

# FAIR TRIALS INTERNATIONAL



A Guide to  
**The European Supervision Order**  
September 2012

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Working for a world where every person's right to a fair trial is respected,  
whatever their nationality, wherever they are accused

## About Fair Trials International

Fair Trials International ('FTI') is a UK-based non-governmental organisation that works for fair trials according to international standards of justice and defends the rights of those facing charges in a country other than their own. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused.

We pursue our mission by providing assistance to people arrested outside their own country through our expert casework practice. We also address the root causes of injustice through broader research and campaigning and build local legal capacity through targeted training, mentoring and network activities. In all our work, we collaborate with our Legal Expert Advisory Panel, a group of over 80 criminal defence practitioners from 22 EU states.

Although we usually work on behalf of people facing criminal trials outside of their own country, we have a keen interest in criminal justice and fair trial rights issues more generally. We are active in the field of EU Criminal Justice policy and, through our expert casework practice, we are uniquely placed to provide evidence on how policy initiatives affect defendants throughout the EU.

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# The European Supervision Order

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## About this Guide

This Guide introduces the European Supervision Order ('ESO'), an important new tool for practitioners representing non-resident defendants at the pre-trial stage. The ESO will allow pre-trial supervision measures imposed in one Member State to be supervised by another Member State.

The Guide draws together the essential resources on the ESO and relevant case-law of the European Court of Human Rights and Court of Justice of the European Union. The Guide is designed to be practically useful in your own country. It explains the key provisions in the ESO Framework Decision, and covers two or three key legal issues which may arise.

The objective is to provide a comprehensive introduction to this new tool, to encourage practitioners to be ready to make the most of it when the transposition deadline is reached on 1 December 2012.

We are publishing this Guide in advance to generate awareness so we will, in due course, produce updated versions once we have feedback from practitioners on the way national authorities are applying this instrument in practice. With that in mind –

**We want to hear from you:** Has your country properly implemented the ESO? Are courts refusing to acknowledge it or consider using it? What practical problems have you encountered and how have you overcome these? Please [email us](#) or write to us at 3/7 Temple Chambers, Temple Avenue, London EC4Y 0HP, United Kingdom.

# Definitions

**The ESO Framework Decision** means 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 2009 L 294, p. 20-40](#).

**European Supervision Order (ESO)** means a decision by a competent authority of one EU Member State imposing supervision measures on a defendant as an alternative to pre-trial detention, which is forwarded to another Member State for it to supervise on its territory.

**Pre-trial detention** means the detention a person on reasonable suspicion that they have committed an offence, prior to the determination as to that person's guilt or innocence by a tribunal.

**Supervision measures** are obligations imposed on a defendant who is not detained pre-trial: for instance, an obligation to report regularly to police or to reside at a specified place.

**Defendant** means the person who is the subject of criminal proceedings, at any point in time at the pre-trial stage. No distinction is made here between the stage prior to a formal decision to prosecute the person, and the stage following such a decision.

**Flight risk** means the risk that the Defendant will not attend trial or other court hearings, including because s/he will leave the territory of the state where the criminal proceedings are ongoing. This is referred to in the case-law of the European Court of Human Rights as the 'risk of absconding'.

**Trial state** means the Member State where the criminal proceedings are ongoing. This is used synonymously with the term 'issuing Member State' in the ESO Framework Decision.

**State of residence** means the Member State where the defendant 'lawfully and ordinarily resides' within the meaning of Article 9(2) of the ESO Framework Decision.

**The EAW Framework Decision** means Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended [OJ L 190, 18.7.2002, p. 1-20](#).

**The Victims Framework Decision** means Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings [OJ L 82, 22.3.2001](#), p. 1-4.

**The Probation Decisions Framework Decision** means 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 [OJ L 337, 16.12.2008, p. 102-122](#).

# Introduction

This paper introduces the ESO Framework Decision, which establishes an important new tool for lawyers representing non-defendants at the pre-trial stage, which will soon be available:

**The deadline for implementation of the ESO Framework Decision in national law is 1 December 2012.**

The ESO Framework Decision establishes a system whereby the decision of a judicial authority in one Member State, imposing supervision measures on a non-resident defendant as an alternative to pre-trial detention, can be forwarded to the defendant's state of residence, which then has to recognise the decision and supervise the defendant itself.

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. However:

**The ESO Framework Decision's effectiveness depends on practitioners making the most of it. This paper draws together the essential materials and arguments to necessary to make the case for using an ESO in representations to prosecutors or courts in your country.**

## The problem

The ESO Framework Decision responds to a well-documented problem of non-resident defendants being at a comparative disadvantage vis-à-vis residents at the pre-trial stage. In the Explanatory Memorandum which accompanied the original proposal ([COM\(2006\) 468 final](#)) for the ESO Framework Decision, the Commission summarised the problem in the following way:

“At present ... EU citizens, who are not residents in the territory of the Member State where they are suspected of having committed a criminal offence are sometimes – mainly owing to the lack of community ties and the risk of flight – kept in pre-trial detention or perhaps subject to a long-term non custodial supervision measure in a (for them) foreign environment. A suspect who is resident in the country where he or she is suspected of having committed an offence would in a similar situation often benefit from a less coercive supervision measure, such as reporting to the police or travel prohibition” (page 2).

The Commission went on to note the ‘vulnerable’ position of the non-resident defendant, as opposed to someone normally resident in the country:

“Apart from being more or less cut off from contacts with family and friends, there is a clear risk that a non-resident suspect in such a situation could lose his or her job as a coercive measure (e.g. travel prohibition) that the judicial authority of the trial State has imposed on the suspect would stop this person from going back to his or her country of normal residence” (page 2).

The Commission continued:

“The problem is that the different alternatives to pre-trial detention and other pre-trial supervision measures (e.g. reporting to the police) cannot presently be transposed or transferred across borders as States do not recognise foreign judicial decisions in these matters” (page 2).

Thus, the ESO Framework Decision was designed to address, primarily, (i) the situation where a non-resident defendant is kept in detention pending trial because the court finds that there is a flight risk, often because the defendant has no community ties to the trial state; but also (ii) the situation where a non-resident defendant is granted temporary release but cannot leave the trial state, meaning prolonged separation from his/her state of residence.

Both situations have considerable human impact: the defendant may lose his/her job; contact with family and friends will be restricted significantly; and if the defendant is detained, this will of itself have deleterious effects on his/her physical and mental health. The trial state also has to bear the financial cost of detaining the person.

### Example

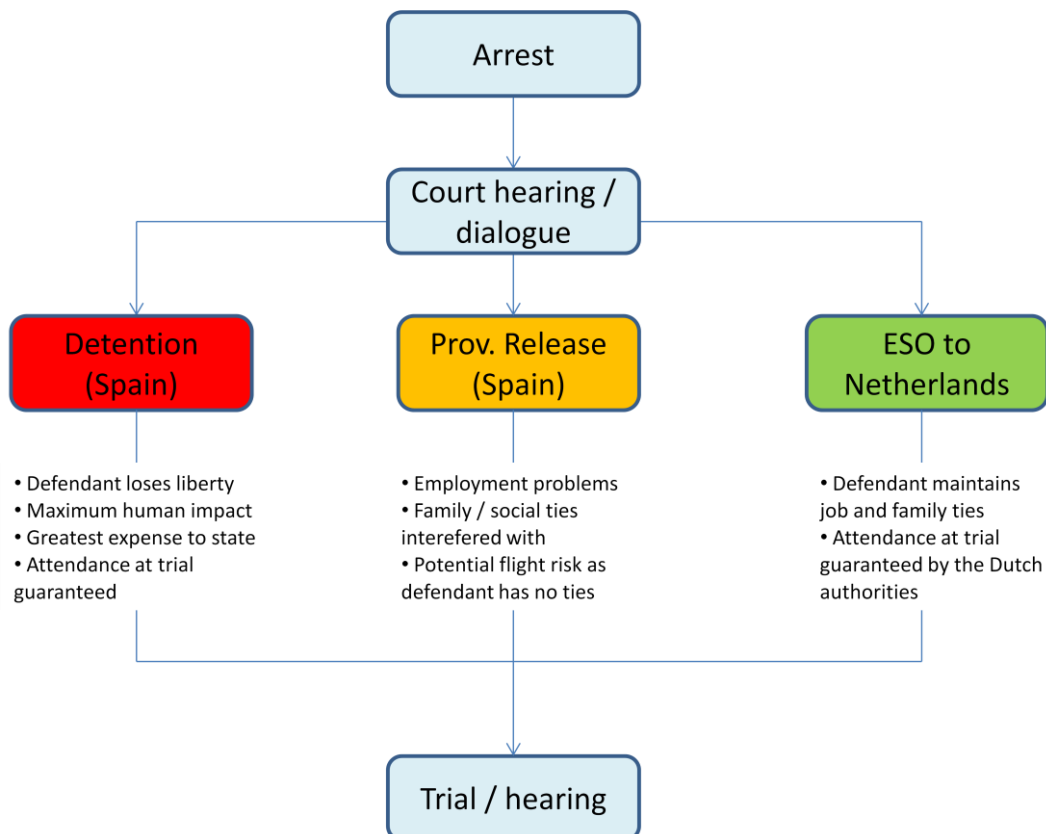
- FTI’s client Andrew Symeou was arrested in the UK for alleged involvement in a fight in Greece. After lengthy extradition proceedings, during which he was at conditional liberty and complied with the conditions imposed on him, Andrew, who had no previous convictions, was extradited to Greece in July 2009. He was detained for nearly a year in appalling conditions, including 6 months in the infamous Korydallos prison. He was refused bail, largely because he was a foreign national and had no ties with Greece, despite his father renting an apartment for him there. He was eventually released pending trial but was prohibited from leaving Greece, where he had to remain for a further 8 months. As a result, Andrew and his family’s lives were turned upside down. He had to suspend his university studies, which cost him dearly and deprived society of a skilled worker for several years. Had the Greek authorities been able to transfer supervision measures to the UK, safe in the knowledge that they would be recognised and monitored, this harm could have been averted.

## The solution

The solution agreed upon by the Member States is the ESO Framework Decision, which establishes a uniform system whereby the court of the trial state can forward a decision on supervision measures and forward it to the state of residence, whose authorities are then required to recognise the decision and supervise the defendant on the territory of the state of residence.

This should, in theory, provide an effective alternative to pre-trial detention. The defendant will be supervised by the authorities of the state of residence, so the authorities in the trial state need not impose a condition requiring them to stay in the trial state.

**Example: Geert, a resident of the Netherlands, is arrested in Spain:**



It is impossible to predict at the time of writing this Guide exactly how the procedure of applying for an ESO will work, and this is likely to vary between Member States. We are keen to hear from you about how things are working in practice, so please [let us know](#) how you get on.

# The ESO – Key provisions

## **What kind of measure is the ESO Framework Decision?**

The ESO Framework Decision is a ‘mutual recognition’ instrument. The trial state ‘issues’ the ESO, and another state is required to ‘execute’ it. In this procedural guide we refer to the issuing state as the trial state, and the executing state as the state of residence, since this will normally be accurate (but see the comments on Article 9(2) below).

## **What is a European Supervision Order?**

Article 4(a) of the ESO Framework Decision refers to a ‘decision on supervision measures issued as an alternative to provisional detention’, and the ESO Framework Decision establishes the system whereby that decision is forwarded to and recognised by another Member State. Effectively, an ‘ESO’ as we refer to in this document exists wherever a national decision on supervision measures is forwarded to another Member State in accordance with the ESO Framework Decision.

## **Which authorities can issue an ESO?**

Under Article 6 of the Framework Decision, Member States have to designate the judicial authority / authorities competent to issue and enforce ESOs, by notifying the Council of the EU. This information should be available from the Council’s website shortly after 1 December 2012, but if not we will try to obtain the information so please check subsequent versions of this Guide online.

## **When can an ESO be issued?**

Article 1 provides that the ESO Framework Decision applies to supervision measures issued as an alternative to ‘provisional’ detention; under Article 2(1)(a), its purpose is to ‘ensure the due course of justice, and in particular, that the person will be available to stand trial’. Clearly, the ESO Framework Decision covers supervision measures issued prior to trial.

Note the Probation Decisions Framework Decision covers mutual recognition of non-custodial sanctions involving supervision obligations after a ‘final decision’ establishing the guilt of an offender. It is therefore reasonable to assume that the ESO Framework Decision does not cover supervision obligations imposed after final conviction.

It is not clear whether states will accept that the ESO Framework Decision also covers supervision measures imposed after acquittal / conviction but prior to the determination of an appeal. This may depend on whether, under the national law of the trial state, the acquittal / conviction becomes final only after the determination of any appeals.



## **What sort of supervision measures are covered by the ESO?**

Article 8(1) of the Framework Decision lists the core supervision measures which can always be the subject of an ESO:

- An obligation to inform the authorities of a change of residence
- An obligation not to enter certain places (in either Member State)
- An obligation to remain at a specified place (with possible curfew requirements)
- An obligation regarding leaving the territory of the executing Member State
- An obligation to report at specific times to a specific authority
- An obligation to avoid contact with specific persons

Article 8(2) of the Framework Decision lists several other supervision measures which Member States can accept, or decline, to supervise:

- Restrictions on professional activity
- Obligation not to drive a vehicle
- Financial security
- Addiction treatment
- Avoiding contact with specific objects, which perhaps refers to computers in high-tech crime cases.

Member States do not have the option of accepting or declining to supervise each kind of measure on an ad-hoc basis. Instead they notify the Council on a one-off basis which measures they will, and which they will not supervise.

An ESO can include any of the measures contained in Article 8(1), but only such measures as have been accepted by the executing Member State under Article 8(2). The Council of the EU is to make this information to all Member States, but it is worth ensuring the authority in your country has checked this before issuing an ESO, to avoid unnecessary complications.

## **Is the court required to issue an ESO?**

Article 2(2) of the Framework Decision specifies that it does not confer a 'right' on a person to the use, in criminal proceedings, of a non-custodial measure as an alternative to custody. This is governed by the national law of the trial state. However, see the section later in this paper on what to do if courts refuse to entertain using the ESO.

## **How does the process work?**

Under Article 10, the issuing authority forwards a decision on supervision measures complete with a certificate, in the standard form provided in the Annex I to the Framework Decision. The Annex contains a series of tick-boxes detailing the types of measures imposed, an estimate of the time they will last, and other details. Article 22(1)(a) foresees a certain

amount of dialogue between the authorities in preparing the ESO. The ESO is then forwarded to another Member State.

### **Which Member State can an ESO be sent to?**

Under Article 9(1) of the Framework Decision, an ESO can be forwarded to the competent authority of the Member State in which the person is ‘lawfully and ordinarily residing’ – that is, the state of residence – where the person consents. No definition of this concept is offered, and Member States’ laws may implement it in different ways.

Alternatively, under Article 9(2) of the Framework Decision, at the defendant’s request an ESO can be forwarded to the competent authority of a Member State other than that in which s/he ordinarily resides. In these cases, the consent of that authority is required.

Note that neither Article 9 nor other provisions of the ESO Framework Decision rule out the possibility of forwarding an ESO to more than one state.

### **Can the state refuse to recognise the ESO?**

Under Article 12(1) of the Framework Decision, the competent authority in the state of residence *shall*, as soon as possible and within 20 working days, recognise the decision on supervision measures and without delay take all necessary measures to monitor the supervision measures – unless one of the ‘grounds for non-recognition’ apply.

### **When can a state refuse an ESO?**

Article 15 defines eight circumstances in which the state of residence executing Member State can refuse to recognise the ESO. The main ones are:

- Where the certificate is incomplete or obviously does not correspond to the decision on supervision measures;
- Where the state considers that it is not the state of ‘lawful and ordinary residence’ within the meaning of Article 9(1); or does not consent to the ESO in Article 9(2) cases;
- where the supervision measure included in the ESO is one which it has not accepted to supervise under Article 8(1);
- Where recognition would contravene the *ne bis in idem* rule (that is, where the state of residence considers that the defendant has already been finally acquitted / convicted in respect of the same acts as those forming the basis for the proceedings in the trial state; as to the meaning of this concept, see the case-law listed in the resources section of this Guide); and
- Where the supervision decision relates to acts which would not constitute a criminal offence in the executing Member State (except for 32 categories of offence, which match those listed in the EAW Framework Decision).

### **What happens if the defendant breaches the supervision measures?**

Under Article 19(3), the authority of the executing state must immediately notify the authority of the issuing state of any breach of a supervision measure. Annex II of the ESO Framework Decision includes a standard form for this purpose.

The issuing authority will then decide the consequences: under Article 18(1), the authority in the issuing state remains competent at all times to take subsequent decisions relating to the first decision on supervision measures, in accordance with its national law and procedures.

If, under its national law, the issuing Member State must hear the defendant before varying the supervision measures or issuing an arrest warrant, Article 19(4) provides that available instruments for telephone and video conferencing may be used.

### **What role do defence lawyers play in breach proceedings?**

The ESO Framework Decision does not lay down any clear rules on this point, but competence for taking subsequent decisions remains with the issuing state (Article 18). It will take these decisions in accordance with national law, which means there may be scope for defence lawyers to make representations to the competent authority according to national procedure.

Make sure your client knows to contact you immediately if s/he fails to comply with a supervision measure, so you can anticipate the report to be forwarded under Article 19(3) and ask to exercise any right to be heard available under national law before the issuing authority takes a subsequent decision.

Your client may wish to consider retaining the services of a lawyer in the executing Member State, who may be in a better position to obtain evidence in the event of an alleged breach (police reporting records, for instance).

### **How is the return of the person to the trial state ensured?**

The assumption is that the defendant will voluntarily attend court dates in the issuing Member State. However, if a breach of supervision measures leads to the issuing of an arrest warrant, Article 21 provides that the defendant is to be surrendered in accordance with the EAW Framework Decision.

Usually, a European Arrest Warrant can only be issued for the surrender of someone wanted to stand trial if the maximum penalty is at least two years' imprisonment. In ESO cases, this threshold requirement is not to apply, in principle. However, Member States can decide – on a one-off basis – that they will apply the minimum sentence threshold.

In effect, this would prevent defendants facing allegations of minor crimes from being surrendered back to the trial state, which would presumably make the trial state unwilling

to use an ESO in the first place. Given that allegations carrying lesser sentences are the cases where alternatives to detention are more likely to be used, Member States' decisions on this subject will be quite important. This information should be available from the Council of the EU but check subsequent versions of this Guide for up-to date information.

# Key legal issues

## What if courts refuse to consider using an ESO?

If this happens, do please [let us know](#), as we will be monitoring the implementation of the ESO Framework Decision.

The ESO Framework Decision, at Article 2(2), makes it clear that it does not create a right to the use of supervision in lieu of detention. It is quite possible that courts will not change their decision-making at all once the ESO is available. However, under the ECHR, courts are *required* to have regard to the possibility of using an ESO.

- [Ambruszkiewicz v. Poland App. no. 38797/03 \(4 May 2006\)](#): “the detention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it must also be necessary in the circumstances” (paragraph 31). Applying the test, the Court found that the failure to consider release subject to financial security and police surveillance meant that the detention was not in accordance with Article 5(1).

The Court has recently described this principle as a ‘proportionality requirement’ embodied in Article 5 § 1 (c) (in [Ladent v. Poland App. no. 11036/03 \(18 March 2008\)](#), paragraph 55), stating again that ‘domestic authorities should always consider the application of other, less stringent, measures than detention’ (paragraph 56). In effect, under Article 5 ECHR, the onus is on the authorities to use less stringent alternatives unless all the circumstances justify detention.

One alternative, of course, is to release the defendant within the trial state subject to supervision measures. Courts cannot simply assume that because the defendant is a non-resident, s/he is a flight risk and only detention will suffice to guarantee their attendance at trial. The ECtHR has repeatedly held that ‘the mere absence of a fixed residence does not give rise to a danger of flight’ (see [Suloaja v. Estonia App. no. 55939/00 \(15 February 2005\)](#), paragraph 64),<sup>1</sup> insisting that courts have to assess the risk of absconding ‘in light of the factors relating to the person’s character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted’ (see [Ignatenko v. Moldova App. no. 36988/07 \(8 February 2011\)](#), paragraph 80). But the court cannot stop there. Indeed, the whole point of the ESO Framework Decision is to make this assessment unnecessary.

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<sup>1</sup> Mr Suloaja lacked a fixed address, but still resided in Estonia. The principle is however to be understood more broadly in the sense that the defendant’s residence status cannot of itself show a flight risk (see [Goroshchenya v. Russia App. no. 38711/03 \(22 April 2010\)](#), paragraph 86).

The ESO Framework Decision provides national courts with a further option. It allows the court to consider whether supervision measures would suffice to guarantee the defendant's attendance at trial if monitored in the state of residence, where the defendant will have social, family and employment ties, and where they are likely to be much more effective.

Courts must consider this further possibility. Detention is a measure of last resort which can be justified 'only when *all* the other available alternatives are found to be insufficient' ([Lelièvre v. Belgium App. no. 11287/03 \(8 November 2007\)](#), paragraph 97 ('lorsque toutes les autres options disponibles s'avèrent insuffisantes') (emphasis added)). The court's duty to consider alternatives is therefore not complete until it has considered whether supervision measures – if enforced in the state of residence by means of an ESO – would guarantee the defendant's attendance at trial.

This applies even if the offence charged is a serious one and detention is ordered on a first occasion. The authorities remain under an ongoing duty to explain why less stringent alternatives cannot be used, particularly after an extended period of detention (see, to that effect, [Darvas v. Hungary App. no. 19574/07 \(11 January 2011\)](#), paragraph 27). Again, since the ESO renders conditional liberty a more effective alternative, it must also be borne in mind by any court reviewing ongoing detention as the prosecution progresses (or fails to).

Finally, note that the ESO Framework Decision requires the authorities of each country to consult each other in preparing the ESO (see Article 22(1)(a)). Your client may be detained while this process goes on. In this case, you should argue that, just as they are under a duty to prosecute with 'special diligence' where someone is detained, authorities must use this facility proactively and diligently, *ex officio*, in order to minimise detention of a person presumed innocent.

### **What if my country has not implemented the ESO?**

Again, first of all, please [let us know](#) if your country has failed to implement the ESO.

The ESO Framework Decision sets up a system which depends on the Member States adopting laws to implement it. Unlike a directive, it is incapable of giving rise to rights which can be relied on directly in national courts.

If there are no national laws to give effect to the ESO Framework Decision, your options are limited. As from 1 December 2014, the European Commission will have power to bring infringement proceedings against Member States for failure to implement framework decisions, but this does not represent a solution for individual clients.

However, even if your country has taken no steps to implement the ESO Framework Decision, you may still be able to help your client, relying on the *Pupino* decision of the Court of Justice of the European Union ('CJEU') to require your national courts to interpret existing laws in line with the ESO Framework Decision.

- [Case C-105/03 Criminal Proceedings against Maria Pupino \[2005\] ECR I-5285](#) An Italian schoolteacher was accused of using violent disciplinary measures. The prosecutor asked for the evidence taken from the alleged victims (minors) at the preliminary stage to be proved at the trial without cross-examination. A ‘special enquiry procedure’ allowed this, but this procedure was reserved for sexual offences cases. The CJEU held that the Victims Framework Decision, which entitles vulnerable witnesses to give evidence in favourable conditions, required the Italian court to consider making this procedure available to the complainants, notwithstanding its exclusion under the letter of national law. National courts had to interpret national law ‘as far as possible in light of the wording and purpose of the framework decision, in order to attain the objectives which it pursues’ (paragraph 43), though national courts could not be required to go so far as to interpret national *contra legem* (paragraph 47).

This ‘duty of conforming interpretation’ places courts under an obligation to look at the entire corpus of national law (not just implementing laws) to see whether it can, taken as a whole, receive an interpretation which achieves the objective of the framework decision.

This applies even in the absence of legislation specifically implementing the framework decision. In *Pupino* itself, and in a series of other cases on the Victims Framework Decision, the CJEU considered provisions of national criminal codes which either pre-dated the framework decision or were not intended to implement it, and still held that the *Pupino* principle applied (see [Case C-404/07 Katz \[2008\] ECR I-7607](#); [Joined Cases C-483/09 and C-1/10 Gueye and Sanchez \[2011\] ECR I-0000](#); [Case C-507/10 X \[2011\] ECR I-0000](#)).

So if there are laws in your country which concern enforcement of foreign supervision measures, then, even if these were not designed to implement the ESO Framework Decision, you can argue that they should be read in such a way as to give effect to it. Laws enabling enforcement of foreign post-conviction probation decisions, for instance, could be read as applying to pre-trial supervision measures forwarded under the ESO. However, bearing in mind that the *Pupino* rule cannot lead to an interpretation of national law which is contrary to its clear meaning, you should keep your expectations realistic.<sup>2</sup>

### **What if my country has passed implementing laws, but the ESO is difficult to use in practice?**

Once again, please [let us know](#) of any problems with national implementing laws.

If national laws have been passed but it is difficult for non-resident defendants to obtain an ESO in practice, the first step may be to engage in reasonable dialogue with prosecutors and judges to see if you can get them to adopt a more relaxed approach. But if the problem arises from a rule of national implementing law, again, you can try relying on the *Pupino* approach to overcome the problem. For example:

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<sup>2</sup> In the UK, there is no scope to rely on *Pupino* at all, following a recent Supreme Court decision.

- [Case C-42/11 Lopes De Silva Jorge \[2012\] ECR I-0000](#) concerned Article 4(6) of the EAW Framework Decision, which enables Member States to refuse execution of a conviction EAW if they undertake to have the offender serve the sentence on their territory. The provision applies to nationals and those 'staying in or resident of' the country concerned. French law reserves this option to its own nationals exclusively. The Court, reaffirming the *Pupino* principle, suggested that the French court could interpret the whole body of national laws and principles in such a way as to assimilate those with a strong connection to France resulting from social and economic ties, to nationals of France (see paragraphs 56-58), effectively shaping national law to achieve the purpose of Article 4(6), which clearly intended to cover more than nationals alone.

It is not possible to predict what sort of problems will arise with national implementing laws, and how exactly you might address them. However, here are some possibilities:

- 'Lawful and ordinary residence' (Article 9(1)): suppose national law requires you to prove the state of residence by formal documents (residence permits, employment working contract, tax documents etc). You could argue that, since the purpose of Article 9(1) is to identify the state where the defendant has social and economic ties, authorities should be able to consider objective factors such as family relationships, effective place of work, EU residence rights etc, in order to ensure that the ESO Framework Decision's objective is achieved.
- Adaptation / variation of measures (Articles 13 / 18): suppose that, acting in the executing state, you apply for the day and time of reporting to a police station to be changed, but the authority refuses, claiming that only the issuing authority is competent to 'modify' supervision measures. A first solution would be to encourage the authorities to discuss the matter (as foreseen by Article 22(1)(b)), but you might also wish to argue that the executing authority's competence to 'adapt' measures forwarded to it entitles it to change reporting times in order to enforce the measure effectively (this being implicit in a scheme relying on trust between judicial authorities).

Domestic rules of interpretation, applicable to national laws implementing international law obligations, may also be of assistance.



## Links to key texts and resources

To consult these materials, first access the electronic version of this document online at <https://www.fairtrials.net/documents/ESOGuide> and follow the links.

### ESO materials

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 2009 OJ L 294, pp. 20-40 (link: [pdf](#) / [html](#)).

Proposal for a Council framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union COM(2006) 468 final (link: [pdf](#) / [html](#)).

### Fair Trials International materials

Communiqué issued after the Fair Trials International Legal Experts Advisory Panel Meeting (London 22 September 2011): Pre-trial detention in Today's European Union (link: [pdf](#) only).

Detained Without Trial: Fair Trials International's response to the European Commission's Green Paper on detention, October 2011 (link: [pdf](#) only).

### Other useful case-law of the Court of Justice of the EU

Case C-66/08 *Kozłowski* [2008] ECR I-6041 ([Judgment](#) / [View](#))

Case C-123/08 *Wolzenburg* [2009] ECR I-9621 ([Judgment](#) / [Opinion](#))

Case C-306/09 *I.B.* [2010] ECR I-10341 ([Judgment](#) / [Opinion](#))

Case C-42/11 *Lopes De Silva Jorge* [2012] ECR I-0000 ([Judgment](#) / [Opinion](#))

Case C-261/09 *Mantello* [2010] I-11477 ([Judgment](#) / [Opinion](#))

Case C-491/07 *Turanský* [2008] I-11039 ([Judgment](#))

Case C-297/07 *Bourquain* [2008] I-9425 ([Judgment](#) / [Opinion](#))

Case C-367/05 *Kraaijenbrink* [2007] I-06619 ([Judgment](#) / [Opinion](#))

### Other European Court of Human Rights cases on alternatives to detention

[Wemhoff v. Germany App. no. 2122/64 \(27 June 1968\)](#) (para. 15 of 'The Law')

[Garlicki v. Poland App. no. 36921/07 \(14 June 2011\)](#) (para. 89)

[Khayredinov v. Ukraine App. no. 38717/04 \(14 October 2010\)](#) (paras. 27-29)

[Tinner v. Switzerland App. no. 59301/08 and no. 8439/08S \(26 April 2011\)](#) (para. 58)

See also section C of the 'Detained Without Trial' report mentioned above, which includes a comprehensive summary of pre-trial detention principles.

## Example scenario

The scenario below is designed to help you to understand how the ESO will work in practice. The application of these rules in specific cases will depend on the way that the ESO is implemented into the national law of the Member State concerned, and on that country's laws on the application and review of pre-trial detention.

**Mr Schmidt is a German national who has lived and worked in Germany since birth. Last summer he travelled to spend a holiday in the Czech Republic. One night during his stay, he was driving back home from a night out and his car hit a man, who later died.**

**Charges have been brought against him for involuntary manslaughter, which carries a maximum sentence of six years if the death was caused by the driver's error. Although people accused of similar offences are not usually remanded in custody in the Czech Republic pending trial, the authorities decided to keep Mr Schmidt in pre-trial detention due to concerns that he might flee and not return to the Czech Republic to attend trial.**

**Mr Schmidt wants to return to Germany until his trial because his family and young children live there and he is worried that he will lose his job. Assess what you could do as a defence lawyer to use the ESO to allow him to return home to Germany pending trial. Below you will find a list of questions to help guide you through the process.**

### *Defence lawyers in the Czech Republic:*

- *Can you request an ESO in this situation?*

An ESO is intended to enable people resident in one Member State, but subject to criminal proceedings in a second Member State, to be supervised by the authorities in their state of residency whilst awaiting trial. Under Article 9(1),<sup>3</sup> a decision on supervision measures may be forwarded to the state where the defendant 'lawfully and ordinarily resides', with the person's consent. As Mr Schmidt is resident in Germany and wishes to return there pending trial, you could ask for an ESO to be sent to Germany in this case.

- *What sort of supervision measures could be imposed on Mr Schmidt?*

The Czech court can issue whatever supervision measures are available under national law but, if it wishes for these to be supervised in Germany, they must be covered by Article 8 of the ESO Framework Decision.

Article 8(1) lists the supervision measures that can always be imposed under an ESO (reporting, curfew and residence obligations, etc). Any of these measures will have to be recognised and monitored by Germany.

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<sup>3</sup> All references are to the ESO Framework Decision

In this case, given the nature of the offence, it is likely that the Czech Republic would also want to impose an obligation on Mr Schmidt not to drive a vehicle. This measure falls within Article 8(2) and can be the subject of an ESO only if Germany has previously notified the council that it is prepared monitor driving prohibitions. The Czech authorities should consult with the German authorities, as required by Article 22(1)(a) of the ESO Framework Decision, to see whether this is the case. If an ESO is sent to the German authorities with a measure they have not accepted to supervise, they can refuse to execute it.

- *Who would issue the ESO?*

The competent authority in this case will depend on who is nominated by the Czech Republic when it implements the Framework Decision. Under Article 6, each issuing or executing Member State must inform the General Secretariat of the Council which judicial authority(s) are competent to act on the ESO. This may be a non-judicial authority, provided that this authority is competent to deal with decisions of a similar nature under national law.

- *If the authorities in the Czech Republic refuse to issue an ESO, is there any legal remedy against that decision?*

Article 2(2) makes it clear that there is no right to have a non-custodial measure used as an alternative to custody. Therefore, any remedy against a refusal to issue an ESO will depend on the national law of the Czech Republic on reviewing pre-trial measures.<sup>4</sup>

- *Do you think that the issuing authority would issue an ESO?*

It will be impossible to tell exactly how the ESO will operate in different Member States until it has been implemented into their national laws.

However, while the ESO Framework Decision covers all offences and is not restricted to particular types or levels of seriousness, supervision measures are generally applied as an alternative to pre-trial detention in cases involving less serious offences. Whether or not an ESO is issued in this case will be a matter of discretion for domestic authorities in the Czech Republic, who will make a decision in accordance with national law. The fact that people accused of similar offences are not usually held in pre-trial detention in the Czech Republic suggests that an ESO may be appropriate, but it is important to remember that the Framework Decision does not grant an automatic right to non-custodial measures as an alternative to pre-trial detention.

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<sup>4</sup> However see pages 12-13 of this note which address the requirement under the ECHR that courts must at least have regard to the possibility of using an ESO.

- *If issued, how long would the ESO be valid for?*

Under Article 10(5), the Czech authorities decide the length of time for which the decision on supervision measures applies and whether a renewal of the decision is possible.

- *Could Mr Schmidt ask for a review of the terms of the ESO if he is not happy with them?*

Under Article 17(1)(a), all decisions relating to review of a supervision measure are made by the issuing state authority. Therefore, whether Mr Schmidt will have the right to request a review will depend on the national law in the Czech Republic.

- *What will be the consequences if Mr Schmidt breaches the supervision measures?*

Under Article 19(3), if Mr Schmidt breaches the supervision measures then the German competent authority must immediately notify the authorities in the Czech Republic. The Czech authorities will then decide on the consequences of the breach (they are competent to make decisions at this stage under Article 18(1)).

The Czech authorities may decide to continue with the same supervision measures, vary the supervision measures (for example to make them more stringent) or to take Mr Schmidt into custody for breach of the ESO. The action taken will likely depend on the circumstances and seriousness of the breach and on Czech national law.

If Czech national law requires that Mr Schmidt be heard by a court before the supervision measures are varied, then telephone and video conferencing may be used under Article 19(4).

If the Czech authorities issue an arrest warrant following the breach, then under Article 21 the German authorities must surrender Mr Schmidt in accordance with the EAW Framework Decision.

- *What could you do, as a defence lawyer in the Czech Republic, about the consequences of a breach?*

As the Czech authorities are responsible for deciding the consequences of a breach of the supervision measures, a defence lawyer may be able to make representations on behalf of Mr Schmidt, according to national procedure. As a defence lawyer in the Czech Republic, you should maintain contact with Mr Schmidt and his lawyer in Germany to ensure that they keep you informed of any breach of a supervision measure so that you can act accordingly.

#### ***Defence lawyers in Germany:***

- *Can you request that an ESO be issued in Germany?*

No, the decision to impose supervision measures must be taken by the trial state and forwarded to the state of residence which will then monitor them. It is the job of the lawyer

in the trial state to request the ESO. However, Mr Schmidt's lawyer in Germany may be able to liaise with his lawyer in the Czech Republic in order to provide any information that would be helpful for an application for an ESO (for example, proof of employment or evidence about his residence and family life in Germany).

- *Would the German authorities recognise the ESO?*

Yes, under Article 12 the executing authority must recognise a decision from the issuing state within 20 working days of receipt, and without delay take all necessary measures for monitoring the supervision measures. Therefore, provided the Czech authorities have properly completed the certificate detailing the supervision measures and that none of the refusal grounds in Article 15 apply, Germany must recognise the ESO.

As Mr Schmidt is resident in Germany and is accused of an offence that took place on his current holiday (meaning that it is unlikely that recognition will contravene the *ne bis in idem* rule) it is likely that Germany would have to recognise the ESO. If Germany has not agreed to supervise an obligation not to drive a vehicle then it would not have to recognise this particular measure.

- *Is Germany entitled to change any of the supervision measures imposed by the Czech authorities?*

Under Article 13, if the supervision measures are incompatible with the law of the executing state, they may be adapted in line with the types of measures which apply to equivalent offences under national law. The adapted measure cannot be more severe than was originally imposed. Whether any changes to the measure imposed are required will be for the German authorities to determine.

- *Is there a maximum length of time that the measures can be in force?*

When issuing the ESO, the Czech authorities must specify the length of time that the supervision measures will apply for and whether a renewal of the measures is possible. If there is a maximum time period that supervision measures can apply under German law, then this must be communicated to the Czech authorities. In Member States where supervision measures must be periodically renewed, the maximum length of time is taken to be the total length of time after which renewal is no longer legally possible.

- *What can you do as Mr Schmidt's defence lawyer in Germany if he breaches the terms of the ESO?*

If Mr Schmidt breaches the ESO then the German authorities will immediately notify the Czech authorities. You should make sure that Mr Schmidt immediately contacts you if he fails to comply with a supervision measure so that you can anticipate this notification and liaise with his lawyer in the Czech Republic to ensure that he exercises any right to be heard under Czech law before any subsequent decisions are taken.