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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings

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1. INTRODUCTION

1.1. Objective and scope of the Framework Decision

In a genuine area of justice based on mutual trust, citizens can legitimately expect safety and security and to be protected against crime across the European Union, while at the same time having confidence that their fundamental rights are respected when they find themselves involved in criminal proceedings as defendants.

The European Union has put in place various tools to fight cross-border crime more effectively. Criminal activities may take place in the territory of several Member States: for instance the preparation of a crime can be carried out in one Member State, while the crime can be committed in another Member State; its perpetrators can be arrested in a third Member State and the assets of the crime transferred to a fourth Member State. This leads to situations where potentially several Member States are competent to conduct criminal investigations in respect of the crime and proceedings against the alleged perpetrators. This poses challenges not only in terms of coordination and effectiveness of criminal prosecutions, but also with regard to respect for the fundamental principle of criminal law, also enshrined in the Charter of Fundamental Rights of the European Union ("the Charter"), that a person may not be prosecuted and convicted twice for the same offence.[1]

The European Union adopted Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings[2], which aims to prevent unnecessary parallel criminal proceedings concerning the same facts and the same person in the European Union.

It is in the interests of effective criminal justice within the European area of justice to ensure that criminal proceedings are conducted in the best-placed Member State, for example in the State where the major part of the criminality occurred, where the majority of the loss was sustained or where the suspected or accused person or victims have significant interests. This jurisdiction must be chosen in a transparent and objective way in order to safeguard legal certainty for citizens and in order to improve judicial cooperation in criminal matters between authorities that may exercise parallel competence.

This Framework Decision is the first important step in European Union law on prevention of conflicts of jurisdiction.[3] In the context of the internationalisation of crime within the European Union, this measure provides added value by improving the proper functioning of the European area of justice. It therefore also contributes to the efficient administration of criminal justice in the Member States.

The purpose of this report is to provide a preliminary evaluation of the national transposition laws already received by the Commission.

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[1] Article 50 of the EU Charter ("*Ne bis in idem*"): ***"Right not to be tried or punished twice in criminal proceedings for the same criminal offence***: No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

[2] This Framework Decision was initiated by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and the Kingdom of Sweden.

[3] The Council of Europe Convention on Transfer of Proceedings of 1972 only entered into force in 13 EU Member States.

As of 1 December 2014, the date of expiry of the five year transitional period of the Lisbon Treaty, the judicial powers of the Court of Justice and the Commission's enforcement powers will fully apply with regard to the pre-Lisbon Treaty acquis in the field of judicial cooperation in criminal matters and police cooperation.

1.2. Fundamental rights safeguards

This instrument respects fundamental rights and observes the principles enshrined in Article 6 of the Treaty on the EU and reflected in the Charter of Fundamental Rights of the EU. With the entry into force of the Lisbon Treaty, the Charter became legally binding and the right not to be tried or punished twice in criminal proceedings has been reinforced. Article 50 of the Charter enshrines the "ne bis in idem" principle which Member States, pursuant to Article 51 of the Charter, are obliged to respect, observe and promote when implementing EU law.

The "ne bis in idem" principle is contained in Articles 54-58 of the Convention Implementing the Schengen Agreement (CISA), as interpreted by the European Court of Justice (CJEU) in several cases.[4]

1.3. Main elements of the Framework Decision

The Framework Decision sets out the procedure whereby competent national authorities of the EU Member States shall contact each other when they have reasonable grounds to believe that parallel proceedings are being conducted in another EU Member State(s). In such a case, it must seek confirmation of the existence of such parallel proceedings from the competent authority of another Member State. The contacted authority must reply without undue delay or within the deadline set by the contacting authority.

This measure also establishes the framework for these authorities to enter into direct consultations when parallel proceedings are discovered, in order to find an effective agreement about which of the Member States involved is best placed to continue to prosecute the crime. The consultation should lead, preferably, to the concentration of the proceedings in one EU Member State, for example through the transfer of criminal proceedings. In order to reach consensus, the competent authorities should consider all relevant criteria, which may include those set out in the Guidelines, which were published in the Eurojust Annual Report 2003, and take into account of for example the place where the major part of the criminality occurred, the place where the majority of the loss was sustained, the location of the suspected or accused person and possibilities for securing his/her surrender or extradition to other jurisdictions, the nationality or residence of the suspected or accused person, significant interests of the suspected or accused person, significant interests of victims and witnesses, the admissibility of evidence or any delays that may occur.

If no agreement is reached, the case shall be referred to Eurojust where appropriate and provided that it falls under its competence. As Eurojust is particularly well suited to provide assistance in resolving conflicts, referral of a case to Eurojust should be a usual step, when it has not been possible to reach consensus.[5]

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[4] See for example CJEU cases C-187/01 and C-385/01 Gözütok and Brügge, C-436/04 Van Esbroeck, C-367/05 Kraaijenbrink, C-150/05 Van Straaten, C-297/07 Klaus Bourquain, C-261/09 Gaetano Mantello.

[5] The Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust as amended by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust. Eurojust Annual

1.4. State of play of transposition and consequences of non-implementation

At the time of writing, the Commission has received notifications on the national transposition laws from the following 15 Member States: **AT, BE, CY, CZ, DE, FI, HU, HR, LV, NL, PL, PT, RO, SI** and **SK.**

More than 1 year after the implementation date, 13 Member States have not yet notified the measures transposing the obligations of this Framework Decision: **BG**, **DK, EE, EL, ES, FR, IE, IT, LT, LU, MT, SE** and **UK.**

7 Member States informed the Commission of the process of preparing relevant transposition measures at national level **(BG, EL, ES, FR, LT, MT** and **SE**). However, none of these Member States adopted the measures or notified the Commission before April 2014.

A table on the state of play of implementation of the Framework Decision can be found in the Annex.

Framework Decisions have to be implemented by Member States as is the case with any other element of the EU acquis. 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 non-implementation of the Framework Decisions by some Member States is problematic since those Member States who have properly implemented the Framework Decisions cannot benefit from their co-operation provisions in their relations with those Member States who did not implement them in time. Indeed, the principle of mutual recognition, which is the cornerstone of the European area of justice that this Framework Decision facilitates, cannot work if instruments are not implemented correctly in all Member States concerned. As a consequence, when cooperating with a Member State who did not implement in time, even those Member States who did so will have to rely on the random and often lengthy practice of traditional mutual legal assistance in criminal matters without a reliable guarantee of a timely detection of bis in idem cases, which should already take place at early stages of criminal proceedings. Such a practice increases significantly a risk of double jeopardy.

2. EVALUATION OF THE IMPLEMENTATION BY THE MEMBER STATES OF THE FRAMEWORK DECISION

2.1. Preliminary evaluation of the transposition laws received[6]

This report focuses on selected Articles that form the core part of the Framework Decision in the light of its aims.

Report 2012 states that Eurojust makes limited formal use of its recommendation powers to prevent and resolve positive or negative conflicts of jurisdiction. The notifications show that majority of Member States implemented Article 12 (Cooperation with Eurojust) in a flexible way stating in principle that "where authorities fail to reach consensus on any effective solution, the matter may be referred to Eurojust". Only 1 Member State ensured explicitly the role of Eurojust 2003 "Guidelines for deciding which jurisdiction should prosecute" in its implementing measure.

[6] Where the transposition measure does not include specific provisions on certain elements of the Framework Decision, this report states that the Member State concerned did not transpose those elements.

In general, the Member States have chosen different methods and approaches for transposing the Framework Decision. Some Member States chose to transpose the Framework Decision in their national criminal law legislation (AT, CZ, DE, FI, HR, HU, LV, PT, RO, SI and SK), one Member State in the administrative act (CY) and two Member States transposed the Framework Decision in their internal (administrative) procedure (BE, NL).

As this is a preliminary evaluation, it is too early to draw general conclusions on the quality of implementation. This is also due to the fact that many Member States have not yet complied with their obligation to transpose the Framework Decision. Moreover, thus far Member States have little practical experience in the application of this Framework Decision.

2.2. Evaluation of selected key provisions of the Framework Decision

2.2.1. Competent authorities

The principle of direct contact between competent authorities, established by Article 4, is a key requirement.

Article 4 obliges Member States to determine which national judicial or non-judicial authorities are competent for the purpose of this Framework Decision. As a subsidiary supporting element, however, each Member State may also designate one or more central authorities responsible for the administrative transmission and reception of the requests and for assistance to the competent authorities, if it is necessary because of the organisation of its internal system.

For a majority of Member States, the competent authorities for conducting tasks under the Framework Decision are judicial authorities such as courts (CZ , PL, RO, SK) or public prosecutors (AT, BE, CZ, DE, FI, HR, NL, PL, RO, SK). Police authorities, such as police officers in charge of the investigation were designated in a minority of Member States (FI, CY[7], LV). Additionally, CZ, LV[8], RO and SI make a distinction between the competent authorities depending on the stage of proceedings.

A central authority with an assisting/facilitating role is designated in a minority of Member States, for example in HU[9], FI, PT[10], RO and to some extent in CZ.

The Member States that designated central authorities for conducting the tasks under this Framework Decision must comply with the provision that such authorities function as a subsidiary authority only and that, as a rule, the principle of direct contact between competent authorities should be duly respected.

2.2.2. Language regime

In order to ensure efficient cooperation among the competent authorities in the context of this Framework Decision, it is necessary that Member States' competent authorities are informed of the languages that have to be used in the procedure of taking contact.

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[7] In CY, the Police was designated, and more specifically, European Union and International Police Cooperation Directorate (EU&IPCD).

[8] In addition to Police, LV designated the Prosecutor General's Office and Ministry of Justice.

[9] For the purpose of Article 4, HU designated only the Supreme Prosecutor's Office.

[10] For the purpose of Article 4, PT designated only the Prosecutor General's Office.

According to Article 14, Member States shall declare which languages, amongst the official languages of the institutions of the Union, may be used for the procedure of making contact (*Chapter 2*). In addition the competent authorities are free to agree to use any language in the course of their direct consultations.

For example, SK requires the Slovak language only for the procedures provided for in Chapter 2. Some Member States accept, apart from their own official language, also the English language (CY, NL, HU and SI) or some languages used in their neighbouring geographical context (CZ, NL, FI).

The majority of Member States apply a certain degree of flexibility stating that the competent authority may additionally accept contact requests in another language than the listed language on a reciprocal basis (AT, PT), if no obstacle to its use exists (FI, RO), or in (oral) contacts as long as the language is understood and spoken by the parties in the consultations (NL, BE, SI).

The majority of Member States properly notified their language regime for accepting requests. 3 Member States (DE, HR and LV) did not specify their implementing language regime.

2.2.3. Exchange of information on the case

(Article 5 – Obligation to contact, Article 6 – Obligation to reply, Article 7 – Means of communication, Article 8 – Minimum information to be provided in the request, Article 9 – Minimum information to be provided in the response)

With regard to Article 5(1) of this Framework Decision, which requests Member States to contact another Member State when it has 'reasonable grounds' to believe that parallel proceedings are being conducted, practically all Member States transposed these exact words in their transposition measure (with the exception[11] of DE, HR, HU, LV, PL and PT). NL and RO extensively described in the measure what it considers to constitute 'reasonable grounds'.[12]

The role of the *European Judicial Network* (EJN) should be mentioned in this respect (Article 5(2)). The network was established primarily in order to improve the relations between the competent authorities as regards the exchange of information. This efficient and informal means of fast information exchange may also often contribute to a better awareness of on-going criminal proceedings conducted in two or more Member States regarding the same or related facts.

The transpositions of BE, FI, HR, HU, NL, PL, RO and SK refer to the European Judicial Network, which can help to promote direct contact between practitioners.

According to Article 6(1) of this Framework Decision, contacted authorities should reply to submitted requests within any 'reasonable deadline' indicated by the contacting authority, or without undue delay. BE, CZ, FI, HR, HU, RO, PL and SK

[11] Some Member States used a slightly different terminology such as "when it is justified or when it is established that parallel proceedings are conducted".

[12] According to NL implementation measure: "reasonable grounds will always exist if a suspect states that he/she is subject of parallel criminal proceedings in another Member States; it appears from a request for legal assistance from a competent authority in another Member States that such proceedings may be on-going; the police or judicial authorities provide information from which it can be assumed that parallel criminal proceedings may be on-going; or it emerges from a Dutch criminal investigation that parallel proceedings may be on-going."

have transposed Article 6 of this Framework Decision almost literally into their national legislation/measures, with the only exceptions being that FI has interpreted the requirement of informing "without undue delay" as "promptly" and LV as "as early as possible".

The transpositions of NL and SI also differ in this respect: NL applied "with due dispatch", SI seems to have implemented the provision in the opposite order as it requires a response "without delay or at the latest within the time limit set in the request". Moreover, SI requires its own authorities to set an "appropriate time limit" for contacting authorities.

It is important to point out that AT, DE, LV, NL, PL, PT, RO and SK have omitted to transpose the element of Article 6 (1) of this Framework Decision that requires States to treat requests in cases where a suspect is held in detention as a matter of urgency.

NL differs from other transpositions by granting a strong role to the *International Centres for Legal Assistance* (IRC).[13]

DE has not literally transposed Article 6 of this Framework Decision into its national legislation. Instead, § 59 of the *Law on International Assistance in Criminal Matters* merely ensures in general that if EU rules lay down an obligation to cooperate, this must be taken into account in the exercise of discretionary powers.

BE, CZ, HR, HU, FI, NL, RO and SI accept any form of communication, including electronic communication, as long as it can be recorded in writing. SI stresses that the means of communication chosen should sufficiently protect personal data. The following States have not specified their means of communication: AT, CY, DE, LV, PL, PT, RO and SK. Member States that have not introduced the means of communication enabling the production of written records do not fulfil a key requirement of the Chapter 2 on Exchange of information.

AT, BE, CZ, FI, HR, HU, LV, NL, RO, SI and SK have transposed the wordings of Articles 8 and 9 of this Framework Decision on the minimum information to be provided in the request or in the response (almost) directly into their national measures. Those Member States, who have neither transposed the minimum information requirement under Articles 8 and 9 into national legislation nor into internal binding rules, therefore don't fulfil the key obligation stemming from the Framework Decision and are encouraged to review and align their national implementation measures with the provisions of the Framework Decision.

[13] Requests from the competent authorities in other Member States will be sent directly to the public prosecutor or forwarded from an IRC. If a public prosecutor receives a request directly he or she should notify the IRC.

2.2.4. Procedure for direct consultations and reaching consensus

(Article 10 – Obligation to enter into Direct Consultations; Article 11 – Procedure for Reaching Consensus; Article 12 – Cooperation with Eurojust)

2.2.4.1. Procedure for direct consultations

The majority of Member States used a wording similar to Article 10(1) of this Framework Decision to transpose this obligation into national law/measures (AT, BE, CZ, FI, HR, HU, NL, PL, RO, SI, SK). However, some Member States incorporated additional proceedings or guidance as part of the procedure for direct consultations and reaching consensus. For example, the NL measure suggests that IRCs can provide assistance in the contact between Member States. The BE transposition stipulates that for the application of this Article "all relevant factors must be considered including the factual elements and the points of law".

Furthermore, under the BE measure, a public prosecutor shall, in the event of a "mirror" investigation or a joint investigation, liaise with the relevant authority in another Member State on the prosecution procedures and, as far as possible, establish common deadlines, to prevent any conflict of jurisdiction and to ensure greater efficiency in the prosecution, trial and implementation of the sentence.

This transposition, although not a literal translation of the text in Article 10 of this Framework Decision, reflects the spirit of this Framework Decision. BE went further than the Framework Decision by obliging Member States to enter into direct consultations when a person who is sought pursuant to a European arrest warrant is being prosecuted in BE for the same offence as that in respect of which the European arrest warrant was issued.[14]

PL law stipulates that "*where the interests of justice so require*", the court or the state prosecutor shall consult the competent court or other body of the EU Member State where criminal proceedings in respect of the same act of the same person have been instituted, and request to take over or transfer the criminal prosecution.

Under CY law investigators should, where necessary, not hesitate to request assistance from the European Union and International Police Cooperation Directorate, which may ask the Legal Department for assistance and/or guidance where required.

As a preliminary conclusion, it seems that Article 10(2) of this Framework Decision – which contains an obligation that Member States keep each other informed of any important procedural measures taken in the process – was directly transposed into national laws or measures by AT, BE, CZ, HR, HU, FI, NL, PL, RO, SI and SK.[15]

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[14] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:en:HTML.

[15] For example, PL law provides that the provision of information shall be done regarding the procedure in respect of preventive measures, and other information at the request of the competent body. The NL measure adds that the public prosecutor is also advised to reach agreement with the competent authority on how the exchanged information is to be recorded and used in the criminal proceedings. HU law stipulates that when the consultations start, the prosecutor's office shall suspend the investigation or the court shall suspend the proceedings, as the case may be. The Prosecutor-General shall inform the competent authority in the other Member State of the suspension of the criminal proceedings.

The following Member States made reference to use of a 'national security exception'[16] in the obligation to reply to requests of other competent authorities: AT, BE, CZ, FI, HR, HU, NL, PL, RO, SI and SK.

Some Member States have emphasised that their national prosecutor is not obliged to withdraw or instigate proceedings as part of these consultations. If no agreement can be reached on the concentration of prosecutions in a Member State, even after the mediation of Eurojust, the public prosecutor may pursue criminal proceedings for any offence within its jurisdiction (BE, NL). SI added that direct consultations shall be without prejudice to the introduction or conduct of pre-trial criminal proceedings.

2.2.4.2. Outcome of the direct consultations and reaching consensus under Article 10 and 11

Member States have referred to the following scenarios as potential outcomes of the direct consultation to determine the optimum venue for prosecution and/or trial.

- Concentration/transfer of investigations or proceedings in order to ensure prosecution of the defendant in one Member State (AT, BE, HR, HU, FI, RO, SI and NL). In PL taking over or transfer of criminal prosecution shall only be done "*where the interests of justice so require*";
- To hold the criminal proceedings in an otherwise appropriate manner (FI);
- The investigation is halted (NL, HR). HR specified that "when the criminal proceedings in the other Member State have been completed with a decision that has the force of res judicata, the State Attorney's Office shall stop the criminal prosecution or drop the charges and inform the court thereof";
- Parallel investigations being carried out in both Member States with close collaboration and contact between them (BE, NL);
- The establishment of a joint investigation team (BE, NL);

SI elaborated in detail which circumstances should be considered during direct consultations to reach consensus: "all facts and evidence in connection with the case, and all circumstances relevant to reaching consensus shall be examined." In doing so, it is especially important to "take into account the interests of criminal proceedings, cost-effectiveness of prosecution, availability of evidence, protection of family life, and also the costs of pre-trial criminal proceedings or criminal proceedings entailed until that time or about to be entailed, but not the length of the prescribed penalty."[17]

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[16] If the requested specific information would harm essential national security interests or jeopardise the safety of individuals, the competent authority is not obliged to provide it in individual case.

[17] In HU, in the course of the consultations, the parties shall consider all the significant aspects with a view to deciding which Member State is to continue the criminal proceedings. Such significant aspects may include in particular to the stage that has been reached in the criminal proceedings, in which Member State there is more evidence available, whether the ongoing criminal proceedings in the different Member States are related to other criminal proceedings in the same state, the place where the accused person is held in detention, or the nationality of the accused person.

3. CONCLUSION

- This Framework Decision is a first substantial step in preventing breaches of the "ne bis in idem" principle during criminal proceedings and in avoiding the risk of inadequate exercise of jurisdiction by Member States. The degree of implementation of this Framework Decision varies significantly. While recognising the efforts of the 15 Member States that have transposed to date, the level of implementation of this important piece of legislation is far from satisfactory as 13 other Member States have not transposed it.
- The partial and incomplete transposition of this Framework Decision hampers the effective functioning of the European area of justice. It can moreover undermine the legitimate expectations of EU citizens in certain cases. The national implementing provisions received from 12 Member States seem to be generally satisfactory, especially regarding the most important issues such as the exchange of information mechanism and consultation procedure (AT, BE, CY, CZ, FI, HR, HU, NL, PL, RO, SI, SK).
- Member States are encouraged to provide for exact statistical data as regards the referrals of cases, which would enable an assessment of the efficient application of this Framework Decision in practice.
- Finally, late implementation is to be regretted as this Framework Decision has the potential to increase the efficient administration of criminal justice in cross-border cases by saving time and human and financial resources of the competent authorities in the criminal proceedings.
- It is of utmost importance for all Member States to consider this report and to provide all further relevant information to the Commission, in order to fulfil their obligations under the Treaty. In addition, the Commission encourages those Member States that have signalled that they are preparing relevant legislation to enact and give notification of these national measures as soon as possible. The Commission urges all those Member States that have not yet done so to take swift measures to implement this Framework Decision to the fullest extent. Furthermore, it invites those that have transposed it incorrectly to review and align their national implementation legislation with the provisions of this Framework Decision.