COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL FRAMEWORK DECISION

on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. Introduction

This proposal follows up the White Paper on exchanges of information on convictions and the effect of such convictions in the European Union. That White Paper takes stock of the conditions for circulation and use of information on convictions in Union territory and defines the two focuses of future European Union action: improving the circulation of information and ensuring that it can have an impact outside the convicting State, in particular as a means of preventing further offences and at the time when new convictions are handed down.

The former aspect will be covered by a proposal for a decision establishing a computerised system for exchanging information on criminal convictions, which the Commission is planning to present in the first half of 2005. This proposal covers the second aspect. Improving the circulation of information will be of limited usefulness if the Member States are unable to make use of the information that is transmitted. The possibility of using the information that is transmitted, on the other hand, should be a considerable incentive to improving the exchanges.

Presented in the conclusions of the Tampere European Council as the "cornerstone" of judicial cooperation in both civil and criminal matters, the mutual recognition principle is the basis of a programme of measures adopted by the Council in December 2000[1].

Measure 2 of the programme provides for the "adoption of one or more instruments establishing the principle that a court in one Member State must be able to take account of final criminal judgments rendered by the courts in other Member States for the purposes of assessing the offender's criminal record and establishing whether he has re-offended, and in order to determine the type of sentence applicable and the arrangements for enforcing it".

The purpose of this proposal for a Framework Decision is to attain the objectives set by measure 2 of the programme, by defining the conditions in which a conviction handed down in another Member State can be taken into account in new criminal proceedings concerning different facts. It lays down a series of rules relating to entries in the national judicial record of convictions handed down in another Member State.

a) Taking into account in criminal proceedings

Table 5 annexed to the White Paper on exchanges of information on convictions and the effect of such convictions in the European Union highlights the conditions in which the Member States take into consideration convictions handed down in another Member State, stressing that little if any account is actually taken of them. The fact that equivalent effects cannot be attached to a decision taken in another Member State is contrary to the mutual recognition principle and puts the citizens of Europe on an unequal footing in the event of subsequent prosecutions depending on the place where the first and second cases are brought. Hence the need for Union legislative action.

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[1] OJ C 12, 15.1.2001, p.10.

But this proposal concerns only the taking into account of earlier convictions in criminal proceedings for different facts. It does not address the "*non bis in idem*" rule, on which there will be separate instruments.

The question is also different from the general question of the execution of a conviction in a Member State other than the convicting State. The Member State is not required to execute the conviction handed down in another Member State but simply to draw the consequences of the earlier conviction on the occasion of new proceedings. Nor is the point to harmonise the effects attaching to previous convictions in each of the Member States, which remain governed by national law. In the present case the impact of the mutual recognition principle is rather to confer the same validity and the same effects on convictions handed down in another Member State as on a previous national conviction. In other words, to establish a "principle of assimilation" of judgments given in the other Member State and national convictions, leaving it to national legislation to draw the consequences of this principle.

At the national level, the existence of previous convictions can have effects at the pre-trial stage of new criminal proceedings, during the trial itself and subsequently, in particular at the execution stage. This proposal covers these different procedural stages.

The effects, depending on the national legislation, can be matters of pure fact (in this case it is for the competent authorities, and in particular the judicial authorities, to draw conclusions from the existence of previous convictions at their discretion), or be governed by the law (which can, for example, provide for aggravation of the penalty or of the procedural arrangements applicable to repeat offenders). It will be for the Member States to adopt national legislation to assimilate convictions handed down in the other Member States to national convictions and give the same effect to them whatever they may be.

The draft Framework Decision provides for mandatory and optional grounds for disregarding a conviction handed down in another Member State.

b) Entry in the criminal record of a conviction handed down in another Member State

In some Member States convictions handed down in other Member States against their nationals and possibly also their residents are entered in their criminal record, and they wish to maintain the practice. The proposal for a Framework Decision contains a number of provisions to lay down common rules on entry in the record in order to avoid excessive differences of practice which could in some circumstances be detrimental to convicted persons. But it does not require Member States that make no entries in their records to amend their legislation.

2. Legal basis

The legal basis for this proposal is Article 31 of the Treaty on European Union, as amended by the Nice Treaty, which deals with joint action in the field of judicial cooperation in criminal matters, and Article 34(2)(b).

3. Financial statement

The implementation of the proposed Framework Decision would entail no additional operational expenditure to be charged to the budgets of the Member States or to the budget of the European Union.

4. Comments on the articles

Article 1 – Subject-matter

This article specifies the subject-matter of the Framework Decision, namely determination of the conditions in which it must be possible for a conviction handed down in another Member State to be taken into account in the course of criminal proceedings against the same person for different facts.

Paragraph 2 stresses that this may not have the effect the effect of amending the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty. This paragraph is based on the Framework Decision on the European arrest warrant and surrender procedures between the Member States.

Article 2 – Definitions

This article contains two definitions.

The definitions of "criminal record" and "conviction" are identical to those in the Commission proposal for a decision concerning the exchange of information extracted from the criminal record, adopted on 13 October 2004[2]. These definitions were removed from the version of the text on which the Council came to a first general approach in December 2004. The definition of "convictions" takes account of the concept of offence as used for the purposes of Articles 51 and 52 of the Convention Implementing the Schengen Agreement of 1990 and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000[3]. It is consistent with the usual scope of mutual judicial assistance and makes it possible to bring the hybrid administrative and criminal decisions that exist in certain Member States within the scope of this framework decision. One of the main aims of including them is to ensure that the Framework Decision extends to road traffic offences (when they are hybrid "administrative/criminal"), where knowledge of the past record is particularly useful. The definition selected is deliberately restrictive in order to cover only convictions in the strict sense, i.e. final judgments of the criminal courts (or decisions which could have been court judgments in the case of "administrative/criminal" offences) which, in all the Member States, can be regarded as convictions. It is certainly possible for national legislation to attach effects to other types of decision (for example, decisions by prosecutors to settle cases out of court). Nothing precludes the Member States that so desire from attaching the same effects to this type of decision when it is taken in another Member State and they are informed of it. But that aspect is not covered by the Framework Decision.

The "criminal record" is the national register recording these convictions. Certain Member States may have several registers.

Article 3 – Taking into account, in the course of new criminal proceedings, of a conviction handed down in another Member State

This article establishes the central principle of the Framework Decision, which is that a conviction handed down in another Member State must have equivalent effects to a national

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2 COM(2004)664.

3 OJ C 197, 12.7.2000, p. 1.

conviction. As has already been seen, on the other hand, it does not aim to harmonise the consequences attached in each Member State to previous convictions, which remain governed exclusively by national law.

In order to exclude *non bis in idem* cases, which will be the subject of separate Commission proposals, the text specifies that it governs the effects of previous convictions on the occasion of criminal proceedings ***for different facts***.

The existence of previous convictions can have effects at the various stages of new criminal proceedings:

– at the pre-trial stage, the existence of previous convictions can for example influence the applicable rules of procedure, the definition of the offence and decisions relating to provisional detention;

– at the actual trial stage, the existence of previous convictions can have effects on, for example, the type of court having jurisdiction and, more frequently, the nature and quantum of the penalty (for example exclusion or restrictive use of suspended sentences, increase in the quantum of the penalty incurred, cumulation or confusion with previous penalties);

– if a new conviction is handed down, the existence of previous convictions can have consequences at the time of determining the rules to govern execution (for example cumulation or confusion with previous penalties, possibility of obtaining adjustments of penalties or early releases).

The Framework Decision aims to take previous convictions into account at each stage of criminal proceedings, in accordance with national law.

In practice, the studies undertaken by the Commission (cf. annex to the White Paper on exchanges of information on convictions and the effect of such convictions in the European Union) show that the effects of the previous convictions vary widely, depending on the national systems. In certain Member States, the existence of a previous conviction is a matter of pure fact, left to the appraisal of the competent authorities, which will take account of it when coming to their decision. In others, there are rules applying to repeat offending in the broad sense, in which the existence of a previous conviction has a number of automatic consequences which the competent authorities have no discretion to assess.

In the first hypothesis, taking into account a conviction handed down in another Member State should not be too problematical, since it will be one fact among others. It follows, moreover, from Table 5 annexed to the White Paper that Member States which do not have rules governing repeat offending generally already attach effects to convictions handed down in other Member States, which they regard as a matter of pure fact.

In the second hypothesis, the Member States will have to specify the conditions in which equivalent effects are attached to the existence of a conviction handed down in another Member State. National legal rules applying to repeat offending are often very directly connected with the national structure of offences and penalties, for example in all the cases where there are special systems applicable to repeat offending (repeated commission of a specific type of offence, as in the case of drug trafficking or theft). In these cases it will be up

to the Member States to take all necessary measures to ensure that convictions handed down in other Member States are taken into account.

Article 4 – Mandatory grounds for not taking account of a conviction handed down in another Member State

This article sets out four situations in which a conviction handed down in another Member State cannot be taken into account. The first three hypotheses, which are found in other Union instruments, concern the *non bis in idem* principle, statutory limitation of criminal proceedings or of sentences, and amnesty, where offences might have been within the jurisdiction of the Member State concerned in accordance with its own criminal law. The fourth hypothesis concerns situations where, under national rules governing entries in the national criminal record, references to the conviction would have been deleted.

Article 5 – Optional grounds for not taking account of a conviction handed down in another Member State

Apart from the cases listed in Article 4, which are the mandatory cases, the Member States may also decide to disregard convictions handed down in another Member State in two types of circumstances:

The first is now customary in mutual recognition instruments and concerns double incrimination. A Member State may disregard convictions handed down in another Member State where the underlying facts do not constitute an offence against its own criminal law. But this possibility is limited where the first conviction was for a category of offences on a list taken over from the Framework Decision on the mutual recognition of financial penalties. Where the first conviction was for an offence in the listed categories, it cannot be disregarded in the second case on the basis of the double incrimination principle. Here the Commission has opted to refer to a long list of offences, more relevant than the list in the Framework Decision on the European arrest warrant and surrender procedures since it extends also to road traffic offences, a category where it is particularly worth tackling the problem of repeat offending.

It is also possible to disregard a conviction handed down in another Member State where the consequence of having being convicted in another Member State on the occasion of new criminal proceedings for different facts is that the person concerned is treated more unfavourably than if the conviction had been handed down by a national court. This is a safety net to ensure that a person who has been convicted in another Member State is not treated more unfavourably than a person convicted of the same offence in the national courts. Consider the example of a person sentenced in Member State A to a penalty higher than the maximum available for the same offence in Member State B. If such a sentence has negative legal effects in Member State B (such as stricter procedural rules) that would not have occurred if that Member State's own legal system (and therefore the maximum sentence) had applied, the first decision can be disregarded, as the fact that it was taken in a different legal system providing for a higher maximum sentence puts the person concerned in a more unfavourable situation.

Article 6 - Entry in the national criminal record of a conviction handed down in another Member State and national transmission of a conviction handed down in another Member State

This article concerns only the specific situation of Member States which enter in their criminal record convictions handed down in another Member State against their residents or nationals. It imposes no obligations on Member States which, under their national law, do not enter convictions handed down in other States.

Paragraph 1 provides that the penalty must correspond to the sentence passed in the convicting Member State, even if it is higher than the maximum for the same offence in the registering Member State. The Commission considers that the registration must respect the reality of the sentence passed in the convicting Member State even if the quantum of the penalty does not comply with the rules of the registering State. The point is to ensure transparency as to the reality of the sentence handed down, which will be in the interests of the person concerned, in particular when he is eligible for a scheme allowing sentences to be served concurrently. On the other hand, the situation will be different if the sentence is converted into a lesser quantum, as might be the case at the time of execution in the Member State of registration. But this Framework Decision does not address the question of the conditions in which conversion might take place.

Paragraph 2 establishes a general rule that entry in the national criminal record of a conviction handed down in another Member State must not have the effect that the person is treated more unfavourably than if the conviction had been handed down at national level.

Paragraph 3 specifies that the Member State of nationality or residence which enters a conviction handed down in another Member State must reflect in its national criminal record subsequent events which affect it in the convicting Member State and which were brought to its attention, unless national legislation is more favourable to the convicted person. Entry of the same conviction in several national criminal records often has the effect that different legal systems apply to it. The purpose of this article is to unify the legal status of a conviction as far as possible while preserving the person's rights by retaining the rule of the most favourable State.

Article 7 - Relation to other legal instruments

This Article specifies that this Framework Decision replaces the provisions of Article 56 of the Convention of 28 May 1970 on the International Validity of Criminal Judgments as between the Member States. That Article concerns the taking into account of a previous conviction handed down in another State.

Article 8 - Implementation

This Article requires the Member States to take the measures necessary to comply with the Framework Decision by 31 December 2006 and to communicate to the General Secretariat of the Council and to the Commission the texts of the provisions transposing into their national law the obligations imposed on them by this Framework Decision. Special attention will be paid to Article 3 which, depending on the national legislation of the Member States on taking into account previous convictions, can be transposed by measures of very different scope.

It requires the Commission to present a report on the application of the Framework Decision to the European Parliament and the Council no later than 31 December 2007.

Article 9 - Entry into force

This Article specifies that the Decision takes effect on the day of its publication in the *Official Journal of the European Union.*

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Proposal for a

COUNCIL FRAMEWORK DECISION

on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission[4],

Having regard to the opinion of the European Parliament[5],

Whereas:

(1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice. This objective requires that it be possible for information on convictions handed down in the Member States to be taken into account outside the convicting Member State, both in order to prevent new offences and at the time of new convictions.

(2) On 29 November 2000 the Council, in accordance with the conclusions of the Tampere European Council, adopted a programme of measures to implement the principle of mutual recognition in criminal matters[6]. Measure 2 of the programme provides for the "adoption of one or more instruments establishing the principle that a court in one Member State must be able to take account of final criminal judgments rendered by the courts in other Member States for the purposes of assessing the offender's criminal record and establishing whether he has re-offended, and in order to determine the type of sentence applicable and the arrangements for enforcing it". The purpose of this Framework Decision is to determine the conditions in which a conviction handed down in another Member State must be capable of being taken into account in the course of criminal proceedings against the same person for different facts in another Member State.

(3) Some Member States attach effects to convictions handed down in other Member States, whereas others take account only of convictions handed down in their own courts. Equal treatment of all citizens of Europe must be secured to remedy this situation.

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4 OJ C […], […], p. […].
5 OJ C […], […], p. […].
6 OJ C 12, 15.1.2001, p. 10.

(4) The principle that the Member States must attach to a conviction handed down in other Member States effects equivalent to those attached to a conviction handed down in their own courts must be affirmed, whether those effects be regarded by national law as matters of fact or of law. But this Framework Decision does not seek to harmonise the consequences attached by the different national legislations to the existence of previous convictions.

(5) The effects of a conviction handed down in another Member State must be the same as the effects of a national decision at the pre-trial stage of criminal proceedings, at the trial stage or at the time of execution of the sentence. Where national legislation attaches legal effects to the existence of a previous conviction, national transposal legislation must determine the extent to which equivalent effects are attached to a decision given in another Member State.

(6) The entry in the criminal record of a Member State of convictions against nationals or residents handed down in another Member State must be governed by the same rules as if it had been handed down by a national court and may not cause persons convicted in other Member States to be treated more unfavourably than those who have been convicted by national courts.

(7) This decision is to replace the provisions concerning the taking into consideration of criminal judgments in the Convention of 28 May 1970 on the International Validity of Criminal Judgments.

(8) This Framework Decision respects the principle of subsidiarity provided for by Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community insofar as it aims to approximate the laws and regulations of the Member States, which cannot be done adequately by the Member States acting unilaterally and requires concerted action in the European Union. In accordance with the principle of proportionality, as set out in the latter Article, this Decision does not go beyond what is necessary in order to achieve that objective.

(9) This Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and restated by the Charter of Fundamental Rights of the European Union,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1
Subject-matter

1. The purpose of this Framework Decision is to determine the conditions in which a Member State takes into account, in the course of new criminal proceedings against the same person, convictions handed down in another Member State for different facts or enters such convictions in the criminal record.

2. This Framework Decision may not have the effect the effect of amending the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty.

Article 2
Definitions

For the purposes of this Framework Decision:

a) "conviction" means any final decision of a criminal court or of an administrative authority whose decision can be appealed against in the criminal courts establishing guilt of a criminal offence or an act punishable in accordance with national law as an offence against the law;

b) "criminal record": the national register or registers recording convictions in accordance with national law.

Article 3
Taking into account, in the course of new criminal proceedings, of a conviction handed down in another Member State

1. Each Member State shall, in the course of new criminal proceedings for different facts, attach to convictions handed down in the other Member States in accordance with rules determined by them legal effects that are equivalent to those they attach to national convictions.

2. Paragraph 1 shall apply at the pre-trial stage, at the trial stage itself and at the time of execution of the conviction, in particular with regard to the applicable rules of procedure, including those relating to provisional detention, the definition of the offence, the type and level of the sentence, and the rules governing the execution of the decision.

Article 4
Mandatory grounds for not taking account of a conviction handed down in another Member State

Convictions handed down in another Member State shall not be taken into account in the following circumstances:

a) when the conviction violates the *non bis in idem* principle;

b) where the criminal proceedings were time-barred in accordance with national legislation at the time of the conviction and the alleged offence could have been within the jurisdiction of this Member State in accordance with its own criminal law;

c) when the offence which gave rise to the conviction is covered by amnesty and the Member State had jurisdiction to prosecute the offence in accordance with its own criminal law;

d) when under the national rules which govern entries in the national criminal record the entry relating to the conviction would have been removed from the record.

Article 5

Optional grounds for not taking account of a conviction handed down in another Member State

1. Convictions handed down in another Member State may be disregarded where the underlying facts do not constitute an offence against the criminal law of the Member State.

   The first subparagraph shall not apply to the following categories of offences:

   – participation in a criminal organisation;

   – terrorism;

   – trafficking in human beings;

   – sexual exploitation of children and child pornography;

   – trafficking in narcotic drugs and psychotropic substances;

   – trafficking in weapons, munitions and explosives;

   – corruption;

   – fraud, including fraud affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests;

   – laundering the proceeds of crime;

   – counterfeiting currency, including the euro;

   – computer-related crime;

   – environmental crime, including trafficking in endangered animal species and in endangered plant species and varieties;

   – facilitation of unauthorised entry and residence;

   – murder, grievous bodily harm;

   – illicit trade in human organs and tissue;

   – kidnapping, illegal restraint and hostage-taking;

   – racism and xenophobia;

   – organised or armed robbery;

   – illicit trafficking in cultural goods, including antiques and works of art;

   – swindling;

– racketeering and extortion;

– counterfeiting and piracy of products;

– forgery of administrative documents and trafficking therein;

– forgery of means of payment;

– trafficking in hormonal substances and other growth promoters;

– trafficking in nuclear or radioactive materials;

– trafficking in stolen vehicles;

– rape;

– arson;

– crimes within the jurisdiction of the International Criminal Court;

– unlawful seizure of aircraft/ships;

– sabotage;

– 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 during sports events;

– criminal damage;

– theft;

– offences established by the convicting State and serving the purpose of implementing obligations arising from instruments adopted under the Treaty establishing the European Community or under Title VI of the Treaty on European Union.

2. Without prejudice to paragraph 1, convictions handed down in another Member State may also be disregarded where the consequence of having being convicted in another Member State on the occasion of new criminal proceedings for different facts is that the person concerned is treated more unfavourably than if the conviction had been handed down by a national court.

Article 6

Entry in the national criminal record of a conviction handed down in another Member State

1. Where a Member State enters convictions handed down in another Member State in its criminal record, the amount of the penalty entered shall correspond to that of the sentence actually passed, unless the amount of the penalty has been actually reviewed when the penalty was executed in the registering Member State.

2. If, under national legislation, convictions handed down in the other Member States against nationals or residents are entered in the national criminal record, the rules governing entry in the record, modifications or deletion of the information entered may under no circumstances have the effect of causing the person to be treated more unfavourably than if he/she had been convicted by a national court.

3. Any modification or deletion of an entry in the convicting Member State shall entail an equivalent deletion or modification in the Member State of nationality or residence if it made an entry in the record and is informed of the modification or deletion, unless the legislation of the latter State provides for more favourable treatment for the convicted person.

Article 7

Relation to other legal instruments

1. Without prejudice to its application in relations between the Member States and third countries, this Framework Decision replaces Article 56 of the Hague Convention of 28 May 1970 on the International Validity of Criminal Judgments as between the Member States.

Article 8

Implementation

1. Member States shall adopt the measures necessary to comply with the provisions of this Framework Decision no later than 31 December 2006.

2. Member States shall communicate to the General Secretariat of the Council and to the Commission the texts of the provisions transposing into their national law the obligations imposed on them by this Framework Decision.

3. On the basis of that information the Commission shall, no later than 31 December 2007 present a report to the European Parliament and the Council on the application of this Framework Decision, accompanied if necessary by legislative proposals.

Article 9
Entry into force

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

Done at Brussels,

For the Council
The President