

## Some remarks regarding the Draft Council Framework Decision on the enforcement of decisions rendered in absentia<sup>1</sup>

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### A. Reason for the draft Framework Decision

In various (draft) Council framework decisions on the mutual recognition and execution of judicial decisions various provisions can be found with regard to the recognition and execution or not of decisions rendered in absentia.

Reference is, for example, made to article 7 paragraph 2 of the framework decision on the application of the principle of mutual recognition to financial penalties, in which the following is determined<sup>3</sup>:

*"The competent authority in the executing State may also refuse to recognise and execute the decision if it is established that:*

*(i) 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, or*

*(ii) did not appear personally, unless the certificate states:*

*— that the person was informed personally, or via a representative, competent according to national law, of the proceedings in accordance with the law of the issuing State, or*

*— that the person has indicated that he or she does not contest the case,"*

In the framework decision on the mutual recognition of confiscation orders another fact also appears to be relevant to the question as to whether a confiscation order rendered in absentia should be recognised.<sup>4</sup> This regards the question as to whether the person concerned was represented by an authorised legal counsellor. Reference is made to article 8 paragraph 2 under e of the aforementioned framework decision:

*"The competent judicial authority of the executing State (...) may also refuse to recognise and execute the confiscation order if it is established that (...) the person concerned did not appear personally and was not represented by a legal counsellor in the proceedings resulting in the confiscation order, unless the certificate states that the person was informed personally, or via his representative competent according to national law, of the proceedings in accordance with the law of the issuing State, or that the person has indicated that he or she does not contest the confiscation order."* (my underlining)

The foregoing illustrates the differences relating to the decisions rendered in absentia in the various framework decisions. A confiscation order must be enforced if the person concerned was absent during the procedure but was represented by a lawyer, whereas a decision imposing a financial penalty could be rejected by the executing authority in the same circumstances.<sup>5</sup>

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<sup>1</sup> Hereinafter referred to as 'the draft framework decision'.

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<sup>3</sup> Council Framework Decision 2005/214/JHA of 24 February 2005, OJEC L 076/16.

<sup>4</sup> Council Framework Decision 2006/783/JHA of 6 October 2006, OJEC L 328/59.

<sup>5</sup> Informal Meeting of the Ministers of Justice and Home Affairs, Brdo pri Kranju, 24 – 26 January 2008. Reference is also made to the explanatory memorandum on the draft framework decision.

These kinds of differences induced various Member States to propose the draft council framework decision.<sup>6</sup> Even though the text of the draft framework decision does not explicitly mention this as an objective, it appears to be an important objective to limit the possibilities for refusal where decisions rendered in absentia are concerned. New exceptions are, for example, introduced to the main rule that a decision rendered in absentia does not require to be recognised.

It is proposed in the draft framework decision to replace the regulations in five framework decisions relating to decisions rendered in absentia by one new regulation.<sup>7</sup> In addition to the acquisition of a consistent regime, the proposal also aims to prevent that recognition of the foreign decision is refused as a matter of course, in case the person concerned was not informed of the procedure.<sup>8</sup>

Finally, the draft framework decision indicates that in case of a European Arrest Warrant, for the benefit of the execution of a decision rendered in absentia, the executing Member State may desire that a retrial is sufficiently guaranteed by the issuing Member State (reference is made to article 5 paragraph 1 EAW). According to the authors of the draft framework decision this leads to obscurity with regard to the question as to whether the executing authority may determine whether a guarantee is sufficient or not.<sup>9</sup> The initiating states hence pursue to remove this obscurity with the proposal.

## **B. Exceptions draft Framework Decision**

It is proposed in the draft framework decision that it cannot be refused to recognise and execute a decision rendered in absentia if the person concerned:

*a) in due time*

*(i) was summoned in person or by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that the person concerned was*

*aware of the scheduled trial, and*

*(ii) was informed that a decision may be handed down if he or she does not appear for the trial*

*b)*

*being aware of the scheduled trial had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him/her at the trial, and was indeed defended by that counsellor at the trial;*

*c)*

*after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:*

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

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<sup>6</sup> The initiating states are Slovenia, Germany, France, United Kingdom, Czech Republic, Slovakia and Sweden. In this article I assume the amended text as applicable on 8 April 2008. The latter contains important amendments in respect of the first draft. It goes without saying that the text adopted by the Council may deviate from the text I currently rely on. The most recent draft framework decision can be found at <http://register.consilium.europa.eu>.

<sup>7</sup> The five regulations are the Council Framework Decision 2002/584/JHA on the EAW, Council Framework Decision 2005/214/JHA (Financial Penalties), Council Framework Decision 2006/783/JHA (Confiscation Orders), the draft Council Framework Decision regarding suspended sentences, alternative sanctions and conditional sentences and the draft Council Framework Decision regarding judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty.

<sup>8</sup> Reference is made to recital no. 3: "Solutions provided by these Framework Decisions are not satisfactory as regards cases where the person could not be informed of the proceedings."

<sup>9</sup> Reference is made to recital no. 3: "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."

*(ii) did not request a retrial or appeal within the applicable timeframe;*

Finally, a fourth exception to the main rule that execution of a decision rendered in absentia may be refused yet applies to the European Arrest Warrant, being:

*The executing judicial authority may also refuse to execute the European arrest warrant (...), if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person (...) was not personally served with the decision but:*

*(i) will be personally served with it without delay after the surrender and will be expressly informed of his/her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and*

*(ii) will be informed of the timeframe within which he/she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.*

The text quoted above is, for that matter, based on the lastly known version of the draft framework decision. It should be noted that quite some amendments were implemented in respect of the first version, in my opinion in favour of the person concerned. For example, in the original version it was still established that a decision rendered in absentia would not oppose recognition and execution if the person concerned ‘was informed in accordance with the national law through a competent representative’. This was in line with the existing text in framework decisions. The current text assumes more explicitly that the person concerned should have actually been informed.

Initially the draft also merely established that not making use of the right to a retrial, whilst the person concerned was informed of this right, implied that the decision rendered in absentia had to be executed. In the current text minimum requirements are imposed on the retrial to which the person concerned is entitled.

Below I will further address the aforementioned exceptions. I refer to them as exceptions as it regards exceptions to the main rule that a decision rendered in absentia does not require to be recognised.

The first exception comes down to the fact that a person who was demonstrably informed of the date of the hearing and does not appear at the same can later not invoke that the decision was rendered in absentia. The question is whether this general starting point can at all times withstand the assessment based on article 6 paragraph 3 ECHR. For this assessment the ECHR departs from the question as to whether the person involved unequivocally waived his right to appear at his trial.<sup>10</sup> There are conceivable situations in which the aforementioned question seems to have a negative answer as the person concerned could – due to reasons beyond his control – not be present at the hearing.<sup>11</sup> Think, for example, about an unexpected hospitalisation.

The question is whether the draft framework decision allows discretionary power to the national Court to, in those instances, deviate from the formulated main rule. In my opinion this question should be answered affirmative as article 1 paragraph 2 of the draft framework decision establishes that the rights borrowed from article 6 ECHR cannot be affected by this draft framework decision.

The second exception is new with respect to most of the existing framework decisions. Initially the exception of representation by a legal counsellor was in its entirety not included

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<sup>10</sup> Reference is, for example, made to ECHR *Sejdovic v. Italy*, judgment of 10 November 2004.

<sup>11</sup> In this context reference is also made to the criticism of Lord Grenfell, Chairman of the Select Committee on the European Union, <http://www.parliament.uk/documents/upload/521308ltr070308.doc>.

in the draft framework decision, however it was later, by way of an amendment of the European Parliament, yet included. This kind of exception had already been included in Council Framework Decision 2006/783/JHA (Confiscation Orders). It becomes clear from the text that the person concerned should have personally instructed the legal counsellor to defend him.

This is, for that matter, not new in the Dutch practice as representation at a hearing by a duly authorised legal counsellor does not result in a (Dutch) decision rendered in absentia.<sup>12</sup> In Portugal and Italy it occurs that – as derives from the various documents surrounding the draft framework decision – the person concerned is represented by an appointed legal counsellor without the person concerned being aware of the same. At the moment these proceedings in absentia do not fall within the scope of the aforementioned exception. If a legal counsellor acted at the hearing but did so without consulting the person concerned, recognition of the decision rendered in absentia may be refused regardless of how effective the legal assistance might have been.

The third exception states that recognition of decisions rendered in absentia needs to take place if the decision rendered in absentia was served to the person concerned and it was communicated to the person concerned that he is entitled to a retrial however the person concerned did or will not, for reasons of his own, make use of this right in a timely manner. This exception is new and is not mentioned in the existing (draft) framework decisions. The German Federal Bar already expressed the objection that this way recognition and execution can take place merely because the person concerned remains passive and does not, or untimely, request for a retrial.<sup>13</sup> I would like to add that it is currently not prescribed that the person concerned is informed of the deadline within which he can request for a retrial and how this is to take place. It is, in my opinion, problematic that the person concerned, who is not familiar with the deadline in which he needs to request a retrial, can be reproached that he did not do so in a timely manner.

As, following the execution of a European Arrest Warrant, the person concerned is extradited, the possibility exists to, following the extradition, yet serve the decision rendered in absentia. That is why an additional exception applies to the EAW, i.e. that the decision rendered in absentia is yet served to the extradited person following the extradition and that the person concerned can yet request for a retrial. It is, however, required that in connection therewith the person concerned is informed of the applicable deadline.

In this context the German Federal Bar pointed out that it is quite unpleasant that the person concerned, who is unfamiliar with the existence of a decision rendered in absentia, can nonetheless be extradited. It is true that he is entitled to a retrial, however, he is to exercise such right in detention.<sup>14</sup>

### **C. Changes in respect of the current regulations**

On a number of points the current (draft) framework decisions with respect to the decisions and judgments rendered in absentia are improved. For example, the exception that ‘the person was informed via a competent representative of the proceedings’ is replaced by the stricter rule that ‘the person actually received official information of the scheduled date and place of

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<sup>12</sup> Pursuant to article 279 paragraph 2 Dutch Code of Criminal Procedure.

<sup>13</sup> Reference is made to [http://www.brak.de/seiten/pdf/Stellungnahmen/2008/Stn06\\_engl.pdf](http://www.brak.de/seiten/pdf/Stellungnahmen/2008/Stn06_engl.pdf)

<sup>14</sup> Idem as 9.

the trial (...) in such a manner that it was unequivocally established that the person concerned was aware of the scheduled trial'.<sup>15</sup>

The currently existing exception that 'the person was represented by a legal counsellor' is replaced by 'the person had given a mandate to a legal counsellor (...) to defend him at the trial (...)'.<sup>16</sup>

And article 5 paragraph 1 of the Framework Decision on the European Arrest Warrant is also improved in favour of the person against whom the warrant is issued. At the moment a European Arrest Warrant can already be executed if 'the person has been otherwise informed of the date and place of the hearing which led to the decision rendered in absentia'. In the latter sentence from the EAW the words 'in person' are missing (in all language versions) as a result of which it remains possible that the person concerned was not actually informed of the date of the hearing.<sup>17</sup> The text of the draft framework decision no longer allows this and in this case requires that the person concerned is actually informed of the date of the hearing. Moreover, the draft framework decision provides a further description of the requirements which a retrial or an appeal needs to comply with.<sup>18</sup> This description consists of three elements: a) the person has the right to participate; b) the merits of the case, including fresh evidence, can be re-examined and c) the retrial may lead to the original decision being reversed.

#### **D. Conclusion**

Following the necessary amendments there is now a draft framework decision available which constitutes an improvement in respect of the first version. In addition, on some points it improves the rights of the person concerned with respect to the existing (draft) framework decisions, as also stated in the objective of the regulation.<sup>19</sup> On the other hand, the proposal also aims to improve the mutual recognition of decisions. This factually implies nothing more than that decisions rendered in absentia can be executed more frequently which is accomplished by introducing partly new general exceptions.

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<sup>15</sup> The first exception can currently be found in Council Framework Decision 2005/214/JHA (Financial Penalties), Council Framework Decision 2006/783/JHA (Confiscation Orders) and the draft council framework decision regarding suspended sentences, alternative sanctions and conditional sentences.

<sup>16</sup> This currently existing exception can be found in Council Framework Decision 2006/783/JHA (Confiscation Orders).

<sup>17</sup> T & C Internationaal Strafrecht (second edition) on article 12 Dutch Extradition Act, part 1.

<sup>18</sup> Besides, also new is the explicitly mentioned option of appeal proceedings in addition to a retrial.

<sup>19</sup> Article 1 paragraph 1: "The objective of this Framework Decision is to enhance the procedural rights of persons subject to criminal proceedings and at the same time to facilitate judicial cooperation in criminal matters and in particular to improve mutual recognition of judicial decisions between Member States."