

Article 14 - Information from the executing State

According to this Article the competent authority of the executing State shall inform the competent authority of the issuing State without delay of decisions made in relation to recognition or execution.

AT, CZ, FI, HU, LT, LV, NL, SI have implemented this Article. FR has implemented this Article apart from the case of conversion of penalties that is not laid down by national law in FR.

EE has not implemented this provision. DK stated that this provision does not require transposition.

Article 15 – Consequences of transmission of a decision

This Article deals with cases when the issuing State, by way of exception, can proceed with the execution.

Apart from EE all Member States who have sent notifications have implemented this Article.

Article 16 – Languages

Article 16 states that the certificate must be translated into the official language or one of the official languages of the executing State. However any Member State may at any time declare that it will accept a translation in one or more other official languages.

The majority of Member States require a translation in their own official language (AT, CZ, DK, FR, HU). Others will accept English in addition (EE, LT, LV, NL, SI). FI will accept certificates in Finnish, Swedish or English and in other languages if there are no impediments to the approval of the certificate.

Article 17 – Costs

This Article states that Member States shall not claim from each other a refund of costs resulting from application of this instrument. AT, CZ, FI, NL, SI have implemented this

Article. EE, HU and LV have not. DK, FR and LT stated that this provision does not require transposition.

3. CONCLUSIONS

The degree of implementation of Council Framework Decision 2005/214/JHA of 24 February 2005 in the national legislation of the Member States of the European Union can not be fully assessed at this stage. The transposition is not satisfactory as only eleven notifications have been provided by Member States.

The national implementing provisions generally are in line with the Framework Decision, especially regarding the most important issues such as abolishing dual criminality checks and the recognition of decisions without further formality. Unfortunately the analysis of grounds for refusal of recognition or execution proved once again that whereas almost all Member States transposed them, they were implemented mostly as obligatory grounds. Furthermore, some additional grounds were added. This practice is clearly not in line with the Framework Decision.

The Commission invites all 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 20 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.