



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 9 September 2008

12665/08

**Interinstitutional File:
2006/0158 (CNC)**

COPEN 152

NOTE

from :	Presidency
to :	Delegations
no. CION prop. :	12367/06 COPEN 91 + ADD 1 + ADD 2
no. Pres. prop. :	16494/07 COPEN 181
Subject:	Proposal for a Council framework decision on the European supervision order in pre-trial procedures between Member States of the European Union - Revised text following meeting of 3 September 2008

At its meeting on 3 September 2008, the Working Party on Cooperation in Criminal Matters resumed the examination of the above proposal on the basis of the text set out in doc. 16494/07 COPEN 181. Delegations generally confirmed that they consider that this text is largely preferable to the text of the Commission proposal and that it constitutes a good basis for further work, although some of them indicated that they still see problems of "practicability".

During its work, the Working Party examined Articles 1 - 6, providing useful comments to enhance the quality of the text. Further to these comments, the Presidency revised the text of the draft Framework Decision. This revised text is set out in the Annex.

All delegations have a general scrutiny reservation. DK, IE, FR, SE and UK also have a Parliamentary scrutiny reservation.

The following particular remarks can be made:

- **Recital 4:** the word "suspect" has been replaced by more appropriate language, following comments from i.a. MT, RO and SK.
- **Article 1:** Further to a suggestion by DE, the original Article 1 was split into two separate Articles and the order of the information was reversed (first subject matter, then objectives). On suggestion by UK, in (new) Article 1a a paragraph was added stating that this Framework Decision does not confer any right about the use, in the course of criminal proceedings, of non-custodial measures as an alternative to custody.
- **Article 2a:** The term "supervision order", which could lead to misunderstanding, has been replaced by the term "decision on supervision measures". The definition of this term has been modified and shortened, in line with comments by i.a. DE, EL, IE, AT, SK, FI and SE.
- **Article 4:** On request by LV, FI, SE and UK, this Article was modified in order to allow for the possibility that authorities other than judicial authorities can issue, forward and recognise decisions under this Framework Decision. However, it is made clear that as a general rule judicial authorities should act; action by non-judicial authorities constitutes an exception to that rule. The new language of this Article, which contains a guarantee on judicial review of decisions taken by non-judicial authorities, has been inspired by Article 3 of the draft Framework Decision on "probation" (see doc. 6836/08 COPEN 35).

To be noted that as a result of this change, in the rest of the text the word "[judicial]", in "competent [judicial] authority", has been deleted.

- **Article 5 (new):** This new Article now encompasses the obligation to comply with any summon for a hearing, as formerly set out in (old) Article 5(1)(a) and which - according to various delegations - would be difficult to monitor in an executing State. This obligation should be imposed in all cases, but it is suggested that it should not be forwarded with a view to recognition and monitoring. Failure to comply with this obligation may however constitute a reason to impose (pre-trial) detention, see Article 14(1)(d).

- **Article 5a (new):** This new Article now contains all 'forwardable' obligations that should in principle always be recognised. The Presidency agrees with NL, supported by various other delegations, that this Article therefore needs to be closely examined. In line with comments by several delegations, some items have been linked more closely to the offences allegedly committed. Former items (h) and (i) have been merged, new items (i) ("obligation not to drive a vehicle"), (j) ("medical treatment") and (k) ("bail") have been inserted following suggestions by AT, PL and UK.
 - **Article 6:** This Article has been deleted. The information regarding "national law and procedures" has been transferred to definition 2a.
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REVISED PROPOSAL
with a view to adopting a Council Framework Decision
of
on the application of the principle of mutual recognition to supervision orders in pre-trial
procedures between Member States of the European Union

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31(1)(a) and (c) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission ¹,

Having regard to the opinion of the European Parliament ²,

Whereas:

- (1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice.
- (2) According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 36 thereof, the principle of mutual recognition should apply to pre-trial orders. The programme of measures to implement the principle of mutual recognition in criminal matters addresses mutual recognition of supervision measures in its measure 10.
- (3) The measures provided for in this Framework Decision should aim in particular at enhancing the right to liberty and the presumption of innocence in the European Union seen as a whole and at ensuring cooperation between Member States when a person is subject to obligations or supervision pending a court decision.

¹ OJ C ...

² Opinion delivered on 29 November 2007 (not yet published in the Official Journal).

- (4) As regards the detention of persons subject to criminal proceedings, there is a risk of different treatment between those who are resident in the trial state and those who are not : a non-resident risks being remanded in custody pending trial even where, in similar circumstances, a resident would not. This is due to the perception that the former, by reason of his non-residence in the trial-state, might flee to his home state thereby obstructing the course of justice. In a common European area of justice without internal borders, it is necessary to take action to ensure that a suspect who is not resident in the trial state is not treated any differently from a suspect who is so resident.
- (5) In order to avoid unnecessary costs and difficulties in relation to the transfer of the suspect for the purposes of preliminary hearings or the trial, Member States should be allowed to use video links.
- (6) Where appropriate, electronic monitoring could be used with a view to monitoring supervision measures in accordance with national law and procedures.
- (7) Since mutual recognition of pre-trial supervision measures cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective.
- (8) This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union. No provision of this Framework Decision should be interpreted as prohibiting refusal to recognise a decision on supervision measures if there are objective indications that it was imposed to punish a person because of his or her sex, race, religion, ethnic origin, nationality, language, political convictions or sexual orientation or that this person might be disadvantaged for one of these reasons.

- (9) The provisions of this Framework Decision should be applied in conformity with the right of the Union's citizens to move and reside freely within the territory of the Member States, pursuant to Article 18 of the Treaty establishing the European Community.
- (10) Since all Member States have ratified the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, personal data processed when implementing this Framework Decision should be protected in accordance with the principles laid down in that Convention.

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Subject matter

This Framework Decision lays down rules according to which one Member State recognises a decision on supervision measures issued in another Member State, monitors the supervision measures imposed and surrenders the person to the issuing State in case of breach of these measures.

Article 1a

Objectives

The objectives of this Framework Decision are

- to ensure the due course of justice and, in particular, to ensure that the person will be available to stand trial;
- to promote, in the course of criminal proceedings, the use of non-custodial measures for persons who are not resident in the Member State where the proceedings are taking place.

This Framework Decision does not confer any right to the use, in the course of criminal proceedings, of a non-custodial measure as an alternative to custody, which is a matter governed by the law and procedures of the State where the criminal proceedings are taking place.

Article 2

Definitions

For the purposes of this Framework Decision:

- (a) "decision on supervision measures" shall mean an enforceable decision of a competent authority of the issuing State taken in accordance with its national law and procedures in the course of criminal proceedings and imposing on a natural person, as an alternative to custody, one or more supervision measures (...);
- (b) "supervision measures" shall mean obligations and instructions imposed on a natural person, in accordance with the national legislation of the issuing State, in connection with a decision on supervision measures;
- (c) "issuing State" shall mean the Member State in which a decision on supervision measures has been issued;
- (d) "executing State" shall mean the Member State in which the supervision measures are monitored.

Article 3

Fundamental rights

This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Article 4

Designation of competent authorities

1. Each Member State shall inform the General Secretariat of the Council which judicial authority or authorities, under its national legislation, are competent to issue, forward and recognise decisions on supervision measures according to this Framework Decision in the situation where that Member State is the issuing State or the executing State.
2. As an exception to paragraph 1, Member States may designate non-judicial authorities as the competent authorities for taking decisions under this Framework Decision, provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures.
3. If a decision under Article 14(1)(c) or (d) regarding revocation of the decision on supervision measures or the imposition of a pre-trial detention is taken by a competent authority other than a court, the Member States shall ensure that, upon request of the person concerned, such decision may be reviewed by a court or by another independent court-like body.
4. The General Secretariat of the Council shall make the information received available to all Member States and to the Commission.

Article 5

Obligation to comply with a summon to attend preliminary hearings or trial

A decision on supervision measures shall in all cases contain the obligation for the person concerned to comply with any summon received to attend preliminary hearings or trial relating to the offence(s) with which she has been charged. In addition, the decision shall contain one or more of the supervision measures set out in Article 5a.

Article 5a

Types of supervision measures which can be monitored in the executing State

1. This Framework Decision shall apply to the following supervision measures :
 - (a) (transferred to Article 5 above)
 - (b) an obligation for the person to inform the competent authority in the executing State of any change of residence, in particular for the purpose of receiving summons referred to in Article 5;
 - (c) an obligation not to enter certain localities, places or defined areas in the issuing or executing State;
 - (d) an obligation to remain at a specified place during specified times;
 - (e) an obligation containing limitations on leaving the territory of the executing State;
 - (f) an obligation not to engage in specified activities in relation with the offence(s) allegedly committed, which may include involvement in a specified profession or field of employment;
 - (g) an obligation to report at specified times to a specific authority;
 - (h) an obligation to avoid contact with specific persons or specific objects in relation with the offence(s) allegedly committed;
 - (i) an obligation not to drive a vehicle;
 - (j) an obligation to undergo therapeutic treatment or treatment for addiction;
 - (k) an obligation to pay a certain sum of money as a guarantee through a specified number of instalments.

2. Each Member State shall notify the General Secretariat of the Council, when transposing this Framework Decision, which supervision measures, apart from those referred to in paragraph 1, it is prepared to monitor. The General Secretariat of the Council shall make the information received available to all Member States and to the Commission.

Article 6

(deleted)

Article 7

Criteria relating to the Member State to which the decision on supervision measures may be forwarded

1. A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person has returned or consents to return to that State.
2. The competent authority in the issuing State may, upon request of the person, forward the decision on supervision measures to the competent authority in a Member State other than the Member State in which the person is lawfully and ordinarily residing, on condition that this latter has consented to such forwarding.
3. When implementing this Framework Decision, Member States shall determine under which conditions their competent authorities may consent to the forwarding of a decision on supervision measures in cases pursuant to paragraph 2 of this Article.
4. Each Member State shall make a statement to the General Secretariat of the Council of the determination made under paragraph 3 of this Article. Member States may modify such a statement at any time. The General Secretariat shall make the information received available to all Member States and to the Commission.

Article 8

Procedure for forwarding the decision on supervision measures together with the certificate

1. When, in application of Article 7(1) or (2), the competent authority of the issuing State forwards a decision on supervision measures to another Member State, it shall ensure that it is accompanied by a certificate, the standard form of which is set out in Annex I.
2. The decision on supervision measures or a certified copy of it, together with the certificate, shall be forwarded by the competent authority in the issuing State directly to the competent authority in the executing State by any means which leaves a written record under conditions allowing the executing State to establish their authenticity. The original of the decision on supervision measures, or a certified copy of it, and the original of the certificate, shall be sent to the executing State if it so requires. All official communications shall also be made directly between the said competent authorities.
3. The certificate shall be signed, and its content certified as accurate, by the competent authority in the issuing State.
4. Apart from the measures referred to in Article 5a(1), the certificate referred to in paragraph 1 shall include only such measures as notified by the executing State in accordance with Article 5a(2).
5. The competent authority in the issuing State shall specify for how long it expects that the monitoring of the measures will be needed, taking into account all the circumstances of the case that are known when the decision on supervision measures is forwarded.
6. The competent authority in the issuing State shall forward the decision on supervision measures together with the certificate only to one executing State at any one time.

7. If the competent authority in the executing State is not known to the competent authority in the issuing State, the latter shall make all necessary inquiries, including via the contact points of the European Judicial Network set up by Council Joint Action 98/428/JHA of 29 June 1998 on the creation of a European Judicial Network ³, in order to obtain the information from the executing State.
8. When a authority in the executing State which receives a decision on supervision measures together with a certificate has no competence to recognise it and monitor the supervision measures, it shall, ex officio, forward the decision on supervision measures together with the certificate to the competent authority and shall without delay inform the competent authority in the issuing State accordingly by any means which leaves a written record.

Article 9

Decision of the executing State

1. The competent authority in the executing State shall, as soon as possible and in any case within [10] days of receipt of the decision on supervision measures and certificate, recognise the decision on supervision measures forwarded in accordance with Article 7 and following the procedure laid down in Article 8 and without delay take all necessary measures for the monitoring of the supervision measures, unless it decides to invoke one of the grounds for non-recognition referred to in Article 11.
2. If it is not possible, in exceptional circumstances, for the competent authority in the executing State to comply with the time-limits laid down in paragraph 1, it shall immediately inform the competent authority in the issuing State, by any means of its choosing, giving reasons for the delay and indicating how long it expects to take to issue a final decision.

³ OJ L 191, 7.7.1998, p. 4.

3. The competent authority may postpone the decision on recognition of the decision on supervision measures where the certificate provided for in Article 8 is incomplete or obviously does not correspond to the decision on supervision measures, until such reasonable deadline set for the certificate to be completed or corrected.

Article 10

Adaptation of the supervision measures

1. If the nature of the supervision measures is incompatible with the law of the executing State, the competent authority in that State may adapt them in line with the types of supervision measures which apply, under the law of the executing State, to equivalent offences. The adapted supervision measure shall correspond as far as possible to that imposed in the issuing State.
2. The adapted supervision measure shall not be more severe than the supervision measure which was originally imposed.
3. Following receipt of an information referred to in Article 16(e), the competent authority in the issuing State may decide to withdraw the certificate as long as the monitoring in the executing State has not yet begun. In any case, such a decision shall be taken and communicated as soon as possible and within ten days of the relevant notification at the latest.

Article 11

Dual criminality

1. The following offences, if they are punishable in the issuing State by a custodial sentence or a measure involving deprivation of liberty for a maximum period of at least three years, and as they are defined by the law of the issuing State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to recognition of the decision on supervision measures :
 - participation in a criminal organisation,

- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests ⁴,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,

⁴ OJ C 316, 27.11.1995, p. 49.

- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

2. The Council may decide to add other categories of offences to the list in paragraph 1 at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the Treaty on European Union. The Council shall examine, in the light of the report submitted to it pursuant to Article 24 of this Framework Decision, whether the list should be extended or amended.
3. For offences other than those covered by paragraph 1, the executing State may make the recognition of the decision on supervision measures subject to the condition that the judgment relates to acts which also constitute an offence under the law of the executing State, whatever the constituent elements or however it is described.

Article 12

Grounds for refusal

1. The competent authority in the executing State may refuse to recognise the decision on supervision measures if :
 - (a) the certificate referred to in Article 8 is incomplete or obviously does not correspond to the decision on supervision measures and is not completed or corrected within a reasonable period set by the competent authority in the executing State;
 - (b) the criteria laid down in Article 7(1), 7(2) or 8(4) are not met;
 - (c) recognition of the decision on supervision measures would contravene the *ne bis in idem* principle;
 - (d) the decision on supervision measures relates, in the cases referred to in Article 11(3), to an act which would not constitute an offence under the law of the executing State; in tax, customs and currency matters, however, execution of the decision may not be refused on the grounds that the law of the executing State does not prescribe any taxes of the same kind or does not contain any tax, customs or currency provisions of the same kind as the law of the issuing State;

- (e) the criminal prosecution is statute-barred under the law of the executing State and relates to an act which falls within the competence of the executing State under its national law;
- (f) there is immunity under the law of the executing State, which makes it impossible to monitor supervision measures ;
- (g) if, under the law of the executing State, the person cannot, because of his age, be held criminally responsible for the act on which the decision on supervision measures is based;
- (h) it would, in case of breach of the supervision measures, refuse to surrender the person on the basis of a European arrest warrant for one of the grounds referred to in Article 3 and Article 4(1, 2, 3, 4, 5 or 7) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States⁵ (hereinafter referred to as the “Framework Decision on the European Arrest Warrant”).

2. In cases referred to in paragraph 1 (a), (b), (c) and (i), before deciding not to recognise the decision on supervision measures, the competent authority in the executing State shall communicate, by appropriate means, with the competent authority in the issuing State and, as necessary, request the latter to supply without delay all additional information required.

Article 13

Law governing supervision

The monitoring of supervision measures shall be governed by the law of the executing State.

⁵ OJ L 190, 18.7.2002, p. 1.

Article 14
Competence to take all subsequent decisions
and governing law

1. The competent authority in the issuing State shall have jurisdiction to take all subsequent decisions relating to a decision on supervision measures. Such subsequent decisions include notably :
 - a) review and withdrawal of the decision on supervision measures ;
 - b) modification of the supervision measures ;
 - c) revocation of the decision on supervision measures ; and
 - d) imposition of a pre-trial detention, following a breach of the supervision measures, a failure to comply with a summon to attend preliminary hearings or a trial, as referred to in Article 5, or an engagement in criminal activity.

2. The law of the issuing State shall apply to decisions taken pursuant to paragraph 1 and to all other consequences including, where applicable, the enforcement of the pre-trial detention.

Article 15
Obligations of the authorities involved

1. When the period of time referred to in Article 8(5) has elapsed, the competent authority in the issuing State shall specify, at the request of the competent authority in the executing State, for which additional period it expects that the monitoring of the measures is still needed.

2. The competent authority in the executing State shall immediately notify the competent authority in the issuing State of any breach of a supervision measure, and any other finding which could result in revocation of the decision on supervision measures. Notice shall be given using the standard form set out in Annex II.
3. Where the legislation of the issuing State provides that a judicial hearing must be held before a decision referred to in Article 14(1) is taken, this can be done using *mutatis mutandis* the procedure contained in instruments of international and European Union law that provide for the possibility of using video links for hearing persons.
4. The competent authority in the issuing State shall immediately inform the competent authority in the executing State of any [final] decision referred to in Article 14(1).
5. If the decision on supervision measures has been withdrawn, the competent authority of the executing State shall end the measures ordered as soon as it has been duly notified by the competent authority of the issuing State.

Article 16

Information from the executing State

The competent authority in the executing State shall without delay inform the competent authority in the issuing State, by any means which leaves a written record :

- (a) of the transmission of the decision on supervision measures as well as the certificate to the competent authority responsible for its recognition and for taking the ensuing measures for the monitoring of the supervision measures in accordance with Article 8(8) ;

- (b) of the fact that it is in practice impossible to monitor the supervision measures for the reason that, after transmission of the decision on supervision measures and the certificate to the executing State, the person cannot be found in the territory of the executing State, in which case there shall be no obligation of the executing State to monitor the supervision measures ;
- (c) of the final decision to recognise the decision on supervision measures and take all necessary measures for the monitoring of the supervision measures ;
- (d) of any decision not to recognize the decision on supervision measures and to assume responsibility for monitoring of the supervision measures in accordance with Article 12, together with the reasons for the decision ;
- (e) of any decision to adapt the supervision measures in accordance with Article 10.

Article 17

Surrender of the person

1. If the decision on supervision measures has been revoked and a pre-trial detention has been imposed, the person can be surrendered to the competent authority in the issuing State using the procedure provided for by the Framework Decision on the European Arrest Warrant.
2. Provisions of the Framework Decision on the European Arrest Warrant shall apply in so far as they are relevant in the context of criminal prosecutions, except Article 2(1). Grounds referred to in Articles 3 and in Article 4(1, 2, 3, 4, 5 and 7) of that Framework Decision may not be invoked to refuse to surrender the person, unless they are based on facts that appeared after the recognition of the decision on supervision measures.

Article 18

Consultations

Where and whenever it is felt appropriate, the competent authorities of the issuing State and of the executing State may consult each other with a view to facilitating the smooth and efficient monitoring of the supervision measures.

Article 19

Amnesty

An amnesty may be granted both by the issuing State and by the executing State.

Article 20

Languages

Certificates shall be translated into the official language or one of the official languages of the executing State. Any Member State may, either when this Framework Decision is adopted or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Union.

Article 21

Costs

Costs resulting from the application of this Framework Decision shall be borne by the executing State, except for costs arising exclusively within the territory of the issuing State.

Article 22

Relation to other agreements and arrangements

1. In so far as such agreements or arrangements allow the objectives of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the mutual recognition of pre-trial transfer procedures, Member States may:
 - (a) continue to apply bilateral or multilateral agreements or arrangements in force when this Framework Decision comes into force.
 - (b) conclude bilateral or multilateral agreements or arrangements after this Framework Decision has come into force.
2. The agreements and arrangements referred to in paragraph 1 shall in no case affect relations with Member States which are not parties to them.
3. Member States shall, within three months from the entry into force of this Framework Decision, notify the Council and the Commission of the existing agreements and arrangements referred to in paragraph 1(a) which they wish to continue applying.
4. Member States shall also notify the Council and the Commission of any new agreement or arrangement as referred to in paragraph 1(b), within three months of signing any such arrangement or agreement.

Article 23

Implementation

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by [....].

2. By the same date Member States shall transmit to 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.

Article 24

Report

1. By [...], the Commission shall draw up a report on the basis of the information received from Member States under Article 23(2).
2. On the basis of this report, the Council shall assess
 - the extent to which the Member States have taken the necessary measures in order to comply with this Framework Decision; and
 - the application of this Framework Decision.
3. The report shall be accompanied, if necessary, by legislative proposals.

Article 25

Entry into force

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

Done at [Brussels],

For the Council

The President