

II

(Preparatory Acts pursuant to Title VI of the Treaty on European Union)

Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the 'ne bis in idem' principle

(2003/C 100/12)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 29, Article 31(d) and Article 34(2)(b) thereof,

Having regard to the initiative of the Hellenic Republic ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Whereas:

- (1) The principle of '*ne bis in idem*', or the prohibition of double jeopardy, i.e. that no one should be prosecuted or tried twice for the same acts and for the same criminal behaviour, is established as an individual right in international legal instruments concerning human rights, such as the Seventh Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 4) and the Charter of Fundamental Rights of the European Union (Article 50) and is recognised in all legal systems which are based on the concept of respect for and protection of fundamental freedoms.
- (2) The principle of '*ne bis in idem*' assumes a special significance at a time when transborder crime is on the increase and problems of jurisdiction in connection with criminal prosecutions are becoming more complicated. The importance of this principle is furthermore apparent in the areas of asylum, immigration and extradition and within the framework of the European Union and in agreements between the Union or certain Member States and third countries.
- (3) Point 49(e) of the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice ⁽³⁾ provides that measures will be established within five years of the entry into force of the Treaty 'for the coordination of criminal investigations and prosecutions in progress in the Member States with the aim of preventing duplication and contradictory rulings, taking account of better use of the *ne bis in idem* principle'.

⁽¹⁾ ...

⁽²⁾ ...

⁽³⁾ OJ C 19, 23.1.1999, p. 1.

(4) In the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters ⁽⁴⁾ established by the Council and the Commission the '*ne bis in idem*' principle is included among the immediate priorities of the Union, in particular as regards the taking into account of final criminal judgments delivered by a court in another Member State. Measure No 1 in that programme recommends a reconsideration of Articles 54 to 57 of the Convention implementing the Schengen Agreement, which reiterate the corresponding articles of the Convention between the Member States of the European Communities on Double Jeopardy, signed in Brussels on 25 May 1987, with a view to the full application of the principle of mutual recognition, which has, however, not been ratified by the Member States.

(5) The Communication from the Commission to the European Parliament and the Council of 26 July 2002 on the mutual recognition of final criminal judgments acknowledges the positive contribution of the application of the '*ne bis in idem*' principle to the mutual recognition of judgments and the strengthening of legal certainty within the Union, which presupposes confidence in the fact that judgments recognised are always delivered in accordance with the principles of legality, subsidiarity and proportionality.

(6) In the legal systems of a number of States the principle of '*ne bis in idem*' is recognised only at national level, i.e. vertically, observing the criminal procedure followed in the State in question. Such recognition is provided for either in constitutional provisions or in legal provisions and is based: (a) on Article 14(7) of the International Covenant on Civil and Political Rights of 19 December 1966; and (b) on Article 4 of the Seventh Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Transnational application of the principle, i.e. horizontally, is established by Articles 54 to 57 of Chapter 3 of the Convention implementing the Schengen Agreement.

(7) The application of the '*ne bis in idem*' principle has thus far raised many serious questions as to the interpretation or acceptance of certain substantive provisions or more general rules (e.g. the concept of *idem*) because of the different provisions governing this principle in the various international legal instruments and the difference in practices in national law. The aim of this Framework Decision is to provide the Member States with common legal rules relating to the '*ne bis in idem*' principle in order to ensure uniformity in both the interpretation of those rules and their practical implementation.

⁽⁴⁾ OJ C 12, 15.1.2001, p. 10.

- (8) Since the above objectives of the Framework Decision cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity. In accordance with the principle of proportionality, this Framework Decision does not go beyond what is necessary in order to achieve those objectives.
- (9) As regards Iceland and Norway this Framework Decision constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis⁽¹⁾ which fall within the scope of Article 1(B) of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of that Agreement⁽²⁾.
- (10) The United Kingdom is taking part in this Framework Decision in accordance with Article 5 of the Protocol integrating the Schengen acquis into the framework of the European Union annexed to the Treaty on European Union and to the Treaty establishing the European Community and with Article 8(2) of Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis⁽³⁾.
- (11) Ireland is taking part in this Framework Decision in accordance with Article 5 of the Protocol integrating the Schengen acquis into the framework of the European Union annexed to the Treaty on European Union and to the Treaty establishing the European Community and with Article 6(2) of Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis⁽⁴⁾.
- acts which constitute administrative offences or breaches of order that are punished by an administrative authority by a fine, in accordance with the national law of each Member State, provided that they fall within the jurisdiction of the administrative authority and the person concerned is able to bring the matter before a criminal court;
- (b) 'judgment' shall mean any final judgment delivered by a criminal court in a Member State as the outcome of criminal proceedings, convicting or acquitting the defendant or definitively terminating the prosecution, in accordance with the national law of each Member State, and also any extrajudicial mediated settlement in a criminal matter; any decision which has the status of *res judicata* under national law shall be considered a final judgment;
- (c) 'Member State of the proceedings' shall mean a Member State in which the proceedings took place;
- (d) '*lis pendens*' shall mean a case where, in respect of a criminal offence, a criminal prosecution has already been brought against a person, without a judgment having been delivered and where the case is already pending before a court;
- (e) 'idem' shall mean a second criminal offence arising solely from the same, or substantially the same, facts, irrespective of its legal character.

Article 2

Right of any person not to be prosecuted or convicted twice for the same criminal offence

1. Whoever, as a result of committing a criminal offence, has been prosecuted and finally judged in a Member State in accordance with the criminal law and the criminal procedure of that State cannot be prosecuted for the same acts in another Member State if he has already been acquitted or, if convicted, the sentence has been served or is being served or can no longer be enforced, in accordance with the law of the Member State of the proceedings.

2. The procedure may be repeated if there is proof of new facts or circumstances which emerged after the judgment or if there was a fundamental error in the previous procedure which could have affected the outcome of the proceedings, in accordance with the criminal law and the criminal procedure of the Member State of the proceedings.

Article 3

Lis pendens

If, while a case is pending in one Member State, a criminal prosecution is brought in respect of the same criminal offence in another Member State, the following procedure applies:

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Definitions

For the purposes of this Framework Decision:

(a) 'criminal offences' shall mean:

— acts which constitute crimes under the law of each Member State,

⁽¹⁾ OJ L 176, 10.7.1999, p. 36.

⁽²⁾ OJ L 176, 10.7.1999, p. 31.

⁽³⁾ OJ L 131, 1.6.2000, p. 43.

⁽⁴⁾ OJ L 64, 7.3.2002, p. 20.

- (a) preference is given to the forum Member State which will better guarantee the proper administration of justice, taking account of the following criteria:
- (aa) the Member State on whose territory the offence has been committed;
- (bb) the Member State of which the perpetrator is a national or resident;
- (cc) the Member State of origin of the victims;
- (dd) the Member State in which the perpetrator was found;
- (b) where a number of Member States have jurisdiction and the possibility of bringing a criminal prosecution in respect of a criminal offence based on the same actual events, the competent authorities of each of those States may, after consultation taking account of the criteria mentioned in paragraph (a), choose the forum Member State to be given preference;
- (c) where preference is given to the forum of one Member State, proceedings pending in the other Member States shall be suspended until a final judgment is delivered in the Member State whose forum was preferred. Where proceedings are suspended in a Member State, the competent authorities of that State shall immediately inform the corresponding authorities of the Member State whose forum was preferred. If for any reason no final judgment is delivered in the Member State whose forum was preferred, the competent authorities of the latter shall without delay inform the corresponding authorities of the first Member State which suspended proceedings.

Article 4

Exceptions

1. A Member State may make a declaration informing the General Secretariat of the Council and the Commission that it is not bound by Article 2(1) and (2) if the acts to which the foreign judgment relates constitute offences against the security or other equally essential interests of that Member State or were committed by a civil servant of the Member State in breach of his official duties.
2. A Member State which makes a declaration pursuant to paragraph 1 shall specify the categories of offence to which the exception may apply.
3. A Member State may at any time revoke the declaration concerning the exceptions set out in paragraph 1. Such revocation shall be notified to the General Secretariat of the Council and to the Commission and will take effect from the first day of the month following the date of notification.

4. An exception which may be the subject of a declaration pursuant to paragraph 1 will not be applied if the Member State concerned has asked for the same offences to be prosecuted by the other Member State or has ordered the extradition of the person involved.

Article 5

Accounting principle

If a new prosecution is brought in a Member State against a person who has been definitively convicted for the same offences in another Member State the period of deprivation of freedom or fine handed down by that State in respect of those offences shall be deducted from the sentence which he would probably receive. As far as allowed by national law, any penalties other than deprivation of freedom which have been imposed, or penalties imposed in the framework of administrative procedures, shall also be included.

Article 6

Exchange of information between competent authorities

1. If a prosecution has been brought against a person in a Member State and the competent authorities of the latter have reasons to believe that the charge concerns the same acts for which he has been definitively convicted in another Member State, those authorities shall request the relevant information from the competent authorities of the Member State of the proceedings.
2. The requested information shall be provided as soon as possible using all available technical means and shall be taken into account in order to determine whether the procedure is to be continued.
3. Each Member State shall make a declaration to the General Secretariat of the Council and to the Commission indicating the authorities which are authorised to request and receive the information referred to in paragraph 1.

Article 7

Application of broader provisions

The provisions of Articles 1 to 6 shall not preclude the application of broader national provisions on the rule of '*ne bis in idem*' when it is connected with judgments delivered abroad.

Article 8

Application

1. Member States shall take the measures necessary to comply with this Framework Decision before ... (*).

(*) Two years after the date of entry into force of this Framework Decision.

2. Member States shall transmit by the date referred to in paragraph 1 at the latest to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.

3. On the basis of this information the Commission shall submit before [...] a report to the European Parliament and the Council on the application of this Framework Decision, accompanied where necessary by legislative proposals.

4. The Council shall assess before [...] the measures adopted by the Member States in order to comply with the provisions of this Framework Decision.

Article 9

Repeal

Articles 54 to 58 of the 1990 Schengen Convention shall be repealed upon the entry into force of this Framework Decision.

Where a Member State transposes this Framework Decision before that date, pursuant to Article 8(1), the provisions in question shall cease to apply to the Member State concerned from the date of transposition.

Article 10

Entry into force

This Framework Decision shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Done at Brussels, ...

For the Council

The President

...

Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the prevention and control of trafficking in human organs and tissues

(2003/C 100/13)

THE COUNCIL OF THE EUROPEAN UNION,

in human beings, including common definitions, incriminations and sanctions.

Having regard to the Treaty on European Union, and in particular Articles 29, 31(e) and Article 34(2)(b) thereof,

Having regard to the initiative of the Hellenic Republic ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Whereas:

- (1) The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice ⁽³⁾, the Tampere European Council on 15 and 16 October 1999 and the Santa Maria da Feira European Council on 19 and 20 June 2000, as listed in the scoreboard, indicate or call for legislative action against trafficking

- (2) Trafficking in human organs and tissues is a form of trafficking in human beings, which comprises serious violations of fundamental human rights and, in particular, of human dignity and physical integrity. Such trafficking is an area of activity of organised criminal groups who often have recourse to inadmissible practices such as the abuse of vulnerable persons and the use of violence and threats. In addition, it gives rise to serious risks to public health and infringes on the right of citizens to equal access to health services. Finally, it undermines citizens' confidence in the legitimate transplantation system.

- (3) Opposition to the sale of the human body and its parts has been addressed repeatedly by many international organisations and has been the subject of regulation by international conventions. As early as 1978, the Council of Europe in its Decision (78)29 on harmonisation of legislation of Member States relating to removal, grafting and transplantation of human substances, which was adopted by the Committee of Ministers of the Council of Europe on 11 May 1978, declared that no human substance may be offered for profit. This declaration was confirmed at the third Conference of European Health Ministers, which was held in Paris on 16 and 17 November 1987, the final statement of which stressed that a human organ may not be offered for profit by any organ exchange body, organ storage centre or any other organisation or private individual.

⁽¹⁾ OJ C ...

⁽²⁾ OJ C ...

⁽³⁾ OJ C 19, 23.1.1999, p. 1.