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*Committee on Civil Liberties, Justice and Home Affairs*

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## **WORKING DOCUMENT**

on a proposal for a Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Panayiotis Demetriou

## Background information

Consideration of national sovereignty upon which the territoriality of legislative and judicial authority in penal matters is traditionally based should no longer be an obstacle to the recognition of the legal effects of foreign judgments. We should take account of the mutual confidence between Member States which is based on the high standards of compliance with human rights principles in the internal procedures of Member States, the changes in the forms of criminality in modern society and the necessity of combating it by collaboration across frontiers.

The Tampere European Council in October 1999 concluded that mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union. It was explicitly stated that the principle should apply both to judgments and to other decisions of judicial authorities.

Mutual recognition is designed to strengthen cooperation between Member States but also to enhance the protection of individual rights in the European Union. Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each others' criminal justice systems.

Currently information on convictions in other Member States is governed by Articles 13 and 22 of the 1959 European Convention on Mutual Assistance in Criminal Matters<sup>1</sup> ("the 1959 Convention"), supplemented by Article 4 of the Additional Protocol dated 17 March 1978.

Article 13 of the above-mentioned Convention applies to requests from a judicial authority in connection with a 'criminal matter'. Article 22 of the 1959 Convention determines a rule of automatic communication of information from judicial records and related to nationals of other Contracting Parties.

However, the 1959 Convention makes no mention of the legal consequences that should be attached to foreign convictions. The European Convention on the International Validity of Criminal Judgements<sup>2</sup> of 28 May 1970 makes provision for measures in that area but has been ratified by only a few Member States. At EU level, just one provision on the protection of the euro deals with reoffending.<sup>3</sup>

The absence of international regulation for taking into account foreign convictions has led to the practice, that nationals of other Member States are often sentenced solely on the basis of their criminal record in the country in which the trial takes place, with the courts in complete ignorance of convictions in other Member States.

Based on the conclusions of the Tampere European Council, a programme of measures was adopted by the Council in December 2000<sup>4</sup>. Measure 2 of the programme provides for the "adoption of one or more instruments establishing the principle that a court in one Member State must be able to take account of final criminal judgments rendered by the courts in other

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<sup>1</sup> Council of Europe, European Treaty Series No 30.

<sup>2</sup> European Treaty Series No 70. By 19 October 2004 this Convention had been ratified by nine Member States.

<sup>3</sup> OJ L 329, 14.12.2001, p. 3.

<sup>4</sup> Programme of measures to implement the principle of mutual recognition of decisions in criminal matters; OJ C 12, 15.1.2001, p.10

Member States for the purposes of assessing the offender's criminal record and establishing whether he has re-offended, and in order to determine the type of sentence applicable and the arrangements for enforcing it”.

On 21 November 2005 the Council adopted a Council Decision on the exchange of information extracted from the criminal record.<sup>1</sup> This decision is designed to secure rapid improvements in the current mechanisms for exchanging information between the Member States. It does not fundamentally alter them and will only partially address problems in the areas<sup>2</sup>. However, if the current proposal will be adopted, the Council Decision of 21 November 2005 will be repealed.

## **Content of the Framework Decision**

This proposal follows up the White Paper on exchange of information on convictions and the effect of such convictions in the European Union<sup>3</sup>. The proposal establishes the basic principles or the frame which should be observed when taking account of foreign convictions. However, it will be for the Member States to adopt national legislation to assimilate convictions handed down in the other Member States to national convictions and give the same effect to them whatever they may be.

### *1. Issues not addressed by the Framework Decision*

This proposal concerns only the taking account of earlier convictions in criminal proceedings for different facts. Certain problems, though closely linked to the recognition of foreign criminal judgments, will be addressed by separate instruments:

- it does not address the *non bis in idem* or 'double jeopardy' rule by establishing a procedure for solving disputes of allocating jurisdiction.<sup>4</sup> Yet there is a reference to this principle in the Article 4 as one of the mandatory grounds for refusal, it is meant only as an extra safeguard for ensuring that the principle is taken into account not only within national jurisdictions but also within the Union.

- it does not address the general question of the execution of a conviction in a Member State other than the convicting State. By this proposal the Member State is not required to execute the conviction handed down in another Member State but simply to draw the consequences of the earlier conviction on the occasion of new proceedings.

- it does not address the question of attaching legal consequences to foreign convictions. It is a matter covered by national law. The proposal does not require for harmonising the effects attaching to previous convictions in each of the Member States, which remain governed by national law. In the present case the impact of the mutual recognition principle is rather to confer the same validity and the same effects on convictions handed down in another Member State as on a previous national conviction. In other words, to

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<sup>1</sup>OJ L 322, 9.12.2005., p.33

<sup>2</sup> 22.02.2005 the European Parliament adopted a report on this Decision, T6-0029/2005 (the rapporteur Mr Di Pietro)

<sup>3</sup> COM(2005)10, 21.01.2005.

<sup>4</sup> Commission Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, COM(2005)0696, 23.12.2005. (the rapporteur Ms Esteves)

establish a “principle of assimilation” of judgments given in the other Member State and national convictions, leaving it to national legislation to draw the consequences of this principle

## *2. Basic questions addressed by the proposal:*

- definition of a conviction. To be able to determine conditions for taking account of foreign convictions, agreement should be found on definitions - what is meant by 'convictions'. As discussions, currently taking place in the Council, show the big majority of Member States are against an inclusion of administrative decisions in the definition. Thus restricting the convictions only and purely to the final decisions of criminal courts. The main questions arising from the inclusion of administrative decisions is that many Member States do not enter administrative convictions in their criminal records and that the national definitions of administrative offences are considerably different among the Member States. Such a requirement to include administrative convictions in the criminal record would entail serious changes in the criminal systems of some Member States, but this is not the objective of the proposal. Furthermore, inclusion of convictions imposed by administrative authorities would necessitate the storage of large quantities of data.

- obligation of taking account of the foreign conviction. For the first time the proposal establishes the principle that a conviction handed down in another Member State must have equivalent effects to a national conviction. On the other hand, it does not aim to harmonise the consequences attached in each Member State to previous convictions, which remain governed exclusively by national law. It is not, however, clearly determined what exactly is meant by a "principle of assimilation". Current discussions at the Council show that there is a big uncertainty about this principle among the Member States. Further examination should be done.

- explicitly states which offences shall not be verified of the double criminality requirement. The proposal includes a list of offences taken from the Framework Decision on the mutual recognition of financial penalties<sup>1</sup>.

- grounds for not taking account of convictions handed down in another Member State. There are two types of cases which could be regarded as grounds for refusal: mandatory grounds and optional grounds. However, currently there are debates at the Council on whether those grounds are sufficient or vice versa - too broad; whether those grounds are appropriately attached to mandatory or optional or should this division be revised.

## **Developments of negotiations**

The Commission published its proposal for a Council Framework decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings on 17 March 2005.

Since then, further steps have been taken within this field, which should be taken into account. The Commission has adopted a proposal for a Council Framework Decision on the organisation and content of the exchange of information extracted from criminal records

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<sup>1</sup> OJ L 76, 22.3.2005, p.16.

between Member States<sup>1</sup>. Therefore, taking into account a close connection between those two proposals, many Member States have expressed their opinion that the convictions draft should be examined in parallel with the criminal records draft (the first discussion on the latter was on 2 March 2006 and the next meeting will be probably in June 2006).

### *The Council*

The first discussion at the Council took place at the Working Party on cooperation in criminal matters on 31 January 2006.

The second discussion was on 5 April 2006. Most likely there won't be any other meetings during the Austrian Presidency.

### **Rapporteur's observations**

Mutual recognition implies respect for and acceptance of differences in national systems. However, the research done by the Commission<sup>2</sup> shows that little if any account is actually taken of foreign convictions. The fact that equivalent effects cannot be attached to a decision taken in another Member State is contrary to the mutual recognition principle and puts the citizens of Europe on an unequal footing in the event of subsequent prosecutions depending on the place where the first and second cases are brought

Furthermore, one might ask whether criminal lawyers and judges in Member States are yet sufficiently acclimatised to the idea of 'mutual recognition' to make the proposal workable at any stage of the criminal proceedings.

Taking into consideration the complexity of the issue, the rapporteur would like to work closely with the Commission and the Council. It is very important to follow the developments in the Council and to see responses from practitioners - judges and lawyers in the Member States.

Furthermore, it is the rapporteur's opinion that this report should be dealt with in close collaboration with the report on the organisation and content of the exchange of information extracted from criminal records between Member States (Mr Diaz de Mera report).

The rapporteur would like to emphasize the importance of the draft Council Framework decision on certain procedural rights applying in proceedings in criminal matters throughout the European Union<sup>3</sup>. This is the rapporteur's opinion that the mutual recognition should have been accompanied by minimum standards of procedural law. Common procedural safeguards will not only increase trust in each other's legal systems but will make judicial co-operation between Member States more efficient. Therefore, the rapporteur would like to call on the Council to adopt this decision as soon as possible.

*The rapporteur would like to draw the attention to the following questions:*

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<sup>1</sup> COM(2005)690, 22.12.2005.

<sup>2</sup> Table 5 annexed to the White Paper on exchange of information on convictions and the effect of such convictions in the European Union, SEC(2005)63, 25.01.2005.

<sup>3</sup> Ms Buitenweg's report, adopted by the European Parliament on 12.04.2005, T6-0091/2005

1. Should the definition of 'convictions' include also decisions of an administrative authority whose decision can be appealed against in the criminal courts?

2. What would be the exact responsibilities under the obligation to attach to convictions handed down in the other Member States in accordance with rules determined by them legal effects that are equivalent to those they attach to national convictions? And do those convictions can have effects at the various stages of new criminal proceedings?