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ADDENDUM to INITIATIVE

from : Austrian, Finnish and Swedish Delegations

dated : 24 January 2005

Subject : Draft Council Framework Decision on the European enforcement order and the transfer of sentenced persons between Member States of the EU

Delegations will find attached the explanatory memorandum on the above initiative.

EXPLANATORY NOTE**Framework Decision
on the European enforcement order
and the transfer of sentenced persons between Member States of the EU****Background to the proposal**

The Tampere European Council (1999) took the view that mutual recognition of court decisions should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union. The principle was to apply both to judgments and to other decisions of judicial authorities.

At its meeting on 30 November and 1 December 2000 the Council (Justice and Home Affairs) adopted a programme of measures to implement the principle of mutual recognition of decisions in criminal matters, in which it called for an assessment of the need for modern mechanisms for the mutual recognition of final sentences involving deprivation of liberty (Measure 14) and for extended application of the principle of the transfer of sentenced persons to cover persons resident in a Member State (Measure 16).

The Hague Programme on strengthening freedom, security and justice in the EU requires the Member States to complete the programme of measures, in particular in the field of enforcing final custodial sentences.

In May 2004 the European Commission submitted a Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the EU, in which it concluded that the range of instruments applicable between the EU Member States on the recognition and enforcement of custodial sentences and detention orders in another Member State was incomplete and capable of improvement.

The main instrument governing cross-border enforcement of custodial sentences and detention orders in relations between the Member States is currently the Convention on the Transfer of Sentenced Persons of 21 March 1983. Under that Convention, sentenced persons may be transferred to serve the remainder of their sentence only to their State of nationality and only with their consent and that of the States involved. The Additional Protocol to the Convention, of 18 December 1997, which allows transfer without the person's consent, subject to certain conditions, has not been ratified by all the Member States. Neither instrument imposes any basic obligation to enforce a custodial sentence or a detention order imposed in another Member State or sets any time limits for the decision on the enforcement and for the transfer of the sentenced person to the executing State.

Only a few Member States have ratified the European Convention of 28 May 1970 on the International Validity of Criminal Judgments, which does not require the sentenced person's consent and places a duty on the executing State to accept persons ordinarily resident in that State, subject to certain grounds for refusal.

The abovementioned Council of Europe instruments allow the Parties to choose between continuing to enforce the sentence or converting it. However, allowing the executing State to convert a sentence does not appear compatible with the principle of mutual recognition laid down in the Tampere conclusions and the Hague programme.

The main elements of the proposal are:

- a duty on the executing State to allow nationals, permanent residents and persons with other close links to serve their custodial sentences or detention orders on the territory of that State, subject to certain grounds for refusal;
- waiver of the double criminality requirement with regard to convictions for certain offences on a list corresponding to that contained in the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190 of 18 July 2002;

- if the sentenced person is in the issuing State, he shall, if possible, be given an opportunity to state his opinion orally or in writing before a European enforcement order is issued;
- the consent of the sentenced person is not required when he is a national of the executing State or when he has his permanent legal residence in that State;
- recognition of the foreign final custodial sentence or detention order and its execution on the basis of a form (so-called European enforcement order);
- time-limits for the decision on the European enforcement order and for the transfer of the sentenced person to the executing State;
- enforcement of the final custodial sentence or detention order imposed by the sentencing State without conversion proceedings;
- the duration of the sentence may be adapted to the maximum level provided for a criminal act under the national law of the executing State only where the sanction is incompatible with fundamental principles of the law of the executing State;
- the nature of the sentence may, if it is incompatible with the law of the executing State, be adapted to the punishment or measure provided for under the national law of the executing State for a criminal offence of the same type.

Some provisions in the proposal also apply to the enforcement of sanctions imposed on nationals of the executing State or on persons resident therein who were surrendered to the issuing State, pursuant to Article 5(3) of the Framework Decision on the European arrest warrant, subject to the condition that they be returned to the executing State in order to serve the sanction. The same applies where the executing Member State undertakes, pursuant to Article 4(6) of the Framework Decision, to execute the sanction on which the European arrest warrant is based. These sets of circumstances are currently unregulated.

This initiative constitutes a major step towards full achievement of an area of freedom, security and justice. It is designed to further the social rehabilitation of offenders, since it is more appropriate for measures of rehabilitation to be taken in a State where the offender understands the language and to which the sentenced person has close personal links. The opportunity for social contact with relatives and friends helps prepare the sentenced person for a return to the community. The objective of rehabilitation of the sentenced person is not served if such a person is kept in a foreign State when it is likely that, due to a deportation order, he will no longer be permitted to remain in that State after having served the sentence. An early transfer of the sentenced person to the State of his nationality or the State of his permanent legal residence increases the possibility of rehabilitation.

Legal basis

The proposal is based on Article 31(1)(a) and 34(2)(b) of the EU Treaty. Article 31(1)(a) provides for "facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States ... in relation to proceedings and the enforcement of decisions". Pursuant to Article 34(2)(b) the Council may "adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States".

Comments on the Articles

Article 1 contains definitions of the key terms used in the draft Framework Decision. It follows from the definition of "European enforcement order" that issuing authorities do not necessarily have to be judicial authorities. However, the sanction to be enforced by the European enforcement order must have been passed by a court in the issuing State.

The definition of "sanction" is based on Article 1(a) of the Council of Europe Convention of 1983. It covers not only custodial sentences, but also detention orders imposed on persons who cannot be held criminally responsible for their acts on account of their mental state.

Under Article 2, Member States must notify the General Secretariat of the Council of their competent authorities; the Secretariat will then inform the other Member States and the Commission accordingly. This provision is necessitated by the direct contact between authorities laid down in Article 4(4). Referring orders directly to the competent authority in the executing State is intended to avoid the delays which may be caused by going through a central authority; however, it does mean that there is a small risk of contacting the wrong authority. The Member States can therefore designate one or more central authorities for transmission and reception of European enforcement orders and to assist the competent authorities.

In Article 3 it is made clear that the Framework Decision deals with the enforcement, in the executing State, of sanctions imposed on natural persons by a court in the issuing State, regardless of whether enforcement has already started or whether the person concerned is still in the issuing State or already in the executing State.

Paragraph 3(a) specifies those provisions of the Framework Decision which apply to the enforcement of sanctions imposed on nationals of the executing State or on persons residing there if the executing State had made their surrender to the issuing State according to Article 5(3) of the Framework Decision on the European arrest warrant subject to the condition that the person will be returned to the executing State in order to serve the sentence. In this respect there is currently a legal vacuum.

Also in the case where, under Article 4(6) of the Framework Decision on the European arrest warrant, the executing State undertakes to enforce the sanction on which the warrant is based, there are currently no corresponding provisions in keeping with the principle of mutual recognition. It is therefore made clear in Article 3(b) of the present draft that certain provisions of the Framework Decision do apply to the case mentioned.

Article 4 contains criteria for the forwarding of a European enforcement order to an executing State. The natural person on whom the sanction has been imposed

- must be a national of the Member State concerned, or
- must have his permanent legal residence there, or

- must have other close links with that State.

In the case of *other close links* with the executing State, the forwarding of a European enforcement order – by way of derogation from the general rule (Article 5) – is envisaged only with the consent of the sentenced person. The aim is thus to prevent a Member State from being requested to enforce a European enforcement order because, for example, family members of the sentenced person are resident there but with whom the sentenced person has no contact.

In order to prevent a European enforcement order from being forwarded to a Member State to which the sentenced person does not have close links. Article 4(2) makes it clear that this cannot be done if the sentenced person has his permanent legal residence in the issuing State unless the sentenced person consents to the transfer or would in any case be deported from the issuing State on the basis of a decision giving rise to the European enforcement order after having served the sentence. This provision draws on Article 3(1) of the 1997 Protocol.

The criteria embodied in Article 4 concerning the involvement of a Member State as executing State are to be seen in conjunction with Article 5 and Article 9(1)(g). Under the former provision, the sentenced person, provided that he is in the issuing State, is – if possible – to be given an opportunity to state his opinion before a European enforcement order is issued. That opinion should be taken into consideration when deciding whether a European enforcement order is to be issued and, if so, to which executing State it is to be forwarded. Under the latter provision, the competent authority in the executing State may refuse to recognize and enforce the European enforcement order if the sentenced person neither possesses the nationality of the executing State nor is legally and permanently resident in that State, nor has any close links with that State.

The fact that, on account of an act in respect of which a European enforcement order was issued, a custodial sentence or detention order was imposed in addition to a fine which the sentenced person has not yet paid, does not prevent the European enforcement order being forwarded. For the purposes of enforcing the fine, the issuing State may avail itself of the Council Framework Decision of 24 February 2005 on the application of mutual recognition to financial penalties. This is implicitly stated in Article 4(3).

In addition, Article 4 governs direct contact between the competent authorities. It is furthermore explained how to find out which the competent authority in the executing State is, for example via the Contact points of the European Judicial Network. It is also stipulated that the European enforcement order can be forwarded not only by post but also by fax or e-mail.

In accordance with Article 5, the consent of the sentenced person is not required for a European enforcement order to be forwarded, except for cases where the order is based on the sentenced person's other close links with the executing State. However, the person should be notified of the consequences of transfer to the executing State and, if he is still in the issuing State, he should, if possible, be given an opportunity to state his opinion (orally or in writing). That opinion is to be taken into consideration when deciding whether the European enforcement order is to be issued and if so, to which executing State it is to be forwarded.

Article 6 makes it clear that a European enforcement order has to contain the information mentioned in the annexed form and that, as a main rule, it has to be translated into the official language or one of the official languages of the executing State.

Article 7 refers to those offences that, if they are punishable in the issuing State by a maximum period of at least 3 years, lead to recognition and enforcement of a European enforcement order without verification of the existence of double criminality.

The list of offences corresponds to that in the Framework Decision on the European arrest warrant and in the Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003).

It is made clear in paragraph 3 that for other offences the executing State may make the recognition and enforcement of a European enforcement order subject to the existence of double criminality.

Under Article 8, the competent authority in the executing State is obliged to recognize the European enforcement order without further formality being required and to enforce it, subject to the grounds for refusal in Article 9,. This means that it is in principle not possible to carry out an adaptation procedure in the executing State. Such a procedure would not be in accordance with the principle of mutual recognition. The competent authority in the executing State can consider adapting the sanction only in the following cases:

- if the *duration* of the sanction is not compatible with fundamental principles of the law of the executing State. This may be the case if a life sentence was imposed in the issuing State when such a sentence is incompatible with fundamental principles of the law of the executing State. In this event the competent authority in the executing State may adapt the sanction to the maximum level provided for a criminal act under the national law of that State;
- if the *nature* of the sanction is not compatible with the law of the executing State. In this event, the competent authority in that State may adapt the sanction to the punishment or measure provided for under its own law for a criminal offence of the same type. The punishment or measure must, as far as possible, correspond to the sanction imposed in the issuing State. This provision draws on Article 10(2) of the 1983 Convention.

If the recognition and enforcement of the European enforcement order is partly refused because of lack of double criminality, the competent authority in the executing State may not itself adapt the sanction. Instead, the competent authority in the issuing State has to be contacted with a view to obtaining advice as to which part of the sanction relates to the acts covered by the refusal. Only after this information has been received can the sanction be reduced by the part indicated by the issuing State.

Article 9 states the grounds enabling the executing State to decide not to recognize and enforce the decision. These grounds are:

- Paragraph 1(a): principle of *ne bis in idem*;

- Paragraph 1(b): Absence of dual-criminality in cases where the act to which a European enforcement order relates does not constitute an offence as listed in Article 7(1);
- Paragraph 1(c): Enforcement of the decision is statute-barred according to the law of the executing State, insofar as the executing State has jurisdiction over the act to which the European enforcement order relates;
- Paragraph 1(d): Absence of criminal liability under the law of the executing State because of the age of the sentenced person;
- Paragraph 1(e): Less than four months of the sanction are still to be served at the time the European enforcement order was received by the competent authority of the executing State;
- Paragraph 1(f): When the decision was rendered in absentia insofar as the sentenced person was not summoned personally or informed in some other way of the time and place of the proceedings or has not indicated to a competent authority that he or she does not contest the case. However, the sentenced person can agree to the forwarding of the European enforcement order regardless;
- Paragraph 1(g): The sentenced person neither possesses the nationality of the executing State nor is legally and permanently resident in, nor has any close links with, that State.

In the cases referred to in paragraph 1(a), (f) and (g), the competent authority of the executing State, before deciding not to recognize and enforce a European enforcement order, has to carry out a consultation procedure, during which the competent authority in the issuing State may be asked to supply additional information.

Article 10 lays down the time limit for deciding whether to enforce the European enforcement order. According to that Article, the competent authority in the executing State shall, within a maximum of three weeks of receipt of the European enforcement order, decide whether to enforce it. In order to ensure the necessary degree of flexibility, however, paragraph 2 contains a derogation for unspecified "exceptional cases". In such cases, the competent authority of the issuing State must be notified without delay.

Article 11 concerns the transfer to the executing State of sentenced persons in respect of whom a European enforcement order has been issued. It stipulates that the person must be transferred no later than two weeks after the decision on the enforcement of the European enforcement order. This time limit may be exceeded in the following cases:

- if the transfer within the stipulated period is prevented by unforeseeable circumstances;
- if – exceptionally – the transfer is temporarily postponed for serious humanitarian reasons, in particular if the transfer could endanger the sentenced person's life or health. A corresponding provision is contained in Article 23(4) of the Framework Decision on the European arrest warrant.

Article 12 concerns the required content of a request for the transit through the territory of a Member State of a sentenced person who is being transferred to the executing State, and clarifies that such a request may also be made by fax or e-mail.

A decision on the approval of a transfer must be taken within one week of the request being received.

A transit request is not required in the case of transfer by air without a scheduled stopover. However, if an unscheduled landing occurs, the information referred to in paragraph 1 must be provided.

Under Article 13, enforcement is governed by the law of the executing State. In principle, this also applies to the grounds for conditional release. However, in order to ensure that the sentenced person is not released from custody immediately after transfer to the executing State, paragraph 3 provides that conditional release in that State may only be granted if the sentenced person has served a total of at least half the sanction in the issuing and executing States, unless otherwise agreed between the issuing and the executing States.

The decision on conditional release, which in principle is to be taken in accordance with the law of the executing State, shall take account of the provisions of the issuing State's national law – as stipulated in the European enforcement order – pursuant to which the sentenced person is entitled to conditional release at a specific time. Not all of the issuing State's provisions concerning conditional release are relevant in that respect, only those entitling the sentenced person to conditional release at a specific time. This opens up for the possibility for the executing State, in its decision on conditional release, to take into account any possible earlier conditional release that would have been granted had enforcement of the sentence not been transferred.

Article 14 contains a specialty provision according to which a person transferred to the executing State may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her transfer other than that for which he or she was transferred.

Paragraph 2 refers to cases to which the specialty principle does not apply. A corresponding provision is contained in Article 27(3) of the Framework Decision on the European arrest warrant. It should be noted that the jurists linguists made some changes to the wording of Article 14 para. 2 subpara. d) (at least in the English version). In the opinion of the authors, it would be preferable to go back to the original version which corresponds to the agreed text of Article 27 para. 3 subpara. d) of the Framework Decision on the European arrest warrant.

Paragraph 3 specifies the required content of a request for the consent of the issuing State to prosecute the sentenced person for an offence committed prior to his or her transfer, and stipulates that a decision must be taken no later than thirty days after receipt of the request. Consent shall be given if the offence for which it is requested could give rise to surrender under the Framework Decision on the European arrest warrant.

Article 15 clarifies that an amnesty or pardon may be granted by both the issuing State and the executing State. However, only the issuing State may decide on applications for review of the decision imposing the sanction to which the European enforcement order relates.

According to Article 16, the executing State must terminate enforcement of the sanction if it is informed by the issuing State that it is no longer enforceable, e.g. because of for example an amnesty or pardon.

Article 17 refers to the facts that the competent authority of the executing State must communicate to the competent authority of the issuing State.

Article 18 clarifies that the issuing State, following the transfer of the sentenced person, may not proceed further with the enforcement of the sanction that forms the basis of a European enforcement order. Paragraph 2 lists the derogations, which relate to the cases referred to in Article 17(e) and (f).

Under Article 19, costs resulting from application of the Framework Decision shall as a main rule be borne by the executing State. This also relates to costs in connection with the transport of the sentenced person to the executing State. Costs arising exclusively in the sovereign territory of the issuing State are excluded.

Article 20 aims to enable Member States to continue to apply existing arrangements relating to the enforcement of measures involving deprivation of liberty or protective measures insofar as they are more effective than the new instrument.

The enforcement of such sanctions in the relationship between Member States currently takes place mainly on the basis of the following agreements:

- European Convention on the International Validity of Criminal Judgments of 28 May 1970;
- Convention on the Transfer of Sentenced Persons of 21 March 1983;
- Additional Protocol to the Convention on the Transfer of Sentenced Persons of 18 December 1997;
- Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 13 November 1991;

- Title III, Chapter 5 of the Convention of 19 June 1990 implementing the Schengen Convention of 14 June 1985 on the gradual abolition of checks at common borders.

Since these agreements do not allow the objectives of this proposal to be extended or enlarged and therefore do not help to simplify or facilitate further the procedures for the enforcement of sanctions within the meaning of Article 20, it must be assumed that they will be replaced by the proposed Framework Decision in respect of relations between Member States with regard to the enforcement of sanctions once that Framework Decision has been transposed.

Articles 21 and 22 contain standard provisions concerning the implementation and entry into force of the Framework Decision.
