



**COUNCIL OF
THE EUROPEAN UNION**

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COPEN 7

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 initiative from the German and French Delegations.¹

Encl.:

¹ An explanatory note as well as the mentioned certificates will follow as addendums to this document.

Draft Council Framework Decision 200..../.../JHA of.....

on the recognition and supervision of suspended sentences and alternative sanctions

The Council of the European Union,

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

Having regard to the proposal of the Federal Republic of Germany and of the French Republic,

Having regard to the opinion of the European Parliament,

Whereas,

1. The European Union has set itself the objective of developing an area of freedom, security and justice. This presupposes an understanding of freedom, security and justice on the part of the Member States which is identical in its essential elements, and is based on the principles of freedom, democracy, respect for human rights and fundamental freedoms, as well as the rule of law.

2. The aim of police and judicial cooperation in the European Union is to provide a high degree of security for all citizens. One of the cornerstones for this is the principle of mutual recognition of judicial decisions, established in the Conclusions of the Tampere European Council of 15 and 16 October 1999 and reaffirmed in The Hague Programme of 4 and 5 November 2004. In the programme of measures of 29 November 2000 to implement the principle of mutual recognition of decisions in criminal matters, the Council pronounced itself in favour of cooperation in the area of suspended sentences and parole (measure 23).

3. All the Member States have ratified the Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983. The Convention enables sentenced persons to be transferred to the State of which they are a national, if the States in question and the sentenced person consent to the transfer. The Additional Protocol of 18 December 1997, which provides for transfer without the consent of the person concerned, has not yet been ratified by all Member States. The Council Framework Decision of xx.xx.xxxx extended the principle of mutual recognition to the enforcement of sentences.

4. Relations between the Member States, characterised by the mutual recognition of national legal systems, also enable other types of decision taken by a different Member State in the course of criminal proceedings or enforcement to be recognised. The Council of Europe Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders of 30 November 1964 has only been ratified by 12 Member States, in some cases with numerous reservations. The Council Framework Decision of xx.xx.xxxx is intentionally restricted to the transfer of sentenced persons already in prison. More extensive cooperation between Member States is, however, required especially where criminal proceedings have been conducted against a person in one Member State and a suspended sentence or alternative sanction has been imposed, but the person concerned is ordinarily resident, or has their centre of interests, in another Member State.

5. This Framework Decision respects fundamental rights and adheres to the principles recognised in Article 6 of the Treaty on European Union, which are also expressed in the Charter of Fundamental Rights of the European Union, especially in Chapter VI thereof. No provision of this Framework Decision may be interpreted as prohibiting refusal to recognise and supervise a suspended sentence or alternative sanction if there are objective indications that the suspended sentence or alternative sanction was imposed to punish a person because of their sex, race, religion, ethnic origin, nationality, language, political convictions or sexual orientation or that this person may be disadvantaged for one of these reasons.

6. This Framework Decision does not prevent any Member State from applying its constitutional rules relating to entitlement to due process, freedom of association, freedom of the press and freedom of expression in other media.

7. The provisions of this Framework Decision shall 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.

8. The aim of mutual recognition and supervision of suspended sentences and alternative sanctions in the executing State is to enhance the prospects of the sentenced person's being reintegrated into society, by enabling him to preserve family, linguistic, cultural and other ties, but also to improve monitoring of compliance with suspensory measures and alternative sanctions, with a view to preventing recidivism, thus paying due regard to the protection of victims.

9. To ensure the effective exchange of information concerning all circumstances relevant to the suspension of sentences, Member States are encouraged to include provisions in their national legislation enabling the assumption by them of responsibility for the supervision of suspensory measures and alternative sanctions to be documented in their national registers.

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 must be protected in accordance with the principles laid down in that Convention,

has adopted this Framework Decision:

Article 1

Subject matter and scope

1. The purpose of this Framework Decision is, with a view to facilitating the social re-integration of sentenced persons and improving the protection of victims, to lay down the rules according to which one Member State recognises judgments issued in another Member State, supervises suspended sentences and alternative sanctions imposed in that State and takes all other decisions relating to the suspended sentence, insofar as this falls within its competence.

2. This Framework Decision applies only to the recognition of judgments and the transfer of responsibility for the supervision of measures and sanctions and all other judicial decisions provided for in this Framework Decision. This Framework Decision does not apply to the execution of judgments in criminal cases imposing custodial sentences or measures involving deprivation of liberty which fall within the scope of Council Framework Decision xx of xx.xx.xxxx 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. The recognition and execution of financial penalties and confiscation orders are governed by the legal instruments applicable between Member States, in particular Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties and Council Framework Decision 2006/xxxx/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

Article 2

Definitions

For the purposes of this Framework Decision:

- (a) "Judgment" shall mean a final decision or order of a court of the sentencing State imposing
 - a suspended sentence or
 - an alternative sanction on a natural person or
 - conditionally suspending the imposition of a sentence or detention order by imposing one or more suspensory measures (conditional sentence),
- (b) "suspended sentence" shall mean a custodial sentence or a detention order the execution of which is conditionally suspended, wholly or in part, when the sentence is passed or after part of the custodial sentence has been served (parole),
- (c) "suspsory measures" shall mean obligations and instructions imposed on a natural person, in accordance with the national legislation of the sentencing State, in connection with a suspended sentence or a conditional sentence,
- (d) "alternative sanction" shall mean an obligation or instruction, imposed as an independent sanction, which is not a custodial sentence, detention order or financial penalty,
- (e) "sentencing State" shall mean the Member State in which a judgment, as defined in (a) above, has been issued,
- (f) "executing State" shall mean the Member State in which the suspensory measures and alternative sanctions are supervised and in which all other decisions relating to the suspended sentence are taken, insofar as it has assumed competence to do so.

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

Determination of the 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 according to this Framework Decision when that Member State is the sentencing State or the executing State.

2. The General Secretariat of the Council shall make the information received available to all Member States and to the Commission.

Article 5

Nature of suspensory measures and alternative sanctions

1. A judgment may be transferred to another Member State, in which the sentenced person is legally and ordinarily resident, for the purpose of recognition and supervision of suspensory measures and alternative sanctions, if the judgment includes one or more of the following provisions:
 - (a) An obligation for the sentenced person to inform the competent authority in the executing State of any change of residence,

 - (b) Orders not to leave or enter certain localities in the sentencing or executing State without permission, and other orders relating to life-style, residence, education and training, professional activity or leisure activities,

- (c) to report at specified times to the competent authority in the executing State or to another agency in the executing State,
- (d) to avoid contact with persons and objects which could form an incitement to commit further offences,
- (e) to compensate for the prejudice caused by the offence,
- (f) to carry out community service,
- (g) the appointment of a probation officer,
- (h) to undergo therapeutic treatment or treatment for addiction.

2. Each Member State may inform the General Secretariat of the Council, when transposing this Framework Decision, which suspensory measures and alternative sanctions, apart from those referred to in the first paragraph, it is prepared to supervise. The General Secretariat of the Council shall make the information received available to all Member States and to the Commission.

3. Apart from the measures referred to in the first paragraph, the judgment may only include measures corresponding to those notified by the executing State concerned in accordance with the second paragraph.

Article 6

Procedure for forwarding the judgment and the certificate

1. The judgment or a certified copy of it, together with the certificate, shall be forwarded by the competent judicial authority in the sentencing 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 its authenticity. The original of the judgment, 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 judicial authorities.
2. The certificate, the standard form for which is given in Annex A, must be signed, and its content certified as accurate, by the competent judicial authority in the sentencing State.
3. The sentencing State shall forward the judgment together with the certificate only to one executing State at any one time.
4. If the competent judicial authority in the executing State is not known to the competent judicial authority in the sentencing 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, in order to obtain the information from the executing State.
5. When a judicial authority in the executing State which receives a judgment together with a certificate has no competence to recognise it and take the ensuing necessary measures for its enforcement, it shall, ex officio, forward the judgment together with the certificate to the competent judicial authority. The competent judicial authority in the executing State shall immediately inform the competent judicial authority in the sentencing State, by any means which leaves a written record, that the judgment and the certificate have been forwarded to the competent authority.

Article 7

Decision of the executing State

1. The competent judicial authority in the executing State shall recognise the judgment forwarded in accordance with the procedure laid down in Article 6 and immediately take all necessary measures for the supervision of the suspensory measures and alternative sanctions, unless the competent judicial authority decides to invoke one of the grounds for refusing to recognise and take over supervision of the judgment referred to in Article 9.
2. If the nature or duration of the conditions attaching to the suspended sentence are incompatible with the statutory provisions of the executing State, the competent judicial authority in that State may adapt them in line with the conditions attaching to suspended sentences or alternative sanctions which are provided for, under the law of the executing State, for acts of the same kind. The suspensory measure or alternative sanction, must correspond as far as possible to that imposed in the sentencing State.
3. The adapted suspensory measure or alternative sanction, shall not be more severe than the conditions attaching to the suspended sentence or alternative sanction which was originally imposed.

Article 8

Dual criminality

1. The following offences, if they are punishable in the sentencing 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 sentencing 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 judgment and supervision of suspensory measures and alternative sanctions:
 - 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,
- 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,
- 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 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. The Council shall examine, in the light of the report submitted to it pursuant to Article 18(3) of this Framework Decision, whether the list should be extended or amended.

3. For offences other than those covered by the first paragraph, the executing State may make the recognition of the judgment and supervision of suspensory measures and alternative sanctions 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 9

Grounds for refusing recognition and supervision

1. The competent authority in the executing State may refuse to recognise the judgment and to assume responsibility for supervising suspensory measures and alternative sanctions if

- (a) the certificate referred to in Article 6 is incomplete or obviously does not correspond to the judgment 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 5 are not met,
- (c) recognition of the judgment and assumption of responsibility for supervising suspensory measures and alternative sanctions would contravene the *ne bis in idem* principle,
- (d) the judgment relates, in the cases referred to in the third paragraph of Article 8, 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 judgment 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 sentencing State,

- (e) prosecution, or the execution of a sentence, is already 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) exemptions exist, under the law of the executing State, which make it impossible to supervise suspensory measures and alternative sanctions,
 - (g) if, under the law of the executing State, the sentenced person cannot, because of his age, be held criminally responsible for the act on which the judgment is based,
 - (h) the judgment was rendered in absentia, unless the certificate states that the person was summoned personally or informed via a representative competent according to the national law of the sentencing State, of the time and place of the proceedings which resulted in the judgment being rendered in absentia, or that the person has indicated to a competent authority that he or she does not contest the case;
 - (i) the judgment provides for medical/therapeutic treatment which, notwithstanding the provisions of the second paragraph of Article 7, the executing State is unable to supervise in view of its legal or healthcare system,
 - (j) in the case referred to in the first paragraph of Article 13, no agreement can be reached on adaptation of suspensory measures or alternative sanctions,
2. Before the competent judicial authority in the executing State decides, in the cases referred to in the first paragraph, to refuse to recognise the judgment and to assume responsibility for supervising suspensory measures and alternative sanctions, it shall communicate, by appropriate means, with the competent judicial authority in the sentencing State and, as necessary, request the latter immediately to supply all additional information required.

Article 10

Decision concerning transfer and time-limits

1. The competent judicial authority in the executing State shall decide, within 10 days, whether to recognise the judgment and assume responsibility for supervising the suspensory measures or alternative sanctions. It shall immediately inform the competent judicial authority in the sentencing State, by any means which leaves a written record, of its decision. Reasons must be given for refusing to recognise the judgment and for refusing to assume responsibility for supervision.
2. If it is not possible, in a specific case, for the competent judicial authority in the executing State to comply with the time-limit laid down in the first paragraph, it shall immediately inform the competent judicial authority in the sentencing 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.

Article 11

Law governing supervision

The supervision of suspensory measures and alternative sanctions shall be governed by the law of the executing State.

Article 12

Competence to take all subsequent decisions and governing law

1. The competent judicial authority in the executing State shall be competent to take all subsequent decisions relating to the suspended sentence or alternative sanctions, such as the modification of suspensory measures, the revocation of suspension, sentencing in the case of a judgment as referred to in the third indent of Article 2(a), or remission. The law of the executing State shall apply to the decisions referred to in the first sentence above and to all subsequent consequences of the judgment.

2. The competent judicial authority in the sentencing State may reserve competence to take all subsequent decisions relating to the judgments referred to in the third indent of Article 2(a). In this case the law of the sentencing State shall apply to all subsequent consequences of the judgment.

3. When transposing this Framework Decision, any Member State may indicate that it as executing State may, in individual cases, refuse to assume responsibility as provided for in the first paragraph. In these cases, the decision shall be taken and notification effected in accordance with the procedure laid down in Article 10. This shall not affect the obligation laid down in the first paragraph of Article 7.

Article 13

Consultations between the competent judicial authorities

1. If the competent judicial authority in the executing State intends to make adaptations as provided for in the second and third paragraphs of Article 7, it shall first consult the competent judicial authority in the sentencing State on the adapted suspensory measures and alternative sanctions.

2. When forwarding the judgment and the certificate as provided for in Article 6, the judicial authority in the sentencing State may waive the consultations referred to in the preceding paragraph. In that case, any adaptations made by the competent judicial authority in the executing State in accordance with the second and third paragraphs of Article 7 shall be notified subsequently.

Article 14

Obligations of the authorities involved where the executing State has jurisdiction for all further decisions

1. The competent judicial authority in the executing State shall immediately inform the competent judicial authority in the sentencing State, by any means which leaves a written record, of all decisions with immediate or suspensive effect relating to:

- adaptation of the suspensory measures or alternative sanction;

- revocation of suspension of sentence;
 - imposition of sentence in the case of a judgment referred to in the third indent of Article 2(a)
 - lapsing of the suspensory measures or alternative sanction.
2. The competent judicial authority in the sentencing State shall immediately inform the competent judicial authority in the executing State, by any means which leaves a written record, of any circumstances or findings which, in its opinion, could entail revocation of suspension of sentence or modification of the suspensory measures or alternative sanction.

Article 15

Obligations of the authorities involved where the sentencing State has jurisdiction for all further decisions

1. If the competent judicial authority in the sentencing State has jurisdiction for all further decisions in accordance with the second and third paragraphs of Article 12, the competent judicial authority in the executing State shall immediately notify it of
 - (a) any breach of a suspensory measure or alternative sanction and of
 - (b) any finding which
 - is liable to entail adaptation of suspensory measures or alternative sanctions, or
 - is relevant to imposition of a sentence in the case of a judgment referred to in the third indent of Article 2(a), or
 - could result in revocation of conditional suspension.
2. Notice shall be given using the standard form in Annex B.
3. Before a decision is taken on imposition of sentence in the case of a conditional sentence or on revocation of suspension of sentence, the sentenced person must be given a judicial hearing. If appropriate, this requirement may be met 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.

4. The competent judicial authority in the sentencing State shall immediately inform the competent judicial authority in the executing State of all decisions with immediate or suspensive effect relating to:

- adaptation of the suspensory measures or alternative sanction;
- revocation of suspension of sentence;
- imposition of sentence in the case of a judgment referred to in the third indent of Article 2(a);
- lapsing of the suspensory measures or alternative sanction.

5. In the event of imposition of sentence or revocation of suspension of sentence, the competent judicial authority of the sentencing State shall at the same time inform the competent judicial authority of the executing State whether it intends to forward to the executing State:

- a certificate as provided for in Council Framework Decision xx of xx.xx.xxxx [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 taking over responsibility for enforcement of the measure involving deprivation of liberty;
- a European arrest warrant for the purpose of surrender of the sentenced person in accordance with Council Framework Decision xx of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

6. If the obligation to execute suspensory measures or alternative sanctions has lapsed, the competent judicial authority of the executing State shall end the measures ordered as soon as it has been duly notified by the competent judicial authority of the sentencing State.

Article 16

Amnesty and pardon

An amnesty or pardon may be granted by the sentencing State and also by the executing State.

Article 17
End of jurisdiction of the executing State

If the sentenced person leaves the executing State and establishes his or her lawful habitual residence in another Member State, the competent judicial authority of the executing State shall transfer jurisdiction in respect of supervision of the suspensory measures and alternative sanctions and respect of all further decisions relating to the suspended sentence or alternative sanction to the competent judicial authority of the sentencing State.

Article 18
Languages

Certificates, for which the standard forms reproduced in the Annex are to be used, must 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 Union.

Article 19
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 sentencing State.

Article 20
Relationship with other agreements and arrangements

1. This Framework Decision shall, in relations between the Member States, from [date to be inserted], replace the corresponding provisions of the Council of Europe Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders of 30 November 1964.

2. Member States may continue to apply bilateral or multilateral agreements or arrangements in force when this Framework Decision was adopted, insofar as they allow the objectives of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for the supervision of suspensory measures and alternative sanctions.
3. Member States may conclude bilateral or multilateral agreements or arrangements after this Framework Decision has come into force in so far as such agreements or arrangements allow the prescriptions of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for the supervision of suspensory measures and alternative sanctions.
4. 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 the first paragraph which they wish to continue applying. Member States shall also notify the Council and the Commission of any new agreement or arrangement as referred to in the second paragraph, within three months of signing it.

Article 21

Implementation

1. Member States shall take the necessary measures to comply with this Framework Decision by xx.xx.xxxx.
2. Member States shall communicate to the General Secretariat of 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. On the basis of a report drawn up by the Commission using this information, the Council shall, no later than ... ** assess the extent to which Member States have complied with this Framework Decision.
3. By ... *, the Commission shall establish a report on the basis of the information received, accompanied by any initiatives it may deem appropriate.

Article 22
Entry into force

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

Done at

For the Council
The President
