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NOTE

from :	Presidency
to :	Article 36 Committee
No. prev. doc.:	5208/09 COPEN 7 + ADD 1 + ADD 2
Subject :	Proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings
	- Confirmation by CATS of provisional agreement on selected issues

Introduction

1. By letters received by the General Secretariat in January 2009, the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and the Kingdom of Sweden presented an Initiative for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings.
2. At its meeting on 22 January 2009, Coreper took note of the Initiative and decided to submit the text to the European Parliament for consultation. Coreper also decided to publish the text of the proposed Framework Decision in the *Official Journal of the European Union*.¹

¹ 5155/09 COPEN 2.

3. The text of the Initiative is set out in 5208/09 COPEN 7 + ADD 1. The explanatory memorandum to the Initiative is set out in 5208/09 COPEN 7 ADD 2.

Discussions in the Working Party

4. The Working Party on Cooperation in Criminal Matters held a general exchange of views on the proposed Framework Decision during its meeting on 6 and 7 January 2009. At its meeting on 21, 22 and 23 January 2009, the Working Party discussed some selected issues, including the objectives and scope of the instrument, competent authorities, and the procedure of communication that should be followed for "taking contact".
5. As regards the objectives and scope of the Framework Decision, the Working Party agreed that the instrument should seek to promote a closer cooperation between the competent authorities of two or more Member States conducting criminal proceedings, with a view to improving the efficient and proper administration of justice.

The Working Party underlined that such closer cooperation should aim to prevent situations where the same person(s) is (are) subject to parallel criminal proceedings in different Member States, which might lead to the double final disposal of the same facts ("ne-bis-in-idem"¹).

It was agreed that where a competent authority in a Member State, conducting criminal proceedings, 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), the authority concerned is obliged to take contact with the competent authority in the other Member State.

¹ The notion of "ne bis in idem" will be further clarified in a recital of the Framework Decision, with reference to the case-law of the European Court of Justice and the Schengen Implementation Agreement.

As regards the new criterion "reasonable grounds to believe", it was generally agreed that examples could be provided in a recital of when such grounds could be present. The precise wording of such a recital will be examined in the Working Party.

The Working Party acknowledged that it could be useful to encourage closer cooperation also as regards situations where the criminal proceedings concern the same or related facts involving different person(s). However, a majority of delegations felt that cooperation in this field should be left optional, and therefore the question arose whether it should be regulated in the Framework Decision at all. It was suggested to organize this matter in a Council declaration to be inserted in the Minutes of the Council meeting at which the Framework Decision would finally be adopted.

The Working Party agreed to concentrate the work in the first place on cooperation in respect of "(ne) bis in idem cases", and to examine at a later stage which avenue to follow as regards possible cooperation in other situations.

CATS is invited to confirm the above mentioned general conclusions concerning the objectives and scope, and notably:

- **that the scope of the Framework Decision shall initially be restricted to "ne-bis-in-idem" situations;**
- **that situations concerning the same or related facts involving different person(s) shall be examined at a later stage;**
- **that the criterion of "reasonable grounds to believe ..." shall be used for mandatory taking contact, some examples being mentioned in a recital.**

6. The issues of "criminal proceedings" and of the "competent authorities" which shall act under the Framework Decision were also discussed in the Working Party.

It was generally agreed that, within the context of the proposed Framework Decision, the notion "criminal proceedings" is meant to include both the pre-trial phase and the trial phase (before a court), in accordance with national law. Whereas the authorities competent to act under the Framework Decision would in most cases be judicial authorities (prosecutors, judges), it was generally felt that it should not be excluded that, under the national law of some Member States, also police authorities could be competent to act under the Framework Decision, in full compliance with the legal basis provided in Article 31 TEU on judicial cooperation in criminal matters.

Furthermore, the question of a possible role of "central authorities" arose in this respect. Whereas some Member States were against the idea that a central authority should be involved in the procedure at all, some others were of the opinion that a central authority's subsidiary role could represent an added value.

The Presidency therefore suggests that it should be left to the discretion of each Member State which authority or authorities, including their number, are competent to act under this Framework Decision in compliance with the principle of national procedural autonomy.

CATS is invited to confirm the above mentioned general conclusions concerning "criminal proceedings" and "competent authorities", and notably:

- **that the notion "criminal proceedings" shall have a broad meaning, and include also the pre-trial stage;**
- **that where the authorities competent to act under the Framework Decision in most cases will be judicial authorities (prosecutors, judges), it is not excluded that police authorities shall also be competent to act, in full compliance with Article 31 TEU;**
- **that it is left to the discretion of each Member State which authority or authorities, including their number, shall be competent to act under the Framework Decision.**

7. As regards the "procedure of taking contact", through which a competent authority in a Member State takes contact with the competent authority in another Member State in order to confirm the existence of parallel proceedings in respect of the same facts involving the same person(s), it was generally agreed that this procedure should be left very flexible. No formal notification should be imposed, and no forms should be required to fill in and transmit.

It was however agreed that the competent authorities, when taking contact, should do so by any means whereby a written record can be produced.

Further, it was suggested that the Framework Decision shall prescribe a minimum set of information which the authorities should at least exchange (e.g. such as description of the facts or details of the suspect/accused person), with a view to establish that the same facts and the same person(s) are the subject of proceedings in the two or more Member States concerned.

As regards the obligation for an authority to reply to a communication by another authority, it was agreed that there had to be a general obligation to reply, although it was acknowledged that there could be exceptional situations in which specific information could not be provided, e.g. in view of essential national security interests or the safety of individuals.

As to possible time limits for the reply it was agreed that they should in principle be flexible. As a possible solution it was suggested to draw inspiration from Article 4 of the 2000 MLA Convention.

CATS is invited to confirm the above mentioned general conclusions concerning the "procedure of taking contact", and notably:

- **that no forms shall be required;**
- **that, however, competent authorities shall correspond by any means whereby a written record can be produced;**
- **that the competent authorities shall provide a set of minimum information;**
- **that there shall be a general obligation to reply;**
- **that the time-limits shall be flexible, taking as a basis Article 4 of the 2000 MLA Convention.**

8. In the light of the above mentioned provisional agreement in the Working Party, the Presidency has redrafted the original Articles 1-9 of the proposed Framework Decision in 5208/09 COPEN 7, see 5973/09 COPEN 19 (to be issued). In the Annex to this note, CATS will find for information model provisions with constituent elements of some of the redrafted Articles, which are relevant for some of the above mentioned points.

Action by CATS

9. With a view to facilitating further work on the draft Framework Decision, CATS is invited to confirm the conclusions as set out under points 5-7 above.

Provision A

Objectives

1. This Framework Decision has the objective to promote a closer cooperation between the competent authorities of two or more Member States conducting criminal proceedings, 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"); and
 - c) reach agreement on any effective solution aimed at avoiding the negative aspects of parallel exercise of competence in conducting criminal proceedings.

Provision B

Subject matter and scope

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),
- 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].
