



# Bill Digest

## Criminal Justice (Mutual Recognition of Probation Judgments and Decisions) Bill 2018

No. 92 of 2018

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### Abstract

The [\*Criminal Justice \(Mutual Recognition of Probation Judgments and Decisions\) Bill 2018\*](#) gives effect in Irish law to the EU Council [Framework Decision 2008/947/JHA](#) 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. The Bill aims to enable offenders to serve probation decisions and alternative sanctions in their country of ordinary residence. The Bill also provides for the procedures to apply if an offender, who has been sentenced abroad, is seeking to serve a probation decision or alternative sanction in Ireland.

15<sup>th</sup> January 2019

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## Glossary

<b>Custodial sentence</b>	A custodial sentence involves a term of imprisonment or detention in a prison or in a closed environment (such as a youth detention centre).
<b>Non-custodial sentence</b>	A non-custodial sentence involves alternative forms of punishment to imprisonment, including fines, probation orders, community service orders or suspended sentences.
<b>Framework Decision</b>	A Framework Decision, like an EU Directive, is binding on Member States as to the result to be achieved, but leaves discretion to the Member State as to the principles and procedures to be applied. They do not have direct effect and so cannot be invoked at national level in the absence of State implementation. A reference to “the Framework Decision” in this Bill Digest is a reference to Framework Decision 2008/947/JHA of 27 <sup>th</sup> November 2008.
<b>Appropriate court</b>	A reference to the “appropriate court” in this Bill Digest is a reference to either the High Court or the Circuit Court, as set out in section 2 of the Bill.
<b>The Minister</b>	A reference to “the Minister” in this Bill Digest is a reference to the Minister for Justice and Equality.
<b>Member State competent authority</b>	Means the authority designated by a Member State to be the competent authority for the purposes of the Framework Decision.
<b>Issuing state</b>	The issuing state refers to the Member State in which the relevant judgment or probation decision was made.
<b>Executing state</b>	The executing state refers to the Member State in which the relevant judgment or probation decision is being served.
<b>Mutual recognition</b>	Mutual recognition is a principle of criminal law creating a presumption in favour of the legality of another jurisdiction’s criminal law on the basis of equivalence in the standards of human rights and judicial scrutiny between jurisdictions.

## Summary

The [Criminal Justice \(Mutual Recognition of Probation Judgments and Decisions\) Bill 2018](#) (the Bill) was published by the Minister for Justice and Equality, Charlie Flanagan, on 25<sup>th</sup> July 2018. No General Scheme or Regulatory Impact Assessment was published for this Bill. No Pre-Legislative Scrutiny [PLS] was undertaken as Government approval for the drafting of the Bill predated the introduction of PLS. Speaking on publication of the Bill, the Minister stated the following:

“These proposals will increase the chances of social reintegration of offenders by ensuring that probation measures imposed on them can be followed-up on and supervised in the country in which they live. This allows the offender to maintain ties with family, continue employment or education and engage with support services in his or her home country, all of which assist in rehabilitation and reintegration. Successful reintegration reduces the risk of reoffending, improving the protection of victims and society.”<sup>1</sup>

The Bill applies to the treatment of **post-trial, non-custodial penalties** and to **measures facilitating early release from prison** such as suspended sentences, community service orders and supervision orders. For example, the Bill would allow for a suspended sentence issued in another Member State to be executed in Ireland, or a community service order issued in this jurisdiction to be executed in another Member State. The Bill also introduces procedures to enable the competent authority of the executing country to adapt measures so as to be compatible with the national legislation of the executing country, while ensuring they remain consistent with the original measure imposed by the issuing country.

The Bill arises from the [EU's Framework Decision 2008/947/JHA](#) of 27<sup>th</sup> November 2008. That Framework Decision applies the principle of mutual recognition to judgments and probation decisions. The objectives of the Framework Decision include:

- the social rehabilitation of sentenced persons;
- protecting victims and the general public; and
- facilitating the application of suitable probation measures and alternative sanctions where offenders do not reside in the country of their conviction.

Under Article 25 of the Framework Decision, Member States were required to implement the Framework Decision by 6<sup>th</sup> December 2011. Ireland's failure to implement this measure raises the possibility of the European Commission launching infringement proceedings and imposing fines.

### **Further related Library & Research Service resources**

A Bills Tracker page on the Bill is available on the Library & Research Service's internal website accessed [here](#) (available to those with access to the Oireachtas intranet).

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<sup>1</sup> Department of Justice Press Release, “Minister Flanagan publishes Bill to facilitate the transfer of probation measures between EU Member States.” Available [here](#).

## Table of Provisions

Section	Title	Effect
<b>Part 1.</b>	<b>Preliminary and General</b>	
1.	Short title and commencement	Standard provision that defines the short title of the Bill and provides for commencement by Ministerial order. Commencement orders may be limited to particular provisions of the Bill or purposes.
2.	Interpretation	Standard provision that sets out the meanings to be given to various terms in the Bill. Words or expressions used in both this Bill and the Framework Decision have the same meaning unless the context requires otherwise.
3.	Application of Act	Provides that the Bill will not apply to judgments handed down prior to the commencement of the Bill (if enacted).
4.	Designation of competent authorities	Designates the Minister for Justice and Equality and the “appropriate court” as the competent authorities for the purposes of the Framework Decision. The “appropriate court” is either the High Court or the Circuit Court.
5.	Provisions supplementary to section 4	Enables the Minister to delegate his or her functions as competent authority.
6.	Orders and regulations	Standard provision giving the Minister power to make regulations relating to matters referred to in the Bill, which will be laid before the Houses.
7.	Expenses	Standard provision for the payment of expenses out of funds to be provided by the Oireachtas.
<b>Part 2.</b>	<b>Issuing State is Ireland</b>	
8.	Application of Part 2	Part 2 applies where the probation judgment is delivered by an Irish court.
9.	Definitions	Defines terms used in Part 2.
10.	Request for forwarding judgment in State, etc., to Member State competent authority	Sets out the procedure for a request to be made by a sentenced person or the Director of the Probation Services for the forwarding of a judgment to the competent authority of a Member State.

11.	Forwarding judgment in State, etc., to Member State competent authority	Sets out the mechanism by which a judgment is forwarded to a Member State competent authority.
12.	Withdrawal of Article 6 certificate	Provides for the withdrawal of an Article 6 certificate that has been forwarded. Where the Minister receives information as to the maximum sentence for non-compliance with the probation measure, or receives notification from a Member State competent authority of a proposed adaption to the probation measure and the Minister is of the opinion that it would be in the public interest or interests of justice to withdraw the certificate, the Minister will have the power to do so.
13.	Consequences of recognition of judgment in State	Provides that competence is transferred to the Member State in respect of supervision once the Member State recognises a judgment.
14.	Obligation to provide certain information to Member State competent authority	Requires the Minister to inform a Member State competent authority as soon as he or she becomes aware of any circumstance that may lead to a “subsequent decision.” A “subsequent decision” means a judgment or decision varying or revoking an order imposing probation or an alternative sanction, such as enforcing a custodial sentence where the offender has breached a probation order.
15.	Transfer of jurisdiction back to State	Sets out the procedures for transfers of jurisdiction back to the State where the sentenced person is subsequently charged with an offence under Irish law.
<b>Part 3</b>	<b>Executing State is Ireland</b>	
16.	Application of Part 3	Part 3 applies where the probation judgment is forwarded to the State by a competent authority of another Member State.
17.	Interpretation	Defines terms used in Part 3.
18.	Corresponding offences	Defines corresponding offences as acts or omissions constituting an offence in the issuing state that would constitute an offence if committed in the State, and <i>vice versa</i> .
19.	Probation measures and	Lists the types of probation measures and

	alternative sanctions to which Part 3 applies	alternative sanctions to which Part 3 applies.
20.	Forwarding of judgment, etc., to competent authority in State	Sets out the procedures to be followed where a judgment has been forwarded by the competent authority of a Member State, including where the necessary accompanying documents are incomplete.
21.	Consent to forwarding judgment, etc., where sentenced person not lawfully and ordinarily residing in State	Consent can be given by the Minister to the forwarding by another Member State of a judgment even, if the person to whom the judgment relates is not ordinarily residing in the State, if the person is an Irish citizen or has close ties to the State.
22.	Forwarding of judgment, etc., to Minister	Obliges a court, Minister (other than the Minister for Justice and Equality) or any other public official who receives a relevant document (e.g. a judgment or Article 6 certificate) directly from a competent authority of a Member State to forward it to the Minister for Justice and Equality and to notify the competent authority of the Member State of the action taken.
23.	Consideration of judgment, etc.	The Minister must either make an application to the appropriate court to have the judgment endorsed, or refuse to recognise the judgment based on specified grounds, set out in the section.
24.	Endorsement of judgment, etc., by appropriate court	Provides the appropriate court with the power to make an order endorsing the judgment and sanctioning the State to carry out the measures set out in the judgment. Provides the appropriate court with powers to adapt the measures to make them compatible with Irish law. Sets out grounds on which a court can refuse to endorse a judgment.
25.	Provisions applicable in cases of conditional release and suspended sentences	Where the person to whom the forwarded judgment relates is on conditional release or is serving a suspended sentence, the court shall make an order specifying that the judgment will

		be treated as a temporary release under section 2 of the <i>Criminal Justice Act 1960</i> <sup>2</sup> or a suspended sentence under <a href="#">section 99 of the Criminal Justice Act 2006</a> .
26.	Time limits for decision	Sets out the relevant time limits for applications and decisions relating to the consideration of a judgment or probation decision under section 23 of the Bill.
27.	Notification of endorsement of judgment and, where applicable, probation decision	Requires a court, following the making of an order under section 24(2), [i.e. an order endorsing or adapting a judgment or probation decision] to send a certified copy of the order to the sentenced person, the Minister, the Director of the Probation Service and the superintendent of the Garda Síochána district where the sentenced person resides or will reside.
28.	Recognition of judgment and probation decision	Provides that a judgment endorsed by a court shall be recognised by the Minister. The Minister must take all necessary steps for the supervision of the probation measure or alternative sanction under the judgment.
29.	Obligation to provide certain information to competent authority in issuing state	Requires the Minister for Justice and Equality to notify the issuing state of the recognition or refusal to recognise a judgment forwarded by it, any adaptation of the probation measure, and where applicable, that the State will not take responsibility for subsequent decisions in relation to the judgment.
30.	No jurisdiction to take subsequent decision in certain cases	Provides that where the sentenced person is on conditional release and the law of the issuing state requires a hearing to be held before this can be revoked, the Minister shall transfer jurisdiction back to the competent authority of the issuing state to allow a decision to be taken as to whether to revoke the conditional release.
31.	Judgment not reviewable	Provides that a person cannot appeal in the State a judgment that forms the basis for a probation measure; this must be done in the issuing state.

<sup>2</sup> Section 2 of the *Criminal Justice Act 1960* has been amended by [section 1 of the Criminal Justice \(Temporary Release of Prisoners\) Act 2003](#).

<b>32.</b>	Transfer of jurisdiction back to competent authority in issuing state	Sets out the circumstances in which jurisdiction can be transferred back to the competent authority in the issuing state, for example, where the sentenced person has absconded.
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**Source:** Prepared by the L&RS based on the *Criminal Justice (Mutual Recognition of Probation Judgments and Decisions) Bill 2018*

## Background

This Bill Digest provides general background information in relation to:

- Council Framework Decision 2008/947/JHA;
- Irish case law;
- Sentencing, probation and alternative sanctions; and
- The Irish Probation Service.

### Council Framework Decision 2008/947/JHA

The Bill gives effect to [Framework Decision 2008/947/JHA](#) of 27<sup>th</sup> November 2008. The Framework Decision applies the principle of mutual recognition (see below) to judgments and probation decisions in order to supervise probation measures and alternative sanctions if the offender does not live in the country where the measures were issued. This Framework Decision was part of a larger package of EU legislation aimed at harmonising procedures for the mutual recognition of custodial and non-custodial sentences across the EU.

In this context, three separate and complimentary Council Framework Decisions were adopted in 2008 and 2009:

- Framework Decision 2008/909/JHA (*Transfer of Prisoners*)<sup>3</sup>
- **Framework Decision 2008/947/JHA (*Probation and Alternative Sanctions*)**
- Framework Decision 2009/829/JHA (on *European Supervision Orders*)<sup>4</sup>

A **Framework Decision**, like a Directive, is binding on Member States as to the result to be achieved, but leaves discretion to the Member State as to the principles and procedures to be applied. They do not have direct effect and so cannot be invoked at national level in the absence of State implementation. Post- Lisbon Treaty, Framework Decisions are no longer used as Regulations, Directives, and Decisions are the means of legislating in the EU.

This Bill deals with the implementation of the second of those Framework Decisions. It relates to treatment of offenders in the post-trial stage, and applies mutual recognition to alternatives to custodial sentencing (such as probation and community service) and also to measures which facilitate early release. The application of mutual recognition must also respect fundamental rights and legal principles.<sup>5</sup>

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<sup>3</sup> The Framework Decision on the Transfer of Prisoners is due to be implemented as an amendment to the [Transfer of Sentenced Persons Act 1995](#) in the Transfer of Sentenced Persons and Transfer of Execution of Judgments Bill [the Bills Tracker Page for this Bill is available [here](#)].

<sup>4</sup> The Framework Decision on European Supervision Orders is due to be implemented by the *Criminal Justice (Mutual Recognition of Decisions on Supervision Measures) Bill* [the Bills Tracker Page for this Bill is available [here](#)].

<sup>5</sup> Article 1(4) of Framework Decision 2008/947/JHA.

In 2016 the European Union Agency for Fundamental Rights published a report into the fundamental rights issues which arise in relation to the three Framework Decisions. It notes that the overarching goal of Framework Decisions 2008/909/JHA and 2008/947/JHA is promoting social rehabilitation.<sup>6</sup> The report notes that:

“... [social rehabilitation] is to be achieved by having persons serve their sentences, or having suitable alternatives to detention (probation measures) supervised, ‘closer to home’. The Framework Decision on probation and alternative sanctions also aims to improve the protection of victims and the general public while encouraging suitable alternatives to detention.”<sup>7</sup>

The report notes that differences in language and culture can reduce the capacity of rehabilitative programmes in relation to foreign prisoners<sup>8</sup> and highlights how different countries consider factors such as family and social ties as being conducive to rehabilitation and social reintegration.<sup>9</sup>

### Mutual Recognition

The **principle of mutual recognition** goes to the heart of EU cooperation on criminal matters. It requires that the courts of Member States can refuse to execute warrants, judgments or other decisions from other Member States only on certain strict grounds. There is a general presumption in favour of the legality of a legal instrument that is being executed.

Mutual recognition allows enforcement based on mutual trust in the **equivalence** between legal systems. This is based on a presumption that certain minimum protections, concerning human rights, specifically the right to a fair trial, apply in the Member State seeking execution. These presumptions can be rebutted where the accused can show that there is a real risk that those protections will not be applied.

Mutual recognition features heavily in the operation of the European Arrest Warrant [EAW]. The recent decision of the Court of Justice of the EU [CJEU] in *Minister for Justice v. LM* found that recent legislative changes to the organisation of the Polish judiciary could undermine the mutual trust required to enforce an EAW if the Irish courts felt this threatened the respondent’s right to a fair trial due to concerns arising from the independence of their judiciary.

### European cooperation on criminal matters

The need for greater cooperation at a European level in relation to the area of supervision measures for conditionally sentenced or conditionally released prisoners has long been recognised as a priority to ensure that people are given the best opportunity to achieve the sentencing aims of rehabilitation and deterrence. Cooperation also ensures that offenders cannot avoid the

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<sup>6</sup> European Union Agency on Fundamental Rights (FRA), *Criminal detention and alternatives: fundamental rights in EU cross-border transfers* (2016), at p 35 – 38. Available [here](#).

<sup>7</sup> *Ibid*, at 36.

<sup>8</sup> *Ibid*, at 38.

<sup>9</sup> *Ibid*, 43 – 44.

consequences of sentences imposed on them by moving jurisdiction.<sup>10</sup> In this way the Framework Decision both recognises and supports the free movement of people within the EU.

An early initiative by the Council of Europe<sup>11</sup> was the [European Convention of 30<sup>th</sup> November 1964 on the Supervision of Conditionally Sentenced or Conditionally Released Offenders](#). This sought to create an international system providing for the transfer and supervision of offenders subject to certain conditional sanctions (e.g. suspended sentences, probation and early release).

Recital 4 of the preamble to Framework Decision 2008/947/JHA highlights the deficiencies of the Council of Europe Convention, including the fact that it was ratified by only 12 EU Member States. By contrast, it notes:

“The present Framework Decision provides for a more effective instrument because it is based on the principle of mutual recognition and all Member States participate.”

Prior to the Lisbon Treaty (2009), policy areas were defined according to a pillar structure, with sensitive matters of policing and judicial cooperation in criminal matters falling under the so-called “third pillar”. The EU had more restrictive competence in this field in terms of objectives, conditions, procedures and instruments as Justice and Home Affairs were traditionally an “inter-governmental” matter. Since 1 December 2014, EU policies for police and criminal justice matters are no longer afforded a special status. They are now provided for under Title V of Part Three of the TFEU, entitled “Area of Freedom, Justice and Security.”

[Protocol 21 of the Treaty on the Functioning of the European Union](#) provides for the position of Ireland and the UK in the area of freedom, justice and security. It provides that where EU Directives come under that area Ireland is not bound by such measures. However, Ireland may opt in to such measures. The position adopted by the UK in relation to this Framework Decision is discussed below, in Appendix 1.

### Implementation of Framework Decision 2008/947/JHA

The deadline for the implementation of the Framework Decision was 6<sup>th</sup> December 2011. According to the European Judicial Network [EJN],<sup>12</sup> Ireland is the only remaining country which has yet to implement the Framework Decision.<sup>13</sup>

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<sup>10</sup> The European Commission have noted that prisoners overseas are often more likely to face custodial sentences when compared with nationals living in the jurisdiction as the sentencing judge may consider supervision and probation measures to be inappropriate due to a fear that a sentenced person may not participate or flee the jurisdiction. They suggest that proper implementation of the Framework Decision will give judges greater confidence that probation and alternatives to custodial sentences will be served abroad and thus may lead to a reduction in custodial sentences. See Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention (November, 2014), at p. 3. This report is available [here](#).

<sup>11</sup> Note that the Council of Europe is a separate body (with a focus on upholding human rights) from the EU institutions of the European Council (sets the political direction of the EU) and the Council of the EU (responsible for passing laws). The Council of Europe has 47 members including a number of non-EU members such as Switzerland, Turkey and Russia.

<sup>12</sup> The EJN is an EU network of relevant national authorities which provide for judicial cooperation in criminal matters.

A number of challenges relating to the implementation of this Framework Decision were raised at the Confederation of European Probation [CEP]<sup>14</sup> Dublin conference in October 2009. CEP established the Implementation Support for the Transfer of European Probation Sentences [ISTEP] project in June 2011. ISTEP have prepared a number of tools to assist in the implementation of the Framework Decision.<sup>15</sup> These include a handbook for implementation which identifies obstacles and challenges to implementation, techniques to overcome these obstacles and recommendations for Member States.<sup>16</sup>

The European Commission has been critical of the failure of a number of countries to implement the provisions of the Framework Decision in a timely manner.<sup>17</sup> In 2014 it reported on the implementation status of the three Framework Decisions and highlighted how this failure was undermining mutual recognition, and the potential negative impact it was having on all EU citizens. It states:

“The partial and incomplete transposition of the Framework Decisions hampers the application of the principle of mutual recognition in the area of criminal justice. It moreover breaches the legitimate expectations of EU citizens as they lose a precious tool to reduce the negative impact on their lives if they are suspected or accused in another Member State, in particular those citizens who are subject to a European arrest warrant in the pre-trial stage. At the same time the objective of the Framework Decisions to ensure that justice is served while enhancing the social rehabilitation of the suspected or accused person cannot be achieved.

Finally, late implementation is to be regretted as the Framework Decisions have the potential to lead to a reduction in prison sentences imposed by judges to non-residents. This could not only reduce prison overcrowding and thereby improve detention conditions, but also – as a consequence – allow for considerable savings for the budgets spent by Member States on prisons.”<sup>18</sup>

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<sup>13</sup> See the EJM Judicial Library which provides up to date information on the status of implementation of EU Directives and Framework Decisions. Available at: [https://www.ejm-crimjust.europa.eu/ejm/EJM\\_Library\\_StatusOfImpByCat.aspx?CategoryId=37](https://www.ejm-crimjust.europa.eu/ejm/EJM_Library_StatusOfImpByCat.aspx?CategoryId=37).

<sup>14</sup> CEP is a European organisation that promotes rehabilitation through the promotion of alternative methods of punishing offenders to prison. CEP brings together academics, practitioners, managers and stakeholders working in the area of criminal justice policy through expert conferences on various aspects of probations.

<sup>15</sup> A particularly relevant resource provided by the ISTEP project was an accessible database which allowed for comparisons of different forms of penal sanction across the EU. Member States provided detailed technical information about their legal systems and uploaded new information and updated their national profiles accordingly. Unfortunately, at the date of publication the link to this database is no longer active. More information about ISTEP is available from the CEP Homepage, available [here](#).

<sup>16</sup> ISTEP, *I-STEP – Implementation Support for the Transfer of European Probation Sentences: European Handbook*, Available [here](#).

<sup>17</sup> See note 10, at p. 12.

<sup>18</sup> *Ibid.*

## Irish Case Law: *The Minister for Justice & Equality v. Teelin*

The failure to implement the Framework Decision has also drawn criticism from the judiciary. In *The Minister for Justice & Equality v. Teelin*<sup>19</sup> the High Court considered an extradition request in which the respondent argued that the failure by the State to implement Framework Decision 2008/947/JHA provided grounds for refusing to order his surrender to the UK.

The respondent was convicted of stabbing an individual with the head of a screwdriver, causing a puncture wound to the victim's brain. He was sentenced to 7 years' imprisonment. The respondent was aged 17 at the time of the offence and was in the UK for a brief holiday. Having served 3 years of his imprisonment, he was initially released on licence in 2013. As a condition of his release on licence he resided at a probation hostel. The respondent did not have any connection to the UK and found it difficult to live with strangers away from his family and friends.

Due to the difficulties he faced living in the UK, the respondent sought to have his probation bond transferred to Ireland. Bournemouth Probation Office contacted the Irish Probation Service, who were unable to facilitate a transfer of his licence due to a lack of resources in the Meath area, where the respondent was from. The respondent had his licence revoked after two months and returned to prison. In 2014 he was again released on licence and efforts were again made with the Irish Probation Service to allow for the respondent to serve the remainder of his licence in Ireland. However, shortly after release, the respondent left the UK in breach of his licence and returned to Ireland, where he was arrested.

The respondent challenged the application for his return to the UK on the basis that his surrender would amount to a disproportionate interference with his family and personal rights under both the Constitution and the European Convention on Human Rights. He argued that the legitimate aim of the sentencing option of rehabilitation could not be achieved without the support of his family, all of whom lived in Ireland. The respondent specifically raised the failure to implement Framework Decision 2008/947/JHA, arguing that this interfered with the principle of mutual recognition, because other EU citizens would have been able to avail of the Framework Decision in circumstances equivalent to his.

**Applicant:** In an extradition application the applicant is the body moving the application, i.e. the Minister for Justice and Equality.

**Respondent:** The respondent is the person who opposes the application, i.e. the person the subject of a European Arrest Warrant.

**Release on Licence:** In the UK a person sentenced to a determinate custodial sentence will be released on licence at approximately the halfway point of their sentence. The offender is allowed to serve the remaining time on their sentence at an approved address. Prisoners who are released on licence are subject to seven standard conditions relating to behaviour and residence (one of which is a ban on travelling outside the UK). Additional conditions can be added. Time spent while released on licence is supervised by probation officers.

<sup>19</sup> *The Minister for Justice & Equality v. Teelin* [2015] IEHC 310.

Judge Hunt ordered the respondent's surrender to the UK. However, he criticised the failure to implement the Framework Decision by both Ireland and the UK, stating:

"It is also a matter of regret that neither of the respective jurisdictions has seen fit to implement the Framework Decision on probation matters within the specified time limit, which might have allowed the respondent to have a formal method of instituting a type of supervision arrangement apparently thought to be desirable by the probation services in both jurisdictions. This State has failed to implement the Framework Decision by the time specified in that respect, and the United Kingdom has apparently exercised a right to opt out of implementation thereof. In addition, this State has declined to make resources available to receive the respondent for probation supervision on a voluntary basis.

The facts of this case illustrate clearly that the respondent is precisely the kind of person who could be benefited by a transferred probation arrangement. All successful probation arrangements result in the accrual of a dual benefit, to the individual supervised and to society in general, the possibility of which has now been lost in the case of the respondent. Furthermore, the taxpayer in the United Kingdom might have been spared the expense of further dealings with the respondent."<sup>20</sup>

### Impact of the *Teelin* case

The *Teelin* case provides a practical example of the type of circumstances where, once implemented, this Framework Decision will be of benefit to offenders by providing for their rehabilitation and reintegration in society. It also demonstrates the harm caused by the failure to implement the Framework Decision.

The case provides an insight into how greater resources may be needed by the Probation Service if the Bill is enacted. For example it may lead to an increase in the number of Irish people subject to judgments and probation decisions abroad seeking to serve probation and alternative measures in Ireland. The Bill may also result in more EU nationals the subject of Irish judgments and probation decisions bringing applications to serve probation and alternative measures in their home countries, which may decrease the caseload of the Probation Service.

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<sup>20</sup> [2015] IEHC 310, at p. 15 of the judgment.

## Sentencing, Probation and Alternative Measures

This section provides a brief overview of the types of non-custodial sentencing options which are covered by the Framework Decision. The use of a non-custodial measure is an indication of leniency in sentencing and can either be used as a standalone measure or in conjunction with a custodial sentence. Non-custodial measures are generally aimed at the rehabilitation of the offender. A non-custodial measure will still amount to a conviction on the offender's record, save where the offender is dealt with under [section 1\(1\) of the Probation of Offenders Act 1907](#) or ordered to make a donation to the court poor box (see below).<sup>21</sup>

**Court Poor Box:** is a non-statutory remedy which is used for first-time offenders, primarily in the District Court. Although the prosecution has proved its case, factors such as the age of the offender or the likelihood that they will not reoffend, may persuade the court not to record a conviction. By way of punishment the offender pays a sum of money into the "court poor box." The funds are distributed among various charities selected by the judge.

### Suspended sentences<sup>22</sup>

A court may suspend any sentence of imprisonment save for where the offence carries a mandatory sentence (e.g. life imprisonment for murder). A term of imprisonment can be either fully or partially suspended (e.g. a term of imprisonment for four years with the last two years suspended). To impose a suspended sentence, the court must first impose a term of imprisonment. The court will set out conditions, breach of which may result in the offender being required to serve all or part of his or her term of imprisonment. Conditions commonly attached to a suspended sentence include a requirement to keep the peace and to attend addiction courses. A suspended sentence must also include the period for which the sentence remains suspended.

### Community Service Orders<sup>23</sup>

Community service orders (CSOs) are provided for by the [Criminal Justice \(Community Service\) Act 1983](#) (the 1983 Act), as amended.<sup>24</sup> CSOs can be imposed instead of a custodial sentence of less than 12 months or where an offender has defaulted in respect of a fine. The offender must be at least 16 years old. The CSO requires the offender to carry out unpaid work of benefit to the community. In the District Court a CSO must be considered in cases where the Court considers a term of imprisonment appropriate.<sup>25</sup> Before making a CSO, the court will consider a probation

<sup>21</sup> Use of the court poor box is due to be replaced by the *Criminal Justice (Community Sanctions) Bill* which will establish a statutory reparation fund [the Bills Tracker Page for this Bill is available [here](#)].

<sup>22</sup> For more information on suspended sentences see: Tom O'Malley, "That measure of wise clemency': Defending the Suspended Sentence" *Irish Criminal Law Journal* (2018) Vol. 28(2), 39-53.

<sup>23</sup> For more information on CSOs see: Eoin Guilfoyle, "What exactly is a Community Service Order in Ireland?" *Irish Probation Journal* Vol. 14, (October 2017), 189 – 205. [Available at [http://www.probation.ie/EN/PB/0/26A0CD9C2498EEF1802581D30045BB6D/\\$File/EoinGuilfoyle\\_IPJ.pdf](http://www.probation.ie/EN/PB/0/26A0CD9C2498EEF1802581D30045BB6D/$File/EoinGuilfoyle_IPJ.pdf)].

<sup>24</sup> The 1983 Act has been amended by the [Criminal Justice \(Community Service\) \(Amendment\) Act 2011](#) and the [Fines \(Payment and Recovery\) Act 2014](#). A consolidated version of the 1983 Act is available on [Westlaw.ie](#).

<sup>25</sup> See [section 3 of the Criminal Justice \(Community Service\) \(Amendment\) Act 2011](#).

officer’s report as to the suitability of the offender for community service. The court will also specify the number of hours to be worked.<sup>26</sup> The offender must be a suitable person, suitable community service work must be available and the offender must consent. The work must be completed within 1 year of the making of the CSO. It is an offence where a person fails to comply with a CSO. Table 1 (below), shows that **2,215 CSOs** were made in 2017 amounting to **336,573 hours** of community service.

**Table 1: Community Service**

Community Service	2015	2016	2017
Total Reports considering Community Service	2,421	2,556	<b>2,707</b>
Community Service Orders made	1,937	2,067	<b>2,215</b>
Total number of Community Service Hours ordered in lieu of custodial sentence	291,197	326,967	<b>336,573</b>
Total alternative sentence in years that would otherwise have been served	987	1,006	<b>973</b>

Source: [The Probation Service 2017 Annual Report](#) at p.50

### Probation Orders

The principal legislation covering probation in Ireland is the [Probation of Offenders Act 1907](#). This provides for a broad range of supervisory measures that can be ordered by a court in lieu of imprisonment. A probation order requires the offender to enter into a recognisance to be of good behaviour and to come before the court, for sentencing, at a future date if called upon to do so, up to three years from the making of the order. The court may also require sureties. Offenders can be made subject to a wide variety of conditions aimed at preventing repeat offending. These include:

**Recognisance:** an obligation or bond made before a court requiring a person to perform some act.

**Surety:** a person who acts as a guarantor, putting forward a sum of money which is paid into court where the offender fails to satisfy the conditions of his recognisance.

- an obligation to inform An Garda Síochána or their probation officer of any change of residence or working place;
- obligation not to enter certain localities or come into contact with certain persons or objects;
- payment of compensation;
- instructions relating to behaviour, residence, education and training or leisure activities;
- supervision; and
- attendance at an appropriate programme (addiction, counselling, etc.).

<sup>26</sup> Section 3 of the 1983 Act (as amended by [s. 19 of the Fines \(Payment and Recovery\) Act 2014](#)) provides that it must be between 40 and 240 hours where the offender is convicted on indictment of the offence concerned, and between 30 and 100 hours where the offender is convicted summarily.

## The Probation Service

The Probation Service is responsible for the organisation and management of probation services in Ireland. According to its website:

“The Probation Service protects the public and creates safer communities by helping offenders to desist from committing more crime. We have a strong record of reducing re-offending, managing offenders safely in the community, reintegrating prisoners after release and of providing an effective, efficient and value for money service. We have many success stories of offenders whom we have helped reintegrate into society, as well as statistics that show what we do works.”<sup>27</sup>

The website highlights the benefits that the Probation Service provides, including the fact that probation supervision costs less than 10% of the cost of imprisonment, and that 63% of offenders on probation supervision did not reoffend within a 3 year period. They also note that there are 9,737 people on the caseload of the Probation Service.<sup>28</sup> The Probation Service provides support in a wide range of areas, including:

- drug and alcohol treatment;
- accommodation support;
- counselling;
- mentoring;
- woman-specific programmes;
- restorative justice;
- high-risk offender programmes;
- peer support; and
- offence-focused programmes.

One of the most significant functions of the Probation Service is the preparation of reports that are used by the courts, the parole board and the prison service to evaluate offenders in relation to sentencing, suitability for temporary or early release and diversion schemes. **13,722** reports were prepared in 2017, an **increase of 1,046** reports from the previous year.<sup>29</sup>

The Probation Service also conducts research into the best practices for rehabilitation and the delivery of probation services. The Probation Service hosts CEP conferences, which bring together international practitioners and experts in the field of probation. The Probation Service and the Probation Board for Northern Ireland jointly publish the *Irish Probation Journal*, a peer-reviewed journal which explores probation-related topics.

## Impact of the Bill on the Probation Service

The principal impact of implementation of the Framework Decision will be on the supervision of offenders serving non-custodial sentences. Table 2 (below) compares the number of supervision orders made between 2015-2017. These statistics show an increase in the number of supervision

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<sup>27</sup> See <http://probation.ie/EN/PB/AboutUsPage?readform>.

<sup>28</sup> See <http://probation.ie/en/PB> [Accessed on 15/01/2019].

<sup>29</sup> The Probation Service, *Annual Report 2017*. Available at [http://www.justice.ie/en/JELR/Probation\\_Service\\_Annual\\_Report\\_2017.pdf/Files/Probation\\_Service\\_Annual\\_Report\\_2017.pdf](http://www.justice.ie/en/JELR/Probation_Service_Annual_Report_2017.pdf/Files/Probation_Service_Annual_Report_2017.pdf).

orders made, particularly in respect of supervision during deferment of penalty. Supervision during deferment of penalty relates to the judicial practice of adjourning sentencing of an offender to a future date on condition that the offender submits to supervision by a probation officer and avoids reoffending.

**Table 2: Supervision carried out by the Probation Service**

<b>Supervision (Orders)</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
Orders for Supervision during year (Probation Orders)	1,851	1,850	<b>1,743</b>
Orders for Supervision during deferment of penalty	1,419	1,667	<b>1,894</b>
Community Service Orders	1,938	2,067	<b>2,215</b>
Fully Suspended Sentence with Supervision	670	591	<b>610</b>
Part Suspended Sentence Supervision Orders	490	437	<b>541</b>
Post Release Supervision Orders made	36	48	<b>56</b>
Other Orders	189	89	<b>13</b>
Total Supervision Orders made during year	6,593	6,749	<b>7,072</b>
Number of life sentence prisoners supervised in the community	80	83	<b>93</b>
Number of sex offenders supervised in the community	354	375	<b>376</b>

Source: [The Probation Service 2017 Annual Report](#)

## Principal Provisions of the Bill

This section of the Digest examines the main provisions of the Bill. The Bill comprises 32 sections, many of which directly reflect the provisions of the Framework Decision. For that reason, not every section of the Bill is discussed. The Framework Decision is included in the Schedule of the Bill. A short synopsis of each provision is given in the Table of Provisions (above).

### Part 1 Preliminary and General

#### Interpretation

Section 2 of the Bill sets out the meanings to be given to certain terms used in the Bill. These include:

“Appropriate court”: means either the High Court (if the offence would have been dealt with by the Central Criminal Court under Irish law) or the Circuit Court; and

“Minister”: means the Minister for Justice and Equality.

#### Competent authorities

Section 4(1) of the Bill provides that the Minister is designated as the competent authority in the State for the purposes of the Framework Decision. Section 4(2) provides that the appropriate court is designated as the competent authority in the State for the purposes of Articles 14<sup>30</sup> and 20<sup>31</sup> of the Framework Decision (save in relation to the revocation of a conditional release).

#### Provisions supplementary to section 4

Section 5 of the Bill provides that the Minister may, by order, delegate his functions as competent authority to such persons as he or she considers appropriate. Where such an order is made, a reference in the Bill to the Minister shall be construed as a reference to the person designated by the order to carry out the delegated function. The Minister must inform the General Secretariat of the Council of the European Union of the making of an order under section 5 and of the names of the persons designated under the order.

#### Orders and regulations

Section 6 of the Bill provides the Minister with the power to make regulations providing for any matter referred to in the Bill as “prescribed or to be prescribed.” Where Ministerial orders and regulations are made under this Bill they must be laid before each House of the Oireachtas as soon as possible after they are made.

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<sup>30</sup> Article 14 of the Framework Decision provides for the jurisdiction to take all subsequent decisions and the governing law that applies in these cases.

<sup>31</sup> Article 20 of the Framework Decision provides for the where jurisdiction of the executing state comes to an end.

## Part 2 Issuing State is Ireland

Part 2 of the Bill sets out the procedure that will apply where Ireland is the state in which the relevant judgment or probation decision is issued.

### Request for forwarding judgment in State, etc., to Member State competent authority

Section 10 provides that the Director of the Probation Service (section 10(1)) and the sentenced person (section 10(2)) can make a written request to the Minister for the forwarding of a judgment or probation decision to the competent authority of a Member State. Only the sentenced person can make the request in circumstances where the Member State is not the Member State in which that person is lawfully and ordinarily residing (section 10(3)).

Section 10 corresponds to Article 5 of the Framework Decision. The provisions in section 10 appear to be broader in their application than Article 5 which only specifies the sentenced person in terms of who can request the forwarding of a judgment or probation decision. However, both the Framework Decision (Art 5(1)) and the Bill (section 11(1)(b)) require that the Member State competent authority prior to forwarding a judgment or probation decision is satisfied that the sentenced person “has returned, or wants to return, to that State.” This would suggest that the Director of the Probation Services in requesting the forwarding of a judgment or probation decision would be doing so on behalf of the sentenced person, as opposed to doing so in circumstances where the sentenced person would object to their transfer to the Member State as a person will not be transferred against their wishes.

### Forwarding of judgment in State, etc., to Member State competent authority

Section 11 of the Bill contains the procedures that apply when the Minister is forwarding a judgment or a probation decision which corresponds with Article 6 of the Framework Decision. Section 11(1) relates to requests made under section 10(1) or (2). The Minister must be satisfied that the person is ordinarily and lawfully residing in the other Member State, has returned or wishes to return to that Member State and that there is no possibility of the judgment or probation decision being overturned by way of appeal. Section 11(2) relates to requests under section 10(3).<sup>32</sup> In these circumstances the Minister must be satisfied that the Member State competent authority has consented to the forwarding and that there is no possibility of the judgment or probation decision being overturned by way of appeal.

Where the Minister decides to forward a judgment or probation decision, section 11(8) provides for the forwarding of an “Article 6 certificate” along with the judgment or probation decision. The Article 6 certificate sets out a number of details involving the offence, the offender, the sentence and the competent authority.<sup>33</sup> Section 11(9) stipulates that the Minister must not forward a judgment or probation decision to more than one Member State competent authority at any one time.

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<sup>32</sup> Section 10(3) relates to requests from the sentenced person in circumstances where the Member State is not the Member State in which that person is lawfully and ordinarily residing

<sup>33</sup> The Article 6 certificate is set out in Annex 1 of the Framework Decision.

Section 11(10)(a) sets out what is meant by “lawfully and ordinarily resident.”<sup>34</sup> The Bill defines a person as being lawfully and ordinarily resident in another Member State:

“if he or she were lawfully residing in that State immediately before the giving of the judgment in the State concerned.”

Section 11(10)(b) excludes a person who was serving a sentence of imprisonment or detention in the State in the period immediately prior to the giving of the judgment the person from being considered lawfully resident.

### Withdrawal of Article 6 certificate

Section 12 provides for the withdrawal of an Article 6 certificate. This arises where:

1. the Minister, after requesting information from the Member State competent authority in relation to the maximum custodial sentence that could be imposed where the sentenced person fails to comply with the probation measure or alternative sanction, receives and considers this information; or
2. the Minister receives notification of a Member State competent authority to make an adaption to the probation measure or alternative sanction.

If the Minister is of the opinion that it would be in the public interest or the interests of justice to do so, the Minister may withdraw the Article 6 certificate. Section 12(4) prohibits the Minister from withdrawing the Article 6 certificate if the probation measure or alternative sanction has already commenced in the executing state. Section 12(5) requires the Minister to inform the competent authority of the Member State within 10 days of making the decision to withdraw the Article 6 certificate.

### Consequences of recognition of judgment in State

Section 13 provides for the consequences of recognition of a judgment by a competent authority of a Member State. Section 13(2) provides that the State shall no longer have competence in relation to the supervision of or power to take subsequent decisions in relation to the probation measure or alternative sanction and that the executing state shall gain this competence. Section 13(3) provides that the competence of the executing state reverts back to the State in circumstances where the Minister withdraws the Article 6 certificate. Section 13(4) provides for the competence of the executing state to revert back to the State where the executing state has refused to assume responsibility in respect of a subsequent decision being required in respect of non-compliance with the judgment or probation decision by the sentenced person. Section 13(5) requires the Minister as soon as possible to inform the court which gave the judgment of a transfer of competence back to the State.

### Obligation to provide certain information to Member State competent authority

Section 14 obliges the Minister to provide information to a Member State competent authority where the Minister becomes aware of any circumstances relating to the judgment or probation

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<sup>34</sup> The ambiguity of this phrase is a matter which was raised in the ISTEP Handbook as a potential obstacle to implementation of the Framework Decision as different states could have different definitions of what is meant by “lawfully and ordinarily resident.” See note 16 at p. 22.

decision that could result in the Member State competent authority taking a subsequent decision in relation to the sentenced person. For example, if the Minister were to become aware that a probation order has been breached by the sentenced person, the Minister would be obliged to notify the Member State competent authority as soon as they became aware of this breach.

### **Transfer of jurisdiction back to State**

Section 15 relates to a transfer of jurisdiction back to the State. The Minister can request a transfer, while the sentenced person is under the supervision of the executing state, where the sentenced person is charged with an offence under the law of the State. The Member State competent authority can also transfer competence back to the State where the sentenced person absconds from the jurisdiction. Where the State is resuming competence the Minister can request information from the executing state as to the degree of compliance with the probation measure or alternative sanction. The Minister is obliged, insofar as possible, to notify in writing the sentenced person of the transfer of the resumption of competence.

## Part 3 Executing State is Ireland

Part 3 of the Bill relates to where Ireland is the executing state of the probation measure or alternative sanction delivered by the courts of another Member State.

### Interpretation

Section 17 provides for the meanings to be applied to particular terms in this part of the Bill. It defines a person as being “lawfully and ordinarily residing the State” where they have their “principal residence in the State for the 12 months immediately preceding the date of receipt by the Minister of a judgment and, where applicable, the probation decision in respect of that person forwarded by the competent authority in the issuing state.”

### Corresponding offences

Section 18(a) provides that an offence under the law of the issuing state will correspond to an offence under the law of the State where the act or omission which amounts to the offence under the law of the issuing state, would constitute an offence under the law of the State if it were committed in the State. Section 18(b) provides an offence under the law of the State corresponds to an offence under the law of the issuing state where the act or omission which amounts to the offence under the law of the State, would constitute an offence under the law of the issuing state if it were committed in the issuing state.

### Probation measures and alternative sanctions to which Part 3 applies

Section 19(1) lists the types of probation measures and alternative sanctions to which Part 3 of the Bill applies. These include obligations on the sentenced person to:

- notify specified authorities of changes of residence or working place;
- refrain from entering certain localities;
- report at specified times to a specific authority; and
- carry out community service.

Section 19(2) provides that the Minister may prescribe a measure which does not feature in the list as a probation measure or alternative sanction.

### Forwarding of judgment, etc., to competent authority in State

Section 20 sets out the procedure where a “relevant matter” arises. A “relevant matter” is described in section 20(1) as arising where judgment or probation decision that has been forwarded to the Minister is not accompanied by an Article 6 certificate, where the Article 6 certificate is in a language other than Irish or English, where the Minister considers that an Article 6 certificate is incomplete or where the Article 6 certificate does not correspond to the judgment or probation decision. Section 20(2) provides that where a relevant matter arises the Minister must as soon as practicable, notify the competent authority of the issuing state of the relevant matter and specify a reasonable period of time within which the competent authority of the issuing state may take such remedial action as is necessary in respect of the relevant matter.

### Consent to forwarding judgment, etc., where sentenced person not lawfully and ordinarily residing in State

Section 21 provides for the Minister to consent to the forwarding of a judgment where the sentenced person is not lawfully and ordinarily residing in the State. This may arise where the person is an Irish citizen or if the Minister is of the opinion “the person has close ties with the State and it is in the interests of the person’s social rehabilitation to do so.”

### Consideration of judgment, etc.

Section 23 provides for the Minister to make a decision upon receiving a judgment or probation decision to make either an application to the appropriate court for the recognition of the judgment or to refuse to recognise the judgment. Section 23(5) sets out the grounds upon which the Minister **may** refuse recognition. These include:

- where the Article 6 certificate contains a probation measure or alternative sanction that does not fall within section 19(1);<sup>35</sup>
- where the sentenced person would be immune from prosecution in this jurisdiction;
- where the judgment or probation measure provides for medical or therapeutic treatment which, in the opinion of the Minister, would be impossible or impracticable for the State to provide; and
- where the offence to which the judgment or probation measure applies is considered under Irish law to have been committed wholly or for an essential part in the State.

Section 23(7) sets out the grounds upon which the Minister **must** refuse recognition. These include:

- where the sentenced person has not returned and does not want to return to the State;
- where the Minister has not consented to the forwarding of the judgment or probation decision in circumstances where the sentenced person is not lawfully and ordinarily residing in the State;
- where it is immediately clear the information provided in the Article 6 certificate that recognition would breach the *ne bis in idem* principle;<sup>36</sup>
- where the judgment or probation decision relates to an offence in the issuing state which does not correspond with a offence under Irish law;
- where the judgment or probation decision relates to an offence which if it the same offence had been proceeded against a person of the same age as the sentenced person, could not be proceeded against by reason of his or her age at the time of the offence;
- where the sentenced person did not appear in person at the proceedings resulting in the judgment, and
- where the probation measure or alternative sanction is of less than 6 months’ duration or less than 6 months remains to be served.

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<sup>35</sup> For example, an obligation on the sentenced person to be subject to electronic monitoring.

<sup>36</sup> *Ne bis in idem* is a legal principle which provides that no legal action can be instituted twice in respect of the same cause of action.

### Endorsement of judgment, etc., by appropriate court

Section 24 of the Bill provides for the endorsement of a judgment or probation decision by the appropriate court. It provides that where the appropriate court is of the opinion that the probation measure or alternative sanction is incompatible with the law of the State it may adapt the measure or sanction to that of a measure or sanction prescribed under Irish law for an offence which corresponds with the offence for which the probation measure or alternative sanction was imposed. Where the court is of the opinion that the period of duration of the probation measure or alternative sanction is incompatible with the law of the State it can adapt the period to a period prescribed for a probation measure or sanction under Irish law for an offence which corresponds with the offence for which the probation measure or alternative sanction was imposed. These adaptations should correspond as much as possible with the original probation measure or alternative sanction and they should not aggravate the probation measure or alternative sanction, or exceed the maximum penalty under Irish law.

Section 24(6) provides for the grounds upon which the court **may** refuse to endorse a judgment or probation decision. These are identical to the grounds set out for the Minister under section 23(5). Section 24(8) provides for the grounds upon which the court **shall** refuse to endorse a judgment or probation decision. These are identical to the grounds set out for the Minister under section 23(7).

### Provisions applicable in cases of conditional release and suspended sentences

Section 25(1) provides that where a court makes an order recognising or adapting a judgment or probation decision that relates to a suspended sentence, the order must specify that the suspended sentence corresponds to a suspended sentence under [section 99 of the Criminal Justice Act 2006](#) and set out the prison to which the sentenced person will be committed if the suspended sentence is revoked.

Section 25(2) provides that where a court makes an order recognising or adapting a judgment or probation decision that relates to a conditional release, the order must specify that the conditional release corresponds to a direction given by the Minister under section 2 of the *Criminal Justice Act 1960*,<sup>37</sup> and set out the place to which the sentenced person must be taken if they are arrested.

### Time limits for decision

Section 26 sets out the relevant time limits that apply where the Minister receives a judgment or a probation decision. These require the Minister to make a decision in respect of whether to apply to the appropriate court for recognition or refuse recognition within 60 days of receipt of the judgment or probation decision. Where the Minister is unable to comply with this time limit the Minister is required to inform the competent authority of the issuing state of the delay, the reasons for the delay and the estimated time needed for a decision to be reached. Section 26(5) provides that the appropriate court must decide on an application by the Minister for recognition within 60 days of the receipt of the judgment or probation decision by the Minister. Section 26(6) provides that where

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<sup>37</sup> I.e. a direction for the temporary release of a prisoner. Note that section 2 of the *Criminal Justice Act 1960* was amended by [section 1 of the Criminal Justice \(Temporary Release of Prisoners\) Act 2003](#) which inserts a new section 2 into the *Criminal Justice Act 1960*.

the appropriate court is unable to comply with the time limit it shall inform the Minister of the delay, the reasons for the delay and the estimated time needed for a final decision to be taken.

### **Recognition of judgment and probation decision**

Section 28 provides that where the appropriate court has made an order endorsing the judgment or probation decision the Minister must recognise the probation measure or alternative sanction for the purpose of commencing as soon as possible the supervision of the probation measure or alternative sanction.

### **Obligation to provide certain information to competent authority in issuing state**

Section 29 provides that the Minister must notify and provide information to the competent authority in the issuing state without delay regarding decisions taken in relation to the sentenced person. For example, the Minister would have to immediately notify the competent authority of the issuing state of any discontinuance of supervision specified in the probation decision. Section 29 specifies the circumstances in which such notification requirements will arise.

### **No jurisdiction to take subsequent decisions in certain cases**

Section 30 provides that where the judgment or probation decision relates to a conditional release, and under the law of the issuing state the sentenced person must be given a judicial hearing prior to a decision to revoke their conditional release, an appropriate court that is making an order endorsing the judgment or probation decision must specify in the order that the State shall not assume responsibility for taking a relevant decision. In these circumstances the Minister is obliged to transfer jurisdiction back to the competent authority of the issuing state where the probation measure or alternative sanction has not been complied with and a relevant decision needs to be taken.

### **Transfer of jurisdiction back to competent authority in issuing state**

Section 32(1) provides for the transfer of jurisdiction back to the competent authority in the issuing state where the sentenced person has absconded or is no longer lawfully and ordinarily resident in the State; or the competent authority makes a request for a transfer of jurisdiction where new criminal proceedings have been brought against the sentenced person in the issuing state. The Minister must notify the relevant court of the transfer of jurisdiction within 4 working days.

## Appendix 1: Other jurisdictions

This section provides a brief overview of the law in some of the other jurisdictions to have implemented the Framework Decision. This section also provides a short analysis of the UK's reasoning to opt out of the Framework Decision.

### Implementation in the EU

This section draws on information extracted from a table prepared by the European Justice Network [EJN] on the implementation status of the Framework Decision<sup>38</sup> and a 2016 Report on the Implementation of the Framework Decision prepared by the General Secretariat of the Council of the EU.<sup>39</sup> Table 3 (below) sets out the implementation status of the Framework Decision across the EU and provides some general information on how certain aspects of the Framework Decision have been implemented.

**Table 3: Implementation of Framework Decision 2008/947/JHA**

Member State	Date of implementation	Competent authorities	Additional types of probation measures and alternative sanctions	Conditions for forwarding a judgment/probation decision	Double criminality (Art 10(4))	Refusal to assume responsibility for subsequent decisions
<b>BELGIUM [BE]</b>	Implemented.  Entry into force of legislation:  23 June 2013	- BE as issuing state:  Public prosecutor's office  - BE as executing state:  Public prosecutor's office  MoJ is competent for giving prior agreement for forwarding a judgment ex. Art. 5(2)				

<sup>38</sup> The EJN's table can be accessed [here](#). This table was last updated by the EJN on 7<sup>th</sup> June 2018.

<sup>39</sup> Council of the EU: Implementation of 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 (November, 2016). Available [here](#).

<p><b>BULGARIA [BG]</b></p>	<p>Implemented</p> <p>Entry into force of legislation:</p> <p>28 April 2012</p>	<p>- BG as issuing state:</p> <p>first-instance courts</p> <p>- BG as executing state:</p> <p>provincial courts or Sofia City Court</p>				
<p><b>CZECH REPUBLIC [CZ]</b></p>	<p>Implemented</p> <p>Entry into force of legislation:</p> <p>1 January 2014</p>	<p>- CZ as issuing state:</p> <p>District courts, regional courts, Prague and Brno Municipal Courts</p> <p>- CZ as executing state:</p> <p>1) the locally competent district courts</p> <p>2) regional courts decide as regards legal remedies</p>		<p>CZ competent executing authorities may agree to acknowledge the decision of another Member State in accordance with Article 5(2) of the Framework Decision, if the person to whom the decision is addressed requests that the recognition and execution of that decision be acknowledged and if that person is resident on the territory of the Czech Republic or if it may reasonably be supposed that the person intends to reside there and if the acknowledgement of that decision for recognition and execution in the Czech Republic may be considered as appropriate and effective for purposes of ensuring the successful integration of that</p>	<p>CZ will not apply Article 10(1) of the FD</p>	<p>In the cases referred to in Article 14(3)(a), CZ will not, in the event of a breach of imposed obligations and restrictions, adopt any subsequent decision and it will be for another EU state to adopt binding measures in accordance with its domestic law</p>

				person in society		
<b>DENMARK [DK]</b>	Implemented  Entry into force of legislation:  5 December 2011	Minister of Justice or his/her representative is competent regarding recognition Department of Prisons and Probation is competent for adaptation / supervision	Decisions on intensive monitoring at the sentenced person's place of residence	Certificates must be issued by the Minister of Justice or his/her representative		DK authorities will not take a decision on execution of a custodial sentence in cases referred to in Art. 29 n (2) and (3) of national act
<b>DEUTSCHLAND/ GERMANY [DE]</b>	Implemented  Entry into force of legislation:  25 July 2015	DE as issuing state:  1) Public prosecutor's offices in the regional courts  2) Local courts  DE as executing state:  1) Public prosecutor's offices in the regional courts  2) Regional courts	DE is willing to supervise certain other constraints which satisfactorily make amends for wrongs committed. The same applies to instructions which aim to prevent a specific lifestyle of the sentenced person	DE may consent to the forwarding of a judgment under Art. 5(2) if the sentenced person is a DE national	DE will not apply Article 10(1) FD	DE refuses to assume responsibility for subsequent decisions provided for in Art. 14(1)(b) and (c) in the cases mentioned in Art. 14(3)(a), (b) and (c)
<b>ESPANA/ SPAIN [ES]</b>	Implemented  Entry into force of legislation:  21 November 2014	- ES as issuing state:  The competent judge or court  - ES as executing state:  The Central Criminal Court, or the Central Juvenile Court		The conditions contained in Article 101(2)(b) of the Spanish Law 23/2014 should be fulfilled		ES declares that the issuing authority, rather than the Spanish Court responsible for enforcement, will be competent for subsequent decisions in relation to the three scenarios set out in Article 14(3)

		Judge				
<b>ESTONIA</b>	Implemented  Entry into force:  1 January 2015	Ministry of Justice	Estonia will supervise the probation referred to in Article 4(1)			
<b>HRVATSKA / CROATIA [HR]</b>	Implemented as part of the acquis - 1 July 2013	- HR as issuing state:  competent courts  - HR as executing state:  competent county courts	The domestic competent authorities, on the basis of a recognised foreign probation measure or alternative sanction, will enforce in respect of a convicted person only such types of probation measures and alternative sanctions as are provided for in the criminal legislation of the Republic of Croatia	In cases where, in addition to the agreement of the convicted person, the agreement of the ministry with responsibility for judicial affairs is required for the transmission of a judgment imposing probation measures or alternative sanctions to HR for recognition, the ministry will, when giving that agreement, pay particular attention to facilitating the social rehabilitation of the convicted person and the reintegration of the convicted person into society		A competent court will not take subsequent decisions in three cases
<b>KYPROS/ CYPRUS [CY]</b>	Implemented  Entry into force of legislation:  23 May 2014	- CY as issuing state:  The assize court or the district court  - CY as executing state:  1) The territorial competent district court		The competent executing authority of CY may consent to the forwarding of a judgment issued in another Member State and, where applicable, the probation decision, only when the sentenced person is lawfully and		CY will not assume responsibility for taking any subsequent decision in the event of the sentenced person's non-compliance with a probation measure or alternative sanction or if

		(enforcement) 2) The competent Ministry, section or service (ensuing measures)		ordinarily resident in the Republic of Cyprus and has returned or wants to return there		he commits a new criminal offence. In such cases jurisdiction will be transferred back to the competent authority of the issuing Member State
<b>LATVIA</b>	Implemented Entry into force of legislation: 1 July 2012	A "municipal (district) court"  Ministry of Justice acts as central authority				
<b>LITHUANIA [LT]</b>	Implemented Entry into force of legislation: 1 April 2015	- LT as issuing state: District courts  - LT as executing state: District courts and Probation services	LT will recognise and execute the probation measures and alternative sanctions referred to in Article 4(1) only	In the cases referred to in Article 5(2), the LT court will generally agree to take over the execution of the measure if the sentenced person is studying, working or has been granted an employment contract in LT or if a family member of the sentenced person is resident in LT or if there are other compelling reasons for taking over the execution of the alternative sanction or probation measure	LT will not apply Article 10(1)	
<b>MAGYARORSZÁG/ HUNGARY [HU]</b>	Implemented Entry into force: 1 January 2013	- HU as issuing state: court that imposed the measure or alternative sanction  - HU as		HU consents to forwarding if the sentenced person requests execution of the judgment or the probation decision by the HU authorities and provides proof of	HU will not apply Article 10(1) of the FD	

		executing state:  District courts, or the Central District Court of Buda		close family, cultural or economic connections with Hungary		
<b>NETHERLANDS [NL]</b>	Implemented  Entry into force:  1 November 2012	Public Prosecutor in Haarlem	Decision on electronic supervision		NL will not apply Article 10(1) of the FD	In certain cases, NL will refuse to assume responsibility for subsequent decisions referred to in Art. 14(1)(b) and (c)
<b>ÖSTERREICH/ AUSTRIA [AT]</b>	Implemented  Entry into force:  1 August 2013	- AT as an issuing state:  District and Regional Courts  - AT as an executing state:  Regional Courts		Monitoring can be approved if because of specific circumstances ties exist between the sentenced person and Austria of such intensity that it can be assumed that monitoring in Austria will help facilitate the social rehabilitation and reintegration of the sentenced person		AT refuses to assume responsibility to take subsequent measures in the cases described in Art. 14(3)(a) and (c)
<b>POLAND [PL]</b>	Implemented  Entry into force:  1 January 2012	- PL as issuing state:  District or Regional Courts  - PL as executing state: Regional Courts with local jurisdiction  - PL as exec. State in Art. 5(2) cases:		Where the PL authorities deem that this would better serve the educational or preventive aims of the sanction	PL will not apply Art.10(1)	PL as an executing state will refuse assuming the responsibility provided for in Art. 14(1)(b) and (c) in the cases mentioned in Art. 14(3)(a) and (b)

		Regional Court of Warsaw				
<b>ROMANIA [RO]</b>	<p>Implemented</p> <p>Entry into force of legislation:</p> <p>26 December 2013</p>	<p>RO as issuing and executing state:</p> <p>The district courts which are territorially competent</p>	<p>Where it is the executing state, RO monitors probation measures and alternative sanctions as referred to in Article 4(1)</p>	<p>RO authorities can recognize judgments and probation decisions not only when the convicted person is a Romanian national and he/she lives or is going to live in Romania, but also in cases when the convicted person is not a Romanian national, but he/she either is a resident of Romania or one of his/her family members is a Romanian national or resident, or he/she proves that he/she is going to engage in a professional activity, studying or training in Romania</p>	<p>Romania will make use of the possibility granted by paragraph (3), therefore the recognition of the judgment or probation decision will be subject to a double criminality check</p>	<p>In cases when, after a judgment or a probation decision is recognized, the convicted person fails to comply with the supervision measures or the alternative sanction, or commits a new offence during the probation period, if the foreign decision referred to conditional release or an alternative sanction, without expressly mentioning the custodial sentence which is to be imposed in this case, Romania will not assume jurisdiction and the issuing state will be given the competence to revoke the sanction</p>
<b>SLOVENIA [SI]</b>	<p>Implemented</p> <p>Entry into force:</p> <p>20 September 2013</p>	<p>SI as issuing and executing state:</p> <p>District courts which are territorially competent, depending on the residence of the person</p>				<p>SI will refuse to assume responsibility for the subsequent decisions referred to in Article 14(1)(b) and (c) of the Framework Decision in two cases</p>

		concerned. If the competent court cannot be determined, the competent court is the District Court in Ljubljana				
<b>SLOVAKIA [SK]</b>	Implemented Entry into force: 1 February 2012	- SK as an issuing state:  The court that issued the decision  - SK as an executing state:  The district court in whose area or jurisdiction the sentenced person ordinarily resides				
<b>SUOMI/ FINLAND [FI]</b>	Implemented Entry into force: 5 December 2011	FI as an issuing and executing state:  Central administrative office of the Criminal Sanctions Agency  District courts are competent to take subsequent decisions as referred to in Art. 14(1)(b) and (c)		Where probation in Finland because of particular personal circumstances or other special reason would favour chances of adjusting to society		In certain circumstances, Finland will not take subsequent decisions in cases referred to in Art. 14(1)(b) and (c)
<b>SWEDEN [SE]</b>	Implemented Entry into force: 1 January 2016	- SE as issuing state:  1) Prison and Probation	SE will not supervise any sanctions or probation measures in	SE authorities may consent to a decision being forwarded to Sweden if the social		SE as an executing state will in no case assume jurisdiction to take

		Service 2) Parole boards and ordinary courts  - SE as executing state:  Prison and Probation Service	addition to those referred to in Article 4(1)	rehabilitation of the sentenced person is facilitated by the fact that enforcement is transferred to Sweden and is also appropriate		subsequent decisions as referred to in Article 14(1)(b) and (c)
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Source: Table prepared by L&RS from information provided by the Council of the EU (2016 Report) and the EJM

## United Kingdom

The United Kingdom chose to opt out of Framework Decision 2008/947/JHA, despite opting into the related Framework Decisions on Transfer of Prisoners and the European Supervision Orders. The rationale behind this appears to have been related to concerns over vagueness of the drafting of Framework Decision 2008/947/JHA and its possible interpretation by the Court of Justice of the European Union.

In July 2013, the UK government published a Command Paper indicating that it would opt-out of all police and criminal justice measures which were adopted before the Treaty of Lisbon entered into force.<sup>40</sup> The paper also set out which measures it would seek to rejoin. The paper analysed Framework Decision 2008/947/JHA and noted that there was a “lack of clear understanding about how this measure will operate in practice.”<sup>41</sup> The paper noted that the Framework Decision would likely only apply to a small number of cases across the UK.<sup>42</sup> The flexibility in the Framework Decision in relation to enforcing breaches of probation and alternative sanctions was also raised as potentially leading to the Framework Decision being unevenly applied across the EU.<sup>43</sup>

The decision to opt-out of Framework Decision 2008/947/JHA also featured in a 2013 report<sup>44</sup> of House of Commons, Justice Committee which considered evidence given before both the Justice Committee and the European Scrutiny Committee. The report focused the oral submission of then Justice Secretary, Chris Grayling. He expanded on the concerns of the UK government stating that they were “unclear as to what happens in the event an individual is deported, the probation decision or alternative sanction is transferred, and there is a subsequent breach.”<sup>45</sup> He also appeared to express concerns over mutual recognition and mutual trust as he stated:

“I also have a concern about the doing of justice. If we send somebody back to serve a period of probationary supervision elsewhere, I would want to know that they were actually going to get that period of supervision and it was going to be done properly in the way it is done in this country.”<sup>46</sup>

The Justice Committee highlighted the possible value of the Framework Decision in reducing the number of European Arrest Warrants [EAWs] issued, noting that:

“... it could enable other Member States to transfer probation or non-custodial measures to the UK for execution rather than issuing an EAW for a sentence imposed in default, thus potentially reducing the number of EAWs issued.”

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<sup>40</sup> HM Government, *Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union* (July, 2013). Available [here](#).

<sup>41</sup> *Ibid*, at p. 132.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid*.

<sup>44</sup> House of Commons Justice Committee, *Ministry of Justice measures in the JHA block opt-out: Eight Report of Session 2013-2014* (October, 2013). Available [here](#).

<sup>45</sup> *Ibid*, at p. 15.

<sup>46</sup> *Ibid*, at p. 16.

While recognising the concerns relating to the drafting of the Framework Decision the Justice Committee recommended that in the context of the opt-in negotiations with the EU, this measure could be revisited in an effort to overcome the concerns of the UK Government.

The Framework Decision was also considered by the European Scrutiny Committee in a 2014 Report.<sup>47</sup> The European Scrutiny Committee questioned the rationale behind the decision to opt-out of this measure, where the concerns raised could all equally apply to the other related Framework Decisions on Transfer of Prisoners and European Supervision Orders. The Committee also questioned the approach of the Government given the, “evident operational links between the measures and the EAW.”<sup>48</sup>

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<sup>47</sup> House of Commons European Scrutiny Committee, *Forty-seventh Report of Session 2013-2014* (April 2014). Available [here](#).

<sup>48</sup> *Ibid*, at p. 23.



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