

Mutual Recognition of Judicial Decisions in Criminal Matters with Regard to Probation Measures and Alternative Sanctions

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I. Creation of an Area of Mutual Recognition of Judicial Decisions in Criminal Matters

The adoption of Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to supervision of probation measures and alternative sanctions is a next step in the process of creating a common criminal procedural area within the European Union.¹ The principle of mutual recognition is fast becoming a foundation of co-operation in criminal matters among the EU Member States. From the present stage of development of the European Union, it has become clear that it is necessary to base cooperation on measures of a new quality and accept the idea of equivalency of decisions in criminal matters in all the EU Member States. It has become an accepted legal measure to create a common area of criminal proceedings within the law of the European Union. However, despite wide acceptance of this idea, there is no uniform definition of this particular notion.² There is no legal act regulating, in a coherent way, the entire area of cooperation that would indicate which groups of legal decisions should enjoy the privilege of mutual recognition and which organs should decide on the binding force of such decisions. There is no doubt that this measure of cooperation should be defined more precisely. Presently, this principle has not yet been systematically introduced.³ Although the principle of mutual recognition is recognized as a foundation of cooperation, it has become operative only as a result of the introduction of legal acts paving the way for this specific form of cooperation. The present practice is based on adopting several legal regulations relating only to specific problems – commonly those most pressing in cooperation. This method of legislation results in a fragmentary regulation and cannot substitute a coherent system of mutual recognition. Therefore, the principle of mutual recognition is applied only in several areas of cooperation in criminal matters, such as: arrest warrants, freezing of property, execution of fines. However, the analysis of the relevant non-binding Communications of the Commission leads to the conclusion that all areas of cooperation among Member States should be based on mutual recognition of decisions – starting from the state of investigation till final decisions.⁴ The envisaged instruments let us presume the direction in which the next initiatives will go.

II. The Development of Judicial Cooperation Regarding Probation Law

The execution of final decisions in criminal matters is the most advanced form of mutual recognition.⁵ Final decisions (sentences, verdicts) should be executed without the need to adapt them – in a procedure of conversion – into the frameworks of the executing state's law.⁶ The principle of mutual recognition should apply to all forms of final decisions: sentencing to fines, imprisonment, applying probation, verdicts of not guilty as well as sentences applying alternative sanctions, such as community work or the deprivation of qualifications.

The latest development in this area, ultimately regulating the functioning of the mutual recognition of judgments on probation and alternative sanctions, is the above-mentioned Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to supervision of probation measures and alternative sanctions. Member States should take the necessary steps to implement the provisions of the Framework Decision by 6 December 2011.

Until now, the operating instruments on probation were those adopted by the Council of Europe; the most important of them is the Convention of 30 November 1964 on the Supervision of Conditionally Sentenced or Conditionally Released Offenders,⁷ which has been ratified by 12 Member States (with numerous reserva-

tions). This Convention was intended to provide for those conditionally released to be able to leave the territory of the sentencing state under the condition that adequate control over these persons would be executed. The main idea was to offer assistance in the process of social rehabilitation. However, this cooperation was limited by the usual conditions of cooperation applied by the Council of Europe: double criminality and the non-political character of the offence. The Council of Europe established a certain pattern of cooperation, which has become common in the cooperation among the Member States. The basic rule provides for the execution only after applying the procedure of *exequatur*, either in its simple form or in the form of conversion of a decision. The procedure of *exequatur* is a special procedure for recognition and enforcement of foreign judgments according to which a foreign judgment must be modified in order to be declared enforceable. Now, with the new Framework Decision, the Member States of the European Union have agreed that decisions relating to probation should be executed without the procedure of *exequatur*. The Framework Decision is to replace the Council of Europe Convention from 6 December 2011 (Article 23(1)).

Within the framework of the European Union, several attempts were made to facilitate the application of the principle of mutual recognition in the area of probation and alternative sanctions beforehand. The Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union⁸ of 2004 focuses on areas where a need has been identified to develop further harmonisation among the Member States' legislation. It notes, on the basis of a comparative analysis of the Member States' legislation on the various modes of enforcement of custodial penalties, that states have a relatively large variety of modes of enforcement, allowing a gradual transition from prison to freedom. The approach generally stems from the desire to make use of forms of punishment that are more appropriate than firm imprisonment, as a means of supporting the offender's reintegration into society, as well as from problems linked to overcrowding in prisons. The most widespread form is the suspended sentence, available in almost all the Member States. Electronic surveillance is applied in six Member States and is under testing or consideration in a further five. All the other instruments (suspended or deferred sentencing, day-release, sentences served in installments, and home detention) are known and applied only in a minority of Member States. However, the Green Paper considered only existing possibilities of harmonisation, not providing for any measure to solve the problem of diversities.

III. The Transnational Handling of Disqualifications

The above-mentioned Green Paper also considers the problem of disqualifications, which can be issued as an additional or independent sanction, as an alternative to sanctions connected with the deprivation of liberty. For the purpose of the Green Paper, disqualification means a penalty withdrawing or restricting rights or a preventive measure, whereby a natural or legal person is prohibited, for a limited or unlimited period, from exercising certain rights, occupying a position, going to certain places, or doing certain things.⁹ It is usually connected with the deprivation or limiting of rights – such as the right to be present in specified places, take up certain occupations – e.g., connected with taking care of children – for a given time. This problem was further reflected on in the Communication of the Commission to the Council and Parliament on disqualifications arising from criminal convictions in the European Union of 21 February 2006.¹⁰ It was stressed that the efficiency of decisions concerning the deprivation of rights depends on their widespread recognition in all the Member States. The Commission planned to facilitate recognition of such decisions, admitting at the same time that it might be difficult due to huge differences among the legal systems. Another difficulty, namely the lack of necessary information on existing decisions related to disqualifications, was pointed out.

So far, the area of recognition of alternative sanctions has been regulated in a fragmentary manner. The Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child porno-

graphy,¹¹ for instance, requires the adoption of measures guaranteeing that persons sentenced for crimes involving child abuse will be deprived of the right to carry out occupations related to taking care of children. Presently, from the existing measures, we can see that there is no uniform means of information exchange among the Member States on the topic of disqualifications. Moreover, such decisions are not always present in national criminal records. A person deprived of a driving license or the right to engage in certain occupations can proceed with these activities in another Member State. In a situation involving a factual lack of boundaries and the freedom of movement, such a situation should not be accepted. There can be no doubt that, in order to make a sanction truly effective, information about disqualifications should be available in all the Member States.¹²

A proposition to solve the problems resulting from lack of information was contained in an Initiative of the Kingdom of Denmark with a view to adopting a Council Decision on increasing cooperation among European Union Member States regarding disqualifications of 19 September 2002.¹³ According to the proposition, each Member State would have the possibility to forward information in relation to disqualifications to another Member State on the latter's request. Even without a request to forward data on such convictions, relevant information concerning convictions of citizens of a Member State should be forwarded to the requesting state. Such an obligation would function only for relations between two states, and information about disqualifications would be shared only between the two states concerned, not in all the European Union. This initiative was never adopted, and the only instrument concerning disqualifications that exists among Member States is the Council of Europe Convention on driving disqualifications of 17 June 1998.¹⁴ However, the Convention does not mention mutual recognition of such alternative sanctions.

IV. Mutual Recognition of Probation Decisions with a View to Supervision of Probation Measures and Alternative Sanctions

1. Objectives of the Framework Decision

The Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to supervision of probation measures and alternative sanctions (in the following: "the Framework Decision") aims at providing for a more effective instrument as it is based on the principle of mutual recognition. In this context, it is noteworthy that the Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters, imposing custodial sentences or measures involving the deprivation of liberty for the purpose of their enforcement in the European Union, was adopted on the same day, 27 November 2008.¹⁵ Together, these two Framework Decisions form a coherent area of legislation in the field of recognition of final judgments, regardless of their nature: either related to the deprivation of liberty or to alternative solutions. The Framework Decisions have certain advantages over previous Conventions. First, regulation in the form of a framework decision is more flexible and proved to be more efficient than legislating in the form of a Convention. Secondly, the scope of application of framework decisions is much wider and adjusted to present requirements of cooperation.

The main goal of the Framework Decision on probation measures and alternative sanctions is to build foundations for the recognition of two types of decisions: measures connected to probation *and* sanctions alternative to the deprivation of liberty. It was intended that the provisions will enable the sentenced persons to "preserve family, linguistic, cultural and other ties, but also to improve monitoring of compliance with a view to preventing recidivism thus paying due regard to the protection of victims and the general public."¹⁶ The provisions are to facilitate the social rehabilitation of sentenced persons and facilitate the application of pro-

bative measures and alternative sanctions in case of offenders who do not live in the state of conviction. The aim is to resolve the cross-border nature of such situations as well as ensure the execution of measures connected to probation and sanctions alternative to the deprivation of liberty on a Union-wide scale. The characteristic feature is the need to extend supervision over the execution of probation measures and alternative sanctions in states other than only the state issuing such a decision.

2. The scope of application

The Framework Decision applies only to final judgments or orders issued by a court establishing the guilt of a natural person (Article 2 (1)). These judgments must include solutions regarding probation measures or alternative sanctions, irrespective of whether, in the relevant Member State, such decisions are included in the judgment itself or in a separate decision. Such decisions are grouped into four types (Article 2): The first type relates to custodial sentences or measures involving the deprivation of liberty if a conditional release is granted on the basis of that judgment or by a subsequent probation decision (Article 2 (1(a)) and Article 2 (5)). Second, there are suspended sentences, i.e., measures involving the deprivation of liberty, the execution of which is conditionally suspended, wholly or in part (Article 2 (2)). Third, there are conditional sentences – judgments in which the imposition of a sentence has been conditionally deferred by imposing one or more probation measures instead of a custodial sentence or measure involving a deprivation of liberty (Article 2 (3)).¹⁷ The fourth type relates to alternative sanctions – defined in the Framework Decision as sanctions other than a custodial sentence involving the deprivation of liberty or a financial penalty, imposing an obligation or instruction (Article 2 (4)). The last category is the widest – it concerns all other measures that exist in national systems of law.

As regards the types of probation measures and alternative sanctions to be recognized, the Framework Decision does not distinguish between alternative sanctions and probation measures and joins them into one group (Article 4). It includes in this group:

- an obligation for the sentenced person to inform a specific authority of any change of residence or workplace;
- an obligation not to enter certain localities, places, or areas defined in the issuing or executing state;
- an obligation containing limitations on leaving the territory of the executing state, instructions relating to behaviour, residence, education and training, leisure activities or containing limitations on or modalities of carrying out a professional activity;
- an obligation to report at specified times to a specific authority;
- an obligation to avoid contact with specific persons;
- an obligation to avoid contact with specific objects, which have been used or are likely to be used by the sentenced person with a view to committing a criminal offence;
- an obligation to compensate financially for the injury caused by the offence and/or an obligation to provide proof of compliance with such an obligation;
- an obligation to carry out community service;
- an obligation to cooperate with a probation officer or with a representative of a social service having responsibilities in respect of sentenced persons;
- an obligation to undergo therapeutic treatment or treatment for addiction.

Additionally, Member States should provide information about other probation measures and alternative sanctions that they are prepared to supervise. The recitals of the Framework Decision give further information on what type of measures should be subject to mutual recognition. Accordingly, probation measures and alternative sanctions include, inter alia: orders relating to behaviour (such as the obligation to cease the consumption of alcohol), residence (such as an obligation to change residence for reasons of domestic violence), education and training (such as an obligation to take a “safe-driving course”), leisure activities (such as an obligation to cease playing or attending certain sports) as well as limitations on or modalities of carrying out a professional activity (such as an obligation to seek a professional activity in a different working environment).¹⁸ The set of probation measures may relate to the use of electronic monitoring, although not in all the Member States such solutions have been adopted. The decision does not apply to the execution of sentences imposing custodial sentences or measures relating to the deprivation of liberty as well as sentences imposing financial penalties and confiscation orders as they fall within the scope of other Framework Decisions.

3. The procedure of execution of probation decisions

The basic rule of the Framework Decision is to make it possible for sentenced persons to forward a judgment accompanied by a probation decision (or only a judgment if it itself contains probation measures) or an alternative sanction to the Member State in which he/she resides (or wants to return to), with the aim of the recognition of this decision (Article 5). The decision on forwarding the probation decision or alternative sanction should be made by a competent authority of the issuing Member State. Such a decision should be accompanied by a certificate containing essential information about the sentenced person and the decision, and it should be sent to the competent authority of the executing state (Article 6 (1)). Such authorities, as mentioned in the Framework Decision, are institutions – judicial or non-judicial – designated by the state if they are competent to take such decisions under national law. If the receiving authority is not competent to take any probation decisions under national law, it should take the necessary measures to forward the matter to the competent authority (Article 6 (7)). However, the revocation of the suspension of the execution of the judgment or the decision on conditional release, as well as imposition of a custodial sentence or measure involving deprivation of liberty in the case of alternative sanctions or a custodial sentence, if taken by an authority other than a court, should be reviewed, on the request of the person concerned, by a court, or another independent court-like body. The decision may be forwarded to a Member State other than the one of residence under the condition that it agrees to take part in execution of such a decision. Once the executing Member State receives the decision, it is obliged to recognize it and take, without delay, all the necessary steps for the supervision of probation measures or alternative sanctions. The decision as to recognition of the decision should be taken within the time limit of 60 days of receipt of the decision (Article 12). The state can only postpone the decision of recognition if the certificate accompanying the decision is incomplete, thus making it impossible to execute the decision.

A Member State has the right to refuse recognition of such a decision only in exceptional cases (Article 11). There are only facultative grounds for refusal, connected with incompleteness of the certificate, violation of *ne bis in idem* principle, the lack of a possibility for execution in the national law, existing immunity, the age of the sentenced person, and rendering the judgment in absentia. Another ground for refusal relates to situations in which the specific probation decision concerns a person who has not been found guilty, such as persons who are mentally ill, and the decision provides for medical/therapeutic treatment that the executing state cannot supervise. Additionally, if the offence has been committed on the territory of the executing state, the recognition can be refused – but only in exceptional cases. As regards the lack of double criminality, it may be a ground for refusal only in some cases. There is a list of offences which, 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, give rise to recognition of the judgment or probation decision, without verification

of the double criminality (Article 10). The list of offences is well known from other Framework Decisions in the third pillar. Such lists have become a characteristic feature of the instruments relating to mutual recognition. They provide for automatic recognition only in cases of most serious crimes. Other crimes are subject to the condition of double criminality – when, in order to recognize a sentence, the specific behaviour giving rise to this conviction must be penalized by both the requesting state and the requested state. It can certainly be expected that, in cases involving suspended sentences and probation measures, the scope of most serious crimes in the number of forwarded decisions is not going to be high.

An important guarantee for the executing state is the possibility to adjust the forwarded decision on the probation measure or alternative sanction to its own legal system (Article 9 (1)). If the nature or duration of the relevant probation measure or alternative sanction, or the duration of the probating period, is incompatible with the law of the executing state, it may be adapted in line with the nature and duration of the probation measure and alternative sanctions for equivalent offences in national law. The affected Member State should, however, change the decision only in such a way that it still corresponds as much as possible with the one imposed in the issuing state. Furthermore, the duration of such a probation period should not then be lower than the maximum duration provided by the executing state.

4. Supervision of the execution of probation decisions

If the executing state decides to recognize such a decision, it thus agrees to supervise the probation measures or alternative sanctions. As a result, only the rules and procedures of the executing state can be applied to the execution of the probation decision or alternative sanction. The executing state not only supervises the probation measures but also is responsible for taking all other decisions relating to that judgment. The competent authority of the executing state has the jurisdiction to take all subsequent decisions relating to a suspended sentence, conditional release, conditional sentence, and alternative sanctions, in particular in case of non-compliance with obligations and instructions connected to such a decision (Article 14). Such decisions may relate to the modification of obligations or instructions, the revocation of the suspension of the execution of the judgment or of the decision on conditional release, and the imposition of a custodial sentence or measures involving the deprivation of liberty in case of an alternative sanction or conditional sentence. The issuing state should be notified of such decisions.

If the probation or alternative sanction decision does not contain a custodial sentence or measure involving the deprivation of liberty in case of non-compliance with the obligations or instructions provided by the issuing state, it implies that the executing state can only take a decision to execute such a modification of obligations or instructions or duration period as is contained in the probation decision. The executing Member State may decide – at the time of adoption of the Framework Decision or at a later stage – that it does not assume the obligation of supervision as to certain categories of cases. Then, the jurisdiction of the issuing state is in force and the executing state is under an obligation to inform the issuing state of any incompliance of the sentenced person with a probation measure or alternative sanction. There are two types of decisions that can be taken by both the executing and the issuing states: amnesty and pardon (Article 19). However, only the issuing state may decide on the applications for review of the judgment, which forms the basis for the probation measures or alternative sanctions. In a situation in which new criminal proceedings are taking place in the issuing state, the executing state can transfer the jurisdiction back in respect of the supervision. There is no obligation to supervise if, in fact, it is impossible to supervise the probation measure or alternative sanction because the sentenced person cannot be found in the territory of the executing state.

V. Conclusions

The main disadvantage of the Framework Decision's provisions is the limited obligation to forward information, which relates only to the issuing and executing states of which the sentenced person is a resident. In the situation of still greater mobility of EU citizens, limiting the recognition of probation decisions or alternative measures to only one more state than the issuing one is becoming an outdated solution. Problems may appear if the sentenced person is a resident in several Member States or has no place of residence. Nevertheless, as a common criminal record for all the Member States is still lacking, any other solution would be much more complicated and more difficult to achieve. We can only hope – taking into consideration the latest developments in this area – that such a record will soon be functioning. Even so, we will experience problems with much divergence among the Member States, which record different types of decisions in different types of data bases. In some states, there is no common record for final sentencing decisions and probation or decisions on alternative measures. In addition, once the competent authority of the executing state has recognized the decision forwarded to it and informed the issuing state of its recognition, the issuing state still does not have any competence in relation to supervision of the probation measures or alternative sanctions. Such a situation requires an additional action on the part of the executing state, if the sentenced person decides to return to the issuing state. Then, the competent authority of the executing state may transfer jurisdiction in respect of supervision back to the competent authority of the issuing state, if the sentenced person is no longer a resident on its territory. However, the flexibility of the measures regarding recognition seems to be the main advantage. Not only does mutual recognition relate to a broad range of measures and decisions, but it can still be extended by the decision of a Member State.

On the territory of the European Union, we are experiencing a gradual introduction of the mutual recognition principle. We cannot forget about the fragmentary character of existing legislation though, which results in serious gaps in cooperation. In order to facilitate cooperation in criminal matters, mechanisms should be increasingly standardised. Greater coherency in the adoption of legal acts regulating cooperation would solve most of the obstacles. Many of the existing problems could be also solved thanks to a gradual harmonisation of legal provisions in Member States in the area of criminal law and criminal procedure. The Framework Decision described above will help put an end to the inefficiency of disqualification measures in other states than the state of issuance. Presently, they are enforceable only in one state, namely the state of issuance. The Framework Decision will enable recognition of a judgment accompanied by a probation decision or an alternative sanction in EU Member States other than the state of conviction. When this Framework Decision comes into force, probation decisions and alternative sanctions will become a real discomfort to a criminal who will be subjected to probation measures and restrictions as well as deprived of certain rights in all the states where he chooses to reside. The Framework Decision also forms a part of the criminal procedural area in the European Union and, some day, may also become part of the Code of Criminal Procedure for the European Union if such a codification comes into being.

1. OJ L 337 of 16 December 2008, p. 102.↩

2. G. De Kerchove, *L'espace judiciaire pénal européen après Amsterdam et le sommet de Tampere*, in : *Vers un espace judiciaire pénal européen*, Brussels 2000, p. 14; A. Weyembergh, *L'avenir des mécanismes de coopération judiciaire pénale entre les Etats membres de l'Union européenne*, in: *Vers un espace judiciaire pénal européen*, Brussels 2000, p. 165.↩

3. A. Górski, A. Sakowicz, *Bariery prawne integracji europejskiej w sprawach karnych*, Warsaw 2005, p. 8.↩

4. Communication from the Commission to the Council and the European Parliament: Mutual recognition of final decisions in criminal matters, COM(2000) 495 final; Communication from the Commission to the Council and the European Parliament: Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States COM(2005) 195 final.↩

5. L. Gardocki, *Zagadnienia internacjonalizacji odpowiedzialności karnej za przestępstwa popełnione za granicą*, Warsaw 1979, p. 92; D. Paridaens, *Transfer of Enforcement of Criminal Judgments*, in: B. Swat, A. Klip (eds.), *International Criminal Law in The Netherlands*, Freiburg im Breisgau 1997, p. 195.↩

6. See: A. Górski, A. Sakowicz, *Bariery prawne ... op.cit.*, pp. 35-36; G. Stessens, *The Principle of Mutual Confidence between Judicial Authorities in the Area of Freedom, Justice and Security*, in: G. de Kerchove, A. Weyembergh (eds.) *L'espace pénal européen: enjeux et perspectives*, Brussels 2002, p. 95.↵
7. CETS No. 51. See: L. Moreillon, A. Willi-Jayet, *Coopération judiciaire pénale dans l'Union européenne*, Paris 2005, pp. 305-307; E. Muller-Rappard, M.C. Bassiouni M, *European Inter-state Co-operation in Criminal Matters*. The Council of Europe's Legal Instruments, Dordrecht 1993, pp. 457-480.↵
8. COM (2004) 334 final.↵
9. Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union (presented by the Commission), COM (2004) 334 final, 2.1.7.↵
10. COM(2006) 73 final.↵
11. Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 13 of 20 January 2004.↵
12. COM(2005) 195 final.↵
13. Initiative of the Kingdom of Denmark with a view to adopting a Council Decision on increasing cooperation between European Union Member States with regard to disqualifications, OJ C 223 of 19 September 2002.↵
14. European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle of 28 April 1983, CETS No. 88.↵
15. OJ L 327 p.27 of 5 December 2008.↵
16. Recital 8.↵
17. Probation decisions are judgments granting conditional release or imposing probation measures. Probation measures mean the imposition of obligations and instructions in cases of a suspended sentence or conditional release.↵
18. Recital 10.↵

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