

Part II Application of mutual recognition to the transfer of judgments of conviction in the context of EU law

PART II APPLICATION OF MUTUAL RECOGNITION TO THE TRANSFER OF JUDGMENTS OF CONVICTION IN THE CONTEXT OF EU LAW

Dr. Tony Marguery, LL.M

Dr. Ton van den Brink

Dr. Michele Simonato

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The discussion concerning how fundamental rights actually can limit the principle of mutual recognition as implemented in the EAW, FD 2008/909 and FD 2008/947 can only be understood if one first analyzes what exactly the principle entails according to EU legislation. In other words, it is necessary to explain the extent to which the Member States enjoy discretion in the implementation of mutual recognition. In particular, the following questions will be addressed, which are the authorities responsible for the decisions that have to be recognized, which are the authorities that have to recognize these decisions and what is the nature of the obligations binding on these authorities in these three Framework Decisions.

1. Origins of the principle of mutual recognition and the transfer of judgments of conviction

Mutual recognition entails the “thought that while another State may not deal with a certain matter in the same or even a similar way as one's own State, the results will be such that they are accepted as equivalent to decisions by one's own State.”¹ For criminal law in particular, which forms the focus of this research, Article 82 TFEU establishes now that judicial cooperation in criminal matters is based on the principle of mutual recognition (before the Treaty of Lisbon, the legal base for mutual recognition was found in Article 34 EU). The criminal procedural rules of the Member States can be approximated only to the extent necessary to facilitate mutual recognition.²

In this new territorial area without internal border constituted by the AFSJ, the free movement of for example persons, evidence or assets exposes the Union to transnational crime.³ All the while, enforcement capacities to respond to such crime are largely national.⁴ In an attempt to compensate this lacuna in enforcement capacity, the 1998 Cardiff European Council agreed to the UK's initiative to apply the principle of mutual recognition, which had been so successful in the internal market, by analogy to the AFSJ.⁵ In an area so tied to national sovereignty as criminal law, mutual recognition was attractive, as it did not seem to require harmonization of Member States' criminal laws, unless strictly necessary. The European Council underlined the importance of mutual recognition in the fight against cross-border crime and asked the Council to identify the scope for greater mutual recognition during the 1998 Cardiff European Council meeting.⁶ In the same year, the Council and the Commission initiated their Action Plan with a view to facilitate the mutual recognition of decisions and enforcement of judgments in criminal matters.⁷ In 1999, the European Council endorsed the principle of mutual recognition as the “cornerstone” of judicial cooperation in criminal matters within the Union.⁸ The European Council requested the Council and the

¹ European Commission 26 July 2000, *Mutual Recognition of Final Decisions in Criminal Matters*, COM(2000) 495 final, p. 4.

² Article 82(2) states that Directives can be adopted in order to establish minimum rules that can concern: (a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

³ S. Alegre & M. Leaf, ‘Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant’, (2) *European Law Journal* 2004/10, p. 201.

⁴ This caveat is recalled in Article 72 TFEU.

⁵ V. Mitsilegas, *EU Criminal Law*, Oxford: Hart 2009, p. 116; K. Lenaerts, ‘The Principle of Mutual Recognition in the Area of Freedom, Security and Justice’, *Proceedings of the Fourth Annual Sir Jeremy Lever Lecture All Souls College, University of Oxford*, 30 January 2015.

⁶ European Council 15 and 16 June 1998, *Cardiff European Council Presidency Conclusions*, SN 150/1/98/REV 1, §39.

⁷ Action Plan of the Council and the Commission of 3 December 1998 on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice (*OJ* 1999, C 19/1), §45(f).

⁸ European Council 15 and 16 October 1999, *Tampere European Council Presidency Conclusions*, §33.

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Commission to adopt a program of measures to implement the principle of mutual recognition.⁹ The Council answered this request in 2001 with a list of 24 measures¹⁰ and adopted a number of Framework Decisions to facilitate mutual recognition of decisions and enforcement of judgments in criminal matters.¹¹

Three of these Framework Decisions form the focal point of this research. Measure 8 dealt with handing-over arrangements based on recognition and immediate enforcement of arrest warrants issued by a requesting judicial authority.¹² The aim of this measure was to create a single European area for extradition.¹³ The Council adopted the Commission proposal,¹⁴ which culminated in the EAW: the first concrete measure in the field of criminal law, which implemented the principle of mutual recognition.¹⁵ Measure 14 called for an assessment of the need for modern mechanisms for the mutual recognition of final sentences that involve the deprivation of liberty.¹⁶ Measure 16 concerned the extended application of the principle of mutual recognition on the transfer of sentenced persons to cover persons resident in a Member State.¹⁷ Measures 14 and 16 were combined in the FD 2008/909.¹⁸ After the Council passed the Framework Decision on the enforcement of sentences, further common rules were required on non-custodial sentences. This led to the adoption of the FD 2008/947.¹⁹ The following section analyzes how concretely the principle of mutual recognition operates in these three Framework Decisions.

2. Functioning of mutual recognition in the EAW, FD 2008/909, and FD 2008/947

2.1. The Framework Decision 2002/584/JHA on the European Arrest Warrant

The Framework Decision 2002/584/JHA – later amended by FD 2009/299/JHA – is as it stands the main instrument on judicial cooperation in criminal matters currently applied in the

⁹ European Council 15 and 16 October 1999, *Tampere European Council Presidency Conclusions*, §37.

¹⁰ Council 15 January, *Programme of measures to implement the principle of mutual recognition of decision in criminal matters*, (OJ 2001, C 12/10), preamble.

¹¹ See for instance Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters; Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders; and Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence. For a full list of mutual recognition instruments see http://eur-lex.europa.eu/summary/chapter/justice_freedom_security.html?root_default=SUM_1_CODED%3D23&locale=en.

¹² Council 15 January, *Programme of measures to implement the principle of mutual recognition of decision in criminal matters*, (OJ 2001, C 12/10), p. 15.

¹³ Council 15 January, *Programme of measures to implement the principle of mutual recognition of decision in criminal matters*, (OJ 2001, C 12/10), p. 14.

¹⁴ European Commission 19 September 2001, Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, COM(2001) 522 final (OJ 2001, C 332 E/305).

¹⁵ Council Framework Decision 2002/584/JHA, recital (6).

¹⁶ Council 15 January, *Programme of measures to implement the principle of mutual recognition of decision in criminal matters*, (OJ 2001, C 12/10), p. 16.

¹⁷ Council 15 January, *Programme of measures to implement the principle of mutual recognition of decision in criminal matters*, (OJ 2001, C 12/10), p. 17.

¹⁸ Framework Decision 2008/909/JHA of the Council 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 (OJ 2008, L 327/27).

¹⁹ Framework Decision 2008/947/JHA of the Council of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJ 2008, L 337/102).

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AFSJ.²⁰ It has deeply transformed the approach of the Member States to returning suspects and convicted persons to other countries. The FD EAW has indeed replaced, with respect to the relation between Member States, the extradition treaties created by the Council of Europe, and introduced the concept of the EAW, *i.e.* a judicial decision enforceable in the whole European Union, issued by a Member State and executed in another Member State on the basis of the principle of mutual recognition. Also the traditional instruments on extradition provide, to some extent, for the recognition of foreign decisions. Such decisions, however, need to be transformed into national decisions before being executed. Compared with previous instruments of extradition, the EAW is based on a different logic. The ‘foreign’ decision of a Member States is automatically recognized and executed in another Member State as if it was issued in the executing country. There is no need for an exequatur procedure. In that sense, it has been observed that “mutual recognition creates extraterritoriality: in a borderless Area of Freedom, Security and Justice, the will of an authority in one Member State can be enforced beyond its territorial legal borders and across this area.”²¹ The acceptance of such extraterritoriality requires a high level of mutual trust between the different national authorities; in other words, it is premised upon the acceptance that membership of the European Union means that all EU Member States are fully compliant with the EU standards of fundamental rights. The FD EAW introduced the possibility for a national authority to issue a decision with a view to the arrest and surrender by another Member State of a requested person, either for the purposes of conducting a criminal prosecution (*‘Surrender for prosecution’*) or for the purpose of executing a custodial sentence or detention order (*‘Surrender for execution’*). The present research focuses only on the surrender for execution. In this regard, it is worth stressing already at this point that contrary to the other instruments subject of this study the EAW is not an instrument aiming at the rehabilitation of convicted persons, but rather a procedural mechanism aiming to facilitate the enforcement of sentence issued in one Member State in case the convicted persons are abroad. The consent of the convicted person may play a relevant role in the execution of the EAW, but the main purpose of the EAW remains to make the surrender requested by a competent national authority easier.

Compared with traditional extradition, the main aspects of the procedural mechanisms set out in the Framework Decision are as follows:

- The surrender operates at the level of judicial authorities, *i.e.* the executives do not make the final decision;
- The procedure is much more summary, *e.g.* normally the production of the final decision suffices, and it is not necessary to show to the executing State the evidence justifying the issuing of an EAW;
- The procedure is subject to time limits;
- The ‘double criminality’ requirement is abolished with respect to a long list of offences, provided that in the requesting State they are punishable with at least 3 years of imprisonment. EAW can be issued also for other offences, provided that the sentence is of at least 4 months: in this case, the warrant may be subject to the requirement of double criminality (see below the optional grounds for refusal);

²⁰ See the 2005, 2006, 2007 and 2011 Reports from the Commission on the implementation of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, available at <https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=6> (last accessed October 2017).

²¹ V. Mitsilegas, ‘The symbiotic relationship between mutual trust and fundamental rights in Europe’s area of criminal justice’ (2015) 6 *New Journal of European Criminal Law* 457.

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- The executing Member State can refuse to execute an EAW only for a limited number of specified reasons, some of which are mandatory and most of them optional (i.e. the requested Member State can decide whether refusing the surrender or not).

Functioning of the surrender for execution in the EU

Looking more in detail at the procedure for the surrender of convicted persons, some rules are laid down both for the issuing and the executing authority, in order to facilitate their direct cooperation. In this regard, the Member States determine the competent authorities for surrender cases (Article 6) or designate a central authority (Article 7).

Issuing authority

In the absence of definition in the Framework Decision, the CJEU has decided that the notion of judicial authority competent for the issue of an EAW is an autonomous concept of EU law. In accordance with the principle of the separation of powers, a judicial authority administers justice, unlike, *inter alia*, ministries or other government organs, which are within the province of the executive. In order to secure the mutual confidence of executing judicial authorities, the latter must be satisfied that sufficient judicial control has been carried out before the issue of an EAW. Consequently, the Minister of Justice of a Member State²² or the Police²³ cannot be designated as ‘issuing judicial authorities.’ Nevertheless, a national arrest warrant issued by a police service for the purpose of criminal proceedings can constitute a valid EAW if a public prosecutor has confirmed it.²⁴ Including public prosecutors’ services within the definition of the concept of judicial authority can be in tension with certain criminal justice systems (for example in Poland) where the public prosecutors are not independent from the executive. Courts and prosecutors cannot be considered equally as judicial authorities in this respect.

The competent judicial authority of a Member State can issue an EAW if a sentence or detention order of at least 4 months has been decided in that Member State and the convicted person is abroad. This authority provides the necessary information in the form annexed to the Framework Decision (Article 8). The CJEU clarified that the EAW must be necessarily based on a national judicial decision that is distinct from the EAW itself. This is due to the fact that the EAW system is based on a dual level of protection of fundamental rights: the national, linked to the adoption of the national arrest warrant, and the European, concerning the EAW procedure. If the EAW is issued in the absence of any national arrest warrant separate from the EAW, therefore, the executing authority must refuse the execution.²⁵

Although not explicitly stated by the Framework Decision, the issuing authority should conduct a ‘proportionality check’, *i.e.* it should ‘carefully assess the need for the requested measure based on all the relevant factors and circumstances, taking into account the rights of the suspected or accused person and the availability of an appropriate less intrusive alternative measure to achieve the intended objectives, and shall apply the least intrusive measure.’²⁶

It is worth mentioning that the issuing Member State should also ‘deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or

²² Case C-477/16 PPU *Kovalkovas* EU:C:2016:861.

²³ Case C-452/16 PPU *Poltorak* EU:C:2016:858

²⁴ “[i]n the context of Article 6(1) thereof, the term ‘judicial authority’ must be interpreted as referring to the Member State authorities that administer criminal justice, but excludes police services” Case C-453/16 PPU *Özçelik* para. 32.

²⁵ CJEU, C-241/15, *Bob-Dogi*, 1 June 2016.

²⁶ See for example, European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)).

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detention order being passed’, and should transmit all information concerning the duration of the detention to the executing authority (Article 26). In that regard, the CJEU clarified that ‘measures such as a nine-hour night-time curfew, in conjunction with the monitoring of the person concerned by means of an electronic tag, an obligation to report to a police station at fixed times on a daily basis or several times a week, and a ban on applying for foreign travel documents, are not, in principle, having regard to the type, duration, effects and manner of implementation of all those measures, so restrictive as to give rise to a deprivation of liberty comparable to that arising from imprisonment and thus to be classified as ‘detention’ within the meaning of that provision’. This does not prevent, however, the issuing authority, on the basis of its domestic law, to deduct from the total period of detention all or part of the period during which the requested person was subject to measures involving not a deprivation of liberty but a restriction of it.²⁷

Executing authority

Once the executing authority receives the EAW, it informs the requested person of the warrant, and of the possibility that he may consent to surrender (Article 11). In case of consent, the requested person may also express renunciation of entitlement to the ‘speciality rule’: this means that the person surrendered may also be prosecuted for offences other than those for which he was surrendered (Articles 13 and 27). Furthermore, in case of consent there is no further hearing before the surrender. By contrast, if there is no consent the executing authority (Article 14) will hear the requested person before a decision on the execution is made (Article 17). In these cases, the speciality rule applies; however, the executing State may consent to prosecution, sentencing or detention for other crimes (Article 27, para 3 and 4). When a person is arrested on the basis of an EAW, the executing Member State makes also a decision on whether such a person should remain in detention or be released provisionally according to the rules of the executing Member State (Article 12), provided that it takes all the measures that it deems necessary to prevent this person from absconding. Furthermore, the executing authority verifies whether the offence falls within the list of offences for which the double criminality requirement is abolished (Article 2). If the offence falls within that list – or if that offence, non-included in the list, is however punished in the legal system of the executing Member States – the executing authority verifies whether grounds for mandatory non-execution apply (Article 3, see below); and whether optional grounds for refusal apply (Article 4, see below). If a person is requested by two or more Member States, the executing authority decides which EAW is executed. Such a decision needs to take into due consideration “all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order” (Article 16).

If grounds for non-execution do not apply, the executing authority should make a decision on the execution within certain time limits, *i.e.* 10 days from the consent, if the consent of the requested person is given; 60 days from the arrest of the requested person, if there is no consent. Additional 30 days may be granted in “specific cases” (Article 17). In the case *Jeremy F*²⁸ the CJEU affirmed that – despite the absence of an express provision in the Framework Decision – a Member State may also provide for an appeal suspending the execution of the EAW, in order to give consent with a view to carrying out a custodial sentence or detention order for an offence committed prior to the offender’s surrender, provided that the decision is adopted within the time-limit laid down in Article 17. The CJEU

²⁷ CJEU, C-294/16 PPU, *JZ*, 28 July 2016.

²⁸ C-168/13 *Jeremy F*.

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has also clarified²⁹ that the executing judicial authority remains required to adopt the decision on the execution of the EAW even after the expiration of the time limits, since a different interpretation would run counter to the purpose of the Framework Decision, namely facilitating and accelerating judicial cooperation. Furthermore, the CJEU also stated that the expiration of the time limits does not oblige the executing State to release the detained person, “provided that duration is not excessive in the light of the characteristics of the procedure followed in the case in the main proceedings, which is a matter to be ascertained by the national court.”³⁰ In addition, if the executing authority decides that the duration of the detention is excessive and thereby to release the requested person, that authority is required “to attach to the provisional release of that person any measure it deems necessary so as to prevent him from absconding and to ensure that the material conditions necessary for his effective surrender remain fulfilled for as long as no final decision on the execution of the European arrest warrant has been taken.” In other words, the time limits provided by the Framework Decision do not correspond to a strict time frame, which expiration entails the failure of the procedure and the release of the requested person. On the contrary, the time limits aim only to accelerate the procedure, which needs to be completed in any case, even after the expiration of such limits.

Once the decision on the EAW is made, also the execution is subject to time limits (Article 23), *i.e.* no later than 10 days after the final decision (unless there are exceptional circumstances). The mere expiry of this time limit, if the surrender is impossible due to the repeated resistance of the requested person, cannot relieve the executing authority of its obligation to execute the EAW; therefore, a new surrender date must be agreed with the issuing authority (the surrender can be re-scheduled several times if necessary).³¹ Two general exceptions apply. On the one hand, the surrender may be exceptionally postponed for humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person’s life or health (Article 23). On the other hand, the Framework Decision also provides that, once the executing Member State has decided to execute the EAW, it may postpone the surrender for execution so that the requested person may serve in the territory of the executing Member State ‘a sentence passed for an act other than that referred to in the European Arrest Warrant’ (Article 24). Finally, it is worth mentioning that the executing authority, in case the offence is punishable with life sentence, may also surrender the requested person subject to the conditions that the issuing Member State “has provisions in its legal system for a review of the penalty or measure imposed, on request or at least after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure” (Article 5).

2.2. Framework Decision 2008/909 Transfer of Prisoners

The FD 2008/909 was adopted in order to facilitate the transfer between Member States of the EU of persons who have been subject to a judicial decision imposing deprivation of liberty. By contrast to the FD EAW, the main rationale behind this instrument is to enhance the social rehabilitation of convicted persons allowing these persons to serve their sentence in the State where they have, in particular, family, language, culture, social or economic links (Article 3(1) and recital 9). FD 2008/909 should have been implemented in the Member States by 5 December 2011. In contrast with the Council of Europe instruments – especially the European Convention on the transfer of sentenced persons of 21 March 1983 – that the FD 2008/909

²⁹ C-237/15 PPU *Lanigan*

³⁰ C-237/15 PPU *Lanigan* para. 63.

³¹ C-640/15, *Vilkas*, 25 January 2017.

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replaces, the need for consent of both states involved as well as the sentenced person has become less strict. Moreover, the principle of dual criminality according to which the act in respect of which transfer was sought under the 1983 Convention was recognized as criminal in both the requesting and extraditing State, has been abolished under certain conditions in relation to a list of 32 offences specified in the Framework Decision.

The FD 2008/909 enables the State (issuing State) where a person has been imposed a measure involving deprivation of liberty to forward the judgment together with the certificate annexed to FD 2008/909 to the State (executing State) where the convicted person has the best chance to socially reinsert. The FD is based on the principle of mutual recognition, which imposes an obligation on the executing Member State's competent authority to accept and execute the sentence decided in the issuing State against the person subject to the FD 2008/909. In contrast, there is no obligation for the issuing State to forward a judgment. It is believed that the EU Member States have mutual trust between each other and apply an adequate level of procedural safeguards and fundamental rights protection of convicted persons subject to FD 2008/909. Mutual trust also means that the decision of the judge in the issuing State should be respected by the executing authorities.³² In principle, there should be no revision or adaptation of this decision. It is the legislation of the issuing State that applies to the conviction for the period that has been carried out by the convict in that State until the transfer.³³ The executing State cannot apply retroactively its own legislation on reduction of sentence for example to the sentence already enforced in the issuing State. The competent authority of the executing Member State *may* refuse to execute the sentence in full or in part in specific situations enumerated in Articles 9 and 10 of FD 2008/909 (see below). The grounds for refusal should therefore be implemented as optional for the competent authority. The discretion of competent authorities to decide on a case-by-case basis whether or not to apply a ground for refusal allows these authorities to take into account the aim of social rehabilitation in their decision.

The first report from the Commission on the implementation of FD 2008/909 draws attention to several provisions, which are either not implemented or wrongly implemented in national legislation.³⁴ In particular:

- With regard to the role of the person concerned in the transfer process (Article 6), there should as a minimum be provisions on the taking into account of the opinion of the sentenced person, on giving information to that person, on consultation between authorities and on the possibility for the authorities of the executing State to give a reasoned opinion;
- With regard to the principle that the sentence should not be adapted, certain Member States have widened the possibilities of adaptation by adding additional conditions, which allows the executing State to assess the compatibility of the sentence with its own system;

³² Report on the implementation of the Framework Decisions 2008/909, 2008/947 and 2009/829 COM(2014) 57 final p. 8.

³³ Case C-554/14 *Atanas Ognyanov* EU:C:2016:835 para. 44: "The issuing State alone is competent to grant a reduction in sentence for work carried out before the transfer and, where appropriate, to inform the executing State of that reduction in the certificate referred to in Article 4 of Framework Decision 2008/909. Consequently, the executing State cannot, retroactively, substitute its law on the enforcement of sentences and, in particular, its rules on reductions in sentence, for the law of the issuing State with respect to that part of the sentence which has already been served by the person concerned on the territory of the issuing State"; for a critical assessment see S. Montaldo, 'Judicial Cooperation, Transfer of Prisoners and Offenders' Rehabilitation: No Fairy-Tale Bliss. Comment on *Ognyanov*' (2017) European Papers available at <http://www.europeanpapers.eu/en/content/eu-policies-and-area-freedom-security-and-justice> (last accessed 19 July 2017)

³⁴ Report on the implementation of the Framework Decisions 2008/909, 2008/947 and 2009/829 COM(2014) 57 final.

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- Member States must properly implement the duty to provide information on early and conditional release upon request before transfer and execution of a sentence. Such information is necessary for the issuing State to decide or not to transfer a person;
- With regard to refusal grounds that have been improperly implemented leaving, for example, no discretion to the competent authority (the Commission points out also several infelicities with respect to rules on the compatibility between FD 2008/909 and the EAW);
- With regard to time limits for a transfer to take place that go beyond what is allowed under FD 2008/909.

a) The power to forward judgments imposing sentence and transfer convicted persons (issuing State)

All Member States of the EU have transposed FD 2008/909. Article 2 provides that the Member States decide which authority or authorities, under its national law, are competent in accordance with this Framework Decision when that Member State is the issuing State or the executing State.

Right to initiate the proceedings for transfer

The initiative to forward a judgment can be taken by the executing State, the issuing State or the convicted person. However, the issuing State has no obligation to proceed with an initiative from the executing State or the convicted person. Only natural persons can be subject to FD 2008/909 when a final decision or order of a court of the issuing State imposes a sentence on that person. FD 2008/909 also applies to nationals of the issuing State. A sentence is understood as any custodial sentence or any measure involving deprivation of liberty imposed for a limited or unlimited period of time on account of a criminal offence on the basis of criminal proceedings. A judgment can be transferred only when the convicted person whereabouts is either in the issuing State or the executing State.

According to Article 28 requests received before 5 December 2011 continue to be governed in accordance with the legal framework existing before FD 2008/909. Nevertheless, Member States could – on the adoption of FD 2008/909 – make a declaration indicating that, in cases where the final judgment has been issued before the date it specifies, it will, as an issuing and an executing State, continue to apply the legal framework prior to FD 2008/909. In the reference made by the Amsterdam court in Case C-582/15 *Openbaar Ministerie v Gerrit van Vemde*, the CJEU is asked whether this declaration relates only to judgments issued before 5 December 2011, irrespective of when those judgments became final, or only to judgments which became final before 5 December 2011. The CJEU ruled that the declaration covers only judgments which became final before the date specified by the Member State concerned, 5 December 2011.³⁵

Criteria for determining where the convicted person will be transferred

According to Article 4, before forwarding a judgment, the competent authority must be satisfied that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person. Therefore, the issuing authority may consult the competent authority of the executing State. Unless the need for consent has been waived (Article 4(7)), this authority must consult the executing State when:

- The convicted person has not the nationality of the executing State;
- Or has the nationality of the executing State, but lives in the issuing State and has not been subject of an expulsion order to the executing State.

³⁵ C-582/15 *Openbaar Ministerie v Gerrit van Vemde*, Judgment of 25 January 2017, ECLI:EU:C:2017:37.

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The competent authority of the executing State can forward a reasoned opinion that enforcement of the sentence in the executing State will not serve the purpose of facilitating the social rehabilitation and successful reintegration of the sentenced person into society. However, the issuing authority is not bound by this opinion that does not constitute ground for non-execution and non-enforcement. It should also be mentioned that the issuing State could withdraw the certificate if this State does not agree to the application of the law of the executing State concerning early or conditional release (Article 17). Nevertheless, it is unclear what should happen to the convicted person once the certificate is withdrawn. Even where the executing State is the State of nationality or of permanent residence of the convicted person, the authorities of the issuing State must be satisfied that this State will be the best place for that person to reintegrate into society. In this respect, FD 2008/909 does not provide any clear criteria and leave an important margin of discretion to the issuing State. Social rehabilitation is defined in Article 3(1) as the very objective of FD 2008/909. This Article should be read in combination with recital 9, which affirms the principle that enforcements of a sentence in the executing State should enhance the possibility of the social rehabilitation of the person and that the issuing State should satisfy itself that this is the case. Therefore determining the place where the person will execute his or her sentence may vary from one State to another.

Principle of speciality

According to Article 18, convicted persons, who have been transferred, must not be prosecuted, sentenced or otherwise deprived of their liberty for an offence committed before their transfer other than that for which they were transferred. For example, a person transferred to Germany in order to execute a sentence of 15 years of imprisonment for the murder of X, cannot be subject to a prosecution relating to an offence committed in Germany before his transfer. Nevertheless, the application of the principle of speciality can be waived in several occasions mentioned in Article 18(2). According to Article 18(3), the issuing State cannot refuse to waive the application of the principle of speciality when there is an obligation to surrender in application of the FD on the EAW. In other words, if the executing State issues an EAW against the convicted person, the issuing State cannot refuse to waive the application of the principle of speciality.

b) The obligation to recognize foreign judgments and execute the sentence (executing State)

All Member States of the EU have adopted FD 2008/909.³⁶ Article 2 provides that the Member States decide which authority or authorities, under its national law, are competent in accordance with this Framework Decision when that Member State is the issuing State or the executing State.

Law governing enforcement and adaptation of the sentence

The law of the executing State is applicable once the judgment has been transferred with regard to the enforcement of the sentence. Consequently, the rules on early or conditional release of the executing State apply to the convicted person unless the issuing State disagrees with the application of such rules. Deduction of the period of imprisonment already served by the convicted person in the issuing State is obligatory. In the Case *Onyanov*, the CJEU has ruled that

“Article 17(1) and (2) of 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

³⁶ See however Article 26(5).

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the purpose of their enforcement in the European Union, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as precluding a national rule being interpreted in such a way that it permits the executing State to grant to the sentenced person a reduction in sentence by reason of work he carried out during the period of his detention in the issuing State, although no such reduction in sentence was granted by the competent authorities of the issuing State, in accordance with the law of the issuing State.”³⁷

Under Articles 8(2) and (3), the executing State enjoys the discretion to adapt the sentence in cases where the sentence is incompatible with its law, in terms of duration or nature. Nevertheless, the adapted sentence shall not aggravate the sentence passed in the issuing State in terms of its nature or duration.

Time limits for the decision to recognize

Article 11 and 12 provides for the time limits within which a judgment should be recognized as well as the exception to these limits. The principle is that the executing State should decide as quickly as possible within a period of 90 days of receipt of the judgment and the certificate. Postponement is possible in exceptional cases (for example if the certificate is incomplete or until its translation).

c) Consent of the convicted person to the transfer

A judgment imposing a sentence on a person can only be forwarded to the executing State provided the convicted person consents to this in accordance with the law of the issuing State (Article 6(1)). However, the exceptions to that principle are numerous. Article 6(2) lists situations when the convicted person is deprived of the right to consent to his or her transfer. The consent is not required when the judgment is forwarded:

- To the Member State of nationality in which the sentenced person lives;
- To the Member State to which the sentenced person will be deported once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure consequential to the judgment;
- To the Member State to which the sentenced person has fled or otherwise returned in view of the criminal proceedings pending against him or her in the issuing State or following the conviction in that issuing State.

The FD 2008/909 does not provide convicted persons whose consent is unnecessary with a remedy against the decision to forward the judgment. Therefore, Member States enjoy a wide margin of discretion to provide a judicial review of this decision.

2.3. Framework Decision 2008/947 on probation decisions and alternative sanctions

The Framework Decision on the application of the principle of mutual recognition of probation decisions and alternative sanctions provides that probation decisions, other alternative sanctions or supervision measures may be executed in another EU country. If probation measures or alternative sanctions have been imposed in respect of a person who resides in another EU Member State, the FD 2008/947 allows the supervision of such measures to be carried out in the Member State of residence. If a person is convicted in a Member State other than his Member State of habitual residence, FD 2008/947 would prevent courts from either refraining from suspending a sentence at all or from imposing a suspended

³⁷ Case C-554/14 *Atanas Ognyanov* at 51.

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sentence without imposing any accompanying measures. In this sense, the FD protects not only the interests of the convicted person to social rehabilitation, but also the interests of victims. FD 2008/947 applies to alternatives to custody and to measures facilitating early release (obligations and conditions to be fulfilled). According to the Commission, if implemented well, FD 2008/947 “will encourage judges, who can be confident that a person will be properly supervised in another Member State, to impose an alternative sanction to be executed abroad instead of a prison sentence.”³⁸ Similar to FD 2008/909, FD 2008/947 seeks to enable social rehabilitation (recital 8). This means that the FD may not be used against the will of the person concerned and consent of the sentenced person is thus required. Consent is however assumed in case the sentenced person is ‘lawfully and ordinarily residing’ in the executing State. The issuing State may forward the decision or probation decision to a State where the sentenced person is not lawfully and ordinarily residing only when the sentenced person and the competent authority of this State consent thereto. Thus, the definition of ‘lawfully and ordinarily residing’ determines the position of the convicted person and possibly that of the executing State as well.

The structure and functioning of FD 2008/947 is based on the model of the FD EAW. Both Framework Decisions are based on the principle of mutual recognition and mutual trust. In case of FD 2008/947, the mutual recognition principle is to be effectuated between an issuing State that forwards a judgment or probation decision to the executing State which then assumes responsibility for the supervision of the probation measure or the alternative sanction. Similar to the FD EAW, FD 2008/947 contains a number of list offences. If the probation decision or the alternative sanctions are imposed with regard to other offences, the executing State may apply the double criminality requirement. Also the system of grounds for non-execution is comparable to the FD EAW. Thus, FD 2008/947 established a system of automatic recognition and execution of a ‘foreign’ decision or judgment of another Member State as if it was issued in the executing country, thereby creating a system of extraterritorial application of the judgments and decisions concerned.³⁹ The implementation deadline of the FD expired on 6 December 2011, but the Commission has signaled substantial problems in the implementation of the FD.⁴⁰ Timely and correct implementation of the provisions of the Framework Decision was a problem in quite some Member States⁴¹ and up until the beginning of 2014 no transfers under the FD had taken place.⁴² The CJEU has as yet not issued any decision involving the interpretation of the Framework Decision.

a) Scope of application

FD 2008/947 applies to the post trial stage, and concerns probation decisions and alternative sanctions. The FD concerns the mutual recognition of judgments and decisions and the taking over of responsibility for the supervision of these measures (Article 1 (2)). Financial penalties and confiscation orders are excluded from its scope of application as these are covered by other EU measures (Article 1 (3)). Custodial sentences or any other sanction involving a deprivation of liberty are excluded as well. Yet, the remaining measures by no means form a uniform category of measures.

Types of probation measures and alternative sanctions

³⁸ Commission Report on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA, COM (2014) 57 final.

³⁹ V. Mitsilegas, ‘The symbiotic relationship between mutual trust and fundamental rights in Europe’s area of criminal justice’ (2015) 6 *New Journal of European Criminal Law* 457

⁴⁰ Commission evaluation report of 5 February 2014, COM (2014) 57 final.

⁴¹ *Idem*, section 3.

⁴² *Idem*, p. 7.

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The Council concluded that substantive differences in probation measures and alternative sanctions exist between the Member States and even in the nature of such measures and sanctions.⁴³ The example of electronic monitoring was mentioned. In some Member States such a procedure may be used to enforce custodial sentences or probation orders or may function as an independent sanction whereas in other Member States the procedure may be completely unknown. If the principle of mutual recognition would be applied to such a procedure, the executing Member State might be forced to carry out a procedure that would not exist in domestic criminal legal system. This was seen as undesirable. The FD therefore contains a list with alternative sanctions and probation measures that must be recognized by all Member States (Article 4). Measures and sanctions not listed in principle fall outside the scope of application of the FD. Member States need not take over the supervision of such measures and sanctions. They may, however, identify other measures and sanctions than those listed by the FD which they are prepared to supervise.

b) The procedure

Article 8 contains the general obligation to recognize and take over supervision of suspensory measures and alternative sanctions. The decision to recognize and to take over supervision, must be followed “without delay” by concrete measures to carry out supervision. The FD is based on the fundamental power of the executing State for all subsequent decisions relating to the suspended sentences or alternative sanctions. Article 14 includes a (non-exhaustive) list of such subsequent decisions, but also includes the possibility for executing states to deny responsibility for specific types of subsequent decisions. In that case, the issuing State is responsible for providing the executing State with the necessary information on such subsequent decisions (Article 17). In any case, applications to review the judgment that forms the basis for probation measures or alternative sanctions may only be decided on by the issuing State (Article 19). By contrast, both the issuing and executing State have the right to grant an amnesty or pardon.

An important element to foster mutual trust, the FD prescribes that issuing states complete a certificate of which a model is annexed to the FD. The certificate contains information on the authority which has issued the probation decision or the court which has imposed the sanction. It also includes information on the competent authority in the issuing State which is responsible for the supervision of the probation measures or the alternative sanctions. It should also include the reason why the issuing State forwards the judgment or the decision to the executing State (part f of the certificate). The certificate must also specify:

- The nature of the offences that underlie the sentence or decision;
- The nature of the judgment or decision (suspended sentence; conditional sentence; alternative sanction or conditional release);
- The duration and the nature of the probation measures or alternative sanctions.

As the FD is based on the principle of mutual trust, the decision of the court in the issuing State should in principle be respected. This means that judgments and decisions of the issuing State should not be revised or adapted. Yet, Article 9 of the FD contains a possibility to adapt the probation measure or the alternative sanction of the issuing State in case it would not be compatible with the law of the executing State. This incompatibility may be related to the nature or the duration of the measure. The following conditions apply in order to respect the interests of the issuing State/the sentenced person:

- Adaptation is only possible in case of incompatibility of the judgment or decision with the law of the executing State;

⁴³ Council conclusions from the presidency of 8 December 2010, 17628/10, p. 5.

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- The adapted sentence must correspond as closely as possible to the original sentence;
- The adaptation may not lead to an aggravation of the original sentence in terms of duration or nature.

The costs of the recognition and the subsequent supervision are to be borne by the executing State (Article 22). The supervision and application of probation measures shall be subject to the law of the executing State (Article 13). The competent authority of the executing State must inform the competent authority of the issuing State on all the decisions that are taken in relation to the Framework Decision (Article 18).

Time limits for the decision to recognize:

Article 12 provides for the time limits within which a judgment should be recognized as well as the exception to these limits (60 days). The final decision on recognition should be taken within the set time limit unless an exceptional circumstance applies.

c) Relation to other measures

Unlike other measures in the field of EU criminal law, FD 2008/947 could only to a very limited extent be based on international law instruments. The only international-law instrument on cross-border probation assistance has been the Convention on the supervision of conditionally sentenced or conditionally released offenders (Council of Europe), which entered into force in 1975. This Convention is limited in its material scope of application and knows quite some reservations, making its practical relevance limited. There is a clear link with the European Arrest Warrant in cases in which *e.g.* probation conditions are violated. In such cases the issuing State may request the executing State for the surrender of the sentenced person. Finally it should be mentioned that in a report from the Dutch Meijers Committee a number of inconsistencies in the mutual recognition instruments were addressed.⁴⁴

With the analysis of FD 2008/947, Part II of this book concerning how the principle of mutual recognition imposes obligations on the judicial authorities in the EU comes to an end.

⁴⁴ See the following is an excerpt of that report available <http://database.statewatch.org/article.asp?aid=34813> (last accessed October 2017): “Procedural safeguards for the individual are generally included in the various instruments that apply the principle of mutual recognition to a variety of judicial decisions and judgments. As explained below, it may happen that different instruments apply to the same judicial decision at the same time, while these instruments differ in the exact content of legal protection. As a result, according to the Meijers Committee, there are cases in which the level of protection depends on the legal instrument chosen, without justification. The following examples illustrate the potential consequences of such inconsistencies.

Example 1: The double criminality requirement. In cases where a judge imposes certain restrictions or prohibitions on a convicted person, Framework Decision 2008/947/JHA and Directive 2011/99/EU (European Protection Order) may apply simultaneously. For example, this is the case when a judge imposes an obligation on an offender to avoid contact with his victim, or the prohibition on entering certain areas. Such measures fall under the definition of a protection order (Art. 2 Directive 2011/99/EU), but – since they may also be imposed as part of a conditional or suspended sentence – at the same time they constitute probation measures in the sense of FD 2008/947/JHA.

While Art. 10(1)(c) of the Directive leaves the executing Member State an option to refuse recognition in cases where a foreign protection measure relates to an act that does not constitute a criminal offence under its own law, the Framework Decision prohibits, in principle, the executing Member States from verifying double criminality if the underlying offence is on the well-known list of offences (Art. 10). Thus, depending on which instrument is chosen, the level of legal protection differs for the same measure.

Example 2: Limitations on the possibility of adapting foreign criminal sanctions Another inconsistency occurs in the same situation as described under example 1 (where a probation measure falls under the scope of both FD 2008/947/JHA and Directive 2011/99/EU). Both instruments enable the executing Member State to adapt the foreign probation measure/protection order. However, while the possibility to adapt is limited under the Framework Decision – the adapted sanction may never be longer or more severe than the original sanction (Art. 9) – the Directive does not restrict the executing Member State on this point.

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The next Part will address the limitations to that principles imposed by the necessity to respect the individuals' fundamental rights in mutual recognition proceedings. Of course, one may contend that some of the aspects discussed in Part II could be considered as a limitation to the principle of mutual recognition. In particular, if the request issued that has to be recognized by a foreign counterpart does not meet all the formal requirements imposed by EU law, it should not be accepted by the executing judicial authority (see for example, in the context of the EAW above at 2.1. the requirement concerning the status of the issuing authority) and therefore should be refused. However, such a limitation will only be temporary and in most cases can be redressed by the issuing authority. By contrast, the limitations addressed in the next part of this research will in general put an end to the mutual recognition proceedings.