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LEVEL 1: SUBJECT

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1. INTRODUCTION

1.1 THE PRINCIPLE OF MUTUAL RECOGNITION. A BRIEF ANALYSIS.

Any study analysing the provisions of European law aimed at strengthening cooperation in criminal matters in the European Union must obligatorily begin by mentioning the principle of mutual recognition. But having said this, and precisely because of it, we must agree that in this unit, the third in module IV, entitled “The principle of mutual recognition and its development”, to continue defining this principle and its evolution in the last few years can be a fruitless and repetitive exercise, as well as being quite impractical for this course from an educational point of view. Thus, we will limit ourselves to providing a brief outline of the evolution of this principle.

The principle of mutual recognition can be defined as the way in which a decision from a judicial authority of one Member State, which has transnational implications, will be automatically recognised in other Member States and have identical or at least similar legal consequences to those it would have in the country in which it was issued. The criteria on which mutual recognition is based are therefore equivalence and trust between states, which form the backbone of the implementation of the principle; and this in turn leads to the adoption of another series of actions aimed at increasing this trust and equivalence, both between the judicial authorities of the states and between their legal systems.

It has taken a progressive evolution of international cooperation to reach this point, accelerated as a result of the free movement of citizens between the Member States of the Union, which has made it necessary to increase and facilitate judicial cooperation, both in order to avoid impunity and to ensure greater protection of individual rights. However, until the end of the last century, states were reluctant to apply this principle, already common in civil cooperation, to cooperation in criminal matters, as this area, *ius puniendi*, has shown itself to be one of the pillars of the sovereignty of states.

The first step in this process was taken at the European Council of Cardiff, at which in relation to cooperation in criminal matters, the Council was asked to determine the existing margin for greater mutual recognition of criminal decisions, taking this concept from civil cooperation. Following on from that, the Vienna Action Plan of 3 December 1998[1], adopted by the Council and the Commission, reintroduced this idea as a means of developing the area of Freedom, Security and Justice under the Treaty of Amsterdam. But it was at the Tampere European Council, held on 15 and 16 October 1999, where it was decided that the principle of mutual recognition should be *"the cornerstone of judicial cooperation in civil and criminal matters in the European Union"* (sections 33 to 37). Moreover, the Council and Commission were charged with developing a programme of measures in order to put this principle into practice, which took the form of basic orientations given by the Commission in its communication of 26 July 2000[2]; and which materialised in the " Programme of measures to implement the principle of mutual recognition of decisions in criminal matters"[3], dated 15 January 2001.

This Programme defines the purpose of mutual recognition and designs the scope of action of the community institutions to promote it; the programme was confirmed and completed by the Commission communication of 19 May 2005[4] and its adoption by the Council of the Hague Programme Action Plan[5].

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[1] OJEU C 19 dated 13 January 1999.

[2] Document COM (2000) 495 final, dated 26 July.

[3] OJEU C 12 dated 15 January 2001.

[4] Document COM(2005) 195 final, dated 19 May

[5] OJEU C 53 dated 3 March 2005

Different initiatives promoted by the Member States have been developed in this context with a view to the adoption of framework decisions in relation to the subject matter contained in said programmes, and which include the ones we are going to study here on the recognition of financial penalties.

At present, the 2007 Treaty of Lisbon enshrines as "constitutional" the principle of mutual recognition as a basis for Judicial Cooperation in Criminal Matters in the Union, by amending the TEU, including Articles 69 A and 69 E.

1.2 BACKGROUND TO THE CROSS-BORDER ENFORCEMENT OF FINANCIAL PENALTIES.

The cross-border enforcement of financial penalties is clearly not a new problem, but one that existed prior to the development of mutual recognition, and it is one of the common problems that arise in the enforcement of foreign criminal judgments.

The first Convention that dealt with the enforcement of financial penalties was the Council of Europe Convention on the international validity of criminal judgments (ECIVCJ) dated 28 May 1970[6]. While it is in force, it has only been ratified by nine of the twenty-seven Member States[7], and Articles 45 to 48 regulate the means of enforcing financial penalties. It is a classic international convention, in the sense that the principle of opportunity prevails for the states when it comes to the enforcement of the judgments, requiring dual criminality in any event, transmission via central authorities and the *exequatur* procedure for recognising a decision. A second, more recent precedent is the European Convention on the enforcement of foreign criminal judgments, approved in Brussels on 13 November 1991, in the context of European Political Cooperation. This convention, also inspired in the classic

[6] Spanish State Gazette 78 dated 30 March 1996.

[7] Austria, Cyprus, Denmark, Estonia, Lithuania, Netherlands, Romania, Spain and Sweden.

model of international cooperation, has not even entered into force.

Also within the context of Schengen Cooperation, we should highlight the Agreement of 28 April 1999, on cooperation in proceedings regarding road traffic offences and the enforcement of financial penalties[8], due to is greater proximity; it sets out the means for enforcing financial penalties, defining road traffic offences in the same way as subsequent Framework Decision 2005/214/JHA, and placing criminal and administrative penalties on the same footing in this regard. Despite the greater agility envisaged in the agreement, with direct transfer between competent authorities and a restriction of the causes of refusal, the principle of dual criminality is maintained, both regarding the type and the maximum penalty, requiring that the Member States have ratified the 1990 Schengen Convention. In the same way, and as a precedent for the non-differentiation between criminal and administrative penalties, we must mention the Council Convention of 17 June 1998 on driving disqualifications[9], which is another convention that has not entered into force due to a lack of ratifications (in 2001 it had only been ratified by Spain).

1.3 BACKGROUND TO THE FRAMEWORK DECISION.

As can be seen, the above panorama was not particularly encouraging for the development of the bases for mutual recognition, as the only convention in force (and even then only in five of the fifteen Member States) was the 1970 ECIVCJ.

Faced with this situation, the Commission Communication of 26 July 2000 (in point 9.2) and the Council's Programme of measures (point 3.2) indicated the need to draft a text in order to attain an extensive application of mutual recognition to financial penalties. In the case of the Programme, these considerations took the form of two specific measures, no. 17, with priority rating 1, aimed at the Union-wide integration of the Agreement on the application of the Schengen Agreement of 28 April 1999, on road traffic offences and the enforcement of financial penalties, mentioned in the foregoing

[8] Decision of the Executive Committee of 28 April 1999 (SCH/Com-ex (99) 11 rev 2).

[9] OJEC C 216 dated 10 July 1998.

section, considering that it should be dealt with by a Council act; and measure no. 18, with priority rating 2, aimed at the *"preparation of an instrument enabling the State of residence to levy fines imposed by final decision on a natural or legal person by another Member State"*.

The first measure bore fruit in the shape of the German Initiative of 27 June 2001 for the adoption by the Council of an Act dealing with road traffic offences and the enforcement of financial penalties for road traffic offences; this proposal was in fact a literal reproduction (except in relation to its adaptation to the ambit of the Council) of the Agreement of April 1999 which we mentioned in the foregoing section, which at least for the moment has not materialised as a positive rule, although, as we will see, the Framework Decision we are to study has been adopted to also include the enforcement of such penalties. As a result of the second of the measures, in September 2001 the United Kingdom, France and Sweden presented an Initiative *"with a view to the adoption of a Council Framework Decision on the application of the principle of mutual recognition to financial penalties"*[10].

The legal basis for this proposal was, as explained in the explanatory note, to be found in Articles 31.a) and 34.2b) of the TEU, as the former contemplates *"facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities..."* and the second establishes the Council's power to *"adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States".*

The Initiative contemplated a simpler framework decision than the one that was finally approved, and although the final version did cover administrative penalties, including an annex with the list of the offences to which it would apply, it did not contemplate a list system, which is what it has become, after the Framework Decision on the European Arrest Warrant, regarding the rules on mutual recognition.

The European Parliament issued its report in this regard on 17 January 2002[11], returning it to the Council, which on 8 May 2003 adopted general guidelines on the project, and pending the study of certain aspects of the resolution, adopted a decision on the same in February 2004, before going on to have the document formalised by the

[10] Council document 11178/01COPEN 40 dated 12 September 2001 (OJEU C 278 dated 2/10/01), with an explanatory report published in Document 10710/01 COPEN 37 ADD 1, dated 16 July 2001.

[11] OJEU C 271 E dated 7 November 2002.

jurilinguists; it was finally submitted to the approval of the Council, together with the annexed declarations, on 8 February 2005[12], culminating in Framework Decision 2005/214/JHA, which we will now go on to study.

2. FRAMEWORK DECISION 2005/214/JAI[13]

Having examined the background, both in relation to conventions and specifically the legislative *iter* of the Framework Decision, in this chapter we will examine it in detail, attempting to resolve, from as practical a point of view as possible, the questions that may arise in this regard, in relation to its scope of application, the procedure to be followed and the consequences of the request.

However, and before going ahead, we must state that pursuant to the general rule in mutual recognition, the Framework Decision itself states that it will not be an obstacle for the application of other agreements between Member States which make it possible to exceed its provisions and facilitate the enforcement procedures for financial penalties (Article 18).

2.1 SCOPE OF APPLICATION

The Framework Decision determines the recognition procedure applicable to decisions that impose financial penalties, which necessarily entails a definition of what we should understand by ‘decision’ and ‘financial penalty’, first of all, as well as establishing the types of offences to which it will be applicable and the territorial scope.

2.1.1 BASIC DEFINITIONS

Article 1 of the Framework Decision defines the concepts of ‘decision’ and ‘financial penalty’ for the purposes of this text, which is important as neither

[12] Council document 5871/1/05 Copen 23 REV 1 dated 8 February 2005.

[13] OJEU L 76 dated 22 March 2005.

the concept of ‘decision’ nor that of ‘financial penalty’ are common to all European legal systems; this means that a harmonisation is necessary in this regard.

2.1.1.1 CONCEPT OF ‘DECISION’.

According to point a) of Article 1, a decision should be understood as *“a final decision requiring a financial penalty to be paid by a natural or legal person”*, provided that the decision is issued by one of the following bodies:

a) a court of the issuing State in respect of a criminal offence under the law of the issuing State;

b) an authority of the issuing State other than a court in respect of a criminal offence under the law of the issuing State, provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters;

c) an authority of the issuing State other than a court in respect of offences punishable under the national law of the issuing State by virtue of being infringements of the rules of law, provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters;

d) a court having jurisdiction in particular in criminal matters, where the decision was made regarding a decision as referred to in the foregoing point.

In section a) we find the most common type of decision, handed down by a court in respect of a criminal offence. In any event, it is important to keep in mind that the Framework Decision, while it does state that the decision be adopted on the basis of a criminal offence, does not require that the court issuing the decision be a criminal one, unlike in the following points.

Meanwhile, judicial jurisdiction in decisions in accordance with section d), which includes decisions issued by a criminal court with respect to infringements of the law, unlike in section b), must be taken as referring to legal penalty provisions that are not of a strictly criminal nature.

As for cases b) and c), they make it possible for the decision to be enforceable, notwithstanding the specific compendium of subject matters that we will examine later as regards administrative decisions adopted either in relation to an offence of a criminal nature, or in relation to an offence penalised under administrative law provided that in

either case, the decision can be heard before a criminal court, which according to doctrine is equivalent to the possibility of it being eligible for appeal before a criminal court. The prerequisite in section b) refers to a special kind of penalty that does not exist in some legal systems, such as the Spanish one, while others, such as those of Sweden and Finland, do provide for it. In Sweden for example, for less serious crimes, fines may be imposed directly by the Public Prosecutor or the Police if the suspect agrees (we must not forget that Sweden was one of the states that presented the initiative for this Framework Decision). In relation to section c), it contemplates the possibility in several European legal systems, such as the German one (*Ordnungswidrigkeit*), for administrative offences (some of which are related to formerly criminal acts that were decriminalised) to be reviewed by criminal judges.

As such, in relation to administrative penalties, what we have here is an intermediate solution, as not all the penalty decisions are accepted, just those that can be appealed to, or heard by, a criminal court. This solution was widely debated by the Member States, in an attempt to extend or reduce the range of decisions to be recognised, highlighting the difficulty to fit administrative penalties in under the Third Pillar. An example of this can be seen, on the one hand, in the cumbersome wording of this precept, vis-à-vis the simplicity of the original initiative presented by the United Kingdom, France and Sweden; and, on the other hand, the possibility envisaged in Article 20.2 for the Member States, within a term of five years after entry into force (22 March 2005) to limit the application to cases i) and iv) (the a) and d) that we have just seen) of Article 1.a), i.e., to the decisions issued by a court, by means of a declaration to the Secretariat General of the Council when adopting the Framework Decision.

In any event, the decision adopted in relation to administrative penalties is not that far removed from the existing precedents, as the 1970 Council of Europe Convention on the international validity of foreign judgments (Article1.b) and the 1991 European Convention on the enforcement of foreign criminal sentences (Article 1.1.a) contemplated application to such administrative penalties; the explanatory note issued by France, the United Kingdom and Sweden in relation to their initiative expressly acknowledged such inspiration. Meanwhile, the Commission Communication of 26 July 2000, in relation to the mutual recognition of final decisions in criminal matters, expressly accepts the inclusion of administrative penalty decisions in this field, considering that without them mutual recognition would be incomplete, as well as considering it appropriate from an operational point of view to include them in relation to legal persons, as there are states in which their criminal liability was not yet contemplated, and a distinction on the basis of the authority imposing the penalty could

confuse matters.

Finally, regardless of whether the decision is administrative or criminal, the requirement in both cases is that it be final. The concept of finality is not expressly dealt with in the Framework Decision, and given the different legal systems, this could give rise to problems of a theoretical nature (because in practice, it will be the issuing state that classes the decision as final, as can be seen in section h)1. of the model certificate). The Commission has already pronounced itself on this matter, in its Communication of 26 July 2000, suggesting a working definition, including all the decisions that deal with the merits of the case in criminal proceedings, and against which no ordinary appeal can be filed, or, even if it can be filed, it will not have suspensory effect; this definition is coherent with the provisions regarding mutual recognition of civil and commercial decisions.

2.1.1.2 CONCEPT OF 'PENALTY'.

The following section of Article 1 of the Framework Decision centres on defining what should be understood by financial penalty for the purposes therein. The fact of the matter is that the definition of 'financial penalty' is broader that what would usually be considered a simple financial penalty or fine.

Section b) of Article 1 states that a financial penalty is understood to be an obligation to pay:

a) a sum of money on conviction of an offence imposed in a decision;

b) a compensation imposed in the same decision for the benefit of victims, where the victim may not be a civil party to the proceedings and the court is acting in the exercise of its criminal jurisdiction;

c) a sum of money in respect of the costs of court or administrative proceedings leading to the decision;

d) a sum of money to a public fund or a victim support organisation, imposed in the same decision.

It also provides a negative description, expressly excluding two categories: orders for the confiscation of instrumentalities or proceeds of crime; and orders that have a civil nature and arise out of a claim for damages and restitution and which are enforceable in accordance with Council Regulation (EC) No 44/2001.

Section a) is the classic case of a financial penalty, namely a fine imposed in a decision or an administrative penalty. It should be highlighted that while the Framework Decision only uses the term conviction ("*condemnation*" in French or "*condena*" in the Spanish version), outside the sphere of the courts, it will also be considered applicable to administrative penalties. Section c), meanwhile, is not particularly noteworthy, dealing as it does with the concept of procedural costs (or administrative expenses in the case of a decision of this kind) apart from the evident extension of the concept of "penalty". As for section d), setting a sum of money for a public fund or a victim support organisation means that it is not considered a civil action and its nature is more one of an accessory penalty, although it should be kept in mind that it will only apply in those cases in which the amount is set and cannot be extended to orders for the seizure or confiscation of the proceeds or profits of crime, even if they are subsequently used for said purpose.

Section b) is the one that causes greatest problems, deriving precisely from the doubt that may arise in relation to its nature. It contemplates a concept that is specifically Anglo-Saxon (United Kingdom and Ireland), known as "compensation order"[14]. This is a peculiar institution, of a mixed civil (as it is compensation for an injured party as a result of a crime) and criminal (it is imposed as part of a criminal sentence, although not brought by a party and is in line with the criteria of financial standing of the guilty party, in addition to the damage caused by its imposition) nature. The Commission has considered until now that these judicial declarations are of an essentially civil nature and as such belong to the First Pillar - Regulation 44/01 applies to their enforcement and recognition[15]; meaning that it is debatable as to whether they fall under this Framework Decision. As the CJEC has yet not pronounced itself on this matter, it has not been finally resolved, but the transposition of the Framework Decision into British law expressly includes the "compensation orders" as financial penalties whose enforcement the British judge can request pursuant to the Framework

[14] Articles (sections) 130 to 134 of Powers of Criminal Courts (Sentencing) Act 2000 for England and Wales; Articles 249 to 254 of Criminal Procedure (Scotland) Act 1995, reformed in 2007, for Scotland. This is a separate institution derived from the absence of a private prosecutor or civil party in criminal proceedings (for this reason it is expressly mentioned in the text of the Framework Decision). It consists of an amount that the criminal judge sets in the sentence for the purpose of compensating the victim for the loss or damage suffered. Nevertheless, this sum is not requested by the victim, it is set in the trial, although in those cases where the valuation is complicated, it is not imposed, and the victim is given the option of claiming it via civil channels. What is unusual about this is that in order to calculate it, not only the damage caused is taken into account, but also the financial standing of the accused party and his/her possibilities of paying it. Meanwhile, the fact that this amount is set does not prevent the victim from bringing a civil action in said jurisdiction, although the amount imposed or that actually paid will be discounted from the amount set in the civil proceedings, which will not take into account the sum set by the initial order when issuing its sentence.

[15] This was stated by the Commission in the declaration of the minutes of the Council (Note from the Secretariat of the Council, dated 8 February 2005).

Decision[16].

On the other hand, and as we have indicated, in order to dispel possible doubts, a negative definition is also provided, by means of excluding confiscation orders for instrumentalities or proceeds. The international enforcement of confiscations was expressly excluded under the Project, as it considered that it was already regulated in the European Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ratified by all the Member States and specifically by Spain on 22 July 1998). At present, the mutual recognition of confiscation decisions has its own Framework Decision, 2006/783/JHA, related in turn to Framework Decision 2005/212/JHA dated 24 February Confiscation of Crime-Related Proceeds, Instrumentalities and Property.

Secondly, it excludes the decisions enforceable under Council Regulation (EC) 44/01, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, precisely because such cases concern civil matters and the Regulation expressly states its indifference regarding the court at which the decision is issued, which entails that the civil action derived from the crime will be recognised and enforced via this channel, regardless of whether it was handed down by a criminal court or a civil one, which entails the problems we have already analysed in relation to the dual nature of the "compensation orders".

2.1.2 APPLICABLE OFFENCES

Having defined the concept of 'decision' and 'financial penalty', the following step requires knowing to what decisions imposing a financial penalty the Framework Decision applies. Article 5 determines the scope of application.

[16] The transposition of the Framework Decision into English and Northern Irish law took place via the Criminal Justice and Immigration Act 2008, Part 6 of which regulates international cooperation in the enforcement of financial penalties; Article 80 (5) covers England and Wales and Article 82 (4) deals with Northern Ireland, defining the expression "financial penalties" as including compensation orders. Likewise in Scotland, Article 56 of the Criminal Proceedings etc. (reform) (Scotland) Act 2007, contemplates the definitions set out in Article1 of the Framework Decision, with a mere mention of "fines and other financial penalties" precisely defining "compensation orders" as "financial penalties". The notification to the Secretariat of the Council of the Union was made on 23 November 2009.

As indicated in earlier units, the principle of mutual recognition requires trust between the Member States and this mutual recognition is to be the cornerstone of cooperation in the European Union; the non-questioning of the offences is the keystone, the vital point of this construction. In order to resolve the key obstacle of this questioning, the principle of dual criminality, since Framework Decision 2002/584/JHA[17] on the European arrest warrant, a new system has been used, namely the list of offences, which is adopted by the Member States and which means that all of them assume that they will recognise decisions referring to offences described in the list without questioning whether the act constitutes an offence in the executing state. Indeed, the initiative behind the Framework Decision originally presented on 12 September 2001 did not contain any provision for the offences to which it would be applicable. The fact is that the closed list of offences set out in the Framework Decision on the European arrest warrant, with thirty-two offences, which we have already seen in Unit 10, has become a classic, and is also contained in Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence[18]; in Framework Decision 2006/783/JAI regarding the application of the principle of mutual recognition to confiscation orders[19], or in Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to criminal judgments imposing prison sentences to be served in the European Union[20].

In the Framework Decision we are analysing here however, this list of 32 offences has been extended to include:

a) conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods;

b) smuggling of goods;

c) infringements of intellectual property rights;

d) threats and acts of violence against persons, including violence during sport events;

e) vandalism;

f) theft;

g) offences established by the issuing State and serving the purpose of

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[17] OJEU L 190 dated 18 July 2002.

[18] OJEU L 196 dated 2 August 2003.

[19] OJEU L 328 dated 24 November 2006.

[20] OJEU L 327 dated 5 December 2008.

implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty.

The reason for this extension is derived precisely from the purpose of the Framework Decision, the recognition of financial penalties. On the one hand and in relation to criminal offences, the list of 32 offences refers to relatively serious offences, while financial penalties and the traditional fine tend to be issued in the context of less serious offences, which meant that the classification had to be extended to include offences against road safety, theft, vandalism, threats and any kind of bodily harm. But on the other hand, it also includes administrative penalties, and for that reason none of these new offences listed constitute a criminal offence; instead, they are referred to as offences in general, meaning that they can be prosecuted via the channels for administrative offences (albeit with the restriction that the offence be eligible for trial or appeal before a criminal jurisdiction). And indeed the clearest confirmation of the aim to include any kind of offences is the apparent redundancy of the list in the Framework Decision, as the general list contained in the other framework decisions includes "infringements of intellectual property rights and counterfeiting of goods", and among the offences added we have "infringements of intellectual property rights", a repetition that can only be the result of the intention to punish such infringements, regardless of whether or not they constitute crimes as such.

This list is not considered a closed one, as the possibility is also envisaged, as is the case in the other framework decisions, for extension or amendment, in view of the report to be issued by the Commission after receiving the reports from the states on the status of the adaptation of their national texts to the Framework Decision, pursuant to Article 20.5[21].

Traffic offences

In this extension it is worth paying special attention to road traffic offences. Whereas no. four of the Framework Decision expressly mentions the fact that this text will also include traffic offences. This whereas clause did not appear in the proposal or initiative behind the Framework Decision and its inclusion would make sense if the list of offences had not been used. Once the legislators opted for this system, the express

[21] The report, that should have been issued by the deadline of 22 March 2008, was issued on 24 February 2009, highlighting the tardiness with which the Member States are performing the transposition and without making any evaluation regarding an amendment of the list of offences.

mention of the same seems redundant. However, it serves to highlight the importance attributed to the inclusion of such offences. The Initiative presented in 2001 by the United Kingdom, Sweden and France already stated in its explanatory note that Germany had presented a proposal for a decision regarding the enforcement of financial penalties for infringements of road traffic legislation, based on the Schengen Agreement of April 1999[22], and proposed a joint examination to combine them. In turn, in the declarations annexed to the approval of the Framework Decision, the Council took note of Germany's intention to present an initiative for a new framework decision containing measures on cooperation between the Member States in proceedings regarding traffic offences. The particular interest that Germany has is due to the fact that a considerable part of intra-European road traffic passes through its territory and, as such, one of its priorities is to be able to execute decisions regarding traffic offences. It is for this reason that traffic offences are expressly mentioned in the whereas clause and included in detail on the list, contemplating cases that can go beyond mere contravention of traffic regulations, something which was specified by Germany when approving the Framework Decision, defining its concept of traffic offences for these purposes[23].

There is no record of Germany finally presenting or preparing the presentation of a framework decision in relation to traffic offences, or of the proposed 2001 Convention seeing the light of day. Nevertheless, we are experiencing a new process of communitisation of traffic regulations and their transfer to the First Pillar, highlighted relatively recently (18 March 2008) by the fact that the Commission adopted a proposal from the Parliament and the Council for a Directive aimed at facilitating the cross-border prosecution of traffic offences[24]. This situation is based on the EU's competence in relation to transport and, with that, road safety; and while it is true that its scope is limited to the most common serious offences, the same can be said of the fact that it can be applied in any case of administrative penalty without the need for subsequent review via criminal channels[25]. In any event, the proposal itself avoids possible conflict

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[22] Initiative of 21 June 2001 which we have already mentioned in the background to the Framework Decision.

[23] The German declaration states: "Only infringements of road traffic legislation and the legislation on the protection of traffic facilities will be considered offences and not general criminal offences or infringements of general regulatory provisions. Therefore, traffic regulations will be understood to mean only those provisions that aim to protect road safety or the maintenance of traffic facilities."

[24] The passage of this draft directive is ongoing, and on 15 January 2009, the Council published the amendments proposed by the Parliament on 18 December 2008. The Czech presidency, in its programme of 15 February 2009, gave priority to stepping-up cooperation in this area.

[25] The explanatory report of the proposal takes great care to make the limits of its jurisdiction clear in relation to the jurisdiction of the states and expressly declares: "The proposal does not deal with harmonising road traffic rules, nor with harmonisation of penalties for road traffic offences, since these matters are best left to the Member States. It merely contains provisions of a purely administrative nature for putting in place an effective and efficient system of cross-border enforcement of the main road traffic offences. It does not interfere with Member States qualifications of

with the Framework Decision we are dealing with here, while the directive initially applies to the penalty process (its purpose is the identification and notification of the complaint to a resident in another Member State), the Framework Decision is aimed at the enforcement of the penalty, and as such expressly declares its compatibility with the former.

Dual Criminality.

Nevertheless, the list does not limit the possibility of this channel being used for decisions imposing a financial penalty for other offences. In such cases, however, the executing state may subject recognition and enforcement of the decision to the dual criminality filter (as per section 3 of Article 5), meaning that the act must constitute an offence that is punished in the executing state, leaving the door open for the texts transposing the Framework Decision in each Member State to include this guarantee. In this regard we can appreciate how the model certificate included in the Framework Decision establishes a special section for cases where the offence is not on the list, and where it is sufficient to tick the corresponding box and provide a detailed description of the offence for which the penalty is being imposed.

2.1.3 TERRITORIAL SCOPE

The territorial scope of application of the Framework Decision is clear: all the Member States of the European Union, who have the same obligation to adapt their domestic legislation to allow the application of this Framework Decision. It should be highlighted at this point that, as with the other framework decisions based on mutual recognition, Article 19 specifically states that it is applicable to Gibraltar. It is no secret that the international status of Gibraltar is a source of dispute between the United Kingdom and Spain, derived from its special situation, given that according to international law it is a colony and as such does not form part of the metropolitan territory of the United Kingdom or indeed of the European Union. Given the Spanish claim of sovereignty over the territory in the event of a change of status, the inclusion of

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these traffic offences, which can be either of an administrative or of a penal nature. Neither does it interfere with Member States' laws in terms of who should be liable for the offences in question.

The text applies without making any distinction between the offences concerned in terms of their legal qualification as being criminal or administrative, since this is different in the different Member States; it can readily be applied irrespective of such a qualification".

the same in the instruments of the European Union requires express acceptance, by means of an exception or an extension to a territory that does not form part of the EU, as the only way of reconciling the positions of the parties involved in the dispute[26].

Article 1, sections c) and d) define the concept of 'issuing state' and 'executing state', which raise no difficulties, and it is only necessary to indicate in this regard that the use of the terms 'issue' and 'enforcement' is not a chance one; instead, it is the result of the express aim of highlighting the scope of mutual recognition to which the Framework Decision belongs, leaving behind the traditional terms of requested state and requesting state. 'Executing state' means the Member State in which the penalised or sentenced individual or legal person is normally resident (in the case of a legal person, its registered seat), or in which it owns property or obtains income (Article 4.1).

Lastly, in relation to territorial scope, it is important to mention the fact that, while a decision can be recognised all over the EU, it can only be recognised once on each occasion; Article 4.4 of the Framework Decision states that the decision can only be transmitted to one executing State at any one time. The reason for this provision is to avoid multiple enforcements and a possible overlap, seeking to avoid contravening the *non bis in idem* principle as well as an accumulation of pointless activities and expenses.

2.2 GROUNDS FOR NON-RECOGNITION

In this section we are going to analyse the different grounds or reasons for which the executing state may refuse recognition for the enforcement of a decision imposing a penalty and the consequences thereof. It is necessary to indicate in any event that the provision of the Framework Decision states that refusal will only occur in exceptional cases and that the general rule, once the decision has been transmitted in the manner envisaged, is for recognition and enforcement (Article 6), unless any of the grounds stated below exist.

[26] This observation may seem superfluous to a Spanish or British reader, but it is not difficult to understand the perplexity that this special provision, isolated in the context of the text of the Framework Decision, may provoke in a Latvian, Slovakian, Bulgarian... who may be unfamiliar with the international situation of Gibraltar.

2.2.1 GROUNDS.

It is Article 7 of the Framework Decision that sets out the grounds for refusing recognition or enforcement of a decision sent by the issuing state. First of all, there are the formal defects, such as when it is presented without the certificate mentioned in Article 4, attached as an annex to the Framework Decision, or when it is incomplete or does not clearly correspond to the decision. The importance of the certification is evident, because as there is no standard European penalty instrument to recognise, it is the certificate that converts the national decision into a document that is valid and recognisable in any state of the EU. The certificate is quite meticulous in its thirst for details (the form is eight pages long) and the existence of errors or gaps cannot therefore be ruled out.

In addition to this formal cause, the following other causes are established:

a) a decision has been issued against the sentenced person in respect of the same offences in the executing State or in any State other than the issuing or the executing State, and, in the latter case, that decision has been executed, which represents the confirmation of the *non bis in idem* principle;

b) in one of the cases referred to in Article 5(3), the decision relates to acts which would not constitute an offence under the law of the executing state;

c) the enforcement of the decision is statute-barred according to the law of the executing State and the decision relates to acts which fall within the jurisdiction of that State under its own law; this criterion is coherent with the fact that the enforcement of the penalty is governed by the law of the executing state;

d) the decision relates to acts which are regarded by the law of the executing State as having been committed in whole or in part in the territory of the executing State or in a place treated as such, or have been committed outside the territory of the issuing State and the law of the executing State does not allow prosecution for the same offences when committed outside its territory;

e) there is immunity under the law of the executing State, which makes it impossible to execute the decision;

f) the decision has been imposed on a natural person who under the law of the executing State due to his or her age could not yet have been held criminally liable for the acts in respect of which the decision was passed;

g) in case of a written procedure the person concerned 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 in the event the person concerned 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;

h) the financial penalty is below EUR 70 or the equivalent to that amount, which means that the expense of enforcing the financial penalty is not worthwhile for such small sums. It should be remembered that this is a possibility left open to the executing state and not a prohibition on recognition, meaning that it is up to the transposition legislation of the executing state to admit this possibility or not[27].

If we were to summarise these grounds for non-recognition, we could stay that apart from grounds a) application of the *ne bis in idem* principle, b) consequence of non-inclusion in the list, and h) due to the insignificance of the penalty; the other grounds c), d) e) and f) are based more or less on the enforcement of the decision according to the law of the executing state (Article 9), as they are all related to specific circumstances of domestic legislation, which would prevent the executing state enforcing a decision imposing a penalty under its own law.

[27] In this regard there are already some national legislations that have established the possibility of non-recognition, such as the case of the French legislation (Article D48-22 Code de Procedure Pénale, Partie Réglementaire).

Trials *in absentia*: a matter for debate.

As for the grounds set out in section g), this refers to contempt of court or the broader sphere of judgment *in absentia*. This is one of the flashpoints in relation to the mutual recognition of decisions, due to the different solutions envisaged in the legal systems of the Member States in the event of the absence of the accused at the trial, and one that caused problems in relation to the European Arrest Warrant, as we saw earlier. The concern for the consequences that these differences in the procedural rights of citizens depending on the Member State have for the achievement of the principle of mutual recognition, was already highlighted by the Council in the Hague Programme[28] (point 3.3.1 of the specific guidelines).

In fact, and with a view to refining the procedural rights of the citizens affected by the principle of mutual recognition, an Initiative[29] was presented to the Council which proposed the amendment of several framework decisions, either approved or at the draft stage, regarding the enforcement of decisions handed down *in absentia*, and which affected our own Framework Decision 2005/214/JHA. The initiative proposed adding a new section to Article 1, with a new definition - that of "decisions rendered *in absentia*", (as defined in the article itself), meaning a custodial sentence or a detention order when the person did not personally appear in the proceedings resulting in that decision[30]. This Initiative led to recent framework decision 2009/299/JHA dated 26 February 2009[31], in which the express definition disappears, and instead it only amends Article 7.2.g), i.e. the section we are examining now, which deals exclusively with the case of a failure to notify in the case of written proceedings, with almost exactly the same wording. Two new

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[28] OJEU C 53 dated 3 March 2005.

[29] OJEU C 52 dated 26 February 2008, "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..."

[30] In the Spanish version of the framework decision Initiative, the term used is "*en rebeldía*" or in French "par défaut", although the English expression seems to best describe the actual fact that the accused person is not present at the trial.

[31] OJEU L 81 dated 27 March 2009.

sections are added, i) and j) regarding proceedings not in writing, allowing non-recognition if the decision was rendered when the accused was not personally present, unless the certificate states that:

"i) according to the certificate provided for in Article 4, the person did not appear in person at the trial resulting in the decision, unless the certificate states that the person, in accordance with further procedural requirements defined in the national law of the issuing State:

i) in due time

– either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and
– was informed that a decision may be handed down if he or she does not appear for the trial;

or

ii) 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 or her at the trial, and was indeed defended by that counsellor at the trial;

or

iii) after being served with the decision and being expressly informed of the right to a retrial, or an appeal, in which he or she 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:

– expressly stated that he or she does not contest the decision
or
– did not request a retrial or appeal within the applicable time frame;

j) according to the certificate provided for in Article 4, the person did not appear in person, unless the certificate states that the person, having been expressly informed about the proceedings and the possibility to appear in person in a trial, expressly waived his or her right to an oral hearing and has expressly indicated that he or she does not contest the case."

It also proposes amending Article 7.3 in order to adapt the obligation to consult the issuing authority before rejecting the request, as envisaged in the original section g), as well as the model certificate, in order to adapt it to the new regulations. This new rule must be applicable within 24 months of its publication, unless a state makes an express declaration regarding the impossibility of adopting it in accordance with its internal legislation, in which case it can be deferred until 2014.

As we can see, even though it is somewhat long-winded and even confusing, particularly if we compare it with the relative simplicity of the original initiative, showing the differences existing between the states in this regard[32], its purpose is clear: to mark out the compliance with the procedural rights of the penalised person more exactly, so that the mere "notification of the procedure" is not sufficient; instead, it is necessary to specify that the person concerned has been expressly summoned for trial and warned of the consequences of his/her absence, or that he/she has been notified of the decision rendered *in absentia* and of the right to a review of the case, thus following the requirements set out in by the doctrine of the ECHR in relation to trial *in absentia* (see Yabuz vs. Austria, Ekbatani vs. Sweden; Stanford vs. UK, C. vs. Italy, Colozza vs. Italy, Poitrimol vs. France...).

Multiple enforcement.

Similarly, and even though it is not expressed as a cause of the non-

[32] In fact on 13 March 2009 Italy made just such a declaration under Article 8.3, stating that the amendments to the Framework Decision would not be applicable in its territory until 1 January 2014, as authorised by said precept.

enforcement of the Framework Decision, we should include a further clause, namely that the enforcement is already underway in other Member States. As we stated earlier in section 2.1.3 of this unit, Article 4.4 of the Framework Decision categorically states that the decision may only be sent to one executing state at a time, and Article 15.1 establishes that transmitting the decision will mean that the issuing state waives its right of enforcement. We have already seen what the purpose of this provision is. But, what happens if, by accident or otherwise, an authority sends a decision to several states for enforcement?

It is considered in this case that if the executing authority becomes aware of the fact (usually because the person concerned appears and informs it), after the issuing authority has been consulted, the executing authority will be entitled to refuse to enforce the decision, even if this circumstance is not expressly established, because otherwise it would be contravening the Framework Decision itself.

Legal persons as grounds for non-enforcement.

There is certainly no reference to this in Article 7 of the Framework Decision, but as we pointed out earlier, the question of the criminal liability of legal persons is not a unanimous criterion among the Member States of the European Union, and this is one of the reasons why the Framework Decision covers recognition of administrative penalties, which on occasion are imposed on legal persons instead of criminal penalties. The position of the Commission on this point is clear and its intention is for the national legislations to recognise the individual liability of the same. This objective has not yet been achieved completely (Luxembourg, the Czech Republic and Slovakia do not envisage criminal liability of legal persons).

As a general rule, the Framework Decision states in Article 9.3 that the financial penalty should be enforced in the executing state even when it does not recognise the criminal liability of legal persons. But at the same time,

conscious of these legislative differences, the Framework Decision has envisaged the possibility for each Member State to limit its application regarding legal persons for a period of five years following its entry into force (22 March 2005), to decisions related to acts for which the community instruments establish the principle of liability of legal persons, and only to these (Article 20.2.b), which means that any Member State can apply the principle of reciprocity vis-à-vis a state that has adopted this limitation (Article 20.4). This temporary exclusion, which must be declared to the Secretariat General of the Council at the moment the Framework Decision is adopted, will mean that in those states making such a declaration, the fact that the decision is addressed to a legal person (and with the exception of the community instruments) will be grounds for non-recognition.

No Member State has made such a declaration by the date of adoption of the Framework Decision by the Council, although Portugal and Austria already declared prior to the publication of the Framework Decision that they would avail of this exception. And more recently, on 3 June 2008, the Czech Republic presented its declaration to the Secretariat of the Council and stated that it was impossible to enforce penalties against legal persons as its domestic legislation did not allow it, even though it did not mention Article 20.2.b). Indeed, the Czech transposition legislation established that a request addressed to a legal person constitutes grounds for non-enforcement.

The human rights clause: grounds for non-enforcement?

Finally, we cannot omit another reason for the executing state to refuse recognition, namely the infringement of fundamental rights. Some writers have argued that the suppression, albeit partial, of the dual criminality rule should mean that the protection of certain essential interests of states be

replaced by a clause on the protection of human rights[33], considering that it should be possible to refuse recognition of a decision if it is considered that the adoption of the same has infringed human rights. It could certainly be argued that this idea is pointless as all the Member States have ratified the European Convention on Human Rights and the EU Charter of Fundamental Rights affects them equally; moreover, it would seem to install a criterion of mistrust as opposed to the trust on which the principle of mutual recognition is based. This question was already debated in relation to the same clause in the EAW. The fact is that the preparatory work of the proposal for a Framework Decision on procedural guarantees shows that the Member States implement the standards of the ECHR differently, which, taken with the margin for interpretation that the Convention itself acknowledges regarding each national system, gives some justification to those who argue for the existence of this criterion to safeguard human rights.

The truth is that Article 7 of the Framework Decision, which is the one that in theory regulates the grounds for refusal, makes no mention of such a scenario, but it is also true that Article 3 of the Framework Decision expressly states that "*this Framework Decision shall not have the effect of amending the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty"*. In turn, whereas clause 5 of the Framework Decision (which together with no. 6 forms part of the general whereas of other framework decisions dealing with mutual recognition, such as the Framework Decision on the European arrest warrant, whereas clause 12) considers that the Framework Decision observes the fundamental rights and principles reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI[34] thereof, but it also specifies, as a rule of interpretation, that none of the provisions of the Framework Decision will be interpreted in such a way that they hinder the non-recognition of a decision when there are objective reasons for believing that it has been rendered in order to discriminate against a person in any way (sex, race,

[33] See Vogel,J. in Grützner/Pötz: IRG-Kommentar, 2001, vol I.

[34] OJ C 364 dated 18 December 2000.

religion, ethnic origin, nationality, language, political opinions or sexual orientation).

In view of the above article and the rule of interpretation, when adapting their legislation to this Framework Decision it must be admitted that the states can expressly use any impingement on the fundamental rights as grounds for non-enforcement, and in the same way, even when a decision fulfils all the requirements of Article 7, if it affects fundamental rights and equality in particular, the executing authority will have to decide whether to refuse enforcement, as it cannot take refuge in the literal text of the Framework Decision, or of the instrument that transposes it, in order to allow an infringement of such rights. In this regard we must not forget that the CJEC has already issued decisions on the interpretative value of Framework Decisions, concluding that they serve as a reference for interpreting domestic legislation for the purposes of a allowing their application[35].

In any case and on this point, different European countries have already taken up positions regarding the adaptation of their rules in favour of said grounds for non-enforcement, and thus the United Kingdom, in relation to the European Arrest Warrant, and on the basis of a Framework Decision with identical passages to the ones quoted above regarding human rights, specifically includes among the causes to be examined in the hearing the possible infringement of human rights by the issuing Member State, as grounds for refusing to surrender a citizen (section 21, Extradition Act 2003).

In any event, the possible debate on this point has been overcome in the Framework Decision itself in view of the somewhat unsystematic provisions of Article 20.3, which was included at Germany's request at the last minute, and which definitively confirms the applicability of this reason for non-enforcement, by stating that any state may, where the certificate gives

[35] Judgment of the CJEC of 16 June 2005, case C-105/03

rise to an issue that fundamental rights may have been infringed, oppose the recognition, although a single restriction is imposed stating that the competent authority in the issuing state should be consulted before a decision is adopted[36]. Despite this, or perhaps precisely because of it, a special provision for controlling this cause of non-recognition has been included with Article 20.8 of the Framework Decision stating that each Member State will inform the Council and the Commission of the decisions that are not accepted on the basis of this cause during the year, concluding that on the basis of the reports sent, and within a term of seven years (i.e. by 2012), the Commission will issue a report which the Council will use to decide whether or not to maintain section 3 of Article 20 or replace it with a more specific provision.

2.2.2 CONSEQUENCES.

The basic consequence of non-recognition is clear: the decision will not be enforced in the executing state. This may seem blatantly obvious, but it does have other consequences, and a preliminary decision that the grounds for refusal exist does not always mean automatic non-recognition.

In the cases envisaged in section 1, in letters c) and g) of section 2 of Article 7, and in section 3 of Article 20, i.e., cases of formal defects, the expiry of the enforcement, of decisions *in absentia*, or the possible infringement of fundamental rights; Article 7.3 states that before enforcement is finally refused, the authority in the executing state must first consult with the authority in the issuing state and request any information it deems necessary. This consultation will be by any means that are considered appropriate, which implies direct communication or via the channels established in the European Union for cooperation in criminal matters. The purpose of this exchange of information is based on the general philosophy of the Framework Decision to allow the enforcement of decisions from other states and as such avoid cases of non-recognition that may be down to a lack of information, and its importance

[36] In this regard the Spanish law for the adaptation of the Framework Decision establishes infringement of fundamental rights as grounds for non-recognition, and the French procedural reform regarding adaptation establishes the infringement of the right of non-discrimination as such grounds, as per the fifth whereas clause of the Framework Decision.

is set out in Article 20.7 of the Framework Decision in relation to the non-compliance or hindrance by a Member State of the recognition of these matters *"which have not been solved through bilateral consultations"*. In the case of formal defects this communication makes it possible to remedy any problems with the certificate when the defects are not essential; request clarification or details regarding the judicial or administrative acts performed in the issuing state in order to calculate the term of expiry according to the executing state's legislation, or of the circumstances set out in a trial *in absentia*; or to assess the procedure followed in order to specify the possible infringement of rights.

If such consultations do not make it possible to modify the initial doubt or if we are dealing with any of the other grounds for non-recognition, the authority of the executing state will notify the authority of the issuing state of the decision of non-recognition, a decision that must be reasoned as expressly set out in Article 14 b) of the Framework Decision, the result of which is that the issuing state will recover the responsibility for the enforcement of the penalty, unless the decision of non-recognition was adopted due to the *non bis in idem* principle (because a decision on the same offences has already been rendered in the executing state or in a third state and has already been enforced), or because it is adopted due to an infringement of fundamental rights (Article 15.2.b) of the Framework Decision).

This last scenario means that the "human rights clause" has an importance that transcends the internal sphere of the executing state, as its upholding means that the authority in this state is given the power to classify the adaptation of the proceedings in which the penalty was imposed on the person in question according to its own way of applying the ECHR or the Charter of Fundamental Rights, linking the state in which the decision was rendered and the one in which the decision in question could have been appealed on such grounds. This circumstance entails the risk that it may result in the Member States becoming embroiled in a kind of "war of reciprocity" (such as already occurred in the case of the EAW in relation to the non-extradition of nationals by Germany and the application of the principle of reciprocity by Spain) and an increase in concern for the protection of rights regarding decisions to be enforced in other Member States.

2.3 PROCEDURE.

We should now go on to examine the procedure followed for the issue and enforcement of a decision imposing a penalty. In order to do so, we will look firstly at how the authorities responsible for the issue or enforcement are determined, before going on to analyse the steps to be taken in order to set things in motion, both in relation to issuing and executing, as well as the form and the peculiarities that the enforcement may give rise to.

2.3.1 JURISDICTION.

Article 2 of the Framework Decision establishes that each state will inform the Secretariat General of the Council of the authority or authorities that, by virtue of their national legislation, are competent to issue or enforce a decision. It is clear that we must refer to the instruments transposing the Framework Decision into national law to see what authorities the states have designated.

In any event, it is important to take into account that the competent authority will not necessarily be a judicial authority, as there is also the possibility of the enforcement of administrative penalties. Therefore, and although the standard means of communication will be directly between the competent authorities (Article 4.3 of the Framework Decision), Article 2 envisages the possibility for the states to designate one or more central authorities responsible for the administrative transmission and receipt of the decisions and for assisting the competent authorities when the internal organisation so requires; this is reaffirmed in the cases of the United Kingdom and Ireland (Article 7.7 Framework Decision), derived from the non-application of the provisions regarding mutual assistance under the Schengen Agreement in said countries at the time the Framework Decision was adopted, although it is also the channel they have maintained in the other mutual recognition instruments[37].

[37] In the notification of transposition of 23 November 2009 the competent authorities for issue or execution were established, which are the corresponding judicial authorities, but there are central units for administrative transmission and receipt depending on whether they are sent to England and Wales (Mutual Recognition of Financial Penalties Central Authority), Scotland (The Sheriff Clerk) or Northern Ireland (Business Development Group).

Any declarations regarding the competent authorities will be notified to the Member States and the Commission. However, this does not preclude the difficulties that may arise in the future in identifying the competent authority to which a decision should be sent. This possibility is contemplated in section 5 of Article 4, which somewhat rhetorically states that the issuing authority will make all necessary inquiries, including via the contact points of the European Judicial Network, which is obvious, as that is one of its functions. On this point it is important to point out that the European Judicial Network itself has highlighted the need to create a judicial atlas for this Framework Decision, such as the one that already exists for EAWs. Despite this, by June 2010 the preparation of said consultation document had still not started.

In any event and in order to forestall possible errors of transmission, the Framework Decision states in Article 4.6 that if the executing authority to whom the decision is sent is not competent to enforce it, it will transmit it to whoever is competent, *ex officio*, informing the issuing authority in this regard. It does not specify whether this transmission is limited to the territory of the executing state or not, but as Article 4.4 establishes that decisions will only be sent to one Member State at a time, it seems that in the unlikely event of confusion regarding the executing state, the most appropriate course of action would be to return the decision to the issuer.

2.3.2 PROCESSING.

As far as the processing is concerned, the principle is quite simple: the issuing authority sends the decision or a certified copy of it, together with the certificate contained in the Annex to the Framework Decision, to the executing authority (or, if appropriate, to a central authority), duly filled in and signed by the competent authority. Once the decision and certificate are received, unless grounds for non-recognition arise, the decision will be enforced in the same way as if it were a domestic financial penalty, as such applying the internal law of the executing state.

Nevertheless, certain details should be clarified. First of all, and in relation to the language, Article 16 states that the certificate must be translated into one of the languages accepted by the executing state (the official language(s) or

those declared acceptable to the Council), although the translation of the decision itself is not obligatory; the executing state may opt to translate it at its expense, suspending enforcement in the meantime.

As for the manner of sending it, Article 4.3 states that the decision can be sent by any means that leaves a written record under conditions allowing the executing State to establish its authenticity. It could therefore be sent via email or fax although in said case the executing authority could ask that the original or a certified copy of the decision or certificate be sent.

In the context of the executing authority, once it has received the decision and even though the Framework Decision makes no provision in this regard, it seems correct that acknowledgement of receipt be sent to the issuing authority, identifying the body in question, the person responsible and his/her contact details, also specifying in what languages contact may be made, with a view to making communication between the parties more fluid, if necessary. This is a rule that can be described as courtesy, but it has a basis in law in the 1998 Joint Action on good practice[38].

Article 14 of the Framework Decision does however establish the obligation for the executing authority to provide information by any means which leaves a written record of other incidents, such as: a) the transmission of the decision to the competent authority, b) the total or partial non-enforcement of the decision, c) the enforcement of the decision, or d) the application of alternative sanction (Article 14). It seems evident that this is not the only information that should be supplied; for example, in relation to the last item above, notification that the alternative sanction has been executed could also be given.

2.3.3 ENFORCEMENT.

As we have said, enforcement will be in accordance with the national law of the

[38] "Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on good practice in mutual legal assistance in criminal matters", OJ L 191 dated 7 July 1998.

executing state, as if it were a domestic decision. This means that the possible appearance of the parties in the enforcement will depend on the internal legislation of each state, although the general rule seems to be that where a demand for payment is necessary, the person concerned may appear or be heard, and the Framework Decision takes this as given when it states that the interested party may present evidence in the enforcement (regarding payment for example or the existence of any grounds for non-recognition). But at the end of the day it is a decision from a third state, which determines the existence of some special aspects set out in the Framework Decision.

Sum of the penalty.

Firstly, and in relation to the amount of the penalty, it will in principle be enforced for the amount that appears in the certificate, but in the national currency of the executing state, which means that the countries not belonging to the eurozone will have to convert the amount pursuant to Article 8.2, which states that the applicable rate of exchange will be the one on the date the penalty was imposed[39].

But this general rule does not apply in all cases; in certain scenarios, such as when the offence to which the penalty corresponds was committed outside the issuing state. In this case, if the act for which the penalty was imposed also fell under the authority of the executing state, it may reduce the fine imposed to the maximum amount envisaged in its national legislation (Article 8.1 of the Framework Decision).

Meanwhile, in the event the person concerned can demonstrate that he/she has already made full or partial payment of the penalty in any state, the executing authority, after consulting with its issuing counterpart, will deduct the amount paid from the sum being enforced (Article 9.2 of the Framework Decision). If the payment was made in the issuing state after the certificate had been sent, it will be the issuing authority who will notify the executing authority of this circumstance without delay (Article 15.3).

Alternative penalty.

The Framework Decision expressly envisages the possibility of applying

[39] As an exception to this principle, the notification from the United Kingdom establishes that the compensation orders to be made directly to victims in the United Kingdom must be paid in pounds sterling.

alternative penalties in the event of non-payment of the financial penalty imposed. In this regard, it will be necessary for the issuing state to have envisaged this possibility and for it to be recorded in the corresponding section of the certificate (which sets out the measures that may be adopted and the maximum amount). In this case, if the application of alternative penalties due to non-payment of the financial penalty is envisaged in the legislation of the executing state, the latter may apply them according to its own law, with the maximum limit set out in the certificate from the issuing state. Some states have declared that it is impossible to enforce such alternative penalties under their domestic legal system, either in their territory or abroad, such as France or Finland, or only in their territory, as in the case of Denmark.

Other incidents.

Article 11.1 of the Framework Decision states that amnesty or pardon may be granted by either the issuing or the executing state. If adopted by the former, it will immediately notify the executing state so that it can suspend enforcement (Article 12.2). It seems logical that if the notification of the suspension is due to an amnesty, pardon or any other circumstance that renders the decision null and void (an appeal for review that is upheld, for example), the logical thing would be to definitively shelve enforcement, rather than simply suspend it, although the text of the Framework Decision makes no provision for this.

Suspension of enforcement will also take place when the issuing state adopts any decision that entails the cancellation of the enforceability of the decision, which will mean that, even though the Framework Decision again fails to make a provision in this regard, the authority in the issuing state will specify whether the cancellation of the enforceability of the decision is final (cancellation or revocation of the decision) or provisional (suspension of the procedure), and in the latter case it will inform the executing authority when said suspension ends, in order to continue with the enforcement; these are gaps that the Framework Decision should perhaps have filled.

Meanwhile, the issuing state will continue to maintain the power over the enforcement, in the sense that it can withdraw it from the executing state, with the same consequences that we have just examined.

Finally and although this may seem obvious, Article 11.2 of the Framework Decision states that the executing state has no authority to review the decision; the

state issuing the decision is the only one competent to do so.

Consequences.

Once the penalty has been collected, the amounts will remain in the power of the executing state, unless otherwise agreed with the issuing state, in particular in relation to "compensation orders", i.e. the amounts set in favour of the victims (Article 13)[40]. In consideration, the expenses arising from the enforcement of such decisions may not be claimed from the issuing state (Article 17).

Once enforcement has concluded, the executing state will notify the issuing state. If enforcement was been partial, unsuccessful or withdrawn by the issuing state, the right to enforcement of the decision will return to the issuing state, except in those cases already examined referring to scenarios for refusal of enforcement (infringement of fundamental rights or *res judicata*), or because non-enforcement is due to a pardon or amnesty on the part of the executing state (Article 15.2.a).

3. CURRENT STATE OF TRANSPOSITION

In this final chapter we will look at the current status of the Framework Decision as regards its adaptation to domestic legislation.

The Framework Decision was published on 22 March 2005 and it set a term of two years, until 22 March 2007, for the Member States to adapt their legislations to its provisions (Article 20.1). In turn, it states that the Member States will transmit the text of the adaptation provisions to the Secretariat General of the Council and to the Commission; and that on the basis of a report from the Commission, the Council will verify, by 22 March 2008 at the latest, the extent to which the Member States have adopted the Framework Decision (Article 20.5).

Despite these good intentions, the fact is that on the date of conclusion of this unit (April 2009), only fourteen states have made declarations regarding the Framework

[40] Thus, French law, Articles D48-29 of the CPP (partie Réglementaire) states that all amounts collected will be allocated to the French budget, unless agreed otherwise with the issuing state. Meanwhile, Spanish law (LO 1/08), states in Article 5 that the amounts corresponding to the victims will be handed over to the issuing state.

Decision, all of which refer to the designation of authorities in relation to Article 2 of the text, or to the languages authorised pursuant to Article 16, which leads to the conclusion that they have already adapted it to their national legislation. These states are: Finland (declaration dated 29 March 2007), Denmark (declaration dated 18 June 2007), France (declaration dated 21 June 2007), the Netherlands (declaration dated 17 January 2008), Austria (declaration dated 14 March 2008) and the Czech Republic (declaration dated 3 June 2008), Slovenia (declaration dated 19 September 2008), Estonia (declaration dated 16 October 2008), Latvia (16 October 2008), Lithuania (16 October 2008), Cyprus (25 November 2008), Romania (1 December 2008), Hungary (11 February 2009), Spain (24 February 2009), the United Kingdom (23 November 2009) and Luxembourg (22 April 2010).

No other state of the twenty-seven with the onus to perform the adaptation has complied with its obligations to date, after more than a year has passed since the corresponding deadline. Some states are processing the adaptation, such as the case of Italy, where an act dated 25 February 2008 delegated responsibility to the Government for adopting the legislation by means of a Legislative Decree[41]; this option of delegation has also been adopted in other legal systems, such as the Scottish one[42]. In Portugal, Law 93/09 was passed by the Assembly of the Republic on 1 September 2009[43].

Similarly, the Council has not yet carried out the verification of the transposition status that should have been performed by 22 March 2008 under Article 20.5 of the Framework Decision, although this is hardly surprising in view of the actual status of transposition. Nevertheless, and pursuant to the same precept, the Commission has already drafted the report that is to be used as a basis for verification and which was published on 12 January 2009[44].

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[41] Legge n.34, Gazetta Ufficiale n.56 dated 6 March 2008. Article 28 grants a term of one year as of the entry into force of the act for its adaptation, and Article 32 sets the principles and criteria to be followed, although to date (July 2010) the legislative decree has not been published

[42] See in this regard Article 56 of the Criminal Proceedings etc. (reform) (Scotland) Act 2007 (mentioned in note 17) which contains the definitions set out in Article1 of the Framework Decision, delegating the development of the adaptation to the Framework Decision to the "Scottish Ministers" (Scottish autonomous government), after approval of the draft bill by the Parliament (Article 81). This delegation was duly reflected in the Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) Order 2009, mentioned in the notification and in force as of 12 October 2009.

[43] Lei nº 93/2009, de 01 de Setembro de 2009. Diario da República 1-9-2009, nº 169.

[44] Commission report dated 22 December 2008, COM (2008) 888 final. Council document 5201/09.

The report evaluates the various transpositions in accordance with the different articles of the Framework Decision[45], in relation to the eleven that were in force at the time of drafting, reaching the conclusion, after lamenting the poor degree of transposition attained up to that point (something that prevented it performing a full assessment), that in general, the applicable national provisions were in line with the Framework Decision, particularly in relation to the most important problems, such as the removal of the dual criminality check and the recognition of decisions without further ado. Nevertheless, as for the grounds for refusal of recognition or enforcement, it criticised the fact that the states have largely transposed such grounds as obligatory, even adding additional grounds for refusal, which it considers contrary to the Framework Decision.

[45] For further information on the declarations and transpositions of the states, I recommend reading the next level of the unit ("To learn more").

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Segovia, 30 April 2008.

2nd update, August 2010

LEVEL II: TO KNOW MORE

1. INTRODUCTION.

As we mentioned earlier, in this second level we are going to examine in greater detail the different transpositions of the Framework Decision by the states that have to date complied with the obligation to transpose it.

First of all, it should be pointed out that although Framework Decisions are obligatory for the states in the sense of the results to be achieved, the Commission cannot oblige the states to transpose them, or bring infringement proceedings as such; therefore, all it can do is urge the state to fulfil its obligation and this may be one of the reasons why over five years after its approval, and after three years have elapsed since the deadline for transposition, twelve of the twenty-seven states have not yet notified the transposition, although as we mentioned earlier, some of them have already materially transposed it.

In the first level we stated that the states that have notified their transposition of the Framework Decision are Finland (declaration dated 29 March 2007), Denmark (declaration dated 18 June 2007), France (declaration dated 21 June 2007), the Netherlands (declaration dated 17 January 2008), Austria (declaration dated 14 March 2008) and the Czech Republic (declaration dated 3 June 2008), Slovenia (declaration dated 19 September 2008), Estonia (declaration dated 16 October 2008), Latvia (16 October 2008), Lithuania (16 October 2008), Cyprus (25 November 2008), Romania (1 December 2008), Hungary (11 February 2009), Spain (24 February 2009), the United Kingdom (23 November 2009) and Luxembourg (22 April 2010).

Meanwhile, other states are in the process of transposing it, such as Italy, which in an Act dated 25 February 2008 delegated the responsibility for adapting the legislation by means of a Legislative Decree to the Government[46]; this criterion of delegation has also been adopted in other legal systems, such as the Scottish one[47] which has already implemented it. Portugal, on 1 September 2009, passed Law 93/09[48], transposing the Framework Decision although without sending the notification to the Council.

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[46] Legge n.34, Gazetta Ufficiale n.56 dated 6 March 2008. Article 28 grants a term of one year as of the entry into force of the act for its adaptation and Article 32 sets the principles and criteria to be followed, although to date (April 2009) the legislative decree has not been published.

[47] See in this regard Article 56 of the Criminal Proceedings etc. (reform) (Scotland) Act 2007 (mentioned in note 17) which contains the definitions set out in Article1 of the Framework Decision, delegating the development of the adaptation to the Framework Decision to the "Scottish Ministers" (Scottish autonomous government), after approval of the draft bill by the parliament (Article 81).

[48] Lei nº 93/2009, de 01 de Setembro de 2009. Diario da República 1-9-2009, nº 169.

2. DECLARATIONS

The notifications made by the states have generally been limited to announcing the transposition or designating the competent authorities for the execution of the certificates, in accordance with Article 2.1, designating central authorities, pursuant to Article 2.2, and establishing the language of communication for the purposes of Article 16.1.

2.1 LANGUAGES

In relation to languages, of the countries that have made declarations to date, half of them only accept translations into their own official language: Austria, Denmark, France, Hungary, Romania the United Kingdom and Luxembourg (which accepts German and French, both co-official languages together with Luxembourgish); however, Austria will accept certificates in other languages provided a German translation is attached. The Czech Republic and Spain make no provisions in this regard, which should be interpreted as meaning they will only accept the certificate in their official language (in the case of the Czech Republic, in a notification dated 9 July 2010[49], which updated its notification letter, it confirmed that the absence of such provisions implied that only Czech was accepted). In those states who accept a language other than their national tongue, English predominates: Estonia, Latvia, Lithuania, Slovenia, the Netherlands (which accepts the certificate in any other official language provided an English translation is attached) and Cyprus (which accepts Greek and Turkish as official languages), accepts English as an alternative language. Finally, Finland accepts Swedish as well as Finnish and English.

2.2 AUTHORITIES

Meanwhile, and in relation to the issuing or executing authorities, the states have adopted different solutions depending on their particular legal idiosyncrasies, but in general they have opted for decentralised enforcement, empowering local courts, which gives even greater validity to the idea mentioned in the earlier level regarding the creation of a European atlas for this Framework Decision. Here it is about enforcement, because there is no debate regarding the issuing authorities; all the states confer on the court that issued the decision imposing the penalty the power to request its enforcement.

On this point, and in order to clarify the different declarations, we will first list the designations made under Article 2.1 of the Framework Decision (i.e. competent authorities for the purposes of the issue or enforcement of requests), those made by virtue of Article 2.2 (central authorities), and then the declarations made for cases of administrative penalties, an aspect that has not been considered by some of the states that have transposed the Framework Decision.

[49] http://register.consilium.europa.eu/pdf/en/10/st11/st11439-co01.en10.pdf

In relation to the first point, not all the states opt for a decentralised system of direct transmission between courts. Finland has declared a central authority (Legal Register Centre) as the competent authority pursuant to Article 2.1 (without making a distinction between issue and enforcement), just as Denmark and Estonia have designated the Ministry of Justice and the Netherlands has designated a single competent authority for enforcement and issue (the Public Prosecutor of the Leeuwarden district); Luxembourg has done the same, the authority for both issue and enforcement is the Parquet Général (Public Prosecutor's Office). The United Kingdom, despite its declaration designating the competent courts for issue or enforcement in each of the legal systems (England and Wales, Scotland and Northern Ireland), in accordance with the specific rule established in Article 4.7 of the Framework Decision, it has designated central authorities for administrative transmission and receipt of the requests.[50].

The rest have opted for a decentralised system. France has designated the judges and prosecutors as issuing authorities and the public prosecutor's office of each territory as executing authority; similarly, Austria has designated its regional courts as the authorities responsible for the enforcement of financial penalties. Meanwhile, the Czech Republic has opted to follow the Austrian example and appoint its regional courts and the Prague municipal court as executing authorities. Romania has also opted for a decentralised system and appoints the different courts of the state (local, district or appeal) as competent authorities. Spain has followed a similar course of action and has declared the criminal judicial bodies competent for issuing requests and designated the criminal courts as executing authorities. Cyprus has also opted to consider the provincial or criminal courts as issuing authorities and designate the provincial courts as responsible for enforcement. Lithuania uses an identical system and considers the courts of the republic in general as issuing authorities, specifying that the district courts will be the executing authorities. Latvia has declared that any court or public prosecutor's office will be the issuing authority, while the courts of first instance will be the executing authority. Hungary has appointed its courts in general as both issuing and executing authorities. Finally, Slovenia has only specified its executing authorities for decisions, namely the district courts and the Ljubljana court in particular when it is not possible to determine territorial competence in Slovenia.

As for the designation of central authorities, for the purposes of Article 2.2 of the Framework Decision, not all states have made this designation. The majority of the states making this declaration designate the Ministry of Justice or the department of international cooperation of the same as central authority (Cyprus, Estonia, Lithuania Latvia, Romania). The Netherlands has designated a different authority as central authority (*Central Justitieel Incassobureau*) which is the competent authority for the administrative transfer and receipt of requests. Hungary designates the National Police Force as central authority pursuant to Article 2.2 of the Framework Decision only for administrative decisions. The United Kingdom designates the central authorities we have just referred to in the footnote. The remaining states make no express provision designating a central authority.

[50] We refer to the legislation mentioned in notes 2 and 3, highlighting that the internal English legislation establishes that the courts will receive the requests (certificates) from the office of the Lord Chancellor (Articles 81 to 85). According to the declaration, said units are: in England and Wales, the la Mutual Recognition of Financial Penalties Central Authority, in Scotland, The Sheriff Clerk and in Northern Ireland, the Business Development Group, all of which belong to the administrative court management bodies.

Likewise, not all states contemplate the designation of administrative authorities for the issue or enforcement of requests regarding administrative penalties. And while in the case of the issuing authorities it is understandable in those states whose internal legislation does not contemplate decisions such as those contemplated in Article 1 .a) ii or iii of the Framework Decision, the same cannot be said when it comes to executing them, when it would seem appropriate to designate an administrative authority for enforcement, especially for those resolutions set out in section iii. In this respect, only Austria's declaration states that the district administrative authorities or the police departments are considered competent, which are contained in an annexed list; Slovenia establishes the competence of local courts (the district courts are responsible for judicial penalties), and in Hungary, both the issuing (with a wide range of penalty authorities and a central authority) and executing authorities, the National Police Force, are specified. Cyprus, on the other hand, only declares the issuing authorities for administrative decisions, but not the executing authorities. The rest of the states make no provision in this regard which, while in the case of the designation of a centralised executing authority (Finland, Denmark and Estonia), makes it possible to differentiate each executing authority or unit on an internal level, in the rest of states it will give rise to a situation where the judicial bodies may find it necessary to execute strictly administrative decisions from a third state.

Finally, and in relation to the manner of appointing authorities, different techniques are used in each declaration. Thus, and leaving aside those states in which enforcement is centralised (Denmark, Estonia, Finland, Luxembourg and the Netherlands), several states have drawn up a detailed list of the competent courts, with names and addresses (Austria, Czech Republic, Slovenia and Rumania), while others include a reference to a website (Lithuania). Finally, others simply mention the courts but give no indication as to their location (Cyprus, France, Hungary, Latvia and Spain), which is seen as causing unnecessary difficulties, because it requires no effort on the part of the notifying state to identify, either via annex or an online reference, the competent authorities for execution, and is even more serious in cases in which no central authority to which requests may be sent is identified (France and Spain). The solution that appears most appropriate for this problem would be to prepare a judicial atlas for this Framework Decision, like in the case of the European Arrest Warrant, and this has been recommended, as we saw in the previous level, but to date this project has not been carried out, according to information from Eurojust.

3. TRANSPOSITIONS.

Article 20.5 of the Framework Decision requires that the state transmit the texts of the provisions adapting the same to their national legislations to the Secretariat General of the Council and the Commission, making it possible to evaluate how well they sit with the provisions of the Framework Decision, and on the basis of these communications the Commission drafted the report presented on 22 December 2008[51].

[51] Commission report dated 22 December 2008, COM (2008) 888 final. Council doc. 5201/09.

3.1 DEFINITIONS.

According to said report and in relation to Article 1 of the Framework Decision, the Czech Republic, Hungary, the Netherlands and Spain, as well as the United Kingdom, have all included the definitions that appear in said precept, but the majority of Member States (Austria, Denmark, Estonia, Finland, France and Slovenia) have only incorporated the definitions of 'decision' and 'financial penalty'. Lithuania and Latvia have only transposed the definition of 'financial penalty'. Several transposition laws contain no provisions on certain elements of these definitions, with the non-recognition of the liability of legal persons in the domestic legislation of the Czech Republic, as we mentioned earlier, particularly noteworthy.

3.2 SCOPE.

As for the scope of application and in relation to Article 5 of the Framework Decision, the majority of the states have transposed the list (Austria, Denmark, Estonia, Finland, France, Hungary, Latvia, the Netherlands, Spain and the United Kingdom). However, the Czech Republic, Lithuania and Slovenia have not transposed it in its entirety.

3.3 GROUNDS FOR NON-RECOGNITION.

As for the grounds for non-recognition under Article 7 of the Framework Decision, it is highlighted that although all states have transposed them, the vast majority have done so as obligatory grounds for refusal, with some states including additional grounds which sit uncomfortably with the system and purpose of the Framework Decision. Thus, in relation to the failure to present or defective presentation of the certificate, Finland, France and Hungary have transposed it as optional, while for the rest of the states it is obligatory. As for the principle of *ne bis in idem* (Article 7.2.a of the Framework Decision), the principle of dual criminality (7.2.b), and the time lapse of enforcement (7.2.c), Denmark and Finland transpose them as optional, and all the rest as obligatory. The principle of territoriality as grounds for refusal (7.2.d) is considered optional in the legislation of Finland, France, Hungary and the Netherlands, was not transposed in the cases of Estonia and Latvia, and is considered obligatory for the rest. As for immunity (Article 7.2.e), or the legal age for criminal matters (7.2.f), it is only optional in Finland, and the same occurs in relation to the decisions rendered *in absentia* envisaged in section g) (which Hungary has failed to transpose). Finally, in relation to the amount of the penalty (7.2.h), it is optional in Finland, France and the Netherlands, and obligatory in the rest.

Meanwhile and outside the scope of the grounds under Article 7 of the Framework Decision, the human rights clause as grounds for refusal has also been transposed differently with some states such as the Netherlands or Denmark considering that it did not require special transposition; Latvia invoked its national legislation in this regard and others such as Austria, Hungary or Spain applied it as obligatory grounds for refusing enforcement. Meanwhile, other states have performed specific transpositions: Finland transposed this provision and added the existence of reasonable grounds to suspect that procedural guarantees had been violated in the proceedings that gave rise to the enforcement as obligatory grounds for refusal; France

and Lithuania also included the existence of reasons to believe that the penalty had been imposed for reasons of race, religion, ethnicity, sexual orientation or political opinion as obligatory grounds, and Slovenia, in addition to these grounds, when the enforcement enters into conflict with the Slovenian constitution. Estonia, lastly, considers the fact that the decision was rendered by a court that cannot be considered independent as grounds for refusal.

Finally, some states have added additional motives that are not contemplated in Framework Decision, such as the one we mentioned in the case of the Czech Republic of refusal of enforcement of decisions concerning legal persons as it does not recognise their criminal liability; or Hungary, which includes additional grounds consisting of a time lapse of one year since the entry into force of the foreign decision.

3.4 PROCESSING.

As for the method of transmission and in relation to Article 4 of the Framework Decision, the Czech Republic, Finland, Hungary, Spain, Latvia, Lithuania and the Netherlands have all transposed all the elements of this precept to their internal legislation, while in the cases of Austria, Denmark, France and Slovenia and Estonia transposition has been partial. Regarding the obligation of automatic recognition if all the requirements of the certificate are fulfilled, generally speaking (Article 6 of the Framework Decision) it has been specifically transposed by the Czech Republic, Denmark, Finland, Spain, France, Lithuania and the Netherlands.

As for the procedure and the transmission languages, we already analysed this when looking at the declarations, and as far as the duty of information is concerned (Article 14 of the Framework Decision), Austria, the Czech Republic, Finland, Hungary, Spain, Lithuania, Latvia, the Netherlands, Slovenia and France have all transposed it.

3.5 ENFORCEMENT.

When it comes to enforcement, and specifically determining the amount of the penalty (Article 8 of the Framework Decision), with the possibility of limitation and conversion in accordance with national legislation, Austria, Denmark, the Czech Republic, Finland, Spain, France, Hungary, Latvia, the Netherlands and Slovenia have transposed it; Estonia has failed to do so and Lithuania only refers to the conversion of currency.

As for the application of the legislation of the executing state on this point and the consequence of partial payments (Article 9.1 and 2 of the Framework Decision), this has been transposed by all states. Some have failed to transpose the third paragraph regarding the obligation to enforce even if the state does not recognise the liability of legal persons (Denmark, Estonia, Hungary, Latvia and Lithuania) and others such as Austria, France or the Netherlands have referred the question to their national legislation. Once again, on this point the openly contradictory position of the Czech Republic should be noted.

In relation to alternative penalties due to non-payment of the penalty (Article 10 of the Framework Decision), Austria, the Czech Republic, the Netherlands, Latvia, Spain and Slovenia have transposed this provision; Estonia has done so while at the same time specifying penalties such as conversion into a prison sentence or community work, and Lithuania has transposed it only partially. Finally, some states have stated that it is impossible to apply alternative penalties under their domestic legislation, either in their territory or abroad (France and Finland), or only in their territory (Denmark).

As for the cases of amnesty, pardon or review of the judgment envisaged in Article 11 of the Framework Decision, some states such as Finland, the Netherlands and Spain have transposed it, while others (the Czech Republic and Denmark) only refer to the granting of pardon in their territory. Latvia has transposed the provision regarding amnesty and pardon but failed to mention the review of the decision. In Estonia's transposition, pardon, like review, is attributed to the issuing state. Lithuania contemplates the situation in which the amnesty and pardon of the issuing state are obligatory in Lithuania. Austria and Slovenia have transposed amnesty and pardon as obligatory grounds for refusal and Hungary has established it as grounds for refusal (without specifically transposing this article) when the criminal offence on which the decision is based in the Member State falls within the scope of application of Hungarian legislation, and the criminal offence is covered by an amnesty by virtue of Hungarian legislation. France has not transposed this provision, but has invoked the pertinent existing rules in its national law.

As for the suspension of enforcement as soon as the issuing state sends the corresponding communication, thus cancelling the enforceability of the decision in question, contemplated in Article 12 of the Framework Decision, all the states except Estonia have transposed it.

As for the use given to the amounts collected from the enforcement of decisions, which according to Article 13 of the Framework Decision will remain in the power of the executing state unless agreed otherwise by the states in question, all the Member States except Estonia and Lithuania have transposed it. In relation to the information of the result of the enforcement as per Article 14 of the Framework Decision, all states have transposed it except Denmark, who considered that this provision did not require transposition, and Estonia. The consequences of the transmission of a decision and the cases in which the right to enforce the same returns to the issuing state (Article 25 of the Framework Decision) have been transposed by all states with the exception of Latvia.

Finally, and in relation to the reciprocal waiver of claims for the expenses of the application of this Framework Decision, Austria, the Czech Republic, Finland, the Netherlands, Slovenia and Spain have transposed it. Denmark, France and Latvia have declared that it did not require transposition, while Estonia, Hungary and Lithuania have not transposed it.

LEVEL III: REFERENCE DOCUMENTATION

This level contains references that help to locate the documentation mentioned in the Unit. The links lead to the English version of the European legal texts; where the text is not available in English, the link leads to the original language version.

FRAMEWORK DECISION.

- Framework Decision 2005/214/JHA of 24 February 2005: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:076:0016:0030:EN:PDF
- Report from the Commission of 22 December 2008, on the application of the Framework Decision: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0888:FIN:EN:PDF
- Framework Decision 2009/299/JHA of 26 February 2009, amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:081:0024:0036:EN:PDF

EUROPEAN TREATIES.

- Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:EN:HTML
- Treaty of Lisbon: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML
- Treaty on European Union (Treaty of Maastricht): http://eur-lex.europa.eu/en/treaties/dat/12002M/htm/12002M.html
- Treaty on European Union (1997 Consolidated Version): http://eur-lex.europa.eu/en/treaties/dat/11997M/htm/11997M.html#0145010077

BACKGROUND.

- Conclusions of the Cardiff European Council: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/54315.pdf
- Vienna Action Plan of 3 December 1998: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1999:019:0001:0015:EN:PDF
- Conclusions of the Tampere European Council: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm
- Communication from the Commission to the Council and the European Parliament dated 26 July 2000: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0495:FIN:EN:PDF
- Programme of measures to implement the principle of mutual recognition of decisions in criminal matters: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:012:0010:0022:EN:PDF
- Communication from the Commission dated 19 May 2005: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0195:FIN:EN:PDF
- Hague Programme Action Plan: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF
- European Convention on the International Validity of Criminal Judgments (ECIVCJ) of 28 May 1970: http://conventions.coe.int/Treaty/en/Treaties/Html/070.htm
- Schengen Agreement of 28 April 1999, on cooperation in proceedings for road traffic offences and the enforcement of financial penalties: http://www.consilium.europa.eu/uedocs/cmsUpload/SCH.ACQUIS-EN.pdf (pages 522 to 532)
- Council Act of 17 June 1998 drawing up the Convention on Driving Disqualifications: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:216:0001:0012:EN:PDF

PREPARATORY WORK.

- Initiative *"with a view to adopting a Council Framework Decision on the application of the principle of mutual recognition to financial penalties"*: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:278:0004:0008:EN:PDF
- European Parliament Report of 17 January 2002: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2001-0444+0+DOC+PDF+V0//EN&language=EN

NOTIFICATIONS OF ADAPTATION.

- ROMANIA:
  http://register.consilium.europa.eu/pdf/en/08/st16/st16283.en08.pdf
  http://register.consilium.europa.eu/pdf/en/09/st06/st06934.en09.pdf
- CYPRUS:
  http://register.consilium.europa.eu/pdf/en/08/st16/st16239.en08.pdf
- ESTONIA:
  http://register.consilium.europa.eu/pdf/en/08/st14/st14381.en08.pdf
- LATVIA:
  http://register.consilium.europa.eu/pdf/en/08/st14/st14385.en08.pdf
- LITHUANIA:
  http://register.consilium.europa.eu/pdf/en/08/st14/st14389.en08.pdf
- CZECH REPUBLIC:
  http://register.consilium.europa.eu/pdf/en/08/st08/st08390.en08.pdf
- SLOVENIA:
  http://register.consilium.europa.eu/pdf/en/08/st13/st13174.en08.pdf
- AUSTRIA:
  http://register.consilium.europa.eu/pdf/en/08/st07/st07026-re01.en08.pdf
- THE NETHERLANDS:
  http://register.consilium.europa.eu/pdf/en/08/st05/st05388.en08.pdf
  http://register.consilium.europa.eu/pdf/en/08/st05/st05388-re01.en08.pdf
- FRANCE:
  http://register.consilium.europa.eu/pdf/en/07/st11/st11080.en07.pdf
- DENMARK:
  http://register.consilium.europa.eu/pdf/en/07/st10/st10909.en07.pdf
- FINLAND:
  http://register.consilium.europa.eu/pdf/en/07/st07/st07965.en07.pdf
- HUNGARY:
  http://register.consilium.europa.eu/pdf/en/09/st06/st06356-re02.en09.pdf
- SPAIN: http://register.consilium.europa.eu/pdf/en/09/st06/st06448.en09.pdf

- UNITED KINGDOM
  http://register.consilium.europa.eu/pdf/en/09/st16/st16457.en09.pdf
- LUXEMBOURG
  http://register.consilium.europa.eu/pdf/en/10/st08/st08897.en10.pdf

NATIONAL LEGISLATIONS.

Due to linguistic limitations, only the legislative texts of the Member States who have translated the adaptations of their national legislation into Spanish, English, French or Italian are contained in this section.

- SPAIN: Law 1/08, on the enforcement in the European Union of decisions imposing financial penalties:
  http://www.boe.es/boe/dias/2008/12/05/pdfs/A48679-48691.pdf
- UNITED KINGDOM (England and Northern Ireland): Criminal Justice and Immigration Act 2008 (Part 6):
  http://www.bailii.org/uk/legis/num_act/2008/ukpga_20080004_en_1.html#pt6
- UNITED KINGDOM (Scotland): Criminal Proceedings etc. (reform) (Scotland) Act 2007 (s.56):
  http://www.bailii.org/scot/legis/num_act/2007/asp_20070006_en.html
- UNITED KINGDOM (Scotland): The Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) Order 2009:
  http://www.bailii.org/scot/legis/num_reg/2009/ssi_20090342_en_1.html
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