



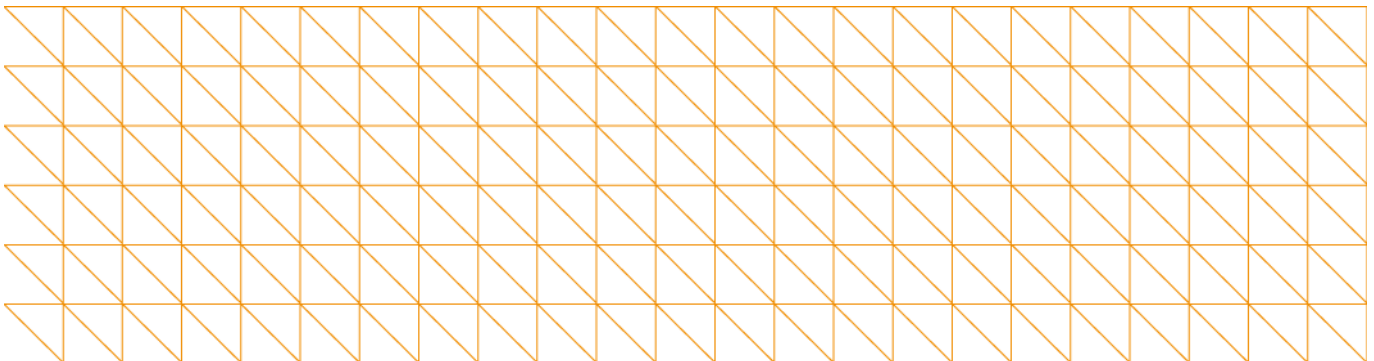
Enhancing procedural rights and judicial co-operation in the EU:

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

Response to Consultation

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Introduction and contact details

This document is the post-consultation report for the consultation paper, *Enhancing procedural rights and judicial co-operation in the EU: Proposed Framework Decision on new rules for cross-border cases where judgment are made in absentia*.

It will cover:

- the background to the report;
- a summary of the responses to the report;
- a detailed response to the specific questions raised in the report; and
- the next steps following this consultation.

This report is available on the Ministry of Justice's website: www.justice.gov.uk

Further copies of this report and the consultation paper can be obtained by contacting **Gabrielle Kann** at the address below:

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Background

The consultation paper *Enhancing procedural rights and judicial co-operation in the EU: Proposed Framework Decision on new rules for cross-border cases where judgment are made in absentia* was published on 28 February 2008. It invited comments on the draft Framework Decision (the FD) on trials in absentia, which is a legislative initiative tabled by the Slovenian Presidency and co-sponsored by the UK, France, the Czech Republic, Sweden, Slovakia and Germany.

The proposal aims to improve mutual recognition of judgments following a trial in absence. Its objective is to set clearer rules about the procedural safeguards that need to be met by Member States in order to enforce a decision made in the absence of the accused. The FD's objective is to bring consistency between five Framework Decisions containing provisions on trials in absence¹ by aligning the grounds for non-execution of an in absentia decision.

The consultation period closed on 10 April and this report summarises the responses, including how the consultation process influenced the final shape of the proposal consulted upon.

A list of respondents is at Annex A.

¹The FDs concerned are on the European Arrest Warrant, financial penalties, confiscation orders and custodial sentences. The *Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions* was added during the negotiations. Not all of those FDs are yet implemented.

Summary of responses

1. A total of 11 responses to the consultation paper were received. Of these, three responses were from members of the judiciary (the Council of Circuit judges, the European Network of Councils for the Judiciary and the Sheriffs' Association) and one from the magistracy (the Magistrates' Association). Two were from representative bodies of the police (Association of Chief Police Officers in Scotland and the Police Federation of England and Wales) and one from the Crown Prosecution Service. Two responses were received from the Law Society and the Bar Council. The remaining responses were received from non-governmental organisations (Fair Trials International and the AIRE (Advice on Individual Rights in Europe) Centre).
2. The responses received were on the whole supportive of the proposal's aim, which is to clarify instances where a foreign decision made in absentia can be executed (not to increase instances where a trial in absentia may take place). The responses raised broadly similar issues, mostly in relation to the notion of fair trial. Some respondents felt that, although they supported the objective of the proposal, the detail did not achieve the practical improvements it sought to attain.
3. It was decided to shorten the consultation period from 12 weeks to six weeks because of the rapid pace at which the proposal is being discussed, to ensure that consultation responses could be taken into account during the negotiation process. Her Majesty's Government welcomed the points made by respondents and took them into account as far as possible in refining its negotiating stance, including some responses received after the deadline.
4. Consultees' main concerns related to suspects' rights and the notion of fair trial as developed by the European Court of Human Rights (ECtHR) case law, notions which are very much at the heart of this FD. More specifically, the main issues revolved around the means of notification, the right to a retrial and effective representation. The general consensus was that a decision should not be enforced if it appears that the person concerned had not received an effective notification of the trial, was not represented (i.e. had not given a mandate to a legal counsellor to act on his behalf) or did not have the guarantee of the right to a retrial. We should make clear that this is entirely in line with the Government's position.

Responses to specific questions

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

On the whole, respondents felt the definition was not too narrow and that it was explicit enough, although some noticed a lack of clarity as to what constitutes 'proceedings' in the context of a decision in absentia. The wording of the recital contained in the draft consulted on referred to a decision in absentia as being "a decision rendered following a trial at which the person concerned did not appear in person". Some respondents were of the view that the definition should not be interpreted as meaning that partial absence amounts to 'absence'.

In fact, during the course of negotiations, Member States agreed that it would be better to remove the definition altogether because of the difficulties it created in relation to national laws. It was felt that trying to find a definition that would take into account the differences of national system would lead to harmonisation, where the aim of this instrument is to bring clarity to cross-border procedures, not to change national laws. As a respondent illustrated in their response: "it would be impossible for the FD to provide for particular time periods or percentages of the case that need to be missed to establish trial in absentia [...]".

Some respondents offered views on the notion of representation in response to this question. On this specific point, the draft submitted to public consultation provided that the person should have been summoned in person or "informed by a competent representative" in due time. Many respondents expressed – sometimes diverging – views regarding the exact meaning of representation, the role of a representative and how to assess whether a representative was properly appointed. Most respondents were of the opinion that effective representation is sufficient to deem the person present, though some were of the view that representation at trial should not be regarded as equivalent to presence at trial. In particular, the view was expressed that the defendant should have free access to competent representation. The Government agrees that it is absolutely key that representation should be effective. However, the European Convention on Human Rights (ECHR) and the jurisprudence of the Strasbourg Court make clear what Member States obligations are and this FD's objective is not to set detailed procedural standards but to bring consistency between grounds for refusal.

One respondent specifically raised the issue of situations where the person has informed their representative of their intention not to attend the trial, which creates a conflict between the duty to the client and the duty to assist proceedings in Court. This is not something that could be addressed in this instrument, since it deals more specifically with the code of ethics of the lawyer's profession.

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

All respondents agreed that the need for effective information to be received by the defendant is a vital element of a fair trial and concurred that merely sending the notification to the last known address is not sufficient. Member States should be able to demonstrate, be it by personal service or by providing evidence or proof of service, that the notification was received by the person, i.e. that the accused effectively knew of the time and date of the hearing. There was however a concern that, as drafted, the changes would result in a 'tick box' exercise, where the executing state would rely on the certificate rather than the circumstances of the case.

Her Majesty's Government understands the concerns that are raised here. Given that the notion of 'competent representative' also gave rise to difficulties in defining the exact meaning it would take under national laws, the text is likely to be amended to place the emphasis on the receipt of the notification rather than on the person delivering it. Negotiations point to the text being tightened in a way that would show that the notification was personal and effective. The person concerned should therefore be summoned in person, informed or by other means receive official information of the scheduled date and time of the hearing. This requirement would be reflected in the certificates, which would allow for a precise description of the way in which this obligation was fulfilled by the issuing authority (i.e. date and time, or in the event that the individual was not summoned in person, a description of how it is established they knew of the trial).

Some respondents called for a clarification of the meaning of 'summoned in person' and 'personal service'. Both expressions remain undefined in the current draft because it has proved difficult to reach a common definition that would be compatible with national legislations and it is important to take into account the diversity of legal systems. However, the provision, as currently drafted, seems to convey adequately the idea that the person must be personally notified. The addition of the word 'thereby' ('was summoned in person and thereby informed') should help further clarify the meaning and efficacy of the expression.

Another respondent suggested that the notification should outline the nature of the proceedings or charge the person is to face, and the potential penal consequences of an adverse decision. The FD partly does that by posing a double condition that the person knew of the trial and of the possibility of a decision being handed down in case of no appearance at trial. However, it would be too onerous to devise a mechanism by which the person would be informed of the details of the proceedings in case they decided not to attend trial, so this suggestion is not being pursued in negotiations.

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

All respondents concurred that there should be a right to a retrial when a Member State seeks a person's surrender, not merely a right to apply for a retrial. Some respondents called for the guarantee that a retrial – or an appeal, depending on the features of each national system – should confer on the individual the same rights as a trial under Article 6 ECHR. The Government wholly agrees with this position and in particular notes that retrials should allow for the presence of the person concerned, a re-examination of the merits of the case, including fresh evidence, with the effect of the original decision possibly being reversed. These views are shared by other Member States and we expect the text to be amended in this way.

One response took a slightly different stance on the issue by stating that the retrial is not necessarily a sufficient safeguard *per se*, as long as there is no harmonisation of procedural rights across the EU. This argument mixes two considerations: minimum safeguards attached to a trial in absence on one hand, and procedural safeguards in criminal proceedings in general on the other hand. Whatever the merits of this view, the objective of this proposal is more limited, focussed on enhancing the compliance with existing standards in the specific context of trials in absence, not to attempt to establish common procedural standards in criminal proceedings across Member States' legislations. The consultation paper made clear that this proposal is relatively modest and aims only at bringing consistency between existing mutual recognition instruments. Harmonisation of procedural law is a very different project altogether and was never the intention of this FD.

A respondent suggested mandatory circumstances where a person should not be tried in their absence, namely when the defendant is suffering from a serious medical condition or is a child or young person. This type of exclusion would necessarily mean a degree of harmonisation of legal systems, as national laws may vary as to who could not be tried in their absence. This consideration is therefore going beyond the scope of the present instrument.

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

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

Few respondents commented on this question but those who did indicated that they felt the provision was adequate and could not envisage circumstances not covered by the current draft.

A respondent pointed out that acceptance of a fine does not constitute an admission of guilt while another said that any fine imposed by a non-judicial authority should be subject to an appeal procedure which may be judicially reviewed. These provisions have been discussed by Member States, and the discussions made clear that the way fines are imposed vary widely and that the inclusion of further detail (such as avenues of challenge) in this Framework Decision would go beyond its scope.

Some responses included additional comments, not directly relating to the questions asked.

A respondent pointed out that the FD does not foresee a mechanism to monitor the protection of the extradited person upon their return to the requesting Member State. A detailed mechanism is not provided for by this FD but HMG notes that the final clauses of the current text prescribe a review of the implementation of this instrument, which will enable the Commission to evaluate the compliance of Member States with their obligations.

Some respondents indicated that they would like to see an express reference to the issue of languages and interpretation in the proposal. The Government sought to include an explicit reference to a right to free interpretation in the draft but the suggestion has unfortunately not been retained in the negotiations.

Finally, a respondent pointed out that the proposal's numbering is inconsistent and confusing. This will be solved by the jurist-linguist group when the proposal is finalised before formal adoption.

Conclusion and next steps

The Slovenian Presidency is very committed to a successful outcome on this proposal and is determined to try and reach a general approach at the June Justice and Home Affairs Council. The UK will actively support the Presidency in its goal.

Consultation Co-ordinator contact details

If you have any complaints or comments about the **consultation process** rather than about the topic covered by this paper, you should contact Gabrielle Kann, Ministry of Justice Consultation Co-ordinator, on 020 7210 1326, or email her at consultation@justice.gsi.gov.uk.

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

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If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given on page 3.

The consultation criteria

The six consultation criteria are as follows:

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

These criteria must be reproduced within all consultation documents.

Annex A – List of respondents

- The AIRE (Advice on Individual Rights in Europe) Centre
- The Association of Chief Police Officers in Scotland
- The Bar Council
- The Council of Circuit Judges
- The Crown Prosecution Service
- The European Network of Councils for the Judiciary
- The Law Society
- The Magistrates' Association
- Fair Trials international
- The Police Federation of England and Wales
- The Sheriffs' Association

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