With financial support from the Specific Programme Criminal Justice of the European Union

HANDBOOK

PROJECT JUST/2013/JPEN/AG/4495 – SOCIAL REINTEGRATION OF SENTENCED PERSONS: A COMPREHENSIVE EUROPEAN APPROACH

Table of contents

With financial support from the
Specific Programme Criminal Justice
of the European Union

Executive summary

This Handbook is produced under the project 'Social reintegration of sentenced persons: a comprehensive approach' funded by the European Commission (JUST/2013/JPEN/AG/4495).

The aim of the project is to facilitate the social rehabilitation and reintegration of sentenced persons in the EU Member States, through common training seminars open legal practitioners from the competent judicial authorities in Romania and other Member States. As it was developed by and large by the trainers involved in this program, this Handbook should be read as a resource for training the competent authorities in the EU Member States.

The chapters of the Handbook combine theoretical presentations of the framework decisions and the associated concepts with practical examples that were discussed either in the moot court exercise or in different workshops. In order to facilitate communication and common understanding of terms, the book includes also one chapter dedicated to linguistics. The final chapter of the Handbook calls for a more practice-focused, linguistic competent and inter-disciplinary approach when considering a training on the framework decisions.

The book is useful for competent authorities implementing the framework decisions discussed here but it may be also used as teaching resource for students, professors and researchers in law or social sciences.

Methodology

1. Overview

The project ``*Social reintegration of sentenced persons: a comprehensive European approach*`` (JUST/2013/JPEN/AG/4495) is supported by the European Commission within the framework of the Specific Programme Criminal Justice of the European Union.

The Romanian Superior Council of Magistracy coordinates the project and is supported by Romanian National Institute of Magistracy in issues related to the training activities.

The Associate Partners are the Academy of European Law (ERA), the Italian School for the judiciary, Ecole Nationale de la Magistrature – France and the Romanian National School of Clerks. The Co-beneficiary Partners are the Institut de Formation Judiciaire (IFG-IGO) from Belgium, the National School of Judiciary and Public Prosecution from Poland, the Judicial School of the General Council for the Judiciary in Spain, the National Institute of Magistracy and the Ministry of Justice from Romania.

All partners are requested to appoint experts in the project. They should be highly appreciated professionals, judges or prosecutors, with an excellent legal background in judicial cooperation. Participation in previous projects constitutes an important criterion for being selected as an expert. The appointed professionals should be fluent in English and have excellent legal English skills. Moreover, the expert responsible with the linguistic sessions should have experience in training judges and prosecutors both at national and at European level.

During the project's preliminary meeting, the experts establish the agenda, the topics, and the study cases' content and they are expected to divide the tasks among them. The trainers should know each other from the project's start-up meeting. They have to agree on a common view concerning the project. The linguist has to complement the legal background of the project. The lecturers should also be asked to include in their presentation all the legal issues tackled during the workshop sessions.

2. Background of the project

The project has as a premise the increased need for training in the field of EU law, human rights and international judicial cooperation. This need was previously underlined by magistrates themselves. Each year judges and prosecutors face a larger volume of cases. There is a rather large range of issues related

to the settlement of legal relations with foreign elements. The free movement of persons also involves a free movement of crime.

In this large context, the objective of the project "Social reintegration of sentenced persons: a comprehensive European approach" is to facilitate the social rehabilitation and reintegration of sentenced persons in the EU Member States, through common training seminars open to Romanian legal practitioners from the competent judicial authorities in Romania (judges, prosecutors, probation officers, legal advisers of the Romanian Ministry of Justice, prison officers, court clerks and lawyers) as well to representatives from 5 Member States.

3. Concept. A new approach

Therefore, NIM has created a seminar that would integrate several types of practical exercises. Each exercise aims to position the participant in direct contact with the legal provisions. According to this format the participant is expected not only to listen, but also to search for the applicable legal provisions, to write legal documents in relation to the issue, to answer to legal practical problems and to solve issues related to criminal judicial cooperation in the European Union.

4. Format of the project

4.1. Format of the seminars

4.1.1. General overview

The project is conceived as a series of 4 – 6 seminars, repeating the same format and the same agenda. Each seminar involves about 20 judges and prosecutors coming from all the member states partners in the project. The same number of participants is expected from all Member States (4-6 participants). All the seminars involve also probation officers, legal advisers of the Romanian Ministry of Justice, prison officers, court clerks and lawyers from Romania.

The seminars have no translation. All the activities are conducted directly in English. One goal of the project is also to ensure a direct communication between the trainers and the participants. This allows for a direct

communication among participants themselves. The project helps participants to improve their language skills.

To gather as many participants, during the final conference translation in Romanian is provided.

We conceived the format as a combination of:

- Lectures;
- Linguistic sessions;
- Moot court sessions;
- Simulated proceedings of judicial cooperation.

4.1.2. Lectures

The seminar starts with two lectures on 2 of the most important legal instruments that are going to be discussed upon during the seminar. The basic legal concepts should be clarified for the participants before they begin to work in practice with the relevant legal instruments.

The first lecture offers a general overview on the mutual recognition of judgements imposing custodial sentences. This lecture is also concerned with the presentation of the new legal instruments (Council Framework Decision 2008/909/JHA from 27 November 2008), the application of the mutual recognition principle to judgments in criminal matters imposing custodial sentences and measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

The second lecture deals with the presentation of the Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of principle of mutual recognition of judgments and probation decisions, with a special focus on supervision of probation measures and alternative sanctions.

The third lecture is scheduled in the second day of the seminar. During this lecture the following legal instruments are presented: the Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings and the Council

Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States.

To provide for the participants with in-depth information on legal environment of the most important instruments discussed during the seminars, as well as for raise awareness of recent achievements of EU law in this field, the NIM organizes also short lectures on the newest EU legal instruments on penal law. These events are focused mainly on description of EU rules concerning judicial cooperation in criminal matters thru the newest law, important particularly from the perpetrator's rights and safeguards point of view.

4.1.3. Linguistic Session

The lectures are followed by a linguistic session – a training module that has the goal to warm up the participants by using their English in the seminar's framework.

4.1.4. Moot Court

The afternoon of the first day starts with a moot court sequence where a judge, a prosecutor, a lawyer and a clerk, coming from Romania, are performing in front of their colleagues. The moot court is focused on a hearing in a Romanian court regarding executing a request to transfer a convicted Romanian person from Italy. The exercise shows the participants to the seminar how a certain judicial cooperation procedure would be dealt within a Romanian court. The foreign participants receive the relevant case details. They are able, therefore, to follow the procedure, compare and identify any differences between their national legal systems.

4.1.5. Simulated Proceedings

The first day's afternoon continues with another practical exercise, simulating drafting letters of rights related to the procedural rights of the accused persons. They also have to discuss some issues related to the study cases.

The next morning groups change files and decide whether to execute or not the other group's requests and have to fulfill the tasks concerning the other case study.

Spokespersons from each group present the results of their work, with a focus on the main issues discussed during the debates.

In the second day's seminar afternoon participants will also be divided into small groups, each with a task focusing on the supervision of the conditional release.

4.1.6. Second Linguistic Session

On the third day, there is another linguistic session focused on the meaning and content of the terms frequently used in the field of judicial cooperation in criminal matters. One type of exercises deals with special prepositions that are used in the field of the social reintegration of sentenced persons.

4.1.7. Final Lecture

The seminar ends with a lecture on the latest developments in the area, the newest tendencies aimed at increasing the trust in judicial cooperation in criminal matters, especially on the European prison rules.

4.2. Final Conference

The main objectives of the final conference are to consolidate and disseminate the results of the project among participants.

There are around 100 participants coming not only from all the project's partners but also from other Member States (including Romanian representatives from National School of Clerks, Ministry of Justice and other judicial institutions).

In the two days of the final conference the participants are provided with presentations, mainly focused on practical examples, and they have to solve two practical cases one focused on the Council Framework Decision 2008/909/JHA of 27 November 2008 concerning 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 and the other on the

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.

4.3. Handbook

Although a formal study will not be carried out within this project, the recommendations' and practical issues raised throughout the training activities will be published in this project's Handbook. The materials produced within this project will be made available in electronic format (in English version) to EJTN, the EU judicial training institutions for legal practitioners and other on-line judicial platforms. Furthermore, 300 pages of training materials will be translated in English and a Project handbook will be published on the partners' web site (in English version).

The feedbacks from the workshops and the conclusions of each of the 6 seminars have been gathered and have been used as raw material for the elaboration of the Handbook. The answers from the practical cases used in the seminars form one part and the other part consists from opinions of the experts involved, opinions which are based on the legal instruments used in the project, on the relevant jurisprudence from the ECtHR, Court of Justice of the European Union and national courts (Constitutional Courts, Supreme Courts or Courts of Appeal).

The Handbook comprises also written materials on the Council Framework Decision 2008/909/JHA, Council Framework Decision 2008/947/JHA, Council Framework Decision 2008/675/JHA and Council Framework Decision 2009/315/JHA, which emphasis the main elements of these legal instruments, good examples of national transposition laws, some points to discuss or challenges faced with.

With financial support from the
Specific Programme Criminal Justice
of the European Union

Chapter I 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

Ioan DURNESCU*[1]

Keywords: prisoners - prisoner's transfer – competent authorities – practical and legal obstacles

1. Background

Due to an increase in the geographical mobility among EU citizens more and more people end up in prisons that are outside the territory of their own country. They constitute the so-called foreign national prisoners category. This category is larger and larger in some Western European countries. They are 50,2 % in Austria, 33% in Italy, 29,1 % in Spain, 72,3 % in Luxembourg and so on (in 2014[2]). As they are foreigners and do not speak the language of the hosting country, they are not able to take full benefit of the prison activities and therefore their reintegration prospects are quite slim. One solution for this problem was to facilitate their transfer back into their national counties.

The first cross-border enforcement of custodial sentences between the Member States is the Convention of the Transfer of Sentenced Persons, adopted by the Council of Europe in 1983. According to this document, sentenced persons may be transferred to serve their custodial sentence only to their State of nationality and only with their consent and that of the States involved. All members of the Council of Europe ratified this Convention. Due to the its limited application, in 1997, the Council of Europe adopted the Additional Protocol to the Convention which allows transfer without the person's consent, subject to certain conditions. Only a few countries adopted this Protocol and therefore its application is still very limited. Furthermore,

***[1]Mr. Ioan DURNESCU - Professor, University of Bucharest, Sociology and Social Work Department, Romania, idurnescu@gmail.com**

2 See http://www.prisonstudies.org/map/europe

neither of these two documents was explicit in the obligation of the States regarding the enforcement or in setting any time limits for the decisions on the enforcement or for the transfer.

In order to compensate these limits, in 2005, delegations from **Austria, Finland and Sweden** put forward to the Council of European Union an initiative called: Council Framework Decision on the European enforcement order and the transfer of sentenced persons between the Member States of the EU.

2. The legal background

The legal background of this initiative consisted of:

1. The Tampere European Council (1999) that stressed that mutual recognition of court decisions should become the cornerstone of judicial cooperation.
2. The measures adopted by the Council in 2000 regarding the implementation of the principle of mutual recognition of decisions in criminal matters, including the sentences involving deprivation of liberty and for the extended application of the principle of transfer to cover persons resident in a Member State.
3. The Hague Programme on strengthening freedom, security and justice in the EU.
4. The Greed Paper submitted by the European Commission on the approximation, mutual recognition and enforcement of criminal sanctions in the EU where it was envisaged that recognition and enforcement of custodial sentences in another Member State is incomplete and capable of improvement.
5. Art. 31(1)(a) – 'facilitating and accelerating cooperation between competent ministries and judicial …. In relation to proceedings and the enforcement of decisions' and 34(2)(b) – 'the Council may adopt framework decisions for the purpose of approximation of the laws and regulations on the Member States' of the EU Treaty.

3. Short history of the FD

As stated in the Explanatory note, the main elements of the proposal were:

- a duty on the executing State to allow nationals, permanent residents and persons with other close links to serve their custodial sentences or detention orders on the territory of that State, subject to certain grounds for refusal;
- waiver of the double criminality requirement with regard to convictions for certain offences on a list corresponding to that contained in the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190 of 18 July 2002;
- if the sentenced person is in the issuing State, he shall, if possible, be given an opportunity to state his opinion orally or in writing before a 'European enforcement order' is issued;
- the consent of the sentenced person is not required when he is a national of the executing State or when he has his permanent legal residence in that State;
- recognition of the foreign final custodial sentence or detention order and its execution on the basis of a form (so-called European enforcement order);
- time-limits for the decision on the European enforcement order and for the transfer of the sentenced person to the executing State;
- enforcement of the final custodial sentence or detention order imposed by the sentencing State without conversion proceedings;
- the duration of the sentence may be adapted to the maximum level provided for a criminal act under the national law of the executing State only where the sanction is incompatible with fundamental principles of the law of the executing State;
- the nature of the sentence may, if it is incompatible with the law of the executing State, be adapted to the punishment or measure provided for under the national law of the executing State for a criminal offence of the same type.

Based on this proposal, COPEN dedicated several meetings with Member States delegates where different issues related to the prisoner transfer were discussed: the national rules for conditional / early release and / or measures involving full and/or partial deprivation of liberty; the double criminality issue, consent of the executing State and the consent of the sentenced person and so on.

Special discussions took place on issues such as the social rehabilitation, if the lack of it should or should not be a ground for refusal of transfer. In the end the compromise was that the prisoner will be heard

When adopting the FD 909 it was agreed that the deadline for the implementation (transposition) was 5 December 2011. By their nature, the Framework Decisions are binding upon the Member States in terms of the result, but it is a mater for the national authorities to choose the form and the method of implementation. Framework Decisions can not have a direct effect. They need to be transposed in the national legislation. However, the principle of conforming interpretation is binding in relation to the Framework Decisions.

In order to facilitate the implementation of the FD, the EC organized several expert meetings where different impediments were discussed.

For instance, in the meeting that took place in Brussels at 14th of November 2012, participants expressed their concern regarding the 'transition period' when the requests are received before the states did not transposed the FD. In this case, some participants were of the opinion that the existing instruments (such as the Council of Europe Convention) should be maintained with those who have not yet transposed the FD.

One of the participants (the UK representative) asked if it is not possible to agree on what constitutes a reasonable time period to qualify for residency. Although something mandatory was not agreed, the participants suggested that some kind of guidelines would be useful.

The discussions also stressed the importance of information. It would be impossible for a sentenced person to agree on a transfer unless he/she knows what to expect (e.g. prison conditions, conditional release etc.).

Other issues were discussed regarding the social rehabilitation ('social reinsertion') and the multiple offences. In both these cases the MS will have to communicate among themselves and agree the best solution that would facilitate the social reinsertion.

The European Parliament was also consulted and adopted a resolution in 2006 recommending the Council to strengthen the procedural rights of the prisoners in the criminal proceedings.

4. The competent authority

Member States must designate the competent authorities for issuing and executing judgments. The competent authority of the issuing state is responsible for forwarding the judgment accompanied by the

certificate annexed to the framework decision directly to the competent authority of one executing state at a time and in a manner that leaves a written record.

Most of the EU member States nominated judicial bodies as competent authorities. Some countries designated a central competent authority (see The Netherlands) but others nominated all the judges or prosecutors in charge with supervision the execution of the prison sentence.

It is now acknowledged as a good practice to have on single central point to coordinate the process for each member state.

5. The procedure of forwarding

The custodial sentence may be forwarded to:

- the Member State of which the sentenced person is a national and where s/he lives;
- the Member State of which the sentenced person is a national and to which s/he could be deported following the judgment, even if this is not his/her place of residence;
- any other Member State, provided that its competent authority agrees to the forwarding.

A judgment may be forwarded only once the issuing state has ensured that the enforcement of the sentence in the executing state would serve the purpose of facilitating the sentenced person's social rehabilitation and reintegration.

Upon receiving the forwarded judgment and certificate, the executing state must decide within a maximum of 90 days whether it will recognize the judgment and enforce the sentence.

The competent authority of the executing state has to recognise the judgment and to take all necessary measures to enforce the sentence, unless it decides to invoke one of the grounds for non-recognition and non-enforcement provided in the framework decision.

When the sentenced person is located on the territory of the issuing state, s/he must be transferred to the territory of the executing state within a period of 30 days from the date when the latter has recognised the judgment.

6. The non-recognition grounds

The non-recognition of the judgment and non-enforcement of the sentence is possible when the:

- certificate is incomplete or does not correspond to the judgment;
- criteria for forwarding the judgment and the certificate have not been fulfilled;
- enforcement would contravene the *ne bis in idem* principle;
- offence is not recognised as such under the law of the executing state, with certain exceptions;
- enforcement is statute-barred under the law of the executing state;
- law of the executing state provides for immunity;
- sentenced person cannot be held liable under the law of the executing state due to his/her age;
- remaining sentence is less than six months when the executing state receives the judgment;
- sentenced person had not appeared in person at the trial where the judgment was passed, with certain exceptions;
- issuing state rejects the request of the executing state to prosecute, sentence or otherwise deprive the liberty of the sentenced person for another offense committed before the transfer;
- sentence requires for psychiatric or health care or for another measure involving the deprivation of liberty that the executing state cannot provide;
- offence was committed on the territory of the executing state.

In case the certificate is incomplete or does not correspond to the judgment, the executing state may postpone its recognition.

7. The double criminality check

The framework decision provides a list of offences 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 (32 offences). 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.

It should be mentioned that this list of offences is the same as for the European Arrest Warrant or the FD 947.

8. The sentence adaptation

Where the duration or nature of the sentence is not compatible with the national law of the executing state, it may adapt the sentence. However, the adapted sentence must correspond as closely as possible to and in no case be harsher than the original sentence. The duration of the sentence can be adapted to the maximum provided for that offence in the executing State.

9. Consent

In general, the consent of the person regarding the transfer is required. However, this consent is not required when the executing state is the Member State:

- of which the sentenced person is a national and where s/he lives;
- to which the sentenced person is deported upon release, by reason of the order included in the judgment;
- to which the sentenced person has fled or returned, while criminal proceedings against him/her are pending or following a conviction in the issuing state.

In any event, if the sentenced person is in the issuing state, s/he must be given the opportunity to provide an oral or written opinion.

10. Difficulties

In February 2014, the Commission adopted a report for the European Parliament and the Council regarding the implementation of three Framework Decision (909, 947 and 829). At that time, only 18 countries notified the Commission on the national transposition laws (DK, FI, IT, LU, UK, AT, BE, CZ, FR, HR, HU, LV, MT, NL, PL, RO, SI AND SK)[3]. According to this document a number of preliminary obstacles have been identified:

- 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.
- 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. Some countries (PL and LV) widened the possibilities of adaptation undermining the spirit of the mutual trust.

[3] In March 2014 the stats were the same regarding the number of MS that adopted the FD 909.

- Subsequent decisions. In principle, the subsequent decisions need to be adopted by the executing state. However, there are large differences between Members 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.
- 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.
- Time limits – some countries did not set out time limits for the transfer procedure on the ground that prisoners need legal rights and remedies.
- 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.
- 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.

In its report, Commission also reminds the Member States that at 1st of December 2014 the Court of Justice of EU will have full jurisdiction in the area or police cooperation and judicial cooperation in criminal matters. This creates the possibility of the Member States or the Commission to launch infringement proceedings against those Member States that have not implemented or not correctly implemented EU law.

More recent projects (see the STEPS2 project) discovered more difficulties. One of the most important difficulties reported by the sentenced persons themselves is the length of the transfer procedure. It seems that for them the procedure makes sense only if it takes place at the beginning of the sentence and not at a latter stage. More over, they stressed the fact that in most cases the internal procedures within the Issuing State – prior to forwarding the certificate – is the one that poses many problems. There were situations where this procedure took as long as one year and a half.

11. Sources of information

The most reliable and up dated information regarding the implementation of the FD 909 can be found on the European Judicial Network - http://www.ejn-crimjust.europa.eu/ejn/

Detailed and useful information about obstacles and solutions but also about the prison systems in Europe can be found on the EuroPris website: http://www.europris.org/

With financial support from the
Specific Programme Criminal Justice
of the European Union

Chapter II Short presentation of the 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

Ioan DURNESCU

Keywords: probationers – probationer's transfer – legal and practice related obstacles – good practices

1. Background[4]

The EU intends to be an area of freedom, security and justice without internal borders. These principles support an increasing movement of EU citizens between countries, usually bringing considerable economic and cultural benefits. An inevitable consequence is that some people will commit crimes in the countries that they visit, seek work or where they choose to reside. Many countries accord different rights to 'non-nationals' in these circumstances, raising challenges about equity and justice. Even where there is no formal distinction in law, the real-world consequences of sanctions and measures are often very different for non-nationals. One such a consequence may be an over-representation of foreign prisoners in the prisons across Europe (see states like Luxembourg, Italy, Spain, Ireland and so on).

European Union Framework Decisions may be seen as a partial response to that challenge. Framework Decisions (FDs) require member states to bring about certain results in the area of criminal justice, but do not prescribe the means by which these outcomes are to be achieved. Each country is expected to implement the requirements of an FD by transposing them into domestic law. FDs therefore provide a flexible mechanism for enhancing cooperation in these areas.

The central concept of the FDs is the concept of mutual trust, which was first mentioned as a prerequisite for mutual recognition in the Programme of measures to implement the principle of mutual recognition in criminal matters (2001) and echoed later in the Hague Program (2004) and in the Stockholm Program

4 Parts of this section are based on the Canton and Durnescu (unpublished) Framework Decision 2008/947/JHA and its implementation: Filling the gaps.

(2010). Briefly put, the mutual trust refers to the mutual confidence in the procedural rights guaranteed by another Member State in its criminal procedure.

Mutual recognition is therefore based on the mutual trust between the Member States. As a principle, mutual recognition was first mentioned in the Tampere Council (1999) and was firmly regulated in the Lisbon Treaty (2007) as: 'EU shall strive for full application of mutual recognition' (art. 70) and 'judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions' (art. 82). By applying the mutual recognition principle, it means: '…a decision taken by an authority in one Member State may be accepted as it stands in another state '(Europe n.d.). The principle of mutual recognition provides that the Member States do not have to apply the *exequatur* principle – the procedure of conversion – for foreign judgments (Kuczynska 2009). This discussion on the mutual trust is also relevant for the other framework decisions.

The idea of transferring non-custodial sentences for execution from one jurisdiction to another is not a new one. The precursor of the current FD is the Council of Europe Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, adopted in 1964. The aim of the Convention was for the members to provide each other 'the mutual assistance necessary for the social rehabilitation of the offenders'. Although the Convention was open for ratification in 1964 and entered into force in 1975, by October 2014 only 19 states ratified it and 5 signed it without ratifying it (out of 47 states). Due to this low number of ratifications and also to the lack of time limits and other impediments, the Convention achieved 'only limited application (signatures and ratifications) and little real impact in practice' (McNally and Burke 2012: 2). The major difference between the Convention and the FD 947 is that the last one will have to be implemented by all the EU Member States by December 2011.

2. The aim of the FD

On a long run, the aim of the FD is to contribute to the development of an area of freedom, security and justice by enhancing the police and judicial cooperation.

On a short term, as stipulated at Recital 8 of the FD, the immediate aim of the FD is to:

'The aim of mutual recognition and supervision of suspended sentences, conditional sentences, alternative sanctions and decisions on conditional release is to enhance the prospects of the sentenced person's being reintegrated into society, by enabling that person to preserve family, linguistic, cultural and other ties, but also to improve monitoring of compliance with probation measures and alternative sanctions, with a view to preventing recidivism, thus paying due regard to the protection of victims and the general public.'

The idea of enhancing the offender's social rehabilitation is mentioned several times in the FD text as being the main rationale of the FD. The FD operates with a rather narrowed understanding of the social rehabilitation concept – to preserve the family, linguistic, cultural and other ties. As noted elsewhere (see Durnescu and Canton, unpublished) this concept is likely to be interpreted in different countries in different ways. It can be understood, for example, as a process of 'change for the better' (Robinson and Crow, 2009:10) or as a restoration of the individual to their original rights (McNeill, 2011). These conceptual difficulties are compounded by the challenges of translation. There is rarely a direct correspondence between rehabilitation in English and the words in different languages.

It may be that the safest way for the national transposition law is to keep this definition to the minimum, as mentioned in the FD text – rehabilitation as maintaining meaningful ties (family, linguistic, cultural or others). More about the concept of social rehabilitation and its implications will be developed in the dedicated chapter.

Although the social rehabilitation is mentioned in the text several times, the other two aims should not be overlooked: to improve monitoring of compliance with probation measures and alternative sanctions in order to reduce recidivism and also pay attention to the protection of the victims and the general public.

The FD does not go into details how the mutual recognition will contribute to these two aims but it is rather implicit that supervision and compliance could arguably be better achieved in the native language and in a more familiar socio-economic and cultural environment.

The victim perspective is also only mentioned and not detailed in the FD text.

It may be useful to read this FD in dialog with the Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. This Directive is expected to be transposed into the national legislation by the 16 November 2015. From that moment on member states should be able to use on a larger scale restorative justice schemes and other means to inform, assist and protect the victims of crime. However, one note of caution should be sounded regarding the implementation of these two distinct documents: more rights for victims

should not lead to less rights and guarantees for the offenders. These two actors should be treated in such a way that the community safety is promoted on a long run.

3. What probation measures and alternative sanctions can be transferred?

In order to avoid any misunderstanding, art. 2 of the FD provides for clear definitions of the terms used in the text.

Therefore, 'judgment' shall mean a final decision or order of the court of the issuing State, establishing that a natural person has committed a criminal offence and imposing:

a) custodial sentence or measure involving deprivation of liberty, if a conditional release has been granted on the basis of that judgment or by a subsequent probation decision;

(b) a suspended sentence;

(c) a conditional sentence;

(d) an alternative sanction;

It is important to mention here that this FD applies only to court decisions or orders (in Scotland) and is not useful for any prosecution decisions.

In this respect the Commission might consider extending the scope of this FD to the decisions made at the prosecution level (the so called praetorian probation).

Further more, a 'probation decision' shall mean a judgment or a final decision of a competent authority of the issuing State taken on the basis of such judgment:

a) granting a conditional release, or
b) imposing probation measures.

By 'probation measure' the FD understands obligations and instructions imposed by a competent authority on a natural person in connection with a suspended sentence, a conditional sentence or a conditional release.

Another useful definition at this point is the 'alternative sanction', which means a sanction, other than a custodial sentence, a measure involving deprivation of liberty or a financial penalty, imposing an obligation or instruction.

Therefore, this FD does not apply to financial penalties or confiscation orders (see for instance FD 2006/783/JHA on the application of the principle of mutual recognition to confiscation order).

Across Europe there are several probation measures and alternative sanctions that are common and all EU Member States are in principle willing to supervise.

They are (Art. 4):

- to inform the relevant authority of any change in residence or working place;
- not to enter certain defined localities or places;
- not to leave the territory of the executing State;
- to follow the instructions issued relating to behavior, residence, education, training, leisure activities, or limitations in on or modalities of carrying out professional activities;
- to report at specified times to the relevant authority;
- to avoid contact with specific persons and objects;
- to compensate for the harm caused by the offence;
- to carry out community service;
- to cooperate with a probation officer or a relevant representative of a social service;
- to undergo therapeutic treatment or treatment for addiction.

Most of these probation measures or alternative sanctions are well known and are defined more or less the same in different jurisdictions (there are still issues of definition. See the European Sourcebook of Crime and Criminal Justice Statistics 2014[5] for more discussions on the topic).

However, some differences may be of great importance when it comes to consent or different ways of implementation.

Maybe one word should be addressed to the community service in this respect. This probation measures or alternative sanction is a work penalty that can be found in different jurisdictions under different names (e.g.

5 Available at: http://www.heuni.fi/material/attachments/heuni/reports/qrMWoCVTF/HEUNI_report_80_European_Sourcebook.pdf

fr. travail d'intérêt général) and involves the offender working for the benefit of the community for a certain number of hours without pay. In some countries (e.g. England and Wales) it is possible that part of the community service hours to be used for rehabilitation activities.

But the list provided at art. 4 is not exhaustive. Member States may state that they are prepared to supervise more measures or sanctions. In this case they must notify the General Secretariat of the Council.

4. **Which authorities/organizations are involved in the transferring process?**

Paying due respect to the European diversity in the judicial traditions and organization, the FD allows for each Member State to create its own internal mechanisms for recognizing the judgments and probation decisions.

Thus, Member States can designate any authority or authorities as competent to act according to this FD, in both situations: as the issuing State or as the executing State. The only condition is that this authority should have the right competence under the national law.

Member States may designate non-judicial authorities as competent authorities. In this case Member States must:

1. ensure that these authorities have competence for taking decisions of a similar nature under their national law and procedure
2. ensure that the person concerned may, upon request, address for review to a court or to another independent court-like body.

In all cases, the Member States will have to inform the General Secretariat of the Council which authority or authorities are competent to act according to this FD in both scenarios: as issuing State and as executing State.

The General Secretariat of the Council will make the information available to all Member States and to the Commission.

Based on the discussions that took place in different European workshops it is now considered as a good practice for the Member States to have a central authority which could act as a clearing house – collecting requests, transmitting them to the competent authorities, monitoring the process and the time limits etc.

5. The transfer procedure

a) Who has to take the initiative?

According to where the sentenced person is located or his/her intentions, there are two situations provided by the FD:

- when the sentenced person has returned or wants to return to the State where he/she is lawfully and ordinary residing – the competent authority of the issuing State may trigger the procedure.
- when the sentenced person wish to forward the judgment or the probation decision to anther State than the one where he/she is lawfully and ordinary residing – the sentenced person may request this forwarding from the issuing State. In this case, the forwarding is conditioned by the third State's consent.

The FD does not provide details on when the intention of the person is collected. This depends of the national systems and procedures. However, it is important to create a flexible and accessible system whereby the sentenced persons may express his/her wish whenever necessary.

b) Which documents should accompany the request?

The following documents should accompany the forwarding:

1. the certificate – in the standard form (set in Annex 1 of the FD), in original.
2. the judgment or the probation decision – in original or in certified copies.

In case the implementation of the judgment or the probation decision started in the issuing State, it may be a good practice for the issuing State to share the implementation documents (e.g. initial assessment, interventions that took place etc.) with the executing State. This could save time and effort on both sides and create a perception of continuity of supervision for the sentenced person.

c) To whom the request has to be send?

The judgment or the probation decision together with the certificate shall be forwarded by the competent authority of the issuing State directly to the competent authority of the executing State.

The competent authority of the issuing State shall forward the judgment or the probation decision only to one State at a time.

For information regarding the competent authorities in EU Member States, please see the final section of this chapter.

d) What happens when the request is not send to a competent authority?

When the competent authority of the executing State has no competence to recognize the judgment or the probation decision it will ex officio forward it to the competent authority and inform without delay the competent authority of the issuing State.

e) What kind of decisions can or have to be made by the executing State?

The competent authority in the executing State can decide to:

- refuse recognition and supervision by invoking one of grounds of refusing.
- recognize the judgment or the probation decision
- recognize the judgment or the probation decision but refuse to take responsibility for subsequent decisions in case of non-compliance if deprivation of liberty is involved.
- postpone the decision on recognition if the certificate is incomplete or does not correspond to the judgment

f) When has or can the execution State refuse the request for transfer by the issuing State?

The general principle of the FD is to encourage Member States to cooperate as far as possible.

However, the competent authority of the executing State may refuse to recognize the judgment or the probation decision and take responsibility of the supervision if:

a) the certificate in incomplete, does not correspond to the judgment or probation decision or has not been completed or corrected within a reasonable period set by the competent authority of the executing State.
b) the sentenced person has not returned or does not want to return in the State where he/she is lawfully and ordinary residing
c) the conditions set under art. 4 paragraph 3 are not met.
d) the probation measures or alternative sanctions included in the judgment or the probation decision are not among those provided by art. 4 and the executing State has not notified the General Secretariat of the Council that it is prepared to supervise.
e) in ne bis in idem cases.

f) the judgment relates to an act that is not an offence under its national law. However, this ground of refusal does not apply when the act relates to taxes or duties, customs and exchange;
g) the action is statute-barred under its national law;
h) supervision is impossible because of immunity under its national law;
i) the sentenced person cannot, because of his/her age, be held criminally responsible for the act on which the judgment is based;
j) the sentenced person did not appear at the trial, unless he/she was summoned in person, he/she had given a mandate to a legal representative or, following the decision, he/she did not contest the decision, or request a retrial or appeal;
k) the judgment or probation measure orders medical treatment that the executing State cannot provide;
l) the duration of the measure or sanction is less than six months;
m) based on its law, the offence was committed wholly or for essential part on its territory.

In some cases where the executing State decides to invoke a ground of refusal, in agreement with the issuing State, the executing State may take responsibility in supervising probation measures or alternative sanctions without assuming the responsibility for taking any subsequent decision.

g) If the execution State refuses the request, which steps have to be taken by that State?

Before deciding not to recognize the judgment or the probation decision, the executing State shall communicate with the competent authority of the Issuing State in order to supply all additional information required without delay.

If the decision is not to recognize the judgment or the probation decision and not to assume responsibility for the supervision, the executing State has to inform, by any means that leaves a written record, without any delay the competent authority of the issuing State.

h) Is the transfer bound by time limits?

As stipulated in art. 12 of the FD, the competent authority of the executing State shall decide as soon as possible but no latter that within 60 days from the receipt of the judgment and the probation decision together with the certificate.

In exceptional cases when the competent authority of the executing State cannot comply with this time limit, shall immediately inform the competent authority of the issuing State and:

1. give the reasons of the delay and
2. indicate the estimated time needed for the final decision to be taken.

i) If the execution State accepts the transfer what are then the steps that this State has to take in order to have the probation measure or alternative sanction be enforced?

If the executing State decides to recognize the judgment or the probation decision, it needs to inform the competent authority of the issuing State.

In the same time it could be useful to inform also the sentenced person about the supervision procedure governed but the executing State.

j) If a certain probation measure or alternative sanction does not exist in the executing State, would it be possible to convert this sanction or measure in another existing sanction of measure?

Yes, but only under certain circumstances:

1. the adaptation of the nature of the probation measures or alternative sanction shall be in line with the national law of the executing State for equivalent offences,
2. the adaptation shall correspond as far as possible to that imposed in the issuing State,
3. the adapted probation measures or alternative sanction shall not be more severe or longer than the one originally imposed,
4. the issuing State is informed about the adaptation and does not withdraw the certificate.

k) Is transfer possible when the probation measure or alternative sanction in the issuing State differs from that in the execution State as far as it concerns e.g.: the duration and severity of the sanction or measure, the probationary period, combination with other sanctions and measures)

Yes, it is possible under the conditions mentioned above plus that if the duration of the probation measure or alternative sanction is longer than the maximum provided in the executing State, the probation measure or alternative sanction shall be adapted and will not be bellow the maximum duration provided for equivalent offences under the law of the executing State.

l) Which country is responsible for the costs connected to the transfer and execution?

The costs from the application of the FD shall ne borne by the executing State except for those costs arising exclusively within the territory of the issuing State.

6. **What are the consequences for the sentenced person when the probation measure or alternative sanction is not or not fully executed in the execution State?**

When the judgment or the probation decision is not recognized by the executing State, and the executing State does not take responsibility for the supervision of the probation measure or alternative sanction, the sentence person will have to comply to the legislation in the issuing State.

7. **Which steps and decisions have to be made by the execution State and/or the issuing State when the probation measure or alternative sanction is not or not fully executed in the execution State?**

In this case, the competent authority of the executing State will inform immediately the competent authority of the issuing State about the decision to refuse the recognition and the reasons behind this decision. The sentence person shall comply with the law in the issuing State as far as the supervision is concerned.

8. **Which organization is responsible for supervising the transferred probation measure or alternative sanction?**

The organisations that are under the national law in the executing State responsible for supervising probation measures or alternative sanctions will be also responsible for supervising the offenders transferred from other jurisdictions.

In most Member States, probation services are responsible for supervising offenders in the community. A few excerptions are in Scotland (where social services are responsible for supervision), in The Netherlands and Austria (where the NGOs are empowered by the Ministry of Justice to take over this activity).

9. **When ends the responsibility and the jurisdiction of the executing State?**

The end of the jurisdiction and the responsibility of the executing State take place when:

1. the sentenced person cannot be found in the territory of the executing State.
2. the sentenced person absconds or no longer has a lawful and ordinary residence in the executing State. In this case the competent authority of the executing State transfers back the supervision and all the subsequent decision to the competent authority of the issuing State.

3. when new criminal proceedings are taking place in the issuing State. In this case the competent authority of the executing State may transfer back the supervision and all the subsequent decisions to the competent authority of the issuing State.

In both these cases, the competent authority of the issuing State resumes jurisdiction and take into account the duration and the degree of compliance of the person concerned.

10. Can the issuing State and/or executing State grant pardon or amnesty to the transferred person?

Both states may grant pardon and amnesty but only the issuing State may review the sentence.

11. Which countries have implemented FD 947 up to now?

The date for the transposition of the FD was decided for 06.12.2011. However, for some reasons, only some countries transposed the FD into the national legislation.

According to the latest review on European Judicial Network, 24 member states already transposed the FD in their own national legislation. Sweden and Ireland are in the process of implementation. Italy and UK did not start yet the procedure.

It is also to be mentioned that most of these countries transposed the FD after the date of 06.12.2011 set in the document.

12. Where can information be found about the national implementation laws, relevant literature, good practices etc?

The text in all EU languages can be found on the EUR-Lex website:

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1425126491209&uri=CELEX:32008F0947

Information about the state of play, declarations and notifications, competent authorities and so on can be found on the European Judicial Network (EJN): http://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=37

More discussions on fact sheets, obstacles in the implementation and so on could be found on the Confederation of European Probation:

http://www.cep-probation.org

In order to support the implementation of the FD, the European Commission supported some projects like:

1. Implementation Support for the Transfer of European Probation Sentences:

http://www.probation-transfers.eu/uploaded_files/ISTEP_Handbook_EN.pdf

2. Probation measures and alternative sanctions in the EU:

http://www.euprobationproject.eu

With financial support from the
Specific Programme Criminal Justice
of the European Union

Chapter III The moot court

RECOGNITION OF CUSTODIAL SENTENCES

Isabelle TOCAN*[6]

Keywords: right to a fair trial - conviction *in absentia* - *ne bis in idem* principle

Through decision no. 12871/11 from the 9th of November 2011, Milano Tribunal has convicted the Romanian citizen I.B. to 4 months imprisonment and 140 euros fine for accessory after fact to a theft, as provided by art. 648 of the Italian Criminal Code. The decision has become final on the 11th of December 2011.

The court established that on the 27th of July 2007, in Milano, the defendant has acquired a Piaggio Gilera Typhoon bike from an unidentified person, knowing it had been stolen on the 24th of March 2007 from the Italian citizen C.A.

The Italian authorities requested the recognition of the decision after I.B. expressed his consent. I.B. had already been transferred to Romania as a result of a prior request from Italy for executing a conviction of 13 years imprisonment and 200 euros fine. The request was sent to the Romanian Ministry of Justice that forwarded it to the Prosecution Office attached to Bucharest Court of Appeal, the court of I.B.'s place of detention. The Prosecution Office has presented the request to Bucharest Court of Appeal, the convicted person was summoned and presented in Court, assisted by an attorney at law.

After presenting the hearing as would have taken place in a Romanian court, there were discussions regarding the following aspects, as invoked by the convicted person:

*[6] **Mrs. Isabelle TOCAN - Judge, Bucharest Court of Appeal, Romania, isabelletocan@yahoo.com**

1. THE RIGHT TO A FAIR TRIAL

The discussions referred to whether art. 6 of European Convention for Human Rights is applicable or not for the procedure ulterior the conviction, when the competent authorities decide on the request of transfer. According to the preamble, this Framework Decision respects fundamental rights and observes the principles recognized by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision should be interpreted as prohibiting refusal to execute a decision when there are objective reasons to believe that the sentence was imposed for the purpose of punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced on any one of those grounds.

This Framework Decision should not prevent any Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media

Also, there were references to the ECHR case-law:

PIOTR CIOK v. Poland, 23 October 2012

Circumstances: The applicant, a Polish citizen, was convicted and is serving life imprisonment in Belgium for homicide. The Belgian authorities requested the Polish authorities to take over the execution of the applicant's sentence and they also decided that the applicant was to be expelled from Belgium and prohibited from returning for a period of ten years. The applicant did not give his consent to his transfer to Poland.

ECHR: The Court notes that the Polish courts did not determine a criminal charge against the applicant when converting his Belgian sentence into a Polish one, which, as established above, was clearly a matter of execution. Article 6 is therefore also not applicable to those proceedings and this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a).

DROZD AND JANOUSEK v. FRANCE AND SPAIN, 26 June 1992

Circumstances: Mr Jordi Drozd, a Spanish citizen, and Mr Pavel Janousek, a citizen of Czechoslovakia, are serving a term of fourteen years' imprisonment in France, following their conviction by a court of the Principality of Andorra for an armed robbery committed in Andorra la Vella. Both applicants chose to serve their sentences in France rather than Spain and they were transferred to France due to the special relation between Andorra and France (the president of France is co-prince of Andorra).

The applicants claimed that their detention was contrary to French public policy, of which the Convention formed part; the French courts had not carried out any review of the judgments of an Andorran court whose composition and procedure had not complied with the requirements of Article 6.

ECHR: the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice (Soering v. the United Kingdom).

Concurring opinion: This must clearly be a flagrant breach of Article 6 or, to put it differently, Article 6 has in its indirect applicability only a reduced effect, less than that which it would have if directly applicable (the theory of the "reduced effect" of order public with reference to the recognition of foreign judgments or other public acts is well known to international law).

There is no need here to develop general rules on the extent of the indirect effect of Article 6; in any event, in establishing the factors to be taken into consideration, the seriousness of the conviction and sentence pronounced abroad also plays a part.

To see whether the enforcement of a foreign judgment will clash with this indirect effect of Article 6, the requested State must, to be sure, carry out a review of some kind. Such a review is provided for in all legislative systems, the thoroughness of the review and the conditions of its exercise being left to the legislation of the requested State; it merely has to comply with the requirements of the Convention.

JÁNOS CSOSZÁNSZKI v. SWEDEN

Circumstances: The applicant, Mr János Csoszánszki, is a Hungarian national serving a 10 years prison sentence applied by the District Court of Malmö- Sweeden for drugs offence. The court also ordered that he be permanently expelled from Sweden. The applicant was transferred to Hungary without his consent.

The applicant complained that in Hungary he would have to serve a longer de facto term of imprisonment (one year and four months longer) than if he had served his sentence in Sweden.

ECHR: The Convention does not require the Contracting Parties to impose its standards on third States or territories. To lay down a strict requirement that the sentence served in the administering country should not exceed the sentence that would have to be served in the sentencing country would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is reflected in the Transfer Convention and is in principle in the interests of the persons concerned (see Drozd and Janousek v. France and Spain. In view of this, the possibility of a longer period of imprisonment in the administering State does not in itself render the deprivation of liberty arbitrary as long as the sentence to be served does not exceed the sentence imposed in the original criminal proceedings.

The Court has consistently held that Article 6 § 1 does not apply to proceedings concerning expulsion or extradition, as decisions regarding the entry, stay and deportation of aliens do not concern the determination of civil rights or obligations or of a criminal charge, within the meaning of that Article (see, among other authorities, Maaouia v. France and Sardinas Albo v. Italy).

The applicant's transfer is likely to delay the date of his conditional release and may, as claimed by the applicant, subject him to harsher prison conditions. However, the Convention does not confer the right to such release or the right to serve a prison sentence in accordance with a particular regime. Nor does it require that parole decisions be taken by a court. Furthermore, questions of conditional release relate to the manner of implementation of a prison sentence. (…) According to the Court's case-law, proceedings concerning the execution of a sentence are not covered by Article 6 § 1 of the Convention (see Aydin v. Turkey).

SMITH v. GERMANY, 1 April 2010

Circumstances: The applicant, a Dutch national, was convicted by the Lübeck Regional Court to three and a half years' imprisonment for drugs offences. Following negotiations with the applicant's legal representatives, the Lübeck Public Prosecutor gave the applicant an assurance that the prosecution service would institute proceedings under Article 11 of the Convention on the Transfer of Sentenced if the applicant returned to Germany for his trial and confessed to the alleged crimes. The applicant, who had voluntarily returned from the Netherlands, gave a full confession.

The Dutch Justice Ministry declared that in principle there was a willingness to allow the sentence to be executed in the Netherlands. However, in the Netherlands continued enforcement was allowed only in exceptional circumstances, which did not apply in the present case. The Dutch Ministry therefore requested its German counterpart to approve the conversion of the prison term imposed on the applicant, under Article 8 § 1 (b) of the EC Convention on Enforcement. The German authorities opposed to a formal application for execution assistance because the Netherlands would make the execution dependent on a conversion of the sentence.

ECHR: the Court has generally held that Article 6 § 1 under its criminal head does not apply to proceedings relating to the execution of a final criminal sentence (see Enea v. Italy). The Court has also held that in the event of conviction, there is no “determination ... of any criminal charge”, within the meaning of Article 6 § 1, as long as the sentence is not definitively fixed (see Eckle v. Germany).

However, the proceedings relating to the applicant's transfer request were very closely related to the criminal proceedings and to the final determination of the sentence. The Court notes, in particular, that the Public Prosecutor, during the proceedings leading to the applicant's conviction, expressly declared that they had no objections to the transfer of the applicant to the Netherlands. It was only in view of this reassurance that the applicant returned to Germany in order to stand trial and gave a full confession leading to his criminal conviction.

The Court therefore considers that the transfer proceedings have to be regarded as an integral part of the criminal proceedings in so far as they directly relate to the assurance which was given by the Public Prosecutor during the criminal proceedings.

The Court is aware of the fact that the decision taken by the Justice Ministry on the transfer request does not solely depend on the public prosecutor's recommendations and on considerations regarding the execution of sentence, but also on considerations of foreign policy which fall within the core area of public law. It is therefore acceptable if this part of the decision is not subject to judicial review.

Accordingly, the Court has previously held that Article 6 § 1 was not applicable to proceedings under the Transfer Convention (see Csoszánski v. Sweden; Szabo v. Sweden, Veermae v. Finland). However, in those cases the Transfer Convention was not prospectively influencing the course of the trial and the fixing of the sentence, because no assurance was given by the public prosecution before or during the criminal proceedings.

It follows that Article 6 § 1 of the Convention under its criminal head is, under the specific circumstances of the present case, applicable to the proceedings concerning the applicant's transfer request in so far as they relate to the assurance given by the public prosecution during the criminal proceedings.

The German courts did not review the substance of the applicant's complaint about the refusal to institute transfer proceedings under Article 11 of the Transfer Convention. (…) that the applicant has been denied access to a court with regard to the part of the decision on his transfer request which did not concern considerations of public policy.

CASE OF BUIJEN v. GERMANY, 1 April 2010

Circumstances: The applicant, a Dutch national, was convicted to eight years' imprisonment by Lübeck District Court for drugs offences. Following negotiations with the applicant's legal representatives, the Lübeck Public Prosecutor gave the applicant an assurance that the prosecution service would institute proceedings under Article 11 of the Convention on the Transfer of Sentenced Persons if the applicant confessed to the alleged crimes. The applicant confessed in writing to having committed the crimes specified in the arrest warrant.

The Head of the Chief Public Prosecutors in the Netherlands stated that he would only endorse a transfer under Article 10 of the Transfer Convention on condition that the Dutch authorities gave an assurance of continued enforcement and did not release him before two-thirds of the sentence had been served.

The applicant asked the Dutch courts for a judicial determination of the Public Prosecutor's decision to pursue the applicant's transfer under Article 10 and not, as he had previously been assured, under Article 11 of the Transfer Convention. He submitted that he had only confessed in the light of the Public Prosecutor's assurance that the prosecution service would support his transfer under Article 11, and that the Public Prosecutor's decision to pursue the transfer under Article 10 violated his right to a fair trial under the Convention.

The Dutch courts rejected the applicant's request as inadmissible. Referring to the Public Prosecutor's submissions, the courts considered that the Public Prosecutor's comment on the applicant's transfer request did not constitute a judicial decision, as it did not concern the domestic administration of criminal justice, but related to a diplomatic relationship with a foreign State. Furthermore, the Convention on the Transfer of Sentenced Persons did not confer any individual rights on the applicant.

ECHR: the Court has generally held that Article 6 § 1 under its criminal head does not apply to proceedings relating to the execution of a final criminal sentence (see Enea v. Italy).

Under the particular circumstances of this case it has to be taken into account that the proceedings relating to the applicant's transfer request were very closely related to the criminal proceedings and to the final determination of the sentence. It would be too formalistic to limit the scope of application of Article 6 under its criminal head to the proceedings which took place before pronouncement of the judgment. The Court therefore considers that the transfer proceedings have to be regarded as an integral part of the criminal proceedings in so far as they directly relate to the assurance which was given by the Public Prosecutor during the criminal proceedings.

The Court is aware of the fact that the decision taken by the Justice Ministry on the transfer request does not solely depend on the public prosecutor's recommendations and on considerations regarding the execution of sentence, but also on considerations of foreign policy which fall within the core area of public law. It is therefore acceptable if this part of the decision is not subject to judicial review.

The applicant has been denied access to a court with regard to the part of the decision on his transfer request which did not concern considerations of public policy.

SELMOUNI v. FRANCE, 28 JULY 1999

Circumstances: Mr Selmouni, a Netherlands and Moroccan national, was sentenced to to fifteen years' imprisonment and permanent exclusion from French territory by Bobigny Criminal Court. The applicant requested a transfer to the Netherlands to serve the remainder of his sentence there.

The Netherlands Government, having regard to the circumstances of the case, supported the applicant's request, observing that the two States concerned are parties to the Convention on the Transfer of Sentenced Persons of 21 March 1993.

ECHR: The Court reiterates that Article 41 does not give it jurisdiction to make such an order against a Contracting State (see, for example, mutatis mutandis, the Saïdi v. France and the Remli judgment).

VEERMÄE v. FINLAND, 15 MARCH 2005

Circumstances: The applicant, an Estonian citizen, was convicted by a Finnish district court for an aggravated narcotics offence and sentenced to nine years' imprisonment. Also, the Directorate of Immigration ordered his expulsion to Estonia. The judgment and the expulsion order both became final.

The Finish Ministry of Justice ordered the applicant to serve the rest of his sentence in Estonia considering that the applicant did not have particular bonds with Finland and that he had closer social ties to Estonia than to Finland.

The applicant appealed the decision to the Helsinki Administrative Court, requesting the quashing of the Ministry of Justice's decision and argued that in Finland it would be possible for him to be released on parole after serving half his sentence, while in Estonia would only be possible after serving two-thirds of the sentence.

ECHR: The Court notes that the applicant has an expectation of being released on parole in Finland after serving half his sentence. It observes that the application of the Transfer Convention may, in principle, result in the applicant spending a longer time in prison than he would in Finland before being released on parole. The effect would be to postpone his release, but it appears that there is no question of his sentence being increased as a matter of law.

The European Convention on Human Rights does not require the Contracting Parties to impose its standards on third States or territories. To lay down a strict requirement that the sentence served in the administering country should not exceed the sentence that would have to be served in the sentencing country would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is reflected in the Transfer Convention and is in principle in the interests of the persons concerned

The possibility of a longer period of imprisonment in the administering State does not in itself render the deprivation of liberty arbitrary as long as the sentence to be served does not exceed the sentence imposed in the criminal proceedings. In this context, reference may also be made, as a safeguard against arbitrariness, to the possibility of appealing to an administrative court against the transfer decision.

The Court does not exclude the possibility that a flagrantly longer de facto sentence in the administering State could give rise to an issue under Article 5, and hence engage the responsibility of the sentencing State under that Article. For this to be the case, however, substantial grounds would have to be shown to exist for believing that the time to be served in the administering State would be flagrantly disproportionate to the time which would have had to be served in the sentencing State (see Cruz Varas and Others v. Sweden).

In so far as Article 6 is concerned, the Court notes that, if the applicant is transferred to Estonia, any conversion of his sentence will be determined by the Tallinn City Court. Having regard to its finding above under Article 5, the Court considers that no issue arises under Article 6.

The applicant cannot be compared to prisoners of Finnish origin serving their sentences in Finnish prisons as the Transfer Convention concerns the transfer of prisoners back to their home countries. Its aim constitutes objective and reasonable justification for the difference in treatment of the applicant and prisoners of Finnish origin on the one hand and other prisoners of Estonian origin on the other. The Court accepts the Government's argument that the difference in treatment between, for example, prisoners of Estonian origin is due to the fact that the time-consuming arrangements for a transfer are a practical obstacle to transferring prisoners serving only short sentences prior to their release on parole in Finland.

WILLCOX & HURFORD v. UNITED KINGDOM

Circumstances: The first applicant was convicted to life imprisonment in Thailand, the country in which he then resided, on drugs charges. He was given credit for the guilty plea in the form of a one third reduction in his sentence, equating the life sentence with fifty years' imprisonment. The second was sentenced to thirty years' imprisonment for drugs offences. A royal amnesty subsequently reduced his sentence to twenty-six years and eight months' imprisonment. For both the applicants, the quantity of drugs gave rise to the "irrefutable presumption" of having the drugs with the intent to sell.

The applicants were transfer to the United Kingdom to serve the remainder of their sentence, pursuant to a bilateral prisoner transfer agreement between Thailand and the United Kingdom, after having served a required minimum term in Thailand. The applicants consented to the terms and signed a consent form.

ECHR: The requirement of Article 5 § 1 (a) that a person be lawfully detained after "conviction by a competent court" does not imply that the Court has to subject proceedings in third countries leading to that conviction to a comprehensive scrutiny and verify whether they have fully complied with all the requirements of Article 6 of the Convention (see Stoichkov v. Bulgaria and Drozd and Janousek). To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 would thwart the current trend towards strengthening international cooperation in the administration of justice, which the Court has already reiterated is generally in the interests of the persons concerned.

However, the Court has also held that if a conviction is the result of proceedings which were a "flagrant denial of justice", that is, were "manifestly contrary to the provisions of Article 6 or the principles embodied

therein", the resulting deprivation of liberty would not be justified under Article 5 § 1 (a) (see Stoichkov, and Othman (Abu Qatada) v. the United Kingdom). The Court has indicated that "flagrant denial of justice" is a stringent test of unfairness. It goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of a fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article (see Othman (Abu Qatada)).

Certain forms of unfairness could amount to a flagrant denial of justice. These have included: conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge; a trial which is summary in nature and conducted with a total disregard for the rights of the defense; detention without any access to an independent and impartial tribunal to have the legality the detention reviewed; and the deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country; and the admission of evidence obtained by torture (see Othman (Abu Qatada)). It follows from the examples given and from the nature of the test itself that instances where there has been a flagrant denial of justice will be obvious and known to the diplomatic representatives of the receiving State prior to the transfer taking place.

The first applicant had the benefit of a number of procedural guarantees in the Thai proceedings. He was tried in public before two independent judges; he was present throughout the proceedings and was legally represented; he was acquitted of some of the charges in accordance with the presumption of innocence and, despite the fact that possession of heroin and ecstasy was not contested, evidence was led to demonstrate that the drugs were in his possession; and he was sentenced in accordance with the applicable law and was given a significant reduction for his guilty plea. In any event, it is a material factor, when assessing the impact of the "irrefutable presumption" on the overall fairness of the trial, that the first applicant did not alert the British authorities, either during his trial or when making his request for a transfer, to the alleged flagrant denial of justice in his case.

The Court concluded that while the applicant's defense rights were restricted by the operation of the "irrefutable presumption" in his case, it cannot be said that the very essence of his right to a fair trial was destroyed. Having regard to all the circumstances of the case, the Court considered that the applicant has failed to demonstrate that there has been a flagrant denial of justice in his case.

2. CONVICTIONS *IN ABSENTIA*

According to article 9 paragraph 1 of the FD, the competent authority of the executing State may refuse to recognize the judgment and enforce the sentence, if according to the certificate provided for in Article 4, the person did not appear in person at the trial resulting in the decision, unless the certificate states that the person, in accordance with further procedural requirements defined in the national law of the issuing State:

(i) in due time: — either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and — was informed that a decision may be handed down if he or she does not appear for the trial; or

(ii) being aware of the scheduled trial had given a mandate to a legal counselor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counselor at the trial; or

(iii) after being served with the decision and being expressly informed of the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed: — expressly stated that he or she does not contest the decision, or — did not request a retrial or appeal within the applicable time frame.

The refusal ground was introduced through FD 2009/299/JHA (that amended the 2008/909 FD) that aimed to regulate the situations where the transferred person was convicted in absentia, considering that the right of an accused person to appear in person at the trial is included in the right to a fair trial provided for in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights, but this right is not absolute and under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally, waive that right. This Framework Decision is aimed at refining the definition of such common grounds allowing the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person's right of defense.

Framework Decision sets conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused. These are alternative conditions; when one of the conditions is satisfied, the issuing authority, by completing the relevant certificate, gives the assurance that the requirements have been or will be met, which should be

sufficient for the purpose of the execution of the decision on the basis of the principle of mutual recognition. The recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused if either he or she was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or if he or she actually received, by other means, official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial.

During the seminars there were discussions concerning the national legislations that allow a conviction in absentia even if the accused is not personally informed on the procedure (the subpoena is signed by a member of the family or displayed on the door of the house) and a following request to reopen the trial would be inadmissible, whereas according to the FD, if the accused is not personally informed on the trial, the requested state may refuse to recognize the decision considering that the right to a fair trial was breached as a consequence of the accused being denied the right to appear in court.

The ECHR standards regarding convictions in absentia were also discussed during the seminars. Under this Framework Decision, the person's awareness of the trial should be ensured by each Member State in accordance with its national law, it being understood that this must comply with the requirements of ECHR.

Analyzing the guarantees imposed by the right to a fair trial, the European Court of Human Rights stated that proceedings that take place in the accused's absence are not of themselves incompatible with the right to be present at trial in the ECHR if the accused may subsequently obtain a fresh determination of the charges in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself or that he intended to escape trial (Sejdovic v. Italy).

The obligation to hold a hearing is, however, not absolute in all cases falling under the criminal head of Article 6. In the light of the broadening of the notion of a "criminal charge" to cases not belonging to the traditional categories of criminal law (such as administrative penalties, customs law and tax surcharges), there are "criminal charges" of differing weights. While the requirements of a fair hearing are the strictest concerning the hard core of criminal law, the criminal-head guarantees of Article 6 do not necessarily apply with their full stringency to other categories of cases falling under that head and not carrying any significant degree of stigma (Jussila v. Finland).

The character of the circumstances which may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be dealt with by the competent court – in particular, whether these raise any question of fact or law which could not be adequately resolved on the basis of the case file. An oral hearing may not be required where there are no issues of credibility or contested facts which necessitate an oral presentation of evidence or cross-examination of witnesses and where the accused was given an adequate opportunity to put forward his case in writing and to challenge the evidence against him (Jussila v. Finland). In this connection, it is legitimate for the national authorities to have regard to the demands of efficiency and economy (Jussila v. Finland concerning tax-surcharge proceedings and Suhadolc v. Slovenia concerning a summary procedure for road traffic offences).

The European Court of Human Rights has found that for a trial in absentia to be consistent the defendant's right to be present at trial, the following conditions must be met. First, a defendant must have notification of his or her impending trial. Second, a defendant has to unequivocally waive his or her right to be present at trial. Silence from the defendant after notice has been attempted does not constitute a waiver. Third, a defendant must have the right to representation. Finally as mentioned above, the defendant must be able to subsequently obtain from a court which has heard him a fresh determination of the merits of the charge.

These principles were established and reaffirmed in several decisions of the ECHR.

CASE OF SANADER v. CROATIA, 7 April 2015

Circumstances: The applicant, a Serbian national, was investigated for the crimes committed in Petrinja-Croatia in September 1991. At that time the applicant could not be traced as he lived on the occupied territory of Croatia which was out of the effective control of the domestic authorities. After he had been indicted on charges of war crimes, a three-judge panel allowed for his trial in absentia. A lawyer was appointed to represent him and was notified of the various steps taken in the proceedings. Given the conditions of the escalating war in Croatia at the time and the fact that the applicant lived on territory which was outside the control of the domestic authorities it was impossible for them to notify him of the criminal proceedings or to secure his presence. The applicant was sentenced to twenty years' imprisonment. The applicant asked the court to reopen the proceedings on the grounds that he had learned about the judgment only after several years and that he had not committed the crime at issue, the request was dismissed on the grounds that he had failed to show that there were any new facts which could alter his conviction.

ECHR: The Court has already accepted that the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice (see Colozza). Thus, in the particular circumstances of the present case, given that the gravity of the crime at issue which, although not susceptible to statutory limitation periods, was commensurate with great public interest and the interest of the victims to see the justice being done, the Court accepts that holding a hearing in the applicant's absence was not in itself contrary to Article 6.

Although proceedings that take place in the accused's absence are not in themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted in absentia is subsequently unable to obtain from the court a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been unequivocally established that he has waived his right to appear and to defend himself (see Colozza, Einhorn v. France, Krombach v. France, Somogyi v. Italy) or that he intended to escape trial (see Medenica v. Switzerland).

The procedural means offered by domestic law and practice must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor sought to escape trial (see Medenica and Somogyi). The refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a "flagrant denial of justice" rendering the proceedings "manifestly contrary to the provisions of Article 6 or the principles embodied therein".

Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, his entitlement to the guarantees of a fair trial (see Kwiatkowska v. Italy). However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see Poitrimol v. France). Furthermore, it must not run counter to any important public interest (see Håkansson and Sturesson v. Sweden).

The Court has held that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from his status as a "fugitive", which was founded on a presumption with an insufficient factual basis, that he had waived his right to appear at the trial and defend himself (see

Colozza). It has also had occasion to point out that, before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see Jones v. the United Kingdom).

Furthermore, a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure (see Colozza v. Italy). At the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant a finding that he had been absent for reasons beyond his control (see Medenica v. Switzerland).

SOMOGYI v. ITALY, 18 May 2004

Circumstances: The applicant, a Hungarian national, was investigated for arms trafficking charge. As the defendant did not appear at the preliminary hearing, he was declared to be willfully seeking to evade trial and the court appointed a lawyer to assist him. The court sentenced the accused to eight years' imprisonment and a fine of 2,000,000 Italian lire. The subpoena was signed by somebody and the defendant argued that it was not his and it did not resemble the signature in his passport. The applicant was then extradited from Austria to Italy.

The request to reopen the trial allowed for an appeal was admissible only where a defendant alleged that he had been prevented from finding out about his conviction by circumstances beyond his control. It would be inadmissible, however, if he pleaded that service of a notice was null and void. In such a case a person convicted at first instance could lodge an appeal out of time, arguing in effect that the time allowed for an appeal had not begun to run.

In the present case the Italian authorities took the view, in substance, that the applicant had waived his right to appear at his trial because, although he had been informed by registered letter of the charges against him and the date of the preliminary hearing, he had not taken the trouble to report to the preliminary investigations judge or appoint legal counsel. The applicant contested that version of the facts, asserting that he had never received the registered letter in question because the address on it was incorrect.

ECHR: The Court considers that, in view of the prominent place held in a democratic society by the right to a fair trial (see Delcourt v. Belgium), Article 6 of the Convention imposes on every national court an obligation to check whether the defendant has had the opportunity to apprise himself of the proceedings against him where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit.

As regards the Government's assertion that the applicant had in any event learned of the proceedings through a journalist who had interviewed him or from the local press, the Court points out that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights, as is moreover clear from Article 6 § 3 (a) of the Convention; vague and informal knowledge cannot suffice (see T. v. Italy).

CASE OF DEMEBUKOV v. BULGARIA

Circumstances: The applicant had been present and had been assisted by a lawyer of his own choosing when he had been initially charged with the theft of the electricity cables, when the charges had been amended and also when the results of the preliminary investigation had been presented to him. During pre-trial investigations, authorities had placed a restriction on his movements, entailing that he should not leave the village without an authorization from the public prosecutor's office. However, in violation of the imposed restriction and without informing the prosecuting authorities of his new address, the applicant changed his place of residence. Even though the authorities had been unable to serve the applicant with the indictment against him and the summons to attend the hearings before the District Court, the latter decided to examine the case against the applicant in the absence of the former as it found that this would not impede the proceedings. It then assigned a court-appointed lawyer to defend the applicant and proceeded to examine the case. The District Court found the accused guilty as charged and sentenced the applicant to three years' imprisonment.

Supreme Court of Cassation refused to reopen the criminal proceedings conducted in the absence of the applicant because it found that he had known about them and had, by violating the restriction placed on his movement and changing his place of residence without informing the public prosecutor's office, willfully made himself unavailable to participate in the proceedings against him and had therefore lost the right to seek their reopening.

ECHR: Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance; furthermore, it must not run counter to any important public interest (see Håkansson and Sturesson v. Sweden, Sejdovic, Poitrimol v. France).

The legislature must accordingly be able to discourage unjustified absences, provided that any sanctions used are not disproportionate in the circumstances of the case and the defendant is not deprived of his right to be defended by counsel (see Krombach v. France, Van Geyseghem and Sejdovic).

It is for the courts to ensure that a trial is fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence is given the opportunity to do so (see Van Geyseghem and Sejdovic).

3. *NE BIS IN IDEM* PRINCIPLE

According to article 9 paragraph 1 letter c of the FD 2008/909, the competent authority of the executing State may refuse to recognize the judgment and enforce the sentence, if enforcement of the sentence would be contrary to the principle of *ne bis in idem*. The conditions to apply this principle are not set in the FD, but they can be inferred analyzing the various international legal instruments where it is provided.

A. The principle it is to be found as ground for refusal to agree to cooperation in several other international legal instruments:

The Council of Europe instruments: the *ne bis in idem* principle is, inter alia, provided as a ground for mandatory refusal under the European Convention on Extradition of 13 December 1957 (Article 9) and its additional protocol of 15 October 1975 (Article 2). It is also ground for refusal of cooperation in -specific conventions concerning a particular type of crime. This is the case for the convention on money laundering, search, seizure and confiscation of the proceeds from crime of 8 November 1990 (Article 18(1)(e)), which only mentions it as an optional ground for refusal. Furthermore, although some conventions on cooperation do not expressly stipulate it, the *ne bis in idem* principle can still substantiate refusal to agree to the

requested cooperation, based on reservations acquiesced by some States in this respect. This is the case with the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959: it does not refer to the *ne bis in idem* principle *per se*, but several States have submitted reservations allowing them to refuse mutual assistance on this basis (Article 23).

The European Union instruments: the *ne bis in idem* principle is mentioned as a ground for refusing cooperation in several horizontal cooperation instruments, including those applying mutual recognition: article 3 of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States, article 4 of Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, article 7(1)(c) of Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, article 7(2)(a) of the Framework Decision of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, Article 11(1)(c) of 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.

B. This principle has also been provided as one of the conditions of cooperation, specifically for the international validity of judicial decisions and the principle of mutual recognition:

Within the Council of Europe, the European Convention of 28 May 1970 on the international validity of criminal judgments (ETS 70), and the European Convention of 15 May 1972 on the transfer of proceedings in criminal matters (ETS 73) set down this principle.

Within the European Union (including Schengen):

- The *ne bis in idem* principle also appears in some -specific instruments: see, for example, the Convention of 26 July 1995 on the protection of the financial interests of the European Communities (Article 7) and the Convention of 26 May 1997 on corruption (Article 10).
- On 25 May 1987 the Member States of the European Communities signed a convention on the application of the *ne bis in idem* principle.
- Articles 54 to 58 of the 1990 Convention Implementing the Schengen Agreement (CISA).

In 2005, the Commission published a Green Paper on this matter, but it was not followed by a formal proposal.

C. Article 50 of the Charter of Fundamental Rights establishes the principle whereby 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'.

D. The Court of Justice of the European Union has given several fundametal judgments on the *ne bis in idem* principle:

a) 11 February 2003, Joined Cases C-187/01 and C-385/01, Gözütok and Brügge
b) 10 March 2005, Case C-469/03, Miraglia
c) 9 March 2006, Case C-436/04, Van Esbroeck
d) 28 September 2006, Case C-150/05 van Straaten
e) 29 September 2006, Case C-467/04, Gasparini
f) 18 July 2007, Case C-288/05, Kretzinger
g) 18 July 2007, Case C-367/05, Kraaijenbrink
h) 11 December 2008, Case C-297/07, Bourquain
i) 22 December 2008, Case C-491/07 Turansky
j) 16 November 2010, Case C-261/09, Mantello.

The main international instruments for the protection of human rights only recognize the *ne bis in idem* principle as having national scope (International Covenant on Civil And Political Rights of 16 March 1966 (Article 14(7)), protocol No 7 to the ECHR of 22 November 1984 (Article 4(1)). The wording of Article 4 of Protocol No. 7 restricts its application to the national level. In the case of Atilla GÖKALP v. Poland and Jaime Eduardo CARDONA GIRALDO v. Poland (decision 11 September 2012) the Court has rejected as manifestly ill-founded the request of the applicant for failure to meet this condition.

However, the scope of some international instruments extends to retrial in a second State or before an international tribunal. For instance, the Statute of the International Criminal Court contains an explicit exception to the *ne bis in idem* principle as it allows for prosecution where a person has already been acquitted in respect of the crime of genocide, crimes against humanity or war crimes if the purpose of the proceedings before the other court was to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the International Criminal Court (Article 20).

Within the Council of Europe, the aim of the instruments listed above was to extend the scope of the *ne bis in idem* principle so that it would no longer be applied exclusively within the jurisdiction of a given State but would have 'trans-national' application. In other words, it would apply between the jurisdictions of more than one Member State.

Moreover, whereas most of the cooperation instruments that aim to transnationalism only do so between contracting Parties or between Member States, some of the EU Framework Decisions extend the territorial scope of the *ne bis in idem* principle beyond the Member States of the European Union: see, for example, Article 4(5) of the EAW Framework Decision.

CONDITIONS TO APPLY *NE BIS IN IDEM*

1. The **same acts** - Court of Justice of the European Union case-law

Van Esbroeck case (Case C-436/04)

Circumstances: Van Esbroeck, a Belgian national, was sentenced in 2000 by a Norwegian court to five years' imprisonment for illegally importing drugs into Norway. After serving part of his sentence, he was released on parole in 2002 and sent back to Belgium, where a prosecution was brought against him soon after his return. Following, in 2003 he was sentenced to one year's imprisonment for, inter alia, illegally exporting the same drugs out of Belgium. The judgment was upheld on appeal. Both judgments applied Article 36 of the 1961 United Nations Single Convention on Narcotic Drugs, as amended by its 1972 protocol, under which each of the offences, which include the import and export of narcotic drugs, are to be regarded as a separate offence if committed in different countries. An appeal was brought before the Court of Cassation, invoking infringement of the *ne bis in idem* principle, as enshrined in Article 54 of the CISA. The Court of Cassation referred a question to the CJEU for a preliminary ruling.

CJEU: the only relevant criterion is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected. The situation at issue may constitute a set of facts which, by their very nature, are inextricably linked, but the Court leaves the definitive assessment to the competent national courts. Both the legal classification and the identity of the protected legal interest may vary from

one Member State to another and in the absence of harmonization, they may create barriers to the objective of Article 54, that is, the right to freedom of movement.

In its latter case-law, the Court confirmed and explained this approach:

- Gasparini case, C-467/04 (paragraph 53);

- van Straaten case, C-150/05 (paragraphs 40, 49, 50)- the quantities of the drug at issue in the two Contracting States concerned are not required to be identical (paragraphs 49 and 50);

- Kretzinger case, C-288/05 (paragraph 34);

- Kraaijenbrink case C-367/05 (paragraph 36): different acts consisting, in particular, first, of holding in one Contracting State the proceeds of drug trafficking and, second, of exchanging at exchange office in another Contracting State sums of money also originating from such trafficking, should not be regarded as 'the same acts' within the meaning of Article 54 CISA merely because the competent national court finds that those acts are linked together by the same criminal intention. It is for that national court to assess whether the degree of identity and connection between all the facts to be compared is such that it is possible, in the light of the said relevant criterion, to find that they are 'the same acts' within the meaning of the Article 54 CISA.

The European Court of Human Rights has also recently ruled in favor of a factual idem, understood as covering facts that are substantially the same (Sergey Zolotukhin v. Russia).

2. The trial must be '**finally disposed of**"

Prosecuting the same person for the same acts prior to a final judgment will not infringe the *ne bis idem* principle. The Court of Justice of the European Union has analyzed this condition in several cases.

Gözütok and Brügge, 11 February 2003 – The *ne bis in idem* principle also applies to procedures whereby further prosecution is barred if the Public Prosecutor discontinues criminal proceedings without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor.

van Straaten, 28 September 2006 - The *ne bis in idem* principle falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence.

Gasparini case, 29 September 2006- The *ne bis in idem* principle applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred.

Miraglia case, 10 March 2005- The principle *ne bis in idem* does not fall to be applied to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.

Turansky case, 22 December 2008- The *ne bis in idem* principle does not fall to be applied to a decision by which an authority of a Contracting State, after examining the merits of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the suspension decision does not, under the national law of that State, definitively bar further prosecution and therefore does not preclude new criminal proceedings, in respect of the same acts, in that State

3. Supplementary conditions in case of a conviction- **enforcement of the penalty**

According to Article 54 of the Convention Implementing the Schengen Agreement if the final judgment is a conviction, the penalty must have been enforced, be in the process of being enforced or be no longer enforceable under the laws of the sentencing state.

Kretzinger case, 18 July 2007- for the purposes of Article 54 of the CISA, a penalty imposed by a court of a Contracting State 'has been enforced' or is 'actually in the process of being enforced' if the defendant has been given a suspended custodial sentence. A penalty imposed by a court of a Contracting State is not to be regarded as 'having been enforced' or 'actually in the process of being enforced' where the defendant was for a short time taken into police custody and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the custodial sentence under the law of the State in which judgment was given.

Bourquain case, 11 December 2008, the *ne bis in idem* principle is applicable to criminal proceedings instituted in a Contracting State against an accused whose trial for the same acts as those for which he

faces prosecution was finally disposed of in another Contracting State, even though, under the law of the State in which he was convicted, the sentence which was imposed on him could never, on account of

specific features of procedure such as those referred to in the main proceedings, have been directly enforced.

Zoran Spasic case, 27 May 2014- Article 54 CISA must be interpreted as meaning that the mere payment of a fine by a person sentenced by the self-same decision of a court of another Member State to a fine and a custodial sentence that has not been served is not sufficient to consider that the penalty 'has been enforced' or is 'actually in the process of being enforced' within the meaning of that provision. The Court also underlined that the execution condition of the CISA implies that, in the event that the particular circumstances of the case and the attitude of the first sentencing State have led to a situation in which the penalty imposed has been enforced or is actually in the process of being enforced — as the case may be through the use of the instruments provided by EU law to facilitate the execution of sentences — a person definitively convicted and sentenced by a Member State can no longer be prosecuted for the same acts in another Member State. Therefore, in the system established by Article 54 CISA, such prosecutions would take place only in cases where the system currently provided by EU law was — for whatever reason — not sufficient to prevent the impunity of persons definitively convicted and sentenced in the European Union.

With financial support from the
Specific Programme Criminal Justice
of the European Union

Chapter IV Workshop no. 1

Isabelle TOCAN

SECTION I CASE-STUDY ON PROBATION DECISION

Keywords: probation measures - conviction *in absentia* - subsequent responsibility

Mr. VV is a Bulgarian citizen convicted in Romania for counterfeiting instruments of credit and payment (art. 311 Penal Code) and illegal access to an electronic payment system (art. 360 PC). His domicile before being sentenced was in Dobrich, Bulgaria. He has a college degree and is working as an IT specialist.

In fact, between 21st -23rd of February 2014, VV designed and used some special devices to clone the PIN code of the cards introduced in the cash-withdrawal machines. After cloning the cards, VV, with the help of an accomplice, used this private information to illegally access the bank accounts of the victims.

For these crimes, VV was sentenced to two years of imprisonment. Taking into account the offender's attitude during the trial and also the fact that he has one minor in his direct care, the court decided to suspend the execution of the sentence under supervision (art. 91 CP) with a probation period of three years.

The supervision measures that the offender has to observe during the probation period are:

a. to report to the probation service, at the dates established by this service,

b. to receive visits from the designated probation counselor,

c. to inform the probation counselor of any change in the domicile and any travel that takes longer than 5 day,

d. to inform the probation counselor of any change in the employment,

e. to inform the probation counselor of his income.

The court imposed also the interdiction for VV to leave the country without the consent of the court and the obligation to carry out community service (unpaid work for the benefit of the community) for 60 days at the city hall of the 4th or 5th department of Bucharest. As a complementary penalty, the court applied the interdiction for VV to exercise any IT profession.

Task:

Mr. VV expressed the wish to transfer the execution of his sentence to Bulgaria. Please complete the certificate provided in the Annex of the FD 2008/947/JHA.

During the seminars all participants filled in the certificates attached to the FD with information as provided in the case-study, had discussions about the competent authorities to execute requests based on the FD according to the national legislation of each country, underlying the principle of mutual trust. Also, they accessed the www.ejn-crimjust.europa.eu. website in order to check the declarations made by the MSs, the state of implementation in each MS and the competent authorities to execute requests based on the FD with which they are supposed to directly cooperate according to Article 6 paragraph 2 of the FD.

The competent authorities involved in this procedure are determined by each Member State that will inform the General Secretariat of the Council which authorities are competent to issue and enforce judgments within the context of the Framework Decision, and the General Secretariat makes this information available to all Member States (Article 3). Member States may designate non-judicial authorities as the competent authorities for taking decisions under this Framework Decision, provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures. Where the competent authority in the executing State is not known to the issuing authority, the latter may contact the European Judicial Network (Article 6(6)). If the authority in the executing Member State has no competence to recognize it, the authority that has already received the request will not dismiss it, but will forward the judgment and certificate ex officio to the relevant competent authority and will inform the issuing authority accordingly (Article 6(7)).

In order to facilitate the procedure, it is imperative to forward the judgment and certificate, dully filled in and translated into one of the official languages of the executing Member State or into another official language of the institutions of the European Union that it has declared it will accept (Article 21). If the certificate is incomplete or manifestly does not correspond to the judgment, recognition may be postponed until a reasonable deadline set by the executing Member State for the certificate to be completed or corrected (Article 8(2)).

In any case, the certificate will be forwarded to only one Member State at any one time (Article 6(5)).

Topics to be discussed:

1. Is the request to transfer the supervision of the measures in Bulgaria admissible?

Both Romania and Bulgaria have implemented the FD, so the request is admissible.

2. Is it possible for the requested authority to change the nature or duration of the probation measures or the duration of the probation period?

Since the procedure established by the Framework Decision is covered by the principle of 'mutual recognition', it is not a matter of 'converting' the foreign decision but rather of enforcing or continuing enforcement of a foreign judgment.

There are different ways in which States can recognize the probation decisions: continued enforcement or conversion. In both cases the executing state must refrain from altering the initial decision as much as possible.

According to article 8 and 9 of the FD, the competent authority of the executing State shall recognize the judgment and, where applicable, the probation decision and shall without delay take all necessary measures for the supervision of the probation measures or alternative sanctions, unless it decides to invoke one of the grounds for refusing recognition and supervision referred to in Article 11, with the possibility to adapt the nature or duration of the relevant probation measure or alternative sanction, or the duration of the

probation period if these are incompatible with the law of the executing State. The adapted probation measure, alternative sanction or duration of the probation period shall correspond as far as possible to that imposed in the issuing State and shall not be below the maximum duration provided for equivalent offences under the law of the executing State, nor they will be more severe or longer than the probation measure, alternative sanction or probation period which was originally imposed.

3. Will the transfer of supervision include the complementary penalty?

According to paragraph 10 of the preamble, the FD does not cover the supervision of compliance with any professional disqualifications imposed on the person as part of the sanction.

4. Would the request to transfer the supervision be admissible if VV were convicted in absentia?

According to article 11 letter h of the FD, the competent authority of the executing State may refuse to recognize the judgment and enforce the sentence, if according to the certificate provided for in Article 6, the person did not appear in person at the trial resulting in the decision, unless the certificate states that the person, in accordance with further procedural requirements defined in the national law of the issuing State:

- in due time: — either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and — was informed that a decision may be handed down if he or she does not appear for the trial; or
- being aware of the scheduled trial had given a mandate to a legal counselor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counselor at the trial; or
- after being served with the decision and being expressly informed of the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed: — expressly stated that he or she does not contest the decision, or — did not request a retrial or appeal within the applicable time frame.

The refusal ground was introduced through FD 2009/299/JHA (that amended the 2008/909 FD) that aimed to regulate the situations where the person was convicted in absentia, considering that the right of an

accused person to appear in person at the trial is included in the right to a fair trial provided for in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights, but this right is not absolute and under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally, waive that right. This Framework Decision is aimed at refining the definition of such common grounds allowing the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person's right of defense.

Framework Decision sets conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused. These are alternative conditions; when one of the conditions is satisfied, the issuing authority, by completing the relevant certificate, gives the assurance that the requirements have been or will be met, which should be sufficient for the purpose of the execution of the decision on the basis of the principle of mutual recognition. The recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused if either he or she was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or if he or she actually received, by other means, official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial.

During the seminars there were discussions concerning the national legislations that allow a conviction in absentia even if the accused is not personally informed on the procedure (the subpoena is signed by a member of the family or displayed on the door of the house) and a following request to reopen the trial would be inadmissible, whereas according to the FD, if the accused is not personally informed on the trial, the requested state may refuse to recognize the decision considering that the right to a fair trial was breached as a consequence of the accused being denied the right to appear in court.

The ECHR standards regarding convictions in absentia were also discussed during the seminars (see comments regarding convictions in absentia on the moot-court case).

5. Can VV ask for the transfer of the supervision in other member state than Bulgaria?

According to article 5 of the FD, the supervision can be transferred to the Member State in which the sentenced person is lawfully and ordinarily residing, in cases where the sentenced person has returned or

wants to return to that State or to a different Member State on condition that this latter authority has consented to such forwarding. The aim of the transfer must be to enhance the prospects of the sentenced person's being reintegrated into society, by enabling that person to preserve family, linguistic, cultural and other ties, but also to improve monitoring of compliance with probation measures and alternative sanctions, with a view to preventing recidivism, thus paying due regard to the protection of victims and the general public.

6. If Bulgaria is taking over the supervision of the probation measures, what are the consequences if VV does not comply with the measures imposed (competence, applicable law)?

According to article 14 of the FD, the executing State shall have jurisdiction to take all subsequent decisions relating to a suspended sentence, conditional release, conditional sentence and alternative sanction, in particular in case of non-compliance with a probation measure or alternative sanction or if the sentenced person commits a new criminal offence and the law of the executing State shall apply in these cases.

Each Member State may, at the time of adoption of this Framework Decision or at a later stage, declare that as an executing State it will refuse to assume the responsibility in these cases (e.g. Poland, the Netherlands, Finland) and the jurisdiction shall be transferred back to the competent authority of the issuing State in case of non-compliance with a probation measure or alternative sanction if the competent authority of the executing State is of the view that a subsequent decision needs to be taken.

7. What is the nature of the time limit provided by article 12 of the FD?

The competent authority of the executing State shall decide as soon as possible, and within 60 days of receipt of the judgment whether or not to recognize the judgment and assume responsibility for supervising the probation measures or alternative sanctions.

It is a recommended time limit since paragraph 2 is accepting that under exceptional circumstances may not be possible for the competent authority of the executing State to comply with this time limit in which

case the competent authority of the issuing State shall immediately be informed by any means, giving the reasons for the delay and indicating the estimated time needed for the final decision to be taken.

SECTION II CASE-STUDY ON TRANSFER OF CONVICTED PERSONS

Keywords: accessory/complementary sanctions – consent - requested state - EAW

In 2010, Romanian citizen H.M. was convicted by Tivoli Tribunal- Italy to 16 years imprisonment, a fine of 8000 euros and the interdiction for life to public office and the right to be a guardian for aggravated robbery, destruction and rape, as provided by article 582, 605, 628, 635, 609 bis Criminal Code. The defendant did not appear in person at the trial after being summoned at the address he had declared for obtaining the work permit. The sentence was issued at 5.12.2010 and has become final at 24.03.2011.

The court has established that at 5.04.2009, in Guidonia, the defendant has threatened the victims A.B. and B.C. with a knife, destroyed their car with a baseball bat and stole a Tissault golden watch and some jewelry. On the same occasion, with the help of an accessory, the defendant raped the victim B.C.

The defendant is executing the sentence in a penitentiary in Italy starting 05.08.2011 (after having been apprehended in Italy) and has expressed his consent to be transferred to Romania, where his family is presently residing.

Task:

Fill in the certificate provided by the FD 2008/909/JHA to request Romania the transfer of H.M. in a Romanian penitentiary.

During the seminars all participants filled in the certificates attached to the FD with information as provided in the case-study, had discussions about the competent authorities to execute requests based on the FD according to the national legislation of each country, underlying the principle of mutual trust. Also, they accessed the www.ejn-crimjust.europa.eu. website in order to check the declarations made by the MSs, the

state of implementation in each MS and the competent authorities to execute requests based on the FD with which they are supposed to directly cooperate according to Article 5 paragraph 1 of the FD.

The competent authorities involved in this procedure are determined by each Member State that will inform the General Secretariat of the Council which authorities are competent to issue and enforce judgments within the context of the Framework Decision, and the General Secretariat makes this information available to all Member States (Article 2). Where the competent authority in the executing State is not known to the issuing authority, the latter may contact the European Judicial Network (Article 5(4)). If the authority in the executing Member State has no competence to recognise it, the authority that has already received the request will not dismiss it, but will forward the judgment and certificate ex officio to the relevant competent authority and will inform the issuing authority accordingly (Article 5(5)).

In order to facilitate the procedure, it is imperative to forward the certificate, dully filled in and translated into one of the official languages of the executing Member State or into another official language of the institutions of the European Union that it has declared it will accept (Article 23), while forwarding the judgment is optional. The judgment may be requested by the executing authority, in case the content is insufficient (Article 23 (3)). If the certificate is incomplete or manifestly does not correspond to the judgment, recognition may be postponed until a reasonable deadline set by the executing Member State for the certificate to be completed or corrected (Article 11).

In any case, the certificate will be forwarded to only one Member State at any one time (Article 5(3)).

Topics that were discussed:

1. Will the executing authority recognize the accessory/complementary sanctions and the fine?

The FD is only applicable to measures involving deprivation of liberty (imprisonment, confinement) on account of a criminal offence on the basis of criminal proceedings conducted by a court of law. The legal instrument will also be applicable in the case of a not-guilty verdict if the court has applied a measure

involving deprivation of liberty as a consequence of a criminal offence (medical confinement for accused found not-guilty insanity).

The FD will not apply to:

- pre-trial detention: a person can be transferred to execute pre-trial detention in the issuing state if located in a different MS (not necessarily the state of origin) on the basis of FD 2002/548/JHA;
- non-custodial measures will be executed under 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;
- financial penalties will be recognized and executed under FD 2005/214/JHA provided they were applied by a court in respect of a criminal offence or other authority of the issuing state provided that the person concerned had the opportunity to have the case tried by a court having jurisdiction in criminal matters;
- legal persons (deprivation of liberty does not apply to this type of subjects); in the case of confiscation and freezing of assets of legal persons FD 2006/783/JHA and 2003/577/JHA can be applicable;
- other types of liberty-depriving measures that are ordered by courts but not in respect of a criminal offence (e.g. confinement of dangerous persons).

The fact that, in addition to the sentence, a fine and/or a confiscation order has been imposed, which has not yet been paid, recovered or enforced, shall not prevent a judgment from being forwarded. Whenever possible, the specific legal instruments will be used or the decision can be partially recognized and enforced.

If the issuing state has applied the accessory penalty consisting in banning the exercise of several rights while the convicted person is executing the principal penalty (imprisonment), the accessory penalty will be applied as a direct mandatory consequence of the principal penalty of imprisonment, penalty to be executed in a Romanian penitentiary, according to the national legislation. So, the judge must adapt the accessory penalty choosing the closest one to the one imposed by the issuing court, but only if applied by this court and without the possibility to remove or add rights that the issuing court has already ruled upon (in an affirmative or negative way).

If the issuing court has also applied the complementary penalty of banning the exercise of the civil rights, this penalty will not be recognized nor executed on the territory if the requested state.

According to Article 1 of the FD in: 'sentence' shall mean 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.

The same terminology is used in Article 2 pct. 2 of the European Convention on the transfer of convicted persons, Strasburg 1983: a person sentenced in the territory of a Party may be transferred to the territory of another Party in order to serve the sentence imposed on him, while the conviction is defined as punishment or measure involving deprivation of liberty ordered by a court for a limited or unlimited period of time on account of a criminal offence.

Considering these limitations, as established in the international legal instruments, the executing state should not recognize and impose the complementary penalties since they do not involve any type of deprivation of liberty. It should also be taken into consideration that the conviction state has an interest in having this penalty executed on its own territory, respecting the content and the period initially established (if, for example, the penalty is perpetual and the executing state will impose it only for a period of ten years, the convicted person would be able to exercise the banned rights on the territory of the conviction state after the maximum period allowed under the law of the executing state).

2. Is it possible for the executing authority to have H.M. execute a different penalty (different nature or duration) than those applied by the issuing state?

Since the procedure established by the Framework Decision is covered by the principle of 'mutual recognition', it is not a matter of 'converting' the foreign conviction but rather of enforcing or continuing enforcement of a foreign conviction.

There are different ways in which States can recognize the sentences that may be imposed on persons who are to be transferred: continued enforcement or conversion. In both cases the executing state must refrain from altering the initial decision as much as possible.

The conversion is only possible when the sentence is incompatible with the law of the executing State in terms of its duration, when the penalty will be diminished to the maximum penalty provided for similar offences under the law of the executing State or of its nature, when the executing state will apply the penalty imposed for similar offences under the national law.

This possibility is a direct application of the principle *nulla poena sine lege*. Since the penalty will be executed in the requested state, it will have to be in the limits provided in its own law. Naturally, the issuing state has the possibility to withdraw the certificate if the difference is too big to consider that such a penalty would be a proper repressive response to the offence committed by the convicted person.

If the executing authority chooses the conversion, the punishment or measure should correspond as closely as possible to the sentence imposed in the issuing State and the adapted sentence shall not aggravate the sentence passed in the issuing State in terms of its nature or duration. Under no circumstances will the penalty be transformed into a pecuniary sanction.

In the case of multiple offences, the executing authority is bound to observe the penal treatment applicable under the law of the issuing state. The executing authority will not make a readjustment of the penalty under its own national law, the only possibility is to apply the maximum provided by law.

Regarding the issue of a different treatment applied to the Romanian citizens convicted by national courts than the one applied to the Romanian citizens convicted by foreign courts on the basis of a different system of individualization of penalty applied for several offences, Romanian Constitutional Court has ruled in decision no 285/27 March 2012, case no. 346D/2011, stating: ”The article does not rise privileges nor discriminations on arbitrary considerations as long as the Romanian citizens convicted in a Member State for an offence committed on its territory do not have the same juridical situation as the Romanian citizens convicted for an offence committed on Romanian territory, thus the juridical treatment cannot be identical; the different situation is an objective and reasonable justification for applying a different treatment.

The variety of custodial sentences as regulated by the legislations of the conviction states demanded a possibility for the executing state to adapt the sentence in order to have it executed on its territory.
This must be interpreted only as regarding the duration of the resulting penalty that is incompatible with the Romanian legislation and not the incompatibility of the systems applied for multiple offences. Considering these arguments, if the conviction court has established a resulting penalty cumulating each of the penalties applied for each of the several offences, according to the legislation of the conviction state, the executing authority cannot replace this system with the one imposed by the Romanian Criminal Code of 1969 (the most severe penalty with a possible increase of up to 5 years imprisonment).”

Also, Romanian High Court of Cassation and Justice has ruled on the same problem in a decision of interpretation no. 23/13.10.2009, request no. 13/2009, stating:" The executing court, analyzing the request to recognize the foreign decision in order to transfer the convicted person in a Romanian penitentiary must observe whether the nature of the penalty applied for several offences or its duration is incompatible with the Romanian legislation, without substituting the system applied to establish the resulting penalty by the conviction court with the Romanian system.

In case the penalty applied by the conviction court does not correspond entirely to the denomination or regime as stated in the Romanian system, this penalty is incompatible with the Romanian legislation. Thus, if the penalty is not provided by the Romanian criminal law (as the case of reclusion or unlimited detention) it is incompatible with the Romanian legislation and the executing authority will have to adapt it as much as possible to one penalty provided by the internal legislation (the Romanian court will not decide the execution of reclusion or undetermined detention but execution of limited detention).

There is incompatibility between the penalty applied by the conviction court and the Romanian legislation if the duration is higher than the maximum provided by the internal legislation: general maximum of 30 years imprisonment, the special maximum provided for the offence for which the person was convicted, the limit of all penalties added if several penalties were applied for several offences.

The conversion of the sentence is only applicable when the duration of the resulting penalty is higher than the limits imposed in the Romanian legislation and not when the systems applicable in the case of several offences are different."

3. Is the request admissible in the case of H.M. refusing to be transferred? Can he withdraw his initial consent?

The consent of the convicted person is no longer mandatory if the executing state is the one of nationality where the person lives (as it was required under the European Convention on the transfer of sentenced persons if there was no expulsion or flight case), but his opinion will be taken into consideration in order to assess the possibility of the social rehabilitation.

Also, the consent of the sentenced person is not required if:

- s/he 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;
- s/he has fled or otherwise returned in the issuing State.

The consent of the convicted person is given in accordance with the law of the issuing State, orally or in writing, usually in front of an official of the state. The executing state must be given the possibility to verify the consent through one of it's own officials. If due to the age or physical or mental condition, the consent could be vitiated, the convicted person can express the consent through his appointed legal representative.

The consent must be based on information provided on the legal provision that will be applied once the transfer is executed, in a language the s/he understands, with the assistance of an interpreter, if needed.

- The consent can be revocable or irrevocable, according to the national legislation of each MS.

4. Will Romania deny such a request if the requesting state had not implemented the FD 2008/909/JHA?

- The FD is replacing the corresponding provisions of the following conventions applicable in relations between the Member States:

- The European Convention on the transfer of sentenced persons of 21 March 1983 and the Additional Protocol thereto of 18 December 1997;

- The European Convention on the International Validity of Criminal Judgments of 28 May 1970;

- Title III, Chapter 5, of the Convention of 19 June 1990 implementing the Schengen Convention of 14 June 1985 on the gradual abolition of checks at common borders;

- The Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 13 November 1991.

In case the FD is not implemented yet in one of the MSs, the procedure can still take place under the conditions imposed of the prior legal instruments.

5. Can H.M. request to be transferred in a different state other than Romania?

The person convicted in a MS may execute the penalty in the conviction state or in a different state, which can be:

(a) the Member State of nationality of the sentenced person in which he or she lives; or

(b) the Member State of nationality, to which, while not being the Member State where he or she lives, 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 taken consequential to the judgment; or

(c) any other Member State if the competent authority consents where the convicted person lives and has been legally residing continuously for at least five years and will retain a permanent right of residence there.

Permanent right of residence means that the person concerned:

- has a right of permanent residence in the respective Member State in accordance with the national law implementing Community legislation adopted on the basis of Article 18, 40, 44 and 52 of the Treaty establishing the European Community, or

- possesses a valid residence permit, as a permanent or long-term resident, for the respective Member State, in accordance with the national law implementing Community legislation adopted on the basis of Article 63 of the Treaty establishing the European Community, as regards Member States to which such Community legislation is applicable, or in accordance with national law, as regards Member States to which it is not.

In all cases, there must be a link between the convicted person and the executing state that would favor the social rehabilitation during and after the execution of the custodial measure. The state of nationality is presumed to be the best place for this purpose considering the cultural, linguistic, social background that would contribute to the reinsertion of the convicted person and the FD establishes an obligation for the MSs to have their own nationals execute the custodial sentences in their own countries providing limited grounds for refusal. In all the other cases, the competent authority of the issuing State will take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, language, culture, social or economic background.

In order to establish whether the person lived in the requested state or had been residing there, there are several decisions of the Court of Justice of the European Union regarding article 4(6) of Council Framework

Decision 2002/584/JHA of 13 June 2002 (concerning the situation of non-nationals residents of the executing MS) that are relevant and could be taken into consideration:

Szymon Kozłowski, case C-66/08, decision of 7 July 2008,

Circumstances: Mr Kozłowski has been imprisoned in Stuttgart (Germany), where he is serving a custodial sentence of three years and six months, to which he was sentenced by two judgments of the Amtsgericht Stuttgart, in respect of 61 fraud offences committed in Germany. The Polish issuing judicial authority requested the German executing judicial authority, by a European arrest warrant to surrender Mr Kozłowski for the purposes of execution of the sentence of imprisonment of five months imposed on him by the Sąd Rejonowy w Tucholi.

CJEU: The term 'staying' cannot be interpreted in a broad way which would imply that the executing judicial authority could refuse to execute (…) merely on the ground that the requested person is temporarily located on the territory of the executing Member State.

(…)the terms 'resident' and 'staying' cover, respectively, the situations in which the person (…) has either established his actual place of residence in the executing Member State or has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence.

(…) it is necessary to make an overall assessment of various objective factors characterizing the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State.

Dominic Wolzenburg v. The Netherlands, case C-123/08, 6 October 2009

Circumstances: Mr Wolzenburg, a German national entered the Netherlands, where he works and resides under a letting agreement, without meeting the conditions for grant of a residence permit of indefinite duration on the ground that he had not yet resided in the Netherlands for a continuous period of five years. He was arrested and provisionally detained in the Netherlands on the basis of an alert in the Schengen Information System (SIS) for the enforcement of a final custodial sentence applied in Germany.

CJEU: a Member State is entitled to ensure, by means of a requirement for residence of a continuous period of at least five years, that execution (…) is refused only where the warrant is issued against requested persons who have genuine prospects of a future in the Netherlands. It is thus

legitimate to require a genuine connection between the requested person and the society in which that person wishes to be reintegrated after the sentence has been completed.

A supplementary administrative requirement, such as a residence permit of indefinite duration (…), cannot, where a Union citizen is concerned, constitute a precondition to application of the ground for optional non-execution.

João Pedro Lopes Da Silva Jorge v. France Case C-42/11, 5 September 2012

Circumstances: Mr. Da Silva Jorge is a Portuguese national resident in France married to a French national, employed as a long-distance lorry driver in France under a contract of indefinite duration by a company established in that Member State. He was arrested on the basis of a European arrest warrant issued by a court in Portugal for the purposes of enforcing a penalty of five years' imprisonment for drug trafficking.

CJEU: The Member State of execution is entitled to pursue such an objective reintegrating into society when the sentence imposed on him expires only in respect of persons who have demonstrated a certain degree of integration in the society of that Member State.

(…) it cannot be accepted that a requested person who, without being a national of the executing Member State, has been staying or been resident there for a certain period of time is not in any circumstances capable of having established connections with that State which could enable him to invoke that ground for optional non-execution.

It is for the executing judicial authority – in order to determine whether, in a specific situation, there are connections between the requested person and the executing Member State which lead to the conclusion that that person 'is staying' or 'resident' (…), to make an overall assessment of various objective factors characterizing the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State.

(…) in so far as that person demonstrates a degree of integration in the society of that Member State comparable to that of a national thereof, the executing judicial authority must be able to assess whether there is a legitimate interest which would justify the sentence imposed in the issuing Member State being enforced within the territory of the executing Member State.

it would be for the national court, on the basis of an overall assessment of the objective factors characterizing the situation of the requested person, to examine whether, in the main proceedings, there are sufficient connections between the person and the executing Member State – in particular family, economic and social connections – such as to demonstrate that the person requested is integrated in that Member State, so that he is in fact in a comparable situation to that of a national.

6. Are there any other options (provided by international legal instruments) for H.M. to be executing the sentence in Romania?

If the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law (art. 4 paragraph 6 of 2002/584 FD on EAW).

According to art. 5 paragraph 3 of 2002/584 FD on EAW where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.

7. Will a latter request from Italy regarding a different conviction of the same citizen, already transferred to Romania, be admissible?

According to art. 3 paragraph 2, this Framework Decision shall apply where the sentenced person is in the issuing State or in the executing State, so a latter request will be admissible (according to European Convention on the transfer of convicted persons, the request of transfer was only possible if the convicted person was still on the territory of the issuing state).

8. Will Romanian authorities be able to prosecute H.M. for an offence committed in 2008? Will Romanian authorities be able to surrender H.M. to Austria under FD 2002/584/JHA on the basis of an EAW issued after H.M. had been transferred to Romania?

According to art. 18 of the FD, a person transferred to the executing State pursuant to this Framework Decision shall not, subject to paragraph 2, be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed before his or her transfer other than that for which he or she was transferred (speciality rule).

The speciality rule shall not apply in the following cases:

(a) when the person having had an opportunity to leave the territory of the executing State has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it;

(b) when the offence is not punishable by a custodial sentence or detention order;

(c) when the criminal proceedings do not give rise to the application of a measure restricting personal liberty;

(d) when the sentenced person could be liable to a penalty or a measure not involving deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure in lieu may give rise to a restriction of his or her personal liberty;

(e) when the sentenced person consented to the transfer;

(f) when the sentenced person, after his or her transfer, has expressly renounced entitlement to the specialty rule with regard to specific offences preceding his or her transfer. Renunciation shall be given before the competent judicial authorities of the executing State and shall be recorded in accordance with that State's national law. The renunciation shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel;

(g) for cases other than those mentioned under points (a) to (f), where the issuing State gives its consent in accordance with paragraph 3.

Where the speciality rule is applicable, a request for consent shall be submitted to the competent authority of the issuing State, accompanied by the information mentioned in Article 8(1) of Framework Decision 2002/584/JHA and a translation as referred to in Article 8(2) thereof. Consent shall be given where there is

an obligation to surrender the person under that Framework Decision. The decision shall be taken no later than 30 days after receipt of the request. For the situations mentioned in Article 5 of that Framework Decision, the executing State shall give the guarantees provided for therein.

Similar provisions are included in art. 27, 28 of the FD 2002/584 regarding the prosecution or conviction of persons surrendered on the basis of a EAW.

With financial support from the
Specific Programme Criminal Justice
of the European Union

Chapter V Social rehabilitation and reintegration in the Framework Decisions 909 and 947/2008

Ioan DURNESCU

Keywords: rehabilitation – reintegration – consent – cooperation

The aim of this chapter is to explore the potential difficulties in understanding the concepts of rehabilitation and reintegration in the practice related to mutual trust and sentence recognition.

The concepts of social rehabilitation and reintegration are central to both framework decision 909 and 947.

Recital 8 of the FD 947/2008 states that:

> 'The aim of mutual recognition and supervision of suspended sentences, conditional sentences, alternative sanctions and decisions on conditional release is to enhance the prospects of the sentenced person's being reintegrated into society, by enabling that person to preserve family, linguistic, cultural and other ties, but also to improve monitoring of compliance with probation measures and alternative sanctions, with a view to preventing recidivism, thus paying due regard to the protection of victims and the general public'

Besides the rather complicated formulation, a few ideas can be discerned. First, the reintegration of the person is associated at least partly to the social bond theory. The assumption behind the text seems to be that the social and cultural ties can only be positive and pro-social. However, the research recommends some caution in this respect. Researchers like Martinez and Abrams (2013) argue that sometimes the family relationships can be toxic: 'family members provided the support and comfort of "the ties that bind" but with potentially unrealistic expectations and re-enactment of old roles and negative dynamics' (p. 169).

Secondly, the reintegration is placed in the context of monitoring compliance with the requirements. While this might be true, research seems to suggest that compliance is a rather complex and 'liquid' process that comes and goes according to many factors. Scholars such as Robinson and McNeill (2008), Bottoms (2001), Tyler (2003), McCulloch (2015) and so on emphasise that compliance is a dynamic process that can be seen in connection to legitimacy, the threat of breach, enforcement style, the involvement of the

offender (co-production) etc. None of these aspects are mentioned in the FD text. Not to mention that they are not so observed into the practice routines of the probation officers around the world. This observation made Robinson and McNeill (2008) call the current practices as based on compliance myopia, defined as short sighted and narrowly focused view.

Closely linked to compliance is the issue of consent. It seems from the literature cited above that co-production and the involvement of the offender into his/her own process of rehabilitation is crucial in producing substantive / long term compliance. Essential to any form of co-production is consent. In this respect both FDs have some flaws. The FD 947/2008 manages to skillfully avoid the issue of consent by stating that the issuing State:

> '…may forward a judgment and, where applicable, a probation decision to the competent authority of the Member State in which the sentenced person is lawfully and ordinarily residing, in cases where the sentenced person has returned or wants to return to that State.'

The transfer may also take place to another Member State on the condition that this state has consented to such forwarding.

The assumptions behind these provisions are that once the person returned or wants to return to the Member State where he/she is lawfully residing or have a job or wishes to continue the studies, he/she implicitly consented to the forwarding. As we know from the literature and the doctrine, consent needs to be clear and informed. How many offenders know what style of supervision is exercised in the Executing State? Do they know about the breaching procedures in that state? Once they are transferred to another State, the offenders might feel 'tricked' or 'trapped' into a supervision system they did not know before making the decision of transfer. This disappointment may have serious consequences on the legitimacy and compliance.

The issue of consent is even more problematic under the FD 909/2008. Although the general rule is that prisoner's transfer will take place with the prisoner's consent, there are three situations provided in the FD text where consent is not required:

> (a) the Member State of nationality of the sentenced person in which he or she lives; or
>
> (b) the Member State of nationality, to which, while not being the Member State where he or she lives, 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 taken consequential to the judgment; or
>
> (c) any Member State other than a Member State referred to in (a) or (b), the competent authority of which consents to the forwarding of the judgment and the certificate to that Member State.

In these cases the sentenced person is not required to consent for the transfer. Again, the lack of consent may create a lot of frustration and disappointment in the prisoners and this may reflect in the way they will interact with prison staff in the future. As a vague consolation, the FD 909/2008 recommends that prisoner's view regarding the forwarding will be collected by the court.

The third dimension that results from the Recital 8 of the FD 947/2008 is that reintegration is conceived as contributing to reducing recidivism, paying due regard to the protection of victims and the general public. All these claims may be true but it is not clear in the FD text how these generous aims will be achieved. For example, the word 'victim' is mentioned only when the aims of the FD are stated. No further reference to the victim, how the FD will contribute to the protection of the FD and so on, is made in the rest of the paper.

Article 1 of the same FD restates the aim of:

> '… facilitating the social rehabilitation of sentenced persons, improving the protection of victims and of the general public, and facilitating the application of suitable probation measures and alternative sanctions, in case of offenders who do not live in the State of conviction'

This article suggests that another aim of the FD is to promote suitable probation measures and alternative sanctions. Indeed, as acknowledged in explanatory note and also in the expert groups' discussions, one of the aims of the FD is to encourage courts to impose community sanctions or alternatives sanctions to foreigners and avoid the inflation of prison penalties. By avoiding the excessive use of incarceration, the FD may indirectly contribute to the offender rehabilitation.

The same aim is designed more or less for the FD 909/2008:

> 'Enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation of the sentenced person.'

where the social rehabilitation:

> 'take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State'

Looking at Recital 8 and Article 1, it can be inferred that the concepts of social rehabilitation and reintegration are used in a loose manner. Although they are used as if they share the same semantics they should not read like that at all.

The meaning of rehabilitation is contested and variable but most scholars tend to agree that the core of the concept is the idea of a 'change for the better' (Robinson and Crow 2009:10), a process that involves some psychosocial dimensions. De Wree et al. (2009) object, however, that none of these processes is adequately recognized or supported by the FD and the orientation towards change that is essential in the process of rehabilitation is only rarely found in the FD.

Complementary to rehabilitation, reintegration means 'a process that follows a period of formal punishment whereby the ex-offender resumes life as a member of community' (Robinson, 2007). Reintegration is a distinct, if complementary, concept, referring typically to the processes that follow a custodial sentence whereby the ex-prisoner resumes life back in society.

If rehabilitation involves a behavioral and cognitive dimension, the concept of reintegration suggests more a symbolic or a practical dimension.

As both FDs define their main aim in connection to offender's social and cultural ties, it can be concluded that they actually mean reintegration rather than rehabilitation. But reintegration is not only about meaningful ties. We know from the literature that that reintegration is also about employment, education, mental health treatment, addiction treatment, identity papers and so on.

It may be useful for the judiciary when looking at rehabilitation/reintegration prospects to pay a close attention to these factors as well as the social/cultural ties. These ties are mentioned in the FDs as examples of factors. Depending on each case, other relevant factors as the ones mentioned above may be included in the assessment. Consent and cooperation are another two factors that should be pursued

anytime this is possible.

References

Bottoms, A. (2001) Compliance and Community Penalties in A.E. Bottoms, L. Gelsthorpe, Rex (eds), Community Penalties: Change and Challenges, Willan Publishing;

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, Available at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008F0909;

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, Available at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008F0947;

De Wree, E., Vander Beken, T., Vermeulen, G. (2009) The transfer of sentenced persons in Europe, Punishment and Society, Vol11(1): 111-128;

Martinez D., J., Abrams, L.,S. (2013) Informal social support among returning young offenders: a metasynthesis of the literature, International Journal of Offender Therapy and Comparative Criminology 57(2) pp.169-190;

McCulloch, T. (2015), Beyond compliance: Participation, co-production and change in justice sanctions, European Journal of Probation, Vol. 7(1): 40-57;

Robinson, G. (2008) Late-modern rehabilitation: The evolution of a penal strategy. *Punishment and Society*, 10(4), 429-445;

Robinson, G., Crow, I. (2009). Offender Rehabilitation: Theory, Research and Practice. London, UK: Sage.

Robinson, G., McNeill, F. (2004) Purposes Matters: The Ends of Probation, in G. Mair (ed.) What Matters in Probation Work. Cullompton: Willan;

Tyler, T., R. (2003) Procedural justice, legitimacy, and the effective rule of law In M. Tonry (Ed.), Crime and justice-A review of research (volume 30; pp. 431-505). Chicago: University of Chicago Press.

With financial support from the
Specific Programme Criminal Justice
of the European Union

Chapter VI Council Framework Decision 2008/675/JHA[7] of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings

Daniel Constantin MOTOI *[8]

2008/675 – How easy is these days to assess the criminal history of an offender in the new proceedings within the European Union?

Keywords: principle of equivalence - example of national transposition laws - practical challenges and examples

In these days people are moving freely across Europe and some of them are committing crimes abroad. In this regard, it is important for the judicial authorities to know their criminal history, in order to asses, in the course of the new criminal proceedings, whether these persons present a serious danger to the public order, to the victims of crimes and why not, in the end, have an effective criminal justice.

The adoption of one or more instruments establishing the principle that a court in one Member State must be able to take account of final criminal judgments rendered by the courts in other Member States for the purposes of assessing the offender's criminal record and establishing whether he has reoffended, and in order to determine the type of sentence applicable and the arrangements for enforcing it was one of the conclusions of the Tampere European Council, when was adopted the programme of measures to implement the principle of mutual recognition of decisions in criminal matters.

In order to do this, the competent judicial authorities need to take into account previous convictions handed down against the same person for different facts in other Member States to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law.

The idea of taking into account of convictions in the course of new criminal proceedings behind the Council Framework Decision 2008/675/JHA of 24 July 2008 is not new. In article 56 of European

[7] OJ 220/32, 15.08.2008

***8 Mr. Daniel Constantin MOTOI - Judge, 4-th District of Bucharest First Instance Court, Romania, motoidaniel79@yahoo.com**

Convention on the International Validity of Criminal Judgments (The Hague, 28.V.1970) it is provided that Each Contracting State shall legislate as it deems appropriate to enable its courts when rendering a judgment to take into consideration any previous European criminal judgment rendered for another offence after a hearing of the accused with a view to attaching to this judgment all or some of the effects which its law attaches to judgments rendered in its territory. It shall determine the conditions in which this judgment is taken into consideration.

In article 4 and also in preamble 10 of the Council Framework Decision 2008/675/JHA of 24 July 2008 it is mentioned that it shall replace Article 56 of the European Convention of 28 May 1970 on the International Validity of Criminal Judgments as between the Member States parties to that Convention, without prejudice to the application of that Article in relations between the Member States and third countries.

At a glance, there are three aims of the Council Framework Decision 2008/675/JHA:

- establish a minimum obligation for Member States to take into account convictions handed down in other Member States (preamble 3 paragraph 1),

- enable consequences to be attached to a previous conviction handed down in one Member State in the course of new criminal proceedings in another Member State to the extent that such consequences are attached to previous national convictions under the law of that other Member State (preambles 5 and 6) and,

- determine the conditions under which, in the course of criminal proceedings in a Member State against a person, previous convictions handed down against the same person for different facts in other Member States, are taken into account (article 1).

Unlike the European Convention on the International Validity of Criminal Judgments, in the Council Framework Decision 2008/675/JHA of 24 July 2008 there is an obligation to take foreign convictions into account unless we don't find in the provisions from article 3 paragraph 3 to 5 of the Framework Decision (when the taking into account is not mandatory).

Also, unlike the European Convention on the International Validity of Criminal Judgments, the Framework Decision does not provide anything with regard to the prior hearing of the convicted person or to the convictions given in absentia, which means, that, in general, these conditions will not impede to the taking into account of foreign convictions in the course of new criminal proceedings.

Still, in preamble 12 of the Framework decision it is provided that the Framework Decision respects the fundamental rights and observes the principles recognized by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union and in article 1 paragraph 2 it is provided that this Framework Decision shall not have the effect of amending the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty.

This means that taking into account of the conviction in some Member States in the course of new criminal proceedings is excluded in cases, for example, where there are reasonable grounds to assume that it would infringe the freedom and rights of an individual convicted in another Member State.

For example, in Poland it was provided the condition that a previous conviction should comply with the right to a fair trial, within the meaning of Article 6 of the European Convention on Human Rights.

In Romania, it is provided the condition not to exist objective grounds that the final conviction was given by breaching the fundamental rights and freedoms, and especially that the penalty was imposed to a person on the grounds of sex, race, religion, ethnic origin, citizenship, language, political believes or sexual orientation, and the convicted person hadn't the possibility to complain against these circumstances before European Court for Human Rights or to other International Court.

When it comes to the principle of equivalence from the preambles 5 and 6 and article 3 paragraph 1 of the Framework Decision, the Framework Decision provides that Each Member State shall ensure that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member States are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law.

Moreover paragraph 2 of the article 3 of the Framework Decision provides that paragraph 1 shall apply at the pre-trial stage, at the trial stage itself and at the time of execution of the conviction, in particular with regard to the applicable rules of procedure, including those relating to provisional detention, the definition of the offence, the type and level of the sentence, and the rules governing the execution of the decision.

When Member States have transposed the Framework Decision, most of them have provided the dual criminality condition, which means that the previous final conviction will be taken into account only if it is based on a crime that is also recognized and punishable under the law of that Member State.

It means that, if a crime, on which a previous conviction is based, is not recognized and punishable in another Member State, then, it will be impossible for the judicial authorities, in the course of new criminal proceedings, to attach equivalent legal effects as to previous national convictions, in accordance with national law.

It is, for example, the case for Poland, Romania, Spain and France. In addition, in Romania, in case of a penalty applied for more crimes, the dual criminality checking is made for each of the crimes. In France, it is provided that, for the appreciation of the judicial effects of the convictions given by other Members States, the qualification of the facts is determined in relation to the legal incrimination defined by the national law and only the equivalent penalties of those imposed by foreign Courts provided by the national law are taken into consideration.

In case of Poland we find additional conditions imposed that need to be checked before taking into account previous convictions handed in other Member States. There are the conditions to have sufficient information about the previous conviction, the penalty imposed is not known to the Polish criminal law, previous conviction cannot be taken into account if the matter is subject to a remission measure having the force of amnesty or pardon, the offender would not be punished under Polish law, taking into account would lead to the repeal or amendment of the judgment.

Also, in Spain, in the course of new criminal proceedings, judicial authorities need to have sufficient information about the previous convictions handed down against the same person for different facts in other Member States.

If we look at the transposition provisions in national laws we can see that Member States have mentioned that previous convictions are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law.

For example, in case of Belgium, it is provided that the rules for recidivism will apply also to previous convictions given in other Member States and that previous convictions given in other Member States will be taken into consideration like the national decisions and they will produce the same judicial effects of these. It is also provided that this provision (the taking into consideration) will not apply to the legal provision (article 65 paragraph 2 of the Belgian Criminal Code) which relates to the establishment of a single penalty in case of multiple crimes committed with the same criminal intention.

In Romania, it is provided (article 41 paragraph 3 of the Romanian Criminal Code) that, in order to establish a case of recidivism, a foreign conviction given for a crime which is punishable under the national law can be taken into account only under the condition that the foreign condition has been recognized according to the national law (which is Law 302/2004 on international judicial co-operation in criminal matters).

Apart from this provision, if information on foreign conviction is transmitted and has been entered into the criminal record of the offender, the competent judicial authorities can, in the course of new criminal proceedings take into consideration any foreign conviction the at the pre-trial stage (e.g. when deciding a restrictive measure), at the trial stage itself (e.g. when imposing the type and level penalty to be imposed) and at the time of execution of the conviction (e.g. when placing the person in a more severe regime based on the crime committed, penalty imposed, and on the criminal record of the convicted person).

In Spain, article 14 from the Law 7/2014 provides that foreign convictions are taken into account and will produce the same effects as they are given by domestic courts under the conditions that the facts at the date of the commission are punishable under the Spanish law and that sufficient information is provided in relation to that conviction through judicial cooperation or by means of exchange of information extracted from the criminal records.

In Poland, article 107a of the Polish Criminal Code provides that article 108 of the same code (in case of multiple offences) will not be applicable if one the conviction is given in other Member States.

In France, article 132-23-1 of the Criminal Code provides that the convictions given in other Member States are taken into account under the same conditions like the convictions rendered by national courts and they produce the same judicial effects as they were domestic convictions.

As we have seen, paragraph 2 of the article 3 of the Framework Decision provides that the taking into account, in the course of the new criminal proceedings, shall apply at the pre-trial stage, at the trial stage itself and at the time of execution of the conviction, in particular with regard to the applicable rules of procedure, including those relating to provisional detention, the definition of the offence, the type and level of the sentence, and the rules governing the execution of the decision.

This means in practice that at the pre-trail stage a previous conviction can be a factor in the decision of the competent judicial authorities not to further investigate a case and to halt procedures if there is no public interest in doing so.

For example, in Romania, article 318 of the Criminal Procedural Code provides that in some cases, along with other conditions (the maximum penalty provided by law for the offence to be 7 years, the seriousness of the crime committed, efforts of the offender to put aside the consequences of the crime committed) the criminal history of the offender is a factor for the prosecutor to decide not to further investigate a case and to halt procedures if there is no public interest in doing so.

Also, a previous conviction can influence the decision on pre-trial detention rendered by a judge or refusing a bail. But, this factor should be seen in close connection with the relevant case law of the European Court of Human Rights. As an example we can give here the judgment Scundeanu[9] against Romania in which the Court mentioned that it will be a breach of article 5 paragraph 2 of the Convention a decision to provisionally arrest a person only based on the fact that this person has a criminal record. In this situation the judicial authorities must analyse the concrete situation of the person and offer relevant and sufficient grounds to arrest and keep in custody an offender, not only the criminal record of the latter.

At the trail stage a previous conviction is a factor in deciding the type, level and extent of a sentence. It can also be a factor in deciding whether there are aggravating circumstances.

In Romania, in some conditions (if the foreign conviction is recognized according to the national law and it is the conditions for recidivism according to the national law are met – article 41 of the Criminal Code), the previous conviction will exclude institutions like giving up applying the penalty, postponement of the application of the penalty, the supervised suspension of penalty execution applied. Also, if the conditions for recidivism are not met, the previous conviction is taken into account in deciding the type, level and extent of a sentence and the offence in respect of which the conviction was handed down is considered to be relevant for the offence trailed in the course of new criminal proceedings (article 74 of the Criminal Code).

In the execution stage a previous conviction can be factor in deciding the conditional early release of the person, the regime under which the convicted person will execute the penalty imposed in the course of new criminal proceedings, in the decision to commute a life sentence into a fixed term imprisonment or to change the regime under which the convicted person will execute the penalty imposed.

In Romania, when deciding the conditional early release of the person, as a condition, the court must be convinced that the convicted person will reintegrate into society, and in doing so, the court will take into account the criminal history of the convicted person.

Also, in the conditions provided by Law 254/2013 regarding the execution of the custodial penalties, the criminal history of the convicted person, along with other conditions (the nature of the crime committed in the new criminal proceedings, the behavior of the convicted person prior to the judgment becomes final –

[9] Case number 10193/02, 02.02.2010

e.g. if the convicted person was in provisional arrest during the new criminal proceedings) can determine a more lenient or severe regime than the one which normally will have been imposed based only on the level of the penalty imposed in the course of new criminal proceedings.

According to Article 2 of the Framework Decision for the purposes of this Framework Decision 'conviction' means any final decision of a criminal court establishing guilt of a criminal offence.

Although this article indicates that the conviction should normally be a final decision of a criminal court establishing guilt of a criminal offence, still, paragraph 2 of the preamble 3 provides that the Framework Decision should not prevent Member States from taking into account, in accordance with their law and when they have information available, for example, final decisions of administrative authorities whose decisions can be appealed against in the criminal courts establishing guilt of a criminal offence or an act punishable under national law by virtue of being an infringement of the rules of law.

Seeing article 2 of the Framework Decision it is clear that the decision must be final in order to fully respect the procedural rights guarantees for suspects and accused persons in criminal proceedings, and especially the presumption of innocence[10]. This is valid also in the case decisions of administrative authorities whose decisions can be appealed against in the criminal courts establishing guilt of a criminal offence or an act punishable under national law by virtue of being an infringement of the rules of law.

In addition, preamble 13 provides that the Framework Decision respects the variety of domestic solutions and procedures required for taking into account a previous conviction handed down in another Member State. The exclusion of a possibility to review a previous conviction should not prevent a Member State from issuing a decision, if necessary, in order to attach the equivalent legal effects to such previous conviction. However, the procedures involved in issuing such a decision should not, in view of the time and procedures or formalities required, render it impossible to attach equivalent effects to a previous conviction handed down in another Member State.

In most of the Member States the condition that the conviction must be final of the Framework Decision was not expressly provided, the legal provisions referring to previous conviction, without mentioning whether this conviction is final or not.

[10] Report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decision 2008/675/JHA of 24 July 2008 on taking into account of convictions in the Member States of the European Union in the course of new criminal proceedings, Brussels, 2.6.2014 COM(2014) 312 final, p. 7

For example, Belgium, refers to the previous conviction given in another Member State and that rules for recidivism will apply, but there is no reference to the fact that the previous conviction should be final or not.

Also France provides that the convictions given in other Member States are taken into account under the same conditions like the convictions rendered by national courts and they produce the same judicial effects as they were domestic convictions without reference to the fact that the previous conviction should be final or not.

Poland stipulates that the convictions given in other Member States are taken into account if the conditions provided by law are met, also without reference to the fact that the previous conviction should be final or not.

Romania provides that in order to establish a case of recidivism, a foreign conviction given for a crime which is punishable under the national law can be taken into account only under the condition that the foreign condition has been recognized according to the national law. Still, Law 302/2004[11] on international judicial co-operation in criminal matters provides that one of the conditions to recognize a foreign conviction is that of the judgment is final.

In Spain, Law 7/2014, in article 14 paragraph 1 makes a clear reference to the fact that the convictions given in other Member States must be final in order to produce the same effects as they are given by domestic courts.

We have seen that Member States have transposed the obligation to take into account. But the Framework Decision provides limits for this obligation (which means, in practice, that in these situations it is not mandatory to take into account previous convictions, but still it is a possibility to do so if the national transposing law allows).

For example, in article 3 paragraph 3 of the Framework Decision it is mentioned that the taking into account of previous convictions handed down in other Member States, as provided for in paragraph 1, shall not have the effect of interfering with, revoking or reviewing previous convictions or any decision relating to their execution by the Member State conducting the new proceedings.

In accordance with paragraph 3, paragraph 1 shall not apply to the extent that, had the previous conviction been a national conviction of the Member State conducting the new proceedings, the taking into

[11] Law no. 302 of 28 June 2004 on international judicial co-operation in criminal matters as amended and supplemented by Law no. 300/2013

account of the previous conviction would, according to the national law of that Member State, have had the effect of interfering with, revoking or reviewing the previous conviction or any decision relating to its execution (article 3 paragraph 4 of the Framework Decision).

The Framework Decision gives some examples on what does it means interfering with the previous conviction or any decision relating to its execution.

Preamble 14 of the Framework Decision states that interference with a judgment or its execution covers, inter alia, situations where, according to the national law of the second Member State, the sanction imposed in a previous judgment is to be absorbed by or included in another sanction, which is then to be effectively executed, to the extent that the first sentence has not already been executed or its execution has not been transferred to the second Member State.

If the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed, paragraphs 1 and 2 shall not have the effect of requiring Member States to apply their national rules on imposing sentences, where the application of those rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings (article 3 paragraph 5 of the Framework Decision)

Where, in the course of criminal proceedings in a Member State, information is available on a previous conviction in another Member State, it should as far as possible be avoided that the person concerned is treated less favourably than if the previous conviction had been a national conviction (preamble 8 of the Framework Decision).

Article 3 paragraph 5 of the Framework Decision should be interpreted, inter alia, in line with recital 8, in such a manner that if the national court in the new criminal proceedings, when taking into account a previously imposed sentence handed down in another Member State, is of the opinion that imposing a certain level of sentence within the limits of national law would be disproportionately harsh on the offender, considering his or her circumstances, and if the purpose of the punishment can be achieved by a lower sentence, it may reduce the level of sentence accordingly, if doing so would have been possible in purely domestic cases (preamble 9 of the Framework Decision).

The abovementioned provisions with regard to the limits for the obligation to take into account need to transposed and applied with utmost consideration because if incorrect transposed or misunderstanding of these provisions can lead to situations in which a person is treated less favourably than if the previous

conviction had been a national conviction which exactly what preamble 8 of the Framework Decision forbids.

Usually, situations provided by article 3 paragraphs 3, 4 and 5 of the Framework Decision appear in cases of merged penalties for multiple offences.

For example, in the course of the new criminal proceedings the court can find out (*ex officio* or from the prosecutor, the offender itself or his lawyer) about a previous conviction given in another Member States which is not yet fully executed or is a conditional sentence.

If the court were to take into consideration the previous conviction this would mean, according to the national law, to merge the previous conviction with the new conviction and to impose only one penalty or first to revoke the conditional sentence and then merge it with the previous conviction with the new conviction and in the end impose only one custodial sentence.

We consider that this situation is expressly covered by preamble 14 of the Framework Decision, because, the sanction imposed in the previous judgment is to be absorbed by or included in another sanction, which is then to be effectively executed, to the extent that the first sentence has not already been executed or its execution has not been transferred to the second Member State according to other legal instruments (e.g. Council Framework Decision 2008/909/JHA[12] 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 or Council Framework Decision 2008/947/JHA[13] 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).

In Romania, in this situation, it is not possible to take into consideration a previous conviction given in another Member States which is not yet fully executed or it is a conditional sentence because it automatically means to interfere with this judgment and apply the rules for merging penalties or for recidivism including the penalty that has not been transferred according to the procedure lay down by the Council Framework Decision 2008/909/JHA of 27 November 2008 or by the Council Framework Decision 2008/947/JHA of 27 November 2008.

[12] OJ L 81/24, 27.03.2009
[13] OJ L 337/102, 16.12.2008

In Poland, article 107a of the Criminal Code provides that article 108 of the same code (the case of multiple convictions for multiple offences) will not be applicable if one the conviction is given in other Member States.

In Spain it is provided that the taking into account of foreign conviction would not take place if this were to interfere in any way with a final conviction issued before by the Spanish courts or with the rulings issued for the enforcements of the above mentioned previous convictions. Also, the taking into account of foreign conviction would not take place in the ongoing criminal proceedings for offences committed before the convictions issued in another Member State. Another limitation is that the taking into account of foreign conviction will not take place if it this were interfering with the acts issued according to article 988 of the Spanish Criminal Procedural Law, according to which a judge is establishing, in cases of multiple convictions, the time to be served according to article 76 of the Spanish Criminal Code.

In the situation in which the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed the Framework Decision this also means that it will not require Member States to apply their national rules on imposing sentences, where the application of those rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings.

This a situation in which, the court, basically, in the course of new proceedings if it were to take into consideration the previous conviction it would limit the margin of discretion with regard to the type, level and extent of a sentence.

In Romania, this situation is covered by article 1401 of the Law 302/2004 on international judicial co-operation in criminal matters and this article provides that the recognition of a foreign judgment can be done at the request of the convicted person or the prosecutor but only if this is mandatory for the new proceedings or can improve the situation of the convicted person in the course of the new proceedings or his reintegration.

In Belgium, it is provided that the taking into consideration will not apply to the legal provision (article 65 paragraph 2 of the Belgian Criminal Code) which relates to the establishment of a single penalty in case of multiple crimes committed with the same criminal intention.

In Spain, article 14 paragraphs 2 letters c) from Law 7/2014 provides that in cases of aggregated sentences the courts will not take into account the previous conviction means because it interferes with the acts issued according to article 988 of the Spanish Criminal Procedural Law.

Still, does article 3 paragraph 5 of the Framework Decision also cover the situation in which a convicted person requests a merge penalty between a fully executed penalty from a foreign conviction and a final national sentence imposing also a custodial sentence? Do we have a new criminal proceeding in this case? Would it this situation limit in any way a judge in imposing a sentence in these proceedings?

We think that in this situation we are not talking about new criminal proceedings in the sense provided by the Framework Decision and that there are no grounds to refuse such a request if the conditions provided by national law are met for similar cases.

For example, in Romania, such a request would be admissible and this would mean recognising the previous conviction and merging the penalties according the national law in this respect and deducting all the time spent in custody for both of the penalties. Only if the admission of it would not be in favour of the convicted person (e.g. the merging of the penalties will worsen his situation) then the request is denied by the court.

In France, also the national rules for merging penalties are applied if the conditions provided in article 132-23-1 and 2 are met with regard to the taking into account of foreign convictions.

In Spain and Poland, the situation is different and according to the national provisions, in cases of aggregated sentences the courts will not take into account the previous conviction given in another Member States. Also, in Belgium, the national law only refers to the foreign convictions with regard to recidivism and there is no provision in relation to cases of merging penalties.

Chapter VII Council Framework Decision 2009/315/JHA[14] of 26 February 2009 on the organization and content of the exchange of information extracted from the criminal record between Member States

Daniel Constantin MOTOI

2009/315 - Improving the circulation of information on convictions within the European Union

Keywords: scope of application - obligations for the Member States involved - procedures

According to Article 29 of the Treaty on European Union, the European Union has set itself the objective to provide citizens with a high level of safety within an area of freedom, security and justice. This objective presupposes the exchange of information concerning criminal convictions of persons who reside in the territory of the Member States between the competent authorities of the Member States.

On 25 March 2004[15], the European Council instructed the Council to examine measures on the exchange of information on convictions for terrorist offences and the possibility of a European register on convictions and disqualifications, and the Commission in its communication on measures to be taken to combat terrorism and other forms of serious crime, in particular to improve exchanges of information, stressed the importance of an effective mechanism for transmission of information on convictions and disqualifications.

Under Council of Europe Recommendation No R (84) 10[16] on the criminal record and rehabilitation of convicted persons, the main aim of establishment of the criminal record is to inform the authorities responsible for the criminal justice system of the background of a person subject to legal proceedings with a view to adapting the decision to be taken to the individual situation. Since all other use of the criminal record that might compromise the chances of social rehabilitation of the convicted person must be as limited as possible, the use of information transmitted under this Decision for use otherwise than in the course of criminal proceedings can be limited in accordance with the national legislation of the requested State and the requesting State..

14 OJ L 93/23, 07.04.2009
15 Presidency Conclusions of the Brussels European Council (17 and 18 June 2004), Brussels, 19 July 2004
16 Adopted by the Committee of Ministers on 21 June 1984 at the 374th meeting of the Ministers' Deputies

The Framework Decision 2009/315/JHA is a response to the wishes expressed by the Council on 14 April 2005[17], following the publication of the White Paper on exchanges of information on convictions and the effect of such convictions in the European Union and the subsequent general discussion thereof. Its main aim is to improve the exchange of information on convictions and, where imposed and entered in the criminal records of the convicting Member State, on disqualifications arising from criminal conviction of citizens of the Union.

Relation with other legal instruments

According to article 12 paragraph 4 of the Framework Decision 2009/315/JHA it repeals the Council Decision 2005/876/JHA[18] of 21 November 2005 on the exchange of information extracted from the criminal record, a legal instrument that was designed for the Member States in order to simplify the procedures for transferring documents between States, using, if necessary, standard forms to facilitate mutual judicial assistance.

In relations between the Member States, this Framework Decision supplements the provisions of Article 13 of the European Convention on Mutual Assistance in Criminal Matters[19], its additional Protocols of 17 March 1978[20] and 8 November 2001[21] and also the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union[22] and its Protocol of 16 October 2001[23] (article 12 paragraph 1 of the Framework Decision).

Also, the Framework Decision 2009/315/JHA provides that for the purposes of the Framework Decision, Member States shall waive the right to rely among themselves on their reservations to Article 13 of the European Convention on Mutual Assistance in Criminal Matters (article 12 paragraph 2 of the Framework Decision).

---

17 Proposal for a council framework decision on the organisation and content of the exchange of information extracted from criminal records between Member States

18 OJ L 322/33, 9.12.2005

19 European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20.IV.1959

20 Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 17.III.1978

21 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 8.XI.2001

22 OJ 2000/C 197/01

23 OJ C 326, 21.11.2001, p. 2–8

Article 13 paragraph 1 of the European Convention on Mutual Assistance in Criminal Matters provides that a requested Party shall communicate extracts from and information relating to judicial records, requested from it by the judicial authorities of a Contracting Party and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in like case. If it not a criminal matter then the request shall be complied with in accordance with the conditions provided for by the law, regulations or practice of the requested Party (paragraph 2 of article 13 from the Convention).

Without prejudice to their application in relations between Member States and third States, this Framework Decision replaces in relations between Member States which have taken the necessary measures to comply with this Framework Decision and ultimately with effect from 27 April 2012 the provisions of Article 22 of the European Convention on Mutual Assistance in Criminal Matters, as supplemented by Article 4 of said Convention's additional Protocol of 17 March 1978 (article 12 paragraph 3 of the Framework Decision).

According to the article 22 paragraph 1 of the European Convention on Mutual Assistance in Criminal Matters each Contracting Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter Party, entered in the judicial records. Ministries of Justice shall communicate such information to one another at least once a year. Where the person concerned is considered a national of two or more other Contracting Parties, the information shall be given to each of these Parties, unless the person is a national of the Party in the territory of which he was convicted.

Furthermore, according to the paragraph 2, any Contracting Party which has supplied the above-mentioned information shall communicate to the Party concerned, on the latter's request in individual cases, a copy of the convictions and measures in question as well as any other information relevant thereto in order to enable it to consider whether they necessitate any measures at national level. This communication shall take place between the Ministries of Justice concerned.

The Framework Decision 2009/315/JHA also supplements article 6 paragraph 8 letter b) of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union which provides that the following requests or communications shall be made through the Central authorities of the Member States - notices of information from judicial records as referred to in Article 22 of the European Mutual Assistance Convention. However, requests for copies of convictions and measures as referred to in Article 4 of the Additional Protocol to the European Mutual Assistance Convention may be made directly to the competent authorities.

The Framework Decision supplements the Council Framework Decision 2008/675/JHA of 24 July 2008[24] on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings in the sense that, prior to the taking into account any foreign conviction, information on this conviction should be transmitted by the Member States of conviction to the Member States of the nationality of the convicted person and entered into the criminal record of the latter person.

Also, it is provided that the Framework Decision shall not affect the application of more favourable provisions in bilateral or multilateral agreements between Member States (article 12 paragraphs 5 of the Framework Decision).

Scope of application

The Framework Decision expressly provides that it only applies to the transmission of information extracted from criminal records concerning natural persons.

Still, the application of the mechanisms established by the Framework Decision to the transmission of information extracted from criminal records concerning natural persons should be without prejudice to a possible future broadening of the scope of application of such mechanisms to the exchange of information concerning legal persons (preamble 7 of the Framework Decision).

Objectives of the Framework Decision

According to article 1 of the Framework Decision the purposes of it are:

- define the ways in which a Member State where a conviction is handed down against a national of another Member State (the 'convicting Member State') transmits the information on such a conviction to the Member State of the convicted person's nationality (the 'Member State of the person's nationality');

- define storage obligations for the Member State of the person's nationality and to specify the methods to be followed when replying to a request for information extracted from criminal records;

[24] OJ L 220/32, 15.08.2008

- to lay down the framework for a computerised system of exchange of information on convictions between Member States to be built and developed on the basis of this Framework Decision and the subsequent decision referred to in Article 11(4).

This last objective is the link with the Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA.

However, according to the Framework Decision, the aim of the provisions concerning the transmission of information to the Member State of the person's nationality for the purpose of its storage and retransmission is not to harmonize national systems of criminal records of the Member States.

Also, the Framework Decision does not oblige the convicting Member State to change its internal system of criminal records as regards the use of information for domestic purposes (preamble 16 of the Framework Decision).

For the purposes of this Framework Decision, 'conviction' means any final decision of a criminal court against a natural person in respect of a criminal offence, to the extent these decisions are entered in the criminal record of the convicting Member State, 'criminal proceedings' means the pre-trial stage, the trial stage itself and the execution of the conviction and 'criminal record' means the national register or registers recording convictions in accordance with national law.

Obligations for the convicting Member State

According to article 4 of the Framework Decision the obligations for the convicting Member State are:

- ensure that all convictions handed down within its territory are accompanied, when provided to its criminal record, by information on the nationality or nationalities of the convicted person if he is a national of another Member State (article 4 paragraph 1 of the Framework Decision).

- the Central Authority of the convicting Member State shall, as soon as possible, inform the central authorities of the other Member States of any convictions handed down within its territory against the nationals of such other Member States, as entered in the criminal record.

If it is known that the convicted person is a national of several Member States, the relevant information shall be transmitted to each of these Member States, even if the convicted person is a national of the Member State within whose territory he was convicted (article 4 paragraphs 2 of the Framework Decision).

The transmission of information on convictions handed down within its territory to the Member State of the convicted person's nationality is the main idea of the Framework Decision in order to have a complete criminal history of the convicted person, especially in the course of the new criminal proceedings, when, taking into account is possible according to the Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

The transmission of information on convictions is done ex officio and as soon as possible according to the Framework Decision.

- information on subsequent alteration or deletion of information contained in the criminal record shall be immediately transmitted by the central authority of the convicting Member State to the central authority of the Member State of the person's nationality according to article 4 paragraph 3 of the Framework Decision.

It is important for the central authority of the convicting Member State to transmit to the central authority of the Member State of the person's nationality any other information related to the prior information sent.

For example, any information on execution of the penalty, revocation, amnesty or pardon in relation to the prior conviction will have to be transmitted also to the central authority of the Member State of the person's nationality.

- any Member State which has provided information under paragraphs 2 and 3 shall communicate to the central authority of the Member State of the person's nationality, on the latter's request in individual cases, a copy of the convictions and subsequent measures as well as any other information relevant thereto in order to enable it to consider whether they necessitate any measure at national level (article 4 paragraph 4 of the Framework Decision).

Unlike the information with regard to the conviction, a copy of the conviction and subsequent measures, as well as any other information relevant thereto in order to enable it to consider whether they

necessitate any measure at national level, will be communicated on the request of the Member State of the person's nationality and not ex officio.

Obligations for the Member State of the person's nationality

According to article 5 of the Framework Decision the obligations for the Member State of the person's nationality are:

- store all information in accordance with Article 11(1) and (2) transmitted under Article 4 paragraph 2 and 3, for the purpose of retransmission in accordance with Article 7.

If information provided by the convicting Member State is unclear or insufficient (e.g. the convicted person is not identified by the receiving Member State based on the data received or there are more than one person that match with the personal data of the convicted person) then, the receiving Member States should immediately notify the convicting Member State in order to solve the situations encountered.

- Any alteration or deletion of information transmitted in accordance with Article 4 paragraph 3 shall entail identical alteration or deletion by the Member State of the person's nationality regarding information stored in accordance with paragraph 1 of this Article for the purpose of retransmission in accordance with Article 7.

- for the purpose of retransmission in accordance with Article 7 the Member State of the person's nationality may only use information which has been updated in accordance with paragraph 2 of this Article.

Information transmitted according to the Framework Decision

1. Obligatory information

According to article 11 of the Framework Decision, when transmitting information in accordance with Article 4(2) and (3), the central authority of the convicting Member State shall always transmit the following information, unless, in individual cases, such information is not known to the central authority:

- Information on the convicted person (full name, date of birth, place of birth (town and State), gender, nationality and – if applicable – previous name(s));

- Information on the nature of the conviction (date of conviction, name of the court, date on which the decision became final);

- Information on the offence giving rise to the conviction (date of the offence underlying the conviction and name or legal classification of the offence as well as reference to the applicable legal provisions); and

- Information on the contents of the conviction (notably the sentence as well as any supplementary penalties, security measures and subsequent decisions modifying the enforcement of the sentence);

2. Optional information

The following information that shall be transmitted if entered in the criminal record:

- the convicted person's parents' names;

- the reference number of the conviction;

- the place of the offence

- disqualifications arising from the conviction;

3. Additional information

The following information may be transmitted, if available to the central authority:

- the convicted person's identity number, or the type and number of the person's identification document;

- fingerprints, which have been taken from that person; and

- if applicable, pseudonym and/or alias name(s).

- any other information concerning convictions entered in the criminal record.

Procedures for request and reply for information on convictions according to the Framework Decision

We have seen that the objective to provide citizens with a high level of safety within an area of freedom, security and justice presupposes the exchange of information concerning criminal convictions of persons who reside in the territory of the Member States between the competent authorities of the Member States.

The principle of this Framework Decision is that the exchange of information concerning criminal convictions of persons is taken places only through central authorities of the Member States concerned.

In this sense, for the purposes of this Framework Decision, each Member State shall designate a central authority. However, for the transmission of information under Article 4 and for replies under Article 7 to requests referred to in Article 6, Member States may designate one or more central authorities. Each Member State shall inform the General Secretariat of the Council and the Commission of the central authority or authorities designated in accordance with paragraph 1. The General Secretariat of the Council shall notify the Member States and Eurojust of this information (article 3 of the Framework Decision).

All requests from the central authority of a Member State for information extracted from the criminal record shall be submitted using only the form set out in the Annex. The reply shall be made using the form set out in the Annex. It shall be accompanied by a list of convictions, as provided for by national law.

1. Request for information on convictions

When information from the criminal record of a Member State is requested for the purposes of criminal proceedings against a person or for any purposes other than that of criminal proceedings, the central authority of that Member State may, in accordance with its national law, submit a request to the central authority of another Member State for information and related data to be extracted from the criminal record.

Requests that are not for the purpose of criminal proceedings can be, for example: requests for non-criminal proceedings from a competent administrative authority, requests for obtaining a permit to stand for elections.

The communication through central authorities applies also if the request for information from the criminal record of a Member State comes from a person.

The Framework Decision provides that, when a person asks for information on his own criminal record, the central authority of the Member State in which the request is made may, in accordance with its national law, submit a request to the central authority of another Member State for information and related data to be extracted from the criminal record, provided the person concerned is or was a resident or a national of the requesting or requested Member State.

2. Replying to a request for information on convictions

2.1 For the purposes of criminal proceedings

When information on convictions from the criminal record is requested from the central authority of the Member State of the person's nationality for the purposes of criminal proceedings, that central authority shall transmit to the central authority of the requesting Member State information on: convictions handed down in the Member State of the person's nationality and entered in the criminal record, convictions handed down in other Member States which were transmitted to it after 27 April 2012, in application of Article 4, and stored in accordance with Article 5(1) and (2); convictions handed down in other Member States which were transmitted to it by 27 April 2012, and entered in the criminal record and any convictions handed down in third countries and subsequently transmitted to it and entered in the criminal record.

2.2 For purposes other than criminal proceedings

When information extracted from the criminal record is requested from the central authority of the Member State of the person's nationality for any purposes other than that of criminal proceedings, that central authority shall in respect of convictions handed down in the Member State of the person's nationality and of convictions handed down in third countries, which have been subsequently transmitted to it and entered in its criminal record, reply in accordance with its national law.

Also, when transmitting the information in accordance with Article 4, the central authority of the convicting Member State may inform the central authority of the Member State of the person's nationality that the information on convictions handed down in the former Member State and transmitted to the latter central authority may not be retransmitted for any purposes other than that of criminal proceedings. In this case, the central authority of the Member State of the person's nationality shall, in respect of such convictions, inform the requesting Member State which other Member State had transmitted such information so as to enable the requesting Member State to submit a request directly to the convicting Member State in order to receive information on these convictions.

2.3 Requests from third countries

When information extracted from the criminal record is requested from the central authority of the Member State of the person's nationality by a third country, the Member State of the person's nationality may reply in respect of convictions transmitted by another Member State only within the limitations applicable to the transmission of information to other Member States in accordance with paragraphs 1 and 2 of the article 7.

2.4 Requests from other Member States the one of the person's nationality

When information extracted from the criminal record is requested under Article 6 from the central authority of a Member State other than the Member State of the person's nationality, the requested Member State shall transmit information on convictions handed down in the requested Member State and on convictions handed down against third country nationals and against stateless persons contained in its criminal record to the same extent as provided for in Article 13 of the European Convention on Mutual Assistance in Criminal Matters.

Deadlines for replies

The Framework Decision provides different periods of time for replying to a request coming from the central authority for the purposes of criminal proceedings against a person or for any purposes other than that of criminal proceedings to that coming from a person who asks information on his own criminal record.

In the first case, replies to the requests shall be transmitted by the central authority of the requested Member State to the central authority of the requesting Member State immediately and in any event within a period not exceeding ten working days from the date the request was received, as provided for by its national law, rules or practice, using the form set out in the Annex.

If the requested Member State requires further information to identify the person involved in the request, it shall immediately consult the requesting Member State with a view to providing a reply within ten working days from the date the additional information is received.

In the second case, replies to the request from persons (also sent through the central authority) shall be transmitted within twenty working days from the date the request was received.

Languages

Article 10 of the Framework Decision provides that, when submitting a request referred to in Article 6(1), the requesting Member State shall transmit to the requested Member State the form set out in the Annex in the official language or one of the official languages of the latter Member State. The requested Member State shall reply either in one of its official languages or in any other language accepted by both Member States.

Any Member State may, at the time of the adoption of this Framework Decision or at a later date, indicate, in a statement to the General Secretariat of the Council, which are the official languages of the institutions of the European Union that it accepts. The General Secretariat of the Council shall notify the Member States of this information.

With financial support from the
Specific Programme Criminal Justice
of the European Union

Chapter VIII Council Decision 2009/316/JHA[25] of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA

Daniel Constantin MOTOI

2009/316 – A useful tool for the strengthening of mutual understanding of the information extracted from criminal records

Keywords: format of transmission of information - examples - manuals

This Council Decision is based on the principles established by Framework Decision 2009/315/JHA and applies and supplements those principles from a technical standpoint.

It aims to implement Framework Decision 2009/315/JHA in order to build and develop a computerized system of exchange of information on convictions between Member States.

The Council Framework Decision 2009/316/JHA was introduced and focused on the introduction of ECRIS, which is an electronic system for the exchange of criminal records, replacing the Network of Judicial Registers[26] pilot system and involving all Member States. The NJR was an interconnection and automated exchange of notices of conviction and criminal record extracts that became effective on 31 March 2006 and 16 Member States were part in this project.

The Decision establishes the elements of a standardized format that will allow information to be exchanged in a uniform, electronic, and easily computer-translatable way.

The standardized format particularly comprises information on the offence that gives rise to the conviction as well as information on the content of the conviction.

The automatic translation and mutual understanding of information is ensured by reference tables for categories of offences and categories of penalties and measures.

However, the Decision provides that this exercise does not lead to legal equivalences between the offences, penalties, and measures existing at the national level.

[25] OJ L 93/33, 07.04.2009

[26] Council of the European Union, ECRIS non-binding Manual for practitioners, 2013, p.8, 9061/2/13 REV 2

In addition, the Decision states that the established EU system for a facilitated exchange of information extracted from criminal records does not harmonize national systems of criminal records, so, there is no obligation for Member States to change their internal systems of criminal records as regards the use of information for domestic purposes.

ECRIS is a decentralized information technology system, in which criminal records data are solely stored in databases operated by individual Member States, and is composed of two elements:

(1) an interconnection software enabling the exchange of information among the Member States' criminal record databases and

(2) a common communication infrastructure that provides an encrypted network.

Format of transmission of information

When transmitting information in accordance with Article 4(2) and (3) and Article 7 of Framework Decision 2009/315/JHA relating to the name or legal classification of the offence and to the applicable legal provisions, Member States shall refer to the corresponding code for each of the offences referred to in the transmission, as provided for in the table of offences in Annex A.

By way of exception, where the offence does not correspond to any specific sub-category, the 'open category' code of the relevant or closest category of offences or, in the absence of the latter, an 'other offences' code, shall be used for that particular offence.

Member States may also provide available information relating to the level of completion and the level of participation in the offence and, where applicable, to the existence of total or partial exemption from criminal responsibility or to recidivism.

Examples from the ANNEX A

Common table of offences categories referred to in Article 4

Code	Categories and sub-categories of offences

- 0300 00 Terrorism

Open category

- 0301 00 Directing a terrorist group
- 0302 00 Knowingly participating in the activities of a terrorist group
- 0303 00 Financing of terrorism
- 0304 00 Public provocation to commit a terrorist offence
- 0305 00 Recruitment or training for terrorism

- 2700 00 Other offences

Open category

- 2701 00 Other intentional offences
- 2702 00 Other unintentional offences

Offences parameters

Level of completion:

Completed act	C
Attempt or preparation	A
Non-transmitted element	Ø

Level of participation:

Perpetrator	M
Aider and abettor or instigator/ organiser, conspirator	H
Non-transmitted element	Ø

Exemption from criminal responsibility:

Insanity or diminished responsibility S

Recidivism R

When transmitting information in accordance with Article 4(2) and (3) and Article 7 of Framework Decision 2009/315/JHA relating to the contents of the conviction, notably the sentence as well as any supplementary penalties, security measures and subsequent decisions modifying the enforcement of the sentence, Member States shall refer to the corresponding code for each of the penalties and measures referred to in the transmission, as provided for in the table of penalties and measures in Annex B.

By way of exception, where the penalty or measure does not correspond to any specific sub-category, the 'open category' code of the relevant or closest category of penalties and measures or, in the absence of the latter, an 'other penalties and measures' code, shall be used for that particular penalty or measure.

Member States shall also provide, where applicable, available information relating to the nature and/or conditions of execution of the penalty or measure imposed as provided for in the parameters of Annex B.

The parameter 'non-criminal ruling' shall be indicated only in cases where information on such a ruling is provided on a voluntary basis by the Member State of nationality of the person concerned, when replying to a request for information on convictions.

Examples from ANNEX B

Common table of penalties and measures categories referred to in Article 4

- 1000 Deprivation of freedom

Open category

- 1001 Imprisonment
- 1002 Life imprisonment

- 2000 Restriction of personal freedom

Open category

- 2001 Prohibition from frequenting some places
- 2002 Restriction to travel abroad
- 2003 Prohibition to stay in some places
- 2004 Prohibition from entry to a mass event
- 2005 Prohibition to enter in contact with certain persons through whatever means
- 2006 Placement under electronic surveillance
- 2007 Obligation to report at specified times to a specific authority
- 2008 Obligation to stay/reside in a certain place
- 2009 Obligation to be at the place of residence on the set time
- 2010 Obligation to comply with the probation measures ordered by the court, including the obligation to remain under supervision

- 11000 Exemption/deferment of sentence/penalty, warning

Open category

- 12000 Other penalties and measures

Open category

Sanctions parameters

ø	Penalty
m	Measure
a	Suspended penalty/measure
b	Partially suspended penalty/measure
c	Suspended penalty/measure with probation/supervision
d	Partially suspended penalty/measure with probation/supervision
e	Conversion of penalty/measure
f	Alternative penalty/measure imposed as principal penalty
g	Alternative penalty/measure imposed initially in case of non-respect of the principal penalty
h	Revocation of suspended penalty/measure
i	Subsequent formation of an overall penalty
j	Interruption of enforcement/postponement of the penalty/measure
k	Remission of the penalty
l	Remission of the suspended penalty
n	End of penalty
o	Pardon
p	Amnesty
q	Release on parole (liberation of a person before end of the sentence under certain conditions)
r	Rehabilitation (with or without the deletion of penalty from criminal records)
s	Penalty or measure specific to minors
t	Non-criminal ruling

According to article 5 of the Decision the following information shall be provided by the Member States to the General Secretariat of the Council, with a view in particular to drawing up the non-binding manual for practitioners referred to in Article 6(2)(a):

(a) the list of national offences in each of the categories referred to in the table of offences in Annex A. The list shall include the name or legal classification of the offence and reference to the applicable legal provisions. It may also include a short description of the constitutive elements of the offence;

(b) the list of types of sentences, possible supplementary penalties and security measures and possible subsequent decisions modifying the enforcement of the sentence as defined in national law, in each of the categories referred to in the table of penalties and measures in Annex B. It may also include a short description of the specific penalty or measure.

The lists and descriptions referred to in paragraph 1 shall be regularly updated by Member States. Updated information shall be sent to the General Secretariat of the Council. The General Secretariat of the Council shall communicate to the Member States and to the Commission the information received pursuant to this Article.

Members States and the Commission should inform and consult one another within the Council in accordance with the modalities set out in the Treaty on European Union, with a view to drawing up a non-binding manual for practitioners which should address the procedures governing the exchange of information, in particular modalities of identification of offenders, common understanding of the categories of offences and penalties and measures, and explanation of problematic national offences and penalties and measures, and ensuring the coordination necessary for the development and operation of ECRIS.

In this regard, there is a first non-binding Manual for practitioners – ECRIS – elaborated by the Presidency following the discussions at the COPEN meeting on 25 October 2011 and observations submitted by the delegation[27].

Another revised draft version of the ECRIS - non-binding Manual for practitioners was designed to address the frequent practical occurrences of ECRIS and country specific themes which may arise during the use of ECRIS[28].

[27] Council of the European Union, Manual for practitioners - ECRIS, 2011, 17879/11
[28] See ref. 13

With financial support from the
Specific Programme Criminal Justice
of the European Union

Chapter IX Workshop no. 2

Daniel Constantin MOTOI

Abstract

The **case-study on conditional release** deals with three important legal instruments within the European Union: the 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 Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings and the Council Framework Decision 2009/315/JHA of 26 February 2009 on the organization and content of the exchange of information extracted from the criminal record between Member States.

It covers potential situations that can arise in practice after the recognition of judgments or probation decisions with a view to the supervision of probation measures and alternative sanctions within the European Union like the competent authorities in charge of deciding in case of breaching the probation measures, law applicable, examples of procedures to be followed in practice.

It takes a step forward and points out how the circulation of information on convictions within the European Union works in practice and how it has been improved through the Council Framework Decision 2009/315/JHA. Also, it highlights how easy is these days for judicial authorities to assess the criminal history of an offender in the new proceedings within the European Union with the help of the Council Framework Decision 2008/675/JHA.

Case-study on conditional release

Mr. G.A., a Hungarian citizen, was convicted in Romania for trafficking in stolen vehicles to five years of imprisonment. After serving two and a half years in prison in Romania, G.A. was conditionally released before the penalty was considered finished by the competent authority in Romania and the following probation measures were imposed to him:

- an obligation to report to the probation service, at the dates established by this service,
- an obligation to receive visits from the designated probation counsellor,
- an obligation to inform the probation counsellor of any change of residence and any travel that takes longer than 5 days,
- an obligation to carry out community service (unpaid work for the benefit of the community) for 300 hours.

Because G.A. had the domicile and his family in Hungary he wanted to return there after the conditional release.

The competent authority from Hungary recognized the decision from Romania and agreed to take over the supervision of the probation measures imposed to G.A. for the remaining period of time.

According to this decision G.A. returned home and he was personally informed about the probation service in charge with the supervision on the probation measures imposed to him.

Four months later, the competent authorities from Hungary have established that G.A. has changed his residence without informing them and hasn't come to the probation service for the same period of time.

As a result, the probation service from Hungary decided to report this to the competent authority in charge to decide if it is the case for the revocation of the decision on conditional release or not.

Topics to be discussed:

1. If you are the person deciding on the revocation of the decision on conditional release what will you first verify in this case?

2.a. What is the competent authority in case of subsequent decisions?

b. What is the procedure to be followed for both member states involved?

3. a. Supposing that G.A., during the same probation period as recognized by the Hungarian authorities, has fled to Austria and has committed there an offence, how can the Austrian judicial authorities obtain information on G.A.'s previous convictions ?

b. Which are the legal instruments applicable in this case?

c. What is the procedure to be followed and where to address for the information needed?

4. a. Can the conviction from Romania be taken into consideration in the course of the criminal proceedings against G.A. in Austria?

b. If yes, to what extent? If no, why?

1. According to article 2 paragraph 6 of the 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 a 'conditional release' means a final decision of a competent authority or stemming from the national law on the early release of a sentenced person after part of the custodial sentence or measure involving deprivation of liberty has been served by imposing one or more probation measures.

In this case it is presented a situation in which after the national decision on conditional release of the convicted person, this decision was sent to the other Member State in order to be recognized and to assume responsibility for supervising probation measures.

The recognition of the decision was accepted and the other Member State took over the responsibility for supervising probation measures imposed on the convicted person.

The facts of the case show that the convicted person intentionally breached the probation measures imposed and recognized by the other Member State and the national competent authorities of the latter are put to decide whether it is the case to revoke the decision on condition release as it has been previously recognized according to article 14 paragraph 1 letter b) of the Framework Decision.

As the general rule according to article 14 paragraph 1 of the Framework Decision 2008/947/JHA the competent authority of the executing State shall have jurisdiction to take all subsequent decisions relating to a suspended sentence, conditional release, conditional sentence and alternative sanction, in particular in case of non-compliance with a probation measure or alternative sanction or if the sentenced person commits a new criminal offence.

Such subsequent decisions include notably:

(a) the modification of obligations or instructions contained in the probation measure or alternative sanction, or the modification of the duration of the probation period;

(b) the revocation of the suspension of the execution of the judgment or the revocation of the decision on conditional release; and

(c) the imposition of a custodial sentence or measure involving deprivation of liberty in case of an alternative sanction or conditional sentence.

In paragraph 2 of the article 14 it is provided that the law of the executing State shall apply to decisions taken pursuant to paragraph 1 and to all subsequent consequences of the judgment including, where applicable, the enforcement and, if necessary, the adaptation of the custodial sentence or measure involving deprivation of liberty.

Also, according to article 3 of the Framework Decision each Member State shall inform the General Secretariat of the Council which authority or authorities, under its national law, are competent to act according to this Framework Decision in the situation where that Member State is the issuing State or the executing State and the General Secretariat of the Council shall make the information received available to all Member States and to the Commission.

Member States may designate non-judicial authorities as the competent authorities for taking decisions under this Framework Decision, provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures.

If a decision under Article 14(1)(b) or (c) is taken by a competent authority other than a court, the Member States shall ensure that, upon request of the person concerned, such decision may be reviewed by a court or by another independent court-like body (article 14 paragraph 2 of the Framework Decision).

The prevision provision somehow is in contrast with preamble 22 of the Framework Decision which provides that all subsequent decisions relating to a suspended sentence, a conditional sentence or an alternative sanction which result in the imposition of a custodial sentence or measure involving deprivation of liberty should be taken by a judicial authority, so not reviewed by a court or by another independent court-like body upon request of the person concerned.

As an exception, art. 14 paragraph 3 of the Framework Decision provides that each Member State may, at the time of adoption of this Framework Decision or at a later stage, declare that as an executing State it will refuse to assume the responsibility provided for in paragraph 1(b) and (c) in cases or categories of cases to be specified by that Member State, in particular:

(a) in cases relating to an alternative sanction, where the judgment does not contain a custodial sentence or measure involving deprivation of liberty to be enforced in case of non-compliance with the obligations or instructions concerned;

(b) in cases relating to a conditional sentence;

(c) in cases where the judgment relates to acts which do not constitute an offence under the law of the executing State, whatever its constituent elements or however it is described.

The Framework Decision allows Member States to decide and to notify whether they will refuse to assume the responsibility provided for in article 14 paragraphs 1(b) and (c) in cases or categories of cases specified by the Member States.

Declarations shall be made by notification to the General Secretariat of the Council. Any such declaration may be withdrawn at any time. The declarations and withdrawals mentioned in this Article shall be published in the Official Journal of the European Union.

Still, regardless of the fact that the Member State has made this kind of notification, according to paragraph 3, the obligation to recognise the judgment and, where applicable, the probation decision, as well as the obligation to take without delay all necessary measures for the supervision of the probation measures or alternative sanctions, shall not be affected.

2. a) In our case, for example, according to the notification to Article 14(3) (refusal to assume responsibility for subsequent decisions) Hungary has not made any with regard to the fact that it will refuse to assume the responsibility provided for in paragraph 1(b) and (c), which means that a Hungarian competent court will decide whether to revoke or not the decision on custodial release, as it has been recognized by the national competent local court.

If it were not the case, and Hungary would have made such a notification, that it will refuse to assume the responsibility provided for in paragraph 1(b) and (c) in specific cases or categories of cases, then, according to paragraph 4 of article 14, the competent authority from Hungary will transfer jurisdiction

back to the competent authority from Romania in case of non-compliance with a probation measure or alternative sanction if the competent authority of the executing State is of the view that a subsequent decision as referred to in paragraph 1(b) or (c) needs to be taken.

2. b) With regard to the procedure to be followed in this case, it also depends whether the executing State has notified according to the article 14 paragraph of the Framework Decision that it will refuse to assume the responsibility provided for in paragraph 1(b) and (c) in specific cases or categories of cases.

For example, In Romania, Law no. 302/2004[29] on international judicial co-operation in criminal matters has different provisions with regard to the procedure to be followed in cases where the execution of the supervision measures is with the assuming of the responsibility for subsequent decisions from the executing state or without.

- In the first situation, according to the article 17041 of the Law no. 302/2004, during the supervision of the probation measures, the judge in charge with the enforcement of the decision communicate ex officio information that could lead to the revocation of the conditional release in case of non-compliance with a probation measure. This information is sent by filling in the form from the Framework Decision.

- In the second situation, according to the article 17042 of the Law no. 302/2004, the court who has issued the conditional release regains competence with regard to the revocation of the conditional release in case of non-compliance with a probation measure and the notifications made under article 14 paragraph 3 form the Framework Decision are checked by the judge in charge with the enforcement of the decision when filling the certificate.

The judge in charge with the enforcement of the decision on conditional release requests to the competent authorities of the executing Member State, during the supervision of the probation measures, to inform the court that rendered the decision on conditional release of any behaviour form the convicted person that could lead to the revocation of the conditional release, especially in cases or the person has committed a crime or in cases of non-compliance with a probation measure. This information must be sent by filling in the form from the Framework Decision.

When the national conditions for the revocation of the conditional release are met, then the court that rendered the decision on conditional release will proceed according to national law and taken into account the judgment related to the prior conviction.

Also, in the second situation, if the convicted person is still in executing State the hearing of the person can be performed by videoconference according to the provisions from Law no. 302/2004 in the

[29] Law no. 302 of 28 June 2004 on international judicial co-operation in criminal matters as amended and supplemented by Law no. 300/2013

presence of a person from the Probation Service (Office) or from other competent authority from the executing State.

The subsequent decision of the court that rendered the decision on conditional release will be sent to the competent authority from the executing State.

It must be seen that the decision on revocation of the conditional release, according to the national law, is taken after the hearing of the convicted person, and if the person is in the executing Member State, then the hearing of the person can be performed by videoconference.

It worth mentioning here that it is without relevance for the court from the issuing State when deciding on the revocation of the conditional release whether the competent authority from the executing State has proceeded to the adaptation or modification of the probation measures or has shortened the probation period according to national law, the decision been taken only according to the national law and in relation to the judgment imposing the penalty. In this sense, in case of the revocation of the conditional release the penalty which will have to be enforced is that from the judgment on conditional release, which is the period remained until the penalty was to be considered fully executed according to national law.

3. In each case every time we must verify which of the legal instruments are applicable, in order to identify the procedure to be followed by the requesting Member State.

At this time, first thing to notice in our case is that the Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States has not been transposed by all three of the Member States – Romania, Hungary and Austria (Romania has not yet transposed the Council Framework Decision 2009/315/JHA, although a legislative process is on-going). Also, we must check any ratifications (if applicable) made by Member States concerned at the time of transposition or after.

This means that Romania, as a convicting Member State, will apply article 2 of the Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record which provides that each central authority shall, without delay, inform the central authorities of the other Member States of criminal convictions and subsequent measures in respect of nationals of those Member States entered in the criminal record.

After the transposition of the Framework Decision 2009/315/JHA by Romania, according to article 4 of the Framework Decision a convicting Member State is obliged to send through its Central Authority, as soon as possible, to the Central authority designated by Hungary the conviction handed down within its territory against a Hungarian citizen and entered in the criminal record.

Also, any information on subsequent alteration or deletion of information contained in the criminal record must be immediately transmitted by the Central authority of the convicting Member State to the

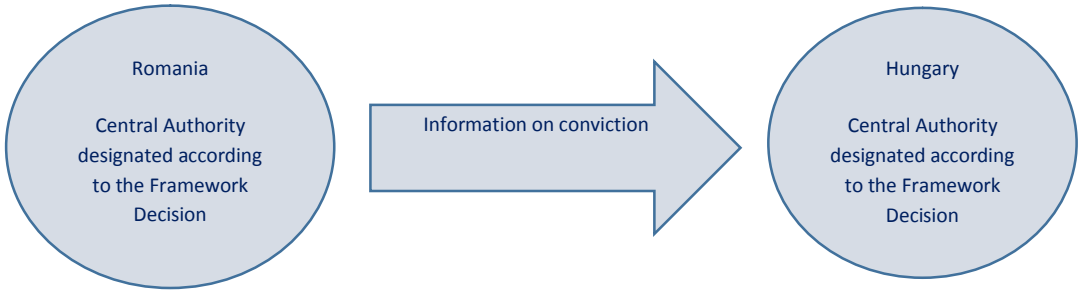
central authority of the Member State of the person's nationality according to article 4 paragraph 3 of the Framework Decision.

According to the Framework Decision Hungary has the obligation to store all information in accordance with Article 11(1) and (2) transmitted under Article 4 paragraph 2 and 3, for the purpose of retransmission in accordance with Article 7. Any alteration or deletion of information transmitted in accordance with Article 4 paragraph 3 shall entail identical alteration or deletion by the Member State of the person's nationality regarding information stored in accordance with paragraph 1 of this Article for the purpose of retransmission in accordance with Article 7. For the purpose of retransmission in accordance with Article 7 the Member State of the person's nationality may only use information which has been updated in accordance with paragraph 2 of this Article.

When information extracted from the criminal record is requested from the Central authority of the Member State of the person's nationality for the purposes of criminal proceedings, Austria in our case, that Hungarian Central authority shall transmit to the Central authority of Austria information on: convictions handed down in the Member State of the person's nationality and entered in the criminal record; any convictions handed down in other Member States which were transmitted to it after 27 April 2012, in application of Article 4, and stored in accordance with Article 5(1) and (2) and any convictions handed down in other Member States which were transmitted to it by 27 April 2012, and entered in the criminal record.

So, basically, the Central Authority from Romania that keeps the criminal records, as a convicting Member State will transmit the information on conviction to the Central Authority from Hungary that will enter it into the national criminal record system (figure 1).

Figure 1

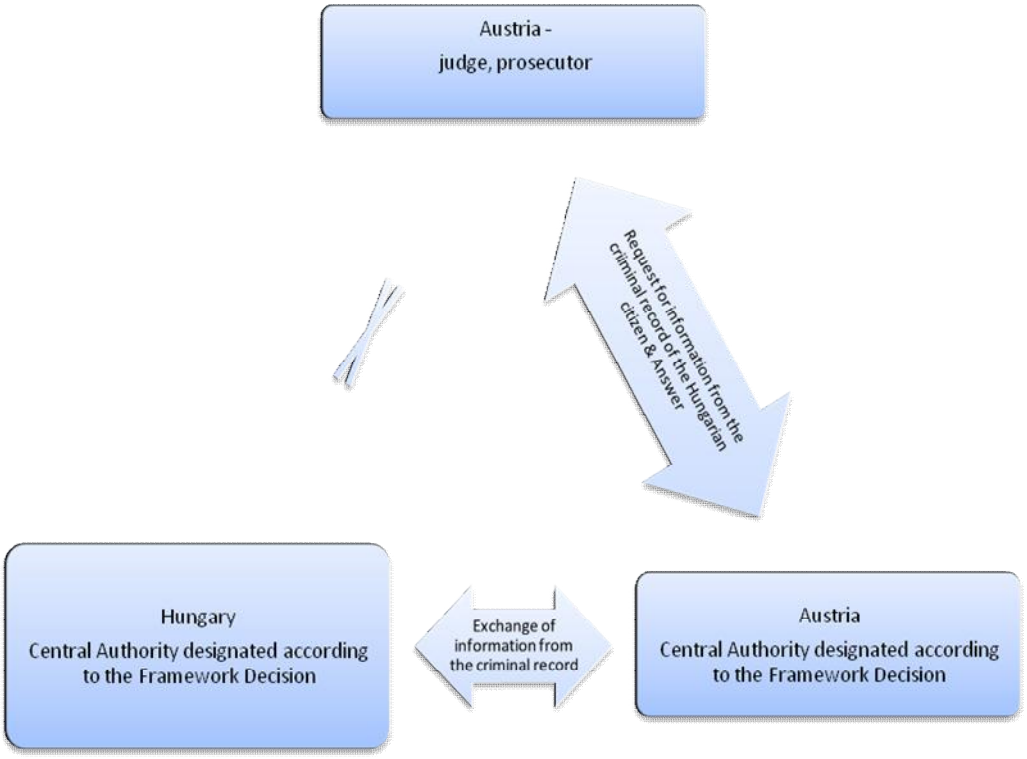


Then, if requested by a judicial authority from Austria for the purposes of new criminal proceedings, the information extracted from the criminal record from Hungary is been exchanged through the Central Authorities of Austria and Hungary, because, according to the Framework Decision the principle is that the

exchange of information concerning criminal convictions of persons is taken places only through Central authorities of the Member States concerned.

The information extracted from the criminal record from Central Authority of Hungary obtain by the Central Authority of Austria is sent back to the national judicial authorities for the purpose of ongoing criminal proceedings (figure 2).

Figure 2



We have seen that the procedure from the Framework Decision 2009/315 is fully applicable, because all the Member States concerned have transposed the Framework Decision.

Until the deadline for transposition of Framework Decision 2009/315, article 13 par. 1 of the European Convention on Mutual Assistance in Criminal Matters would also have been applicable. This article provides that a requested Party shall communicate extracts from and information relating to judicial records, requested from it by the judicial authorities of a Contracting Party and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in like case. If it not a criminal matter then the request shall be complied with in accordance with the conditions provided for by the law, regulations or practice of the requested Party (paragraph 2 of article 13 from the Convention).

The Framework Decision 2009/315/JHA provides that for the purposes of the Framework Decision, Member States shall waive the right to rely among themselves on their reservations to Article 13 of the European Convention on Mutual Assistance in Criminal Matters (article 12 paragraph 2 of the Framework Decision).

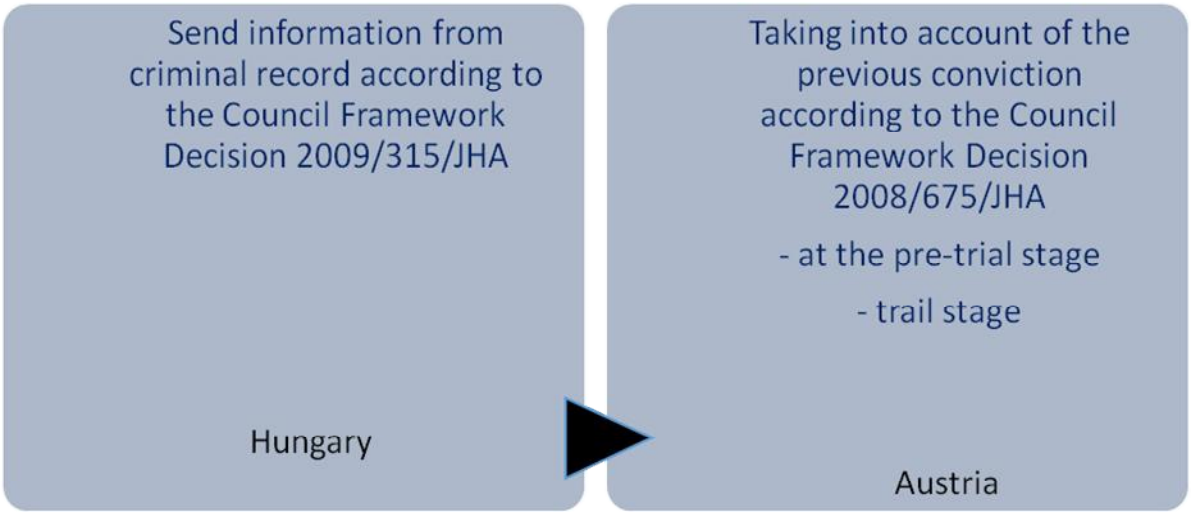
Also, article 6 paragraph 8 letter b) of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union which provides that the following requests or communications shall be made through the Central authorities of the Member States - notices of information from judicial records as referred to in Article 22 of the European Mutual Assistance Convention would have been applicable.

4. According to the Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings its aims are to establish a minimum obligation for Member States to take into account convictions handed down in other Member States, to enable consequences to be attached to a previous conviction handed down in one Member State in the course of new criminal proceedings in another Member State to the extent that such consequences are attached to previous national convictions under the law of that other Member State and to determine the conditions under which, in the course of criminal proceedings in a Member State against a person, previous convictions handed down against the same person for different facts in other Member States, are taken into account.

In order to apply the principle of equivalence, which means that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member States are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law, first thing to verify is that if the Member State where the new proceedings are pending has transposed the abovementioned Framework Decision.

In our case this prior condition is fulfilled because Austria has transposed the Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings which means that the competent judicial authorities from this country can take into account the previous conviction handed down in Romania in the pre-trail or trail stage itself. For example, this means that in the pre-trail stage pre-trial detention may be ordered if the suspect has been convicted in recent years and in the trail stage itself, previous conviction is taken into account in the decision on the type, level and extent of a sentence/sanction (figure 3).

Figure 3



If it hadn't been the case, and Austria wouldn't have transposed the Framework Decision 2008/675/JHA, then, we should search other legal instruments applicable between Romania and Austria.

In this case this would have been the European Convention on the International Validity of Criminal Judgments from 1970 (Romania and Austria have ratified this Convention), which in article 56 provides that Each Contracting State shall legislate as it deems appropriate to enable its courts when rendering a judgment to take into consideration any previous European criminal judgment rendered for another offence after a hearing of the accused with a view to attaching to this judgment all or some of the effects which its law attaches to judgments rendered in its territory.

With financial support from the
Specific Programme Criminal Justice
of the European Union

Chapter X EU rules concerning judicial cooperation in criminal matters in the light of the newest instruments

*[30]Rafal KIERZYNKA

Keywords: mutual recognition - UE criminal law - criminal safeguards - procedural rights - victim protection

In October 1999, at the Tampere European Council, mutual recognition was asserted to be the cornerstone of judicial cooperation, also in criminal matters, between EU Member States. This golden rule is based on the mutual trust between the judicial authorities. Apart from different modalities of the domestic laws, the Member States are making permanent effort to meet this requirement. In the international environment it means that the judicial authorities try to follow the same patterns, stemmed from the concept of rule of law and exercise the same, or at least similar, way of dealing with the issues on the table. Therefore, the best way to achieve the goal of the mutual trust is an approximation of the legal procedural standards between the Member States.

Thus, the latest EU activity in this field is focused on the three main clusters:

- common standards concerning the safeguards for suspects and accused persons,
- common standards on rights and protection for victims,
- common standards for better cooperation for judiciary and all the stakeholders.

Bearing in mind the main subject of the project, this is the first bullet point, pertaining to the suspects and accused persons, which is of utmost importance. The protection of victims could be also taken into account, since the proper balance between suspects' or accused persons' rights and the rights of the victim must be considered a general prerequisite for fair trial. In this context, the Directive 2011/99/EU on the European protection order, seems to be the most important instrument. The last bullet point, although crucial in many fields, is rather irrelevant for the purpose of the issue in question.

Under Swedish Presidency of the Council of the EU, namely on 30th November 2009, in line with earlier efforts in the fields of the procedural rights of suspects and accused persons, the EU Council adopted the document named "2009 Roadmap". It covered the obligation to adopt a number of the instruments,

*[30]**Mr. Rafal KIERZYNKA, Ph. D., Judge in European Criminal Law Unit at the Polish Ministry of Justice, Poland, kierzynka@go2.pl**

establishing or re-constructing the perpetrators' rights and relevant safeguards. Namely, it covered following issues:

- right to translation and interpretation (measure A),
- right to information on rights and information about the charges (measure B),
- right to legal advice and legal aid (measure C),
- right to communication with relatives, employers and consular authorities (measure D),
- special safeguards for suspects or accused persons who are vulnerable (measure E).

During further works the initial agenda has been modified: some of the planned measures have been merged, some have been remarkably altered, some have been adopted merely as non-binding recommendations. Finally, after several years, the Eu enriched itself with the several modern and far-going instruments, which are briefly described hereinafter.

Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 2010, p. 1)

This Directive establishes minimum EU-wide rules on the right to interpretation and translation in criminal proceedings and in proceedings for the execution of the European Arrest Warrant. It is considered a first pace in series of measures covered by the 2009 Roadmap. The Directive enacts the rule that interpretation must be provided free of charge to suspected or accused persons who do not speak or understand the language of the criminal proceedings including during police questioning, essential meetings between client and lawyer and all court and any necessary interim hearings. Interpretation via videoconference, telephone or internet can be used if the physical presence of the interpreter is not required to ensure fairness. Furthermore, the Directive provides for the right to translation of essential documents. Suspected or accused persons who do not understand the language of the proceedings must be provided with a written translation of documents that are essential for their defense. This includes any decision depriving a person of his liberty, any charge or indictment as well as any judgment. However, it should be underlined that the competent authorities may decide to translate any other documents on a case-by-case basis. The suspected or accused persons or their legal counsel may also request the translation of other essential documents

In proceedings for the execution of a European Arrest Warrant, persons concerned must be provided with interpretation and with a written translation of the warrant, if necessary.

The Directive takes up also the issue of quality of translation and interpretation. This service must be of sufficient quality to allow the persons concerned to understand the case against them and to exercise their

right of defense. To this end, EU countries are required to set up a register of independent and qualified translators and interpreters, which should be available to legal counsels and relevant authorities.

The Directive came into force on 15 November 2010. It was to be transposed into EU countries' national law by 27 October 2013.

Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 2012, p. 1)

The Directive provides that suspects or persons accused of a criminal offence in an EU country must be informed of their procedural rights and the charges against them. It sets out minimum standards for all EU countries regardless of a person's legal status, citizenship or nationality. It is designed to help prevent miscarriages of justice and reduce the number of appeals.

According to the Directive, suspects and accused persons must be informed promptly, either orally or in writing, of several procedural rights. These include access to a lawyer, any entitlement to free legal advice, the right to be informed about the accusation, the right to interpretation and translation and the right to remain silent.

Furthermore, arrested persons must receive promptly a Letter of Rights from the law enforcement authorities (i.e. the police or justice ministry, depending on the EU country), written in simple language, providing information on further rights including access to case documents, the right to inform one person and to contact consular authorities, the right to urgent medical assistance, the information about know the maximum period, in hours and days, that they will be detained before being brought before a judicial authority an d the information whether they can challenge the lawfulness of the arrest.

Where a person has been arrested under a European Arrest Warrant, they must be provided with a specific Letter of Rights by the law enforcement authorities reflecting the different rights that apply in that situation.

In addition, suspects or accused persons must be provided promptly with information about the criminal act they are suspected of having committed and (at a later stage) with detailed information on the accusation. If they are arrested or detained they must also be informed about the reasons for this arrest or detention. They must also have access to the case materials so they can exercise their rights of defense.

The directive entered into force on 21 June 2012 and had to be transposed by EU countries by 2 June 2014.

Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon

deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 2013, p. 1)

The directive lays down citizens' rights in criminal and European arrest warrant proceedings, especially concerning access to a lawyer.

This EU law ensures that suspects and accused persons in criminal proceedings and requested persons in European Arrest Warrant proceedings have access to a lawyer and have the right to communicate while deprived of liberty. The EU citizens must have access to a lawyer without undue delay:

- before they are questioned by a law enforcement (e.g. the police) or judicial authority;
- during an investigative or other evidence-gathering act (e.g. confrontation);
- from the moment of deprivation of liberty;
- in due time before they appear before a criminal court.

More specifically, the Directive law covers:

- the right to meet in private and to communicate with a lawyer;
- the right for the lawyer to participate effectively when the person is questioned, and to attend the investigative and evidence-gathering acts;
- the confidentiality of all forms of communication (meetings, correspondence, telephone conversations, etc.).

As regards persons subject to a European arrest warrant, the directive lays down the right of access to a lawyer in the executing Member State and to appoint a lawyer in the issuing Member State.

The UE citizens deprived of liberty have the right, without undue delay:

- to have at least one person of their choice informed of their deprivation of liberty. If the arrested person is a child, the holder of parental responsibility should be informed as soon as possible;
- to communicate with at least one person of their choice.

If they are deprived of liberty in an EU country other than their own, they have the right to inform their consular authorities, to be visited by them, to communicate with them and to have legal representation arranged for by them.

The Directives provides however some exceptions form these general rights. It namely allows for the possibility to derogate temporarily from certain rights in exceptional circumstances and under strictly defined conditions.

The Directive came into force on 27 November 2013. It is to be transposed into EU countries' national law by 27 November 2016.

Apart from the instruments providing for the new safeguards for suspects and accused persons, another factor, namely the rights of the victims, must be taken into account, while proceeding the mutual recognition case. The requirement for the internal balance of the penal proceedings obliges the practitioners to take care of this aspect too. The transferring of the final judgment abroad cannot infringe the rights of the victim or injured party, which have been recognized and adopted by EU lawmaker. Hereinafter, there is a brief description of the instruments, which should be considered while analyzing the link between transfer of the final judgments between EU member states and position of the victim in the criminal proceedings. Both directives concern possible protection and support measures which can be offered to the injured party.

Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315, 2012, p. 57)

The Directive accords the status of victim not only to persons directly harmed by the offence, but also to certain family members, if the person dies as a result of the offence.

To enable them to fully access their rights, victims must receive sufficient information in a comprehensible form. They must also have access to psychological support and practical assistance. Therefore the Directive provides for following measures of assistance, support and protection of victim:

- the right to receive information from first contact with a judicial authority, specifically on how to make a complaint of a criminal offence, details of the proceedings and how to obtain protection if required;
- the right to receive information about their case, in particular on the decision to end or proceed with an investigation, on the time and place of the trial, and, under certain conditions, on the release of the person prosecuted for the offence;
- the right to understand and to be understood;
- the right to interpretation and translation: if victims do not speak the language of the criminal proceedings, they shall be provided with interpretation free of charge and shall receive a translation of the complaint made, of any decision ending the proceedings, and of information concerning their rights;
- the right to access victim support services: these services must be free of charge and also accessible to certain family members. They provide emotional and psychological support, as well as practical assistance, for example concerning financial issues and the role of the victim in criminal proceedings.

Victims have a legitimate interest in seeing that justice is done. Furthermore, they should be able to participate in the criminal proceedings which concern them. To this end, the Directive includes a number of rights which victims should be assured of:

- the right to have their complaint acknowledged;
- the right to be heard during the proceedings;
- the right to request a revision in the event of a decision not to prosecute;
- rights to safeguards in the event of using mediation and other restorative justice services; the aim is to protect victims from any intimidation or further victimisation during the process. These services can only be used with victims' consent and after they have been properly informed. Consent may be withdrawn at any time;
- the right to legal aid and to reimbursement of costs where the victim participates in criminal proceedings;
- the right to the return of property seized in the course of criminal proceedings;
- the right to a decision on compensation from the offender in the course of criminal proceedings;
- concerning victims resident in another EU country, the difficulties connected with these cases should be reduced, specifically by taking a statement from the victim immediately after the complaint of the criminal offence is made and by using video conferencing and telephone conference calls as much as possible for the purpose of interviewing victims. Where victims were unable to make a complaint of a criminal offence in the State where the offence took place, they should be able to do so in their Member State of residence which will then send the complaint to the Member State concerned.

The Directive notes that measures should be available to protect the safety of victims and their family members from possible retaliation or intimidation by the offender. The authorities will therefore ensure that contact with the latter is reduced, particularly in premises where the criminal proceedings are conducted.

During the investigation, victims should be interviewed quickly and only as many times as is necessary. If they wish, they may be accompanied by a legal representative or by a person of their choice. Their private life as well as that of their family must be protected.

The Directive recognizes that certain people have a particularly high risk of suffering further during criminal proceedings. After an assessment of their individual needs, these vulnerable victims shall be accorded certain additional rights and services. This Directive considers children, disabled people and victims of sexual violence or human trafficking to be vulnerable victims.

It is important that justice professionals, police officers and members of the victim support services receive appropriate training so that they are better able to meet the needs of victims.

The Directive came into force on 15 November 2012. It was to be transposed into EU countries' national law by 16 November 2015.

Directive 2011/91/EU of 13 December 2011 on European Protection Order (OJ L 338, 2011, p.2)

The European Protection Order (EPO) Directive does neither create obligations to modify national systems for adopting protection measures provided for the victims, nor does create obligations to introduce such measures into domestic laws of the Member States. It introduces the mechanism for mutual recognition of the measures already existing in the national legal systems. Every single Member State developed its own procedures for protection of victims, by application so – called protection measures, aim specifically to protect a person against a criminal act which may, in any way, endanger that person's life or physical, psychological and sexual integrity, as well as that person's dignity or personal liberty and which aim to prevent new criminal acts or to reduce the consequences of previous criminal acts.

The EPO Directive applies to protection measures adopted in criminal matters, and does not therefore cover protection measures adopted in civil matters. This solution was adopted after in-depth discussion, resulting in the concept of introducing two separate instruments – EPO and civil EPO, now covered by the Regulation (EU) No 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters[31]. Tackling a great diversity of protection measures systems in the Member States, the European legislator provided that the Directive should apply to any protection measure, if available during criminal proceeding. It is not necessary however that given measure is to be adopted by criminal court.

The Directive covers following prohibitions or restrictions:

- a prohibition from entering certain localities, places or defined areas where the protected person resides or visits;
- a prohibition or regulation of contact, in any form, with the protected person, including by phone, electronic or ordinary mail, fax or any other means; or
- a prohibition or regulation on approaching the protected person closer than a prescribed distance.

One of the hallmark and peculiarity of EPO is that the order follows a victim. So far, the instruments basing on the mutual recognition of the criminal decision provided the transmission of the decision or order after the perpetrator, to the state where he or she moved to, intended to move or was supposed to be moved. In this case however this model has been entirely altered, which implies serious consequences for the general concept of the instrument and a relevant procedure.

Firstly, EPO may be transmitted to more than one executing state. It may be caused by living conditions of the victim, while he or she moves to one country and – for instance – works in the other. Secondly, EPO may be issued basing on the decision which was not originally rendered by the authority of the issuing state. EPO mechanism covers also the situation when the judgment comprising given protection measure was delivered by one state, and then transferred to the other one, who decides afterword to issue EPO on

[31]OJ L 181, 29.6.2013, p. 4.

its basis. Thus, the source of the protection measure may be the decision which is as well either delivered or solely executed by the issuing state.

A European protection order may be issued when the protected person decides to reside or stay or already resides or stays in another member state. The competent authority in the issuing state shall take into account, inter alia, the length of the period that the protected person intends to stay in the executing state and the seriousness of the need for protection. It must be however considered, that aforementioned conditions are solely demonstration, therefore the issuing authority may decide upon issuing EPO on the basis of different premises too, if they imply a need for doing so.

EPO cannot be issued ex officio, on the own motion of the issuing authority. As the protection measures cannot be executed against the will of protected person, his or her motion is needed in any situation.

The EPO is generally executed under the laws of executing state. The laws of various member states are however different, that may cause specific problems, especially in the case of breaching of the obligation imposed in the protection order. The result of breach may significantly vary in the Member States, depends on their legal standards. Therefore the Directive provides for the general cluster of feasible solutions that can be applied in such case. The executing authority may then:

- impose criminal penalties and take any other measure as a consequence of the breach, if that breach amounts to a criminal offence under its the law of the executing state
- take any non-criminal decisions related to the breach, or
- take any urgent and provisional measure in order to put an end to the breach, pending, where appropriate, a subsequent decision by the issuing State.

If there is no available tool at national level in a similar case that could be taken in the executing state, its competent authority shall at least report to the issuing authority of the any breach of the protection measure described in the EPO of which it is aware. This option should be considered as the last resort measure, bearing in mind that exchange of information, even the swiftest one, will not provide real and material protection for the protected person pending quite a period of time.

The Directive came into force on 10 January 2012. It was to be transposed into EU countries' national law by 11 January 2015.

Chapter XI The final conference

Introduction

The final conference within the ***Project JUST/2013/JPEN/AG/4495 – Social Reintegration of Sentenced Persons: A Comprehensive European Approach*** was held in Bucharest on the 19th and 20th of November 2015. There were around 100 participants coming not only from all the project's partners but also from other Member States (including Romanian representatives from National School of Clerks, Ministry of Justice and other judicial institutions).

The main objectives of the final conference were to consolidate and disseminate the results of the project among participants.

Content

In the two days of the final conference the participants were provided with presentations, mainly focused on practical examples, and they had to solve two practical cases one focused the 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 and the other on the 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.

The first presentation covered general aspects with regard to the history of judicial cooperation in criminal matters, focusing on the principle of mutual recognition of criminal judgments and other judicial decisions. There were highlighted potential legal and practical obstacles in the process of mutual recognition of criminal judgments and other judicial decisions and the participants were provided with possible solutions to overcome them (e.g. increasing communication between the judicial authorities involved; training for judges, prosecutors; raising awareness with regard to the prison conditions, the conditions for early release, the probations measures available across the European Union).

The next two presentations focused on the Council Framework Decision 2008/909/JHA and on the Council Framework Decision 2008/947/JHA were meant to give the participants some insights in order to help them solve the practical case during the workshop.

Both presentations had a lot of practical examples and highlighted the differences, especially the advantages, with the Convention from 1983 on the transfer of sentenced persons and with the Convention from 1964 on the supervision of conditionally released offenders.

The last presentation of the day - Social rehabilitation in law, theory and practice – tried to emphasize the core elements of the social rehabilitation concept from the Council Framework Decision 2008/909/JHA and the Council Framework Decision 2008/947/JHA. The participants were provided with examples on how the social rehabilitation should work in practice and what factors should be taken into account during this (difficult) process. Also, some conclusions that practitioners need to be aware of and to take into account were drawn based on the examples provided.

The last part of the day was the interactive one and was dedicated to the *workshop*. For the workshop the participants were split into 12 mixed groups and each of the groups had to solve two practical cases, one concerning Council Framework Decision 2008/909/JHA and the other Council Framework Decision 2008/947/JHA.

Each of the groups was moderated by an expert and had to designate a *rapporteur*, who, the next day, provided feedback for one different question. The participants tried and succeeded by themselves to solve the practical cases provided beforehand.

By solving the practical cases the participants went through some (not all) potential problems that can arise in practice when faced with cases in relation to the two legal instruments abovementioned. The participants rely on the two legal instruments and the national transposition laws in order to solve the practical cases.

There were discussions in the groups with regard to the scope of the application of the two legal instruments, especially in relation to the complementary penalties imposed (the admissibility in the recognition process), and also with regard to the process of adaptation as provided in the two legal instruments and in the national laws (how this is done in practice by judicial authorities).

Another point of discussion was the convictions *in absentia*, where the participants saw the relation between the two legal instruments and the provisions from the European Convention on Human Rights and the relevant jurisprudence from ECtHR.

Other topics, like the cases where the consent of the convicted person is still needed or it is no longer needed provided by the two legal instruments or, the countries where the sentenced person can be transferred or can personally ask for transfer, were found interesting by the participants.

The next day, the findings from the workshop were discussed in the plenary, and the participants engaged into lively discussions in relation to the solutions to the practical cases.

The participants enjoyed the idea of the workshop and actively participated both in the mixed groups for solving the practical cases and in the discussions in the plenary.

After the feedback in plenary, the conference went on with a presentation on Fundamental Rights in EU Criminal Procedure, presentation that focused on the limitations of the rights and freedoms of the Charter, the relationship between the ECHR and the Charter of fundamental rights, the relationship between human rights (ECHR and the Charter) and the fundamental freedoms under the Treaties.

The presentations touched upon some of the most important rights covered by the European Convention on Human Rights and the Charter of fundamental rights like: the right to liberty and security, the right to privacy, the right to a fair trial which covers the right to an independent and impartial tribunal, the presumption of innocence, the right to be informed of the charge, the right to remain silent, the reasonable time of procedure, the access to the file, the right to be present in court, the right to defence/free choice of defence counsel, lawyer-client privilege.

The last part of this speech was dedicated to the presentation of some of the main elements from the proposal for a directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

A special part of the final conference was dedicated to the presentation of the methodology used in the project and also of the content of the draft Handbook elaborated in the project which will be later published for dissemination among practitioners.

First, the objective of the project, which is the improving judicial cooperation in criminal matters, was again emphasized. Then, participants were explained the methodology used in the project and the structure of each seminar.

The experts explained that the feedbacks from the workshops and the conclusions of each of the 6 seminars have been gathered and have been used as raw material for the elaboration of the Handbook. The answers from the practical cases used in the seminars are one part the findings of the participants and other part the opinions of the experts involved, opinions which are based on the legal instruments used in the project, on the relevant jurisprudence from the ECtHR, Court of Justice of the European Union and national courts (Constitutional Courts, Supreme Courts or Courts of Appeal).

The participants were explained also that each of the seminars contained a Moot Court, which is an example from a Romanian court session in relation to the execution of a request for transfer of a convicted person in another Member State. After the interactive part of this Moot Court, there were points to discuss with the participants like the right to a fair trial, convictions *in absentia* and the principle of *non bis in idem*. Further explanations from the experts and the material on the Moot Court are also part of the Handbook.

The participants were explained that the Handbook comprises also written materials on the Council Framework Decision 2008/909/JHA, Council Framework Decision 2008/947/JHA, Council Framework Decision 2008/675/JHA and Council Framework Decision 2009/315/JHA, which emphasis the main elements of these legal instruments, good examples of national transposition laws, some points to discuss or challenges to face with.

The last presentation of the final conference focused on the "What's new?" issues. The presentation "*EU rules concerning judicial cooperation in criminal matters; new legal instruments*" explained the road from the classical mutual legal assistance to the principle of mutual recognition of judgments and other judicial decisions and the advantages of the latter one.

Then, the presentation focused on the main (new) elements from the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters which will enter into force on 22nd May 2017.

Also, the participants where provided with the role of the European Judicial Network and Eurojust in judicial cooperation in criminal matters and how they can help the practitioners in their daily activity.

The last part of the presentation focused on the Proposal for a Regulation of The European Parliament and of The Council on the European Union Agency for Criminal Justice Cooperation (Eurojust) and on the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office. The participants were provided with the new provisions from the two proposals, especially with regard to EPPO and its main characteristics.

In the end of the conference the experts presented their opinions with regard to the project and its results and encouraged the participants to use the legal instruments (and other available and applicable legal instruments) used as material in this project for cooperation in criminal matters.

Conclusions

The team of experts believes that the participants had the opportunity to take part into an activity that combined both theory (presentations) and practice (the workshop), activity that was supposed, along with its general objectives, to raise awareness between the participants with regard to the main four legal instruments available within the European Union and actively involved them in solving the practical cases.

The participants liked the idea of the final conference, especially the interactive part of it, and for this reason, they actively participated into the solving of the two practical cases provided beforehand.

Some of them had (some) previous experiences with the legal instruments used within the final conference, others didn't, but in the end, they all enjoyed the fact that they were put to solve issues that can arise in practice and even managed to find the solutions by themselves.

The participants actively participated in the mixed groups and also through their *rapporteur* in the plenary. They also found the practice of mixed groups very good because they had the opportunity to get closer with their colleagues from other countries, to see other national provisions and, why not, find and speak *a common language*.

Judicial cooperation in criminal matters means having trust in other judicial systems and for this reason the participants considered such training sessions very important in building trust among practitioners coming from different Member States. Also, the team of experts considers that the final conference was another good exercise in order to strengthen the judicial cooperation in criminal matters between practitioners.

In the final conference, the methodology and the results of the project were provided to the participants in order for them to understand the main elements taken into consideration when drafting the practical cases used in the 6 seminars and the content of the Handbook that will be elaborated within the project. The participants were interested about the content of the Handbook and considered it to be a good tool to use in practice when faced with same kind of issues or other similar ones.

The team of experts considers that the length of the final conference was enough in order to disseminate the results of the project and consolidate what has been done within the 6 seminars organized in this project. The team of experts also believes that the final conference has reached its purposes which were the consolidation and the dissemination of the results of the project.

With financial support from the
Specific Programme Criminal Justice
of the European Union

Chapter XII Linguistic module

Andreea Roxana CONSTANTINESCU*[32]

Introduction

'*The European Union has set itself the objective of developing an area of freedom, security and justice. This presupposes that there is an understanding of freedom, security and justice on the part of the Member States which is identical in its essential elements and based on the principles of freedom, respect for human rights and fundamental freedoms, as well as the rule of law.*

The aim of police and judicial cooperation in the European Union is to provide a high degree of security for all citizens. One of the cornerstones for this is the principle of mutual recognition of judicial decisions […].'

(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)

The objective of 'developing an area of freedom, security and justice' is a core objective stated in the opening words of all or most European Directives, Regulations and Framework Decisions in the field of judicial cooperation. 'Mutual recognition', based on 'mutual trust' and 'mutual confidence', is other key concept commonly used in the European texts. The topic of the seminar and of the present handbook invites the audience to find 'a comprehensive European approach'. Such objectives can only be attained

*[32] **Mrs. Andreea Roxana Constantinescu – assistant, National School of Political and Administrative Studies, Bucharest; Legal English trainer, National Institute of Magistracy, Bucharest; linguistic expert, European Judicial Training Network, Brussels, arctranslations@yahoo.com**

and such an approach can only be found by means of cooperation, i.e. by means of speaking one language which everybody understands The English language, as the European working language of judicial cooperation, is an important tool in this process. It is therefore essential for the members of the judicial systems involved and participating in such cooperation to be able to use this tool effectively. And this proves to be easy and difficult at the same time.

Participants in judicial cooperation should have in mind two important aspects when using English as a tool for judicial cooperation. Firstly, English legal (including criminal) terminology is not always (easily) translatable into other European languages, given the particularities of the common law system, whose distinct features, concepts, and institutions are not to be found in any other European system. This is also the case of translations of legal concepts from any European language into English. Secondly, legal English is different from general English in a number of ways, which will be briefly shown below.

As far as the first aspect is concerned, i.e. the differences between the common law system and the different European systems, translations of legal terms and phrases from and into English can be problematic. When it comes to English concepts or terms which are not translatable into other European languages, an English law dictionary is a good solution, since it explains what that particular word or concept stands for. Difficulties arise when one wants to use terms corresponding to concepts or institutions that are not to be found in the English system. Most speakers' quick solution is, in that situation, to 'adapt' words from their vernacular language to English. The situation is sometimes the same when there are equivalent institutions or concepts in the English system, but the speakers' tendency is still to adjust words form their vernacular languages, which appear to be similar to particular words in English; the English terms, however, have other meanings.

The problem with such misusages of English terms is not only the improper use of English, but also the risk of adversely affecting communication, and hence cooperation, since not all European languages share the similarities with the exact same words in English. For example, the term 'magistrate', used by some speakers to designate a 'member of the judiciary' (typically a judge or a prosecutor in some systems – e.g. Romania, Bulgaria, France, Italy), can be understood differently by speakers from different European states (e.g. in Spain as a senior judge, in Poland as a local authority or the city hall, in Germany as an archaic way of referring to a teacher, etc.) while in English it stands for a minor judicial officer acting as a judge in a magistrates' court, without legal qualification and sometimes doing unpaid work. Other examples include terms like 'prescription' (used by some speakers to refer to the statute of limitations or limitation period, while in English it refers to medical prescription, this being its common understanding by other European natives, who do not happen to have this 'false friend' at all), 'sentence' (which in English is only

used in criminal cases, as opposed to languages like Italian, Spanish or Romania, where this term is also used in civil cases), 'instance' (which can be used by some speakers to refer to a court in general, whereas in English the meaning is 'an occurrence of something'), 'process', etc.

The second important aspect mentioned above is the difference between legal English and general English. The most relevant characteristics of legal English will be briefly outlined below.

Firstly, legal English presupposed the use of technical (legal) terms, which are only employed in legal contexts ('probation', 'defendant', 'hearing', 'respondent', 'judgment', 'extradition', 'appellate', etc.), and semi-technical terms, which have a specific meaning in legal contexts, different from the one they have in general English ('action', 'serve a document', 'procedure', 'sanction'). Many of these terms are illustrated and suggested for practice in the exercises below (terms strictly relating to criminal law and procedure, court language, the legal profession, criminal proceedings). Terms are not usually abbreviated, with the exception of a few acknowledged acronyms (Q.C. – Queen's Counsel, EAW – European Arrest Warrant, ECRIS – European Criminal Records Information System).

Secondly, the vocabulary is characterized by formality. Thus, complex prepositions ('in the event of', 'having regard to'), formal expressions ('in accordance with', 'pursuant to'), compound prepositions and adverbs ('hereby', 'herein', 'hereinafter', 'thereafter', 'therein', 'thereof', etc.), as well as words belonging to a higher register ('expedite' instead of 'speed up', 'deem' instead of 'considered') are common in legal texts.

Thirdly, formality is also a feature of the morphological and syntactic structures. The most common grammatical structures used in legal language (both in the UK and in the EU) include certain modal verbs (notably 'shall', 'may', 'should', and more rarely, but still in very formal contexts, 'can' and 'must'), passive structures, which place the emphasis on the result rather than the agent, formal connectors ('provided that'), as well as long and complex sentences, which are rarely to be found in general English.

The present handbook is therefore designed to point out the problematic aspects of legal English in general, and criminal terminology in particular. All the aspects mentioned above are illustrated by the exercises below, which provide a variety of means of making speakers aware of the correct use of the legal vocabulary and of the typical grammatical structures of legal English. The different designs of the exercises have the objective of improving a particular aspect or developing a particular skill. The 'matching', 'multiple choice', 'word formation', 'gap fill' and 'reading' exercises are aimed at enriching the speakers' vocabulary or at activating the passive vocabulary. Exercises dealing with particles, modal verbs or other grammatical structures are designed to improve the speakers' fluency in English. Other exercises are meant to help speakers use their language skills (including the new terms and structures acquired) in situational (work

related) contexts. For purposes of effectiveness of the exercises, a key is provided at the end of the manual.

PART I. GENERAL CRIMINAL TERMINOLOGY.

I. Complete the phrases below by matching the words in the two columns. Explain, in your own words, what these phrases mean.

1. community	a. of innocence
2. conditional	b. officer
3. arrest	c. bargaining
4. burden	d. release
5. rebut	e. proceedings
6. probation	f. doubt
7. plea	g. warrant
8. reasonable	h. officer
9. legal	i. service
10. probation	j. of proof
11. presumption	k. aid
12. criminal	l. a presumption

II. Complete the table below with words deriving from the ones given.

Verb	Noun
rule	
	trial
decide	
	release
judge	
	service
deprive	

III. Choose the correct answer:

1. The Regulation comes into ……. on January, 1.

a. practice b. force c. power d. date

2. The people involved in the violent demonstration made ……. at the police.

a. an argument b. an assertion c. a statement d. a claim

3. Although the prosecutor was sure he was guilty, he could not ……. anything against him.

a. charge b. accuse c. prove d. prosecute

4. The offender has to ……. the imprisonment sentence.

a. execute b. serve c. enforce d. carry out

5. He is waiting for his legal counsel to give him …….

a. a good advice b. some good advice c. some advices d. some advises

6. At the end of the trial he was …… of theft.

a. sentenced b. judged c. condemned d. convicted

7. The high court judge will pass …… next Monday.

a. verdict b. justice c. punishment d. sentence

8. He was found guilty …… blackmail.

a. of b. with c. for d. by

9. The …… sentenced the defendant to imprisonment.

a. counsel b. jury c. judge d. barrister

10. The crime he was suspected of was trafficking …… human beings.

a. of b. in c. with d. for

11. The defendant …… to speak in the absence of his lawyer.

a. denied b. rejected c. resisted d. refused

12. He was granted legal aid, since he couldn't pay …….. legal assistance and advice.

a. for b. to c. Ø d. in

13. The head of the department was charged …… embezzlement, but he still claims he is innocent.

a. of b. for c. with d. in

14. The judicial decision must be …… without delay.

a. forced b. enforced c. executed d. implemented

15. His income did not allow him to pay …… the lawyer's fees.

a. for b. Ø c. to d. in

16. Since the police didn't have enough …… against him, the suspect had to be released.

a. proof b. proves c. evidences d. evidence

IV. Complete the table below with the required forms, deriving from the words given.

Verb	Noun	Adjective
accuse		
deprive		
sentence		
presume		
appeal		
allege		

V. Match the following terms with their corresponding definitions.

a. arson	h. manslaughter	o. embezzlement
b. libel	i. extortion	p. slander
c. burglary	j. assault	q. piracy
d. bribery	k. blackmail	r. forgery
e. murder	l. theft	s. robbery
f. smuggling	m. racketeering	
g. perjury	n. hijacking	

1. the act of unlawfully taking and keeping a good that belong to another person

2. the unauthorised use and reproduction of another persons' copyrighted or patented material

3. the crime of killing a human being intentionally

4. the act of defaming a person in writing or by other representational means

5. the act of taking goods belonging to another person by using force, threats, or violence

6. the fraudulent appropriation of money entrusted by a company or organisation

7. the act of unlawfully attacking another person, causing physical harm

8. the act of engaging in illegal activities for profit

9. the act of intentionally setting fire to a property

10. the act of illegally taking goods or people into or out of a country for profit

11. the defamation of a person by means of oral statements

12. the act of killing a human being without malice aforethought

13. the act of entering a building with the intention of committing theft

14. the act of making, adapting or imitating objects or documents for a deceitful or fraudulent purpose

15. the act of threatening to disclose discreditable information about a person in an attempt to obtain money

16. the act of seizing, diverting or appropriating a vehicle

17. the act of giving or accepting money or other favours in exchange of obtaining an advantage

18. the crime of obtaining money or other advantages by abusing one's position or authority

19. the crime of wilfully giving false testimony while under oath

VI. Confusing pairs. Provide one word for each pair that illustrates the main difference between the terms in the pair.

1. kidnapping – abduction

2. murder – assassination

3. forgery – counterfeit

4. theft – robbery

5. theft – burglary

VII. Complete the table below with the required forms. For each verb, provide two nouns – one for the action or event, and one for the person. Then use words from the table to fill in the gaps in the sentences below.

Verb	Noun action/event	Noun person
convict		
detain		
suspect		
appeal		
defend		
hear		
offend		

prosecute		
try		
apply		
judge		

1. At the end of the proceedings, the …… was found guilty of trafficking in human beings.

2. Since there was no realistic prospect of ……, the case was dropped.

3. The …… is expected to pass sentence.

4. He was apprehended by the police on …… that he had committed the …… of smuggling persons into the country.

5. Since he thought his procedural rights had not been observed, he filed a(n) …….

6. The …… claimed that he was treated inhumanely by the prison officers.

7. The decision was not to …… the case, since the evidence was not sufficient.

8. The …… was sentenced to community service.

9. He decided to challenge the first instance decision, because he was …… *in absentia*.

10. The …… claimed that he had the right to remain silent.

11. The …… was not of much help, since the accused refused to speak in the absence of a lawyer.

12. The accused requested to be assisted by a lawyer who could help him prepare his …….

13. A person is presumed to be innocent until he/she is proved guilty at the end of the ……

14. Since he was suspected of having committed a serious offence, he was apprehended by the police and …… in custody.

VIII. Provide synonyms or explanations for the terms below. Check whether you have 'false friends' of those terms in your vernacular language, i.e. words that look or sound similar, but whose meaning is completely different from the English term they suggest. If yes, what is the real meaning of those terms in English?

1. sentence
2. magistrate
3. accusation
4. to execute
5. prescription
6. process

IX. While reading the text below, choose the right words or phrases to fill in the blank spaces.

Judicial accountability and independence

https://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/

We are all familiar with media reports of a government minister who is forced to resign or (1) ..... for behaviour which is or is perceived to be inappropriate or for incompetence in the (2) ..... of his or her duties. There are also many press headlines which (3) ..... a judge or magistrate, for example for handing down a "soft" sentence, but there are almost none which announce that

the judge in question has resigned or has been dismissed as a result of that criticism. Many may wonder why steps are not taken to dismiss such judges or to force them to resign. Why is it that judges and magistrates appear to be (4) …… in the face of such criticism? Why is it that the way they are treated appears to be different to the treatment of many others, from government ministers and public officials, to the directors and employees of companies?

(1) a. expelled	b. fired	c. dismissed	d. banned
(2) a. realisation	b. execution	c. serving	d. performance
(3) a. sentence	b. condemn	c. convict	d. punish
(4) a. irresponsible	b. unresponsible	c. inaccountable	d. unaccountable

The truth is that the judiciary is accountable, but in a different manner. The reason for this difference is a fundamental feature of our constitution going to the very heart of our democracy. The difference stems from the need to ensure that judges are impartial and independent of central and local government and from pressures from the media, companies, and pressure groups while (5) …… their judicial functions. That need is also reflected in the constitutions of all democratic countries.

(5) a. doing	b. making	c. executing	d. exercising

The extent to which the judiciary in England and Wales are accountable, how they are accountable, and why there is a need for judges to be completely independent from Government and other powerful groups, are difficult questions.

With some 35,000 men and women holding (6) …… office in England and Wales, the answers to these questions have a significant impact on our daily lives. They may affect the confidence people have in the ability of judges to (7) ……. the rule of law. It is a complex area, but we hope that an understanding of some of the issues involved will help to put into perspective the way in which the courts deliver justice.

(6) a. juridical	b. judicial	c. judiciary	d. legal
(7) a. maintain	b. uphold	c. preserve	d. keep

1. Independence

1.1 Independence from whom and what?

It is vitally important in a democracy that individual judges and the judiciary as a whole are impartial and independent of all external pressures and of each other so that those who appear (8) ..... them and the wider public can have confidence that their cases will be decided fairly and in accordance with the law. When carrying out their judicial function they must be free of any improper influence. Such influence could come from any number of sources. It could arise from improper pressure by the executive or the legislature, by individual litigants, particular pressure groups, the media, self-interest or other judges, in particular more senior judges.

(8) a. to b. at c. before d. in front of

1.2 Why is independence important?

It is vital that each judge is able to decide cases solely on the (9) ..... presented in court by the parties and in accordance with the law. Only relevant facts and law should form the basis of a judge's decision.

(9) a. evidence b. evidences c. proof d. proves

The responsibilities of judges in (10) ..... between the citizen and the state have increased together with the growth in governmental functions over the last century. The responsibility of the judiciary to protect citizens against unlawful acts of government has thus increased, and with it the need for the judiciary to be independent of government.

(10) a. processes b. challenges c. arguments d. disputes

As well as in fact being independent in this way, it is of vital importance that judges are seen to be both independent and impartial.

1.3 The ways in which independence is protected and its limits

Whilst an independent and impartial judiciary is one of the cornerstones of a democracy, the practical ways in which this is given (11) ..... are often treated with suspicion. For example, judges are given immunity from (12) ..... for any acts they carry out in performance of their judicial function. They also benefit from immunity from being sued for defamation for the things they say about parties or witnesses in the course of (13) ..... cases. These principles have led some people to suggest that Judges are somehow 'above the law'.

(11) a. action b. prominence c. execution d. effect

(12) a. persecution b. prosecution c. sentencing d. punishment

(13) a. seeing b. hearing c. listening d. judging

However, it is not right to say that Judges are above the law. Judges are subject to the law in the same way as any other citizen. The Lord Chief Justice or Lord Chancellor may (14) …… a judge to the Judicial Complaints Investigations Office in order to establish whether it would be appropriate to remove them from office in circumstances where they have been found to have committed a criminal offence.

(14) a. send b. defer c. refer d. submit

Judicial independence does, however, mean that judges must be free to exercise their judicial powers without interference from (15) ……., the State, the media or powerful individuals or entities, such as large companies. This is an important principle because judges often decide matters between the citizen and the state and between citizens and powerful entities. For example, it is clearly inappropriate for the judge in charge of a criminal trial against an individual citizen to be influenced by the state. It would be unacceptable for the judge to come under pressure to admit or not admit certain evidence, how to direct the jury, or to (16) …… a particular sentence. Decisions must be made on the basis of the facts of the case and the law alone.

(15) a. litigants b. defendants c. appellants d. appellees

(16) a. give b. present c. pass d. submit

Judicial independence is important whether the judge is dealing with a civil or a criminal case. Individuals involved in any kind of case before the (17) …… need to be sure that the judge dealing with their case cannot be influenced by an outside party or by the judge's own personal interests, such as a fear of being sued for defamation by litigants about whom the judge is required in the course of proceedings or judgment to make adverse comment. This requirement that judges be free from any improper influence also underpins the duty placed on them to declare personal interests in any case before it starts, to ensure that there is neither any bias or partiality, or any appearance of such.

(17) a. tribunals b. courts c. instances d. hearings

A practical example of the importance of judicial independence is where a high profile matter, which has generated a great deal of media interest comes before the court. Such matters range from the criminal trial of a person accused of a shocking murder, the divorce of celebrities, and challenges to the (18) …… of government policy, for example the availability of a new and expensive drug to NHS patients. In the 24 hour media age in which we live, it stands to reason that the judge hearing the case will often be under intense scrutiny, with decisions open to intense debate. It is right that this is so. But it is important that decisions in the courts are made in accordance with the law and are not influenced by such external factors. It is also important however to observe one or two points which will have an impact on the outcome of the (19) …… and our understanding of it:

(18) a. correctness b. legality c. adequacy d. appropriateness

(19) a. process b. procedure c. dispute d. trial

1. In a Crown Court criminal trial in England and Wales:

- The judge does not decide guilt or innocence. That decision is made by the jury, which is made up of resident citizens and registered electors selected at random.
- If the jury decides that the defendant is guilty, it is then the task of the judge to pass sentence. In doing so the judge will have to take into account the sentencing scheme which has been (20) ..... in legislation by Parliament, and the various sentencing guidelines which have been agreed and published by the Sentencing Guidelines Council. The Guidelines and the decisions of the Court of Appeal (Criminal Division) set out key considerations which must be taken into account by the judge when determining any sentence and provide a framework of appropriate sentences for the judge to apply. The judge is (21) ..... to depart from the guidelines or a decision of the Court of Appeal (Criminal Division) only when the interests of justice require such a departure.
- Any sentence that is unduly harsh or in the case of more serious offences is unduly (22) ..... may be corrected by the Court of Appeal, on an appeal by the (23) ..... person or a reference to the Court of Appeal by the Attorney General.

(20) a. acted b. enacted c. given d. presented

(21) a. correct b. right c. awarded d. entitled

(22) a. nice b. kind c. convenient d. lenient

(23) a. condemned b. convicted c. punished d. penalised

2. In civil cases any errors by the trial judge may also be corrected by the Court of Appeal and

3. In cases raising important points of law, the decisions of the Court of Appeal may be appealed to the Supreme Court

4. It is important to recognise that, in both civil and criminal cases, what we read in the papers and see on the news will often only cover a fraction of what has been heard in court. This is not a criticism of journalists. They only have a certain amount of space or time to cover a particular story. It is worth bearing in mind that, for instance, in a criminal case there are often many (24) ..... or aggravating circumstances surrounding the offence and the offender. These will have had a direct bearing on the sentence handed (25) ..... and are often difficult for the

media to report in full. A good example of this is where a defendant pleads guilty to a crime. In such circumstances Parliament has directed that judges must significantly reduce the sentence.

(24) a. softening b. weakening c. mitigating d. lessening

(25) a. down b. in c. up d. for

The purpose of the above examples is not to suggest that judges never get it wrong, or that in criminal cases they have no say in the sentence handed down, but to give an idea of the factors they must consider when making decisions.

PART TWO. THE VOCABULARY OF JUDICIAL COOPERATION

IN CRIMINAL MATTERS.

SOCIAL REINTEGRATION OF SENTENCED PERSONS:

A COMPREHENSIVE EUROPEAN APPROACH

I. Fill in the gaps with near-synonyms of the words in brackets.

1. The experience …… (collected) from these activities has encouraged the Member States to further …… (intensify) their efforts and showed the importance to …… (carry on) streamlining the …… (reciprocal) exchange of information on convictions between the Member States.

2. Any …… (modification) or …… (erasure) of information transmitted in accordance with Article 4(3) shall …… (involve) identical …… (modification) or …… (erasure) by the Member State of the person's nationality regarding information stored in accordance with paragraph 1 of this Article for the purpose of retransmission in accordance with Article 7.

3. Member States shall take the necessary measures to …… (arrange) that personal data received from another Member State under Article 4, if transmitted to a third country …… (according to) Article 7(3), is subject to the same usage …… (restrictions) as those applicable in a requesting Member State.

4. For the purposes of this Framework Decision, Member States shall …… (relinquish) the right to rely among themselves on their …… (doubts) to Article 13 of the European Convention on Mutual Assistance in Criminal Matters.

5. In order to ..... (speed up) the development of ECRIS, the Commission should adopt a number of technical measures to ..... (help) Member States in preparing the technical infrastructure for interconnecting their criminal records databases.

6. The common communication infrastructure shall be the S-TESTA communications network. Any ..... (additional) developments thereof or any alternative ..... (safe) network shall ensure that the common communication infrastructure in place continues to meet the conditions set out in paragraph 6.

7. Each Member State shall ..... (inform) the General Secretariat of the Council, when implementing this Framework Decision, which probation measures and alternative sanctions, apart from those referred to in paragraph 1, it is prepared to supervise.

8. The adapted probation measure, alternative sanction or probation period shall not be more ..... (harsh) or longer than the probation measure, alternative sanction or probation period which was ..... (initially) imposed.

9. When, in application of this Article, jurisdiction is transferred back to the issuing State, the competent authority of that State shall ..... (restart, reassume) jurisdiction.

10. Relations between Member States, which are characterized by special mutual ..... (trust) in other Member States' legal systems, ... (facilitate) recognition by the executing State of decisions taken by the issuing State's authorities.

11. If the transfer of the sentenced person within the period laid down in paragraph 1 is ..... (hampered) by ..... (unexpected) circumstances, the competent authorities of the issuing and executing States shall immediately contact each other.

12. Transfer shall take place as soon as these circumstances ..... (stop) to exist.

13. Under that Convention, sentenced persons may be transferred to serve the ..... (rest) of their sentence only to their State of nationality and only with their consent and that of the States involved.

14. The Council adopted a programme of measures to implement the principle of mutual recognition of decisions in criminal matters in which it called for a(n) ..... (evaluation) of the need for modern mechanisms for the mutual recognition of final sentences involving deprivation of liberty.

II. Supply the negative forms of the words in italics by adding negative prefixes. Then use these negative forms in sentences of your own.

1. 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.

2. In view of the principle of mutual recognition, on which this Framework Decision is based, issuing and executing Member States should promote direct contact between their competent authorities in the application of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

4. The competent authority of the issuing State may forward a judgment and, where applicable, a probation decision to the competent authority of the Member State in which the sentenced person is lawfully and ordinarily residing, in cases where the sentenced person has returned or wants to return to that State.

5. The competent authority of the executing Member State may postpone the decision on recognition of the judgment until the reasonable deadline set for the certificate to be completed or corrected.

6. The competent authority of the executing State shall immediately notify of any finding which is likely to result in the imposition of a custodial sentence or measure involving deprivation of liberty.

7. There is a need for more efficient and accessible procedures of exchange of such information at European Union level.

8. Member States may also provide available information relating to the level of completion and the level of participation in the offence and, where applicable, to the existence of total or partial exemption from criminal responsibility or to recidivism.

9. The representatives of the relevant departments of the administrations of the Member States and the Commission shall inform and consult one another within the Council.

10. This Framework Decision should be implemented and applied in a manner which allows general principles of equality, fairness and reasonableness to be respected.

11. The executing State should consider the possibility of adapting the sentence in accordance with this Framework Decision.

12. The issuing State may agree to the application of such provisions or it may withdraw the certificate.

III. Fill in the gaps with words deriving from the ones in brackets, using the clues given.

1. This Framework Decision is to replace the …… (provide, noun, pl.) of Article 56 of the European Convention of 28 May 1970 on the International …… (valid, noun) of Criminal Judgments, concerning the taking into …… (consider, noun) of criminal judgments, as between the Member States parties to that Convention.

2. The following offences, if they are …… (punish, adj.) in the issuing State by a …… (custody, adj.) sentence or a measure involving …… (deprive, noun) of liberty for a maximum period of at least three years, and as they are defined by the law of the issuing State, under the terms of this Framework Decision and without …… (verify, noun) of the double …… (crime, abstract noun) of the act, give rise to recognition of the judgment and, where …… (apply, adj.), the probation decision and to …… (supervise, noun) of probation and alternative sanctions.

3. The competent …… (authorize, noun) of the executing State shall decide as soon as possible, and within 60 days of …… (receive, noun) of the judgment and, where applicable, the probation decision, whether or not to recognize the judgment, and, where applicable, the probation decision and assume …… (responsible, noun) for supervising the probation measures or alternative sanctions.

4. The subsequent decisions relating to a suspended sentence include:

(a) the …… (modify, noun) of obligations or …… (instruct, noun, pl.) contained in the probation measure or alternative sanction;

(b) the …… (revoke, noun) of the …… (suspend, noun) of the execution of the judgment; and

(c) the …… (impose, noun) of a custodial sentence or measure involving deprivation of liberty in case of an alternative sanction or …… (condition, adj.) sentence.

5. The competent authority of the executing State shall without delay inform the competent authority of the issuing State, by any means which leaves a written record of the …… (transmit, noun) of the judgment and, where applicable, the probation decision, together with the …… (certify, noun) referred to in Article 6(1).

6. …… (enforce, noun) of a sentence in the executing State should enhance the …… (possible, noun) of social …… (rehabilitate, noun) of the sentenced person.

7. Where in this Framework Decision …… (refer, noun) is made to the State in which the sentenced person 'lives', this indicates the place to which that person is attached based on …… (habit, adj.) residence and on elements such as family, social or …… (profession, adj.) ties.

8. The …… (apply, noun) of the mechanisms established by this Framework Decision only to the transmission of information extracted from …… (crime, adj.) records concerning natural persons should be without prejudice to a possible future …… (broad, vb., gerund) of the scope of …… (apply, noun) of such mechanisms to the exchange of information concerning …… (law, adj.) persons.

9. When information extracted from the criminal record is requested under Article 6 from the …… (centre, adj.) authority of a Member State other than the Member State of the person's …… (nation, abstract noun), the requested Member State shall transmit information on …… (convict, noun, pl.) handed down in the requested Member State and on …… (convict, noun, pl.) handed down against third country …… (nation, noun for person, pl.) and against …… (state, adj., neg.) persons contained in its criminal record.

10. Member States and the Commission should inform and consult one another within the Council in accordance with the modalities of …… (identify, noun) of offenders, common understanding of the categories of offences and penalties and measures, and …… (explain, noun) of …… (problem, adj.) national offences and penalties and measures, and ensuring the …… (coordinate, noun) necessary for the …… (develop, noun) and …… (operate, noun) of ECRIS.

IV. Fill in the gaps with antonyms of the words in brackets.

1. This Decision …… (violates) fundamental rights and …… (infringes) the principles recognized in particular by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union.

2. For the purposes of this Framework Decision, 'conviction' means any …… (initial) decision of a criminal court establishing …… (innocence) of a criminal offence.

3. The …… (inclusion) of a possibility to review a …… (subsequent) conviction should not …… (facilitate) a Member State from issuing a decision.

4. Each Member State may, at the time of adoption of this Framework Decision or at a …… (earlier) stage, declare that as an executing State it will …… (accept) to assume the responsibility provided for in paragraphs 1(b) and (c) in cases or categories of cases to be specified by that Member State.

5. The competent authority of the executing State shall have jurisdiction to take all …… (prior) decisions relating to a suspended sentence, conditional release, conditional sentence and alternative sanction, in particular in case of non-compliance with a probation measure or alternative sanction or if the sentenced person commits a …… (old) criminal offence.

6. The adapted sentence shall not be …… (more) than the …… (minimum) penalty provided for …… (similar) offences under the law of the executing State.

7. The adapted sentence shall not …… (alleviate) the sentence passed in the issuing State in terms of its nature or duration.

8. Any Member State may, on adoption of this Framework Decision or later, state in a declaration deposited with the General Secretariat of the Council that it will …… (refuse) a translation in one or more other official languages of the Institutions of the European Union.

V. Insert the appropriate particles. Some of the particles given in the table below may occur more than once.

after, at, between, by, for, from, in, into, on, through, to, under, with, within

1. The principle that the Member States should attach ..... a conviction handed down ..... other Member States effects equivalent ..... a conviction handed down ..... their own courts in accordance ..... national law should be affirmed, whether those effects be regarded by national law as matters of fact or of procedural or substantive law.

2. Interference ..... a judgment and its execution covers, inter alia, situations where, according ..... the national law of the second Member State, the sanction imposed ..... a previous judgment is to be absorbed ..... or included ..... another sanction, which is then to be effectively executed, ... the extent that the first sentence has not already been executed or its execution has not been transferred ..... the second Member State.

3. This objective presupposes the exchange ..... the competent authorities of the Member States of information extracted ..... criminal records.

4. This Framework Decision contributes ..... achieving the goals provided ..... by measure 3 of the programme, which calls ..... the establishment of a standard form like that drawn up for the Schengen bodies, translated ..... all the official languages of the Union, ... criminal records requests.

5. The main aim of this Framework Decision is to improve the exchange of information ..... convictions and, where imposed and entered ..... the criminal records of the convicting Member State, ... disqualifications arising ..... criminal conviction of citizens of the Union.

6. Notwithstanding the need to provide the sentenced person ..... adequate safeguards, his or her involvement ..... the proceedings should no longer be dominant by requiring in all cases his or her consent ..... the forwarding of a judgment ..... another Member State ..... the purpose of its recognition and enforcement of the sentence imposed.

7. The Council may decide to add other categories of offences ..... the list provided for in paragraph 1 ..... any time, acting unanimously ..... consultation of the European Parliament ..... the conditions laid down ..... Article 39(1) of the Treaty ..... European Union.

8. Any decision under paragraph 1(k) in relation ..... offences committed partly ..... the territory of the executing State, or ..... a place equivalent to its territory, shall be taken by the

competent authority of the executing State only ..... exceptional circumstances and ..... a case-by-case basis, having regard ..... the specific circumstances of the case, and ..... particular to whether a major or essential part of the conduct ..... question has taken place in the issuing State.

9. For the further supervision of the probation measures or alternative sanctions, the competent authority of the issuing State shall take account ..... the duration and degree of compliance ..... the probation measures or alternative sanctions ..... the executing State, as well as of any decisions taken ..... the executing State in accordance with Article 16(1).

10. A pilot project is currently being developed with a view ..... interconnecting criminal records. Its achievements constitute a basis ..... further work ..... computerized exchange of information ..... European Union level.

11. The categories of data to be entered ..... the system, the purposes ..... which the data is to be entered, the criteria ..... its entry, the authorities permitted to access the data, and some specific rules ..... protection of personal data are defined ..... the Framework Decision 2009/315/JHA.

12. By way ..... exception, where the penalty or measure does not correspond ..... any specific sub-category, the 'open category' code of the relevant or closest category of penalties and measures or, in the absence ..... the latter, an 'other penalties and measures' code, shall be used ..... that particular penalty or measure.

13. The fact that, in addition ..... the sentence, a fine and/or a confiscation order has been imposed, which has not yet been paid, recovered or enforced, shall not prevent a judgment ..... being forwarded.

14. The Member State requested to permit transit may hold the sentenced person ..... custody only ..... such time as transit ..... its territory requires.

VI. Fill in the gaps with the suitable modal verbs in the affirmative or negative.

1. If the national court in the new criminal proceedings […] is of the opinion that imposing a certain level of sentence within the limits of national law would be disproportionately harsh on the offender, considering his or her circumstances, and if the purpose of the punishment ..... be achieved by a

lower sentence, it ..... reduce the level of sentence accordingly, if doing so would have been possible in purely domestic cases.

2. This Framework Decision respects the principle of subsidiarity, insofar as it aims to approximate the laws and regulations of the Member States, which ..... be done adequately by the Member States acting unilaterally and requires concerted action in the European Union.

3. A court in one Member State ..... be able to take account of final judgments rendered by the courts in other Member States for the purposes of assessing the offender's criminal record and establishing whether he has reoffended, and to determine the type of sentence applicable and the arrangements for enforcing it.

4. A Member State ..... refuse to recognize a judgment and, where applicable, a probation decision, if the judgment concerned was issued against a person who has not been found guilty, such as in the case of a mentally ill person, and the judgment or, where applicable, the probation decision provides for medical/therapeutic treatment which the executing State ..... supervise in respect of such persons under its national law.

5. No provision of this Framework Decision ..... be interpreted as prohibiting refusal to recognize a judgment and/or supervise a probation measure or alternative sanction if there are objective reasons to believe that the probation measure or alternative sanction was imposed to punish a person because of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation or that this person ..... be disadvantaged for one of these reasons.

6. If, under the national law of the issuing State, the sentenced person ..... be given a judicial hearing before a decision is taken on the imposition of a sentence, this requirement ..... be met by following mutatis mutandis the procedure contained in instruments of international or European Union law that provide the possibility of using video links for hearing persons.

7. The accuracy of the codes mentioned ..... be fully guaranteed by the Member State supplying the information and it ..... preclude the competent authorities in the receiving Member State from interpreting the information.

8. Execution of a judgment ..... be refused on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs.

VII. Turn the following sentences into the passive voice.

1. A judicial authority should take all subsequent decisions related to a suspended sentence, a conditional sentence or an alternative sanction which result in the imposition of a custodial sentence or measure involving deprivation of liberty.

2. If a competent authority other than a court takes a decision under Article 14(1) (b) or (c), the Member States shall ensure that, upon request of the person concerned, a court or another independent court-like body may review such decision.

3. The competent authority of the issuing state shall sign the certificate referred to in paragraph 1 and certify its content as accurate.

4. The general budget of the European Union should cover all expenditure concerning the common communication infrastructure.

5. Not all Member States have ratified the Additional Protocol to that Convention, which allows transfer without the person's consent, subject to certain conditions.

6. The competent authority of the issuing State shall forward the judgment and, where applicable, the probation decision, directly to the competent authority of the executing State.

7. The competent authority of the executing State may refuse to recognise the judgment and enforce the sentence if at the time the competent authority of the executing State received the judgment less than six months of the sentence remain to be served.

8. The issuing State and also the executing State may grant an amnesty or pardon.

VIII. Choose the appropriate connectors.

1. …… the probation measures or alternative sanctions include community service, then the executing State should be entitled to refuse to recognise the judgment and, where applicable, the probation decision.

a. unless b. if c. even if d. only if

2. …… the probation measure, the alternative sanction or the probation period has been adapted because its duration exceeds the maximum duration provided for under the law of the executing State, the duration of the adapted probation measure, alternative sanction or probation period shall not be below the maximum duration provided for equivalent offences under the law of the executing State.

a. where b. whereof c. whereto d. whether

3. Only the issuing State may decide on applications for review of the judgment …… forms the basis for the probation measures or alternative sanctions to be supervised under this Framework Decision.

a. who b. which c. what d. whom

4. The competent authority of the issuing state may, upon request of the sentenced person, forward the judgment and, where applicable, the probation decision to a competent authority of a Member State other than the Member State in which the sentenced person is lawfully and ordinarily residing, …… this latter authority has consented to such forwarding.

a. although b. even though c. conditioned that d. on condition that

5. The form of the certificate is drafted in such a way …… essential elements of the judgment and, where applicable, of the probation decision are comprised in the certificate.

a. as to b. as that c. so to d. so that

6. Member States may designate non-judicial authorities as the competent authorities for taking decisions under this Framework Decision, …… such authorities have competence for taking decisions of a similar nature under their national law and procedures.

a. provided that b. providing that c. provided for d. providing for

7. ……, in application of this Article, jurisdiction is transferred back to the issuing State, the competent authority of that State shall resume jurisdiction.

a. when b. since c.. for d. because

8. Member States may conclude bilateral or multilateral agreements or arrangements after 6 December 2008, ... such agreements and arrangements allow the provisions of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for the supervision of probation measures and alternative sanctions.

a. in order as b. in order to c. so far as d. insofar as

9. During such consultation, the competent authority of the executing State may present the competent authority of the issuing State with a reasoned opinion, ... enforcement of the sentence in the executing State would not serve the purpose of facilitating the social rehabilitation and successful reintegration of the sentenced person into society.

a. which b. that c. so that d. so as

10. In cases where the sentenced person could be transferred to a Member State and to a third country under national law or international instruments, the competent authorities of the issuing and executing States should, in consultations, consider ..... enforcement in the executing State would enhance the aim of social rehabilitation better than enforcement in a third country.

a. unless b. where c. whether d. when

11.Member States may provide that any decision on early or conditional release may take account of those provisions of national law, indicated by the issuing State, ... the person is entitled to early or conditional release at a specified point in time.

a. under that b. that c. under which d. which

12. ..... the enforcement of the sentence in the executing State has not begun, the issuing State may withdraw the certificate from that State, giving reasons for doing so.

a. as long as b. as long c. when d. whenever

13. The competent authority of the executing State may refuse to recognise the judgment and enforce the sentence if the judgment was rendered in absentia, ... the certificate states that the person was summoned personally or informed via a representative competent according to the national law of the issuing State of the time and place of the proceedings which resulted in the judgment being rendered

in absentia, or that the person has indicated to a competent authority that he or she does not contest the case.

a. if b. even if c. unless d. although

14. Subject to paragraph 2, the issuing State shall not proceed with the enforcement of the sentence …… its enforcement in the executing State has begun.

a. as soon as b. once c. unless d. when

15. The competent authority of the issuing State shall forthwith inform the competent authority of the executing State of any decision or measure …… the sentence ceases to be enforceable immediately or within a certain period of time.

a. for which b. as a result of which c. where d. as to

16. Paragraph 1 (A person transferred to the executing State shall not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed before his or her transfer other than that for which he or she was transferred.) shall not apply when the sentenced person could be liable to a penalty or a measure not involving deprivation of liberty, in particular a financial penalty or measure in lieu thereof, …… the penalty or measure in lieu may give rise to a restriction of his or her personal liberty.

a. if b. unless c. only if d. even if

17. The competent authority of the executing State shall terminate enforcement of the sentence …… it is informed by the competent authority of the issuing State of the decision or measure referred to in paragraph 1.

a. as soon as b. immediately that c. immediately as d. as soon that

18. This Framework Decision should not prevent Member States from taking into account, in accordance with their law and when they have information available, for example, final decisions of administrative authorities …… decisions can be appealed against in the criminal courts establishing guilt of a criminal offence or an act punishable under national law by virtue of being an infringement of the rules of law.

a. which b. of which c. whose d. of whom

19. Some Member States attach effects to convictions handed down in other Member States, …… others take account only of convictions handed down by their own courts.

a. where b. when c. whereas d. whereto

20. All Member States should ensure that sentenced persons, in respect of whom decisions under this Framework Decision are taken, are subject to a set of legal rights and remedies in accordance with their national law, …… the competent authorities designated to take decisions under this Framework Decision are of a judicial or non-judicial nature.

a. regardless b. regardless of whether c. regardless whether d. regardless if

21. …… ensure the mutual understanding and transparency of the common categorisation, each Member State should submit the list of national offences and penalties and measures falling in each category referred to in the respective table.

a. so to b. as to c. in order to d. for to

22. The ground for refusal relating to territoriality should be applied only in exceptional cases and with a view to cooperating to the greatest extent possible under the provisions of this Framework Decision, …… taking into account of the objectives thereof.

a. when b. then c. whereas d. while

23.The central authority of the Member State of the person's nationality shall, in respect of such convictions, inform the requesting Member State which other Member State has transmitted such information …… enable the requesting Member State to submit a request directly to the convicting Member State in order to receive information on these convictions.

a. so as to b. so to c. as to d. for to

24. …… the objective of this Decision is not to harmonise national systems of criminal records there is no obligation for a convicting Member State to change its internal system of criminal records as regards the use of information for domestic purposes.

a. since b. where c. whereas d. while

IX. Reading comprehension.

A. Before reading the text below, answer the following questions.

1. Are prisons overcrowded in your country? Explain why.

2. What are the prison conditions in your country?

3. Is the percentage of foreign detainees high? Explain why.

1. Experts reflect on spike in prison population

(www. swissinfo.ch)

Jan 26, 2010 - 21:36

The Swiss prison population stands at 80 detainees for every 100,000 residents.

(Keystone)

2. The recent rise in prisoner figures has cast light on the impact of penal reforms and regional variations in detention policy.

The number of inmates in Swiss prisons grew by five per cent last year to 6,084 - the second-highest level in a decade. This is particularly evident in French and Italian-speaking regions.

The overall growth has caused mixed reactions among observers.

“It’s a startling increase,” said Daniel Laubscher from the Federal Statistics Office, which published the figures last week.

The crime and penal law expert had rather expected a drop in prisoners following reforms to Swiss criminal law, which entered into force in 2007.

These controversial changes included abolishing jail terms of less than six months and introducing a system of so called day-fines calculated on a person's income. It also introduced communal work as a sanction for offenders.

The rise in inmates is also set against four years of successive falls in the overall number of reported crimes.

3. "Upwards trend"

But Martin Killias, a professor of criminology at Zurich University, said he was not surprised by the increase.

"It seems paradoxical, but the unsurprising, sad reality is that these reforms are likely to produce more prisoners than fewer," he told swissinfo.ch.

"When judges cannot use short sentences they usually impose alternative sanctions, like day fines, but they may also feel such an approach is inappropriate for the crime and impose a heavier custodial sentence of just over six months."

Swiss politicians are not eager to learn from the mistakes made by other countries, said Killias, pointing to Portugal, Spain, Greece and Cyprus, where similar penal reforms have led to an "explosion" in prisoner numbers.

"This upwards trend is likely to be with us in Switzerland for the next few years," he added.

Another emerging concern is that over the next five years there will be an increasing use of day fines without suspended sentences, he said. This will lead to a serious problem as more people are sent to prison for not being able to pay their fines, as in Germany and Austria.

"This is not yet happening, but will increase dramatically over the next few years," said the criminology professor.

4. Regional differences

The growth in the number of people serving prison sentences in Switzerland is particularly striking in French- and Italian-speaking regions.

According to the Federal Statistics Office, the number of detainees in this category rose by 20 per cent over the past decade from 746 to 1,115 in this part of the country, while the figures for central and eastern Switzerland dropped slightly.

"This underlines the bad trend among French-Swiss and Italian-Swiss justice systems to much more willingly lock people away," said Nicolas Quéloz, professor of penal law and criminology at Fribourg University.

Federal statistics also show that cantons Fribourg, Geneva, Jura, Neuchâtel, Vaud, Valais and Ticino also resort more readily to pre-trial detention. This is partly due to the "more repressive culture" of judges from those regions, said Quéloz, but also because the percentage of foreign suspects is much higher than in other Swiss regions.

5. Foreign flight risks

Overall, almost three out of four detainees nationwide are foreign. But this is not because foreigners commit more crimes but rather because they are seen as "flight risks" by authorities, according to a 2006 study by Bern University. In the above-mentioned cantons, around 87 per cent of people in pre-trial detention are foreign, compared with 73 per cent in eastern regions and 74 per cent in central and north-west Switzerland. "Cross-border crime is much more of a western-Swiss phenomenon than in eastern regions," said Killias. "Suspects living abroad all end up in pre-trial detention; otherwise they would never come to a hearing."

According to the Statistics Office, prisons in French- and Italian-speaking parts are 100 per cent full, while the overall occupancy rate of Swiss prisons stands at 90 per cent. Despite this general upward trend, Quéloz said it was important to put all these statistics into perspective.

"The Swiss prison population is 80 detainees for every 100,000 residents. When you compare this with Austria (110), France (100), Germany (95), Italy (80), Russia (630), Poland (235), the Netherlands (113), Switzerland shouldn't be too worried," he said.

Simon Bradley, swissinfo.ch

5.1 Swiss prison system

There are 114 detention centres in Switzerland with places for 6,683 inmates. In 2009 there was a total of 6,084 people under lock and key (+5% compared with 2008), the second highest level in a decade. Women accounted for 6% of the prison population, and teenagers 1%.

On the office's reference day - September 2 - 1,888 people were being held in detention. A further 3,603 were serving time, while 411 were waiting to be expelled from the country. The 182 others were being held for a variety of reasons. Foreigners represented 70% of those in detention.

Switzerland's most overcrowded prison, Champ-Dollon jail in Geneva, was built in 1977 to hold 270 prisoners but today averages nearly twice as many. In mid-January 2009 there were 502 detainees. Around 60% of people held there are in investigative custody.

6. Infamous for being the most overcrowded prison in the country, Champ-Dollon in Geneva has just opened a new annex with room for 100 more inmates.

swissinfo.ch joined local politicians gathered at the prison to attend the inauguration of the building, which has been welcomed by all parties as a step in the right direction.

Located between two residential villages in the Geneva suburbs, within sight of the French border, Champ Dollon prison is a vast building site. Three cranes tower over the complex, sign of the frenzy of activity which has gripped the place for several months.

The imposing walls topped with barbed wire around the giant complex and the numerous guards who watch the comings and goings of trucks and workers make it clear: expanding a prison while maintaining business as usual is a monumental task.

All the more difficult because daily life in the prison is very tense owing to the chronic overcrowding which has affected the prison since the beginning of the last decade.

Built for 270 inmates, Champ-Dollon is currently housing almost double that number. A year ago the prison reached a lamentable record: 622 inmates were locked up there in extremely crowded conditions.

On this unseasonably cool grey morning in July, the prison opened its doors to Geneva's political and judicial establishment. Which may explain why, when the 30 or so journalists entered the courtyard to the brand new 100-bed annex, shouts and insults flew from the main building.

7. Record build

To avoid too much disruption to the precarious calm of the place, the opening ceremony took place in the prison gymnasium.

Head of the Geneva government Mark Müller welcomed the realisation of an exceptional project, noting that it took only 18 months from the decision of the cantonal government to the inauguration of the new building, with a total cost of SFr35 million ($43.68 million).

"This is the result of a project equally necessary for the inmates and the guards who work in extremely difficult conditions," Müller said.

His colleague Isabel Rochat is head of security and police. "We are relieved because the detention conditions will finally improve. Respect for the person, whatever the crime committed, has too often been flouted in our history," she said.

In the recent past, the "powder keg" of Champ-Dollon has often hit the headlines. Last year was no exception, with several riots and an attack on five guards in October.

Last week, the Geneva press revealed that four internal inquiries were underway following complaints by the inmates of bad treatment. This explosive situation has repeatedly drawn criticism from human rights organisations.

The director of the prison, Constantin Franziskakis, defends his employees: "An overcrowded prison is a place in which incidents inevitably happen. We are not dealing with an easy population. But the incidents remain isolated."

8. New code

In 2008, the anti-torture committee of the Council of Europe criticised the overcrowding at Champ Dollon in a report. Unworthy practices in a canton which is home to the main international institutions defending human rights, Isabel Rochat admits.

"A canton and a country are judged by how they manage their security. Geneva is the cradle of the humanitarian organisations, it should show an example and offer places of detention which respect the most elementary laws."

So why wait so long to expand the prison? "It has to be acknowledged that we did not fully grasp the rapid increase in the number of inmates. We hoped that the numbers had reached a peak and would go down but that was not the case," she said.

Since the beginning of the year, a change in the law has somewhat taken the pressure off the director of the prison and his staff of almost 300. The entry into force of a new penal procedure code has put an end to the systematic use of preventative detention for minor crimes.

Many lawyers had been complaining in Geneva about the over-use of provisional detention. Since the beginning of the year, the prison population has fallen by 25 per cent.

But not all the problems have been solved and the prison still has just 370 places for 456 registered inmates.

The minister in charge of security is less than optimistic about the outlook for Geneva.

"The security situation is very critical in Geneva. Our canton has become a sort of supermarket without a checkout. We are unfortunately not moving towards a decrease in the number of inmates."

9. National stakes

A. Another building destined to house 92 inmates suffering from psychiatric problems is scheduled to be completed in 2013. The new annex of Brenaz prison will accommodate 150 new inmates between now and 2015.

As for the possibility of building a new prison at Champ-Dollon, it depends on the evolution of the number of inmates in the coming months. "We want to move faster," Müller said.

The Swiss Human Rights League has long denounced the competitive expansion of the prison system, claiming that the places created in recent years only have the effect "of multiplying the incarceration of the population and reinforcing the abuse of preventative detention, driven by an unacceptable penal populism".

The burning question of prison overcrowding may be symbolised above all by Champ-Dollon but the problem goes beyond canton Geneva. The rate of occupation of Swiss prisons reached 92.5 per cent on average in September 2010, date of the last survey by the Federal Statistics Office.

With an occupation rate of 105 per cent, the prisons in French- and Italian-speaking regions are particularly problematic.

"The prisons are full all over Switzerland," Rochet said. "In the same way that the number of police is a Swiss problem, prison overcrowding is also a national problem. We have to solve it together."

9.1 Champ-Dollon prison

Opened in 1977, Geneva's Champ-Dollon prison has the main function of detaining prisoners before trial and sentencing.

Since the beginning of the last decade, the prison has seen a constant increase in numbers of inmates, leading to the development of a chronic problem of overcrowding. Over the year 2010, a record total of 3,075 inmates were accommodated at Champ-Dollon. The site currently houses 456 inmates, although it was built for 270.

Inmates: 115 different nationalities were represented in the prison in 2010 with just 7.2% Swiss. Most of the inmates did not have a known address in Switzerland. One in ten of the total spent just one night in the prison; 36% stayed eight nights or more.

Expansion: The opening of Cento Rapido, an annex to the main prison will provide 100 more places from August 15, as well as workshops. By 2013 the Curabilis prison for dangerous inmates and those with psychiatric problems will offer 92 more places. The construction of a new hospital unit will free up 40 more places.

9.2 Punishment

There are 114 detention establishments in Switzerland. Seven of them are for prisoners serving sentences. They offer 6,683 places in total.

On September 2009 (last date of reference of the Federal Statistics Office), 6084 people were imprisoned in Switzerland, including 374 women (7% of the total).

4,272, or 70 % of prisoners were foreigners.

31% were in preventative detention and 59% serving sentences. 7% were subject to constraint measures and 3% were incarcerated for other reasons. The occupancy rate was 91%, five per cent more than the previous year.

The occupancy rate was particularly high in French-speaking Switzerland (105%) where certain prisons are overcrowded.

The number of inmates per 100,000 population has increased. It has gone from 76 to 80 per 100,000.

B. Answer the following questions.

1. How does the text describe the trend in Swiss prisons when it comes to the prison population?

2. How is the rise in the number of prisoners explained?

3. In which cases is pre-trial detention preferred and why?

4. In which regions of Switzerland are prisons more overcrowded? Why?

5. Why do Swiss authorities expect a decrease in the number of detainees?

6. What in the new criminal procedure code is expected to reduce the number of detainees?

7. Why are day fines not regarded as a good solution?

8. What was the authorities' excuse for not having expanded Champ-Dollon prison?

9. Why did the Swiss Human Rights League fear that the expansion of the prison is not a good solution?

C. Vocabulary exercise

Provide near-synonyms or explanations for the following words and phrases.

1. inmates
2. rise in prisoner figures
3. a drop in prisoners
4. abolishing jail terms
5. day-fines
6. lock people away
7. resort more readily to pre-trial detention
8. 'flight risks'
9. serve time
10. inquiries were underway
11. the numbers had reached a peak
12. respect for the person has been flouted

KEY TO EXERCISES

PART I. GENERAL CRIMINAL TERMINOLOGY.

I. 1 – i; 2 – d; 3 – g; 4 – j; 5 – l; 6 – h; 7 – c; 8 – f; 9 – k; 10 – b; 11 – a; 12 – e.

II.

Verb	Noun
rule	ruling
try	trial
decide	decision
release	release
judge	judgment
serve	service
deprive	deprivation

III. 1 – b; 2 – c; 3 – c; 4 – b; 5 – b; 6 – d; 7 – d; 8 – a; 9 – c; 10 – b; 11 – d; 12 – a; 13 – c; 14 – b; 15 – b; 16 – d.

IV.

Verb	Noun	Adjective
accuse	accusation	accused

deprive	deprivation	deprived
sentence	sentence/sentencing	sentenced
presume	presumption	presumed
appeal	appeal	appellate
allege	allegation	alleged

V. 1. – l.; 2. – q.; 3. – e.; 4 – b; 5. – s; 6. – o; 7. – j; 8. – m; 9. – a; 10. – f; 11. – p; 12. – h; 13. – c; 14. – r; 15. – k; 16. – n; 17. – d; 18. – l; 19. – g.

VI. 1. money/profit; 2. public figure; 3. document/currency; 4. violence; 5. building/dwelling/property

VII.

Verb	Noun action/event	Noun person
convict	conviction	convict
detain	detention	detainee
suspect	suspicion	suspect
appeal	appeal	appellant
defend	defence	defendant
hear	hearing	-
offend	offence	offender
prosecute	prosecution	prosecutor

try	trial	-
apply	application	applicant
judge	judgment	judge

1. defendant; 2. conviction; 3. judge; 4. suspicion, offence; 5. appeal; 6. detainee; 7. prosecute; 8. offender; 9. tried; 10. suspect; 11. hearing; 12. defence; 13. trial; 14. detained.

VIII. 1. punishment given by a judge in court to a person who has been found guilty of an offence; 2. a person usually without legal qualifications and doing unpaid work, sitting in a magistrates' court and dealing with minor offences, a justice of the peace; 3. charge, allegation of an offence; the offence charged; 4. to perform something; to inflict capital punishment; 5. directions from the physician to the pharmacist as to what remedies or medicines to prepare or sell; 6. a series of actions taken in order to achieve a result; a continuous action or a series of changes taking place in a definite manner; the course or development of the proceedings

IX. (1) – c; (2) – d; (3) – b; (4) – d; (5) – d; (6) – b; (7) – b; (8) – c; (9) – a; (10) – d; (11) – d; (12) – b; (13) – b; (14) – c; (15) – a; (16) – c; (17) – b; (18) – b; (19) – d; (20) – b; (21) – d; (22) – d; (23) – b; (24) – c; (25) – a.

PART TWO. THE VOCABULARY OF JUDICIAL COOPERATION

IN CRIMINAL MATTERS.

SOCIAL REINTEGRATION OF SENTENCED PERSONS:

A COMPREHENSIVE EUROPEAN APPROACH

I. 1. gathered, enhance, continue, mutual; 2. alteration, deletion, entail, alteration, deletion; 3. ensure, in accordance with, limitations; 4. waive, reservations; 5. accelerate, assist; 6. further, secure; 7. notify; 8. severe, originally; 9. resume; 10. confidence, enable; 11. prevented, unforeseen; 12. cease; 13. remainder; 14. assessment.

II. 1. ineffective; 2. indirect, incompetent; 3. disrespect, illegal; 4. inapplicable, unlawfully; 5. unreasonable; 6. unlikely; 7. inefficient, inaccessible; 8. unavailable, inexistence; 9. irrelevant; 10. inequality, unfairness, unreasonableness; 11. impossibility; 12. disagree.

III. 1. provisions, validity, consideration; 2. punishable, custodial, deprivation, verification, criminality, applicable, supervision; 3. authority, receipt, responsibility; 4. (a) modification, instructions; (b) revocation, suspension; (c) imposition, conditional; 5. transmission, certificate; 6. enforcement, possibility, rehabilitation; 7. reference, habitual, professional; 8. application, criminal, broadening, application, legal; 9. central, nationality, convictions, convictions, nationals, stateless; 10. identification, explanation, problematic, coordination, development, operation.

IV. 1. respects, observes; 2. final, guilt; 3. exclusion, previous, prevent; 4. later, refuse; 5. subsequent, new; 6. less, maximum, different; 7. aggravate; 8. accept.

V. 1. to, in, to, by, with; 2. with, to, in, by, in, to, to; 3. between, from; 4. to, for, for, into, for; 5. on, in, on, from; 6. with, in, to, to, for; 7. to, at, after, under, in, on; 8. to, within, in, in, on, to, in, in; 9. of, with, in, by; 10. to, for, on, at; 11. into, for, for, on, in; 12. of, to, of, for; 13. to, from; 14. in, for, through.

VI. 1. can, may; 2. cannot; 3. must; 4. may, cannot; 5. should, might; 6. must, may; 7. cannot, should not; 8. may not.

VII. 1. All subsequent decisions related to a suspended sentence, a conditional sentence or an alternative sanction which result in the imposition of a custodial sentence or measure involving deprivation of liberty should be taken by a judicial authority. 2. If a decision under Article 14(1) (b) or (c) is taken by a competent authority other than a court, the Member States shall ensure that, upon request of the person concerned, such decision may be reviewed by a court or another independent court-like body. 3. The certificate referred to in paragraph 1 shall be signed and its content certified as accurate by the competent authority of the issuing state. 4. All expenditure concerning the common communication infrastructure should be covered by the general budget of the European Union. 5. The Additional Protocol to that Convention, which allows transfer without the person's consent, subject to certain conditions, has not been ratified by all Member States. 6. The judgment and, where applicable, the probation decision, shall be forwarded by the competent authority of the issuing State directly to the competent authority of the executing State. 7. The competent authority of the executing State may refuse to recognise the judgment and enforce the sentence if at the time the judgment was received by the competent authority of the executing State, less than six months of the sentence remain to be served. 8. An amnesty or pardon may be granted by the issuing State and also by the executing State.

VIII. 1 – b; 2 – a; 3 – b; 4 – d; 5 – d; 6 – a; 7 – a; 8 – d; 9 – b; 10 – c; 11 – c; 12 – a; 13 – c; 14 – b; 15 – b; 16 – d; 17 – a; 18 – c; 19 – c; 20 – b; 21 – c; 22 – d; 23 – a; 24 – a.

IX. Reading comprehension.

B. Suggested answers: 1. There are complaints that the prisons are overcrowded, with the number of detainees constantly on the increase. 2. It is explained by the fact that courts are prone to pass imprisonment sentences rather than alternative sanctions, and that there is an excessive imposition of pre-trial detention. 3. In the case of foreign offenders, who have no residence in Switzerland and who are feared to leave the country in order to escape. 4. In the French- and Italian-speaking regions, because in those regions courts resort more readily to pre-trial detention and because the percentage of foreign suspects is higher. 5. Because the criminal procedure code was changed. 6. The replacement of sentences of less than six months of imprisonment with alternative sanctions. 7. Because prisons will end up being overcrowded by people who do not afford to pay the fines. 8. They hoped that the huge number of inmates had reached a peak, and they assumed that this number would gradually drop. 9. They claimed that this is a competitive expansion, which will eventually lead to the overcrowding of prisons, since the places created in the recent years would encourage courts to pass imprisonment sentences.

C. 1. detainees; 2. increase in number of the prison population; 3. a decrease in number of the prison population; 4. abolishing/putting an end to imprisonment sentences; 5. fines calculated per day on the basis of a person's income; 6. imprison people; 7. have a high tendency/are more prone to order pre-trial detention; 8. suspects who are seen as more likely to abscond; 9. serve a custodial sentence; 10. inquiries were initiated, in progress; 11. the numbers had reached a maximum; 12. respect for the person has been defied, disregarded.

Chapter XIII Conclusions of the project

The Project's success was guaranteed by the use of innovative training methods, a relevant and well-structured content and by the international dimension assured through the presence of both participants and experts from different Member States.

The Training Methods used – Best practice dissemination

Previous projects developed in the area of judicial cooperation in criminal matters have focused on training magistrates on the content of the Framework - Decisions and other legal instruments. We felt that although judges and prosecutors were already familiarized with the relevant European law, they needed to focus more on the practical implementation of such provisions. Therefore, the project aimed to explore the already existing practice throughout common training of different multinational legal practitioners in order to better implement the relevant European legal instruments.

At the same time, the focus of the project was the presentation of several new instruments, such as: the provisions of 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, 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, Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings and Decision 2009/315/JHA on the organization and content of the exchange of information extracted from the criminal record between Member States.

Given the novelty of this domain and the new judicial training standards established at the European level as a result of the EU Commission's recommendation and best practices developed[33], we decided to design a practice-oriented project with a strong linguistic component, while also implementing an inter-professional dimension.

[33] Final report of the EU Commission financed project "Tender JUST/2012/JUTR/PR/0064/A4 – Implementation of the Pilot Project – European Judicial Training"- Lot 1 "Study on Best Practices in training of judges and prosecutors"

Practice-oriented approach

Sometimes judicial authorities are expected to apply legal instruments even when these do not envisage a clear solution to a certain practical situation. The legal practitioners have to find an efficient way for applying these legal provisions to real life circumstances. Some cases entail the application of principles developed at the national level or from the jurisprudence of the European Court of Human Rights and the European Court of Justice.

Our experience in judicial training proved that one of the most efficient working methods is "learning by doing". This is why we decided to structure the Project's activities by integrating both practical and theoretical sessions. The lecturers were meant to provide the participants with information they need in order to solve the practical cases during the workshops.

The theoretical presentation at the beginning of each seminar and of the final conference always offered a good starting point for further discussions. The active involvement of the participants during the lectures resulted from their questions and genuine interest in discovering the practice and specificity of other judicial systems while also sharing their own national experiences. All throughout the lectures, an interactive dialogue between the experts and the participants was achieved. This approach generated brief discussions that helped smoothen the connection with the following theoretical issues.

Using practical cases to better understand the legal instruments constituted a fast and efficient learning tool. Participants had to identify the applicable law, were expected to draft different legal documents related to EU Criminal Law and were asked to exchange views with their colleagues on certain situation solved differently at national level.

During the debates triggered during the study cases' analysis, participants enjoyed the opportunity to share their knowledge and decide upon the best solution according to the EU legal framework and the jurisprudence of ECtHR.

Another practice-oriented exercise was the moot court session that illustrated how a hearing on executing a request to transfer a convicted person is dealt with in a Romanian court. The participants were thus able to identify any similarities and differences between their national criminal proceedings. The debriefing session,

that followed the moot court, allowed the participants to share their own experiences and to explain how these procedures are applied in their countries. Also this was a good opportunity for participants to discuss and try to come up with better and innovative solutions on the issues at stake. This exercise leads to the strengthening of the mutual trust between participants - actors in the common effort for building a more efficient judicial cooperation.

The training's practice-orientated approach was highlighted in the positive feedback received.

Linguistic component

One of the Project's goals was to enable the direct communication between trainers and participants and between participants themselves. Therefore, no translation was provided during the seminars, as all the activities were conducted in English.

The seminars combined the training on legal instruments (the legal component) with the training on linguistics and judicial cooperation vocabulary (the linguistic component). Each seminar has two modules of linguistic training, covered by a linguist expert.

During these particular sessions, participants had the opportunity to use concepts related to criminal law and criminal procedure while also using formal vocabulary and common grammar rules that apply to legal English structures. As a result, participants highly appreciated the usefulness of these exercises, as they improved their communication skills for future work related situations. Another positive outcome of this linguistic training, pointed out by the participants, was the enrichment of their vocabulary in the field of judicial cooperation in criminal matters.

Inter-professional dimension

The project brought together representatives of different legal professions such as judges, prosecutors, lawyers and court clerks from several European Union Member States.

According to the feedback received, this format offered the advantage of delivering unitary knowledge. Moreover, each of the Project's activities took into account the perspective of both lawyers and court clerks.

Discussions from multiple points of view were therefore encouraged. The court clerks gave examples of problems they encountered in their work when applying EU Criminal Law provisions.

Therefore, the presence of lawyers and court clerks constituted an added value to the project, since they were deeply involved in the project and eager to share their perspectives. They participated also in the moot court exercise, being asked to perform their specific role. This helped increase the impact of this particular exercise.

The International dimension of the Project

The international dimension constituted a crucial element for the projects successful outcome. Having participants and experts from different Member States guaranteed the equal representation of the different judicial systems present in the partner countries.

The study cases used during the workshops were also built around complex situations involving different international elements, which created the proper context for triggering a judicial cooperation procedure.

One cannot build a mutual trust only through the use of legal instruments. The project enabled the participants to better understand the different legal systems of other Member States. There were moments when the participants and the expert from one Member State acted as national team in order to clarify some practical issues that were discussed during the seminars.

Participants learned that the main procedural issues encountered during the criminal proceedings coincided. Problems such as a proper interpretation of certain legal concepts or solving claims concerning infringements of human rights raised by defendants constitute common issues raised in all the states represented in the project.

All this aspects - inherent to an international approach - laid the premises for a constructive debate based on an exchange of best practices developed at national level. Participants contended this knowledge enrichment that will indubitable facilitate their future judicial cooperation endeavours.

The Content of the training activities

One of the Project's strengths was the legal framework chosen as the core element of the training curricula. All participants agreed upon the importance of accurately understanding and properly applying the provisions of 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, 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, Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings and Decision 2009/315/JHA on the organization and content of the exchange of information extracted from the criminal record between Member States.

Judgements have to be executed even when the convicted persons benefit from the free movement of persons, which creates practical difficulties for the judicial authorities. The participants stressed out the problems encountered in the process of recognition of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty or judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. In order to achieve social reintegration of the convicted persons, an enhanced judicial cooperation is needed.

Another focal point in the agenda was the presentation of Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings and of Council Framework Decision 2009/315/JHA on the organization and content of the exchange of information extracted from the criminal record between Member States.

Equally useful was the lecture on how to increase the trust in judicial cooperation in criminal matters through the European prison rules.

The training activities were highly effective as this type of project encouraged an interactive approach.

The Project's activities

The three pillars (innovative training methods, relevant and well-structured content and international dimension) were reflected in all the project's activities: six seminars, final conference and the Project's Handbook.

As mentioned in the previous sections, the seminars represented a blending of theory and practice and implied an active involvement of all participants representing different legal professions and coming from all the Project's partner States.

Also, the three pillars can be easily identified in the final conference's format: regardless of the high number of participants, maintaining the practice oriented and interactive character of the training constituted a priority. This was reflected in the structure of the conference which included not only lectures but also workshops and national reports.

In order to allow the dissemination of this Project's format as an example of best practice in the field, one of the envisioned outcomes was the elaboration of a handbook that would offer all the elements and learning materials needed in order replicate the training concept. . The materials included in the handbook are a valuable source of information because they were agreed upon by legal practitioners, judged, prosecutors, lawyers and court clerks.

The final conference created the environment where participants could offer a feedback on the handbook. The handbook initiative was supported by all the participants as being a useful tool for legal practitioners all throughout the European Union.