Trust & Action Project

The European Supervision Order*

Council Framework Decision 2009/829/JHA

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Council Framework Decision 2009/829/JHA (hereafter, "FD 2009/829/JHA") 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 is an act of the European Union which lays down rules according to which one Member State recognises a decision on supervision measures issued in another Member State as an alternative to provisional detention.[1]

In particular, the mechanism established by FD 2009/829/JHA entails the issuance of a European Supervision Order (ESO), a decision by a competent authority of one Member State imposing supervision measures on a defendant as an alternative to pre-trial detention, which is forwarded to another Member State to be supervised by it within its territory. In

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[1] Council Framework Decision 2009/829/JHA of 23 October 2009 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, OJ L 294, 11.11.2009, p. 20

particular, an ESO may be issued for all non-custodial pre-trial supervision measures, for example, restrictions on travel and a duty to report regularly to the authorities.

Overall, FD 2009/829/JHA fulfils three main purposes: it ensures the due course of justice; it enhances the right to liberty and the presumption of innocence by avoiding excessive use of provisional detention against non-residents; and it protects victims and the general public.

1. Background.

At EU level, Article 6 of the Charter of Fundamental Rights of the European Union and, at supranational level, Article 5, para.1, lett. c), of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, "ECHR") enshrine the individual's right to liberty and security. In particular, pursuant to Article 5, para.1, lett. c) ECHR, this fundamental right is guaranteed except in some cases, including "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". Consequently, pre-trial detention is typically regarded as an exceptional last resort measure to be adopted only when necessary to ensure that the person concerned will be available to stand trial or to prevent him from committing a new offence against the same or other victims.

Although all Member States have alternatives to pre-trial detention, foreign and non-resident suspects are not usually considered for the same range of alternative measures as national offenders. Indeed, many foreigners and non-residents are often regarded as being at risk of absconding; therefore, they are often subjected to pre-trial detention, although they would normally have qualified for provisional release or a non-custodial supervision measure, kept in prison until their trial is held, or released only to be expelled from the country. In addition to this risk of discriminatory treatment, foreigners and non-residents held in pre-trial detention are in a much more vulnerable position than residents.

In 2001, the European Parliament urged the European Commission to consider adopting an instrument enabling control, supervision or preventive measures ordered by a judicial authority pending the trial court's decision being recognised and immediately enforced. A proposal on mutual recognition of non-custodial pre-trial supervision measures was established as a priority in the Hague Programme on strengthening freedom, security and justice in the European Union, approved by the European Council on 5 November 2004, and included in the work programme of the Commission for 2005.

In 2006, the European Commission issued a proposal for a Framework Decision on the European Supervision Order in pre-trial procedures between Member States of the European Union, with the aim of reinforcing the right to liberty and the presumption of innocence in the European Union and promoting equal treatment of all citizens in the area of freedom, security and justice.

In 2007, the Council debated the proposal. Three further revised proposals followed[2] until FD 2009/829/JHA was finally adopted on 23 October 2009.

FD 2009/829/JHA constitutes an EU instrument alternative to the Council of Europe Convention of 30 November 1964 on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, which is heavily influenced by a traditional intergovernmental approach.

2. Procedure under Council Framework Decision 2009/829/JHA.

2.1 Identification of the competent national judicial authority.

Two core authorities are identified within FD 2009/829/JHA, namely the competent national judicial authority of the issuing and executing Member States concerned. In that regard, under Article 6 of FD 2009/829/JHA, each Member State is obliged to inform the General Secretariat of the Council of the judicial authority or authorities identified under their domestic law as those competent to act within FD 2009/829/JHA. Moreover, as an exception, Member States may also designate non-judicial authorities as those competent for taking decisions under FD 2009/829/JHA only if the latter are responsible for taking similar decisions under their domestic law and procedures.

In addition, under Article 7 of FD 2009/829/JHA, Member States may designate a central authority to assist its competent authorities. If envisaged by the organisation of its internal judicial system, a Member State may make its central authority responsible for sending and receiving decisions on supervision measures and all other related official correspondence.

2.2 Forwarding of a decision on supervision measures to the competent executing Member State.

According to Article 4, lett. *a*) of FD 2009/829/JHA, a decision on supervision measures is 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*". In particular, paragraph 1 of Article 8 envisages the types of supervision measures to which FD 2009/829/JHA applies:

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[2] Proposal for a Council framework decision on the European Supervision Order in pre-trial procedures between Member States of the European Union - revised text prepared by the Presidency, Council document 16494/07 of 2007-12-11; proposal for a Council framework decision on the European Supervision Order in pre-trial procedures between Member States of the European Union - revised text following the meeting on 3 September 2008, Council document 12665/08 of 2008-09-07; proposal for a Council framework decision on the European Supervision Order in pre-trial procedures between Member States of the European Union - general approach, Council document 16382/08 of 2008-11-27.

a. an obligation for the defendant to inform the competent authority in the executing Member State of any change of residence, particularly for the purpose of receiving a summons to attend a hearing or a trial during the course of criminal proceedings;
b. an obligation not to enter certain localities, places or defined areas in the issuing or executing Member State;
c. an obligation to remain at a specified place, where applicable during specified times;
d. an obligation containing limitations on leaving the territory of the executing Member State;
e. an obligation to report at specified times to a specific authority;
f. an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed.

Moreover, under paragraph 2 of Article 8, each Member State may also decide to monitor supervision measures additional to those referred to in paragraph 1:

a. an obligation not to engage in specified activities relating to the offence(s) allegedly committed, which may include involvement in a specific profession or field of employment;
b. an obligation not to drive a vehicle;
c. an obligation to deposit a certain sum of money or to give another type of guarantee, which may either be provided through a specified number of instalments or in full at once;
d. an obligation to undergo therapy or addiction treatment;
e. an obligation to avoid contact with specific objects in relation to the offence(s) allegedly committed.

The UK (which left the EU on 31 January 2020) and Finland were the only two Member States that declared only to monitor the supervision measures identified in Article 8, paragraph 1. In addition, several Member States, such as Hungary, Czech Republic, Sweden, Latvia and Luxembourg, have not yet made a declaration in that regard.

The competent authority of the issuing Member State must forward a decision on supervision measures to the competent authority of the Member State in which the person subject to that decision lawfully and ordinarily resides, if that person has agreed to return to that State (Article 9 (2) of FD 2009/829/JHA). In addition, the person subject to a decision on supervision measures may also ask the competent authority of the issuing Member State to forward the decision to the competent authority of a Member State other than the one in which the person concerned lawfully and ordinarily resides if the latter has so agreed (Article 9 (2-4) of FD 2009/829/JHA).

The competent authority of the issuing Member State must forward the decision on supervision measures to the competent authority of the executing Member State together with a certificate, the standard form of which is set out in Annex I of FD 2009/829/JHA, indicating the supervision measures chosen by the issuing Member State in accordance with Article 8(1) and (2) of FD 2009/829/JHA. In addition, the issuing Member State must specify in these

documents the length of time for applying the decision, the possibility of the latter being renewed and the necessary duration of the monitoring activities.

2.3 Recognition of the decision on supervision measures by the executing Member State.

After receiving the decision on supervision measures and the certificate, the competent authority in the executing Member State must decide as soon as possible and, in any case, within 20 working days, whether or not to recognise the decision on supervision measures sent by the issuing Member State. If recognised, it must take all necessary measures to monitor the supervision measures (Article 12 (1) of FD 2009/829/JHA).

In addition, Article 12 of FD 2009/829/JHA establishes some extensions to that time limit. For example, according to paragraph 2 of this Article, if a legal remedy has been introduced against the decision concerned, the time limit for its recognition is extended by a further 20 working days. Moreover, if, in exceptional circumstances, the competent authority of the executing Member State cannot comply with the time limits established in paragraphs 1 and 2 of Article 12, it must immediately inform the competent authority in the issuing Member State, giving reasons for the delay and indicating when it expects to take a final decision on recognition. Lastly, the competent authority may postpone the decision on recognition where the accompanying certificate is incomplete or does not correspond to the decision at issue, establishing a reasonable time limit for completing or correcting the certificate.

2.4 Competence over monitoring of the supervision measures.

For as long as the competent authority of the executing Member State does not recognise the decision on supervision measures, the competent authority of the issuing Member State remains responsible for monitoring the supervision measures imposed. Thus, once the competent authority of the executing Member State has recognised the decision and informed the issuing Member State to that end, the responsibility for monitoring the supervision measures is transferred to the competent authority of the executing Member State (Article 11 (1) of FD 2009/829/JHA).

However, under paragraph 2 of Article 11 of FD 2009/829/JHA, that responsibility reverts back to the competent authority of the issuing Member State in the following circumstances:

a. where the person concerned has established his/her lawful and ordinary residence in a State other than the executing State;
b. where the competent authority in the issuing Member State has notified withdrawal of the certificate to the competent authority of the executing Member State;
c. where the competent authority in the issuing Member State has modified the supervision measures and the competent authority in the executing Member State has refused to monitor those modified measures as they do not fall within the types of

supervision measures referred to in Article 8(1) and/or within those notified by the executing Member State concerned in accordance with Article 8(2) of FD 2009/829/JHA;

d. where the time period indicated in Article 20(2)(b) of FD 2009/829/JHA has elapsed;
e. where the competent authority in the executing Member State has decided to stop monitoring the supervision measures and has informed the competent authority in the issuing Member State of the same.

2.5 Monitoring of measures: applicable law and continuation.

Considering the high level of judicial cooperation that FD 2009/829/JHA aims to regulate, the monitoring of supervision measures is at the discretion of the executing Member State's domestic law (see Article 16 of FD 2009/829/JHA). Furthermore, where the maximum length of time imposed in accordance with Article 20(2)(b) is due to expire and the supervision measures need to be extended, the competent authority in the issuing Member State may communicate this need to the competent authority in the executing Member State. The latter will be entitled under Article 17 to decide on this request in accordance with its domestic law and, where relevant, the competent authority in the executing Member State may establish the maximum duration of the extension.

2.6 Adaptation of supervision measures.

If the nature of the supervision measures imposed in the issuing Member State is incompatible with the law of the executing Member State, the latter may adapt them to its domestic law, through the corresponding domestic rules, provided that the new measure is not more severe than the original one, both in terms of intrusion on the defendant's rights and in terms of length (see Article 13 of FD 2009/829/JHA). Moreover, under Article 13(3) of FD 2009/829/JHA, when receiving the information indicated in Article 20(2)(b) or (f), the issuing authority may decide to withdraw the certificate when monitoring has not yet begun in the executing Member State.

2.7 Post-recognition phase: decisions on supervision measures.

Once recognition has been granted and monitoring in the executing Member State has begun, the jurisdiction to take all subsequent decisions on supervision measures is retained by the competent authority in the issuing Member State, pursuant to Article 18(1) of FD 2009/829/JHA (see also Recital 9). To that end, the aforesaid authority applies the law of the issuing Member State, as prescribed by Article 18(2) (see also Recital 8). Thus, during this phase, there is clear separation between the authority entrusted with the power/duty to monitor the precautionary measures and the authority competent for making decisions related thereto.

Pursuant to Article 18(1) of FD 2009/829/JHA, the issuing authority may decide (a) to renew, review or withdraw the decision that had imposed the supervision measure on the defendant, as well as (b) to modify the precautionary measure imposed or (c) to issue an arrest warrant

or equivalent decision. To avoid costly and unnecessary transfers of the individual involved, if the latter has to be heard prior to the decisions indicated in Article 18(1), that hearing should preferably be held by teleconference or videoconference.

In this respect, it is noted that these means of communication should be preferred, more generally, with a view to avoiding costs that are not strictly necessary, according to Article 19(4) and Recital 10.

In the cases indicated in letters (a) and (b), the executing authority may decide to abide by the new decision only after recognising it through a new recognition procedure. In addition, when the supervision measure has been modified (letter b), the executing authority may decide to adapt it pursuant to Article 13 of FD 2009/829/JHA, or even to refuse to monitor it when the measure is not one of those indicated in Article 8(1) or notified under Article 8(2) of FD 2009/829/JHA. In the latter case, the competence for monitoring the (new) supervision measure reverts back to the competent authority in the issuing State, pursuant to Article 11(2)(c) of FD 2009/829/JHA.

3. Coordination and communication between authorities.

One peculiarity of the ESO is that it requires a rapid and diligent exchange of information between the competent authorities in order for the mechanism to work properly. This need for permanent communication may be, *inter alia*, one reason for the underuse of this judicial cooperation instrument[3].

Be that as it may, several provisions of FD 2009/829/JHA impose obligations on the authorities involved to communicate with, or consult, each other.

3.1 Communication from the executing authority.

The competent authority in the executing Member State is expected to communicate with the issuing authority in a wide range of situations.

First and foremost, any breach of the supervision measure must be immediately notified to the issuing authority, also for the purposes of Article 18(1); thereafter, the two authorities should consult each other under Article 22(1)(c).

Secondly, as laid down by Article 19(1) of FD 2009/829/JHA, the executing authority is entitled to ask the authority in the issuing Member State, at any time during the monitoring, whether supervision is still needed; the answer should be provided by the latter authority without delay.

Thirdly, Article 20(2) of FD 2009/829/JHA lists a number of issues that must be communicated promptly by the executing authority to the issuing authority. These issues are:

a. any change of residence of the person concerned;
b. the maximum time, if any, after which monitoring can no longer be carried out under the executing Member State's domestic law;

[3] A. M. NEIRA-PENA, *The Reasons Behind the Failure of the European Supervision Order: The Defeat of Liberty* versus *Security*, in *European Papers*, 4 November 2020, pp. 13, 14.

c. the practical impossibility of monitoring the person due to him no longer being found in the executing Member State;
d. the fact that a legal remedy has been introduced against the decision to recognise;
e. the final decision to recognise and start monitoring;
f. the decision to adapt the measure, so that it is in line with the supervision measures available for equivalent offences in the executing State (as prescribed by Article 13 of FD 2009/829/JHA);
g. the decision not to recognise the decision on supervision measures and, consequently, not to assume responsibility for monitoring.

All information indicated in Article 20(2) must be provided by means leaving a written record.

3.2 Communication from the issuing authority.

On the other hand, if the period initially indicated as the duration of the supervision measure - pursuant to Article 10(5) of FD 2009/829/JHA - is about to elapse, the issuing authority must alert the executing authority, specifying any additional period for which monitoring is still required.

Secondly, immediate information on any decision taken under Article 18(1) must be provided, along with any information on a legal remedy having been introduced against a decision on supervision measures in the issuing Member State.

3.3 Consultations.

More broadly speaking, even in circumstances other than those referred to above, continuous consultation is mandatory. Indeed, Article 22 of FD 2009/829/JHA lays down a general duty for the authorities involved to consult each other before forwarding the certificate, preferably even during its preparation. Furthermore, consultation must be carried out throughout the whole monitoring period, with a view to facilitating it and making it more effective.

Further consultation, concerning the risk possibly posed by the person involved to the general public or to the victim and prescribed by Article 22(2), is of utmost importance. Indeed, Recital 3 describes the protection of the general public as the overriding objective of the ESO.

In the context of the consultations, information on the identity, residence and criminal record of the defendant, as well as all other relevant and useful information, must be exchanged between the two authorities involved.

4. Surrender of the person.

If an arrest warrant or other equivalent decision is issued by the competent authority in the issuing State, the ESO and the European Arrest Warrant mechanisms interact. This may happen, for instance, if the person does not return to the issuing Member State voluntarily to stand trial (see Recital 12), or if the supervision measure imposed is breached[4].

[4] S. QUATTROCOLO, *The European Supervision Order: the need for a new culture of combating impunity,* in L. Marin, S. Montaldo (eds.), *The Fight Against Impunity in EU Law*, Hart Publishing, p. 4.

Article 21 of FD 2009/829/JHA states that, in such cases, the person must be surrendered pursuant to Council Framework Decision 2002/854/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (hereafter, "EAW FD") and, in principle, the minimum/maximum penalty thresholds stipulated in Article 2(1) of the EAW FD shall not apply in these circumstances. Nevertheless, upon notification to the General Secretariat of the Council, the Member States may apply the aforesaid thresholds, pursuant to Article 21(3). According to the information provided by the General Secretariat itself, thirteen Member States have invoked that option so far.

5. Grounds for non-recognition

FD 2009/829/JHA illustrates only non-mandatory grounds for refusing to recognise the decision on supervision measures. Such optional grounds are listed in Article 15 of FD 2009/829/JHA and they cover formal and material aspects[5]:

a. incomplete certificate (which should be forwarded together with the decision on supervision measures to the competent authority of the executing State, specifying the address at which the defendant will stay in the executing State, as well as any other relevant information which might facilitate the monitoring of the supervision measures in the executing State) (see Recital 6 of FD 2009/829/JHA);
b. infringement of the *ne bis in idem* principle (a general principle of law, barring multiple prosecutions or punishments against the same defendant, on the basis of the same facts);
c. impunity under the law of the executing State (making it impossible to monitor supervision measures);
d. age (under the law of the executing State, the person cannot, because of his age, be held criminally liable for the act on which the decision on supervision measures is based);
e. executing State refuses to surrender the person on the basis of an EAW (when breaching the supervision measures);
f. lack of double criminality.

Article 14(1) of FD 2009/829/JHA lists 32 offences that give rise to recognition of the decision on supervision measures, without verifying the double criminality of the act (the Member States were free to declare that they would not apply the clause abolishing the double criminality control for some of the 32 offences, based upon their domestic constitution).

6. Implementation.

The implementation date of FD 2009/829/JHA expired in December 2012. However, just a few Member States complied with this duty in a timely fashion, namely Poland, Latvia, Finland and Denmark. Moreover, at the beginning of 2014, fewer than half of the Member

[5] S. QUATTROCOLO, *The European Supervision Order*, *cit.*, p. 5.

States had fulfilled the transposition obligation. At present, all Member States, except for Ireland, have implemented the Framework Decision.

The initial lack of commitment on the part of the Member States in the transposition phase of FD 2009/829/JHA now seems to have been transferred to the action of the competent issuing authorities of the Member States, which enjoy discretionary power when it comes to deciding whether or not to issue an ESO[6]. The European Agency for Fundamental Rights highlighted in its Report on Criminal Detention that data on the implementation of the Framework Decision are absent in 19 jurisdictions; nonetheless, the available data confirms that the ESO has been poorly used.

For instance, according to the annual reports prepared by the Spanish General Council of the Judiciary, in 2015, Spain issued two ESOs and did not receive any. In 2016, three were issued and, again, none were received from other Member States. In 2017, two were issued and three were received. In 2018, only one ESO was issued. In 2019, the year in which the instrument was used the most to date, Spain received two ESOs and issued seven. Similarly, research carried out by the Trust and Action Project reveals the same situation in other countries. For instance, in Italy, two cases were reported in 2016, four in 2017 and three in 2019. In Romania, four were reported in 2017 and two in 2018.

The main reason behind this lack of success consists of insufficient mutual trust between the Member States[7]. Mutual trust lies at the core of the functioning of the ESO as it is a judicial cooperation instrument that entails the transfer of *ius puniendi*. The issuing authority transfers its supervisory powers to the executing Member State; therefore, the former assumes the risk of the investigations carried out in its territory being frustrated by the poor exercise of supervision by the latter. For this reason, it has been said that the ESO requires a higher level of mutual trust than other judicial cooperation instruments. As stated by the Commission Green Paper on the application of EU criminal justice legislation in the detention area: "*Mutual trust is central to the ESO's successful operation. However, there is a risk that the instrument will not be used uniformly across all Member States, but only between those countries where mutual trust exists*".

Furthermore, the high level of trust underlying FD 2009/829/JHA seems to be further complicated by two provisions of that framework decision. Firstly, Article 23 gives the executing Member State the opportunity to stop monitoring the supervision measure if the issuing Member State fails to comply with the time limits of the consultation procedure. Secondly, Article 21, regulating the surrender procedure of the defendant to the issuing Member State in accordance with the EAW FD, in its third paragraph inexplicably envisages the possibility to apply the condition that the defendant faces a custodial sentence of less than 12 months. This provision counters the assumption in Recital 13 that "*supervision measures should generally be applied in case of less serious offences*".

In addition, the national frameworks appear to be quite problematic. Pre-trial coercive measures are extremely fragmented throughout the European Union. These divergences are hampered even further by the jurisprudence of the Member States' Supreme Courts as they require strict observance of domestic legal provisions governing the application and

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[6] B. MIN, *The European Supervision Order for Transfer of Defendants: Why Hasn't it Worked?*, in *Penal Reform International*, 25 September 2015, www.penalreform.org.

[7] A. M. NEIRA-PENA, *The Reasons Behind the Failure of the European Supervision Order*, *cit.*, pp. 6-17.

execution of the measure at issue[8]. Nonetheless, it should be noted that the case law of the Court of Justice[9] obliges the Member States to interpret their domestic law in a manner consistent with EU law. Therefore, in the context of pre-trial coercive measures, the objectives of the ESO should be taken into account.

The case law of the Court of Justice places another obligation on Member States, specifically when exercising the discretion permitted by EU legislation. National authorities acting as issuing authority enjoy discretionary powers in deciding whether or not to issue an ESO. In doing so, they are obliged to comply with EU law as a whole (including the Charter of Fundamental Rights of the EU and the ECHR by virtue of Article 52(3) of the Charter)[10]. Accordingly, if the national courts refuse to consider the ESO, the decision could be questioned in light of the obligations stemming from the ECHR. The European Court of Human Rights has described a sort of proportionality requirement embodied in Article 5.1 ECHR with respect to the deprivation of liberty. The Strasbourg Court Ladent vs. Poland stated that "*domestic authorities should always consider the application of other, less stringent, measures than detention*". Furthermore, in Lelièvre vs. Belgium, the ECtHR claimed that detention is considered a last resort measure and it is justified "*only when all the other available alternatives are found to be insufficient*". Therefore, national courts have the duty to consider all alternatives to detention and this examination is not complete until they have considered supervision measures enforced by means of FD 2009/829/JHA.

[8] S. QUATTROCOLO, *The European Supervision Order*, *cit.*, p. 10.

[9] See, *inter alia*, Court of Justice of the European Union, Judgment of 16 June 2005, C-105/03, *Pupino*, para. 34; Court of Justice of the European Union, Judgment of 5 September 2012, C-42/11 *Lopes Da Silva*, para. 54.

[10] S. MONTALDO, '*Offenders' rehabilitation and the cross-border transfer of prisoners and persons subject to probation measures and alternative sanctions: a stress test for EU judicial cooperation in criminal matters*', in *Revista Brasileira de Direito Processual Penal*, 2019, pp. 925-958.