



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 14 January 2008**

**5213/08**

**COPEN 4**

**INITIATIVE**

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from : Slovenian, French, Czech, Swedish, Slovak, United Kingdom and German delegations

dated : 14 January 2008

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Subject: Draft Council Framework Decision 200./.../JHA of... on the enforcement of judgments *in absentia* and modifying:

- Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States
  - Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties
  - Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders
  - (Framework Decision .../.../JHA of ... on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union)
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Delegations will find in the Annex an initiative from the Republic of Slovenia, the French Republic, the Czech Republic, the Kingdom of Sweden, the Slovak Republic, the United Kingdom and the Federal Republic of Germany.<sup>1</sup>

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<sup>1</sup> An explanatory note will follow as addendum to this document.

DRAFT

**Council Framework Decision 200.../.../JHA of.... on the enforcement of judgments *in absentia* and modifying:**

- **Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States** <sup>1</sup>
- **Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties** <sup>2</sup>
- **Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders** <sup>3</sup>
- **(Framework Decision ..../.../JHA of ..... on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union)** <sup>4</sup>

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Republic of Slovenia, the United Kingdom, the Czech Republic, the Federal Republic of Germany, the French Republic and the Kingdom of Sweden <sup>5</sup>,

Having regard to the Opinion of the European Parliament <sup>6</sup>,

Whereas:

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<sup>1</sup> OJ L 190, 18.7.2002, p. 1.

<sup>2</sup> OJ L 76, 22.3.2005, p. 16.

<sup>3</sup> OJ L 328, 24.11.2006, p 59.

<sup>4</sup> OJ ... (last version of draft text: 9688/07 COPEN 86 + COR 1 REV 1)

<sup>5</sup> OJ ...

<sup>6</sup> OJ ...

- (1) The right for the accused person to be present during hearings of the trial is a fundamental right provided in the United Nations Covenant on Civil and Political Rights (Article 14.3.d). The European Court of Human Rights declared that it is included in the right to a fair trial provided in Article 6 of the European Convention on the Protection of Human Rights; it also declared that such right of the accused person to be present during hearings is not absolute as well that under certain conditions the accused person may waive the right to be present.
- (2) The various Framework Decisions implementing the principle of mutual recognition to final judgments do not deal consistently with the issue of judgments rendered *in absentia*. This diversity complicates the work of the practitioner and hampers judicial cooperation.
- (3) Solutions provided by these Framework Decisions are not satisfactory as regards cases where the person could not be informed of the proceedings. Framework Decisions 2005/214/JHA, 2006/783/JHA and .../.../JHA [transfer] allow the executing authority to refuse the execution of such judgments. Framework Decision 2002/584/JHA allows the executing authority to require the issuing authority to give an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment. The adequacy of such guarantee is a matter to be decided by the executing authority and it is therefore difficult to know exactly when execution may be refused.
- (4) It is therefore necessary to provide clear and common solutions which define the grounds for refusal and the margin of appreciation left to the executing authority.
- (5) Such changes require amendment of the existing Framework Decisions implementing the principle of mutual recognition to final judicial decisions. The new provisions should serve as a basis for future instruments in this field.

- (6) Common solutions on grounds for refusal in the existing Framework Decisions concerned should take into account the diversity of situations with regard to the notification of the accused person of his right to a retrial.
- (7) This Framework Decision is limited to the definition of grounds for refusal in instruments implementing the principle of mutual recognition. Therefore, provisions such as the definition of the concept of judgment rendered *in absentia* or rules on the right to a retrial have a scope which is limited to the definition of these grounds for refusal. They are not designed to approximate national legislations.

HAS ADOPTED THIS FRAMEWORK DECISION:

*Article 1*  
*Objective and scope*

1. The objective of this Framework Decision is to ensure the procedural rights of persons subject to criminal proceedings and at the same time to facilitate judicial co-operation in criminal matters and in particular to improve mutual recognition of judicial decisions between Member States of the European Union.
2. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union, and any obligations incumbent upon judicial authorities in this respect shall remain unaffected.
3. The scope of this Framework Decision is to establish common rules for the recognition and (or) execution of judicial decisions in one Member State (executing Member State) issued by another Member State (issuing Member State) following proceedings where the person was not personally present, according to the provisions in Article 5(1) of Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, Article 7(2)(g) of Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, Article 8(2)(e) of Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders and Article 9(1)(f) of Framework Decision .../.../JHA of ..... on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

*Article 2*  
*Modifications to Framework Decision 2002/584/JHA*

In Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, the following modifications shall be made:

1. In Article 1, the following paragraph 4 shall be inserted:

'4. "Decision rendered *in absentia*" shall mean a custodial sentence or a detention order, when the person did not personally appear in the proceedings resulting in this decision.'

2. The following Article 4a shall be inserted:

'Article 4a  
Decisions rendered *in absentia*

The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order, if the judgment was rendered *in absentia*, unless the European arrest warrant states that the person:

- a) was summoned in person or informed in accordance with the national law of the issuing State via a competent representative and in due time, of the scheduled date and place of the hearing which led to the decision rendered *in absentia* and informed about the fact that such a decision may be handed down in case the person does not appear for the trial;

b) after being served with the judgment and being expressly informed about the right to a retrial and to be present at that trial :

(i) expressly stated that he does not contest the decision rendered *in absentia*;

or

(ii) did not request a retrial in the applicable timeframe which was of at least [...] days;

or

c) was not personally served with the decision rendered *in absentia* but :

(i) will be served with it at the latest on the fifth day after the surrender and will be expressly informed about the right to a retrial and to be present at that trial;

and

(ii) will have at least [...] days to request a retrial.'

3. In Article 5, paragraph 1 is deleted.

4. In the Annex ("certificate"), box d is replaced by the following :

(d) Indicate if the decision was rendered *in absentia*:

1.  No, it was not

2.  Yes, it was. If you have answered yes, please confirm that:

- 2.1 the person was summoned in person or informed in accordance with the national law of the issuing State via a competitive representative and in due time of the scheduled date and place of the hearing which led to the decision rendered *in absentia* and informed about the fact that such a decision may be handed down in case the person not appear for the trial

*Time and place when and where the person was summoned or otherwise informed:*

.....

*Describe how the person was informed:*

.....

OR

- 2.2 the person, after being served with the decision rendered *in absentia*, expressly stated that he or she does not contest the decision rendered *in absentia*

*Describe when and how the person expressly stated that he or she does not contest the decision rendered in absentia:*

.....



OR

2.3 the person was entitled to a retrial under the following conditions:

2.3.1 the person was personally served with the decision rendered *in absentia* on ..... (day/month/year); and

- the person was expressly informed about the right to a re-trial and to be present at that trial; and
- after being notified of this right, the person had .... days to request a re-trial and he or she did not request it during this period.

OR

2.3.2 the person was not served with the decision rendered *in absentia*, and

- the person will be served with the decision rendered *in absentia* within ..... days after the surrender; and
- when served with the decision rendered *in absentia*, the person will be expressly informed about the right to a re-trial and to be present at that trial; and
- after being served with the decision rendered *in absentia*, the person will have ..... days to request a re-trial.

*Article 3*

*Modifications to Framework Decision 2005/214/JHA*

In Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, the following modifications shall be made:

1. In Article 1, the following subparagraph (e) shall be inserted:

'(e) "Decision rendered *in absentia*" shall mean a decision as defined in subparagraph (a) when the person did not personally appear in the proceedings resulting in this decision.'

2. In Article 7(2):

- indent (g) is replaced by the following:

'(g) according to the certificate provided for in Article 4, the person concerned, in case of a written procedure was not, in accordance with the law of the issuing State, informed personally or via a representative, competent according to national law, of his right to contest the case and of time limits of such a legal remedy;'

- a new indent (i) is inserted, worded as follows:

'(i) according to the certificate provided for in Article 4, the decision was rendered *in absentia*, unless the certificate states that the person:

- a) was summoned in person or informed in accordance with the national law of the issuing State via a competent representative and in due time, of the scheduled date and place of the hearing which led to the decision rendered *in absentia* and informed about the fact that such a decision may be handed down in case the person does not appear for the trial; or
- [b) expressly stated to a competent authority that he or she does not contest the case; or]
- c) after being served with the decision rendered *in absentia* and being informed about the right to a retrial and to be present at that trial :
  - (i) expressly stated that he or she does not contest the decision rendered *in absentia*;
  - or
  - (ii) did not request a retrial in the applicable timeframe which was of at least [...] days.'

3. In box (h) of the Annex ("certificate"), point 3 is replaced by the following:

3. Indicate if the decision was rendered *in absentia*:

1.  No, it was not

2.  Yes, it was. If you have answered yes, please confirm that:

- 2.1 the person was summoned in person or informed in accordance with the national law of the issuing State via a competitive representative and in due time of the scheduled date and place of the hearing which led to the decision rendered *in absentia* and informed about the fact that such a decision may be handed down in case the person not appear for the trial

*Time and place when and where the person was summoned or otherwise informed:*

.....

*Describe how the person was informed:*

.....

OR

- 2.2 the person, [before or] after being served with the decision rendered *in absentia*, expressly stated that he or she does not contest the decision rendered *in absentia*.

*Describe when and how the person expressly stated that he or she does not contest the decision rendered in absentia:*

.....

OR

- 2.3 the person was served with the decision rendered *in absentia* on .....  
(day/month/year) and was entitled to a retrial in the issuing State under the following conditions:
- the person was expressly informed about the right to a re-trial and to be present at that trial; and
  - after being notified of this right, the person had ... days to request a re-trial and did not request it during this period.

*Article 4*

*Modifications to Framework Decision 2006/783/JHA*

In Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, the following modifications shall be made :

1. In Article 2, the following subparagraph (i) shall be inserted:

- '(i) "Decision rendered *in absentia*" shall mean a confiscation order as defined in subparagraph (c) when the person did not personally appear in the proceedings resulting in this decision.'

2. Article 8(2)(e) is replaced by the following:

- '(e) according to the certificate provided for in Article 4(2), the decision was rendered *in absentia*, unless the certificate states that the person:

a) was summoned in person or informed in accordance with the national law of the issuing State via a competent representative and in due time, of the scheduled date and place of the hearing which led to the confiscation order rendered *in absentia* and informed about the fact that such a confiscation order may be handed down in case the person does not appear for the trial;

or

b) after being served with the confiscation order rendered *in absentia* and being informed about the right to a retrial and to be present at that trial :

(i) expressly stated that he she does not contest the confiscation order;

or

(ii) did not request a retrial in the applicable timeframe which was of at least [...] days.'

3. In the Annex ("certificate"), box (j) is replaced by the following:

(j) Indicate if the decision was rendered *in absentia*:

1.  No, it was not

2.  Yes, it was. If you have answered yes please confirm that:

- 2.1 the person was summoned in person or informed in accordance with the national law of the issuing State via a competitive representative and in due time of the scheduled date and place of the hearing which led to the decision rendered *in absentia* and informed about the fact that such a decision may be handed down in case the person not appear for the trial

*Time and place when and where the person was summoned or otherwise informed:*

.....

*Describe how the person was informed:*

.....

OR

- 2.2 the person, after being served with the decision rendered in absentia, expressly stated that he or she does not contest the decision rendered *in absentia*

*Describe when and how the person expressly stated that he or she does not contest the decision rendered in absentia:*

.....

OR

- 2.3 the person was served with the decision rendered *in absentia* on .....  
(day/month/year) and was entitled to a retrial in the issuing State under the following conditions:
- the person was expressly informed about the right to a re-trial and to be present at that trial; and
  - after being notified of this right, the person had ... days to request a re-trial and did not request it during this period.

*Article 5<sup>1</sup>*

*Modifications to Framework Decision .../.../JHA*

In Framework Decision .../.../JHA of .... on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union :

1. In Article 1, the following subparagraph (e) shall be inserted:

- '(e) "Decision rendered *in absentia*" shall mean a judgment as defined in subparagraph (a), when the person did not personally appear in the proceedings resulting in this decision.'

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<sup>1</sup> Only if the Framework Decision on "transfer" (see 9688/07 COPEN 86 + COR 1 REV 1) is adopted before this Framework Decision on "*in absentia*".



2. Article 9(1)(f) is replaced by the following:

'(f) according to the certificate provided for in Article 4, the decision was rendered *in absentia*, unless the certificate states that the person:

a) was summoned in person or informed in accordance with the national law of the issuing State via a competent representative and in due time, of the scheduled date and place of the hearing which led to the decision rendered *in absentia* and informed about the fact that such a decision may be handed down in case the person does not appear for the trial;

or

b) after being served with the decision rendered *in absentia* and being informed about the right to a retrial and to be present at that trial :

(i) expressly stated that he or she does not contest the decision rendered *in absentia*;

or

(ii) did not request a retrial in the applicable timeframe which was of at least [...] days.

3. In box (k) of the Annex ("certificate"), point 1 is replaced by the following:

1. Indicate if the decision was rendered *in absentia*:

a.  No, it was not

b.  Yes, it was. If you have answered yes please confirm that:

- b.1 the person was summoned in person or informed in accordance with the national law of the issuing State via a competitive representative and in due time of the scheduled date and place of the hearing which led to the decision rendered *in absentia* and informed about the fact that such a decision may be handed down in case the person not appear for the trial

*Time and place when and where the person was summoned or otherwise informed:*

.....

*Describe how the person was informed:*

.....

OR

- b.2 the person, after being served with the decision rendered *in absentia*, expressly stated that he or she does not contest the decision rendered *in absentia*

*Describe when and how the person expressly stated that he or she does not contest the decision rendered in absentia*

.....

OR

b.3 the person was served with the decision rendered *in absentia* on .....  
(day/month/year) and was entitled to a retrial in the issuing State under the following conditions:

- the person was expressly informed about the right to a retrial and to be present at that trial; and
- after being notified of this right, the person had ... days to request a re-trial and did not request it during this period

### *Article 6*

#### *Implementation*

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by [...]<sup>1</sup>.
2. 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.
3. On the basis of the information communicated by the General Secretariat of the Council, the Commission shall, by [...] at the latest, submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied, where necessary, by legislative proposals.

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<sup>1</sup> 18 months after the date of entry into force of this Framework Decision.

*Article 7*  
*Entry into force*

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

Done in (Brussels) on .....

For the Council,  
The President

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