



CRIMINAL JUSTICE SYSTEM



# **Enhancing procedural rights and judicial co-operation in the EU:**

## **Proposed Framework Decision on new rules for cross-border cases where judgments are made in absentia**

**Consultation Paper [CP(L)/0408]**

Published on 28 February 2008

This consultation will end on 10 April 2008





Criminal Justice System: working together for the public



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# Enhancing procedural rights and judicial co-operation in the EU:

**Proposed Framework Decision on new rules  
for cross-border cases where judgments are  
made in absentia**

A consultation produced by the Office for Criminal Justice Reform, a cross-departmental organisation reporting to Ministers in the Ministry of Justice, the Home Office and the Office of the Attorney General.

It is available on [www.cjsonline.gov.uk](http://www.cjsonline.gov.uk) and [www.justice.gov.uk](http://www.justice.gov.uk)





## **Contents**

Foreword	3
Executive summary	4
Introduction	5
The proposals	8
Questionnaire	14
About you	15
How to respond	16
Initial Impact Assessment	18
The consultation criteria	19
Consultation Co-ordinator contact details	20
<b>Annexes</b>	<b>21</b>

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## Foreword

The UK is delighted to co-sponsor, along with France and Germany and others, this measure proposed under the Slovenian Presidency of the European Union.

Though the reform is modest, it meets an important and pressing need, namely to ensure that requests for the execution of European Arrest Warrants provide the necessary guarantees for citizens who have been sentenced abroad in their absence. The UK currently adopts a strict approach in such cases. We believe that the rules which apply at Union level in cross-border cases should reflect such high standards of clarity and respect for fair trial rights. We are glad that there is widespread support among Member States for this approach.

Though we are clear on the need for a change in EU law on this topic there is scope for discussion on precisely how the law should be framed. That is the focus of this public consultation. We look forward to reading the outcome.



*Patricia Scotland*

**The Rt Hon Baroness Scotland of Asthal, QC**

Attorney General

*Kenny MacAskill*

**Kenny MacAskill**

Cabinet Secretary for Justice, Scottish Government

*Paul Goggins*

**Paul Goggins MP**

Minister of State, Northern Ireland Office

## **Executive summary**

This paper invites views on a draft EU Framework Decision on Trials in Absentia, tabled by the Slovenian Presidency and co-sponsored by the UK as well as France, the Czech Republic, Slovakia, Sweden and Germany. Its aim is to improve co-operation and safeguard rights in cross-border cases where judgments have been made in the absence of the defendant. To achieve this it amends the mutual recognition instruments, i.e. those on the European Arrest Warrant, fines, confiscation orders, and custodial sentences. More specifically, it clarifies and makes more consistent the “grounds for refusal” contained in these instruments, i.e. the instances where the judicial authority of the requested State can refuse to execute the judgment where it was made in absentia.

UK sponsorship reflects our policy of full support for measures which (a) address real problems facing practitioners in the field; (b) cannot be solved without legislation at Union level; and (c) can be confined exclusively to the cross-border context.

The sponsors’ intention is that this short Framework Decision should be agreed under the existing EU Treaty and during the Slovenian Presidency, which ends in June. If that cannot be achieved the measure may fall. Therefore the negotiations are proceeding within a tight timescale. For this reason we have fixed a shorter timescale for this consultation than is usual (6 weeks instead of 12).

## **Introduction**

This paper sets out for consultation the contents of a proposed EU Framework Decision to improve procedural rights and enhance judicial co-operation in cases where there has been a trial in absentia. The consultation is aimed at practitioners and stakeholders, and anybody else who is interested throughout the UK.

Although in the main this consultation follows the Code of Practice on Consultation issued by the Cabinet Office, the Attorney General has decided that in order for the consultation to be meaningful in the context of the swift discussions expected on this issue, a shorter timescale needs to be fixed for this consultation than is usual, in order to allow the inputs made to effectively inform the debate.

An initial Impact Assessment has been completed and does not indicate that the proposals are likely to lead to additional costs or savings for businesses, charities or the voluntary sector, or the public sector. Consequently, this paper does not contain an Impact Assessment. If you disagree with this conclusion you are invited to send your reasons as part of your overall response to this paper.

*Copies of the consultation paper are being sent to:*

Association of Chief Police Officers

Amnesty International

Association of Chief Police Officers Scotland

Council of Her Majesty's Circuit Judges

Council of Northern Ireland County Court Judges

Criminal Bar Association

Criminal Bar Association (Northern Ireland)

Criminal Law Solicitors' Association

Criminal Procedure Rule Committee

Crown Prosecution Service

Equality and Human Rights Commission

Equality Commission for Northern Ireland

Faculty of Advocates

Fair Trials International

Fraud Advisory Panel

General Council of the Bar

HM Revenue and Customs

Institute of Legal Executives

Judicial Studies Board

Justice

Justices' Clerks Society

Law Reform Committee of the Bar

Law Society of England and Wales

Law Society of Scotland

Law Society for Northern Ireland

Legal Services Commission

Liberty

Local Criminal Justice Boards

Local Government Association

Lord Chief Justice of England & Wales

Lord Chief Justice for Northern Ireland

Lord Justice General

Magistrates' Association

NACRO (National Association for the Care and Re-settlement of Offenders)

Northern Ireland Magistrates' Association

Police Federation of England and Wales

Police Superintendents' Association of England and Wales  
Public Prosecution Service for Northern Ireland  
Revenue and Customs Prosecution Office  
Scottish Criminal Cases Review Commission  
Serious Fraud Office  
Serious Organised Crime Agency  
Sir Igor Judge  
The Law Societies Joint Brussels Office  
Whitehall Prosecutors Group

The Scottish Government and the Northern Ireland Office are arranging further circulation within their jurisdictions.

This list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

## The proposals

*Note: The text of the proposed FD, dated 13 February, is at Annex A. New texts may be issued in the course of the negotiations and will be available from OCJR or the Scottish Government. Relevant extracts of the FDs which are to be amended are at Annex B.*

### Objective

1. Article 1 sets out the objective and scope of the proposal. It is a cross-cutting Framework Decision (FD) to amend four existing FDs<sup>1</sup> concerning mutual recognition within the EU, which deal in different ways with the issue of trials in absentia.

2. Article 1(2) is a non-regression clause, which ensures ECHR standards are respected. It does this by referring to Article 6 of the Treaty on European Union, which provides (at paragraph 2) that the Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights (ECHR). The ECHR sets standards for procedural rights, to which all EU countries must adhere. ECHR caselaw has established that the right of the defendant to be present is one of the essential requirements of Article 6 of the Convention. However trials in absence are not barred by the ECHR. In the leading case the ECHR Grand Chamber held<sup>2</sup> that the accused can waive his right to be present at his trial but such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance and must not run counter to any important public interest. They said a denial of justice occurs when a person convicted in his absence is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he waived his right to appear.

### European Arrest Warrant

- 
- <sup>1</sup> Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (“the EAW FD”)
  - Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (“the Fines FD”)
  - Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (“the Confiscation Orders FD”)
  - 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. (“the Custodial Sentences FD”)

<sup>2</sup> *Sejdovic v Italy* (App 56581/00, 2006).

3. Article 2 amends the FD on the European Arrest Warrant (EAW). Article 2(1) seeks to define what a decision in absentia is. This definition is replicated in each of the other Framework Decisions amended by this instrument, although the drafting varies according to their specific nature and structure.

4. Existing instruments do not have a consistent means of identifying what constitutes a decision 'in absentia' and it is not clear, for example, how much of the trial the defendant needs to miss for the decision to be considered to be 'in absentia'. There are also issues concerning whether a defendant who is represented by a lawyer who he is instructing, can be deemed to be present. We expect the latter point will need to be addressed and that there will be further discussion on this point in the Council Working Group.

**Question 1: Do you have any suggestions as to specific circumstances that should be excluded from the definition of trials in absentia?**

5. The main changes to the EAW FD are in Article 2(2). Under the existing Article 5(1) of the EAW FD, executing authorities may not refuse to execute EAWs because of trial in absentia issues, but may make the surrender of a person who was not informed of the hearing subject to an assurance about an opportunity to apply for retrial. In the new text, executing authorities may refuse the execution of an EAW unless certain conditions are fulfilled: in essence, those conditions are that either (a) the person was summoned in person or via a representative with specified information having been given in due time as to the scheduled date and place of the hearing that led to the sentence and the possibility of a trial in absentia, or (b) that the person was served with the decision and afforded a right to a retrial of which he did not avail himself, or (c) will be served with the decision on surrender and will have a right to a retrial.

6. We do not think (a) is quite clear as to the meaning of personal service, and we expect this matter will be discussed further. It is proper to cater for a variety of circumstances, but at the same time it is vital to be clear, particularly where liberty is at stake, that the defendant himself actually received notice of his trial. In the Crown Court defendants, if not held in custody, are bailed to appear. Defendants may be summoned by letter to the Magistrates Court, but Section 11 (3) of the Magistrates Court Act 1980<sup>3</sup> prevents the court from passing a sentence of imprisonment in the absence of the accused. (This is being amended by the current Criminal Justice and Immigration Bill to allow imprisonment in these circumstances but not when the accused has only been summoned in writing). In Scotland the court may proceed to trial in absence of the accused, though in such cases it may not pass a sentence of imprisonment. However, before proceeding the court must be satisfied the accused is represented and that the accused received intimation both of the diet and that the court could allow the trial to proceed in his absence.

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<sup>3</sup> In Northern Ireland the equivalent provision is Article 23(3) of the Magistrates Courts (Northern Ireland) Order 1981

7. The specifics of the information that has to be given for the purposes of (a) above apply also to the relevant amendments to the other three FDs. We will seek to ensure that it achieves the delicate balance which would enable authorities to enforce decisions across EU borders with the minimum of bureaucracy, while ensuring that individual rights are protected.

**Question 2: Are the requirements for certain information to be certified as having been given to the defendant in advance of the trial both fair to the defendant and workable in terms of cross-border enforcement of judgments?**

8. Article 2(2) is in our view particularly helpful as regards UK law in that it makes the EAW FD more consistent with section 20 of the Extradition Act 2003, as concerns trial in the defendant's absence. The current EAW FD refers only to the person being given 'an opportunity to apply for a retrial of the case.' The draft conveys a 'right to a retrial'. We think there is a need to clarify the essential criteria for the 'retrial' and expect this to be further discussed in the Working Group.

**Question 3: Do you agree that the EAW FD should be modified so as to enable Member States to refuse to surrender a person who has been tried in his absence, without having been properly informed of the trial, unless either he had a right to retrial that he chose not to exercise; or he still has a right to retrial?**

9. Article 2(4) amends the EAW form to reflect the changes. The existing EAW form does not clearly require adequate information to be provided and the revisions are intended to avoid the need for executing authorities to raise queries. Similar amendments to the relevant forms are also made for all the other FDs, although these are not specifically referred to below.

## Fines

10. Article 3 amends the Fines FD, which is not yet in effective operation in practice, having been implemented by only 4 Member States. UK implementing legislation is currently in hand<sup>4</sup> so the instrument should be implemented here in the first half of 2009.

11. The Fines FD covers financial penalties as low as 70 euros, so covers a great variety of cases, including penalties imposed by authorities which are not courts. Art 3(2) of this proposed FD, insofar as it inserts paragraph (2)(g) into Article 7 of the Fines FD, follows the wording of the existing Fines FD and prescribes when a request for enforcement can be refused where the decision was taken on a written procedure. A 'written procedure' in UK terms will include fixed penalty procedures. Where a financial penalty has been imposed in such a case, enforcement can be refused unless the person was informed personally or via a competent representative of his right to contest the case

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<sup>4</sup> The Criminal Justice and Immigration Bill, part 8, for England and Wales and Northern Ireland. Scotland has passed separate primary legislation (an order-making provision in section 56 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007) and will bring forward an order in due course to implement the FD.

and of the relevant time limits (in accordance with the specified information requirements).

12. Article 3(1) inserts a definition of what constitutes a decision rendered in absentia, which accords with that inserted in the EAW FD. As explained above, written procedures are dealt with separately in the amendments to the Fines FD. Article 3(2) then inserts a new paragraph (2)(i) into Article 7 of the Fines FD, to prescribe when a request for enforcement can be refused for a decision taken in absentia. New Article 7(2)(i) is a more specific requirement than in the existing FD: a request can be refused unless the person (a) was summoned in person or via a representative in accordance with the specified information requirements (new Article 7(2)(i)(a)); (b) expressly indicated that he did not contest the case (Art.7(2)(i)(b)); or (c) was served with the decision and afforded a right to a retrial of which he did not avail himself (Art.7(2)(i)(c)). Guilty pleas by letter are the only UK cases where ‘decisions’ on liability taken in court without the accused personally appearing are common. We think they are adequately catered for by the new Article 7(2)(i)(a), as we understand the intention (which may need to be clarified) is that ‘summoned in person’ includes a written summons<sup>5</sup>.

13. The provision about not contesting the case is in square brackets because there is doubt about whether it should be retained, and in what form. Its meaning is less than clear, and even differs between the different language versions of the existing Fines FD. In most languages the word equivalent to ‘case’ is replaced by a word equivalent to ‘judgment’. Apart from this confusion there is concern that as drafted a person might be held not to have contested a case of which he was not properly informed.

**Question 4: (a) Does Article 3 properly cater for all the circumstances where fines may be imposed in the UK in the absence of the offender?**

**(b) Does it also allow us to refuse to execute fines imposed on our citizens abroad in their absence without sufficient safeguards?**

14. New Article 7(2)(i)(a) is aligned with the specified information requirements in the EAW FD and is more specific than the current Fines FD. Article 7(2)(i)(b) reflects current Article 7(2)(g)(ii) of the Fines FD in so far as a decision in absentia has to be enforced where the person indicated that they do not contest the case. Article 7(2)(i)(c) would fill a current perceived gap for cases where the sentenced person was expressly offered a retrial and did not take it. At present, enforcement is not required in such circumstances, even though the defendant clearly rejected the opportunity of a retrial.

### **Confiscation Orders**

15. Article 4 amends the Confiscation Orders FD (which has been adopted and requires implementation by 24 November 2008).

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<sup>5</sup> In Scotland, the position is similar. In Scotland, the procurator fiscal can impose a financial penalty upon the accused but which the accused must accept or reject. The accused may plead guilty by letter before the justice of the peace court or sheriff court.

16. Article 4(1) inserts a new paragraph (i) in Article 2 of the Confiscation Orders FD which defines what 'decision rendered in absentia' means and follows the provision inserted in the EAW FD. In combination with the amendments made to Article 8, this is an adjustment to the current text of the FD, which equates cases where the accused is present with cases where he is 'represented by a legal counsellor' (so that if either occurred, the order must be recognised and executed). Under the Confiscation Orders FD as it would be amended, confiscation orders imposed in cases where the accused was not present but was represented by a lawyer are not necessarily required to be enforced abroad unless the specified additional safeguards apply. However we expect that agreement will be reached as regards cases where the defendant is represented by a lawyer who he is instructing (as mentioned in paragraph 4 above).

17. Article 4(2) replaces Article 8(2)(e) of the Confiscation Orders FD to prescribe the circumstances in which a confiscation order rendered in absentia does not have to be enforced, namely (i) if the person was not summoned in person or via a competent representative in accordance with the specified information requirements (as per the EAW FD), or (ii) was served with the order and afforded a right to a retrial of which he did not avail himself. This deals in a different way to the current FD with situations where person does not contest the confiscation order. Under the existing FD it appears the person can decide at the outset not to contest the order. Following the amendments (new Art 8(2)(e)(ii)) he can only make that decision having been served with the order. Otherwise the changes follow the Fines FD.

### **Custodial Sentences**

18. Article 5 amends the Custodial Sentences FD (which has been agreed and is expected to be formally adopted in 2008, before any conclusion on this FD).

19. Article 5(1) inserts a new Article 1(e) into the Custodial Sentences FD, to include a definition of 'decision rendered in absentia' that would be aligned with the EAW FD. Article 5(2) replaces Article 9(1)(f) of the Custodial Sentences FD to prescribe the circumstances in which enforcement of a decision rendered in absentia can be refused. As for the other FDs, Article 9(1)(f)(i) enables refusal where the person was not summoned in person or informed via a competent representative in accordance with the specified information requirements. As for the Fines FD and the Confiscation Orders FD, Article 9(1)(f)(ii) enables refusal where a person has been served with the decision and afforded a right to a retrial of which he has not availed himself. The FD as amended would deal in a different way from the existing FD with the case where the person does not contest the decision. Under the existing FD it appears the person can decide at the outset not to contest the case (as in the Fines FD). Under these amendments (new Art 9(1)(f)(ii)) that sort of express waiver by a defendant would only trigger the enforcement obligation after he had been served with the decision and offered a right to a retrial.

## **Questionnaire**

We would welcome responses to the following questions set out in this consultation paper.

**Question 1: Do you have any suggestions as to specific circumstances that should be excluded from the definition of trials in absentia?**

**Question 2: Are the requirements for certain information to be certified as having been given to the defendant in advance of the trial both fair to the defendant and workable in terms of cross-border enforcement of judgments?**

**Question 3: Do you agree that the EAW FD should be modified so as to enable Member States to refuse to surrender a person who has been tried in his absence, without having been properly informed of the trial, unless either he had a right to retrial that he chose not to exercise; or he still has a right to retrial?**

**Question 4: (a) Does Article 3 properly cater for all the circumstances where fines may be imposed in the UK in the absence of the offender?**

**(b) Does it also allow us to refuse to execute fines imposed on our citizens abroad in their absence without sufficient safeguards?**

**Thank you for participating in this consultation exercise.**

## About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>Address</b>	
<b>Postcode</b>	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

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## How to respond

Please send your response by 10 April 2008 to:

**Magali Provensal**  
**Office for Criminal Justice Reform**  
**Better Trials Unit**  
**Ministry of Justice**  
**Fry Building Ground Floor SW**  
**2 Marsham St**  
**London**  
**SW1P 4DT**

**Tel: 0207 035 8316**  
**Fax: 0207 035 8601**  
**Email: [magali.provensal@cjs.gsi.gov.uk](mailto:magali.provensal@cjs.gsi.gov.uk)**

### **Extra copies**

Paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.justice.gov.uk/index.htm>.

Alternative format versions of this publication can also be requested from this address.

### **Scotland**

If you are based in Scotland, please send your response to:

Bill Barron  
Criminal Procedure Division  
The Scottish Government  
GW14 St Andrews House  
Regent Road  
Edinburgh EH1 3DG

### **Northern Ireland**

If you are based in Northern Ireland, please send your response to:

Northern Ireland Office  
Criminal Law Branch  
Massey House  
Stoney Road  
Belfast BT4 3SX  
Tel 02890 527442  
e-mail: [cjrdd.public@nio.x.gsi.gov.uk](mailto:cjrdd.public@nio.x.gsi.gov.uk)

### **Publication of response**

A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available on-line at <http://www.justice.gov.uk/index.htm>.

### **Representative groups**

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

### **Confidentiality**

The information you send us may be passed to colleagues within the Ministry of Justice, the Northern Ireland Office, HM Government, the Scottish Government or related agencies.

Furthermore, information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the (UK-wide) Data Protection Act 1998 (DPA); in England and Wales the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004; and in Scotland the Freedom of Information (Scotland) Act 2002 and the Environmental Information Regulations (Scotland) 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on us.

We will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

## Initial Impact Assessment

This is a short and rather technical Framework Decision (FD) which amends 4 other FDs on the cross-border enforcement of judgments in criminal cases within the EU. The main advantage for the UK is purely legal: it will better align the European Arrest Warrant (EAW) FD with the Extradition Act 2003, by enabling the executing state to refuse to execute an EAW unless there is a right to retrial in the issuing state, if the person concerned did not know of his trial. The main impact will thus be on Member States that conduct trials in absentia in serious cases without personal notification to defendants. They will either need to make more efforts to locate defendants, to hold retrials, or to accept they cannot enforce all their EAWs abroad. Judgments in absentia are rare in the UK in such cases – and in any case where we do hold them we should readily be able to demonstrate that the defendant knew of the trial. We do not therefore expect any impact on our role as issuing authority, nor any increase in retrials.

We do expect a marginal impact in our role as executing authority, which will be beneficial: issuing authorities will in future be required to provide better information about in absentia cases at the outset. At present the information provided may be inadequate, and our authorities may need to request further information. So there should be a marginal saving.

The EAW FD is the only one of these 4 FDs that is in effective operation. Figures for 2006 show the UK issued 129 EAWs but received 4910 EAWs. The discrepancy seems to be due to the fact that as the UK is not yet part of the Schengen Information System it receives many EAWs of a speculative nature, which it cannot pursue as there is no trace of the wanted person in the UK. We do not expect any impact on these numbers from this FD.

As the other FDs concerned are not in effective operation there are no figures on them but the changes to these FDs are marginal and we see little likely impact either way.

We are satisfied that the policy of this FD, whose main likely benefit is for anyone tried abroad in their absence, does not contain issues likely to be relevant to persons falling into one of the equality groups.

## **The consultation criteria**

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

**These criteria must be reproduced within all consultation documents.**

## Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Laurence Fiddler, Ministry of Justice Consultation Co-ordinator, on 020 7210 2622, or email him at [consultation@justice.gsi.gov.uk](mailto:consultation@justice.gsi.gov.uk).

Alternatively, you may wish to write to the address below:

**Laurence Fiddler  
Consultation Co-ordinator  
Ministry of Justice  
5th Floor Selborne House  
54-60 Victoria Street  
London  
SW1E 6QW**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under **the How to respond** section of this paper at page 15.





## ANNEX A

**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 13 February 2008  
(OR. en)**

**5598/08**

**COPEN 11**

### **LEGISLATIVE ACTS AND OTHER INSTRUMENTS**

Subject: Initiative of 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 with a view to adopting a Council Framework Decision on the enforcement of decisions rendered *in absentia* and amending Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders and Framework Decision 2008/.../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



**Initiative of 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 with a view to adopting a  
COUNCIL FRAMEWORK DECISION 2008/.../JHA**

**of**

**on the enforcement of decisions rendered *in absentia* and amending  
Framework Decision 2002/584/JHA on the European arrest warrant  
and the surrender procedures between Member States,  
Framework Decision 2005/214/JHA on the application of  
the principle of mutual recognition to financial penalties,  
Framework Decision 2006/783/JHA on the application of  
the principle of mutual recognition to confiscation orders,  
and Framework Decision 2008/.../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**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31(1)(a) and Article 34(2)(b) thereof,

Having regard to the 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>6</sup>,

Having regard to the opinion of the European Parliament<sup>7</sup>,

Whereas:

- (1) The right for an accused person to be present during hearings of the trial is a fundamental right provided in the United Nations' International

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<sup>6</sup> O J C

<sup>7</sup> O J C

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 Convention for the Protection of Human Rights and Fundamental Freedoms. It also declared that such right of the accused person to be present during hearings is not absolute and 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 of final judicial decisions do not deal consistently with the issue of decisions 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<sup>8</sup>, 2006/783/JHA<sup>9</sup> and 2008/.../JHA<sup>10</sup> allow the executing authority to refuse the execution of such judgments. Framework Decision 2002/584/JHA<sup>11</sup> 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.

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<sup>8</sup> OJ L 76, 22.3.2005, p. 16.

<sup>9</sup> OJ L 328, 24.11.2006, p. 59.

<sup>10</sup> OJ L

<sup>11</sup> OJ L 190, 18.7.2002, p. 1.

- (4) It is therefore necessary to provide clear and common solutions which define the grounds for refusal and the discretion left to the executing authority.
- (5) Such changes require amendment of the existing Framework Decisions implementing the principle of mutual recognition of 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 relevant existing Framework Decisions should take into account the diversity of situations with regard to informing 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 decision 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 harmonise national legislation,

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 cooperation in criminal matters and in particular to improve mutual recognition of judicial decisions between Member States.
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, 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 (the executing Member State) issued by another Member State (the issuing Member State) following proceedings where the person was not present, according to the provisions in Article 5(1) of Framework Decision 2002/584/JHA, in Article 7(2)(g) of Framework Decision 2005/214/JHA, in Article 8(2)(e) of Framework Decision 2006/783/JHA and Article 9(1)(f) of Framework Decision 2008/.../JHA.

*Article 2*

*Amendments to Framework Decision 2002/584/JHA*

Framework Decision 2002/584/JHA is hereby amended as follows:

1) the following paragraph shall be added to Article 1:

"4. For the purpose of this Framework Decision, "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 that decision.";

2) the following Article 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 decision 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 Member State through 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 decision rendered *in absentia* and being expressly 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;
    - 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 shall be deleted;

---

\* Period to be provided.

4) in the Annex ("EUROPEAN ARREST WARRANT"), box (d) shall be 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 Member State through 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

*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 retrial and to be present at that trial; and

– after being informed of this right, the person had .... days to request a retrial 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 retrial 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 retrial.

".

*Article 3*

*Amendments to Framework Decision 2005/214/JHA*

Framework Decision 2005/214/JHA is hereby amended as follows:

- 1) the following point shall be added to Article 1:  
  
"(e) "Decision rendered *in absentia*" shall mean a decision as defined in (a) when the person did not personally appear in the proceedings resulting in that decision.";
  
- 2) Article 7(2) is hereby amended as follows:  
  
(a) point (g) shall be 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 through a representative, competent according to national law, of his right to contest the case and of time limits of such a legal remedy;"

(b) the following point shall be added:

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

(i) was summoned in person or informed in accordance with the national law of the issuing State through 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

(ii) expressly stated to a competent authority that he or she does not contest the case; or

(iii) 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:

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

or

– did not request a retrial in the applicable timeframe which was of at least [...] \* days."

---

\* Period to be provided.

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 through 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

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

".

#### *Article 4*

##### *Amendments to Framework Decision 2006/783/JHA*

Framework Decision 2006/783/JHA is hereby amended as follows:

1) the following point shall be added to Article 2:

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

2) in Article 8(2), point (e) shall be 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:

(i) was summoned in person or informed in accordance with the national law of the issuing State through 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

(ii) 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 :

– expressly stated that he she does not contest the confiscation order;

or

– did not request a retrial in the applicable timeframe which was of at least [...] \* days.";

---

\* Period to be provided.

3) in the Annex ("certificate"), box (j) shall be 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 through 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

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

".

*Article 5*

*Amendments to Framework Decision 2008/.../JHA*

Framework Decision 2008/.../JHA is hereby amended as follows:

1) the following point shall be added to Article 1:

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

2) in Article 9(1), point (f) shall be 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:

(i) was summoned in person or informed in accordance with the national law of the issuing State through 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

(ii) 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:

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

or

– did not request a retrial in the applicable timeframe which was of at least [...] \* days.";

---

\* Period to be provided.

3) in box (k) of the Annex ("certificate"), point 1 shall be 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 through 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

*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 informed of this right, the person had ... days to request a retrial 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 ...\*.
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.

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\* 18 months after the date of entry into force of this Framework Decision.

*Article 7*

*Review*

1. By ...\*, the Commission shall draw up a report on the basis of the information received from the Member States pursuant to Article 6.
2. On the basis of the report referred to in paragraph 1, the Council shall assess:
  - (a) the extent to which Member States have taken the necessary measures in order to comply with this Framework Decision;  
and
  - (b) the application of this Framework Decision.
3. The report referred to in paragraph 1 shall be accompanied, where necessary, by legislative proposals.

*Article 8*

*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 at

*For the Council*

*The President*

---

\* \_\_\_\_\_  
Date to be provided.



## **ANNEX B**

### **EXTRACTS FROM THE FDs AMENDED BY THE PROPOSED FD ON TRIALS IN ABSENTIA**

#### ***EAW FD***

##### *Article 5*

##### *Guarantees to be given by the issuing Member State in particular cases*

The execution of the European Arrest Warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

1. where the EAW has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the EAW that he or she will have the opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment;

.....

#### ***FD on financial penalties***

##### *Article 7*

##### *Grounds for non-recognition and non-execution*

1. The competent authority of the executing State may refuse to recognise and execute the decision if the certificate provided for in Article 4 is not produced, is incomplete, or manifestly does not correspond to the decision.
2. The competent authority in the executing State may also refuse to recognise

and execute the decision if it is established that:

.....

(g) according to the certificate provided for in Article 4, the person concerned

(i) in the 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 the 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.

### ***FD on confiscation orders***

#### *Article 8*

##### *Reasons for non-recognition or non-execution*

1. The competent authority of the executing State may refuse to recognise and execute the confiscation order if the certificate provided for in Article 4 is not produced, is incomplete, or manifestly does not correspond to the order.
2. The competent judicial authority of the executing State, as defined in the law of that State, may also refuse to recognise and execute the confiscation order if it is established that:

.....

- (e) according to the certificate provided for in Article 4(2) 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.

***FD on custodial sentences***

*Article 9*

*Grounds for non-recognition and non-enforcement*

1. The competent authority of the executing State may refuse to recognise the judgment and enforce the sentence, if:  
.....
  - (f) the judgment was rendered in absentia, unless the certificate states that the person was summoned personally or informed via a representative, competent according to the national law of the issuing State, of the time and place of the proceedings which resulted in the judgment being rendered in absentia, or that the person has indicated to a competent authority that he or she does not contest the case.







Criminal Justice System: working together for the public

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