

## APPLICATION OF THE PRINCIPLE OF MUTUAL RECOGNITION TO FINANCIAL PENALTIES BASED ON ARTICLE 20 OF THE COUNCIL FRAMEWORK DECISION 2005/214/JHA

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**Abstract:** *The paper presents a foray in the national legislations of each EU member state on financial penalties legislation field. This study is 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 and the national obligation, of each EU Member States to transpose. The main goal being to emphasize the areas that benefit of good juridical implementation and the areas that require improvement from the national legislation point of view.*

**Key words:** *European financial penalties legislation, implementation, the principle of mutual recognition to financial penalties.*

Framework Decision 2005/214/JHA [1] 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.

Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 22 March 2007. In concordance with article 20 (5), Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of a report established on the basis of this information by the Commission, the Council shall, no later than 22 March 2008, assess the extent to which Member States have complied with this Framework Decision.

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On the basis of this transmission the following results:

1. 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, CZ, DK, EE, FI, FR, HU, LT, LV, NL, SI. 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.

2. 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 Union. [2] 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 eleven Member States.

Regarding the most important article from the Decision, we can conclude the following:

1) 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 legislation. [3]

2) 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.

3) 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.

#### 4) 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.

#### 5) Article 6 - Recognition and execution of decisions

According to Article 6 the decision in question shall be recognized 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.

#### 6) 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 recognize the responsibility of legal persons, execution of requests relating to them will be refused; [4]
  - 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);
  - 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.
- 7) 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.
- 8) 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.

9) 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.

10) Article 12 – Termination of enforcement

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.

11) 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.

12) 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.

13) 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.

### 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 his Report [5] and to take the opportunity to provide all further relevant information to the Commission and to the Council Secretariat, in order to fulfill their obligations under Article 20 of the Framework Decision. In addition, the Commission encourages those Member State that have signaled that they are preparing relevant legislation to enact and notify these national measures as soon as possible.

### References

1. JO L 76, 22.3.2005, pp. 16-30.
2. Judgment of the European Court of Justice, Pupino, Case-105/03 (16 June 2005), OJ C 193, 6.08.2005, p. 3.
3. 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.
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.
5. COM(2008) 888 final