

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. Framework Decision. Initiative Austria, Finland, Sweden

2005/0805(CNS) - 27/11/2008 - Final act

PURPOSE: to provide for the principle of mutual recognition of judgments and the enforcement of sentences in the European Union.

LEGISLATIVE ACT: Council Framework Decision 2008/909/JHA 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.

CONTENT: the purpose of this Framework Decision is to establish the rules under which a Member State is to recognise a judgment and enforce the sentence on its territory.

The main elements of the Framework Decision can be summarised as follows:

Recognition of judgments and enforcement of sentences: the Framework Decision sets the criteria for forwarding a judgment and a certificate to another Member State: for a judgment to be recognised and enforced, the person must have been sentenced in the issuing State or in the executing State. That person must also have given his/her consent, in accordance with specific terms set out in the Framework Decision. A standard form for the certificate is given in Annex I to the Framework Decision.

The forwarding of the judgment and the certificate may take place where the competent authority of the issuing State, after consultations between the competent authorities of the issuing and the executing States, is satisfied that the enforcement of the sentence by the executing State would serve the purpose of **facilitating the social rehabilitation of the sentenced person**. In the context of satisfying itself that the enforcement of the sentence by the executing State will serve that purpose, the competent authority of the issuing State should take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State.

A judgment may be forwarded to: (i) the Member State of nationality of the sentenced person in which he or she lives; (ii) the Member State of nationality to which the sentenced person will be deported, as provided for in the judgment; (iii) any other Member State, the competent authority of which consents to the forwarding of the judgment.

The enforcement of a sentence shall be governed by **the law of the executing State**.

The Framework Decision lays down the procedure to be followed for forwarding judgments together with the certificates.

Consent and opinion of the sentenced person: in principle, a judgment together with a certificate may be forwarded to the executing State for the purpose of its recognition and enforcement of the sentence only with the consent of the sentenced person. However, the consent of the sentenced person shall not be required where the judgment together with the certificate is forwarded to the Member State of nationality in which the sentenced person lives or to the Member State to which the sentenced person has fled. In each of these cases, the sentenced persons shall automatically be transferred to the executing State, with the exception of Poland which has a derogation of five years in this respect to enable it to face the practical and material consequences of transfer of Polish citizens convicted in other Member States.

In all cases where the sentenced person is still in the issuing State, he or she shall be given an opportunity to **state his or her opinion orally or in writing**, or via his or her legal representative. The opinion of the sentenced person shall be taken into account when deciding the issue of forwarding the judgment together with the certificate. These opinions may result in the executing State changing its opinion insofar as it considers that the enforcement of a sentence on its territory would not contribute to facilitating the rehabilitation of the sentenced person.

Timetable for the recognition of a judgment: in principle, the final decision on the recognition of the judgment and the enforcement of the sentence shall be taken within a period of 90 days of receipt of the judgment and the certificate.

Double criminality: the Framework Decision includes provisions to ensure that all serious offences, such as participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs or weapons, corruption, fraud or laundering of the proceeds of crime, rape, racism, etc., punishable by a sentence of at least three years, give rise to recognition of the judgment and enforcement of the sentence imposed, under the terms of this Framework Decision and **without verification of the double criminality of the act**. The Council may decide to add other categories of offences to the list at any time, acting unanimously after consultation of the European Parliament, in the light of the results of a report that shall be submitted by the Commission.

Each Member State may, on adoption of this Framework Decision or later, by a declaration notified to the General Secretariat of the Council declare that it will not apply this provision.

Enforcement of sentences following a European arrest warrant: provisions of this Framework Decision shall apply *mutatis mutandis* to the extent they are compatible with provisions under the [European arrest warrant](#).

Grounds for non-recognition and non-enforcement: the Framework Decision provides for the principle of recognition, by the executing State, of judgments forwarded by the issuing State, in accordance with the terms laid down in the Framework Decision. However, the competent authority of the executing State may refuse to recognise the judgment and enforce the sentence, if:

- the certificate is incomplete or manifestly does not correspond to the judgment;
- the criteria set forth are not met;
- enforcement of the sentence would be contrary to the principle of *ne bis in idem* (according to this principle, a person cannot be tried or judged twice for the same offence);
- the enforcement of the sentence is statute-barred according to the law of the executing State;
- there is immunity under the law of the executing State, which makes it impossible to enforce the sentence;
- at the time the judgment was received by the competent authority of the executing State, less than six months of the sentence remain to be served;
- the sentence imposed includes a measure of psychiatric or health care or another measure involving deprivation of liberty, which cannot be executed by the executing State;

- the judgment relates to criminal offences which under the law of the executing State are regarded as having been committed wholly or for a major or essential part within its territory, etc.

The ground for refusal relating to territoriality should be applied only in exceptional cases and with a view to cooperating to the greatest extent possible under the provisions of this Framework Decision. Any decision to apply this ground for refusal should be based on a case-by-case analysis and consultations between the competent authorities of the issuing and executing States.

There are also provisions on the partial recognition or enforcement of certain judgments or on postponement of recognition (in order to correct an incorrect certificate, for example).

Provisional arrest and transfer of sentenced persons: where the sentenced person is in the executing State, the executing State may, at the request of the issuing State, before the arrival of the judgment and the certificate, arrest the sentenced person, or take any other measure to ensure that the sentenced person remains in its territory.

However, if the sentenced person is in the issuing State, he or she shall be transferred to the executing State at a time agreed between the competent authorities of the issuing and the executing States, and no later than 30 days after the final decision of the executing State on the recognition of the judgment and enforcement of the sentence has been taken.

Speciality: a person transferred to the executing State pursuant to this Framework Decision shall not, unless otherwise provided for, be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed before his or her transfer other than that for which he or she was transferred.

Exchange of information: there are also provisions so that the competent authorities of the issuing and executing States inform each other of any decision or measure as a result of which the sentence ceases to be enforceable immediately or within a certain period of time (for example, an amnesty) or of the fact that in practice it is impossible to enforce the sentence or any other type of important information.

Territorial application: the Framework Decision shall apply to Gibraltar.

Transitional provision: requests received before 5 December 2011 shall continue to be governed in accordance with the existing legal instruments on the transfer of sentenced persons. Requests received after that date shall be governed by the rules adopted by Member States pursuant to this Framework Decision. However, any Member State may make a declaration, to be published in the Official Journal, indicating that it will not apply the provisions of this Framework Decision. In this case, it shall continue to apply the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011. The declaration may be withdrawn at any time.

ENTRY INTO FORCE: 05/12/2008.

IMPLEMENTATION: 05/12/2011. As of this date, the Framework Decision shall replace:

- the European Convention on the transfer of sentenced persons of 21 March 1983 and the Additional Protocol thereto of 18 December 1997;
- the European Convention on the International Validity of Criminal Judgements of 28 May 1970;
- 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;
- the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 13 November 1991.

By 5 December 2013, the Commission shall establish a report, accompanied by any initiatives it may deem appropriate in order to solve difficulties encountered by Member States in the application of the Framework Decision.