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ADDENDUM TO INITIATIVE

from: German and French Delegations
dated: 15 January 2007
Subject: Draft Council Framework Decision 200../.../JHA of.....on the recognition and supervision of suspended sentences and alternative sanctions

Delegations will find attached an explanatory memorandum in respect of the Initiative presented by the Federal Republic of Germany and the French Republic with a view to the adoption by the Council of a Framework Decision on the recognition and supervision of suspended sentences and alternative sanctions.

EXPLANATORY MEMORANDUM

Proposal for a Framework Decision on the recognition and supervision of suspended sentences and alternative sanctions

Background

The Conclusions of the Tampere European Council of 15 and 16 October 1999 established the principle of mutual recognition of judicial decisions as the cornerstone of police and judicial cooperation in the European Union. In the programme of measures adopted on 29 November 2000 to implement the principle of mutual recognition of judicial decisions in criminal matters, the Council pronounced itself in favour of cooperation in the area of suspended sentences and parole (Measure 23).

In the Hague Programme of 4-5 November 2004, the principle of mutual recognition was reiterated.

To date, the only international-law instrument on cross-border probation assistance is the Council of Europe Convention of 30 November 1964 on the supervision of conditionally sentenced or conditionally released offenders, which entered into force in 1975.

This Convention has thus far been ratified by only 12 Member States (AT, BE, CZ, EE, FR, IT, LU, NL, SE, SI, SK, PT); some of them expressing numerous reservations. This has limited the importance of this instrument in practice. Where the Convention has been applied, it has proven cumbersome.

The topic was addressed in 2001 under the Belgian Presidency in the Council Working Party on Cooperation in Criminal Matters (COPEN). A proposal dated 6 July 2001 (10646/01 COPEN 36) served as the basis for discussion. However the work was not followed up any further, because other legislation projects were on the agenda.

In its communication dated 10 May 2005 on the Hague Programme (COM(2005) 184 final), the European Commission announced a "proposal on recognition and execution of alternative sanctions and on suspended sentences" for the year 2007 (point 290 of the List of Measures in the Annex of the aforementioned COM document).

To this end, the Commission convened a meeting of experts on 23-24 October 2006, during which it was confirmed both that there was a practical need in this field and that the existing legal instruments were inadequate.

The intention is for the present draft to fit into the set of Framework Decisions that have so far been adopted or are currently under consideration, but not to affect their application. More specifically, the proposal is intended to constitute a useful addition to the Framework Decision 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 European Union. In particular, this Framework Decision provides for arrangements for the transfer of a person sentenced to a term of imprisonment or measure involving deprivation of liberty from the sentencing State to the executing State. It also provides that any subsequent decision regarding conditional release is governed by the law of the State to which the person has been transferred. However, the situation where a sentenced person is released in the sentencing State subject to certain conditions after partially serving a sentence (conditional release), is included in the scope of application of the present draft Framework Decision. If the person sentenced then returns to his/her country of origin, the same problems arise as if the sentence had been suspended at the time of imposition.

Most of the provisions of the draft are based as far as possible on the Framework Decision on the enforcement of custodial sentences, in order to ensure that application of the instruments in the field of cooperation in criminal matters is as coherent as possible.

The draft contains the following key elements:

- Fundamental obligation to recognise the foreign judgment and to supervise the measures imposed by the sentencing State;
- Inclusion of conditional release and alternative sanctions in the scope of application;

- Dependence of the competence of the executing State on the lawful habitual place of residence of the sentenced person;
- Setting of conditions that the executing State must be able to supervise, subject to it having the possibility of adapting them to its own law;
- Waiver of the verification of double criminality for certain listed offences as taken over from the list of 32 categories of offences in the Framework Decision on the European arrest warrant;
- Fundamental competence of the executing State for all other decisions relating to the suspended sentence or alternative sanction;
- Time limits for decisions concerning the denial of supervision or the assuming of competence for any additional decisions;
- Where the sentencing State is competent for any additional decisions: the obligation to communicate whether, after the revoking of suspension, enforcement of the sentence will be sought according to the Framework Decision on the enforcement of custodial sentences, or the transfer of the sentenced person will be requested according to the Framework Decision on the European arrest warrant.

The aim of the proposal is that convicted persons who have been given a suspended sentence or alternative sanction can return from the sentencing State to their State of habitual residence without any adverse effect on the suspensory measures imposed. Likewise, it is necessary to avert the risk that in the case of the prosecution of persons who have their habitual place of residence in another Member State, a court either refrains from suspending a sentence at all or imposes a suspended sentence without imposing any accompanying measures. The provisions of this proposal are intended to make it easier to impose and enforce such sentences on non-residents by introducing an obligation for Member States to recognise the conviction of a person for whom they constitute the State of origin or of residence, and to supervise the suspensory measures and alternative sanctions imposed. The draft Framework Decision can also enable better protection of victims, promote the social reintegration of sentenced persons and prevent relapses. In this, both the provisions and the goals of this draft correspond to those that have been incorporated into previous Framework Decisions.

Legal basis/Subsidiarity

The legal basis for the Framework Decision is Article 31(1)(a) and (c) of the EU Treaty

There is no other instrument that appears sufficient to regulate EU-wide, cross-border cooperation in the area of probation assistance than a Framework Decision. In particular, the Member States cannot each establish rules of their own that will both be individually appropriate and mutually compatible. It is only through a Framework Decision that the objective sought by the draft can be achieved.

Explanation of the specific provisions

Article 1 defines the Proposal's subject matter and scope of application. Article 1(1) expressly states that the motives for cross-border supervision of suspended sentences are both the re-integration of convicted persons as well as the protection of victims. Article 1(2) determines the Framework Decisions which remain unaffected by the Proposal's scope of application. These particularly include the Framework Decisions on the enforcement of custodial sentences and on the application of financial penalties. In this regard, the proposed Framework Decision fills the previously described gap in the Framework Decisions previously adopted and/or currently in the process of discussion.

Article 2 contains a definition of terms which strive to take into account the various particularities in the individual Member States. Therefore, under the definition of the term "judgment" in Article 2(a) of the proposal, the scope of application includes, in addition to suspended sentences, alternative sanctions as well as the suspension of imposition of a sentence or detention order by imposing one or more suspensory measures (so-called conditional sentence). The term "detention order" is taken from Article 1 of the Framework Decision on the European arrest warrant and is identical in terms of content.

The terms enumerated in point (a) are explained in more detail in Article 2(b) to (f). Pursuant thereto, the term "suspended sentence" (Article 2(b)) also includes conditional release after a portion of a custodial sentence or detention order has been served. While "suspensory measures" (Article 2(c)) mean obligations which are connected with a suspended sentence or a sentence or detention order whose imposition has been suspended, the "alternative sanction" (Article 2(d)) is an independent punishment whose goal is to effect compliance with a particular obligation or instruction. The inclusion of this type of sanctions is based upon the idea that such measures are generally those that may be imposed as suspensory measures in other Member States, and which are thus of a familiar nature.

The term "executing State" (Article 2(f)) is defined in terms of where the measures are in fact supervised. The actual allocation of competence for supervision arises from Article 5(1), which refers to the place in which the sentenced person is legally and ordinarily resident.

Article 3 refers to the obligations arising from Article 6 of the Treaty on the European Union and is consistent with Article 3(4) of the Framework Decision on the enforcement of custodial sentences.

Article 4 deals with the determination of the competent judicial authorities of the Member States and is largely consistent with Article 2 of the Framework Decision on the enforcement of custodial sentences. The term "judicial authorities" makes it clear that neither administrative authorities nor institutions under public or private law that provide probation assistance may be vested with primary competence and decision-making capacity by way of this Framework Decision. However, this does not exclude the possibility that other tasks, such as, for example, the concrete implementation of measures or the selection of the probation officer, may be performed by other offices.

As with other legal instruments on mutual recognition, the principle is the direct transmission of the judgment and certification by the judicial authority of the sentencing State to the judicial authority of the executing State which is competent both in terms of location and subject matter.

In order for cooperation in probation assistance to remain manageable despite the substantially differing systems in the Member States, Article 5 provides a list of suspensory measures and alternative sanctions whose supervision may be ensured by all Member States. In addition to the sentenced person's obligation to notify the competent authorities of the executing State of any change of residence, pursuant to Article 5(1) of the draft these include orders regarding life-style, reporting requirements, contact and residence bans, rules with respect to compensation for prejudice caused as well as community service activities. The assignment of a probation officer is provided for as well. Pursuant to Article 5(2), the Member States may specify that they are prepared to supervise other obligations and instructions that go beyond this list of measures. In this way, bilateral particularities such as, for example, already-existing cooperation between neighbouring States, may be taken into account. Article 5(3), applying paragraphs 1 and 2, specifies the measures whose supervision may be transferred to the executing State. Its goal is not to restrict the type of measures that a national judicial authority may impose upon a sentenced person; rather, it merely specifies the measures whose supervision may be transferred to the State of ordinary residence pursuant to this Framework Decision.

Article 5(1) provides that the State of legal and ordinary residence is the criterion for application of the draft Framework Decision. When the judgment is forwarded to it, the executing State (Article 2(f)), subject to Articles 8 and 9, has the obligation to recognise and supervise the suspensory measures or alternative sanctions pursuant to Article 7.

Article 6 describes the procedure provided for forwarding the judgment and the certificate, including the use of forms (Article 6(2)). The rules correspond in large part to those of Article 4 of the Framework Decision on the enforcement of custodial sentences.

Article 7 contains the general obligation to recognise and take over supervision of suspensory measures and alternative sanctions. It simultaneously provides that, as soon as the executing State has decided to recognise and take over supervision, it is to immediately take the necessary measures to carry out supervision. Article 10 provides for a time-limit of ten days for the executing State to make this decision. If no grounds for refusal are asserted pursuant to Article 9, the executing State must directly take the measures necessary for supervision of the conditions imposed.

In order to facilitate the taking over of the measures by the executing State, Article 7(2) and (3) of the draft provide for the possibility of adapting the suspensory measures or alternative sanctions specified in the judgment to the law of the executing State. The determining factor in this respect is the incompatibility of the measure with regard to its nature or duration. The adapted measure or sanction must correspond as far as possible to that imposed in the sentencing State and may not be more severe. In such a case, Article 13 provides for mandatory consultations between the judicial authorities involved.

Like the other legal instruments regarding mutual recognition, Article 8 excludes the possibility of asserting the lack of double criminality for offences from the list of the 32 categories of criminal offences from the Framework Decision on the European arrest warrant. This provision was selected in order to ensure cross-border supervision of measures to the widest possible extent. It seems to be possible, in cases where the executing State is merely taking over supervision, to waive the verification of double criminality. In contrast, the executing State retains the possibility of refusing responsibility for all subsequent decisions owing to the lack of double criminality (Article 12(3)).

The reasons for which recognition of the judgment and assumption of responsibility for supervising suspensory measures may be refused are enumerated in Article 9, and are also for the most part consistent with the reasons for refusal already familiar from other Framework Decisions. Special significance is accorded to the reasons for refusal connected firstly with those cases in which the judgment provides for medical/therapeutic treatment which, in view of the legal or healthcare system of the executing State, cannot be supervised notwithstanding the opportunities for adaptation pursuant to Article 7 (Article 9(1)(i)), and secondly, in cases where no agreement on adaptation of suspensory measures or alternative sanctions can be reached between the judicial authorities involved (Article 9(1)(j)). Article 9(1)(i) is designed to provide the executing State with the opportunity of refusing to assume responsibility for supervision of measures if, for legal or factual reasons, it is not in a position to do so, for example because a certain form of therapy is not allowed pursuant to its domestic law. Article 9(1)(j) regulates the effects of failed consultations on the adaptation of suspensory measures or alternative sanctions pursuant to Article 7(2) and (3). If the States involved do not then come to an agreement, the recognition and taking over of supervision may be refused, and the sentencing authority may decide to secure implementation of the measures itself.

Article 10 provides that the competent judicial authority of the executing State must decide within ten days whether it will recognise the judgment and take over supervision of the suspensory measures and alternative sanctions. This short time-limit is designed to ensure rapid decisions in order to avoid failure to secure supervision for too long a period.

Article 11 makes it clear that the law of the executing State is to be applied to the supervision of suspensory measures and alternative sanctions in cases where supervision is taken over. This applies particularly to the practical organisation of supervision.

Article 12(1) regulates the principle that the competent judicial authority in the executing State of the draft is also competent to take all subsequent decisions relating to the suspended sentence or alternative sanction. In particular, this applies to the modification of suspensory measures, sentencing in the case of a conditional sentence, the revocation of conditional suspension of the sentence and remission of the sentence. The law of the executing State also applies to all other consequences of the judgment, in particular enforcement of the custodial sentence imposed. This means that full competence is transferred from the sentencing State to the executing State. This solution reflects in principle the idea on which the Framework Decision on the enforcement of custodial sentences is based: full responsibility for enforcement of the sentence lies with the executing State. This solution serves to avoid the legal complexity caused by the division of competences between the sentencing and the executing authorities, and the ponderousness of transfer procedures that such a division can entail when a measure is revoked.

However, in the event of a conditional sentence, the sentencing State may, in accordance with Article 12(2), reserve competence to take all subsequent decisions so that its own law would remain applicable. Such cases, where the guilt of a convicted person has been established but a sentence has not yet been imposed, can justify the sentencing State having the possibility of deciding on the specific punishment itself.

As an exception to the principle contained in Article 12(1), the Member States may, on a case-by-case basis, limit their assumption of responsibility to the supervision of suspensory measures and alternative sanctions so that the sentencing State retains competence to take all subsequent decisions in such cases. The purpose of this rule is to accommodate those cases in particular where insurmountable legal or factual difficulties stand in the way of the executing State assuming responsibility for all subsequent decisions. The decision to refuse subsequent responsibility must be notified together with the decision on recognition of the judgment within the time-limits set in Article 10. Article 12(3), third sentence, makes clear that in spite of the executing State's refusal of responsibility for all subsequent decisions it is still obliged in all cases to recognise the judgment and to supervise the suspensory measures and alternative sanctions in accordance with Article 7.

Article 13 stipulates the obligation to consult in the event of measures being adapted in accordance with Article 7(2) and (3). This is intended to give the sentencing State the opportunity to indicate its position on the nature and extent of such adaptation, in order to give the greatest possible effect to the measures imposed. Article 13(2) provides for the possibility of waiving consultations, in order to speed up the procedure. It is possible in practice that the sentencing State will only have an interest in indicating its position on how the measures are adapted if, in exceptional cases, it retains competence to take all subsequent decisions. In the event of consultations being waived, the executing State must subsequently notify the sentencing State of any adaptations made (Article 13(2)).

Article 14 stipulates the obligation of the authorities in both Member States involved to provide information if the executing State assumes jurisdiction for all further decisions. According to Article 14(1), the executing State must inform the sentencing State as to how supervision will proceed. Such knowledge can be important, both for the formal conclusion of domestic proceedings and in the event that jurisdiction is transferred back to the sentencing State in accordance with Article 17. Article 14(2) concerns the competent authority in the sentencing State. Its obligation to provide information is explained, for example, by the possibility that some new elements, such as the convicted person re-offending, could prove relevant to the question of suspension.

Article 15 applies only in exceptional cases where the sentencing State has retained jurisdiction for all further decisions. Pursuant to Article 15(1), notification is to be made firstly of any breach of a suspensory measure or alternative sanction, because this can always be a determining factor for further decisions (point (a)). Secondly, point (b) provides that the executing State must also notify any other finding which might possibly lead to a new decision in the sentencing State. The assessment of whether findings within the meaning of the provision are involved in such cases is a matter for the executing State.

Article 15(3) provides that the sentencing State, in the case of a decision on imposition of sentence or on revocation of suspension of sentence, is obliged to ensure that the person located in the executing State is first given a judicial hearing. The executing State must take those measures which, if applicable, enable this hearing to be conducted via video-conference as provided for in Article 10 of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union.

Article 15(4) deals with the duty of the sentencing State to immediately inform the executing State of the decisions enumerated in the provision with determining effects on the supervision of measures so that the executing State may take the appropriate steps. It must then either enforce the adapted suspensory measures or end the measures (Article 15(6)). In the event of imposition of a sentence or revocation of suspension of sentence, Article 15(5) provides that the competent authority of the sentencing State must notify whether it intends to request the executing State to take over responsibility for enforcement of the measures involving deprivation of liberty pursuant to the Framework Decision on the enforcement of custodial sentences or whether it will request surrender of the person concerned pursuant to the Framework Decision on the European arrest warrant. The executing State then takes the measures provided for in the respective relevant Framework Decision in order to secure enforcement of the sentence or surrender of the sentenced person. In both cases, the further procedure is also governed by the provisions of the relevant Framework Decision. This rule is based upon the idea that the rules of this draft and those of already adopted legal instruments of judicial cooperation are to be properly interlinked with one another.

Article 16 makes it clear that both States involved have the right to declare an amnesty or pardon. Such a decision is to be recognised by the respective other State.

Article 17 deals with the case where the sentenced person transfers his lawful habitual residence to another Member State, whether this be the sentencing State or a third Member State. The rule provides that the jurisdiction in respect of supervision of the suspensory measures and alternative sanctions, as well as all further decisions relating to the suspended sentence or alternative sanction, is transferred back to the competent judicial authority of the sentencing State. If the sentenced person is in another Member State, the sentencing State decides about a possible renewed transfer. The key here is to avoid having a Member State retain responsibility for supervision of the suspensory measures even if the sentenced person is no longer present in its sovereign territory and his social reintegration in that State can therefore no longer be assured.

Articles 18 and 19 are consistent with Articles 18a(1) and Article 19 of the Framework Decision on the enforcement of custodial sentences.

Article 20 governs the relationship with the Council of Europe Convention of 1964 (paragraph 1) and, with regard to existing or future Conventions or agreements, clarifies that the Member States may apply and/or agree upon instruments which go beyond the goals of the proposal (paragraphs 2 and 3).

Articles 21 and 22 contain provisions on the implementation and entry into force of the Framework Decision.

