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NOTE

from : Presidency
to : Article 36 Committee / Coreper / Council
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Subject : Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union
- Policy debate

I. Introduction

1. On 4 September 2006 the Commission submitted a proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union¹.
2. The European Parliament's opinion has been sought².
3. The establishment of the European supervision order (ESO) allows the suspect to benefit from a non-custodial pre-trial supervision measure in her / his Member State of residence, thus contributing to reinforce the right to liberty and the presumption of innocence across the European Union and promoting equal treatment of all citizens in the common area of freedom, security and justice.

¹ 12367/06 COPEN 91 + ADD 1 + ADD 2.

² It is expected that Parliament will deliver its opinion in October/November 2007.

The ESO enables persons on whom a non-custodial supervision measure has been imposed at the pre-trial phase in criminal proceedings (in a Member State where they are not normally resident) to be subject to control and supervision in the Member State where they are normally resident.

That Member State will then be responsible for supervising the measure imposed to the suspect and will be required to report any breach thereof to the issuing Member State in which criminal proceedings are pending. In case of such reporting, the latter will decide on the consequences of the breach and may in particular have the person subject to the order arrested and transferred to stand trial.

According to the Commission proposal, the ESO is conceived not only as an alternative to a pre-trial detention, but may also be issued in relation to an offence for which only less severe coercive measures than pre-trial detention are allowed¹.

4. By applying the principle of mutual recognition to non-custodial pre-trial supervision measures, this proposal gives full effect to the priorities set in the Hague Programme (2004)², as well as the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (2005)³.

II. Working Party proceedings

5. On 9 and 10 January 2007 the Working Party on Cooperation in Criminal Matters gave the proposal a first, general reading. Delegations generally supported the objectives of the Commission proposal and its main underlying idea of eliminating the potential for pre-trial detention on account of habitual residence in another Member State.

¹ Explanatory Memorandum, page 8.

² OJ C53, 3.3.2005, p. 1.

³ OJ C198, 12.8.2005, p. 1 (p. 18, section 4.2(g)).

6. However, delegations raised various issues and technical difficulties¹ concerning certain aspects of the Commission proposal.

During the German Presidency, Member States were sent a questionnaire² to gauge their positions more clearly.

It emerged that the aims of the proposal were broadly welcomed and, in general terms³, the idea that the ESO should be based on the principle of mutual recognition, without involving any harmonisation of Member States' criminal law or criminal procedural law, was appreciated.

A broad majority took the view that the conditions for issuing an ESO should be governed by the law of the issuing Member State, with arrangements made for smooth cooperation for the cross-border recognition and execution of supervision orders.

The need for coherence with the approach taken in other mutual-recognition-based instruments already adopted or under discussion was also pointed out, as was the contribution which could be made to this proposal by some of the solutions arrived at for the proposal for a Framework Decision on the recognition and supervision of suspended sentences, alternative sanctions and conditional sentences (probation)⁴.

III. The need to move forward

7. The European Union is a unique area with free movement of people, seeking to establish an area of freedom, security and justice (Article 29 TEU). The goal of achieving an effective and efficient criminal justice policy and the rational administration of justice demands, in particular, that further work on measures based on the principle of mutual recognition succeeds in striking a balance between freedom, security and justice.

¹ 5442/07 COPEN 13.

² 9464/07 COPEN 61.

³ 10662/07 COPEN 91 + ADD 1 + ADD 2 + ADD 3 (answers by delegations to questionnaire) and 12157/07 COPEN 117 (summary of answers).

⁴ 5325/07 COPEN 7 + ADD 1 + ADD 2 and subsequent documentation.

8. In a context of increasing movement of people within the European area, turned into a common one by the right of Europe's citizens to move around freely, the effectiveness of criminal justice requires action to avoid loss of social integration and to prevent crime and recidivism, which involves further adoption of measures based on the principle of mutual recognition, meaning investment in mutual trust between Member States, their systems and their authorities.
9. The Council has been pressing ahead with measures to foster social integration at the post-trial phase, such as 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 (already agreed by the Council) and the Framework Decision on the recognition and supervision of suspended sentences, alternative sanctions and conditional sentences (probation) (still under discussion).
10. Under the programme of measures to implement the principle of mutual recognition of decisions in criminal matters, however, that principle is to encompass such decisions "*... in all phases of criminal procedures or otherwise relevant to such procedures ...*" (see section 3.3.1 of the Hague programme)¹.
11. In view of the work already carried out by the Council on this subject, the Presidency considers it important to press on in furtherance of the principle of mutual recognition, seeking a balance between measures relating to the pre-trial phase and the post-trial phase, with the aim of adopting instruments to prevent recidivism and/or make for continued presence of the suspect in a favourable social and legal environment.
12. In most – if not all – Member States, pre-trial detention is a coercive measure imposed in particular to prevent any action which may have the effect of evading justice.

In accordance with criteria such as necessity, appropriateness and proportionality, pre-trial detention is used as a last resort, with other, non-custodial measures being imposed in preference to it.

¹ OJ C53, 3.3.2005, p. 1.

13. The judicial authorities empowered to impose coercive measures will assess in each specific case whether the individual concerned is likely to evade justice, in particular by virtue of living in another Member State.

While it may not be a statutory criterion, residence in another Member State may in practice be used by the courts as a factor for assessing the risk of absconding, and lead to the imposition of a more severe coercive measure than that which would be applied to an individual residing in the Member State in question. A less severe coercive measure would not only be more favourable to the individual to whom it is applied, but it would also contribute to a better administration of justice.

14. Non-custodial coercive measures play a key-role in Member States' criminal justice policies, and greater flexibility in the scope for imposing them will significantly help reduce pre-trial detention rates, which should be an objective shared by all Member States.

For reasons relating both to the individual and to the administration of justice, namely, the fact that:

- (a) pre-trial detention should be resorted to only in exceptional, and more serious cases, in accordance with the "presumption of innocence";
- (b) suspects should as far as possible be allowed to live in their natural environment, albeit subject to control and supervision;
- (c) pre-trial detention should be used as a last resort, since prison, as some criminologists, point out, may act as a "school for crime";
- (d) efficient, rational administration of justice also stands to gain in budgetary terms from the imposition of non-custodial coercive measures,

there is thus a need to work towards those aims, including by facilitating recognition and application of non-custodial pre-trial supervision measures.

15. In view of the above, and of Member States' favourable general reactions to the aims of the proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union, the Presidency believes that there is now a need to move ahead.

IV. Proposal put to the Council

In the light of the replies to the questionnaire, the Presidency suggests that the Council agree on a general approach to further work, based on redrafting the proposal, particularly along the following lines:

- The establishment of the ESO on the basis of the principle of mutual recognition and with respect for the specific features of the Member States' systems of criminal justice and criminal procedure in what concerns the criteria and conditions for issuing a European supervision order. However, limits should be set on the discretion of the issuing Member State so as to make for simple, swift and effective cooperation within Member States.

- Ensuring coherence with the approach taken in other mutual-recognition-based instruments, by establishing flexible rules on cross-border recognition and enforcement of an ESO. For that purpose, account should be taken of some of the solutions used in the proposal for a Framework Decision on the recognition and supervision of suspended sentences, alternative sanctions and conditional sentences (probation). Nevertheless, the work on these two proposals should be kept separate, as they involve specific technical aspects (relating to the pre-trial and post-trial phase) and are at different stages of the negotiation.

The Presidency welcomes the views of Member States on any other point that, in their opinion, should also be taken into account in the redrafting of the proposal.

The Council is invited to instruct its bodies to take work forward by adjusting the proposal along these lines, on the basis of a new text, to be submitted by the Presidency in consultation with the Commission, with a view to subsequent discussion.