



# BUNDESRECHTSANWALTSKAMMER

## Position of The German Federal Bar

on the Draft Council Framework Decision 2002/584/JHA of .... on the enforcement of judgments *in absentia* and modifying:

- Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States
- Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties
- Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders
- (Framework Decision .../.../JHA of ... on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union)  
(Council document 5213/08 – COPEN 4 – of 14 January 2008)

drafted by

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The German Federal Bar thanks the Council for the opportunity to express its opinion. As the umbrella organisation of the German legal profession The German Federal Bar represents the 27 regional Bars and the Bar at the Federal Court of Justice. These Bars represent the total of currently approximately 142,800 lawyers in the Federal Republic of Germany.

### I.

The German Federal Bar endorses the Draft Council Framework Decision's objective which, apart from the aim of facilitating judicial co-operation in criminal matters, is to achieve, if only in part, a balance between repressive measures and the so far non-existent procedural rights. The German Federal Bar believes that the codification of procedural rights in criminal procedures within the European Union is indispensable. Following the failure to adopt the Draft Council Framework Decision on certain procedural rights throughout the European Union<sup>1</sup>, The German Federal Bar launched an appeal addressed to the Member States and the European institutions<sup>2</sup>, calling for a further promotion of the codification of minimum standards for procedural rights in criminal proceedings. Against the background of the progressing introduction and extension of pan-European criminal prosecution measures, they are indispensable in order to ensure the equality of arms between criminal prosecution and the interests of those involved in the proceedings, and thus to ensure a fair trial.

### II.

The German Federal Bar regrets that the Initiative's objective to strengthen the suspected person's rights in *in absentia* judgments is not achieved with the present version. Instead of making the principle declared in the Explanatory Memorandum to be the standard rule, which is that the executing State can refuse to execute an *in absentia* judgment, the central principle, the Draft undermines – from The German Federal Bar's point of view - this fundamental rule. The Draft rather contains provisions that further limit the possibilities to refuse the mutual recognition of an *in absentia* judgment and thus leads to the consolidation of the worrying practices that prevail with regard to judgments rendered *in absentia* throughout the European Union.

### III.

All of the four Framework Decisions on the implementation of the principle of the mutual recognition of enforceable decisions which are to be amended by the present Draft, allow for the executing State to refuse recognition of a judgment rendered *in absentia* where the person was not summoned in person or otherwise informed of the hearing which led to the judgment *in absentia*<sup>3</sup>.

In the case of the Framework Decision on the European Arrest Warrant<sup>4</sup>, however, this possibility to refuse recognition is subject to the further condition that there be no

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<sup>1</sup> COM(2004)328.

<sup>2</sup> BRAK-Appell, September 2007: [http://www.brak.de/seiten/pdf/Stellungnahmen/2007/Stn37\\_kurz.pdf](http://www.brak.de/seiten/pdf/Stellungnahmen/2007/Stn37_kurz.pdf)

<sup>3</sup> Article 5 (1) Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States; Article 7 (2) (g) Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties; Article 8 (2) (e) Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders and Article 9 (1) (f) of the Draft Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (Council document 9688/07 – COPEN 68 – of 22.5.2007)

<sup>4</sup> Framework Decision 2002/584/JHA

adequate assurance by the issuing State that the person concerned can apply for a retrial and be present at that trial in the issuing Member State.

The present Draft extends this limitation of the possibility to refuse the (mutual) recognition and – in the extended version – introduces it into the Framework Decisions on the application of the principle of mutual recognition to financial penalties<sup>5</sup>, on the application of the principle of mutual recognition to confiscation orders<sup>6</sup> and the Draft Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters<sup>7</sup>.

The present proposal therefore results in an “increased marketability” and thus a “strengthening” of *in absentia* judgments, in which the person concerned was neither summoned in person nor otherwise informed of the hearing that led to the *in absentia* judgment. It runs counter to the objective of ensuring, at least in part, minimum proceedings.

#### IV.

The German Federal Bar is against the Draft’s inherent “strengthening” of *in absentia* judgments, in which the person concerned was neither summoned in person nor otherwise informed of the hearing that led to the *in absentia* judgment.

In view of the rule expressly stated in Article 14.3.d. ICCPR<sup>8</sup> as well as the ECPHR’s<sup>9</sup> guarantee of the accused person’s right to be present during hearings, one of the European Union’s aims on its way towards an area of freedom, security and justice must be to make it clear that *in absentia* judgments rendered in criminal matters are not acceptable, and to induce the Member States to dispense with *in absentia* judgments accordingly. The present proposal, which makes the (mutual) recognition of *in absentia* judgments easier, contravenes this aim.

#### V.

In order to meet the Initiative’s clearly stated objective, that is to guarantee procedural rights, it is absolutely necessary to thoroughly review the present Draft.

Following the proposed text, the issuing State could always proceed in accordance with Article 4(a)(c) of the Framework Decision on the European Arrest Warrant<sup>10</sup>, if it wants to achieve an uncomplicated enforcement of a judgment rendered *in absentia*. Under Article 4(a) the person concerned does not have to have been summoned in person. Nor does the person have to have been served with the *in absentia* judgment personally. It is enough if the absent person has a right to apply for a retrial after the surrender. In fact, this means that the surrendered person can introduce fresh proceedings – whatever these may look like – while at the same time he/she begins to serve a prison sentence. Obviously, it is in no way reconcilable with the standard

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<sup>5</sup> Framework Decision 2005/214/JHA

<sup>6</sup> Framework Decision 2006/783/JHA

<sup>7</sup> Draft Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (Council document 9688/07 – COPEN 68 – of 22 May 2007)

<sup>8</sup> International Covenant on Civil and Political Rights of 16 December 1966

<sup>9</sup> Cf. BVerfG, Beschl. vom 27.12.2006 – 2 BvR 1872/03 = StraFO 2007, 190 (191); Trechsel, Human Rights in Criminal Proceedings, Oxford 2005, S. 252.

<sup>10</sup> Framework Decision 2002/584/JHA

rule set out in the Memorandum to create such a situation. Furthermore, this would not constitute an improvement compared to the existing rule in the Framework Decision on the European Arrest Warrant.

It does not become obvious from Articles 3, 4 and 5 of the Initiative in what sense there would be an improvement compared with the rules provided in the individual Framework Decisions. On the contrary: Articles 3 to 5 even contain a deterioration insofar as they provide that a judgment rendered *in absentia* may be executed or recognized if the person concerned fails to apply for a retrial within a certain timeframe after the judgment was served.

In this respect the existing regulations only provide that execution or recognition of a judgment rendered *in absentia* shall be possible where the person concerned has declared after service of the judgment that he/she does not contest the *in absentia* judgment. Following the new Proposal, the legal consequence shall be determined only by the fact that the person remains passive. This means that non-observance of the time limit alone can lead to execution.

In this respect, too, the Proposal misses the given target.

#### 1.

As a rule, judgments rendered *in absentia* must only be recognized provided that the person concerned was summoned personally or, in accordance with the national law of the issuing State, was notified via an authorized representative in due time about the scheduled time and place of the hearing that led to the *in absentia* judgment and provided that that person was furthermore informed about the fact that such a judgment may be handed down in case the person does not appear in court.

From a technical point of view, this can be achieved by deleting subparagraph a) in Article 2 2) a), Article 3 2) a), Article 4 2) a) and Article 4 2) f) a) of the Draft Framework Decision. Thus, the text will mention the summons to appear as a general precondition and not an alternative option. Furthermore, the intended amendments regarding the annexes ("Certificates") of the Framework Decisions will have to be adapted. Here, every number 2.1 and, in Article 5, number b.1., respectively, as well as the following "OR", have to be deleted. Thus, 2.2 becomes 2.1 and 2.3 becomes 2.2, while, in Article 5, b.2 becomes b.1 and b.3 becomes b.2.

In comparison with the existing provisions in the Framework Decision on the European Arrest Warrant<sup>11</sup>, an improvement in handling judgments rendered *in absentia* that impose a custodial sentence or a detention order, can only be achieved if Article 2 2) c) of the Draft Framework Decision - i.e. Article 4a) c) of the Framework Decision on the European Arrest Warrant – is completely deleted.

#### 2.

Beyond our general concerns regarding the introduction of regulations that make (mutual) recognition of judgments rendered *in absentia* easier, the present Draft does not contain any guarantees either as to the retrial that can be introduced in the issuing State and which is set out in the Draft as an additional condition for the refusal to recognize a judgment.

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<sup>11</sup> Framework Decision 2002/584/JHA

Thus, the present Draft does not contain any provisions to guarantee that the retrial proceedings are indeed completely fresh proceedings, also with regard to the facts, in which the accused enjoys all the rights that he/she would enjoy if the facts were heard for the first time, and that this is not a reopening of the proceedings, in whatever form, which would only put the accused person in a weak legal position.

Just how important this differentiation is in practice is demonstrated by the fact, for example, that the German legislator – when transposing the Framework Decision on the European Arrest Warrant<sup>12</sup> into German law - interpreted the guarantee of a „retrial“ to mean a condition to start fresh proceedings in which the charges are examined comprehensively („*neues Gerichtsverfahren, in dem der Vorwurf umfassend überprüft wird*“)<sup>13</sup>.

Apart from the guarantee of fresh proceedings, also from the factual point of view, the present Draft also lacks any other type of procedural safeguards with respect to the new trial. But in particular with regard to an easier (mutual) recognition of judgments, where we can expect that the person concerned, who will look to defend him/herself against a judgment rendered *in absentia* in a retrial, often does not speak the language of the issuing State and does not know its legal culture, it is necessary to guarantee such minimum rights – such as the right to a defense lawyer and the right to a translator.

### 3.

The German Federal Bar would also like to remark that there is a need for clarification regarding the Draft Framework Decision’s scope due to different wordings in the English and the German versions.

On the basis of the English version’s definition of a judgment rendered *in absentia* as „a custodial sentence or a detention order“ in Article 2 (1), it can be assumed that, as far as „detention orders“ are concerned, the Initiative refers to all kinds of decisions, including arrest warrants that are issued because there is a risk of escape. This contradicts the recitals, according to which the objective is the mutual recognition of “final judgments”. This is also the understanding that forms the basis of the German version of Article 2. According to the German version, the Initiative covers “*eine*

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<sup>12</sup> 2002/584/JHA

<sup>13</sup> Thus, in accordance with Article 5 (1) of the Framework Decision on the European Arrest Warrant, the executing judicial authority may attach the execution of the European Arrest Warrant for the purpose of executing a sentence or a detention order that was imposed through an *in absentia* judgment, to the condition that “the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment”, where the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*. The German legislator used the authority provided under Article 5 (1) of the Framework Decision on the European Arrest Warrant to establish in the Law on the European Arrest Warrant (*Europäisches Haftbefehlsgesetz*) of 20 July 2006 that surrender is inadmissible if, where the execution of a judgment is sought, that judgment was rendered *in absentia* of the prosecuted person and where that person was not summoned in person or otherwise informed of the date and place of the hearing that led to the *in absentia* judgment, unless the prosecuted person, being aware of the proceedings brought against him/her and which involved a defense lawyer, prevented the personal summons by escaping, or, where after the surrender, the person concerned is given the right to a retrial in which the charges brought against him/her are examined comprehensively as well as the right to be present at the court hearing (Art. 1 Abs. 8 EuHbG [§ 83 Abs. 3 IRG]).

*Entscheidung über die Verhängung einer Freiheitsstrafe oder freiheitsentziehenden Maßregel der Sicherung*“. The wording of the English version should be adapted accordingly.

## VI.

From The German Federal Bar's point of view it is hardly comprehensible why the present Draft Framework Decision contains amendments to draft legislation – in this case the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union - which has not yet been adopted. There may be good reasons to make *in absentia* decisions a topic of joint substantive discussion. But making draft regulations that have not been adopted the subject-matter of amendments, reflects a certain legislative “activism” which is hardly appropriate to reinforce trust in the European legislative process.

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