

Transfer of Probation Supervision between Member States: An EU Initiative

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Summary: At the end of last year a new mechanism was initiated within the EU which will come into effect in December 2011 across all Member States. Orders for probation supervision will then be able to be transferred to another Member State for implementation. The principal features of this legal instrument are outlined, with some comments on the wider context and on how probation agencies should approach the issue.

Keywords: Framework Decision, probation supervision, recognition of the judgment, alternative sanctions.

Introduction

A meeting of the Ministers of Justice within the European Union (EU) on 27 November 2008 agreed the text of a new Framework Decision that will authorise, in specific circumstances, supervision in one Member State of an order made in another Member State. As these arrangements, and any underpinning changes in national legislation, have to be implemented within three years, probation agencies should start familiarising themselves with the concepts now and plan ahead. This paper will outline the structure and process contained in the Framework Decision (FD), contrast it with parallel procedures put in place by the Council of Europe, and note some specific implications for probation internationally. An addendum explains what FDs are and how they fit within the EU legal system, and the genealogy of the probation and prisoner FDs.

The legally binding text is contained in 27 Articles, which can best be explained as a sequence of steps. The FD must be capable of being

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grafted on to the different criminal justice systems in all 27 Member States. To simplify the explanation, however, complications that do not apply in Ireland (for example a probation decision by a separate body following on a court finding) will not be referred to. Yet some of the options provided must get a mention as other countries may well apply them, even if it is unlikely that Ireland or the UK will do so.

Principal features of this FD

Objective and scope

Article 1 states clearly that the FD ‘aims at facilitating the social rehabilitation of sentenced persons, improving the protection of victims and of the general public, and facilitating the application of suitable probation measures and alternative sanctions, in case of offenders who do not live in the State of conviction’. To achieve these objectives, the FD ‘lays down rules according to which a Member State other than the Member State in which the person concerned has been sentenced, recognises judgments or alternative sanctions contained in such a judgment, and takes all other decisions relating to that judgment, unless otherwise provided for in this Framework Decision’.

There are therefore two elements: the recognition of the judgment and the implementation of the supervision ordered. The two go together: if the judgment is recognised then supervision normally commences. Hence the FD has no application to non-custodial decisions not involving supervision, for example binding over, absolute discharge, or suspended sentence without supervision. It applies to sentenced persons, and it is clear this has to be natural persons, so the FD has no relevance to convicted legal persons such as corporations.

Categories of supervision

The FD encompasses four types of judgment giving rise to supervision:

- suspended sentence
- conditional sentence
- alternative sanction
- conditional release.

While there is no definition of supervision as such, ‘probation measures’ are defined as ‘obligations and instructions imposed by a competent authority on a natural person, in accordance with the national law of the issuing State, in connection with a suspended sentence, a conditional

sentence or a conditional release' (Article 2). In the FD, the 'issuing State' is the Member State in which a judgment is delivered, and the 'executing State' is the Member State that recognises the judgment and implements the supervision.

The definitions of suspended sentence and conditional release (from custody) cause no problems. 'Conditional sentence' refers to a deferment of sentence imposition subject to conditions. Disappointingly, the alternative sentence – a non-custodial penalty mandating a period of supervision – is simply defined as a sanction that is not a custodial sentence or a fine, which imposes an obligation or instruction (could be several such).

Article 4 of the FD lists 11 different requirements of probation measures with which we are all too familiar, for example inform a specific authority of any change of residence or working place, report at specific times, carry out community service, co-operate with a probation officer, undergo therapeutic treatment. All Member States are required to implement this list of measures, and may indeed add others.

Initiating the process

For the purposes of the FD, each Member State is required to designate one or more competent authorities to forward or receive judgments, decide on recognition or otherwise and ensure that consequential decisions are taken. Consideration is being given in both Ireland and the UK to establishing a central authority to co-ordinate actions under the FD. The competent authorities in each Member State are notified to the General Secretariat of the Council, which circulates the information to all Member States. The judgment, accompanied by a completed standard certificate, is then forwarded by the authority in the issuing State, i.e. the State transferring the judgment to the corresponding authority in the executing State (the State that receives the judgment and implements supervision). Normally this will be a Member State in which the sentenced person is lawfully and ordinarily residing, i.e. the offender wants to return to that State, or has already done so. However, the sentenced person may request to travel instead to another Member State, and the request can be sent to that State instead, if the competent authority in that State has agreed to receive it. Each State must determine the criteria that will apply to a decision to agree or not, although Recital 14 provides some examples. For further details, see Articles 3, 5 and 6 of the FD.

Grounds for defining recognition and supervision

Article 8 is very clear: the competent authority in the executing State 'shall recognise the judgment', and 'shall without delay take all necessary measures for the supervision of the probation measures or alternative sanctions' unless there are grounds for refusal as set out in Article 11 of the FD.

Some grounds for refusal are fairly obvious, such as that the certificate is not properly completed or signed, or it includes measures other than those in the standard list or what other ones the executing State has agreed to supervise, or the certificate 'manifestly does not correspond to the judgment'. Others are legal grounds, for example the enforcement of the sentence is statute-barred according to the law of the executing State; or the sentenced person, because of his or her age, cannot be held criminally liable for the act in question under the law of the executing State. Others again are practical, such as the inability of the executing State to provide the medical or therapeutic treatment required in the order. Again, if the probation measure or alternative sanction is of less than six months' duration, or the community service would normally be completed within six months, then the executing State can decline.

Under Article 10, the requirement of 'double criminality' must also be satisfied, i.e. that the judgment relates to acts that also constitute an offence under the law of the executing State. There is an agreed list of 32 offences that in this and other FDs are recognised as sufficiently serious in all countries that double criminality need not be proved. However, there may be some dispute in particular cases, so a Member State may declare that it requires double criminality to be established in all cases, and Ireland is likely to so declare. This issue is particularly relevant for probation supervision, which may well be ordered for minor or less heinous instances of a serious offence category.

Where there are difficulties with the certificate, or practical issues arise, the competent authority in the executing State may postpone the decision and request additional information/clarification from the issuing State. Nevertheless, the competent authority in the executing State is required to make its decision as soon as possible and within 60 days of receipt of the judgment and certificate. If it is not possible to comply with this time limit 'in exceptional circumstances the competent authority in the executing State must inform the issuing State of the reasons for the delay and the estimated time needed for the decision' (Article 12).

Adapting the judgment to the law of the executing State

If the nature or duration of the probation measures is ‘incompatible’ with the law of the executing State, then the competent authority of that State may adapt them to domestic law (for example if the hours of community service exceed the maximum in domestic law). The adapted measure must of course correspond as far as possible to what was imposed in the issuing State, and ‘shall not be more severe or longer’ than what was imposed (Article 9). The issuing State must be told of the adaptation and, if it is not happy, it may withdraw the certificate ‘provided that supervision in the executing State has not begun’.

Follow-through of supervision

Supervision ‘shall be governed by the law of the executing State’ (Article 13). So the executing State has jurisdiction to take all subsequent decisions (Article 14), including:

- modification of the obligations or instructions
- revocation of suspension of the sentence, or of conditional release
- imposition of a custodial sentence.

However, some States are anxious to retain jurisdiction to deal with breaches or failures to comply. An executing Member State may therefore declare that it will not accept responsibility for revocation or imposition of a custodial sentence, in which case jurisdiction in these situations is transferred back to the competent authority in the issuing State. The sentenced person of course remains in the executing State, and the executing State is then expected to carry out whatever decision is made by the issuing State (Article 16). It seems unlikely that Ireland or the UK will make the declaration, at least not for all cases.

Exchange of information

As well as a general encouragement to competent authorities in the issuing and executing States to consult with one another, there are specific obligations on the executing State to inform the issuing State of decisions on modifications, revocations, etc., and vice versa. The issuing State in particular must inform the executing State of any findings that are likely to result in revocation etc. and indeed of ‘any circumstances or findings which could entail such a decision’ (Article 16).

End of jurisdiction of the executing State

The competent authority in the executing State may transfer jurisdiction back to the issuing State if the sentenced person absconds (Article 20). (If the sentenced person cannot be found in the territory of the executing State after the judgment is transmitted, then the issuing State is so informed and the executing State has no further obligations.) Where new criminal proceedings are commenced in the issuing State, after supervision has begun in the executing State, then the issuing State may ask for jurisdiction to be returned and the executing State may, or may not, comply with this request.

Coming into force of the FD

Once adopted by the Council, the text of the FD was published in the *Official Journal of the European Union*, and came into force on that day, i.e. 16 December 2008. Member States then had just under three years to take all the necessary measures to implement the FD, including transposing it into national law. So the system envisaged by the FD will not become fully operational until 6 December 2011, assuming all Member States meet the deadline. The text of amendments to national law to implement the FD must be transmitted to Brussels. The Commission (not the Council) has to draw up a report by December 2014 on the extent of implementation. This report will be based on the information received from Member States and may include legislative proposals.

The wider context

This FD aptly illustrates the difference between, on one hand, Council of Europe Conventions that are opened for signature and ratification by States within the Council but may never be implemented if states choose not to, and, on the other, FDs promulgated within the EU that are then obligatory on Member States to implement, albeit within a generous timeframe.

On 30 November 1964, the Council of Europe issued a Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders. Only eight countries subsequently signed and ratified it, a further four signed but did not ratify, and the remainder (including Ireland and the UK) did not even sign it. The text also contained a vague opt-out clause if the requested state deemed that the

sentence in question, including the conditions to be implemented, was incompatible with the principles underpinning its own national law. So the Convention has been ineffective and is widely considered a failure.

In contrast, the FD is mandatory on all 27 EU Member States. Article 23 states clearly that the FD replaces the corresponding provisions of the 1964 Council of Europe Convention in relations between Member States. To avoid history repeating itself, it is therefore crucial that every effort be made to operate the FD effectively, so that it does not become a dead letter too. It may seem complex at first sight, but that is because it had to cover the varying criminal justice systems across all Member States. The principles, however, are clear and the real test is not the mechanisms for recognition but the effort that will be put into successfully completing the order received from the foreign court.

The Council of Europe also instituted a Convention on the Transfer of Offenders serving custodial sentences, and this appears to have been much more successful. Now the EU has also introduced an FD on the execution of judgments in criminal matters, imposing custodial sentences or measures involving deprivation of liberty, 2008/909/JHA. The two FDs are expected to work in parallel, so it is important that probation agencies are seen to be effective on their side of the fence.

Specific implications for probation internationally

We live in an age of frequent and mass travel, where many go to a city abroad for weekends as well as annual holidays, and very many young people travel to other countries for work or education/training. Almost inevitably, there has been an increase across Europe of nationals from one Member State appearing on criminal charges before a court in another Member State. At present, these courts have the option of either imposing custody or letting the offender return home with a stern admonition.

With this FD a third alternative emerges, namely imposing a non-custodial order with conditions, including supervision, to be implemented in the offender's home State. There is a danger that this disposal would be utilised (apart perhaps from community service) when appraisal would suggest that there are no significant underlying criminogenic or social issues to be addressed and that supervision is not really needed for what would be termed a low-risk offender; in other words the offender has been 'up-tariffed'. This would be a pattern to be commented on for the review of the FD due in 2014.

The FD formally extends EU law to cover probation via the transfer of responsibility for supervision, implicitly acknowledging the development of supervision orders in Member States. As noted above, it constitutes a challenge to probation organisations to be familiar with the national legal provisions that will ensue and to operate them as professionally as possible. Hence the importance of risk assessment, of programmes that work in dealing with the criminogenic factors identified, and ensuring that offenders who blithely ignore the requirements are dealt with accordingly.

Of course, the FD does not go as far as some would wish. For example, the only reference to probation reports is at the end of the certificate, which merely requests that a box be ticked if such reports are available. The language in which such reports are written should be indicated, with a footnote that the issuing State is not obliged to provide translation of these reports! What would be needed, however, is home circumstances appraisals, for example the type of accommodation that the offender has in the executing State, his or her employment or training prospects, therapeutic treatment that would be organised to address substance abuse, etc. The court in the issuing State is unlikely to be familiar with the social circumstances and facilities available in the executing State, hence the specific entitlement to modify conditions during the currency of the supervision. Ideally a home circumstances appraisal should be prepared and considered before the decision is taken to recognise the judgment, but the tight time-line (60 days) will militate against that in most cases, particularly if the offender in question has never been dealt with by probation, or has no criminal record, in his or her home country. It may well be, therefore, that a full assessment of social functioning and attitudes to crime should be the first order of business once supervision commences.

The use of the term 'alternative sanctions' in the FD is unfortunate and may rightly be criticised as outdated, especially in light of the Council of Europe Rules on Community Sanctions and Measures. The definition of community sanction used there would indeed cover the other three categories in that they are orders for supervision in the community. It would seem, however, that many European countries traditionally use 'alternative sanctions' and are unwilling to change, despite the linguistic implication that such sanctions, as an alternative to custody, are somehow second best and that custody is the principal and preferable punishment. As noted above, the definition in the FD is of

little value, being simply a negative, so it is up to each national legislature to define its own supervised non-custodial sanctions in its own way.

Electronic monitoring is often used in Europe as an enforcement of bail measure or as an added requirement for early release from custody. Although it is not legislated for in the text of the FD, Recital 11 acknowledges that it could be used in the supervision of probation measures, in accordance with national law and procedures. It is therefore a matter for each Member State to determine its application.

It could be argued that this FD too closely parallels the FD on the execution of custodial sentences. Many provisions (for example grounds for refusing to recognise) are very similar, using sometimes identical phrases. This is understandable in that much of the groundwork discussion on the draft texts was undertaken in the Council's Working Party on Co-operation in Criminal Matters. Many of the members of this working party are lawyers from the Ministries of Justice of the Member States, hence the emphasis on legal rules and procedures. The same working party had earlier completed the ground work on the text of the FD on custodial sentences and hence saw a value in consistency and parallel provisions. Not a few were unfamiliar with contemporary thinking on probation, and considered supervision as basically reporting to the police at regular intervals, with social assistance added. A minority of countries, indeed, do not have a probation service as such. Transferring prisoners in custody essentially means changing from one cell to another, while for probation, transfer to another jurisdiction involves having to deal with issues such as accommodation, employment, family and interpersonal relationships, and appropriate leisure pursuits.

Conclusion

This FD presents both a challenge and an opportunity to probation agencies across Europe. The challenge is to make transnational supervision effective. The opportunity is to make probation a valued option for offenders throughout all Member States. As the name implies, we now have a framework, a basic structure on which each legislature in the EU must build the sinews of how the FD will work in its jurisdiction. It is to be hoped that the professional probation bodies will bring their experience and expertise in the field of supervision to the task of formulating the provisions and protocols necessary for the implementation of the FD, and that they will be invited to do so.

Addendum

1. The Maastricht Treaty, formally entitled the Treaty on European Union (TEU), entered into force on 1 November 1993. The contracting Parties to the Treaty (the Member States) went beyond the existing European Community (EC) to establish a European Union (EU) which was to consist of three pillars:
 - (i) the existing EC, a structure of common developments in social and economic areas, overseen by the European Commission
 - (ii) a Common Foreign and Security Policy (CFSP)
 - (iii) co-operation in the field of Justice and Home Affairs (JHA).

The two new pillars would operate alongside, but beyond the ambit of, the European Commission. Intergovernmental structures would be used, with decisions being made by the Council (i.e. all national governments acting collectively), which would keep the Commission informed and elicit the views of the European Parliament.

So, co-operation in the field of Justice and Home Affairs became one of the three basic areas of competence of what was now no longer the EEC but the EU.

2. The Treaty of Amsterdam, which entered into force on 1 May 1999, expanded the role of the European Commission to include 'Visas, Asylum, Immigration and other policies relating to the Free Movement of Persons' (new Title IIIa, inserted into the Treaty of Rome by Article 2.15 of the Amsterdam Treaty). The key element remaining was Police and Judicial Co-operation in Criminal Matters. (PJCC), so Title VI of Maastricht was replaced by a new Title VI, Articles K.1 to K.14 inclusive (Article 1.11 of the Amsterdam Treaty). Article 12 of the Amsterdam Treaty decreed that the Articles of the TEU were to be renumbered in accordance with the table of equivalences set out in the Annex to the Treaty. Therefore references to any provision of the TEU would from then be to the new number, in the case of PJCC to Articles 29 to 42 inclusive.
3. Art. 29, TEU, now states clearly: 'The Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the

Member States in the fields of police and judicial co-operation in criminal matters'. This links with the fourth objective set for itself by the Union, namely 'to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime' (Article 2, TEU).

4. Preventing and combating crime by closer co-operation between judicial and other competent authorities of the Member States is to include (Art. 31):
 - '(a) Facilitating and accelerating co-operation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions.
 - (b) Facilitating extradition between Member States.
 - (c) Ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such co-operation.
 - (d) Preventing conflicts of jurisdiction between Member States.
 - (e) Progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.'

As always with EU documents the phrases are carefully constructed. The first emphasis – (a) and (b) – is on the Union simply facilitating the Member States. A wider focus to ensure compatibility and establish minimum rules points to a mediator role, finding ways in which the Member States can co-operate more effectively. It cannot be the imposition of a uniform European criminal code because Article 33 states unambiguously that 'This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. This is the core principle of subsidiarity (that decisions should be taken and actions implemented at the lowest effective level). Matters that can be dealt with most effectively at European level, and only those matters, should be decided at European level. Therefore any initiative or instrument resulting must

address the interaction between Member States, creating a framework within which individual Member States can link together their national criminal justice systems for effective joint working.

5. Because this is the third pillar, responsibility rests with the European Council. Art. 34.1 requires Member States to 'inform and consult one another within the Council with a view to co-ordinating their action'. Then Art. 34.2 goes on: 'The Council shall take measures and promote co-operation, using the appropriate form and procedures as set out ... To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:
 - (a) ...
 - (b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States, Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.
 - (c) ...
 - (d) ...'
6. FDs are therefore a primary means of establishing structures and legal formulae to enable inter-State collaboration to be effective in a specific criminal law issue. They are introduced on the initiative of one or more Member States. The final agreed text must be accepted by all Member States so that the Council of Ministers of Justice can act unanimously when they sign off on it. FDs must be transposed into national law since each Member State has choices to make in the procedures etc. of how it will be implemented, but within the parameters of achieving the mandated objective. Equally, since they operate through domestic legislation, they do not have direct effect, i.e. they cannot provide a cause of action or be relied on by individuals before domestic courts. Discussions on draft FDs are in working parties established by the Council but the Commission must be kept informed (Art. 36.2, TEU) so is usually represented around the table. The Council is also obliged to consult the European Parliament before adopting any FD (Art. 39.1, TEU). The European Court of Justice has a limited jurisdiction to give preliminary rulings on the validity and interpretation of FDs (Art. 35.1, TEU).

7. Coming from the Justice and Home Affairs area, FDs are referenced by the year and the letters JHA. Since the Amsterdam Treaty came into effect, FDs have been used to introduce new co-operative procedures in a range of areas. Some examples (not a complete list):

2000/375/JHA – combating child pornography on the Internet; 2001/383/JHA – counterfeiting of the euro; 2001/500/JHA – money laundering; 2001/720/JHA – standing of victims in criminal proceedings; 2002/475/JHA – combating terrorism; 2002/629/JHA – trafficking in human beings; 2003/568/JHA – combating corruption in the private sector; 2004/68/JHA – sexual exploitation of children; 2005/214/JHA – mutual recognition of financial penalties; 2006/783/JHA – mutual recognition of confiscation orders.

8. The subject of this article is Council Framework Decision 2008/947/JHA, ‘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’. As printed in the *Official Journal of the European Union*, it takes 21 printed pages, comprising:

- a Preamble and 24 recitals (3 pages)
- the legally binding text, in 27 articles (10 pages)
- a standard Certificate (6 pages), and
- a standard form for reporting breach of a probation measure (2 pages).

The Preamble specifies the legal pedigree, i.e. the Council had adopted this Framework Decision having regard to:

- Articles 31 and 34 of the Treaty on European Union
- the initiative of the Federal Republic of Germany and the French Republic (who jointly put the proposal forward), and
- the opinion of the European Parliament (which broadly supported the initiative).

9. Recitals (introductory comments) are important. Although not legally binding, they explain the reasons for and the thinking behind the legal provisions, hence placing the FD within its desired context. The background to this FD is detailed by noting that the Union has

set itself the objective of developing an area of freedom, security and justice. Within this, the specific aim of police and judicial co-operation (PJCC) is to provide a high degree of security for all citizens. A cornerstone of this is applying the principle of mutual recognition of judicial decisions, in other words that court judgments should be respected and enforced throughout the Union. This principle was firmly asserted by the European Council at a special meeting in Tampere, Finland, in October 1999, which focused mainly on JHA issues and which led to a first programme of measures in this area in November 2000. Subsequently the Hague Programme (November 2004) confirmed the aim of advancing the enforcement of criminal sanctions, particularly with a view to facilitating the (re-)integration of offenders into the community.

10. Co-operation in the area of suspended sentences and parole had been put clearly on the agenda in the 2000 programme. Recently the Council adopted Framework Decision 2008/909/JHA (27 November 2008) 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 Union, i.e. enabling the transfer of prisoners serving sentences between Member States. So now, to complement this development, 'further common rules are required, in particular where a non-custodial sentence involving the supervision of probation measures or alternative sanctions has been imposed in respect of a person who does not have his lawful and ordinary residence in the State of conviction' (Recital 3).
11. Other recitals comment on specific Articles of the text and stress that fundamental rights and freedoms within the EU are protected (including data protection – Recital 23). The required references are also included to the principles of subsidiarity (objectives cannot be sufficiently achieved by the Member State on their own) and proportionality (the FD does not go beyond what is necessary to achieve the objectives set) (Recital 24).
12. Finally, the standard Certificate and form for reporting breach, appended to the legal text, must be used where the text specifies and so requires.