Presentation of the Framework Decision on the supervision of probation measures and alternative sanctions
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I. Introduction

Let me begin by thanking the Belgian EU Presidency for taking the initiative for this very timely seminar on legislative and practical aspects of implementation of the Framework Decision on supervision of probation measures and alternative sanctions. This seminar is fully in line with another, current Belgian initiative to complement legislative work in Bruxelles with a host of practical measures intended to facilitate implementation of the framework decisions into national law of the Member States as well as – and even more important – their application in practice. It is thus very appropriate that the current seminar is attended by both, representatives of the Ministries of Justice, who have been involved in the negotiation of the framework decision or are involved in its implementation into national law as well as practitioners, who know from their day-to-day work what the crucial issues and current difficulties of cross-border cooperation in this field are.

I have been asked to give a general presentation of the framework decision and focus in particular on legislative aspects of its implementation. Let me begin by providing you with some facts on the background and process by which this framework decision came about. I will then make a few remarks on its purpose and scope before I will turn to some problem areas we discussed during the negotiation process.

II. Background

The Framework Decision on probation and alternative sanctions was joint German/French initiative. We began to negotiate under the German EU Presidency

in early 2007 and negotiations concluded under Portuguese Presidency ten month later. The draft followed in many respects other instruments on mutual recognition of judicial decisions, which have been developed ever since the 1999 European Council in Tampere: the framework decisions on the European Arrest Warrant, on mutual recognition and enforcement of freezing orders, financial penalties, confiscation orders and enforcement of custodial sentences – not to mention the European Evidence Warrant.

The drafting of the framework decision was inspired by the observation that the increased mobility of European citizens is also leading to an increased number of cases, where citizens are prosecuted for minor offences in another Member State, which warrant a suspended or conditional sentence or an alternative sanction rather than enforcing a custodial sentence. On the other hand, the 1964 Council of Europe Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (CETS 51) has only been ratified by 12 EU Member States, in many cases with extensive reservations, and has found very limited application in practice. The aim thus was to develop a mutual recognition instrument which could replace the COE convention and which could be of benefit to those, who have been found guilty of minor offences and who could be offered the possibility of serving there probation period or alternative sanction in their home country.

Before setting out to draft a proposal for this framework decision we circulated a questionnaire to all Member States to solicit valuable information for the preparation of the draft in particular on questions such as the different legal concepts and procedures applied in the Member States – suspended sentence, conditional sentence, conditional release, alternative sanctions – as well as on the different types of measures that may be imposed in the Member States and the procedures and responsibilities for supervision and – where necessary – revocation of a probation decision.

Together with the European Commission we held an expert hearing in October 2006 in which almost all Member States and representatives of the COE and of NGOs participated. Based on the very fruitful discussions we had during that expert hearing, we could conclude:

- That EU Member States found the CoE Convention not to be sufficient;
- Almost all EU Member States were positive towards the idea of negotiating a new instrument based on the principle of mutual recognition;
- Member States at that expert meeting also agreed that the new instrument should foresee that the jurisdiction to take any subsequent measures after the person has returned to his/her home country and in case the person is found to have not been in compliance with the probation measures, that this jurisdiction to decide on a possible revocation of a decision on early release or on the suspension of enforcement of a custodial sentence should – to the extent possible – turned over to the executing state;
- Furthermore, Member States at that expert meeting also agreed that we should make an attempt to extend the scope of application of the framework decision to alternative sanctions, which are known in some Member States either as an alternative to a custodial sentence or as an alternative to a suspended custodial sentence.

III. Purpose, scope

The draft FD that was presented in early 2007 was largely inspired by the outcome of the discussions at that expert meeting. It was designed to serve a two-fold purpose:

- To offer the convicted person the possibility to return to his home country and to comply with probation measures or alternative sanctions which have been imposed by another Member State;
- To ensure that supervision of compliance with such measures is possible even though the person has returned to his home state.

Thus the aim of the FD is:

- to enhance the person's prospects of being reintegrated into society,
- by setting up a cross-border mechanism of mutual recognition of probation decisions,
- a mechanism that helps to avoid unnecessary prison terms of foreigners which may currently be considered unavoidable because the person has no residence in the state of conviction,
- but also helping to ensure effective supervision of probation measures even if the person has left the sentencing state and thus – as article 1 of the framework decision states – with a view to the protection of victims and the general public.

In reviewing the scope of the framework decision – and this is important to note in the implementation phase – the framework decision can not be utilized for a "transfer" of the person; it applies only if the person has returned to his home country or wants to return to his home country as a "free man". Under certain circumstances the framework decision can – upon request of the sentenced person – also be used if the person wants to relocate to a Member State other than the one in which he previously has been ordinarily residing.

While the framework decision thus serves a similar purpose as the framework decision on the enforcement of custodial sentences – to facilitate social rehabilitation of the person – it applies in a distinctly different phase of enforcement of a custodial sentence: in case of a transfer under the framework decision on enforcement of custodial sentences, the executing state may decide – after the person has been transferred – to conditional release a person while imposing certain probation measures. The new framework decision comes into play if the person has already been released in the sentencing state and wants to return to his home country while being in a probation supervision program.

The framework decision in this respect harmonizes neither the substantive law provisions of the Member States on when and under what conditions a person may be released early (or placed under supervision, following a suspended sentence or

an alternative sanction), nor does it harmonize Member States' procedures and provisions on competent authorities

It thus is a true framework decision on mutual recognition of judicial decisions and defines the conditions under which another Member State is required – within limits – to recognise a foreign judgment, supervise the observance of certain probation measures or alternative sanctions and – where possible, and I will come back to this later – take any subsequent decision that may be required in view of noncompliance.

IV. Problem areas discussed during negotiation

If you have had the pleasure of reading the whole text of the framework decision it may appear to be unusually complex. And I would agree….. It is even more complex than the original German/French draft framework decision was…. This is due to the fact that negotiation of this framework decision appeared to be quite a complicated matter. Not that Member States in the Council working groups were not willing to find agreement on the text or not interested in coming up with an easy to read and easy to apply text.

No, not that. But it turned out that Member States legislation, procedures and practice in the area of sentencing, probation decisions and applicable procedures and practices are rather divergent. It thus was quite difficult to find a common solution for a mechanism of cross-border recognition and supervision.

In view of the discussions to be held at this seminar, I would like to point to four issues that were of particular difficulty in the negotiation process:

1. Different procedural concepts of suspended sentences/conditional release/probation/alternative sanctions in Member States
2. Different authorities competent for decisions
3. Different types of measures
4. Question of competence for subsequent decisions

1. Different procedural concepts

The framework decision – as defined in article 2 – is applicable:

- In case of a judgment imposing a custodial sentence, the enforcement of which has been suspended, either already by the judgment (suspended sentence) or after a certain period of enforcement of the custodial sentence by way of a probation decision granting conditional release;
- In case of a conditional sentence, which is known in some Member States and which can be characterized as a judgment determining the guilt of the person but deferring a decision on a custodial sentence for a certain period of time and under certain conditions;
- And in case of an alternative sanction, which may be characterized as a sanction other than a custodial sentence, a financial penalty or a decision on confiscation. Again Member States' legislation seems to differ in that in some Member States such judgments imposing an alternative sanction already include the determination of a certain custodial sentence in case the person does not comply with the alternative sanction imposed. In other Member States the period of a potential custodial sentence to be applied in case of non-compliance with the alternative sanction is spelled out in the law. In yet other Member States such determination will – in case of non-compliance – be made in a subsequent court decision.

Member States agreed in the Council that each of these different concepts eventually serve a similar purpose and thus Member States are requested under the framework decision to recognize a judicial decision of another Member States regardless of whether or not the law of the executing Member State foresees the same or a similar type of procedure.

Thus in implementing the framework decision, Member States will be expected to ensure effective recognition and supervision as long as the type of decision taken in the issuing state is in conformity with the definitions given in article 2 of the framework decision and irrespective of the legal term applied to this type of procedure either in the issuing or in the executing state.

2. Different authorities competent for decisions

A second area that was a headache for those negotiating the framework decision – and which may still cause some difficulty in the implementation of the framework decision – is the fact that Member States have quite different rules on the competence of their authorities in taking decisions in this area:

- A common starting point in any event is that the basis for any decision to impose probation measures or alternative sanctions must be a judgment by a criminal court (art. 2 sect. 1);
- While such an extension of scope has been suggested in the negotiation process, the framework decision does not apply to such measures/ sanctions being imposed by a public prosecutor; thus the framework decision does e.g. not apply to measures imposed by the public prosecutor in the course of criminal investigations and in return for his decision to close the file or suspend prosecution;
- However, only the judicial decision that is the basis for imposing probation decisions or alternative must be a final judgment whereas the decision on conditional release and/or the decision to impose or select or subsequently modify certain probation measures or alternative sanctions can be taken by a different authority – even an administrative authority if so foreseen by the law of the issuing state;
- It is up to the Member States to determine their competent authorities acting either as issuing or as executing authority. And Member States are in principal required to accept decisions by the authorities of the other Member States regardless of whether or not as similar authority would be in charge to take such a decision in their own state.

- There is one little element of harmonisation in this respect – however applicable only to the Member States as executing Member States: in accordance with article 3 sect. 3 Member States must ensure the possibility for the person to have judicial recourse to any decision by an authority other than a court in case of – the executing state – taking a decision to revoke the suspension of execution of a sentence or of the decision on conditional release or on the imposition of a custodial sentence in case of non-compliance with an alternative sanction or the terms of a conditional sentence which have been imposed in the issuing state. I don't recall if there are Member States where such decisions are taken by an authority other than a court. The framework decision would require these Member States to at least foresee possibilities for judicial control in case of a probation measure or alternative sanction transferred to them under the present framework decision.

3. Different types of measures

Widely discussed during the negotiations were also the different types of probation measures and/or alternative sanctions known in the different Member States. The result of these discussions is a list of measures spelled out in article 4 sect. 1, which all Member States are required to recognize and supervise or enforce.

In addition, they have the possibility by way of a notification to the General Secretariat of the Council to declare which other types of measures they are willing to recognize if imposed by the authorities of another Member State.

The framework decision then allows the executing state for a certain degree of manœuvre in adapting the measure if it is incompatible with the law of the executing state in terms of nature or duration (art. 9 sect. 1). It will be interesting to see how Member States will implement this provision in relationship to the general requirement to recognize and supervise all measures listed in art. 4 sect. 1. It was certainly our assumption during the negotiation that in principle all Member States' legislation or practice "knows" the types of measures listed in article 4 sect. 1. In our

reading, the possibility to “adapt” in accordance with art. 9 sect. 1 should thus be limited to situations where the specific measure imposed – while falling into the categories of art. 4 sect. 1 in principle – would not be legally possible to impose in the executing state.

However – and this was an important issue during negotiations – the framework decision expects Member States to – in principle – recognise and supervise measures of the type listed in art. 4 sect. 1 even if they have been imposed under a different procedure in the issuing Member States. Thus the Member States are expected to recognize a measure which in the issuing state has been imposed in the course of a decision on a suspended sentence even if the executing Member State law foresees this type of measure only in the case of an alternative sanction.

4. Question of competence for subsequent decisions

Perhaps the most difficult issue and most complex part of the final framework decision are the provisions on jurisdiction – authority and responsibility – for taking any subsequent decision. The questions that arise in this context are largely the same that needed to be dealt with already in the CoE Convention: The question if – once the person has travelled to his home country and the home country has undertaken to supervise the probation measures or alternative sanctions – if such subsequent decisions should best be taken by the executing state or the issuing state.

I already mentioned at the beginning of my presentation that during the expert meeting we held together with the Commission prior to drafting the proposal we heard the clear message by Member States that – where possible – such decisions should be in the hands of the executing state.

I can tell you that when we first considered coming up with an initiative we were not sure that Member States would in the end be able to agree on such a far reaching concept and that we should perhaps be less ambitious by focussing on supervision – and information back to the issuing state in case of non compliance.

It seems to me quite obvious, however, that it is much more in the interest of justice and of finding appropriate responses to the convicted person's situation and behaviour to give this responsibility into the hands of an authority in the country where the person now lives rather than leaving the ultimate decision on any modification of the measures or the revocation of the suspension of execution of a sentence in the hands of the issuing state.

The final outcome is a compromise. Negotiations showed that it was not possible to foresee in all cases that such decisions are to be made by the executing authority. The question of the appropriate solution is very much related to two other areas of difficulty which I have mentioned before:

- The different types of procedural concepts – suspended sentence and conditional release, conditional sentence and alternative sanction – the latter either with or without determination of an eventual custodial sentence;
- The different types of authorities responsible for determining probation measures or alternative sanctions as well as their subsequent modification or the revocation of suspension of execution of sentences.

During negotiations it was fairly easy to agree

- that any modifications of probation measures or alternative sanctions should be done by the competent authorities of the executing state in which the convicted person now lives
- and that in case of a suspended sentence or the conditional release of the person any subsequent decision on revocation of suspension or early release should also be taken by the authorities in the executing state. The same should apply in case of an alternative sanction where there is already a decision on a custodial sentence to be applied in case the person does not comply with the alternative sanction.

More difficulties were seen in case of conditional sentences and alternative sanctions where there has not been any pre-determination of an eventual custodial sentence. In both cases many Member States wondered how it would be possible for the judicial authorities in the executing state to determine – in case of non compliance – an appropriate custodial sentence even though the original prosecution and conviction of the person has been undertaken in another Member State.

As a result of these difficult negotiations, the framework decision now foresees that Member States can declare that – as executing states – they will not taken responsibility/authority for such subsequent decisions on a custodial sentence in case of the original judgment being a conditional sentence or an alternative sanction where the judgment does not contain a determination of an eventual custodial sentence. If a Member State has made such a declaration the authority/jurisdiction for these decisions shall be transferred back to the issuing state whenever the competent authority of the executing state determines that such a subsequent decision involving a custodial sentence may be the appropriate response to the person's non-compliance with the measures/alternative sanctions.

It will be interesting to hear whether Member States intend to make use of this possibility for such a declaration. If a Member State does not, it will have to find a way to have his courts decide on a custodial sentence without having been in charge of the original trial and judgment. On the other hand, if Member States do make use of the possibilities to refuse jurisdiction in these cases, it will be very important – not only for the legislator but also for the practitioner – to establish appropriate mechanisms to ensure that the authorities in both Member States co-operate in determining the adequate response to the person not complying with the terms of a conditional sentence or alternative sanction.

V. Conclusion

So in concluding – and as witnessed by all those of you who were present during the negotiations – the diversity of national approaches, which we treasure in Europe, has made negotiation of this framework decision a difficult undertaking. The final outcome

is a text which is certainly one of the more complex legal texts which has been produced in the area of judicial cooperation. It this will be a challenge for the national legislator to implement. Quite aside from the technical legal work of implementing this framework decision it will be of particular importance to implement it in such a way that the practitioners will feel at ease making use of the framework decision. Its aims will not be reached if the framework decision and the national implementation simply sit on the shelf. The aim of facilitating social rehabilitation of the sentenced person who ordinarily resides in another Member States will only be reached if practitioners, if the courts, the prosecutors and the probation services make active use of the possibilities offered by this framework decision.