EUROPEAN
COMMISSION

Brussels, 2.6.2014
COM(2014) 312 final

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the implementation by the Member States of Framework Decision 2008/675/JHA of 24 July 2008 on taking into account of convictions in the Member States of the European Union in the course of new criminal proceedings

TABLE OF CONTENTS

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation by the Member States of Framework Decision 2008/675/JHA of 24 July 2008 on taking into account of convictions in the Member States of the European Union in the course of new criminal proceedings

1. Introduction 3
1.1. Objective and scope of the Framework Decision 3
1.2. Fundamental rights safeguards 4
1.3. Main elements of the Framework Decision 4
1.4. State of play of transposition and consequences of non-implementation 5
2. Evaluation of the implementation by the Member States of the Framework Decision 6
2.1. Preliminary evaluation of the transposition laws received 6
2.2. Evaluation of selected key provisions of the Framework Decision 7
2.2.1. Definition of conviction 7
2.2.2. Requirements for taking into account foreign convictions 7
2.2.3. Equivalent legal effects 8
2.2.3.1. Pre-trial stage 9
2.2.3.2. Trial stage 9
2.2.3.3. Execution of conviction stage 10
2.2.4. Obtaining sufficient data on previous convictions 10
3. Conclusion 11

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the implementation by the Member States of Framework Decision 2008/675/JHA of 24 July 2008 on taking into account of convictions in the Member States of the European Union in the course of new criminal proceedings

1. INTRODUCTION

1.1. Objective and scope of the Framework Decision

In a genuine area of justice based on mutual trust, the European Union has taken action to ensure that citizens are protected against crime across the European Union, while also ensuring that citizens' fundamental rights are respected when they find themselves involved in criminal proceedings, whether as a victim or a defendant.

In the European Union, where people can move and settle freely, this objective of maintaining and developing a genuine European area of justice requires that convictions against persons sentenced in one Member State are taken into account in another Member State in order to prevent future crimes. Equally, if new crimes are committed by the same offender, subject to preserving fairness of the proceedings, this behavioural factor should be taken into account in the framework of new criminal proceedings.

It is indeed in the interests of effective criminal justice, including the protection of victims of crime, within the European Union, that all Member States have rules in place to take into account, at all stages of the criminal proceedings, whether a person is a first offender or whether s/he was already sentenced in another Member State. To be in a position to assess the offender's criminal past is essential for the effective conduct of new criminal proceedings, in particular to ensure informed decisions on pre-trial detention or bail, and to have full information available at sentencing stage.

It was against this background that Framework Decision 2008/675/JHA of 24 July 2008 on taking into account of convictions in the Member States of the European Union in the course of new criminal proceedings was adopted. This Framework Decision allows judicial authorities in one Member State to take account of final criminal judgments given by the courts in other Member States. It determines the conditions under which, in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member States are taken into account by these authorities. In the context of new criminal proceedings, Member States must ensure that previous convictions handed down in another Member State are duly taken into consideration under the same rules as national previous convictions.

This Framework Decision replaces Article 56 of the Council of Europe Convention of 28 May 1970 on the International Validity of Criminal Judgments[1] concerning the taking into consideration of criminal judgments, as between Member States' parties

[1] http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&CM=1&NT=070. This convention was ratified by 11 EU Member States: AT, BE, BG, CY, DK, EE, LT, LV, NL, RO and ES.

to that convention. The information regarding previous convictions can be obtained through an EU system of the exchange of information extracted from the criminal record (ECRIS).[2]

The purpose of this report is to provide a preliminary evaluation of the national transposition laws already received by the Commission.

As of 1 December 2014, the date of expiry of the five year transitional period of the Lisbon Treaty, the judicial powers of the Court of Justice and the Commission's power to launch infringements will fully apply with regard to the pre-Lisbon EU acquis in the field of judicial cooperation in criminal matters and police cooperation.

1.2. Fundamental rights safeguards

As laid down in Article 1 paragraph 2 and Recital 12, this Framework Decision respects fundamental rights and fundamental legal principles recognised by Article 6 of the Treaty on the European Union and reflected in the Charter of Fundamental Rights of the European Union ("the Charter").

In this context, in their implementing legislation, certain Member States explicitly refer to the safeguarding of fundamental rights and fundamental legal principles of European Union law when taking into account previous convictions in the context of new criminal proceedings. In some Member States, taking the conviction into account is excluded in cases where there are reasonable grounds to assume that it would infringe the freedom and rights of an individual convicted in another Member State. Alternatively Member States have provided an explicit requirement in the implementing law that a previous conviction should comply with the right to a fair trial, within the meaning of Article 6 of the European Convention on Human Rights ("ECHR") (AT, DE, PL).

1.3. Main elements of the Framework Decision

This Framework Decision aims to ensure that similar legal effects are given to domestic convictions and convictions from other Member States. According to Article 2 of the Framework Decision a conviction is defined as "any final decision of a criminal court establishing guilt of a criminal offence."

The Article 3 is a key provision of the Framework Decision. This Article is based on the principle of simple assimilation of convictions and imposes as a matter of principle, that the legal effects of foreign convictions must be equivalent to the legal effect of domestic convictions ("principle of equivalence"), according to national law.

This means that there is an obligation to take foreign convictions into account, to be exercised in accordance with national law (the only obligation for Member States

[2] Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:093:0023:0032:EN:PDF. Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:093:0033:0048:EN:PDF.

would be to take into account a foreign conviction to the extent that a national conviction would be taken into account).

Previous convictions are to be taken into account at the pre-trial stage, during the trial as well as when the conviction is executed (Article 3(2)). Due consideration should be given to previous convictions especially in relation to the applicable rules of procedure concerning:

Provisional detention;

Definition of the offence;

Type and level of the sentence;

Execution of the decision.

When previous convictions are taken into consideration by the Member State conducting new proceedings, this shall not have the effect of interfering with, revoking or reviewing the previous convictions. As regards the imposition of sentence in the course of new criminal proceedings, the Framework Decision foresees exceptions to the general rule.

In cases where the previous conviction was not handed down or fully executed by another Member State prior to the commission of the offence for which the new proceedings are conducted, this Framework Decision does not require the Member States to apply their national rules on imposing sentences, if the application of the national rules to previous foreign convictions limits the judge in imposing a sentence.

Additionally, recitals 8 and 9, which have to be read in conjunction with Article 3(5) Framework Decision, provide some guidance in this respect by emphasising the proportionality of level of sentence and personal circumstances of the offender. Interestingly, no Member State's implementing measure made reference to recital 8, which provides that where, in the course of criminal proceedings in a Member State, information is available on a previous conviction in another Member State, in so far as possible the person concerned should not be treated less favourably than if the previous convictions had been a domestic conviction.

Article 3 paragraphs (1) and (2) address the general criminal law principles and procedures foreseen for example in the criminal codes of procedure for taking into account, in the course of new criminal proceedings, a foreign conviction handed down in another Member State. The implementation of Article 3 paragraphs (4) and (5) will have to be assessed in the light of national criminal law principles and procedures related specifically to imposing sentences (e.g. aggregated sentences).

1.4. State of play of transposition and consequences of non-implementation

At the time of writing, the Commission had received notifications on the national transposition laws from the following 22 Member States: **AT, BG, CY, CZ, DE, DK, EE, EL, FI, FR, HU, HR, IE, LU, LV, NL, PL, RO, SE, SI, SK** and **UK**.

More than 3 years after the implementation date, 6 Member States have not yet notified the measures transposing the obligations of this Framework Decision: **BE, ES, IT, LT, MT** and **PT**.

4 Member States informed the Commission of the process of preparing relevant transposition measures at national level (**BE, ES, LT, MT**). However, none of these Member States adopted the measures or notified the Commission before April 2014.

A table on the state of play of implementation of the Framework Decision can be found in the Annex.

Framework Decisions have to be implemented by Member States as is the case with any other element of the EU acquis. By their nature, Framework Decisions are binding upon the Member States as to the result to be achieved, but it is a matter for the national authorities to choose the form and method of implementation. Framework Decisions do not entail direct effect. However, the principle of conforming interpretation is binding in relation to Framework Decisions adopted in the context of Title VI of the former Treaty on European Union.

While the lack of implementation in one Member State does not have direct consequences for the other Member States, in the interests of justice it remains important that a court in one Member State is able to take account of final criminal judgments rendered by the courts in other Member States. This approach is underpinned by ECRIS, a decentralised information technology system which provides for an efficient circulation of information on convictions handed down against Member States' nationals by other Member States. The correct application of the principle of equivalence and the need to ensure that, as a matter of principle, the legal effects of foreign convictions are systematically equivalent to the legal effects of domestic convictions, are important in the European area of justice.

2. EVALUATION OF THE IMPLEMENTATION BY THE MEMBER STATES OF THE FRAMEWORK DECISION

2.1. Preliminary evaluation of the transposition laws received

This report assesses the extent to which Member States have taken the necessary measures to comply with the Framework Decision. When assessing the level of transposition of this instrument in national criminal law, the Commission focuses in particular on the obligations under Article 3, namely that principle of equivalence was duly introduced and legal effects of previous convictions are attached to foreign previous convictions in the national criminal justice systems, in accordance with national law.

In general, the Member States have chosen a mostly similar approach for transposing the Framework Decision into their national legislation and criminal law. Most Member States merely had to amend their law governing this issue, whereas a few Member States adopted separate implementation acts as transposing instruments.

The implementation of the Framework Decision is hampered by the fact that 6 Member States have not yet complied with their obligation under this Framework Decision.

2.2. Evaluation of selected key provisions of the Framework Decision

2.2.1. Definition of conviction

Not all Member States have formally transposed the definition of "conviction" as "any final decision of a criminal court establishing guilt of a criminal offence." Several Member States did not provide an explicit definition of what they consider to be a "conviction" for the purposes of this Framework Decision (AT, BG, DK, EL, FR, IE, LU, LV, RO, SE, SI, SK and UK). However these Member States apply the general principles and definitions of their criminal law. For example, LV and RO merely referred to 'recidivism' instead of defining previous convictions explicitly.

Inaccurate use of the definition of 'previous conviction' can lead to differences in the scope of application of this Framework Decision – namely final decisions – and consequently create lack of legal certainty for individuals. Moreover, the requirement of this Framework Decision to take only 'final' decisions into account, should also be seen in the light of procedural rights guarantees for suspects and accused persons in criminal proceedings throughout the Union. By limiting the scope to final decisions only, the Framework Decision fully respects and supports the principle of the presumption of innocence, which lies at the heart of fundamental, procedural rights protection in criminal proceedings.

FI and UK law explicitly include unconditional prison sentences, community service orders, fines or equivalent sanctions as a type of decision to be considered "conditions under which previous convictions are taken into account."

DK, FI, HR, LU, LV, SE and SI have not set any additional requirements for the taking into account of previous convictions. In those Member States, courts can simply give the same weight to convictions handed down in another Member State as they do to convictions handed down in their own state (principle of judicial discretion). This approach can be considered 'mutual recognition friendly', since it reflects a solid trust in final convictions and criminal records systems in other Member States.

2.2.2. Requirements for taking into account foreign convictions

In most Member States, competent authorities have to apply a dual criminality requirement (as required by their implementing laws and measures) when taking into account previous convictions in individual cases (AT, BG, CZ, CY, EL, FR, HU, NL, PL, RO, SK and UK). This means that the courts can only take a previous conviction into account, if this conviction was based on a crime that is also recognised and punishable under the law of that Member State.

The use of the double criminality check is justified under the Framework Decision as it merely requires States to "take into account" convictions handed down in another Member State to the same extent as previous national convictions and that "equivalent legal effects are attached to them". Hence, if certain acts, on which a previous conviction is based, are not punishable in a certain Member State, it will be impossible for the courts to "attach equivalent legal effects" as there would have been no legal effects at all if it concerned a purely domestic case.[3]

[3] See also Recital 6 of the Framework Decision.

The wording of HU law slightly differs in this respect: sentences imposed or measures stemming from a decision of a foreign court "cannot be contrary to HU law". NL law uses the term "similar offences". The NL law stipulates that a similar offence can be an offence under foreign law "which may have been formulated differently, but which is aimed at protecting the same legal interests and thus belongs to the same category of offences as the NL offence to which the reoffending provision relates". In contrast to this approach, some Member States opted for an approach based on legal qualification, as it is the case for FR. When assessing the double criminality aspect of previous convictions, the qualification of the fact is determined in relation to offences defined under FR law and the sentences will be measured according to equivalent FR sentences that are prescribed by FR law. SK law requires double criminality or that decisions of courts of other Member States in criminal matters may be enforced or have equivalent legal effects in SK only when this is provided for by an international treaty or an act.

Some Member States have set more conditions which have to be fulfilled in addition to the dual criminality requirement. An example is the obligation that, in addition to dual criminality, sufficient information must be available about the previous conviction (CY, PL).[4] PL national law stipulates that a previous conviction cannot be taken into account if the matter is subject to a remission measure having the force of amnesty or pardon (PL).

SK adds that the taking into account of previous convictions is also possible when the State has such an obligation under an international treaty to which it is party. In IE a defendant must have the opportunity to admit or deny each previous conviction when confronted with (non-) domestic convictions. Where previous convictions are relied on for "any purpose" in a trial, they must either be proved by lawful evidence, or expressly admitted by the accused person.

HU submits foreign convictions to an extensive recognition procedure before they can be taken into account. The incorporation of additional requirements for taking into account of foreign convictions should be proportionate to the objectives of this Framework Decision.

2.2.3. Equivalent legal effects

The legal context of this aspect of this Framework Decision is addressed in section 1.3 Main elements of the Framework Decision. The compliance with the rule that the legal effects that attach to foreign previous convictions are equivalent to the legal effects that attach to national previous convictions, in accordance with national law, is, at best, inconclusive. 9 Member States provide no conclusive information on compliance with this rule. It appears from the notifications received that 9 Member States focused on the application of a principle of equivalence only (Art. 3 paragraph 1), but did not provide further details in respect of the types of legal effects they

[4] CY law specifies what is regarded as "sufficient information", for example the full name, date and place of birth of the individual in respect of whom the conviction has been handed down; the date of the conviction, name of the court and the date on which the decision became final; information on the offence leading to the conviction and, specifically, the date the offence was committed, the name or legal definition of the offence, and the references of the legal provisions applied; information on the content of the conviction and, chiefly, on the offence, any additional sanctions, security measures and subsequent decisions amending the execution of the conviction.

attach to previous foreign convictions and at what stage of proceedings (pre-trial, trial stage, execution) these effects apply in their national criminal justice system (Art. 3 paragraph 2): BG, CZ, EE, HU, FR, LU, PL, RO and SK.

Information on the national legal systems and the consequences that are attached to previous convictions should be available to all Member States and particularly defendants in order to enhance the principle of legal certainty and mutual trust.

Following this preliminary assessment, the implementation notification of this Framework Decision by the following 13 Member States addressed all important elements of this Framework Decision (e.g. principle of equivalence and legal effects): AT, CY, DE, DK, FI, EL, HR, IE, LV, NL, SE, SI and UK.

2.2.3.1. Pre-trial stage

In some Member States, previous convictions may already be taken into account during the pre-trial stage in criminal proceedings. In HR data in criminal records and other data on convictions for criminal offences can be considered as the most recent evidence before investigating a defendant following the completion of the evidence-gathering procedure. SE law stipulates that previous criminality is significant in decisions on pre-sentence investigation.

EL specified that a court decision is taken into account at all stages of criminal proceedings, irrespectively of whether it is an EL court decision or a foreign court decision, e.g. also for determination of recidivism.

In some Member States, a previous conviction can influence the decision on pre-trial detention: it can be considered a factor in the court's jurisdiction to refuse bail where the applicant is charged with a serious offence (IE), or pre-trial detention may be ordered if the suspect has been convicted in recent years (AT, EL, NL, SE). Another possibility is to take previous convictions into account in criminal proceedings as part of the principle of opportunity.[5] (SE, SI)

The Commission considers that when Member States take previous convictions into account as a factor in the decision on pre-trial detention, the link between the criteria in the Framework Decision and the criteria in national law which are applied in this decision on pre-trial detention should be strictly assessed in the light of relevant Council of Europe recommendations[6] and the European Court of Human Rights case law. The reasons behind a decision on pre-trial detention should be clearly spelled out having regard to the case in question and cannot be based solely on the fact that a person has been previously convicted.

2.2.3.2. Trial stage

In many Member States, previous convictions are taken into account in the decision on the type, level and extent of a sentence/sanction (AT, CY, DE, DK, HR, HU, IE, LV, NL, SE, SI and UK), for example as a decisive factor in the decision on the

[5] This principle entails the discretionary power of a public prosecutor to pursue investigations into a case or halt procedures.

[6] See also Council of Europe Resolution (65) 11 (Adopted by the Ministers' Deputies on 9th April 1965): https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=582145&SecMode=1&DocId=626216&Usage=2.

degree of guilt (HR), the purpose of punishment (HR) or whether there are aggravating circumstances (DK, LV, UK).

In SE, previous legal proceedings exclude the imposition of a conditional sentence. DK and SE law also take into account that, for a previous conviction to be considered as an aggravating circumstance, the offence in respect of which the conviction was handed down should be relevant for the offence currently under consideration. SI national law states that for the assessment of the severity of the sentence, the court shall in particular consider whether the earlier offence is of the same type as the new one, whether both offences were committed with the same motive, and how much time has elapsed since the previous conviction was served, remitted or statute-barred.

Sometimes, Member States take into account how much time has elapsed since the previous conviction was handed down, served, remitted or statute-barred (DK, NL, SE, SI). It is also possible that previous convictions are taken into account when courts issue an order that aims to ensure the presence of the accused or to eliminate the risk of re-offending, particularly in decisions to order detention or alternative measures to ensure the presence of the accused (SI).

Another possibility is that a previous conviction affects the legal classification of the offence under the Criminal Code (HU, NL, UK), for instance when assessing the seriousness of the offence (UK).

2.2.3.3. Execution of conviction stage

In some Member States, previous convictions are taken into account during the execution of a sentence (DE, HR, NL and SE). It is for instance possible that previous convictions are taken into account during the decision on probation (DE, SE), or conditional early release (DE), or when the suspension of a sentence or custodial measure is revoked (AT, DE). In some countries, courts also have to consider previous convictions when deciding whether a person convicted is to be placed in a high security unit (SE) or a facility for notorious recidivists (NL). It is often stated that courts shall revoke the suspension of a sentence or custodial measure if a person commits an offence during the operational period (DE, SE). SE also takes previous convictions into account in the decision to commute a life sentence into a fixed term imprisonment.

2.2.4. Obtaining sufficient data on previous convictions

Some Member States also informed the Commission about domestic acts or internal rules on the organisation of their national criminal records registers (EE, HU and LV).

Only 2 Member States (EE, IE) have made a reference to the exchange of information extracted from the criminal record (ECRIS). This may be due to the fact that the ECRIS-system was not yet in place at the time this Framework Decision was adopted. Member States started to use ECRIS in April 2012 and to date 25 Member States' Central Authorities are using ECRIS to exchange criminal record information.

ECRIS supports the good implementation of this Framework Decision. To date not all central authorities are interconnected with each other.

3. CONCLUSION

- This Framework Decision sets out the leading principle of equivalence of foreign and domestic convictions in the course of new criminal proceedings. It affirms the principle that Member States should attach to a conviction handed down in other Member States effects equivalent to those attached to a conviction handed down by their own courts in accordance with national law, whether those effects be regarded by national law as matters of facts or of procedural or substantive law. Recital 5 of the Framework Decision states that "this Framework Decision does not seek to harmonise the consequences attached by the different national legislations to the existence of previous convictions, and the obligation to take into account previous convictions handed down in other Member States exists only to the extent that previous national convictions are taken into account under national law."

  The Framework Decision has considerable added value in promoting mutual trust in penal laws and judicial decisions in the European area of justice as it encourages a judicial culture where previous convictions handed down in another Member State are in principle taken into account.

- While recognising the efforts made by the 22 Member States that have transposed this Framework Decision to date, the level of compliance with the letter and spirit of the Framework Decision varies significantly. It appears that the national implementing provisions received from 13 Member States are generally satisfactory: AT, CY, DE, DK, EL, FI, HR, IE, LV, NL, SE, SI and UK.

- The remaining 9 Member States that notified the Commission have provided no conclusive information as regards the transposition of the legal effects attached to previous foreign convictions in their national criminal justice system. The level of compliance on this issue of these Member States cannot be assessed.

- The non-transposition or the partial and incomplete transposition of this Framework Decision hampers the effective functioning of the European area of justice. It can moreover undermine the legitimate expectations of EU citizens as they cannot benefit from this instrument aiming at reducing the reoffending of perpetrators of crime.

- Late implementation is to be regretted as this Framework Decision has the potential to increase the efficient administration of criminal justice by putting in place legal tools to assess the offender’s criminal past and consequently protect victims.

- The Commission will continue to closely monitor the Member States' compliance with all requirements of the Framework Decision. Notably the Commission will examine if the Member States duly apply the principle of equivalence and that, as a matter of principle, legal effects of foreign

convictions are equivalent to legal effects of domestic convictions, in the Member State's criminal justice system.

- It is of utmost importance for all Member States to consider this report and to provide all further relevant information to the Commission, in order to fulfil their obligations under the Treaty. In addition, the Commission encourages those Member States that have signalled that they are preparing relevant legislation to enact and give notification of these national measures as soon as possible. The Commission urges all those Member States that have not yet done so to take swift measures to implement this Framework Decision to the fullest extent. Furthermore, it invites those that have transposed it incorrectly to review and align their national implementation legislation with the provisions of this Framework Decision.