



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 6 February 2009

5973/09

**Interinstitutional File:
2009/0802 (CNS)**

COPEN 19

NOTE

from :	Presidency
to :	Working Party on Cooperation in Criminal Matters
No. prev. doc.:	5802/09 COPEN 7 + ADD 1 + ADD 2
Subject :	Proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings
	- Revised text of Articles

The Working Party held a general exchange of views and discussed Articles 1-9 of the above proposal during meetings on 6 and 7, and on 21, 22 and 23 January 2009. As a result of these discussions, the Presidency revised the entire text of the proposed Framework Decision, taking the views expressed by Member States as much as possible into account.

The redrafted text is set out in the Annex to this note.

Proposal for a

COUNCIL FRAMEWORK DECISION 2009/.../JHA
of
on prevention and settlement of conflicts of jurisdiction
in criminal proceedings

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31(1)(c) and (d) and Article 34(2)(b) thereof,

Having regard to the initiative of the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden,

Having regard to the Opinion of the European Parliament¹,

Whereas:

- (1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice.

¹ Opinion of ... (not yet published in the Official Journal).

- (2) According to the Hague Programme for strengthening freedom, security and justice in the European Union¹, adopted by the European Council at its meeting on 4 and 5 November 2004, with a view to increasing the efficiency of prosecutions, while guaranteeing the proper administration of justice, particular attention should be given to possibilities of concentrating the prosecution in cross-border multilateral cases in one Member State and further attention should be given to additional proposals, including conflicts of jurisdiction so as to complete the comprehensive programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters.
- (3) The measures provided for in this Framework Decision should aim to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, which might lead to the double final disposal of those proceedings. The Framework Decision therefore seeks to promote the application of the "ne-bis-in-idem" principle, as set out in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ L 239, 22.9.2000, p. 19) as interpreted by the European Court of Justice (judgment of 11 February 2003, Gözütok and Brügge, cases C-187/01 and C-385/01).
- (3a) The measures provided for in this Framework Decision should also aim to promote that the competent authorities in the Member States, when conducting parallel criminal proceedings in respect of the same facts involving the same person(s), reach agreement on any effective solution aimed at avoiding the negative aspects of the parallel exercise of their competences in conducting criminal proceedings. Such effective solution, which could notably consist in the concentration of the criminal proceedings in one Member State or any other efficient and reasonable allocation of those proceedings (e.g. through separation), should always be a coordinated one, so as to avoid waste of time and resources of the competent authorities concerned. In this respect, specific attention should be paid to the issue of mutual admissibility of evidence gathered in the course of criminal proceedings.

¹ OJ C 53, 3.3.2005, p. 1.

(3b) For the purposes of this Framework Decision, "criminal proceedings" is meant to include both the pre-trial phase and the trial phase (before a court), in accordance with national law.

(4) (deleted)

(5) (deleted)

(5a) When a competent authority in a Member State has reasonable grounds to believe that parallel criminal proceedings are being conducted in another Member State in respect of the same facts involving the same person(s), which could lead to the double final disposal of those proceedings, it should contact the competent authority of that other Member State. Such reasonable grounds could for example exist in case the suspected or accused person invokes, supported by relevant elements of proof, that he/she is subject to parallel criminal proceedings in respect of the same facts in another Member State, or in case a relevant request for mutual legal assistance by a competent authority in another Member State reveals the possible existence of such parallel criminal proceedings, or in case police authorities provide information to this effect.

(5b) When a competent authority in one Member State contacts a competent authority in another Member State with a view to confirming the existence of parallel criminal proceedings in respect of the same facts involving the same person(s), it should do so by providing a minimum set of information to the authority in the other Member State. Equally, in its reply the latter authority should provide a minimum set of information, allowing to establish whether the same facts involving the same person(s) are the subject of criminal proceedings in the two or more Member States concerned, and with a view to getting to know the stages of the proceedings reached in these Member States.

- (5c) A competent authority of a requested State should have a general obligation to reply to a request for information submitted by a competent authority of a requesting State. An exception should however be allowed when the competent authority in the requested State has overriding objective reasons not to provide specific requested information. Such reasons could be present in case of essential national security interests or in view of the protection of safety of specific individuals, which might arise e.g. within undercover operations or witness protection.
- (5d) A competent authority of a requesting State is encouraged to set a deadline within which the competent authority of the requested State should respond to a request for information, in particular in cases where the suspected or accused person is held in (provisional) detention. The competent authority of the requested State should respond within the deadline set, unless it is reasonably not able to do so. In cases where the suspected or accused person is held in (provisional) detention the competent authority of the requested State should in all circumstances respond without any delay.
- (5e) Member States should have discretion to decide which authority or authorities should be competent to act in accordance with this Framework Decision, in compliance with the principle of national procedural autonomy. Member States should be entitled to decide that police authorities, which are competent under their national law to perform judicial acts, should be competent to act in accordance with this Framework Decision, in full compliance with the legal basis provided in Article 31 TEU on judicial cooperation in criminal matters.
- (6) (deleted)
- (7) None of the Member States concerned should be obliged to give up or take over jurisdiction unless it wishes to do so. If agreement cannot be reached the Member States should retain their right to initiate criminal proceedings for any criminal offence which falls within their national jurisdiction.

- (8) This Framework Decision does not affect the legality principle and opportunity principle as governed by the national law of the Member States. Nevertheless, as the very aim of this Framework Decision is to prevent unnecessary parallel criminal proceedings, its application should not give rise to a conflict of jurisdiction which would not occur otherwise.
- (9) (deleted)
- (10) This Framework Decision is without prejudice to proceedings under the European Convention on the Transfer of Proceedings in Criminal Matters, signed in Strasbourg on 15 May 1972, as well as any other arrangements concerning the transfer of proceedings in criminal matters between the Member States.
- (11) (deleted)
- (12) (deleted)
- (13) (deleted)
- (14) (deleted)
- (15) In the situation where competent authorities become aware that the facts which are the subject of ongoing or anticipated criminal proceedings in one Member State were the subject of proceedings which have been finally disposed of in another Member State, the ensuing exchange of information should be encouraged. The purpose of that exchange of information should be to provide the competent authorities of the Member State where the proceedings have been finally disposed of with information and evidence enabling them to possibly reopen the proceedings in accordance with their national law.

- (16) This Framework Decision should not lead to undue bureaucracy in cases where for the problems addressed more suitable options are readily available. Thus in situations where more flexible instruments or arrangements are in place between Member States, those should prevail over this Framework Decision.
- (17) This Framework Decision should be complementary and without prejudice to the Council Decision 2009/.../JHA of ... on the strengthening of Eurojust and amending Decision 2002/187/JHA^{1*} and it should make use of mechanisms already existing within Eurojust.
- (18) Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters² should apply to the protection of personal data provided under this Framework Decision.
- (19) This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union,

HAS ADOPTED THIS FRAMEWORK DECISION:

¹ OJ

* OJ: insert number, date and publication references of Decision set out in doc.14927/08.

² OJ L 350, 30.12.2008, p. 60.

CHAPTER 1

GENERAL PRINCIPLES

Article 1 (ex 1, split in two - see also Article 2)

Objective

1. This Framework Decision has the objective to promote a closer cooperation between the competent authorities of two or more Member States conducting criminal proceedings¹, with a view to improving the efficient and proper administration of justice.
2. Such closer cooperation aims to:
 - a) prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, which might lead to the double final disposal of the proceedings ("ne-bis-in-idem"²);
 - [(b) improve the communication and coordination between competent authorities of two or more Member States conducting criminal proceedings, in situations where these proceedings concern the same or related facts involving different person(s)]³ and
 - c) reach agreement on any effective solution aimed at avoiding the negative aspects of parallel exercise of competence in conducting criminal proceedings.

¹ See recital 5 for an explanation of the notion of "criminal proceedings".

² See recital 3 on "ne bis in idem".

³ See point 5 in document for CATS (5804/09 COPEN 17) and the possibility of the future inclusion of optional situations at a later stage of the negotiations.

Article 2 (ex 1, split)

Subject matter and scope

1. With a view to achieving the objective set out in Article 1, this Framework Decision sets rules

- a) on a procedure through which a competent authority of a Member State takes contact with a competent authority of another Member State, with a view to confirming the existence of parallel criminal proceedings in respect of the same facts involving the same person(s),

[the same mechanism may be used for situations in respect of the same or related facts involving different persons];¹

- b) on the exchange of information, through direct consultations, between the competent authorities of two or more Member States conducting parallel criminal proceedings in respect of the same facts involving the same person(s), [in case they already have knowledge of the existence of parallel criminal proceedings,] with a view to reaching agreement on any effective solution aimed at avoiding the negative aspects of parallel exercise of competence in conducting criminal proceedings.

[the same mechanism may be used for situations in respect of the same or related facts involving different persons]²

2. [This Framework Decision shall not apply to any proceedings brought against undertakings if such proceedings have as their object the application of European Community Competition Law.]

¹ See point 5 in document for CATS (5804/09 COPEN 17) and the possibility of future inclusion of optional situations at a later stage of the negotiations.

² See point 5 in document for CATS (5804/09 COPEN 17) and the possibility of future inclusion of optional situations at a later stage of the negotiations.

3. This Framework Decision does not confer any rights on a person to be invoked before the national authorities. This does not prevent the Member States from introducing any such rights vis-à-vis their national authorities when implementing this Framework Decision in their national law.¹

Article 3 (ex 2)

Definitions

For the purposes of this Framework Decision:

- (a) "requesting State" shall mean the Member State, of which a competent authority submits a request for information to a competent authority in another Member State (the responding State) with a view to confirm the existence of parallel criminal proceedings being conducted in respect of the same facts involving the same person(s) in the two or more Member States concerned;
- (b) "responding State" shall mean the Member State, of which a competent authority is requested by the competent authority of another Member State (the requesting State) to confirm the existence of parallel criminal proceedings being conducted in respect of the same facts involving the same person(s) in the two or more Member States concerned;

¹ This new wording is a Presidency suggestion following comments by some Member States and by the CLS.

- (c) ["competent authority" shall mean an authority which, under the law of the Member State to which it belongs, is competent
- to submit a request for information to a competent authority in another Member State with a view to confirm the existence of parallel criminal proceedings being conducted in that Member State in respect of the same facts involving the same person(s) as those which are subject to criminal proceedings in its own Member State, or to respond to such a request submitted by a competent authority of another Member State;
 - to enter into direct consultations with a competent authority of another Member State and to reach agreement on any effective solution aimed at avoiding the negative aspects of parallel exercise of competence in conducting criminal proceedings.]

Article 4 (ex 3)

Determination of competent authorities ¹

1. Each Member State shall inform the General Secretariat of the Council which authority or authorities under its national law is or are competent to act according to this Framework Decision in the situation where the Member State concerned acts as a requesting State and as a responding State.
2. Each Member State may designate a central authority or authorities to assist its competent authorities when acting in accordance with this Framework Decision. A Member State may in particular make its central authority (ies) responsible for the administrative reception and transmission of correspondence under this Framework Decision. Member States wishing to make use of the possibility to designate a central authority or authorities shall communicate to the General Secretariat of the Council information relating to the designated central authority (ies).

¹ See recital 5e on “competent authorities”.

3. The General Secretariat of the Council shall make the information received under this Article available to all Member States and to the Commission.

[ex Article 4 has been deleted]

CHAPTER 2

EXCHANGE OF INFORMATION

Article 5

Procedure for submitting a request for information

1. When a competent authority in a Member State has reasonable grounds to believe that parallel criminal proceedings are being conducted in another Member State in respect of the same facts involving the same person(s), it shall contact the competent authority of that other Member State by submitting a request for information and, if the latter authority confirms the existence of such parallel proceedings, initiate direct consultations as provided in Article [12].
2. The competent authority of the responding State which has been contacted in accordance with paragraph 1, shall reply to the request for information within the deadline indicated by the competent authority of the requesting State ¹, or, if no deadline has been indicated, without undue delay ², and inform the competent authority of the requesting State whether criminal proceedings are taking place in its Member State in respect of the same facts involving the same person(s). In cases where the suspected or accused person is held in (provisional) detention the competent authority of the requested State shall respond without any delay.

¹ See new recital 5c on the "obligation to respond".

² See new recital 5d on the "cases where the suspected or accused person is held in (provisional) detention".

3. The obligation to provide a specific requested information as a consequence of the obligation set out in paragraph 2, as further specified in Article 8, shall not apply, if this would harm essential national security interests or would jeopardise the safety of individuals. In such case, the competent authority of the requested State shall, within the deadline set or without (undue) delay, state in its reply that such exceptional reasons apply in respect of the specific requested information concerned.
4. If the competent authority of the responding State cannot provide a reply within the deadline set by the competent authority of the requesting State, it shall promptly inform the competent authority of the requesting State of the reasons thereof and indicate the deadline within which it shall provide the requested information.
5. If the competent authority in the requesting State does not know the identity of the competent authority of the responding State, it shall make all necessary inquiries, including via the contact points of the European Judicial Network, in order to obtain the details of the competent authority in the responding State.
6. Member States may designate a "contact point" to whom competent authorities of requesting Member States can address themselves in order to obtain the details of the authority which is competent to act in the Member State concerned when the latter is the responding State. Member States wishing to make use of this possibility shall communicate to the General Secretariat of the Council information relating to the designated "contact point". The General Secretariat of the Council shall make the information received available to all Member States and to the Commission.
7. If the authority in the responding State which is contacted by a competent authority of the requesting State is not the competent authority under Article 4, it shall without undue delay transmit the request for information to the competent authority and shall inform the competent authority of the requesting State accordingly.

8. The competent authorities of the requesting and responding States shall communicate by any means whereby a written record can be produced.

[ex Articles 6 and 7 have been deleted]

Article 6 (ex 8)

Content of the request for information

1. With a view to establishing that the same facts involving the same person(s) are the subject of criminal proceedings in the two or more Member States concerned, the competent authority of the requesting State, when submitting a request for information to the competent authority of the responding State, shall provide at least the following information:
 - (a) details of the national authority or authorities which are dealing with the criminal proceedings in the requesting Member State;
 - (b) a description of the facts which are the subject of the criminal proceedings concerned;
 - (c) details about the suspect and/or accused person, and about the victims, if applicable;
 - (d) the stage that has been reached in the criminal proceedings; and
 - (e) a brief indication of the “reasonable grounds” which has led the authority mentioned under (a) to believe that parallel criminal proceedings are being conducted in the responding State in respect of the same facts involving the same person(s).

2. The competent authority of the requesting State may provide relevant additional information relating to the criminal proceedings that are being conducted in the contacting State, e.g. relating to any difficulties which are being encountered in that State.
3. [The competent authority of the requesting State may use the form set out in the Annex.]¹

Article 7 (ex 9)

Content of the response to the request for information

1. The response by the competent authority of the responding State to the request for information by the competent authority of the requesting State shall contain the information which is necessary to establish that the same facts involving the same person(s) are the subject of proceedings in the two or more Member States concerned. The response shall therefore contain at least the following information:
 - (a) whether in the responding State criminal proceedings are being or have been conducted in respect of some or all of the same facts as those which are subject of the criminal proceedings referred to in the request for information submitted by the competent authority of the requesting State, and whether the same persons(s), or at least some of them, are involved;

in case of a positive answer under (a):

 - (b) details of the national authority or authorities which are dealing with the criminal proceedings in the responding State;
 - (c) the stage of these proceedings, or, where appropriate, the nature of the final decision.

¹ See point 7 in document for CATS 5804/09 COPEN 17. CATS is invited to confirm that no mandatory use of forms will take place. The possible future facultative use thereof is open to the later stage of negotiations. The form structure may be developed in the framework of European Judicial Network.

2. The competent authority of the responding State may provide relevant additional information relating to the criminal proceedings that are being or have been conducted in the responding State, in particular concerning any related facts which are the subject of the criminal proceedings in the responding State.
3. [The competent authority of the responding State may use the form set out in the Annex.]¹

[ex Articles 10 and 11 have been deleted]

CHAPTER 3

DIRECT CONSULTATIONS

Article 12

Obligation to enter into direct consultations

1. When, as a result of a request for information or by any other means, it is confirmed that parallel criminal proceedings are being conducted in two or more Member States in respect of the same facts involving the same person(s), the competent authorities of the requesting State and of the requested State shall enter into direct consultations in order to reach agreement on any effective solution aimed at avoiding the negative aspects of parallel exercise of competence in conducting criminal proceedings. In the event, that such a confirmation arises as a result of request for information, the relevant requesting authority shall be responsible for coordinating these consultations.

[the same mechanism of direct consultations may be used for situations in respect of the same or related facts involving different persons].²

¹ See point 7 in the document for CATS (5804/09 COPEN 17). CATS is invited to confirm that the use of forms will not be mandatory. The possible future facultative use of forms is left for discussion at a later stage of the negotiations. The structure of the form could be developed in the framework of European Judicial Network.

² See point 5 in document for CATS (5804/09 COPEN 17) and the possibility of future inclusion of optional situations at a later stage of the negotiations.

2. Such consultations could, where appropriate, lead to:
- a) the concentration of the criminal proceedings in one Member State, e.g. through the transfer of criminal proceedings;
- or
- b) setting the timeframe and modalities for any other effective solution concerning the negative aspects of parallel exercise of competence.

Article 13

Providing information on important procedural acts
or measures

The competent authorities of the requesting and responding States which enter into direct consultations shall inform each other of any important procedural measures they take after the commencement of consultations.

Article 14

[deleted]

Article 15

Criteria to determine the best placed jurisdiction(s)

1. There shall be a general presumption in favour of conducting criminal proceedings at the jurisdiction of the Member State where most of the criminality has occurred which shall be the place where most of the factual conduct performed by the persons involved occurs.

2. Where the general presumption according to paragraph 1 does not apply due to the fact that there are other sufficiently significant factors for conducting the criminal proceedings, which strongly point in favour of a different jurisdiction, the competent authorities of Member States shall consider those additional factors in order to reach an agreement on the best placed jurisdiction. Those additional factors shall include, in particular, the following:
 - location of the accused person or persons after an arrest and possibilities for securing their surrender or extradition to the other possible jurisdictions,
 - nationality or residence of the accused persons,
 - territory of a State where most of the damage was sustained,
 - significant interests of victims,
 - significant interests of accused persons,
 - location of important evidence,
 - protection of vulnerable or intimidated witnesses whose evidence is of importance to the proceedings in question,
 - the residence of the most important witnesses and their ability to travel to the Member State where most of the criminality has occurred,
 - stage of proceedings reached for the facts in question,
 - existence of ongoing related proceedings,
 - economy of the proceedings.

Article 16

Cooperation with Eurojust

1. Any national authority shall be at liberty, at any stage of a national procedure, to
 - (a) ask for Eurojust's advice;
 - (b) take a decision to refer to Eurojust specific cases which raise the question of the best placed jurisdiction.

2. Where, in the cases which fall within the competence of Eurojust, it has not been possible to reach an agreement on the best placed Member State jurisdiction for conducting criminal proceedings for specific facts, the disagreement, as well as situations where an agreement has not been reached within [10 months] after entry into direct consultations, shall be referred to Eurojust by any Member State involved.

Article 17

Cases where an agreement has not been reached

In those exceptional situations, where

- (a) an agreement has not been reached even after the intervention of Eurojust in accordance with Article 16,

or

- (b) in cases which do not fall within the competence of Eurojust, the direct consultations were terminated by a disagreement or situations where an agreement has not been reached within [6 months] after entry into direct consultations,

the Member States shall inform Eurojust about the reasons of the failure to reach an agreement.

CHAPTER 4 (ex 5)

MISCELLANEOUS

Article 18

Other exchange of information

1. Where the competent authority of a Member State discovers by whatever means that facts which are the subject of ongoing or anticipated criminal proceedings in its Member State were the subject of proceedings which have been finally disposed of in another Member State, that competent authority may inform the competent authority of the second Member State of this situation and transmit all relevant information.
2. If a competent authority in a Member State discovers, either by way of a request for information or by whatever other means, that the facts which were the subject of proceedings which have been finally disposed of in its Member State are the subject of criminal proceedings being conducted in another Member State, it may consider whether it will request additional information that would enable it to duly assess the possibility of reopening the proceedings under national law.

CHAPTER 5 (ex 6)

GENERAL AND FINAL PROVISIONS

Article 19

Languages

Each Member State shall state in a declaration deposited with the General Secretariat of the Council the languages in which it will accept requests for information referred to in Article 6 and languages in which it will respond to such requests.

Article 20

Relation to legal instruments and other arrangements

1. Insofar as other legal instruments or arrangements allow the objectives of this Framework Decision to be extended or help to simplify or facilitate the procedure under which national authorities exchange information about their ongoing proceedings, enter into direct consultations and try to reach an agreement on the best placed jurisdiction for conducting criminal proceedings for the specific facts which fall within the jurisdiction of two or more Member State, the Member States may:
 - (a) continue to apply bilateral or multilateral agreements or arrangements in force when this Framework Decision comes into force;
 - (b) conclude bilateral or multilateral agreements or arrangements after this Framework Decision has come into force.
2. The agreements and arrangements referred to in paragraph 1 shall in no case affect relations with Member States which are not parties to them.
3. Member States shall, within three months from the entry into force of this Framework Decision, notify the General Secretariat of Council and the Commission of the existing agreements and arrangements referred to in paragraph 1(a) which they wish to continue applying.

Member States shall also notify the General Secretariat of Council and the Commission of any new agreement or arrangement as referred to in paragraph 1(b), within three months of signing any such arrangement or agreement.

4. This Framework Decision shall be without prejudice to Council Decision 2009/XX/JHA amending Council Decision 2002/187/JHA as amended by Council Decision 2003/659/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

Article 21

Implementation

Member States shall take the necessary measures to comply with the provisions of this Framework Decision by [24 months after publication of the FD in the OJ].

By the same date Member States shall transmit to the General Secretariat of Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.

Article 22

Report

The Commission shall, by [36 months after publication of the FD in the OJ] , submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Framework Decision, accompanied, if necessary, by legislative proposals.

Article 23

Entry into force

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

Done at Brussels,

For the Council

The President
