

## POLICY NOTE

### THE MUTUAL RECOGNITION OF SUPERVISION MEASURES IN THE EUROPEAN UNION (SCOTLAND) REGULATIONS 2014

SSI 2014/337

1. The Mutual Recognition of Supervision Measures in the European Union (Scotland) Regulations 2014 (the Regulations) are made in exercise of the power conferred by section 2(2) of the European Communities Act 1972. The Regulations are subject to the negative procedure.

2. 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* entered into force on 1 December 2009. It has become generally known as the European Supervision Order (ESO) Framework Decision. The ESO Framework Decision is one of the ‘third pillar’ measures subject to the UK Government’s opt-out, and one of the individual measures that the UK Government seeks to participate in from 1 December 2014.

#### Policy Objectives

3. The policy objective behind the Regulations is to give effect to the ESO Framework Decision.

4. The ESO Framework Decision promotes mutual recognition within the EU of judicial decisions relating to non-custodial pre-trial supervision measures which may be imposed on accused persons in criminal proceedings. In Scotland the term we use for such supervision measures is bail. Mutual recognition of judicial decisions is the process by which a decision taken by a judicial authority in one member State is recognised and enforced in another<sup>1</sup>. The aim of the ESO Framework Decision is to allow, in certain circumstances, a person accused of a crime in one member State to return home to another member State and be supervised there until the person’s trial starts in the member State where the offence took place, or to enable a person accused of a crime at home to move to another member State and be supervised there while awaiting trial.

5. The policy intention underlying the ESO Framework Decision is to increase the likelihood that non-residents 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 that non-residents are a ‘flight risk’ and avoid the trial state bearing the financial cost of the detention, but also to avoid other adverse impacts associated with lengthy pre-trial detention on individuals with no community ties to the trial state<sup>2</sup>: 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. Equally, it is designed to enable accused persons wishing to take up employment or other opportunities in another member State in exercise of their right to freedom of movement within the EU, to do so and still be effectively supervised while awaiting trial.

---

<sup>1</sup> See point 33 of the [conclusions of the Tampere European Council of 15-16 October 1999](#)

<sup>2</sup> See [Rt Hon Sir Scott Baker’s independent review of extradition laws published in October 2011](#)

6. As summarised by Fair Trials International:

“All too often, criminal courts order the detention of non-residents because they presume them to be a flight risk, or, if they release them, require them to stay in the trial state because they do not have confidence that they can be adequately supervised at home. The ESO Framework Decision provides an answer to these problems, allowing the court to rely on the authorities of other Member States to supervise the defendant, thus removing one of the main avoidable causes of detention of non-residents.”<sup>3</sup>

### **Competent Authority**

7. Under the ESO Framework Decision, a decision on supervision measures, both in terms of issuing a measure for monitoring in another member State or executing a measure on behalf of another member State, can only be taken by a competent authority. The Regulations provide that in Scotland the competent authority is a Scottish court.

### **Monitoring of Scottish bail conditions in another State**

8. The Regulations provide that any Scottish court that can grant bail in criminal proceedings (i.e. the High Court, any Sheriff Court and any Justice of the Peace Court) can request the authorities in another member State to monitor the accused person’s compliance with the bail conditions.

9. Scottish courts are required by the Regulations to consult so far as practicable with the authorities of other member States prior to making requests for supervision measures to be recognised, and in order to facilitate the smooth and efficient monitoring of the bail conditions.

10. Under existing bail procedures in Scotland an accused will always be made aware of the bail conditions which apply to them. The Regulations provide that bail conditions will only be transferred to another member State for monitoring where the accused expresses an intention to reside there. This could include where they wish to return home or where they wish to move to another member State, for example to take up employment.

11. The member State that is to take on the monitoring of the bail conditions (“the executing State”) must recognise the Scottish court’s decision on supervision measures (i.e. bail) unless one of the grounds for non-recognition set out in the ESO Framework Decision apply. The accused may be liberated on bail under restrictions pending acceptance of the request by the executing State. An example of the sorts of restrictions that may be imposed at this stage is that the accused may not leave Scotland until the request is accepted by the executing State. If such a restriction is imposed a future hearing to consider the outcome of the request can be fixed if that is appropriate.

12. The executing State can choose to adapt the measures so as to be compatible with its domestic law. The Scottish court can withdraw the certificate requesting monitoring of the supervision measure if it is not content with the adapted measures, provided monitoring in the executing State has not begun. A notification by an executing State that they intend to adapt

---

<sup>3</sup> See [The Guide to the European Supervision Order](#) by Fair Trials International, September 2012

a supervision measure will be passed on to the prosecutor and accused person in the case who can call for a bail review, which may lead to the request for recognition of supervision measures being withdrawn. The Scottish bail order will remain as issued notwithstanding any adaptation by the executing State.

13. Any breach of Scottish bail conditions reported by the executing State will be notified to the prosecutor in the case against the accused. The breach report will be considered by the prosecutor in line with normal case management procedures and, if necessary, appropriate action can be taken to vary or recall the bail decision, and criminal proceedings may be raised for breach of bail.

### **Monitoring of another State's supervision measures in Scotland**

14. The ESO Framework Decision requires arrangements to be put in place in Scotland to recognise and monitor supervision measures issued in another member State (referred to in the ESO Framework Decision as the "issuing State"). The ESO Framework Decision only requires recognition of measures that require a person to:

- inform the authority monitoring the supervision measures of any change of residence;
- not enter certain locations;
- stay at a specified location;
- comply with certain restrictions for leaving the territory of the monitoring country;
- report at specified times to a specified authority; and
- refrain from contacting specific persons connected to the alleged crime.

15. The Regulations provide for requests from other member States regarding Scotland to be sent to the Scottish central authority. A central authority, in terms of the ESO Framework Decision, is a body that assists the competent authority charged with making decisions under the Framework Decision. In Scotland, the central authority will be the Scottish Court Service. When it receives a request for recognition of a decision on supervision measures from another State, it will allocate the request to the appropriate sheriff court, which will typically be the court with jurisdiction for the place in Scotland where the accused lives.

16. On receipt of the request, the court will consider it in light of the grounds for rejection and compatibility of the supervision measures with Scots law. If the supervision measures are not compatible with Scots law, then the sheriff court can refuse to recognise the decision, or choose to adapt the measures to correspond as closely as possible to the original measures imposed.

17. Once accepted compliance with the supervision measures will be monitored by Police Scotland. The Police will have a power of arrest over individuals who breach an incoming supervision measure. Anyone in breach of the supervision measures will be brought before the sheriff court which would be able to release the person or remand him or her for up to 28 days (or 21 days if the person is under 18).

18. The sheriff court is responsible for notifying the competent or central authority of the issuing State of any breach of a supervision measure. It is for the issuing State to make any subsequent decisions on supervision measures, in accordance with their national law and procedures. If, under its law, the issuing State must hear the accused before varying the supervision measures or issuing an arrest warrant, telephone and video conferencing may be used.

19. Where the issuing State issues an arrest warrant for breach of a supervision measure, the European Arrest Warrant may be used to return the individual back to the issuing State for trial.

20. The Regulations anticipate cross-jurisdictional issues that may arise within the UK in relation to the monitoring of supervision measures imposed in another member State. For example, if Police Scotland find someone in Scotland who appears to have breached the terms of a supervision measure that has been recognised by a court in England and Wales, or in Northern Ireland, they will notify the relevant police force in the other part of the UK. Police Scotland will also notify the Scottish authorities if they receive information from a police force in another part of the UK that a person subject to supervision measures recognised by a sheriff court in Scotland has been found breaching a supervision measure in another part of the UK.

### **Consultation**

21. The Regulations have been considered by an operational working group on the ESO Framework Decision, consisting of representatives of the Crown Office & Procurator Fiscal Service, the Scottish Court Service and Police Scotland, who represent between them those who will be charged with giving effect to the ESO Framework Decision's requirements.

### **Impact Assessment**

22. An Equality Impact Assessment and Privacy Impact Assessment have been completed and are attached.

### **Financial Effects**

23. A Business and Regulatory Impact Assessment has also been completed and is attached.

Scottish Government  
Justice Directorate  
1 December 2014