

Final Business and Regulatory Impact Assessment

Title of Proposal

The Mutual Recognition of Supervision Measures in the European Union (Scotland) Regulations 2014.

Purpose and intended effect

- **Background**

EU nationals suspected of committing an offence in a different Member State often find themselves in a position where either the courts order their detention because they presume them to be a flight risk, or they will release them but require them to stay in the trial state because they do not have confidence that they can be adequately supervised at home.

Council Framework Decision [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*, was agreed and entered into force on 1 December 2009. It is commonly known as the European Supervision Order, or ESO.

This Framework Decision aims to introduce the possibility of transferring a pre-trial non-custodial supervision measure (such as bail) from the Member State where a non-resident is suspected to have committed an offence, to the Member State where they are normally resident. It therefore provides a framework to allow, in certain circumstances, a suspected person to return home and be supervised there until their trial takes place in the requesting Member State where the offence is alleged.

- **Objective**

The Scottish Government's objective is to transpose the requirements of the Framework Decision into Scots law. In doing so it will meet its duties under section 57(2) of the Scotland Act 1998 to ensure that legislation is compatible both with the European Convention on Human Rights and with Community Law.

The ESO is designed to increase the likelihood that EU nationals who are prosecuted in a different Member State will be granted bail rather than remanded in custody. This is not only to counter the presumption of them being deemed a flight risk and avoid the trial state bearing the financial cost of the detention, but also to avoid being cut off from family and friends, the effects of detention on their physical and mental health and the risk of being absent from and consequently losing employment.

It is the objective of the Scottish Government to address issues arising from the increasing use of remand – costs, prison overcrowding, reoffending, risk of suicide and mental health problems and human rights violations, and actively pursue routes to reduce the remand population such as supervised bail¹.

It is in keeping with the Scottish Government's general policies of (1) promoting human rights, in this case by helping to avoid or minimise the impacts of lengthy pre-trial detention on individuals with no community ties to the trial state, and (2) demonstrating that Scotland is a reliable partner at European level.

It is not, however, the Scottish Government's objective to transpose the requirements in such a way as to require services beyond those essential to meet our obligations under the Framework Decision and under the Convention.

- **Rationale for Government intervention**

The Framework Decision is addressed to Member States. Justice is, with some exceptions (e.g. extradition), a devolved competence, so it falls to Scottish Ministers to transpose the requirements of the Framework Decision into law in Scotland.

If Scotland does not transpose the Framework Decision adequately the Scottish Government will be in breach of its obligations under the Scotland Act 1998 namely not to act except in accordance with the law of the European Union. It would be in breach of the UK's requirements to transpose the Framework Decision and would share in any infraction proceedings against the UK, including any financial penalty imposed. It may also suffer reputational damage.

Transposing this Framework Decision will contribute to helping communities to flourish, becoming stronger, safer places to live, offering improved opportunities and a better quality of life.

Consultation

- **Within Government**

Within Government consultation has taken place with the Ministry of Justice in the UK Government, and with officials in the Scottish Government dealing with the courts, the police, Legal Aid, equality and business. Input from these teams has fed into the development of the proposals to ensure consistency and complementarity with wider UK and Scottish Government criminal justice policies and processes.

¹ Armstrong, Sarah (2008) Fixing Scotland's remand problem. In: Lightowler, C. and Hare, D. (eds.) *Prisons and sentencing reform: developing policy in Scotland.* Scottish Centre for Crime and Justice Research, University of Glasgow, Glasgow, pp. 10-14.
http://lx.iriss.org.uk/sites/default/files/resources/Prisons%20and%20sentencing%20reform_0.pdf

- **Public Consultation**

Informal consultation has taken place with the Scottish Courts Service ('SCS'), the Crown Office and Procurator Fiscal Service ('COPFS'), Police Scotland, Judicial Institute, and the Scottish Prison Service in preparing the draft Regulations. The Law Society of Scotland, the Faculty of Advocates, the Society of Solicitor Advocates and Equalities organisations will have been consulted prior to laying of the Regulations, which will also be published on the Scottish Government's website. As the timetable for developing this instrument has been set against the constraints of the UK opt in, and as the measures primarily affect the organisations in Scotland responsible for executing and monitoring the supervision measures who were part of the working group who developed them, we did not consider it appropriate or proportionate to carry out full public consultation.

- **Business**

The Regulations do not create regulatory requirements on business. Nevertheless, as described above, the Law Society of Scotland, the Faculty of Advocates, and the Society of Solicitor Advocates, were consulted informally prior to laying of the Regulations and accompanying documents.

Options

(1) Do nothing – fail to transpose the Framework Decision.

(2) Transpose the Framework Decision, taking advantage of opportunities to lesson impact and avoid undue legislative burdens.

(3) Transpose the Framework Decision without applying such exceptions – for example by specifying in the Regulations that a proof should be held to establish if there has been a breach of a supervision measure.

Sectors and groups affected

Whichever option is chosen, the sectors affected will be the accused subject to the ESO, their legal representatives and the organisations in each Member State responsible for the issuing ,executing and monitoring the supervision measures, which in Scotland would be the Crown, the courts and the police. This is also expected to affect the prison service through a reduction in the number of prisoners held on remand while awaiting trial.

As the ESO introduces new EU obligations, there will be impacts on all these groups under the latter two options, although specific impacts are at this stage difficult to quantify.

Benefits

(1) This represents the "no change" option and thus has no benefits to offer over the current arrangements. Any perceived benefit in terms of reduced burdens over options

(2) and (3) would be short-lived as infraction proceedings and continued fines would force us to abandon this option.

(2) With this option the accused will benefit from having the option to return home and be supervised there until their trial takes place in the Member State where the offence took place. This will help avoid adverse impacts associated with lengthy pre-trial detention on individuals with no community ties to the trial state such as being cut off from family and friends, the effects of detention on their physical and mental health and the risk of being absent from and consequently losing employment. By returning home to await trial, the accused would be in a position to contribute positively to society, bringing potential benefits to the economy. If the policy objective of promoting the use of non-custodial measures in criminal proceedings is achieved we should expect to see a reduction in the number of remand places required in Scotland, resulting in reduced financial costs associated with detention. Scottish organisations such as the SCS will benefit from increased opportunities to engage with EU counterparts on cross-border issues of mutual interest, with increased cooperation between Member States potentially leading to improvements in the operation and administration of these and other related measures.

(3) This option would offer identical benefits as option (2) above. However, by going beyond the minimum requirements of implementing the Framework Decision Scotland could infringe on the rights of other member states to follow their own penal code e.g. by a Scottish Court holding a proof as to whether a breach of a supervision measure was established instead of merely reporting the breach to the State that imposed the supervision measure and allowing the breach to be established under the law of that state.

Costs

(1) If Scotland does not transpose the Framework Decision adequately the Scottish Government will be in breach of the Scotland Act 1998 and share in any infraction proceedings against the UK. While the size of any fines is difficult to predict it is worth noting that any fines levied in infraction proceedings would be on the basis of the coefficients applicable in the case of the UK as a Member State. Thus if an infraction arose because Scotland alone in the UK failed to transpose adequately, the fines would be calculated on the size of the UK but payable entirely from the Scottish block. Moreover fines would continue until Scots law was brought into compliance with the Framework Decision's requirements. Fines may be as high as €700,000 per day, with the specified minimum lump sum currently set at €9,446,000 for the UK.

In the event of failure to transpose Scotland would also suffer reputational damage, both in the EU and within the UK.

(2) It is estimated that the ESO could offer savings from fewer prison places of £2.3m over 10 years:

	Calculation
Volume of Member State suspects on pre-trial detention (Scottish Government Justice Analytical Services ²)	50
Current volume of Member State suspects who would be eligible to apply for ESO (based on Pre-trial Detention in the European Union, 2009 ³ and SEC (2006)1079, Commission Staff working Document ⁴ which suggests that 80% of suspects would be eligible based on data on foreign nationals held on remand in Europe, but eliminating the most serious crimes e.g. rape, murder and robbery)	80% of 50 = 40
Current volume of Member State suspects who exercise the right to apply for ESO (estimate from Office of National Statistics data ⁵ on suspects held on remand who are not permanent residents and therefore are more likely to travel back - it is assumed that 17% of Europeans in the UK only intended to stay here for less than a year).	17% of 40 = 7 (rounded up from 6.8)
Total saving (number of EU suspects who would exercise right to apply for ESO x average cost of prison place per annum (£33,153 ⁶))	7 x £33,153 = £232,071

The UK Government Impact Assessment indicates that far fewer UK nationals are held on remand in Member States than the number of suspects from Member States held on remand in UK prisons – which would suggest that costs of monitoring UK suspects would be fairly small, though there would be additional costs associated with opting in to the ESO. These costs include the costs to the police, COPFS and SCS for executing European Arrest Warrants ('EAW') when Scots suspects failed to return to Member States for trial and the costs to COPFS for issuing EAWs where a Member States national fails to return to Scotland for trial.

Initial estimates suggest that there may be a small annual saving from opting in to the ESO, though as costs have yet to be calculated, it is not possible to quantify this saving

(3) Costs would be dependent on the additional provisions and legislative burdens implemented. It is not considered this option would be consistent with the principles of Better Regulation, a key priority for the Scottish Government, particularly in terms of ensuring consistency with other Member States, and ensuring EU Obligations are transposed without gold plating.

Scottish Firms Impact Test

² Internal analysis of prisons data

³ Pre-trial Detention in the European Union, 2009, edited by Anton van Kalmthout, Marije Knapen and Christine Morgenstern

⁴ SEC (2006)1079 Commission Staff working document

⁵ Based on comparison of Travel Trends data, ONS 2009 (link) and ONS Population by country of birth and nationality, July 2010 – June 2011

⁶ SPS annual reports at <http://www.sps.gov.uk/Publications/Publication-5433.aspx>.

The Scottish Government felt that it would be disproportionate to carry out individual business interviews as the proposals have no regulatory or negative financial impact on the private sector.

Competition Assessment

Using the Competition & Markets Authority Competition Filter questions we have concluded that the proposals will neither directly or indirectly limit the number or range of suppliers, limit the ability of suppliers to compete or reduce suppliers' incentives to compete vigorously as the proposals will have no regulatory effect on business.

Test run of business forms

No new business forms are proposed.

Legal Aid Impact Test

Access to Justice team is aware of these proposals. It advises that legal aid is already offered for criminal proceedings and in particular applications for bail. These services are regarded as part of solicitors' claimable fees. It is not expected that the Regulations will affect the position.

The Scottish Legal Aid Board advises: on the basis of the current assumption that there will only be around 7 bailed persons in Scotland per annum covered by this Supervision Order – there will only be a minimal impact on the fund. Should the volumes of supervised person increase then the impact on the fund would increase as they would be entitled to Criminal Legal Assistance for the hearing in front of the Sheriff.

Enforcement, sanctions and monitoring

The duty to seek appropriate supervision measures (bail conditions) will fall on the police, the Crown and the courts. Mechanisms for the granting of bail and imposition of bail conditions (and their review) are already provided for and in any case it is anticipated that these bodies will comply with the duty. However, if an accused person feels that the supervision measures are unfair or unduly burdensome he or she may make use of existing appeal provisions.

The task of monitoring the effect of the regulations would devolve on those who ensure the provision of these services – the police, the Crown and the courts.

Implementation and delivery plan

The proposal will be implemented through regulations. It is anticipated that the provisions will come into force on 01 December 2014 and from that date the competent authority could both issue and accept ESOs assuming the ESO has been fully transposed and implemented by the appropriate issuing or receiving EU Member State.

- **Post-implementation review**

As long as the Framework Decision is in force, transposing legislation is required.

The Working Group responsible for the development of the provisions, namely the Scottish Government, Scottish Court Service, the Crown Office and Procurator Fiscal Service and Police Scotland, will monitor the practical application of the measures and seek feedback from other sectors and groups affected to assess how the measures are working in practice and to consider whether further provision is required.

Summary and recommendation

Option (2) is being recommended. This fulfils our duty to transpose the Framework Decision without entailing additional, unquantifiable costs.

- **Summary costs and benefits table**

-

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
Option 1 – do nothing	Additional expenditure on accused held on remand who could be released under supervision measures (bail), until such time as Scotland is forced to comply with the Framework Decision.	This position is not tenable and would be brought to an end by either judicial review/compatibility proceedings within Scotland or infraction proceedings, both of which Scotland would lose, with concomitant expense. In the event of infraction proceedings, fines of a lump sum (specified minimum €9,446,000) and daily amounts of up to €700,000.
Option 2 – implement the Framework Decision without adding requirements	Reduces the number of accused on remand who, if resident in Scotland, would not be remanded. Allows citizens of Scotland to benefit from reciprocal arrangements and return to this county pending trial.	Potential Savings to the Scottish Prison Service of £232,000 per annum. Potential costs of enforcing European Arrest Warrants if Scottish citizens fail to return to the issuing Member State for trial.
Option 3 – implement adding requirements to those in the Framework Decision	Introduces additional layers of bureaucracy and regulation that are not required in implementation of the Framework Decision. Potential to infringe upon the legal and administrative processes of other Member States.	Potential Savings to the Scottish Prison Service of £232,000 per annum. Potential costs of enforcing European Arrest Warrants if Scottish citizens fail to return to the issuing Member State for trial. Also increased costs and the potential for double jeopardy caused by breach hearings as a result of additional provisions and legislative burdens.

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:**Date:****Cabinet Secretary for Justice****Scottish Government Contact point:****[Neil Watt](#) and [Neil Robertson](#)****Criminal Justice Division****EU Implementation Team****0131 244 3227/2265**