EUROPEAN PARLIAMENT

2004 *2009*

Committee on Civil Liberties, Justice and Home Affairs

2006/0158(CNS)

3.2.2009

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DRAFT REPORT

on the draft Council Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (17002/2008 – C6-0009/2009 – 2006/0158(CNS))

(Renewed consultation)

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Ioannis Varvitsiotis

Symbols for procedures

*	Consultation procedure *majority of the votes cast*
**I	Cooperation procedure (first reading) *majority of the votes cast*
**II	Cooperation procedure (second reading) *majority of the votes cast, to approve the common position* *majority of Parliament's component Members, to reject or amend the common position*
***	Assent procedure *majority of Parliament's component Members except in cases covered by Articles 105, 107, 161 and 300 of the EC Treaty and Article 7 of the EU Treaty*
***I	Codecision procedure (first reading) *majority of the votes cast*
***II	Codecision procedure (second reading) *majority of the votes cast, to approve the common position* *majority of Parliament's component Members, to reject or amend the common position*
***III	Codecision procedure (third reading) *majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission.)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics.*** In the case of amending acts, passages in an existing provision that the Commission has left unchanged, but that Parliament wishes to amend, are highlighted in **bold**. Any deletions that Parliament wishes to make in passages of this kind are indicated thus: [...]. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). Suggested corrections of this kind are subject to the agreement of the departments concerned.

CONTENTS

Page

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION 5

EXPLANATORY STATEMENT.....19

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the draft Council Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention
(17002/2008 – C6-0009/2009 – 2006/0158(CNS))

(Consultation procedure - renewed consultation)

The European Parliament,

– having regard to the Council draft (17002/2008),

– having regard to the Commission proposal to the Council (COM(2006)0468),

– having regard to its position of 7 November 2007[1],

– having regard to Article 34(2)(b) of the EU Treaty,

– having regard to Article 39(1) of the EU Treaty, pursuant to which the Council consulted Parliament (C-6-0009/2009),

– having regard to Rules 93, 51 and 55(3) of its Rules of Procedure,

– having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A6-0000/2009),

1. Approves the Council draft as amended;

2. Calls on the Council to amend the text accordingly;

3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;

4. Calls on the Council to consult Parliament again if it intends to amend the draft substantially or replace it with another text;

5. Should that draft not be adopted prior to the entry into force of the Treaty of Lisbon, is determined to consider any future proposal by urgent procedure, in close cooperation with the national parliaments;

6. Instructs its President to forward its position to the Council and Commission.

[1] Adopted texts, P6_TA(2007)0551.

Amendment 1

Council draft
Recital 13 a (new)

Amendment

(13a) In the event of a breach of a European supervision order, the issuing authority may decide to issue a European arrest warrant for the purpose of transferring the suspect to the issuing State. In such circumstances, which should be strictly limited to the application of this Framework Decision, Council Framework Decision 2002/584/JHA of 13 June 2002 covers all offences in relation to which a European supervision order may be issued

Or. en

Justification

It is important to clarify and emphasize that the EAW covers all offences only in cases implementing ESO. The scope of the EAW shall not be generally expanded.

Amendment 2

Council draft
Recital 17 a (new)

Amendment

(17a) The European Commission should at the earliest opportunity present a proposal for a legislative instrument concerning procedural safeguards in criminal proceedings.

Or. en

Justification

In order to be effective, any legal instrument based on mutual recognition needs to be completed by consistent and effective procedural safeguards.

Amendment 3

Council draft
Article 2 - paragraph 2 a (new)

Amendment

2a. For the purpose of this Framework Decision, a person is considered as non resident when his/her lawful and ordinary residence is fixed in a Member State different from the Member States where the proceeding is going on.

Or. en

Justification

It appears appropriate to clarify the definition of the residence.

Amendment 4

Council draft
Article 4 - paragraph 1 - point a

Text proposed by the Council	*Amendment*
a) "decision on supervision measures" shall mean an enforceable decision taken in the course of criminal proceedings by a competent authority of the issuing State in accordance with its national law and procedures and imposing on a natural person, as an alternative to provisional detention, one or more supervision measures;	a) "decision on supervision measures" shall mean an enforceable decision taken in the course of criminal proceedings by a competent ***judicial*** authority of the issuing State in accordance with its national law and procedures and imposing on a natural person, as an alternative to provisional detention, one or more supervision measures;

Or. en

Justification

One of the most important procedural safeguards is that decisions involving personal freedom should be adopted only by judicial authorities. The same approach was followed in the Commission's proposal.

Amendment 5

Council draft
Article 4 - paragraph 1 - point d a (new)

Amendment

(da) "competent authority in the issuing State" means a court, a judge, an investigating magistrate or a public prosecutor, with competence under national law to issue a decision on supervision measures;

Or. en

Justification

One of the most important procedural safeguards is that decisions involving personal freedom should be adopted only by judicial authorities. The same approach was followed in the Commission's proposal.

Amendment 6

Council draft
Article 4 - paragraph 1 - point d b (new)

Amendment

(db) "competent authority in the executing State" means a court, a judge, an investigating magistrate or a public prosecutor, with competence under national law to execute and monitor decision on supervision measures

Or. en

Justification

One of the most important procedural safeguards is that decisions involving personal freedom should only be issued executed and monitored by the judicial authorities, or in other words judges, investigating magistrates and public prosecutors. The same approach was followed in the Commission's proposal.

Amendment 7

Council draft
Article 6 - paragraph 2

Text proposed by the Council	*Amendment*
2. As an exception to paragraph 1 and without prejudice to paragraph 3, Member States may designate non-judicial authorities as the competent authorities for taking decisions under this Framework Decision, provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures.	***deleted***

Or. en

Justification

This provision should be deleted in the interests of consistency with the amendments concerning Article 4.

Amendment 8

Council draft
Article 9 - paragraph 1

Text proposed by the Council	*Amendment*
1. A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned consents to return to that State.	1. A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been ***accurately*** informed about the measures concerned ***in a language which he/she understands,*** consents to return to that State.

Or. en

Justification

Pending the adoption of a far-reaching instrument in the field of procedural safeguards, it would be appropriate to establish, at the least, minimum procedural safeguards concerning the execution of supervision measures and notably the right for the suspect to be accurately informed in a language he/she understands

Amendment 9

Council draft
Article 13 - paragraph 2

Text proposed by the Commission	*Amendment*
2. The adapted supervision measure shall not be more severe than the supervision measure which was originally imposed.	2. The adapted supervision measure shall ***be of a technical nature only and shall not of themselves impose additional obligations on the suspect. They shall*** not be more severe than the supervision measure which was originally imposed.

Or. en

Justification

It should be made clear that the executing authority cannot add any obligations to those which are imposed by the issuing authority. The executing authority can make only technical adjustments to the ESO.

Amendment 10

Council draft
Article 14 - paragraph 1

Text proposed by the Council	*Amendment*
1. The following offences, 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, and as they are defined by the law of the issuing 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 decision on supervision	***deleted***

measures :
− 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 1,
− 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 hormonal substances and other growth promoters,
− 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.

Or. en

Justification

As this framework decision aims to apply the least coercive measures to suspects who would otherwise most likely be subject to the application of a prison pre-trial measure, it makes no sense to make the recognition and execution of the decision on supervision measures subject to the verification of the dual criminality. In fact, Article 14, excluding the verification of dual criminality for the categories of offences listed, implicitly, allows a ground for refusal based on the lack of dual criminality for all the offences not included in the list. This would concretely result in a worse treatment of the suspect as in case of lack of dual criminality it would be more likely that he/she would be subject to provisional detention instead of a non detentive measure applied in a Member States where that behaviour is not punishable. Moreover, fixing the threshold for the exclusion of the verification of dual criminality in three years would mean leaving out of the scope of Paragraph 1 the cases which are likely to be more frequent: less serious crime. Finally, the verification of double criminality should gradually disappear from instruments founded on mutual recognition. The provision which this amendment removes is a step in the opposite direction and was not envisaged in the European Commission proposal.

Amendment 11

Council draft
Article 14 - paragraph 2

Text proposed by the Commission	*Amendment*
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 on European Union. The Council shall examine, in the light of the report submitted to it pursuant to Article 27 of this Framework Decision, whether the list should be extended or amended.	***deleted***

Or. en

Justification

This provision should be deleted in the interests of consistency with the other amendments concerning Article 14.

Amendment 12

Council draft
Article 14 - paragraph 3

Text proposed by the Commission	*Amendment*
3. For offences other than those covered by paragraph 1, the executing State may make the recognition of the decision on supervision measures subject to the condition that the decision relates to acts which also constitute an offence under the law of the executing State, whatever the constituent elements or however it is described.	***deleted***

Or. en

Justification

This provision should be deleted in the interests of consistency with the other amendments concerning Article 14.

Amendment 13

Council draft
Article 14 - paragraph 4

Text proposed by the Commission	*Amendment*
4. Member States may, for constitutional reasons, on the adoption of this Framework Decision, by a declaration notified to the General Secretariat of the Council, declare that they will not apply paragraph 1 in respect of some or all of the offences referred to in that paragraph. Any such declaration may be withdrawn at any time. Such declarations or withdrawals of declarations shall be	***deleted***

published in the Official Journal of the European Union.

Or. en

Justification

This provision should be deleted in the interests of consistency with the other amendments concerning Article 14

Amendment 14

Council draft
Article 15 - paragraph 1 - point d

Text proposed by the Council	*Amendment*
(d) the decision on supervision measures relates, in the cases referred to in Article 14(3) and, where the executing State has made a declaration under Article 14(4), in the cases referred to in Article 14(1), 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 decision 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 issuing State;	***deleted***

Or. en

Justification

This provision should be deleted in the interests of consistency with the amendments concerning Article 14.

Amendment 15

Council draft
Article 21 - paragraph 1

Text proposed by the Council	*Amendment*
1. If the competent authority of the issuing State has issued an arrest warrant ***or any other enforceable judicial decision having the same effect,*** the person shall be surrendered in accordance with the Framework Decision on the European Arrest Warrant.	1. If, ***in case of breach of the supervision measure,*** the competent authority of the issuing State has issued an arrest warrant, the person shall be surrendered in accordance with the Framework Decision on the European Arrest Warrant.

Or. en

Justification

The rapporteur in the opinion delivered in 2007 expressly referred to cases of breaches of the supervision measures and to the need not to create a transfer/surrender system parallel to the European Arrest Warrant. The reference to the European Arrest Warrant is therefore mostly welcome.

Amendment 16

Council draft
Article 21 - paragraph 3

Text proposed by the Council	*Amendment*
3. Each Member State may notify the General Secretariat of the Council, when transposing this Framework Decision or at a later stage, that it will also apply Article 2(1) of the Framework Decision on the European Arrest Warrant in deciding on the surrender of the person concerned to the issuing State.	***deleted***

Or. en

Justification

Taking into account the aim of this legal instrument, all offences should be covered, without setting a threshold.

Amendment 17

Council draft
Article 21 - paragraph 4

Text proposed by the Council	*Amendment*
4. The General Secretariat of the Council shall make the information received under the previous paragraph available to all Member States and to the Commission.	***deleted***

Or. en

Justification

This provision should be deleted in the interests of consistency with the amendments on Article 21.

Amendment 18

Council draft
Annex 1 - Certificate box (f) - point 2

Text proposed by the Council	*Amendment*
2. If the alleged offence(s) referred to in point 1 constitute(s) one or more of the following alleged offences, as defined in the law of the issuing State which are punishable in the issuing State by a custodial sentence or measure involving deprivation of liberty of a maximum of at least three years, please confirm by ticking the relevant box(es): ***− 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,***	***deleted***

− 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 1,
− 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 hormonal substances and other growth promoters,
− 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.

Or. en

Justification

This provision should be deleted in the interests of consistency with the amendments

concerning Article 14.

Amendment 19

Council draft
Annex 1 - Certificate box (f) - point 3

Text proposed by the Council	*Amendment*
3. To the extent that the alleged offence(s) identified under point 1 is (are) not covered by point 2 or if the decision, as well as the certificate are forwarded to a Member State, which has declared that it will verify the double criminality (Article 14(4) of the Framework Decision), please give a full description of the alleged offence(s) concerned:	***deleted***

Or. en

Justification

This provision should be deleted in the interests of consistency with the amendments concerning Article 14.

EXPLANATORY STATEMENT

As already stressed in the first opinion on this legislative proposal, pre-trial detention shall be regarded as an exceptional measure which must be strictly tested against the right to liberty and the presumption of innocence[1]. It shall never be compulsory nor be used for punitive reasons[2]. Consequently, in the pre-trial stage, the widest possible use should be made of non-custodial supervision measures.

Deprivation of liberty in the pre-trial stage may in principle be imposed only as an extrema ratio to prevent three classical situations: danger of flight, danger of suppression of evidence and danger of repetition of offences.

In a common European area of justice without internal borders, it is necessary to ensure that a suspect who is not resident in the trial state is not treated any differently from a suspect who is so resident.

However, so far alternative measures to pre-trial detention could not be recognised across borders as no specific mutual recognition instrument was in place and this resulted in an obstruction of the judicial protection of individual rights.

There is a clear risk of unequal treatment between the two categories - EU citizens who are not residents in the territory of the Member State where they are suspected of having committed a criminal offence and EU citizens who are residents. Furthermore, that could also be seen as an obstacle to the free movement of persons.

Taking into account the above-mentioned, the rapporteur strongly supports the adoption of this piece of legislation, which will allow the mutual recognition of pre-trial supervision orders. This instrument would encourage competent national authorities not to detain EU non-residents in pre-trial process due to the danger of absconding but to let them return to the Member State of their current lawful and ordinary residence.

In this spirit, the rapporteur welcomes the amendment of the text in the sense of taking on board his suggestion to widen the scope of the Framework Decision and to include the possibility for the suspect to request the issuing competent authority to forward the supervision order to a Member State other than the one in which he/she is ordinary and lawfully resident. The rapporteur further clarifies the definition of residence. In the light of

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[1]Article 6(2) TEU provides that the Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950) and as they result from constitutional traditions common to the Member States, as general principles of Community law.
The basic rights or fundamental freedoms that govern pre-trial detention and alternatives to such detention and that are determined by the ECHR are as follows:
- Art. 5(1) "everyone has the right to liberty and security of person";
- Art. 6(2) " everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law";
- Art. 5(1)c "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so"

[2] Recommendation of the Council of Europe, Rec(2006)13.

the aim of the proposal, it is vital not to restrict the meaning of the residence to the `permanent` residence which is already well-accepted Community terminology. However, it should be clarified that the residence should be lawful and ordinary. To this purpose *de facto* circumstances should be taken into account.

As this framework decision aims to apply the least coercive measures to suspects who would otherwise most likely be subject to the application of provisional detention, it makes no sense to make the recognition and execution of the decision on supervision measures subject to the verification of the dual criminality. In fact, Article 14 and Article 15 Paragraph 1(d), excluding the verification of dual criminality for the categories of offences listed, allow a ground for refusal based on the lack of dual criminality for all the offences not included in the list. This would concretely result in a worse treatment of the suspect as in case of lack of dual criminality it would be more likely that he/she would be subject to provisional detention instead of a non detentive measure applied in a Member States where that behaviour is not punishable. Moreover, fixing the threshold for the exclusion of the verification of dual criminality in three years would mean leaving out of the scope of Article 14 paragraph 1 the cases which are likely to be more frequent: less serious crime. Finally, the verification of double criminality should gradually disappear from instruments founded on mutual recognition..

In the spirit of ensuring the best treatment to the suspect and pending the adoption of a far-reaching instrument in the field of procedural safeguards, it would be appropriate to establish, at least, minimum procedural safeguards for execution/modification of supervision measures and notably the right for the suspect to be accurately informed in a language he/she understands.

Concerning the transfer mechanism and the new reference to the European Arrest Warrant, the rapporteur in the opinion delivered in 2007 expressly referred to cases of breaches of the supervision measures and to the need not to create a transfer/surrender system parallel to the European Arrest Warrant. The reference to the European Arrest Warrant is, therefore welcome. It is nevertheless the opinion of the rapporteur that the competent issuing authority should decide on a case by case base if, in the case of breach of the supervision measure, the suspect needs to be arrested and surrendered to issuing Member State.

It should in addition be clearly stated that all offences should be covered (without setting a threshold). Therefore, when applying the ESO, the EAW should be extended to cover all offences.