
Implementation of the Framework Decision on the transfer of Probation Measures between States in the European Union

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ABSTRACT

This article provides the background to the European Union's Framework Decision on the transfer of probation measures and alternative sanctions. It describes the implementation process outlining some lessons learned and practical steps prioritised to implement the Framework Decision in Ireland. It provides suggestions for others addressing the same challenge. The article highlights the need for leadership and pro-active management of the implementation process, clear and accessible information on sanctions available and how they are managed in each jurisdiction and the importance of a single point of contact or international desk. It emphasises the need for an effective stakeholder communication strategy. Some suggestions are made on the development of the competent authority to manage incoming and outgoing orders. The article concludes by identifying significant benefits available through an effective implementation of the Framework Decision.

KEYWORDS

Co-operation – Framework Decision - Courts - Probation – Community Sanctions – Alternative Sanctions - Rehabilitation – Penal Policy

The EU Framework Decision² on probation and alternative sanctions³ (FD) stipulates that on 6th of December 2011, offenders who have been sentenced to a supervised non-custodial sanction in another EU member state than where they live can serve their sentence in their home country. All EU countries are expected to take the necessary steps to enable implementation by that date.

BACKGROUND

The increased mobility of European citizens and the absence of agreement on the transfer of probation sanction supervision between jurisdictions have been seen as contributing to an increased number of cases where citizens found guilty of offences in another Member State which, in normal circumstances, would merit a supervised probation period or alternative sanction rather than a period in custody have been at risk of custodial sanction because of

the practical and legal difficulties in imposing probation supervised sanctions outside the jurisdiction of the sentencing State.

Where non-resident nationals of other member states or persons residing abroad were concerned courts were thought to be reluctant to pass a sentence which it was not certain would be put into effect in another country.

In 1964 the Council of Europe Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (CETS 51)⁴ set out to address this issue. Its aim was to supervise released offenders and provide such assistance as might be necessary to ensure their rehabilitation in their country of residence. The Convention achieved only limited application (signatures and ratifications⁵) and little real impact in practice in facilitating supervision of such offenders in their home country.

As a result, with ever increasing mobility and movement between States, there has remained an identified risk of increased use of custody for non-resident nationals of other member states, unnecessary disruption of personal, social and family circumstances for individuals and higher costs.

FRAMEWORK DECISION 2008/947/JHA

A joint German/French initiative beginning in 2006 sought to develop a mutual recognition instrument which could replace the COE convention and which could be of benefit to Member States and those who could be offered the possibility of serving their probation period or alternative sanction in their home country. Negotiations concluded *at the end of 2008 with agreement on Framework Decision 2008/947/JHA*.

The principal aims of the Framework Decision, as negotiated, are to facilitate the social rehabilitation of sentenced persons, improve the protection of victims and the general public and facilitate the application of suitable probation measures and alternative sanctions in case of offenders who do not live in the State of conviction.

The text of the Decision has to be agreed by all 27 Member States to enable the Council to act unanimously. It is mandatory for all States to

implement the FD; there is no discretion to ratify or not. While the FD is binding on all states, the form and method of implementation is left to each national authority. It must, as a Framework Decision, be transposed into national law to detail how it will operate in the State concerned.

The key purposes of the FD as agreed can be summarised as:

1. Offering the convicted person the possibility to return to their home country and to be dealt with there by way of probation measures or alternative sanctions which have been imposed by another Member State;
2. Ensuring that the supervision of measures is as consistent as practicable with the intentions of the sentencing Court even though the person has returned to their home State.

IRELAND AND THE FRAMEWORK DECISION

In Ireland migration inwards and outwards for longer and shorter periods has long been part of normal life. The Probation Service has been familiar with the challenges this mobility and movement gives rise to and evolved (and negotiated), over the years, voluntary arrangements to mitigate obstacles and facilitate, in many instances, effective supervision in Ireland and in other jurisdictions of persons who move or return to their place of residence.

For the Criminal Justice System in Ireland, and the Probation Service in particular, the FD provides an opportunity to structure and formalise management of community sanctions made in other jurisdictions in respect of persons resident in Ireland and vice-versa. It also extends the network of States with whom arrangements can be readily implemented and provides a clear consistent structure within which to speedily implement actions.

This article does not seek to provide detailed historical background analysis of the FD, of the issues and challenges in harmonising sanctions or general criminal justice policy priorities. For consideration of broader FD considerations there are relevant articles and contributions available through the CEP website⁶ and other publications⁷. In this article we will outline some of the lessons

learned and necessary practical steps prioritised and taken to implement the FD in Ireland and provide some suggestions for actions for others addressing the same challenge.

HOW IRELAND BEGAN PLANNING FOR THE FD

Implementation group

To ensure that the required actions were planned, preparations made and target achieved it was essential that clear responsibilities and actions were assigned. The Probation Service, with the Department of Justice and Equality, decided to take on that responsibility and to lead the preparation for the implementation of the FD in Ireland.

An implementation group was established with the task of identifying and resolving the many complex issues associated with the Framework Decision. The membership of the implementation group comprises of six senior officials including representatives from the policy and legislative divisions of the Department of Justice and management and practitioner representatives from the Probation Service. It engages with Courts and other branches of the Criminal Justice System to address particular issues. The implementation group continues to meet and work co-operatively in managing progress on all aspects of the Framework Decision and keeping it as a priority on the agenda from a Department and Service perspective.

FD implementation will be most efficient and successful where it maintains close co-operation and working between the organisations responsible for the day-to-day management of community sanctions, key criminal Justice System partners and the policy makers and drafters of the legislation.

Mapping the issues and processes

The Service began the process by hosting an expert meeting bringing relevant stakeholders and important partners in Ireland and internationally together to identify steps and actions to achieve specific outcomes.

In October 2009 the Probation Service in Ireland, in conjunction with CEP, hosted the expert meeting in Dublin on the implementation process⁸. The conference was attended by policy makers from relevant Ministries and delegates from key Probation organisations across Europe⁹. Attendance from jurisdictions where there was likely to be movement of offenders was important as was the participation of jurisdictions and bodies with expertise, interest and a commitment to shared learning and preparation.¹⁰

The expert meeting in Dublin was critical in placing the Framework Decision on the agenda for policy makers and practitioners in Ireland and the international partners in attendance in a real and practical manner. For many present it was a first opportunity to sit down together and debate the issues, jointly draw up a road map to progress the work and take ownership of issues arising.

Arising from the Dublin meeting a next steps document¹¹ was developed identifying necessary actions under the headings of general steps, competent authority, legislation, progressing objectives and additional steps. The next steps document serves as a road map for the implementation process.

General Steps

The recommended first step is the establishing of a high level implementation group with clear instructions and targets to take ownership and responsibility for the implementation. The mandate should require the group to plan and map the necessary processes, engage relevant partners at home and abroad, ensure decision and progress on necessary actions and deliver the FD in practice. This needed to be undertaken from the viewpoint of both the issuing and executing state, consideration of the measures and processes outlined in the Framework Decision and reconciling them with the principles and practices in Irish law.

Information and Communication

Communication regarding all aspects of the Framework Decision to key stakeholders is critical to complete all necessary preparations and achieve effective implementation.

It is imperative that the organisations tasked with supervising community sanctions have knowledge of and a confidence in the consistent and high quality execution of sanctions in other member States. Good information sharing and communication is therefore critical for all authorities and services across Europe.

In Ireland an immediate priority in February 2010 was the establishing of a central International Desk in the Probation Service to manage and monitor existing voluntary arrangements with services in other jurisdictions, disseminate information on community sanctions available in Ireland and to act as a central gateway and contact point on FD and transfer related enquiries.

At that stage the main contacts were with Northern Ireland, Scotland and England and Wales and arrangements in place are voluntary. These are jurisdictions where there is traditional and easy mobility with large volumes of ‘traffic’ to and from Ireland. It is expected that the number of other states engaging with the International Desk will increase over time with ever increasing mobility across Europe and as transfer of supervision becomes more recognised and considered as an option.

The International Desk functions as a help and advice desk to other jurisdictions and has built up a knowledge and practice expertise which will further assist in promoting best practice. It is important that this facility is centralised and actively managed within the Probation Service to source or provide timely information regarding the alternative measures in each Member State and available arrangements, e.g. information on the availability of addiction treatment in particular situations.

The International Desk assists in identifying and mapping key States with whom most inward and outward transfers are likely. To supplement this data the Probation Service had the benefit of data from

a cultural diversity survey of Service clients conducted in 2009 and was repeated in 2011¹². The International Desk has proven to be an important and valuable resource in the efficient management of international ‘traffic’ and information.

Our experience indicates that an International Desk or equivalent should be established as a priority in all participating states.

To promote knowledge and understanding of the Framework Decision in addition to hosting the Framework Decision seminar with CEP an article was published in Irish Probation Journal 2009 on the Framework Decision¹³ and discussions were initiated with other Criminal Justice stakeholders and key partners. It is important that maximum information and clarity is provided to all interested parties to minimise confusion, misunderstanding and frustration.

There is a responsibility on each member state to drive this communication process so that information is available to judges, prosecutors, defence counsel, offenders and supervising agencies on the possible options of supervision transfer. The Probation Service, in most states, is best placed for this task having the necessary knowledge, expertise and interest in the implementation of the FD.

In the Probation Service, all staff will be briefed on the key components of the Framework Decision and the implications for practice. A particular critical success factor is that Judiciary and Court professionals are informed about the Framework Decision, the process for transfer and the supervision arrangements should an offender return to their home country. They must have confidence that offenders will be supervised appropriately if they return to their home jurisdiction.

There is a key role for Probation Services in informing Courts and authorities about the Framework Decision and the execution of community sanctions and measures in other States. The active promotion and communication of shared understanding of how sanctions and measures are managed and enforced in each jurisdiction will develop confidence in the implementation across all States. This information exchange will be on-going

but is of particular importance in the early stages of implementation as Judges and other authorities need to be informed of the possibility of supervision in the offender's home State should they wish to return home.

The Competent Authority

In the early discussions in Brussels in developing the FD the definition and functions of the Competent Authority was a matter of much complex and detailed discussion.

Article 3(1) of the Framework Decision obliges each Member State to inform the General Secretariat which authority or authorities are competent to act in the situation where the Member State is the issuing or executing state. Each state needs to decide

- i) whether they will have several or one Authority
- and ii) who will staff the competent authority.

With 27 separate States and multiple Criminal Justice authorities the establishing of the Competent Authority is a critical step in each jurisdiction to enable the practical application of the FD and bring the 'foreign order' into being in the issuing and executing jurisdictions. It is essential to identify within each jurisdiction the functions, key players, responsible persons and legislative or other requirements to set up and empower the Competent Authority within national regulations consistent with the requirements of the FD with timelines and targets.

Member States are obliged to accept decisions by the competent authorities of the other Member States regardless of whether or not their own competent authority would take such a decision in their own State.

On practical grounds, based on Irish experience, there is a strong argument to establish just one national authority, acting as a clearinghouse, to which all applications are forwarded and managed. It would undertake the functions of making determinations, adapting the sanction, if necessary, to the law of the State, liaise with Courts where necessary and generally expedite applications. Allowing each individual Court office to

communicate with opposite numbers in any one of 27 Member States risks being a recipe for chaos and not feasible in practice.

A number of member states are presently debating the composition of the most appropriate form of competent authority for their own State. There seems general agreement on having as few authorities as possible and designating one central authority to act as a conduit for orders "in and out".

In Ireland the functions of the Competent Authority are recognised as primarily administrative; the acceptance/non-acceptance of Orders and requests from other States, the preparation of the necessary documentation e.g. verification of the completion of the certificate and judgment in compliance with the legislation, sending documentation to a nominated Judge/Court for decisions/endorsement. A nominated Judge/Court will deal with judicial aspects of the Competent Authority brief and make the judicial decisions regarding the transferring Orders.

The Competent Authority should provide protocols and procedures on how it will function. The authority will require two clear task lists – one for sending information and another for receiving information with check lists to facilitate clarity of information exchange.

In Ireland the Competent Authority will be located in the Department of Justice with close liaison maintained with the Probation Service regarding supervision arrangements, with the Courts Service and the nominated Judge and with the competent authorities in other member states. There will be an advisory group supporting the Competent Authority with representatives from the Probation Service, Department of Justice and the Courts and a Judge nominated by legislation.

Legislation

It is a reality that legislation, procedures and practice in sentencing, probation decisions and applicable procedures and practices in member States are divergent. It has been a real challenge to find a common solution for a mechanism of cross-border recognition and supervision. As a result there has had to be compromises and flexibility built into the

final FD document which, at times, can appear overly complex and qualified.

The Framework Decision allows the executing state a certain degree of manoeuvre 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). While it is expected that most States do have most of the sanctions outlined in Art. 4 sect. 1 and willingness to facilitate transfer, the transposing of the Framework Decision into national law is necessary to give authority to implementation and enforcement in practice in issuing and executing States.

It will be essential that decision on and legal arrangements for appropriate Competent Authorities are completed at the earliest possible point in time to facilitate, among other priorities, refinement of decision and implementation practices and the circulation and exchange of information among States, local stakeholders and relevant interests.

It is therefore necessary that there is timely examination of existing legislation to establish how it fits with the Framework Decision and whether legislative amendments are required. This is particularly important as the process and timeline for legislative changes can be complex and lengthy.

In Ireland new legislation to provide a modern statement of the law governing the role and use of the Probation Service and to give effect to the Framework Decision is part of the Government's planned legislative programme and in preparation. Full provision in law is likely to take until 2013. In the meantime agreed voluntary arrangements will continue.

PROGRESSING OBJECTIVES – PRACTICE CONSIDERATIONS FROM THE IRISH EXPERIENCE

In successfully implementing the Framework Decision, a major challenge is to make trans-national supervision effective alongside the opportunity to make probation a valued option for offenders throughout all Member States.

Once the person has returned under the Framework Decision process to their home State and the home country has taken responsibility for supervision of the probation measures or alternative sanctions any subsequent decisions are best taken by the executing state rather than the issuing state. This was considered at some length during the expert meetings prior to drafting the FD and there was a clear message that, as far as possible, such decisions should be in the hands of the executing state.

It does seem more in the interest of justice and of finding appropriate responses to the person's situation and behaviour to give this responsibility to the appropriate authority in the State where the person now lives; to where the supervision has been transferred rather than to revert to the issuing State where the matter has, for all purposes, been disposed of by way of the Framework Decision.

Within the Framework Decision there is an option of referring back in some limited circumstances. A Member State can make a declaration that 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. In general however it does appear most appropriate in most instances to leave the ultimate decision on any modification of the measures or the revocation and consequences in the hands of the executing State.

It will be very important for the legislator and for the practitioner to establish appropriate mechanisms to ensure that authorities in issuing and executing States co-operate in determining the adequate response to the person not complying with the terms of a conditional sentence or alternative sanction to minimise referrals back and maximise the authority of the supervising authority in the executing State.

INFORMATION AND FD PROJECT MANAGEMENT ACROSS EUROPE

A critical element of the operation and management of the Framework Decision will be the preparation and exchange of information on available sanctions across jurisdictions in clear and simple language.

This information is best managed using a common template completed by each individual State. An initial exercise in developing a shared body of information was undertaken during the Belgian presidency in 2010 and presented at an expert conference in Durbuy¹⁴.

The ISTEP project was established in June 2011 to follow up on actions from the Durbuy conference. It is collating data to develop a Database to enable sentencers and competent authorities to establish a mutual agreement and understanding for the transfer between the Issuing State and the Executing State. ISTEP will produce an (electronic) European Handbook containing an overview of all obstacles (and solutions) to the implementation of the FD and an Implementation Guidance/Suggested Steps, a range of Scenarios, Flowcharts, and Case Studies¹⁵.

The FD implementation across Europe needs to be monitored and managed on a long-term on-going basis using national and international data and experience to identify and review trends, patterns and blockages as they emerge and good communication to resolve issues as they arise. It will be essential that relevant data on FD applications, decision and 'traffic' in each State and across all jurisdictions is gathered, reviewed and evaluated. Commissioned research and study on the on-going implementation could provide valuable assessment and recommendations.

To be effective, user friendly and used in practice (avoiding the fate of the 1964 Council of Europe Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders¹⁶) the Framework Decision needs to be a living document actively managed with real and effective processes. It will need to be maintained, updated and easily available across Europe.

A long-term central mechanism or body would appear essential to manage these tasks, co-ordinate communication and report as necessary as well as to 'champion' the pro-active implementation of the FD.

CONCLUSION – NEXT STEPS

While this EU Framework Decision is one of the more complex legal texts in the area of European judicial co-operation and it will be a challenge for each Member State to implement in the national legislation it is a most exciting and innovative step in reducing the use of custody for non-resident nationals of other member States and in minimising unnecessary disruption of personal, social and family circumstances for individuals. It is of particular importance that it is implemented so that the practitioners, Courts and supervisors, feel at ease making use of it, confident that the decisions will be carried out appropriately and consistently and have clear understanding and expectation of outcomes.

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.

The aims of the Framework Decision through national implementation must be actively championed and progressed rather than allowed to simply sit on the shelf. Therefore a responsible and expert implementation team with a comprehensive information database, Justice 'family' commitment and pro-active management is essential.

Throughout implementation preparations and in this article the importance on good information, clarity in understanding and communication, 'joined up' service co-ordination across borders and simplest possible processes are key factors in preparing for effective and efficient implementation of the Framework Decision in all jurisdictions.

The 2006 joint German/French initiative has now led to the implementation of the Framework Decision providing the possibility of serving their probation period or alternative sanction in their home country. It is a valuable, humane and potentially extremely beneficial resolution for a burdensome and increasing EU problem for the individuals, families and States involved. It is in all our interests to make this work through co-ordinated and co-operative implementation of the Framework Decision in every jurisdiction.

NOTES

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- ² Framework Decisions were a primary means, up to the end of 2009, of establishing structures and legal formulae used to enable inter-State collaboration to be effective in specific criminal law issues. Article 34 of the Amsterdam Treaty on European Union as amended by the Nice Treaty provided the legal basis for Framework Decisions. Framework Decisions ceased after the Lisbon Treaty and have been replaced by EU authority to enact directives and regulations. Actions in relation to existing FDs continue in place.
- ³ 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 the supervision of probation measures and alternative sanctions. <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:337:0102:0122:EN:PDF>
- ⁴ Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders 30 November 1964 CETS 51. <http://conventions.coe.int/treaty/en/Treaties/Html/051.htm>
- ⁵ <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=051&CM=1&DF=&CL=ENG>
- ⁶ <http://www.cepprobation.org/>
- ⁷ e.g. De Wree, E., Vander Beken, T. and G. Vermeulen (2009) 'The transfer of sentenced person in Europe. Much ado about reintegration', *Punishment and Society*, 11(1): 111-128, Morgenstern, C. (2009) 'European initiatives for harmonization and minimum standards in the field of community sanctions and measures', *European Journal of Probation*, 1(2): 128-141; Rusu, I (2010) 'The Probation Service in the Context of European Integration. The Supervision of Convicts in the Community. Critical Observations Acta Universitatis Danubius Juridica VI (2): 113-126; Rusu, I (2011) 'Re-Individualizing the Criminal Sanctions of Deprivation of Liberty in the European Union' Acta Universitatis Danubius Juridica VII (2): 64-77.
- ⁸ Presentations and the report from the Expert Meeting on the Implementation of the Framework Decision on Probation in Dublin, 7-8th October 2009 can be accessed at and downloaded from <http://www.cepprobation.org/news/116/228/report-dublin-expert-meeting-on-the-implementation-of-the-framework-decision-on-probation>
- ⁹ Belgium, Catalunya (Spain), Denmark, Estonia, Germany, Guernsey, Hungary, Ireland, Isle of Man, Jersey, Lithuania, Luxembourg, Malta, Netherlands, Northern Ireland, Norway, Poland, Portugal, Romania, Scotland, Slovakia, Spain, Sweden, United Kingdom.
- ¹⁰ A further expert meeting was hosted by the Belgium presidency in July 2010 in Durbuy, Belgium in July 2010. It examined practical 'realities' such as consent, adaptation and enforcement and the challenges in interpretation and application across jurisdictions and progressed work on the development of a shared information database on probation measures and community sanctions. Presentations and report from the Conference in Durbuy, 7-9th July 2010 can be accessed at and downloaded from <http://www.cepprobation.org/news/116/272/presentations-durbuy-conference-on-legislative-and-practical-implementation-of-the-framework-decision>
- ¹¹ The document is available at http://www.cepprobation.org/uploaded_files/Pres%20Dub%2009%20Steps.pdf
- ¹² Fernee, U and Burke, I (2010) Cultural Diversity and the Probation Service. *Irish Probation Journal* Vol 7 140-151 www.probation.ie/pws/websitepublishingdec09.nsf/Content/Irish+Probation+Journal+2010+Years
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- ¹⁴ Presentations and report from the Conference in Durbuy, Belgium 7-9th July 2010 can be accessed at and downloaded from <http://www.cepprobation.org/news/116/272/presentations-durbuy-conference-on-legislative-and-practical-implementation-of-the-framework-decision>
- ¹⁵ The ISTEP project began in June 2011 and is to be complete by June 2013. For more information regarding ISTEP contact the project manager, Craig Georgiou, on craig.georgiou@noms.gsi.gov.uk
- ¹⁶ See footnotes 3 and 4.