

Rapid literature assessment Summary

**on Council Framework Decision 2008/909/JHA of 27
November 2008 on the application of the principle of mutual
recognition to judgments in criminal matters imposing
custodial sentences or measures involving deprivation of
liberty for the purpose of their enforcement in the European
Union**

Carmen Garcia & Ioan Durnescu



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Introduction

The transfer of foreign sentenced persons to serve their sentences in their home countries is an alternative way of implementing a sentence. Arguably, all things being equal, sentenced persons who serve their sentences in their home countries can be rehabilitated, resocialised and reintegrated into the community better than elsewhere. This is a positive reason for transferring sentenced persons to a state with which they have social links to serve their sentences. Imprisonment in a foreign country, away from family and friends, may also be counterproductive as families may provide prisoners with social capital and support, which improve the likelihood of successful resettlement and reintegration¹.

Methodology

The ultimate aim of this analysis is to inform the research conducted under the project Support for Transfer of European Prison Sentences towards Resettlement (hereinafter STEPS 2). The inclusion criteria for the papers to be covered in this assessment were:

1. to be published in Europe,
2. to be published after 2005, when the discussions on the FD 909 started at the EU level,
3. to be in any EU language
4. to deal with the FD 909 – conception, adoption and implementation.

The main sources of literature are:

1. Consultation of laws and preliminary documents.
2. Consultation of evaluation reports.
3. Consultation of other projects websites, such as <http://www.euopris.org/> , <http://www.euprobationproject.eu> etc.

State of play - implementation

The principle of mutual recognition, which is the cornerstone of the judicial area of justice, requires a reciprocal transposition; it cannot work if instruments are not implemented correctly in the two Member States concerned. As a consequence, when cooperating with a Member State who did not implement in time, even those Member States who did so will have to continue to apply the corresponding conventions of the Council of Europe when transferring EU prisoners or sentences to other Member States.

The objective of developing an area of freedom, security and justice for all EU citizens as laid down in Article 3 of the Treaty on European Union cannot be achieved if Member States do not properly implement the instruments they all agreed upon. It is necessary to remind the power

¹ “Handbook on the International Transfer of Sentenced Persons”. UNODC. 2012.

of the Commission to start infringement proceedings as of 1 December 2014². Nowadays, nineteen **member states have adapted the Framework Decision**³.

Difficulties and obstacles

Different sets of obstacles and difficulties can be found in the literature. Some of these difficulties are more theoretical and apply to all FD, not only to the FD 909.

1. Theoretical Issues:

Two theoretical issues seem to be of great importance:

- The first one, refers to the principle of mutual recognition, which regulates mainly the relations between the states and neglects to a large extent to procedural rights of the prisoners. Most often the FDs mention the fundamental rights and the right of the person to be heard or give consent. Apart from that no other remedies or procedural rights are defined.

- The second theoretical difficulty is associated to the double criminality principle. The framework decision provides a list of offences (32) that must be recognised and enforced without a double criminality check, if they result in a custodial sentence or a measure involving deprivation of liberty of a maximum of at least three years in the issuing state. For all other offences, the executing state may require that they constitute an offence also under its national law in order for them to be recognised and enforced.

2. Implementation obstacles:

The report above mentioned summarizes the main difficulties mostly dealing with the way states transposed the FD into their own domestic legislation.

Considerations regarding the transfer

a. An obligation to accept the transfer unless there are grounds for refusal. While there is an obligation for the executing state to accept the forwarding, there is no obligation on the issuing state to transfer. As noted by the Commission, some countries adopted the grounds for refusal as mandatory or even added other grounds for refusal. Both situations are contrary to the letter and spirit of the FD.

b. The principle of mutual trust – no adaptation of the sentence. The sentence adaptation is allowed only in limited cases where the nature and the duration of the sentence are not compatible.

c. Regarding the crime: double criminality principle: list of offences that must be recognised and enforced without a double criminality check.

d. The link between the FD and European Arrest Warrant. Both FDs allow for the Member States to refuse to surrender a person under a European arrest warrant (or allow for a surrender under the condition that the person has to be returned) where the requested person is a national, a resident or is staying in that Member State if that member State undertakes to enforce the prison sentence. Some Member States regulated this situation only for the nationals.

e. Declarations on transitional provisions. Based on the FD text, Member States can adopt declarations stating that they use the existing legal instruments on the transfer but not after the 5 December 2011, when is the final date of adoption. It seems that some Member States adopted declarations stating that they use the existing legal documents even after this date.

² 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. Brussels, 5.2.2014. COM(2014) 57 final.

³ This information is up-to-date as at 31 October 2014. Romania, Italy and Spain have implemented it. <http://www.europris.org/state-of-play-eu-framework-decisions-909-947-829/>

f. The EJM website is designated to provide to practitioners in the field of international judicial co-operation in criminal matters essential, comprehensive and accurate information about all relevant EU instruments. As the Framework Decision 2008/909 provides for direct communication between the competent authorities in the Member States, not only comprehensive and up-dated information on the implementation of the Framework Decision and on declarations made by Member States would facilitate the co-operation in practice, but also an adjusted Atlas at the website of the EJM should be provided in order to allow an immediate identification of the competent authority in the respective executing State.

Requirement for transfer

a. Subsequent decisions. In principle, the subsequent decisions need to be adopted by the executing state. However, there are large differences between Member States regarding the conditional release. In order to consolidate the mutual trust, executing states need to inform the issuing states regarding the early or conditional release so the issuing states can make an informed decision on whether to transfer or not.

b. Consent: the role of the person concerned in the transfer process – not all the Member States provide enough opportunities for the prisoners to express their views regarding the transfer.

c. Definition of "social rehabilitation"

In the case of Spain this concept has been broadly interpreted, and *The consent of the sentenced person shall not be required where the judgment together with the certificate is forwarded: (a) to the Member State of nationality in which the sentenced **has ties with, considering his habitual residence and his familiar or professional bonds.***

Though the Framework Decision does not contain such a ground for non-recognition and non-enforcement, a request according to Article 4, para. 1b of the Framework Decision to the Member State of nationality, to which, while not being the Member State where the sentenced person lives, but he or she will be deported once released from the enforcement of the sentence on the basis of an expulsion or deportation order, is very often refused due to considerations that such a transfer would not serve the purpose of social rehabilitation of the sentenced person. The Framework Decision however provides that the final assessment, that the enforcement of the sentence by the executing State would serve the purpose of facilitating the social rehabilitation of the sentenced person, falls within the responsibilities of the issuing State. A higher level of imprisonment (related to work and skills training, education, medical treatment, accommodation, etc.) cannot serve as a ground for non-recognition due to reduced prospects of social rehabilitation in the executing State. A single European Justice area governed by the principle of mutual recognition and enforcement requires an approximation of standards in the prison systems of all Member States.

d. The Framework Decision aims at facilitating the procedure of cross-border enforcement of sentences by **reducing the number of documents** which have to be provided by the issuing State to the executing State in comparison with previous existing legal instruments (see especially the Convention of 21 March 1983 on the Transfer of Sentenced Prisoners – CETS 112 and its Additional Protocol – CETS 167). Though the Framework Decision does not contain an obligation to provide an existing expulsion or deportation order, frequently the competent authorities of the executing States request not only a transmission of the certificate, the judgment and the statement of the sentenced person, but also of the expulsion or deportation order. According to the text in the certificate only the name of the authority that issued that order, the date of issue and, if available, the reference number have to be provided. In addition sometimes not only the certificate in the language of the executing State, but also the original of the certificate (in the language of the issuing State) is requested. Due to this practice the objective of the Framework Decision to facilitate the cross-border enforcement of sentences is not achieved. In fact the proceedings have become more cumbersome due to the new legal framework.

e. Though the certificate contains on a regular basis already all required relevant information for a decision on the enforcement, **a translation** also of the judgment is requested in most cases, at least partly. A further facilitation of procedure is expected due to restricted translation requirements under Article 23 of the Framework Decision. In principle only the certificate has to be translated in the/an official language of the executing State. The judgment or essential parts of it have only to be accompanied by a translation into the/an official language of the executing State, where the respective Member State made a declaration according to Article 23, para. 3 of the Framework Decision and where it finds the content of the certificate insufficient to decide on the enforcement of the sentence.

Transfer process

The time limits in Article 12 para 2 and Article 15 para 1 of the Framework Decision are not respected in most cases. To meet the time limit established in Article 15 para 1 an immediate confirmation of the proposed date/circumstances of the transfer is requested⁴. Another major difficulty is the high costs of transferring prisoners from one country to another⁵.

Post transfer considerations

- a. Material detention conditions: There are still huge differences between Member States regarding the detention conditions. This might hinder the transfer procedure.
- b. Victims: There are still questions about the role and the position of victims in the transfer decision and procedure. What is their role in the transfer process and when should they be informed are only two of such questions.

Concluding remarks

The need of rehabilitation has inspired the regulations such as the FD 2008/909. In our opinion, in order to improve its implementation, it is necessary to pay attention first to the transposition process. In this sense, the Report from the Commission established that the level of implementation is far from satisfactory. There are too many states that have not adapted the Framework Decision. At the same time, in the case of those that have done it, the Commission has detected important omissions and discrepancies that should be corrected in order to respect the spirit of the Decision.

Throughout this paper, we have identified the most challenging difficulties presented by the FD as theoretical issues and implementation obstacles. For each category, we have identified concrete issues that may threaten effective and smooth implementation.

In this regard, the Workshop “Operational links between the Framework Decisions ISTEP Final Conference”, held in Lithuania in 2013 has been very useful to identify them. Together with the problems and obstacles it is necessary to determine possible solutions to them. Several documents, like Minutes of the Experts’ Meeting on the implementation of the Framework Decisions 2008/909/JHA (Transfer of Prisoners), 2008/947/JHA (Probation and Alternative Sanctions) and 2009/829/JHA (European Supervision Order) Brussels, 14 November 2012 and evaluation reports made by the Commission or the COPEN have contributed to become more aware of the problems and to provide more appropriate solutions.

⁴ Austrian delegation to: Working Party on Cooperation in Criminal Matters (Mutual recognition experts) COPEN 151 EUROJUST 98

⁵ EU Framework Decisions related to Detention Issues, Strasbourg, France 20-21 June 2013