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Subject: **EVALUATION REPORT ON THE NINTH ROUND OF MUTUAL  
EVALUATIONS**  
**9th round of Mutual Evaluation on Mutual recognition legal  
instruments in the field of deprivation or restriction of liberty**  
**REPORT ON AUSTRIA**

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**EVALUATION REPORT ON THE  
NINTH ROUND OF MUTUAL EVALUATIONS**

**9th round of Mutual Evaluations on mutual recognition legal instruments in the  
field of deprivation or restriction of liberty**

**REPORT ON AUSTRIA**

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## 1 EXECUTIVE SUMMARY

The preparatory work and the evaluation visit to Austria took place in a welcoming and professional atmosphere thanks to the good preparation by the Austrian authorities and the proactive support provided by the Ministry of Justice (MoJ), which coordinated the exercise.

During the visit the Austrian authorities and representatives did their utmost, in a frank and open manner, to provide the evaluation team with information and clarifications on legal and operational aspects of the European arrest warrant (EAW), the transfer of prisoners, the European Supervision Order (ESO) and alternative sanctions. The evaluation team met the relevant bodies with responsibilities in the field of the four Framework Decisions which are the subject of the ninth round of mutual evaluations: the MoJ, the Prison and Probation Service, the judiciary (prosecutors and judges), lawyers and police officers in charge of SIS. The evaluation also included visits to regional judicial authorities in Korneuburg and Vienna, which was very interesting and helped the team to gain a better understanding of the situation at operational level.

### 1.1 Cross-cutting elements

According to the notifications made to the General Secretariat of the Council (GSC), Austria has designated two central authorities only in the field of FD (Framework Decision) 2002/584/JHA: the Federal Ministry of Justice (MoJ) and the Federal Ministry of the Interior's Directorate-General for Public Security with its subdivision, the Federal Criminal Police Office. As a central authority, the role of the MoJ is limited. Indeed it assists the competent judicial authorities only if they so request.

Concerning the three other FDs which are the subject of the ninth round of mutual evaluations, no central authority has been designated.

The experts noted that the Minister of Justice can give instructions in individual cases. Although all the practitioners met mentioned that this situation had not occurred for years, and a panel of independent experts (“*Weisungsrat*”) has to give their opinion on such instructions, the experts believe that this possibility could be problematic, bearing in mind developments in CJEU case-law. Accordingly, the experts encourage Austria to follow its ongoing internal process of reconsidering this power granted to the Minister of Justice.

Austria follows the principle of direct contact between the competent authorities. These authorities usually have no difficulty in exchanging with their European counterparts. Nevertheless, in the field of FD 2008/909/JHA, some Austrian practitioners mentioned to the experts that if an issuing authority does not reply to a request for additional information within the time limit, this will lead them to close the case. In such a situation, rather than ending the procedure, the experts believe that Austrian practitioners should consider the use of all available channels to contact the foreign competent authorities to ensure that they provide the requested additional information - especially because the Austrian judiciary are well aware of the EJM and Eurojust.

The experts would also like to stress that the possibility of contacting the competent Austrian authority in charge of a case, as quickly as is needed, is diminished by the fact that the email contact details of the courts and public prosecutor's offices are not publicly available (e.g. on the web pages of the EJM or another authority). The evaluation team sees this contact channel as being nowadays the primary one, followed by phone, fax or postal communication. The current situation, where direct contact passes through a general email address operated by the MoJ, entails a redundant step for direct contact.

Regarding statistics, Austrian authorities underline the difficulties they have in gathering the relevant data. This observation applies to the four FDs which are the subject of the ninth round of mutual evaluations, with the exception of statistics on FD 2008/909/JHA when Austria is the issuing State. This can be explained by the fact that the competent authorities are mostly decentralised (except when Austria issues a request to recognise a custodial sentence) and it is more difficult to collect data from several entities than from a single one. The MoJ, for statistical reasons, can access the courts' management system but the staff of the courts and the prosecution may not be aware of the specific codes to enter relevant data and the research for this data is not automated. Thus the experts recommend that Austria improve the way it collects statistical data in the field of the four FDs which are the subject of the ninth round of mutual evaluations. They consider that an electronic tool would save time for all the competent authorities and help in having a better picture of the use of the four FDs.



## 1.2 FD 2002/584/JHA

Generally speaking the EAW procedures function well in practice and this mutual recognition instrument is highly appreciated by Austrian practitioners. Courts are the competent authorities and cooperate smoothly with prosecutors and the MoJ.

Regarding the principle of proportionality, the experts consider that it is well integrated into Austrian law. Although the lawyers' representative was somewhat critical of the lack of proportionality in some EAWs, the proceedings for issuing an EAW and the criteria mentioned by the judiciary follow the right path. Indeed when issuing an EAW for prosecution a first assessment regarding proportionality is done by the judge when issuing the national arrest warrant and a second one by the court before the prosecutor issues the EAW. Moreover, the Austrian practitioners interviewed highlighted relevant criteria to consider before requesting an EAW. As executing State, Austrian authorities stated clearly that they do not assess the proportionality of the EAW from the issuing State. The experts consider this approach as following the mutual trust principle.

Despite the good domestic cooperation, mainly due to the advisory role of the MoJ and awareness on the part of all authorities concerned, greater familiarity and closer cooperation with EUROJUST, particularly in the case of competing EAWs (Article 16 of the FD) are needed. Indeed, the Austrian authorities did not mention the possibility of requesting advice from Eurojust in such a case.

The SIRENE Bureau, when entering the A-form in the SIS, adds photographs, facial images, copies of identification documents or fingerprint data of the requested person. Discussions with the Austrian practitioners showed that they do not necessarily think of the national identification number. Experts consider that this additional information, when known, is always useful and recommend entering it. The main goal is to reduce, or even eliminate, cases of contested identity. Incoming alerts in the SIS are checked by police officers without electronic support. This task is time-consuming and experience from the other MSs shows that creating software to help police officers is possible. Therefore the experts would recommend that Austria develop an electronic tool of this kind.

Another point of discussion with the Austrian practitioners was Section 5 EU-JZG. This provision narrows the possibilities for the Austrian authorities to surrender their nationals to the issuing State without their consent. Although such a legal restriction is not uncommon among the Member States and is often considered as fundamental, proceeding from the long-term constitutional premisses of each state, it still must be taken as an obvious barrier to the proper functioning of close international cooperation in criminal matters based on the abovementioned requirement of mutual trust.

### **1.3 FD 2008/909/JHA**

Ten years after its entry into force, FD 2008/909/JHA is well known by Austrian practitioners and used appropriately. As issuing State, the competent authority is the MoJ. MoJ is a centralised body and accordingly its staff are highly specialised. It also gives useful advice to the judiciary and prison staff. As executing State, regional courts are the competent authorities. These courts are decentralised and specialisation of judges is more difficult to achieve, especially in small courts where judges do not regularly deal with FD 2008/909/JHA.

During the evaluation process, the experts found that the grounds for non-recognition and non-enforcement set out in Article 9 of Framework Decision 2008/909/JHA are implemented in Austrian Law as mandatory. The experts recommend that Austria bring its legislation into line with FD 2008/909/JHA and make these grounds for refusal optional.

The evaluation team noticed that, when issuing a certificate, there is no general rule in Austrian law on how to calculate the days of the sentence remaining to be served. This could be a common issue for all MSs. In addition, the calculation of days can differ from one MS to another. Therefore, the experts consider there is a need to produce guidelines at EU level on how to calculate the days of a sentence remaining to be served. This will create a common practice and ensure mutual trust in the calculation made.

Austria has developed an IT system which allows users readily to identify prisoners eligible for a transfer. Undeniably, this tool enables the authorities to start a transfer as soon as possible. Moreover, when a sentenced person arrives in prison she/he is given a leaflet containing all the relevant information to apply for a transfer. It must be underlined that this leaflet is available in all EU languages. In addition, the directorate for the penitentiary system drafted a specific form, used by prison staff when interviewing the prisoner, that gathers all the relevant information regarding social rehabilitation. Experts also stressed the fact that interviews with prisoners are conducted with the assistance of an interpreter who can be reached by video conference; the prisons are sufficiently equipped with electronic devices.

The experts also wish to underline the proactive attitude of the Austrian authorities to solving problems. Austrian practitioners noted that some MSs did not give reasons, or did so with scant information, for delays in recognising a custodial sentence. In order to override these difficulties they have conducted bilateral talks with these MSs. This approach is clearly seen as a best practice to be shared with all the MSs.

#### **1.4 The links between FDs 2002/584/JHA and 2008/909/JHA**

The Austrian legislation provides for enforcing a sentence, after refusing surrender, without receiving a certificate related to FD 2008/909/JHA. In this case, the judgment annexed to the EAW form will be used. The experts note that such a possibility avoids impunity. However, this possibility differs from one MS to another. Indeed, some MSs will always require issuance of a certificate before enforcing the sentence on the basis that it is the issuing State's right to decide if a sentenced person could serve her/his sentence abroad. Therefore the experts consider that the EU institutions should clearly specify whether it is possible to directly enforce a sentence after having refused surrender on the basis of the information contained in the EAW.

## 1.5 FDs 2008/947/JHA and 2009/829/JHA

In the field of FDs 2008/947/JHA and 2009/829/JHA, regional courts are the competent authorities to issue and execute these mutual recognition instruments.

As competence for the two FDs is distributed among the different regional courts, statistics are difficult to compile. In the end, Austrian authorities were not able to present any. According to the practitioners only one case, for each FD, happened in Austria.

The reason for such rare use of these mutual recognition instruments cannot be found in the way the FDs were implemented: practitioners find the Austrian law understandable.

The first explanation must be a lack of awareness among practitioners. Indeed the MoJ representative clearly stressed that after a training event in 2019 on FD 2008/947/JHA contact between competent authorities increased. The differences between alternative sanctions in the different EU MSs and difficulty in finding competent authorities in the EJN Atlas are also identified as problems in the use of this mutual recognition instrument.

Concerning FD 2009/829/JHA, a first explanation is that this instrument does not suit the requirements of criminal proceedings. Indeed, the decision to place a person in provisional detention has to be taken in a few hours, and it is not possible within this timeframe to issue an ESO and receive a reply from the executing MS. Moreover, the Austrian practitioners mentioned that a criminal case will be solved faster if the foreign person is held briefly in provisional detention rather than being released and having to come back for further investigation or the trial. In addition, lawyers, who should be key players in this field, are not aware of FD 2009/829/JHA and it is complicated for them to obtain timely documentation from the executing State to support a request for an ESO.

## 1.6 Training

The model of training is decentralised, divided among several authorities. Practitioners rely on close cooperation with the MoJ when a problem occurs and information is needed. Other possibilities are covered by the European courses within the EJTN or ERA. This range of training is considered sufficient by the practitioners for whom it is provided. However, it might be helpful to have a specialised institution covering the whole spectrum of judicial training for practitioners. Experts believe that Austria should consider establishing a specialised institution covering and arranging training for judicial staff in both the domestic and international field which can offer not only lectures by national specialists but also by foreign practitioners from different legal areas (lawyers, judges, prosecutors, prison staff, police officers...) The aim is to link all the training possibilities, provided by national and European judicial training centres, in one single platform.

The evaluating team would like to strongly emphasise the superior approach to training of prison staff in the area of FD 2008/909/JHA, which is carried out twice a year. Prison staff appear to be highly trained and, in practice, act as a help for the MoJ. Such an approach could be taken into account by the other MSs. Taking all factors into account, the evaluation team appreciates Austria's practice in the use of mutual recognition instruments. From a general perspective the Austrian system works well, practitioners are attached to the principle of mutual trust and the MoJ appears to be highly specialised, notably in the field of FD 2008/909/JHA. Nevertheless, the evaluation team believes that some aspects could be enhanced, such as training in the field of mutual recognition for judges and lawyers. Also, the role of Eurojust in the event of competing EAWs could be highlighted, and data collection could be more efficient. But the main feeling is that Austria adopts a proactive attitude to resolve difficulties with its counterparts and manages to ensure mutual trust with the other MSs. The good integration of the principle of proportionality in Austrian law, the tools created by the directorate for the penitentiary system and the high level of qualification of prison staff are expressions of the care Austria takes to make the best use of mutual recognition instruments. The general opinion of the evaluators is therefore positive.

## 2 INTRODUCTION

Following the adoption of Joint Action 97/827/JHA of 5 December 1997, a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime was established.

In line with Article 2 of Joint Action 97/827/JHA of 5 December 1997, CATS at its meeting of 21 November 2018 decided that the ninth round of mutual evaluations would be devoted to the mutual recognition principle.

Due to the broad range of mutual recognition legal instruments and to their wide scope, at the CATS meeting on 12 February 2019 it was agreed that the evaluation would focus on the following mutual recognition instruments:

- Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States ('EAW').
- Framework Decision 2008/909/JHA 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 ('Custodial sentences').
- 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 ('probation and alternative measures').
- Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle on mutual recognition to decisions on supervision measures as an alternative to provisional detention ('ESO').

At the above CATS meeting it was also agreed that the evaluation would focus only on those specific aspects of such instruments which Member States felt warranted particular attention, as set out in detail in document 6333/19, and on the legal and operational links between FD 2002/584/JHA on EAW and FD 2008/909/JHA on custodial sentences.

Referring to FD 2008/947 on probation and alternative measures and FD 2009/829 on the ESO, it was decided that the evaluation would be of a rather general nature and try to establish the reasons that have led to scarce application of these two Framework Decisions.

The aim of the 9th mutual evaluation round is to provide real added value by offering the opportunity, with the on-site visits, to consider not only the legal issues but especially relevant practical and operational aspects linked to the implementation of these instruments by practitioners in the context of criminal proceedings. This would identify both shortcomings and areas for improvement, as well as best practices to be shared among the Member States, thus contributing to ensuring more efficient and coherent application of the principle of mutual recognition at all stages of criminal proceedings across the Union.

More generally, promoting the coherent and effective implementation of this package of legal instruments at its full potential could significantly contribute to enhancing mutual trust among the judicial authorities of the Member States and to a better functioning of cross border judicial cooperation in criminal matters within the Area of Freedom, Security and Justice.

Furthermore, the current process of evaluation could provide useful input to Member States that may not have implemented all aspects of the various instruments.

Austria was the twenty-third Member State to be evaluated during this round of evaluations, as provided for in the order of visits to the Member States adopted by CATS on 13 May 2019 and then amended on the proposal of some Member States and in the absence of any objection<sup>1</sup>. Nevertheless, due to the travel restrictions, consequences of the public health crisis, preparatory work was done by videoconference and the onsite evaluation took place in a second step, as agreed by CATS on 12 November 2020.

In accordance with Article 3 of the Joint Action, a list of experts in the evaluations to be carried out was drawn up by the Presidency. Member States nominated experts with substantial practical knowledge in the field pursuant to a written request sent to delegations by the Secretariat of the Council of European Union on Friday 17 May 2019.

The evaluation team consists of three national experts, supported by one or more staff from the General Secretariat of the Council and observers. For the 9th round of mutual evaluations, it was agreed that the European Commission, Eurojust and EJM should be invited as observers.

The experts charged with undertaking the evaluation of Austria were Ms Lise Chipault (France), Ms Jūlija Muraru-Klučica (Latvia) and Mr Michael Vrtek (Czech Republic). Observers were also present: Ms Ana Wallis De Carvalho (Eurojust) together with Mathieu Bertola from the General Secretariat of the Council.

This report was prepared by the expert team with the assistance of the General Secretariat of the Council, based on findings arising from:

- the preparatory work by videoconference that took place on 23 June 2021,
- the evaluation visit that took place in Austria from 7 to 11 March 2022,

and on Austrian's detailed replies to the evaluation questionnaire and to the ensuing follow-up questions.

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1 ST 9278-re02.en19



### 3 FRAMEWORK DECISION 2002/584/JHA EAW

#### 3.1 Authorities competent for the EAW

##### 3.1.1 Central authority and principle of direct contact between competent judicial authorities

According to the notification made to the GSC<sup>2</sup>, Austria has designated two central authorities to assist the competent judicial authorities: the MoJ (*Bundesministerium für Justiz*) and the Federal Ministry of the Interior's Directorate-General for Public Security (*Bundesministerium für Inneres, Generaldirektion für die öffentliche Sicherheit*) with its subdivision, the Federal Criminal Police Office (*Bundeskriminalamt*).

In accordance with Article 7 of the FD on the EAW, the Federal Law on judicial cooperation in criminal matters with the MSs of the EU (EU-JZG) does not set out any special role for the MoJ as an Austrian central authority.

In accordance with Article 6 of the FD on the EAW, Article 14(1) and Article 29(2) and (2a) of the EU-JZG provides that exchanges take place directly between the competent judicial authorities.

Nevertheless, the MoJ acts on a case-by-case basis when it is so requested by the competent judicial authority, especially since it maintains excellent relations with its partner authorities in the MSs. Moreover, when a court refuses a surrender, it should report it to the MoJ.

The MoJ also provides support to prosecutors by publishing on its website explanations on the CJEU's case-law or sharing relevant information regarding the legislation in the other MSs. When requested by the prosecutors, MoJ can give legal advice.

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<sup>2</sup> ST 9608/04

In addition, in accordance with the Austrian organisation, the public prosecutors are under the competence of the MoJ. Therefore, Austrian prosecutors have a general obligation to report to the MoJ cases of particular importance or sensitivity. The Minister of Justice is also authorised to issue an order in individual cases. If the Minister of Justice gives instructions in a criminal case, a panel of experts (*Weisungsrat*), working in the prosecutor-general's office, submits and publishes a written opinion.

All the authorities interviewed highlighted the fact that such ministerial order have not been issued for years. The Austrian authorities also mentioned ongoing discussions in Austria to reform this power conferred on the Minister of Justice.

Since the fourth round of mutual evaluations there has been no change in the MoJ's role in dealing with EAWs.

The MoJ is able to share statistics on the EAW, but this task has to be done manually. The MoJ can access the case management system of the courts and the prosecution also for statistical purposes. Nevertheless it requires specific codes to enter the relevant data correctly and to find cases related to EAWs. The staff of the courts and the prosecution may not always be aware of the correct codes so that occasionally cases may be entered not completely or correctly.

### **3.1.2** *Austria as issuing State*

The courts are competent to issue EAWs for the execution of custodial sentences and prosecution<sup>3</sup>.

#### **3.1.2.1** *EAW issued for prosecution*

The process of issuing an EAW starts first with the court's authorisation to deliver a national arrest warrant. On this basis, the prosecutor requests the court to verify the requirements for issuing the EAW and, if the court agrees, the prosecutor issues the EAW.

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<sup>3</sup> Article 29 (2a) EU-JZG

In most cases the court confirms the possibility of issuing the EAW, but it may refuse. Therefore, the national arrest warrant and the EAW are clearly defined as two different steps. Usually the court takes its decision within 24 or 48 hours but in urgent cases the decision can be taken more quickly.

When the EAW is issued, the prosecutor sends it to the police officer in charge of the case. This police officer registers the EAW in the Austrian database system and sends it to the SIRENE Bureau. This Bureau functions 24/7.

The SIRENE Bureau checks the EAW to detect any formal defects and creates the A-form in the SIS. Police officers in the SIRENE Bureau are fluent in English and can translate the EAW on their own. If the translation is too complicated, police officers have recourse to translators, who carry out their task in a few hours, depending on the degree of urgency.

It is the prosecutor's task to decide on the range of the alert. The A-form can be sent to a specific MS, several or all. He can also decide to send it via Interpol.

In the A-form, Austrian prosecutors insert as much identification as possible, such as fingerprints, passport photos or a copy of an identity document. When asked about the possibility of adding the national identification numbers, representatives of prosecutors stated that they do not usually do so.

Austrian practitioners mentioned that they could face difficulties with some executing judicial authorities which refuse EAWs signed electronically. To avoid this difficulty, Austrian prosecutors print the EAW form and sign it manually.

After the surrender of the requested person in Austria, the deletion of the alert in the SIS does not automatically lead to the deletion of the national arrest warrant in the Austrian database. The police officer in charge of the case must do this.

### 3.1.2.2 *EAW issued to enforce a sentence*

After the person is sentenced, the court issues a national order for the execution of the prison sentence. If the sentenced person does not go to prison within one month or if she/he absconds, the court issues an EAW, on application by the prosecution, on the basis of the national order<sup>4</sup>. The next steps are as described above (cf. 3.1.2.1).

In practice EAWs to enforce a sentence are very rare. Indeed the possibility of sentencing someone *in absentia* is reserved for low-level offences which will normally not result in a prison sentence.

### 3.1.3 *Austria as executing State*

The SIRENE Bureau checks all the incoming alerts without the aid of software. This task is divided between trained officers.

In general no problem occurs but there may be a need to flag an alert in case of the issue of double criminality (driving without a licence, driving under the influence of alcohol or child abduction, etc.). The SIRENE Bureau's representative mentioned that software to help the police officers check incoming alerts could be a welcome tool.

Problematic incoming alerts are assessed by a unit consisting of three lawyers. In case of need, the MoJ provides support. Alerts linked to war crimes and terrorist offences are always checked by the MoJ. Police officers also verify the place where the offence was committed and whether the person lives in Austria.

When there is an arrest, all police officers can check the SIS directly with their mobile phone to determine if the person is wanted.

After the arrest of the requested person, the prosecutor will apply to the court for provisional detention. During this first hearing the judge explains consent and the speciality rule. The decision on surrender is taken in a second stage.

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<sup>4</sup> Section 29 paragraph 2a EU-JZG

A lawyer is present and the requested person is entitled to legal aid. The Austrian authorities mentioned the option for lawyers to send documents directly to the Court using an electronic tool. The lawyers' representative also explained that double representation remains a challenge, especially when there is a need to find a lawyer in the issuing State.

## **3.2 The principle of proportionality**

### **3.2.1 *Austria as issuing State***

The principle of proportionality is established in Section 5 of the Austrian Code of Criminal Procedure (StPO), which also applies to the procedures laid down in the EU-JZG pursuant to Section 1 paragraph 2 EU-JZG read in conjunction with Section 9 paragraph 1 of the Austrian Extradition and Mutual Assistance Act (ARHG).

In accordance with the former provision, in Section 177 paragraph 3 StPO it is specified that arrest and detention of a person are not permissible if they are disproportionate to the significance of the case. This criterion must therefore also be taken into account when deciding whether to issue an EAW.

Accordingly, an arrest warrant is issued following an assessment of the proportionality of the measure, where the main criteria for issuing an EAW are the seriousness of the crime and whether the imposition of an unconditional custodial sentence can be expected in the event of a conviction. As part of the proportionality assessment the competent authorities also check whether other measures, such as hearing the defendant by means of a European investigation order (EIO), are sufficient.

In practice, the main assessment of the proportionality by the court is done when issuing the national arrest warrant by reference to the legal provision already mentioned. Nevertheless, the proportionality check to issue an EAW remains, as the Austrian practitioners mentioned that an EAW can be refused by the court, after a national arrest warrant has been obtained.

During the interviews Austrian prosecutors mentioned criteria such as penalty, damage, detention abroad, and criminal records.

In addition, the Austrian authorities pointed out that the European Commission's handbook on the EAW contains extensive explanations on the issue of proportionality (points 2.4 and 2.5). The Handbook was made available via intranet to the judicial authorities on 21 January 2018. The relevance of the handbook's references to proportionality was explicitly stressed in the intranet announcement.

The lawyers' representative was somewhat critical of compliance with proportionality by judicial authorities when issuing an EAW. From his point of view some EAWs are issued for minor crimes or simply to interview persons.

### **3.2.2** *Austria as executing State*

The Austrian authorities expressly mentioned that they do not check the proportionality of EAWs issued when they act as executing State. The reason given is that neither FD 2002/584/JHA nor Austrian law provide for such a proportionality check or lack of proportionality as a ground for refusal.

## **3.3 Exchange of information**

The exchange of supplementary information takes place directly between judicial authorities. Assistance with additional information has only occasionally been requested from SIRENE.

### **3.3.1** *Austria as executing authority*

In general, the executing judicial authorities have not encountered any information deficits. Occasionally information on judgments *in absentia* was incomplete. In those cases the requesting authorities were asked directly to provide the missing information by a set deadline. In most cases these deadlines, even if they are very tight, are complied with and the supplementary information is provided.

Only one judicial authority reported a case in which the execution of an EAW had to be refused because the requesting authority did not provide any information on detention conditions when asked.

When the Austrian judicial authorities execute an EAW, information such as duration of detention and information relating to the speciality rule is contained in the decision authorising surrender. In addition, upon surrender of the requested person, a surrender letter is transmitted *ex officio* to the issuing authorities, containing the exact duration of detention in Austria as well as the details of the judicial decision.

### **3.3.2** *Austria as issuing authority*

In principle, additional information is rarely requested which is not considered necessary by the issuing judicial authorities.

In exchanges with Italy regarding execution, cases have been reported in which the executing Italian judicial authorities requested the national arrest warrant and a summary of the evidence in addition to the EAW.

Where an EAW was issued by the Austrian judicial authorities, cooperation with the Czech Republic, France and Germany was considered particularly good and efficient. Whether and which follow-up information is required varies from MS to MS. So far, follow-up information has always been provided without any problems.

There was only one case in which the executing State did not inform the Austrian authorities that the requested person had been released during the proceedings, resulting in the Austrian court wrongly allowing for a period already spent in custody, to the advantage of the defendant.

### 3.4 Grounds for refusal

#### 3.4.1 *Refusal in the event of a potential risk of violation of fundamental rights in relation to detention*

##### 3.4.1.1 *Delays or refusal in case of prison conditions arguments*

Detention conditions-related arguments, in EAW proceedings, are raised in Austria. Since the issuing authorities respond to the request promptly, there are no significant delays. By contrast, not complying with a deadline could lead to a refusal.

In the execution of an EAW issued by the Greek authorities, objections were raised regarding the detention conditions. The Regional Court asked the Greek authorities for the corresponding supplementary information within a set deadline; that deadline was missed despite requests made via different channels (direct, Sirene), and so the surrender had to be refused.

In some cases these detention condition arguments have led to a refusal of the surrender. For instance, the Romanian authorities requested surrender for enforcement of a sentence and objections were raised by the requested person regarding detention conditions. The Romanian authorities transmitted additional information but it was deemed insufficient by the Austrian court, so execution was rejected.

Nevertheless, objections regarding detention conditions were also raised in relation to Hungary and Bulgaria; in those cases the competent court deemed the general information provided by the issuing judicial authority upon request to be sufficient and surrender was authorised.

In any case, the Austrian judicial authorities avoid impunity in cases where the application of the Aranyosi/Căldăraru two-step test on detention conditions has resulted in a decision to bring the surrender procedure to an end.

If the EAW is issued for prosecution the requested person will be prosecuted in Austria. According to § 65 (1) Z 2 StGB (Criminal Code) this applies if the requested person is not an Austrian citizen, is apprehended in Austria and he cannot be extradited for reasons other than the type or nature of the offence. Austrian authorities mentioned that in some cases a transfer of proceedings might be a solution, however, they consider that there is a lack of an EU instrument in this area.



If the EAW is issued for enforcement of a sentence, the other MS can make use of FD 2008/909/JHA and the Austrian judicial authorities will enforce the foreign judgment.

#### 3.4.1.2 Assessment of detention conditions

##### 3.4.1.2.1 Austria as executing State :

In principle, it is assumed that Member States of the EU respect fundamental rights. An assessment of whether fundamental rights have been violated is conducted in the event of a specific contention being put forward by the requested person in the surrender procedure.

In such a situation, the issuing judicial authority will be required to provide the necessary information by a set deadline. The information requested from, as well as the questions that are put to, the issuing State are based on the assertions made by the person concerned.

In addition, the court examines the reports by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the European Court of Human Rights (ECHR) case-law and country information. Courts also take into account the CJEU jurisprudence, notably the decisions in the cases C-496/16 *Aranyosi II*, C-216/18 PPU, C-220/18 PPU and C-128/18 *Dorobantu*.

The MoJ underlined that it informed the Austrian judicial authorities by circular of 21 January 2022 of the CJEU case-law referred to above. Especially the *Dorobantu* decision was explained in detail and the authorities were asked to take the considerations of the CJEU into account when deciding on the execution of an EAW. Moreover, particular attention was drawn to the recently established online database of the Fundamental Rights Agency on detention conditions in the Member States.

As mentioned previously (3.3.1.) when additional information on detention conditions is required, deadlines are routinely set and are generally met. If a deadline is not met, it may be extended.

#### 3.4.1.2.2 Austria as issuing State:

The Austrian judicial authorities are regularly required to give an assurance that the person concerned will be returned to the executing State in the event of surrender for the purpose of serving the custodial sentence imposed on them. Nevertheless, in their dealings with EU Member States, they have not yet been asked to provide (diplomatic) assurances on detention conditions.

#### 3.4.1.3 Importance of the consent of the requested person

Austria takes the view that the consent of the requested person to their surrender is an important criterion in deciding whether to execute the EAW in cases where detention conditions in the issuing State are an issue. Consent should therefore be taken into account in any event.

Keeping the requested person in the executing State against their will seems unsatisfactory, especially since it can be assumed that the person has reasonable grounds for their wish to be transferred to the issuing State (e.g.: proximity to family and other relatives; facilitation of social rehabilitation; prospective job). In this connection the Austrian authorities also underline that otherwise there is a risk of impunity.

#### 3.4.2 *Refusal in the event of a judgment in absentia*

##### 3.4.2.1 General challenges posed by in absentia judgments

The Austrian judicial authorities state that they often lack precise information on the fundamental admissibility of judgments rendered *in absentia* in the other Member States. Given that the requirements for rendering judgments *in absentia* vary considerably in the Member States, they often request further general information on *in absentia* procedures in the Member States.

There are sometimes misunderstandings as to when a judgment has actually been delivered *in absentia*. The Regional Criminal Court of Vienna points out, for example, that if the person concerned attended court on several days of a trial, a judgment delivered in their absence is nevertheless deemed to have been delivered in their presence; or that if the person concerned is absent for a revocation decision, having previously attended conditional sentencing, judgment is wrongly deemed to have been delivered *in absentia*.

In some EAWs for the purpose of executing a sentence, it is not clear from the content of the EAW (the remarks under point (d) on the form) whether or not the grounds for (optional) refusal under Article 4a of the Framework Decision are applicable, for example because the relevant box is not ticked or because no further details are given (e.g. when a decision to revoke a conditional custodial sentence or to convert a fine into a term of imprisonment was taken in the absence of the person concerned).

In such cases the Austrian judicial authorities consider that it may be necessary not only to request additional information, but also to obtain the relevant national decisions from the issuing State. So far, however, this has usually been possible without further ado. In individual cases, however, surrender has been refused when the additional information requested was not received.

In addition, Austrian competent authorities underline that Poland employs a system of ‘fictitious’ service of documents: defendants must undertake, at the beginning of the proceedings, to notify a change of address within seven days; if they fail to do so, any service at the notified address will nevertheless be deemed to have been effected, which makes a judgment rendered *in absentia* admissible under Polish law. Austrian authorities consider this system incompatible with the Framework Decision.

Additional barriers arise from translation problems when requesting additional information and from sometimes vague information from the issuing authorities; moreover, Austrian judicial authorities find it difficult to verify when the person concerned makes different claims.

#### 3.4.2.2 A need for extensive information in the EAW regarding judgment in absentia

The Austrian judicial authorities consider that more extensive information on the fundamental admissibility of *in absentia* proceedings would be desirable, as would specific information on the procedure underlying the EAW. They believe that it would considerably simplify and speed up the procedure for authorising surrender, since any request for additional information inevitably leads to a prolongation of the surrender procedure and creates an additional burden.

### *3.4.2.3 Impact of the Tupikas, Zdziaszek and Ardic Judgments*

The stricter interpretation introduced by the Tupikas<sup>5</sup>, Zdziaszek<sup>6</sup> and Ardic<sup>7</sup> judgments has led to an increase in requests for additional information. However, deadlines are generally met in cases where additional information does not need to be requested (or only once). Nonetheless, if insufficient additional information leads to repeated queries, the time limits laid down in Article 17 of the EAW Framework Decision may sometimes be exceeded, in which case the repeated inquiries alert the issuing authorities to the fact that the time limit has been exceeded.

Moreover, the three judgments mentioned did not lead to a change in the Austrian legislation. Austrian law already stipulated that the accused person should be heard in such cases<sup>8</sup>.

### *3.4.3 Other grounds for refusal*

#### *3.4.3.1 Double criminality*

##### *3.4.3.1.1 A ground for refusal occasionally raised and easily overridden*

The objection of double criminality is occasionally raised, but the information necessary to resolve this issue can in principle be easily obtained by consulting the issuing authority or the law enforcement authority of the other MS. Therefore, Austria considers there is a good communication with the other MS when assessing double criminality.

Austrian judicial authorities also regard as helpful the simplified access to foreign criminal records via ECRIS, which makes it easy to determine the court from which a foreign judgment can be requested. Subsequently this will usually need to be translated.

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<sup>5</sup> CJEU: Tupikas , C-270/17 PPU, 10 August 2017, ECLI:EU:C:2017:628

<sup>6</sup> CJEU: Zdziaszek , C-271/17 PPU, 10 August 2017, ECLI:EU:C:2017:629

<sup>7</sup> CJEU: Ardic, C-571/17PPU, 22 December 2017, ECLI:EU:C:2017:1026

<sup>8</sup> Sections 286, 287, 471 489 and 494a Code of Criminal Procedure

#### 3.4.3.1.2 Austria as issuing State

When issuing EAWs, the description of the facts contained in the national arrest warrant or in the national judgment are generally used. In the interests of the principle of speciality, the facts are described in as much detail and as comprehensibly as possible.

#### 3.4.3.1.3 Austria as executing State

Where an incoming EAW relates to offences which are partly not punishable in Austrian courts (e.g. driving without a licence, driving under the influence or smuggling migrants without financial gain), the competent regional court declares that surrender for the purpose of criminal proceedings or executing a sentence may only be effected for a listed offence or in cases of double criminality.

Discussions with practitioners in Korneuburg shed light on possible vagueness in Austrian law in defining the authorities competent to end the proceedings when there is an obvious lack of double criminality. In such a situation the prosecutors' representative explained that after the arrest of the requested person Austrian law does not specify whether it is possible for the prosecutor to end the proceedings immediately or whether this has to be done by the regional court. As it is obvious that surrender will be denied, Austrian prosecutors believe it would more respectful of the rights of the requested person to end the procedure as soon as possible.

#### 3.4.3.2 Ne bis in idem

In some cases surrender was refused on grounds of *ne bis in idem*.

Austrian authorities mentioned that they experienced practical problems in borderline cases when determining lawful permanent residence. Indeed Austrian law declares that an EAW to enforce a sentence, concerning a person who has obtained the right to permanent residence within the territory of Austria after five years of lawful und uninterrupted residence within the territory of Austria, may not be executed<sup>9</sup>. Austrian practitioners explained, with good reason, that it is more difficult to establish lawful permanent residence than Austrian nationality.

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9 Provisions of §5 paragraph 4 and § 5a EU-JZG

### 3.4.3.3 *The jurisprudence of the CJEU:*

In one instance, CJEU case-law has led to changes in the Austrian law transposing the FD EAW. In order to take account of the judgment of the CJEU in Case C-42/11, *Lopes da Silva Jorge*, Section 5a was inserted into the EU-JZG, which provides that the arrangement set out in Section 5(4) of that act is also applicable to nationals of other Member States with permanent residence in Austria.

## 3.5 Further challenges

### 3.5.1 *Transit of the requested person*

As a rule, there are no great difficulties in seeking or granting transit permission.

According to the declaration to the GSC, MoJ decides on the transit of persons<sup>10</sup>.

Under current law, the courts are responsible for applying for transit permission (Section 36(1) EU-JZG), but in reality it is often the public prosecutor's office that applies (in cases where it is also responsible for issuing the EAW and transmitting it to the executing State (Section 29 EU-JZG)). A suitable request template in English has been unofficially circulated among the judicial authorities and is regularly used to apply for transit permission.

Problems arise when the MoJ receives an application for transit permission only very shortly before the planned transit date and the details of the EAW have not been translated into English, French or German. In such cases the MoJ uses the information contained in SIS to assess the admissibility of the transit.

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<sup>10</sup> ST 9608/04

### 3.5.2 Offences committed in Austria and in another MS

The Central Public Prosecutor's Office for the Prosecution of Economic Crimes and Corruption (WKStA) cited a domestic circumstance which — in a specific case — ultimately did not hinder surrender: in the case in question, it had to be further argued why extradition would be permissible even though domestic jurisdiction also applied<sup>11</sup>. The more serious offence was committed in Germany (punishable by 10 years' imprisonment), in Austria only the more minor one (Section 153e Criminal Code — punishable by two years' imprisonment). In addition, the decisive evidence and the victims were all located in Germany (losses were caused to German social security funds by undeclared work in Austria). As a result, the WKStA and the Court considered the conditions laid down in Section 7 paragraph 3 subparagraph 1 EU-JZG to be met.

### 3.5.3 Section 5 EU-JZG

Some Austrian practitioners mentioned difficulties with the consequences of Section 5 EU-JZG. This section does not allow Austrian judicial authorities to surrender a national to enforce a sentence. Moreover, it limits the possibility to surrender a national for prosecution. Consent, or not, to the surrender has the following consequences:

- If the person accepts the surrender, the Austrian authorities will ask for a return guarantee and in the end, the person will have to serve his/her sentence in Austria.
- If the person refuses the surrender, the Austrian authorities will have to create a criminal case in order to prosecute the person in Austria.

The second possibility creates several problems for practitioners. From a practical point of view there is a need to take over the case in the issuing State, and all the evidence collected. From a legal perspective it could be challenging to establish the right criminal categorisation of the offence and to identify criteria for competences where the crime was committed abroad.

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<sup>11</sup> Section 6 EU-JZG

## 3.6 Conclusions

### 3.6.1 General considerations

The legal basis of proceedings on an EAW is laid down in the provisions of the EU-JZG, including the transposition of FD 2002/584/JHA. Such legislation is considered as functional, relevantly sufficient and relatively problem-free by the evaluation team. It can be mentioned, and emphasised, that Austria took note of the recommendations made and addressed during the 4<sup>th</sup> round of mutual evaluations, though as explained below, some issues remain unresolved.

Austria has designated two central authorities only in the field of Framework Decision 2002/584/JHA: the Federal Ministry of Justice (MoJ) and the Federal Ministry of the Interior's Directorate-General for Public Security with its subdivision, the Federal Criminal Police Office. As a central authority, the role of the MoJ is limited. Indeed it assists the competent judicial authorities only if they so request.

Experts noted that the Minister of Justice can give instructions in individual cases. Although all the practitioners met mentioned that this situation had not occurred for years, and a panel of independent experts (“*Weisungsrat*”) has to express its opinion on such instructions, the experts believe that this possibility could be problematic, bearing in mind developments in CJEU case-law. Currently, there is an ongoing internal process of reconsidering this power conferred on the Minister of Justice. The working group responsible for this exercise has recently adopted its final report. The experts encourage Austria to follow its ongoing internal process.

Generally speaking the EAW procedures function well in practice and this mutual recognition instrument is highly appreciated by Austrian practitioners. Practitioners are fully familiarised with the procedure and its rules, mostly because of adequate training and cooperation which can be traced between courts and public prosecutors on one side and the MoJ on the other. Therefore all institutions perform their duties professionally, swiftly and in effective way, also due to support from the MoJ on its intranet pages where it provides the other authorities with the necessary practical information concerning the concrete situation and requirements in other Member States.



The evaluation team appreciates the effort made by the Austrian authorities, both as issuing and executing authorities, to handle EAW procedures as swiftly as possible. Nonetheless, at the same time, there is still room for improvement in direct contacts with other Member States, which is crucial for the effectiveness of the EAW. The possibility of contacting the particular person in charge, as quickly as is needed, is diminished by the fact that the email contact details of the relevant court and public prosecutor's office are not publicly available (e.g. on the web pages of an authority). The evaluation team sees this channel of contact as being nowadays the primary one, followed by phone, fax or postal communication. The current situation, where direct contact passes through a general email address operated by the MoJ, entails a redundant step for direct contact.

Regarding statistics, the Austrian authorities underline the difficulty they have in gathering the relevant data. This observation applies not only to FD 2002/584/JHA but also to the three other instruments which are the subject of the ninth round of mutual evaluations, with the exception of statistics on FD 2008/909/JHA when Austria is the issuing State. This can be explained by the fact that the competent authorities are mostly decentralised (except when Austria issues a request to recognise a custodial sentence) and it is more difficult to collect data from several entities than from a single one. The MoJ, for statistical reasons, can access the courts' management system but the staff of the courts and the prosecution may not always be aware of the specific codes to enter the relevant data correctly and this the search for this data is not automated. Thus experts recommend that Austria improves the way it collects statistical data in the field of the four Framework Decisions covered by the ninth round of mutual evaluations. They consider that an electronic tool would save time for all the competent authorities and help to obtain a better picture of the use of the FDs.

### 3.6.2 Austria as issuing State

The issuing process, although - contrary to the practice in many other Member States - it is initiated and implemented by the public prosecutors as issuing authorities, works without any problems and the elementary principles and guarantees of independence are secured by the court authorisation of the EAW. So the principle of proportionality is properly double-checked by both authorities involved.

The Austrian SIRENE Bureau, when entering the A-form in the SIS, adds photographs, facial images, copies of identification documents or fingerprint data of the requested person. Discussions with the Austrian practitioners showed that they do not necessarily think of the national identification number, since Austrian citizens do not have such personal identification number in the Austrian national system. The experts consider that this additional information, when known, is always useful and recommend entering it. The main goal is to reduce, or even eliminate, cases where identity is contested.

Regarding the principle of proportionality, the experts consider that it is well integrated into Austrian law. Although the lawyers' representative was somewhat critical of the lack of proportionality in some EAWs, the proceedings for issuing an EAW and the criteria mentioned by the judiciary follow the right path. Indeed when issuing an EAW for prosecution, a first assessment regarding proportionality is done by the judge when issuing the national arrest warrant and a second one by the court before the prosecutor issues the EAW. Moreover, the Austrian practitioners interviewed highlighted relevant criteria to consider before requesting an EAW. EAWs to enforce a sentence are very rare in Austria. This stems from the fact that *in absentia* judgments are not frequent and concern minor cases.

As issuing State, Austria is never asked about detention conditions in Austrian prisons.

Austrian practitioners stressed the fact that some executing authorities do not accept EAW forms which are electronically signed. Experts do not see the legal basis for this and recommend that the other MSs end this practice.

### 3.6.3 Austria as executing State

The evaluation team has to stress the importance of the principle of mutual trust, which is preserved by the Austrian authorities, not just in the EAW procedure. Indeed, all the practitioners met explained that they do not assess proportionality of the EAW when acting as executing authority. This approach should be considered as exemplary for other Member States. Austrian authorities also observe the time limits laid down without any problems.

Despite good internal cooperation, mainly due to the advisory role of the MoJ and the knowledge of all authorities involved, closer cooperation with EUROJUST would be seen as a positive aspect (e.g. requesting advice from Eurojust in the case of competing EAWs - Article 16 FD).

The SIRENE Bureau's representative informed experts that all incoming alerts in the SIS are checked by police officers without electronic support. This task is time-consuming and experience from the other MSs shows that creating software to assist police officers is possible. The experts would therefore recommend that Austria create an electronic tool of this kind.

Regarding transit, Austrian authorities have created an unofficial template in English which is used to apply for transit permission. The experts consider this a good initiative and believe that the European institutions should follow this example by creating a form dedicated to transfer which will be used by all MSs.

Regarding grounds for refusal, Austrian judges highlighted the fact that *in absentia* judgments could be challenging. They feel that in most cases the EAW form lacks information on how the requested person knew there was a trial and that she/he had been sentenced. Moreover, when additional information is requested the issuing authorities do not reply in time, and delays can lead to refusal to surrender. Moreover Austrian practitioners appear firmly attached to respect for fundamental rights. They apply the CJEU and ECtHR jurisprudence, notably in the field of detention conditions.

Thus, whenever they are informed about difficulties in the issuing MS as regards detention conditions they ask for additional information. In practice, the issuing MSs are able to share with the Austrian executing authorities general information that generally gives satisfaction and ensures the surrender.

Interviews with the Austrian authorities also stressed possible vagueness in Austrian law in defining the authorities competent to end the proceedings when there is an obvious lack of double criminality. The experts consider that Austria should clearly mention whether the prosecutor is entitled to end the procedure in this case or whether it is the court which has the power to do so. The aim is to avoid different practice in Austria, secure the procedure and clarify the rights of the requested person.

Another point of discussion with the Austrian practitioners was the constitutional provision of Section 5 EU-JZG. This provision narrows the possibilities for the Austrian authorities to surrender their nationals to the issuing State without their consent. Although this legal restriction is not uncommon among the Member States and is often considered as fundamental, proceeding from the long-term constitutional premisses of each state, it still must be seen as an possible barrier to the proper functioning of close international cooperation in criminal matters based on the abovementioned requirement of mutual trust.

## **4 FRAMEWORK DECISION 2008/909/JHA 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**

### **4.1 Authorities competent for the recognition of the judgment and execution of the sentence**

The Austrian procedure implementing the FD is a mixed procedure, i.e. partly a judicial procedure and partly an administrative procedure. It entered into force on 1 January 2012.

Austrian practitioners mentioned that there are 28 prisons on their national territory, holding 8 500 inmates. Among these prisoners, 18% are from other EU MS. The most represented EU prisoners are those from Romania, Slovakia and Hungary.

#### ***4.1.1 Austria as issuing authority***

The MoJ is the competent issuing authority<sup>12</sup>.

In practice prison staff prepare the certificate and send it to the MoJ. Then the MoJ verifies the certificate, completes the missing points, signs it and forwards it to the executing State.

This administrative authority also assists the competent executing authorities with questions in connection with FD 2008/909/JHA (either by means of *ad hoc* requests or if appropriate by issuing circulars).

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12 Section 42b EU-JZG

#### **4.1.2** *Austria as executing authority*

The Regional Court is the competent executing authority<sup>13</sup>.

The competence of the regional court depends on the district where the sentenced person lives or has his/her permanent residence. If the sentenced person is in custody, it is the place of custody that prevails. Should it not prove possible to determine the competence of a particular court, it is the Vienna regional criminal court that is competent.

Whenever a court refuses the recognition of the judgment, it has to inform the MoJ.

These judicial authorities are in direct contact with the competent authorities of other MS. According to the Austrian authorities, when contacting them, they seek the assistance of the MoJ and the EJM or Eurojust as needed. Nevertheless some judges mentioned to experts that they simply request additional information from the issuing competent authorities and if they do not reply in time, they refuse the transfer.

Moreover, as there are not many incoming requests from the other MSs, judges are not really specialised in this field.

### **4.2 Documents required for recognising the judgement and executing the sentence**

#### **4.2.1** *Legal need for a written judgment*

By law, a written judgment is required in the case of both incoming<sup>14</sup> and outgoing requests<sup>15</sup> for executing the foreign sentence. Austria is not aware of any problems where the legislation of the issuing State does not require it.

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13 Section 40a EU-JZG

14 Section 41a(1)(1) EU-JZG

15 Section 42b(4) EU-JZG

#### *4.2.2 In practice, translation of the judgment*

According to the notification sent to the GSC<sup>16</sup>, the certificate must be accompanied by a translation into German. Certificates in other languages will be accepted on a basis of reciprocity, i.e. on condition that the Member State concerned also, when it is the executing State, accepts certificates in German.

Austrian law does not contain any provision requiring the judgment to be translated in the case of incoming requests.

Nevertheless, the issuing States usually enclose a translation of the judgment - something which is appreciated by the competent regional courts as executing authorities. There has been the odd occasion on which the courts have deemed a summary translation to be insufficient. Some courts have reported that a translation of the judgment is necessary only in cases where there is a requirement for a more detailed examination of potential grounds for refusal.

In the past, bilateral discussions have been held with Romania in particular regarding the need for judgments to be translated, given that Romania requires such translations in all cases.

Moreover, the MoJ has a translation unit that can swiftly translate judgments when needed.

#### *4.2.3 As issuing State, documents occasionally requested by the executing State*

When using FD 2008/909/JHA, the MoJ always sends the executing State the certificate and the judgment together with the opinion of the sentenced person. The MoJ can easily access a copy of the judgment thanks to its access to the court management system.

The MoJ underlined that in practice the time remaining to be served should be at least 8 months in prison. Indeed the length of the proceedings have shown that this period is a minimum, and the 6 months provided for by FD 2008/909/JHA are too short.

Austrian authorities do not always translate the judgment when issuing a certificate. Nevertheless, according to § 42b (4) 1 EU-JZG a translation is always provided if the judgement has been translated for the sentenced person during the trial. Such translations have become far more common following the implementation of Directive 2010/64 on the right to interpretation and translation in criminal proceedings.

If the sentence has not been translated, Austrian authorities have it translated only if the executing State so requests and if that Member State has made a declaration to that end.

The MoJ's representatives stressed the fact that in Austria time remaining to be served is expressed in years and weeks, not in days as required in the certificate. The calculation of days remaining to be served will be done by the prison staff.

According to the Austrian practitioners, additional documents are occasionally required in the case of judgments *in absentia* and procedures for enforcement of a detention order.

### **4.3 Criteria to assess the facilitation of the social rehabilitation**

#### **4.3.1** *Criteria used to assess social rehabilitation*

It is the task of the penal institutions to provide the MoJ with the necessary information on the social ties of the persons eligible for transfer in the executing and sentencing State.

The sentenced person's chances of social rehabilitation are also discussed in particular when the written record is drawn up with the sentenced person in the penal institution.



The MoJ has not issued guidelines on the specific criteria to be checked. Nevertheless the Directorate for the penitentiary system has created a form used for this purpose. This form has recently been adapted, by expanding the questions on personal circumstances, which play an important role in the issue of social rehabilitation. When being questioned for the written record, the sentenced person is asked about their social contacts and any known (future) employer in both the executing State and the sentencing State, children and language spoken. The sentenced person is also asked to provide information on (legal) stay in the executing State (consolidation of residence).

In cases in which the forwarding of the certificate is based on a final expulsion or deportation order, the chances of social rehabilitation are deemed to be limited.

#### *4.3.2 Exchange of information between the issuing State and executing State*

In general, Austrian competent authorities state that the information pursuant to Article 21 FD 2008/909 (referred to in points (b), (c), (d), (e), (f) and (h)) is provided without delay. Notification regarding the competent authority involved under point (a) of Article 21, and ‘automatic’ notification of completion of the enforcement of the sentence under point (i), is provided by only some Member States.

##### *4.3.2.1 Austria as executing authority*

The courts as executing authorities have so far not needed any further information in connection with the question of social rehabilitation. Even though it is often in the form of standard wording, the information provided in the certificate has been found sufficient.

##### *4.3.2.2 Austria as issuing authority*

As issuing authority, the consultation provided for in Article 4(3) FD 2008/909 is conducted by the MoJ. The MoJ consults the executing authority for all certificates, as required by § 42b (2) EU-JZG. In such cases the foreign executing authorities consulted have mostly consented to the forwarding of the certificate and the judgment (for instance recently in the case of an Iranian national entitled to asylum in Germany, who had requested that execution of the sentence be taken over by Germany).

In the rare cases in which consent was not given, opinions as referred to in Article 4(4) FD 2008/909/JHA were received. A certificate was no longer sent in these cases, due to the negative opinion.

There have been cases in which the executing State has requested the forwarding of the judgment together with the certificate on its own initiative, as well as cases in which the sentenced person themselves has requested the initiation of a procedure under FD 2008/909 (Article 4(5) of the FD).

In the procedure which follows, these cases do not *de facto* differ from other transfer procedures. In these cases too the competent penal institution is first asked to submit the necessary documents (certificate and written record) and after they have been sent to the MoJ, it is verified whether the requirements for a request for transfer of the execution of the sentence are met — regardless of whether the suggestion came from the executing State or the sentenced person. Despite being proposed by the executing State and by the sentenced person it is still possible that in these cases no request for transfer of the execution of the sentence is made, for instance if the remainder of the sentence is too short to conclude the procedure under the FD 2008/909 before (conditional) release.

Austria as issuing State does not request in the certificate that information be provided about the beginning and end of the period of conditional release. However, ‘automatic’ notification of this under point (g) of Article 21 FD 2008/909 is provided by some executing States, such as the Netherlands.

#### 4.3.2.3 Practical arrangements on a bilateral basis

After the implementation of FD 2008/909/JHA the MoJ made contact with its most relevant neighbouring and partner countries. Bilateral talks took place with Hungary, the Slovak Republic and Romania. The discussions focused on practical questions such as the required documents and translations, the modalities of handing over the sentenced persons, transit questions and compliance with the timeframes laid down by the FD. These bilateral talks helped to improve the practical implementation of the FD in most cases of outgoing requests.

### *4.3.3 Opinion and notification of the sentenced person*

#### *4.3.3.1 Procedure followed*

##### *4.3.3.1.1 Austria as executing State*

If the sentenced person is in Austria they must be heard pursuant to Section 41a (8) EU-JZG and given a completed form concerning the conditions governing enforcement. The sentenced person is entitled to inspect the files and be represented by a lawyer. They are informed about all circumstances affecting them, invited to give their opinion and asked whether they would like the consular mission to be informed. All court judgments are served on them.

In accordance with Section 41b(5) EU-JZG, the sentenced person and the public prosecutor's office both have the possibility of filing a legal remedy, within 14 days, in respect of the decision of the Austrian regional court concerning the transfer of execution of sentence. The higher regional court is competent to decide on the appeal.

##### *4.3.3.1.2 Austria as issuing State*

Austria has developed software<sup>17</sup> which enables prison staff to identify prisoners eligible for a transfer. In addition, when they arrive in prison, prisoners receive a leaflet (translated into all the EU languages) containing all the relevant information on how to apply for a transfer. At the time of the onsite evaluation, the Directorate for the penitentiary system was working on a new document aimed at simplifying the information given to prisoners.

The procedure for such requests is laid down in Section 42a EU-JZG. Under this procedure, the director of the detention facility where the sentenced person is being held must draw up a written record with them of their statement regarding the intended enforcement (cf. 4.3.1). The prison staff and the prisoner have the possibility, via videoconference, to consult an interpreter who will help with filling in this form.

Then the document must be transmitted to the MoJ, which then makes a decision about forwarding the certificate and the judgment to the executing State.

The sentenced person and the MoJ are not the only parties able to launch a request for a transfer. A lawyer, another Member State or a court when a person is sentenced *in absentia* can request the MoJ to issue a certificate.

In Austria, no legal remedy is available in respect of a transfer decision in accordance with Article 6(4) FD 2008/909. The sentenced person (if they are in Austria) must merely be informed about this decision (Section 42b(10) EU-JZG). If the sentenced person is already in the executing State, the information is communicated to them by means of transmission of the form in Annex II to the executing State, which must then inform the sentenced person (cf. 4.3.2.3.).

The sentenced person is entitled to consular assistance. They are also entitled to avail themselves of the services of a lawyer. The *ex officio* appointment of a defence lawyer is not provided for.

The MoJ also informs the executing State if the sentenced person is released on probation or granted pardon.

#### 4.3.3.2 Importance of the consent of the sentenced person

The sentenced person's opinion carries significant weight. If the sentenced person has given their consent to the forwarding of the certificate and the judgment, a request will generally be made, except in cases where the remaining portion of the sentence is so short that it is unlikely a transfer procedure could be completed before (conditional) release.

Where the sentenced person does not give their consent, a procedure under the Framework Decision is generally only initiated if there is a final and binding expulsion or deportation order. It is extremely rare for the judgment and the certificate to be forwarded to the executing State without the sentenced person's consent solely on the basis of that person's nationality and habitual residence in the executing State.

#### *4.3.3.3 Information given to the sentenced person*

The sentenced person is notified about the transfer decision (at the same time as the request is made to the executing State) in accordance with Article 6(4) by means of the standard form (Annex II). This standard form is served on the sentenced person by the prison service and a record is kept of service; the sentenced person is informed about their rights in the course of a personal interview, of which a written record is made (this information also includes any measure envisaged, or already adopted, by the Foreigners Office (e.g. ban on staying in the country, deportation)). If the sentenced person is already in the executing State, Annex II is transmitted to the executing State, which must then inform the sentenced person.

In case of adaptation of the sentence, the decision on enforcement is served on the sentenced person.

### **4.4 Adaptation of the sentence**

#### *4.4.1 Austria has not experienced difficulties in adapting the sentence*

##### *4.4.1.1 Austria as executing State*

Austrian authorities are aware primarily of cases of drug-related crimes in which the custodial sentence had to be reduced due to the legal provisions applicable in Austria: in Austria the penalty is linked to the amount of drugs.

No problems were encountered in this connection; in fact, in every case the issuing authorities agreed to the reduction and the request for execution of the sentence to be transferred was maintained.

##### *4.4.1.2 Austria as issuing State*

It is also primarily cases of drug-related crimes that are concerned, with the penalties imposed in Austria being adapted (reduced) by the Netherlands authorities as executing authorities. No problems arose concerning these cases either.

#### *4.4.2 Assessment of similar offences:*

##### *4.4.2.1 Austria as executing State*

The courts examine this question on the basis of the facts of the case established in the foreign judgment. Austrian authorities are not aware of any case of the certificate being withdrawn after the sentence was adapted.

##### *4.4.2.2 Austria as issuing State*

Austrian authorities state that it is extremely rare for a certificate to be withdrawn after adaptation of sentence.

They consider that the system of FD 2008/909/JHA is based on the principle of mutual recognition and thus Article 8(1) FD 2008/909/JHA in principle provides for the continuation of the sentence, in terms of its nature and duration, as imposed in the sentencing State. Article 8(2) FD 2008/909 merely allows adaptation to the maximum penalty applicable under the law of the executing State where the penalty imposed in the sentencing State exceeds that maximum penalty. The adapted sentence may not be less than the maximum penalty laid down for similar offences under the law of the executing State.

Austrian authorities add that the FD does not specify which mandatory criminal law provisions should apply with regard to determination of the penalty – for example where an aggregate sentence is to be determined or in cases where multiple offences have violated a number of provisions – and refers in this context to the law of the executing State.

In addition, they explain that Article 10(1) FD 2008/909 does provide for a consultation mechanism if the executing State is considering partial recognition of a judgment and partial enforcement of sentence. This Article allows the issuing State the possibility to withdraw the certificate.

Under Austria's implementation, the possibility exists pursuant to Section 42c(2) EU-JZG of withdrawing the certificate in the event of reduction of the sentence by the executing State, for example where the person concerned would be released before having served half of the custodial sentence imposed.

In one case with Romania, although half of the custodial sentence imposed in Austria had already been served, the stark contrast between the anticipated determination of sentence in Romania of 11 years and 8 months' imprisonment and the term of 18 years' imprisonment originally imposed in Austria led to the certificate being withdrawn.

#### **4.5 Grounds for non-recognition or non-enforcement**

Experts would firstly like to point out that the grounds for refusal provided for by Article 9 of the FD 2008/909/JHA are optional. In the Austrian implementing law, Article 40 of the EU-JZG<sup>18</sup>, all these optional grounds for refusal have been defined as mandatory grounds for refusal.

##### **4.5.1 Usual grounds for non-recognition or non-enforcement**

###### **4.5.1.1 Austria as executing State**

The most important ground for non-recognition or non-enforcement is when an act does not constitute a prosecutable criminal offence in Austria (e.g. driving a car without a driving licence or financial crimes that come within the competence of the administrative authorities).

In rare cases, *in absentia* proceedings in the issuing State have been used as grounds for non-recognition or non-enforcement due to the lack of adequate information provided. In one case, there was a problem concerning the *ne bis in idem* principle, while in another, expiry of the limitation period constituted grounds for non-recognition.

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<sup>18</sup> The enforcement of a custodial sentence or preventive measure involving deprivation of liberty imposed by final and absolute decision of a court of another Member State shall not be admitted even though the prerequisites of § 39 (1) are met...

Moreover the MoJ's representatives explained that fundamental rights are assessed and can be a ground for non-recognition of the foreign sentence.

#### *4.5.1.2 Austria as issuing State*

The grounds cited for the majority of cases of non-recognition and non-enforcement were that the sentenced person was not resident in the executing State (based on the authorities' records). In this context, a lack of possibilities for social rehabilitation has also been cited.

There have been cases where the sentenced person had absconded or died.

In rare instances there has been complete non-recognition or non-enforcement on the grounds that the act in no way constituted a prosecutable criminal offence in the executing State (for example, there have been a number of cases of non-recognition in Slovakia of theft committed on a commercial basis pursuant to sections 127 and 130(1) of the Austrian Criminal Code (StGB), where the amount of prejudice caused was small, since this did not constitute a criminal offence in Slovakia).

In addition, problems arise in connection with the enforcement of an order pursuant to section 21(2) StGB, since this type of enforcement of an order (combined with the enforcement of a custodial sentence) is not known in most Member States. (cf. 4.5.3.).

Fundamental rights are also taken into consideration when issuing a certificate to transfer a prisoner, notably with regard to detention conditions. For example, as a routine question, the MoJ will ask Romania which prison the sentenced person will be sent to.

#### *4.5.2 Judgments in absentia*

Although there have been individual cases where recognition and execution have been refused in connection with judgments handed down *in absentia*, these cases do not present any significant challenges. The regional courts merely highlighted the need for (in some cases multiple) enquiries concerning the procedures for service of the *in absentia* judgment.



#### *4.5.3 Criminal irresponsibility and imposition of psychiatric care*

In case of incoming requests, no particular challenges were identified in Austria.

Regarding outgoing requests, Austrian authorities are not aware of any problems concerning cases where a person who cannot be held criminally responsible for their actions is to be placed in an institution for mentally abnormal criminals pursuant to Section 21(1) StGB. The supplementary documents such as doctors' reports or medical records that are usually requested are transmitted without delay.

Austrian authorities underline that with regard to the fact that it is only possible to pursue successful treatment in the sentencing State, and thus in the State issuing the certificate under FD 2008/909/JHA, if the person concerned speaks the language of the sentencing State, which is not usually the case, it would appear that, precisely in cases such as these, a transfer for further execution of the order in the executing State is of particular importance, especially since there are in principle no language issues there.

In the case of Section 21(2) StGB, under Austrian law the placement of a person who is in principle responsible for their actions but who committed the act under the influence of a higher degree of mental or psychological abnormality is imposed at the same time as the penalty is pronounced, which is not provided for in many other Member States. Transfer for further execution of this order pursuant to Section 21(2) StGB can therefore not take place in most cases.

## 4.6 Partial recognition

In this field the consultations between competent authorities generally run smoothly. There are occasions when deadlines are not complied with, or when the deadlines set are too short.

### 4.6.1 *Austria as executing State*

In Austria, there have occasionally been instances of partial recognition of judgments, in particular in cases where the judgment related, in part, to a financial offence which falls within the remit of the administrative authorities, or a road traffic offence which is not punishable by a court of law (driving a car without a driving licence).

The criteria used to decide whether to recognise the judgement and execute the sentence only in part is made by comparing the findings contained in the judgment (facts of the case) and the sentence in the foreign judgment to the national law.

### 4.6.2 *Austria as issuing State*

With regard to the Czech Republic and Slovakia, there have been repeated instances of partial recognition of judgments in connection with the offences of suppression of documents pursuant to Section 229 of the Criminal Code and ‘simple’ theft (even when committed on a commercial basis pursuant to Sections 127 and 130(1) of the Criminal Code) involving a small amount of loss. In such cases, the court giving judgment in Austria is seized in accordance with Section 42b(7a) EU-JZG. It must decide which part of the custodial sentence imposed corresponds to those criminal acts regarding which enforcement has been taken over. That decision is notified to the executing authority, which uses it as the basis for its decision regarding (partial) recognition, which generally leads to an adaptation of the sentence.

To assess whether the partial recognition in the executing State is acceptable or to withdraw the certificate, the MoJ assess the reduction of the sentence after the partial recognition. In rare cases, where this reduction was deemed too great, partial recognition led to a withdrawal of the certificate.

## **4.7 Challenges relating to compliance with the deadline for recognition and enforcement**

### **4.7.1 *Compliance with the deadline provided for in Article 12(2) of FD 2008/909***

#### **4.7.1.1 Austria as executing State**

According to the judges interviewed, the time limits may sometimes not be complied with. In accordance with FD 2008/909/JHA, Austrian law allows 90 days to recognise the judgment and there is no sanction if the time limit is exceeded.

According to the most experienced judges met, the decision on recognition can be taken in one or two weeks if all the necessary information is present. However, this is not possible in cases requiring consultations or additional information (e.g. proof of service in the case of judgments *in absentia*, medical records), and where there is a delay in fulfilling those requirements. Delays in replying, by the issuing State, appear to be the main explanation for the length of the proceedings.

#### **4.7.1.2 Austria as issuing State**

According to the Austrian authorities, most Member States fail to comply with the deadlines. They add that multiple reminder letters are often required.

### **4.7.2 *Information in case of delay***

#### **4.7.2.1 Austria as executing State**

It was reported that there is generally no need to provide information regarding a delay and the estimated time needed for taking the decision, since delay is almost always due to a requirement for consultations with or supplementary documentation from the issuing State, and consequently the executing authority is not responsible for it.

#### **4.7.2.2 Austria as issuing State**

Austrian authorities stated that information regarding a delay and the estimated time needed for making the decision is almost never provided spontaneously. In rare cases, reasons are specified only on submission of a corresponding request/reminder letter.

In most cases, however, no reasons are specified; where such information is provided at all, it is stated only that the competent authority in the executing State has yet to take a decision. Consequently, bilateral talks have been conducted with some Member States in recent years to discuss the reasons for the delays and the sometimes lengthy duration of proceedings, and to seek solutions.

#### **4.8 Law governing the enforcement of the sentence**

Austria, as issuing State, does not, in the certificate, request information be provided about the beginning and end of the period of conditional release. However, notification of this under point (g) of Article 21 is provided by some executing States (e.g. the Netherlands).

To date, no certificates have been withdrawn in cases in which information has been provided. In the case described above involving Romania (cf. 4.4.2.2.), the certificate was withdrawn on the grounds of the lightness of the sentence applied in that country.

In view of an amendment made to the Third Protection Against Violence Act (exclusion of the right to conditional release in the case of sexual offenders), in future it should be ensured that there is no conditional release in the executing State in such cases, and a statement to that effect should be included in the certificate. Austrian authorities do not consider it necessary for this to be enshrined in law.

As executing State, Austria is not aware of a certificate having been withdrawn because of its applicable provisions on early or conditional release.

Austrian authorities mentioned that problems have arisen on account of the fact that it is frequently necessary to request clarification regarding time previously served, especially in cases where the information provided as regards terms of imprisonment was incomplete. There have even been cases in which such circumstances have been pointed out by the sentenced persons themselves. Subsequently, the need to request clarification regarding time previously served in the issuing State leads in turn to a procedural delay.

## 4.9 Further challenges

### 4.9.1 *Transit of the sentenced person*

As a rule, no major issues are encountered in Austria when organising the transit of sentenced persons.

There is now a dedicated department within the MoJ known as the ‘Centre of competence for supervision and transfers in connection with the enforcement of sentences’, which is responsible for transfers, including transit.

During the pandemic this unit bought two buses to directly transfer prisoners. These means are used to transfer prisoners to Hungary, Slovakia or Poland. Austrian authorities underlined that such transports reduce the costs.

Delays arise primarily as a result of the need to produce translations (of the certificate) in connection with the request to authorise transit. Authorisation is usually granted within a few days of the request being sent.

The MoJ’s representatives mentioned they have numerous transit requests due to the fact that Vienna is a major hub through which to travel to Eastern Europe. Usually it takes 24 hours to grant transit.

### 4.9.2 *Other challenges*

In the case of outgoing requests, it is very rare for the deadlines for the decision on enforcement to be complied with, and in several cases this has led to a certificate being withdrawn on account of the imminent (conditional) release of the sentenced person, or where such release has already taken place. On the other hand, in the cases referred to in Article 18 FD 2008/909, some Member States refuse recognition if the 30-day deadline laid down in paragraph 3 of that provision is not complied with.

Austrian authorities also mention that delays often arise because some Member States also require the written record drawn up with the sentenced person and/or the ban on residence to be translated.

In addition, Austrian practitioners mentioned the fact that their system does not provide for aggregated sentences. Austrian law only allows for applying sentences in the order in which they were pronounced. It can cause difficulties with short sentences. Indeed an executing State will usually refuse to recognise sentences with a short period to serve.

#### 4.10 Statistics

##### 4.10.1 Austria as issuing State

When Austria is the issuing State, the MoJ is the competent authority. Since it is a centralised body, recording data is relatively simple.

Austrian authorities provided the evaluation team with data only for cases when Austria has acted as issuing State.

**Number and destination of prisoners transferred from Austria, from 2019 to 2021, using FD 2008/909/JHA**

Executing State	Number		
	2019	2020	2021
Romania	74	32	69
Slovakia	17	11	22
Hungary	8	16	22
Germany	17	12	11
Italy	7	4	10
Slovenia	7	4	0
Poland	5	5	9
Bulgaria	0	3	7
Czech Republic	3	6	7
Spain	0	0	7
Croatia	0	7	4
Lithuania	4	3	4

Belgium	0	0	2
Sweden	0	0	1
Latvia	2	0	1
Netherland	7	10	1
Portugal	1	0	0
Greece	1	0	0
France	0	1	0
Estonia	0	1	0
Total number	162	115	174

In 2021, the average length of the procedure was around 270 days.

**Statistics for the use of FD 2008/909 JHA, when Austria has acted as issuing State**

Year	Number of requests	Number of transfers	Number of refusals	Number of withdrawals
2016	266	196	18	69
2017	260	166	15	67
2018	224	136	9	49
2019	257	162		
2020	264	115		
2021		174		

These figures showed that the number of requests is stable. The slight decrease in 2018 was explained to the experts by changes in the number of court cases or of sentences being passed. Regarding the number of withdrawals, Austrian authorities underlined that, from experience, about one out of five requests has to be withdrawn. The reason for this is usually that the enforcement in Austria ended due to the release from the custodial sentence for example. The length of proceedings in the executing State in turn often causes this situation.

According to the Austrian authorities the length of the process is usually around 200 days, from the day the MoJ receives the request for a transfer to the day the person is in the plane for handover.

#### **4.10.2 Austria as executing State**

When Austria is the executing State courts are the competent authorities. Courts do not have an obligation to report each year about the use of FD 2008/99/JHA.

These decentralised authorities have a court management system. When specifying in the court management system an article of the law on which the judgment was rendered it is possible to find a decision linked to FD 2008/909/JHA. Nevertheless no electronic tool as such has been created to record data on FD 2008/909/JHA. Consequently, gathering data on FD 2008/909/JHA when Austria is the executing State is laborious.

This explains why Austrian authorities mentioned that no statistics are available when Austria acts as executing State. They added that such statistics are not provided for by FD 2008/909/JHA. They admitted that statistics for Austria as executing State might help to establish with which Member States cooperation is more difficult, the length of the proceedings or the main grounds for refusal to recognise a sentence. They also questioned whether that information gain justifies the additional workload of collecting data and highlighted practitioners' reluctance to engage in this activity.

### **4.11 Conclusions**

Austria regulates proceedings on mutual recognition of judgements imposing custodial sentences by provisions stipulated in EU-JZG. In general, the practice in using FD 2008/909/JHA is good in Austria.

Austria has not appointed a central authority in the field of FD 2008/909/JHA.

#### **4.11.1 Austria as issuing State**

In the case of Austria as an issuing State, the competent authority is represented by the MoJ, cooperating in close liaison with penal institutions. This centralised body is highly specialised and known throughout the country as the point of reference on FD 2008/909/JHA. Consequently, the MoJ gives advice to numerous practitioners in courts or prosecutor's offices.



The evaluation team does not see any noticeable problems, as in particular criteria for social rehabilitation and also all time limits set for this procedure are fully reviewed and observed. Indeed Austria has developed an IT system which makes it possible to readily identify prisoners eligible for a transfer. Undeniably, this tool enables a transfer to be started as soon as possible. Moreover, when a sentenced person arrives in prison she/he is given a leaflet containing all the relevant information to apply for a transfer. It must be underlined that this leaflet is available in all EU languages. In addition, the directorate for the penitentiary system has produced a specific form, used by prison staff when interviewing the prisoner, that gathers all the relevant information regarding social rehabilitation. Experts also stressed that interviews with prisoners are conducted with the assistance of an interpreter who can be reached by video conference, the prisons being sufficiently equipped with electronic devices.

The evaluation team has noticed that when it comes to issuing the certificates there is no general rule in Austrian law on how to calculate the days of the sentence remaining to be served. This could be a common issue for all MSs. In addition calculation of days can differ from one MS to another. Therefore, the experts consider there is a need to produce guidelines at EU level on how to calculate the days of a sentence remaining to be served. This will create a common practice and ensure mutual trust as regards the calculation made.

The Experts noted that Austrian law does not provide for the possibility for the sentenced person to appeal the MoJ's decision to refuse to issue a certificate to another MS for the recognition and execution of a custodial sentence. Although it is not provided for by FD 2008/909/JHA, the experts would recommend that Austria create such a legal remedy, taking into account that the MoJ is by definition an administrative authority which does not have the same degree of independence as the judicial authorities.

In addition, Austria applies the CJEU's jurisprudence, notably in the Aryanosi and Caldaru case, in the field of FD 2008/909/JHA. Thus if the MoJ deems detention conditions in another MS unsatisfactory with regard to fundamental rights, it can decide not to initiate the transfer of a prisoner.

Experts also wish to underline the proactive attitude taken by Austrian to solve problems. Austrian practitioners noted that some MSs did not give reasons, or did so with scant information, for delays in recognising a custodial sentence. In order to overcome these difficulties they have conducted bilateral talks with these MSs. This approach is clearly seen as a best practice to be shared with all the MSs.

#### *4.11.2 Austria as executing State*

As executing State, courts are the competent authorities. This means that the competent authorities are decentralised and entails a lack of specialisation for some judges in small courts.

Austria follows the principle of direct contact between judicial authorities. Usually these contacts are smooth and swift. Nevertheless some Austrian practitioners mentioned to the experts that if an issuing authority does not reply to a request for additional information within the time limits it will lead them to close the case. In such a situation, rather than ending the procedure, the experts believe that Austrian practitioners should consider the use of all available channels (EJN and Eurojust) to contact the foreign competent authorities in order to ensure that they provide the additional information requested, especially because the EJN and Eurojust are well identified by the Austrian judiciary.

As executing authorities, the Austrian judges met appear to deal with more or less cases depending on the courts they are assigned to. The lack of statistics when Austria is the executing State does not allow for a clear view of how often FD 2008/909/JHA is used. The experts' feeling was that the number of cases as executing State was insignificant compared to the number of cases as issuing State.

In this regard experts would recommend creating a common database at State level holding information about certificates received from the other MSs. This would facilitate understanding of the problems encountered in FD 2008/909/JHA cases and provide a clearer view of the use of the FD. By contrast, statistics on FD 2008/909/JHA where Austria is the issuing State exist and show the length of the proceedings, with which MS transfers are the most frequent and the number of certificates withdrawn.

During the evaluation process it was found that the grounds for non-recognition and non-enforcement established in Article 9 of the Framework Decision 2008/909/JHA are implemented in Austrian law as mandatory. The experts recommend that Austria bring its legislation into line with FD 2008/909/JHA and make the grounds for refusal optional in order to avoid potential infringement proceedings from the Commission.

## **5 LINK BETWEEN FD 2002/584/JHA ON THE EAW AND FD 2008/909/JHA ON CUSTODIAL SENTENCES**

### **5.1 Problems related to the link between FD 2002/584/JHA on the EAW and FD 2008/909/JHA on custodial sentences**

#### **5.1.1 *Criteria followed to decide to use an EAW or a certificate:***

According to the Austrian representatives, the relevant FDs do not contain any provisions to assess the criteria to decide whether to issue an EAW or a certificate in case a person is staying in, or is a national or a resident of the executing State. Therefore, in principle the decision is taken on the basis of the circumstances of the individual case.

In practice the EAW is mostly used if the sentenced person has fled and FD 2008/909/JHA is mostly used if the sentenced person is imprisoned in Austria.

Austrian practitioners consider that preference should be given to a request pursuant to FD 2008/909/JHA, including for reasons of the social rehabilitation of the person concerned, since a sentence can in principle only be enforced in the State of their nationality or residence or - in the case of EU citizens - permanent residence. These considerations do not, however, apply to the case of third-country nationals and where there is no permanent place of residence.

Moreover, according to the Austrian authorities, they do not have problems of coordination between the different competent authorities: prosecutors and courts on the one hand and the MoJ on the other. Communication between all these authorities is so good that they do not believe guidelines would be helpful. This situation can be explained by the fact that the MoJ is always available for practitioners and MoJ staff are highly specialised, especially in the field of FD 2008/909/JHA.

**5.1.2** *As executing State, no need for a certificate after rejecting an EAW or after a surrender granted on the basis of Article 5(3) of the FD 2002/584/JHA:*

As an executing Member State, the Austrian legislation does not require a separate certificate for the execution of the sentence rendered in the issuing Member State. The sentence can be executed on the basis of the information contained in the EAW. This situation also applies when surrender is granted on the basis of Article 5(3) of FD 2002/584/JHA.

The relevant provision is Section 41j EU-JZG:

§ 41j. The provisions of this Subdivision with the exception of §§ 39, 40, 41 (1) items 1 and 3, 41a (1) item 3 and (2) to (8), regarding cases of item 2 also with the exception of § 41e, shall also be applied to the following cases under the condition that enforcement cannot be refused if the certificate (Annex VII) is not forwarded subsequently, supplemented or corrected on time:

1. if an Austrian judicial authority is requested to execute an EAW concerning an Austrian national or a citizen of the European Union concerning whom the prerequisites of § 5a prevail in order to enforce a custodial sentence or preventive measure involving deprivation of liberty and all other prerequisites for surrender of the person concerned according to Chapter II of this federal law are met (§ 5 (4)), or

2. if the execution of an EAW against an Austrian national has been permitted under the condition that he or she is returned to serve the custodial sentence or preventive measure involving deprivation of liberty imposed by the court of the issuing State (§ 5 (5)).

**5.1.3** *As issuing State, after rejecting an EAW, issuing a certificate depends on the request of the executing State*

The EU-JZG does not allow the executing Member State to execute the sentence for which surrender has been refused without a certificate. In such cases, a certificate will be sent if the executing authority so requests.

#### **5.1.4** *Certificate related to the Poplawski case:*

Certificates related to the Poplawski case are in principle unproblematic in Austria due to the provisions of Section 41j EU-JZG.

## **5.2 Conclusions**

No specific criteria for choosing between an EAW or a certificate related to FD 2008/909/JHA are laid down in the law or in guidelines. In practice, the EAW will be preferred if the person has fled and their whereabouts are unknown. A transfer of the prisoner will be chosen if the person is in prison or her/his whereabouts are known.

Although the authorities dealing with FDs 2002/584/JHA and 2008/909/JHA are different, Austrian practitioners do not feel any need for guidelines to help them resolve situations such as:

- choosing between an EAW or a certificate related to FD 2008/909/JHA;
- where an EAW was refused and the question of transferring a prisoner could arise, with the aim of avoiding impunity.

The high level of cooperation between the MoJ and the judiciary added to their smooth communication make this understandable.

The Austrian legislation provides for enforcing a sentence, after refusing surrender, without receiving a certificate related to FD 2008/909/JHA. In this case, the judgment annexed to the EAW form will be used. Experts note that such a possibility avoids impunity. However, this possibility differs from one MS to another. Indeed, some MSs will always require a certificate to be issued before enforcing the sentence on the basis that it is the right for the issuing State to decide if a sentenced person could serve her/his sentence abroad. Therefore the experts consider that EU institutions should clearly specify whether it is possible to directly enforce a sentence after having refused surrender on the basis of the information contained in the EAW.

## **6 FRAMEWORK DECISION 2008/947/JHA ON PROBATION AND ALTERNATIVE SANCTIONS**

### **6.1 Authorities competent for Framework Decision 2008/947/JHA**

The regional courts<sup>19</sup> are the competent authorities.

Those courts have direct contact with other MS's competent authorities.

The EU-JZG does not define a particular role for the Austrian MoJ. Nevertheless, the MoJ acts on a case-by-case basis when it is so requested by the competent judicial authority, especially since it maintains excellent relations with its partner authorities in the other Member States.

### **6.2 Problems related to lack of application of Framework Decision 2008/947/JHA**

#### **6.2.1** *No problems regarding awareness, the law or the institutional organisation*

According to the Austrian authorities, practitioners are aware of the relevant national legislation, especially since they are informed of it by means of circulars. Austrian authorities do not think there are any gaps in the national legislation regarding the implementation of the FD.

There was no need to change the institutional organisation in Austria because the relevant legislative provisions (Sections 81 to 99 EU-JZG) fitted into the existing structure of the EU-JZG.

#### **6.2.2** *A little-used instrument*

No statistics on the implementation of FD 2008/947/JHA are available in Austria.

Austrian competent authorities only know of one case in which an Austrian judicial authority has taken over the execution of probation measures. In one other case, efforts are currently under way to clarify with the Greek EJM contact points whether certain probation measures are legally possible under Greek law and if a request can be made to the competent court.

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<sup>19</sup> Section 83(1) and Section 95(1) EU-JZG

Regarding the reasons why this mutual recognition instrument is so little used, Austrian authorities highlighted the differences between probation measures and especially between alternative sanctions in the EU Member States, and lack of experience. Following this idea, the lawyers' representative suggested harmonising alternative sanctions within the EU. He also underlined that it is difficult to obtain documents supporting the idea of an alternative sanction being served abroad.

In addition practitioners mentioned difficulties when searching for competent authorities in the EJN Atlas webpage.

They also wonder whether the FD really meets the needs of judicial authorities. Nevertheless, the MoJ's representatives underlined that after a training event in 2019 they have seen an increase in contacts between competent authorities in the field of FD 2008/947/JHA.

### **6.3 Conclusions**

In the field of FD 2008/947/JHA Austria has not appointed a central authority and regional courts are the competent authorities to issue and execute the recognition of the judgment on alternative sanctions.

As the competence for FD 2008/947/JHA is distributed among the different regional courts, statistics are difficult to compile. In the end, Austrian authorities were not able to present any. According to them only one case, as executing State, has arisen in Austria.

The reason for such rare use of this mutual recognition instrument cannot be found in the way FD 2008/947/JHA was implemented. Practitioners find the Austrian law understandable.

The first explanation must be a lack of awareness among practitioners. Indeed the MoJ's representative clearly stressed that after a training event in 2019 contact between competent authorities increased. The differences between alternative sanctions in the different EU MSs and difficulties in identifying the competent authorities in the EJN Atlas are also identified as problems in the use of this mutual recognition instrument.



## **7 FRAMEWORK DECISION 2009/829/JHA ON THE EUROPEAN SUPERVISION ORDER (ESO)**

### **7.1 Authorities competent for Framework Decision 2009/829/JHA**

The regional courts<sup>20</sup> are the competent authorities.

The competent authorities have direct contact with other MS's competent authorities.

The EU-JZG does not define a particular role for the Austrian central authority. Nevertheless, the MoJ acts on a case-by-case basis when it is so requested by the competent judicial authority, especially since it maintains excellent relations with its partner authorities in the other MSs.

### **7.2 Problems related to lack of application of Framework Decision 2009/829/JHA**

#### *7.2.1 No problems regarding awareness, the law or the institutional organisation*

According to the Austrian authorities, practitioners are aware of the relevant national legislation, especially since they are informed of it by means of circulars. Austrian authorities do not think there are any gaps in the national legislation regarding the implementation of the FD. For his part, the lawyers' representative mentioned that this mutual recognition instrument is mostly unknown among lawyers.

There was no need to change the institutional organisation in Austria because the relevant legislative provisions (Sections 100 to 121 EU-JZG) fitted into the existing structure of the EU-JZG.

#### *7.2.2 An instrument very rarely used*

According to the Austrian authorities the ESO has been used once. The practitioner who mentioned this case said "it was years ago".

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20 Section 102(1) and Section 115(1) EU-JZG

The explanation given for this situation is the rather narrow field of application and lack of experience with this mutual recognition instrument. Moreover, the Austrian authorities doubt that the ESO meets the needs of judicial authorities. Indeed Austrian practitioners mentioned that it is faster to finalise a criminal case when the person is briefly placed in provisional detention than when she/he is under supervision.

### **7.3 Conclusions**

In the field of FD 2009/829/JHA Austria has not appointed a central authority and regional courts are the competent authorities to issue and execute an ESO.

As the competence for FD 2009/829/JHA is distributed among the different regional courts, statistics are difficult to compile. In the end, Austrian authorities were not able to present any. According to the Austrian practitioners met only one case has arisen in Austria.

The reason for such rare use of this mutual recognition instrument cannot be found in the way FD 2009/829/JHA was implemented. Practitioners find the Austrian law understandable.

The explanation for this scarce application is that FD 2009/829/JHA does not suit the requirements of criminal proceedings. Indeed the decision to place a person in provisional detention must be taken in a few hours and it is not possible in this timeframe to issue an ESO and receive a reply from the executing MS. Moreover, the Austrian practitioners mentioned that a criminal case will be resolved faster if the foreign person is briefly in provisional detention rather than being released and having to come back for further investigation or the trial. In addition, lawyers, who should be a key player in this field, are not aware of FD 2009/829/JHA and it is difficult for them to obtain timely documentation from the executing State to support a request for an ESO.

## 8 TRAINING

### 8.1 Training and information related to the four FDs

Initial and further training of judges and public prosecutors in Austria is organised on a decentralised basis, at the level of the four Higher Regional Courts, while the MoJ is responsible for ensuring the consistency of training. In order to be able to respond to specific further training needs at federal level as effectively as possible, every year a coordination meeting — known as the further training advisory board — is held for the following year.

Building on this, the Supreme Court of Justice, the four Higher Regional Courts, the Association of Austrian Judges, the Association of Austrian Public Prosecutors and the MoJ offer a multitude of further training events every year for judges and public prosecutors in the area of criminal law. Most of this training takes the form of combined training events on different EU mutual recognition instruments and does not focus specifically on an FD which is the subject of the 9<sup>th</sup> round of mutual evaluations.

Moreover, all Austrian judges and public prosecutors are free to take part in EJTN and ERA events in accordance with the number of places available for Austrian participants.

The Austrian judicial authorities make use in particular of the EJN Atlas and the Judicial Library (to check the status of implementation of the FDs and the declarations made by the MS on them). Some judicial authorities find the EJN website very unclear and complicated, in particular if they do not use it every day. Some others also said that they did not use the online tools on the EJN website. One judicial authority explained that it was not in a position to work with the EJN website's online tools due to a lack of time caused by its daily workload.

The Austrian law<sup>21</sup> sets forth a general obligation for judges and public prosecutors to participate in continuous training. However, this general obligation does not refer to participation in specific continuous training activities. Indeed Austrian authorities consider that would run counter to the principle of judicial independence guaranteed by the Austrian Constitution.

All practitioners are encouraged to regularly participate in continuous training activities and from the point of view of the MoJ should generally have sufficient resources to do so. Participation in training activities is considered as working time.

The Austrian authorities mentioned that they do not use e-learning tools in the field of the four FDs which are the subject of the ninth round of mutual evaluations.

Training for lawyers is taken care of by their professional bodies and focuses mostly on the EAW.

## **8.2 Training related to FD 2002/584/JHA**

### **8.2.1 *Training on the EAW instrument***

Topics concerning international cooperation in criminal matters, including the EAW, are regularly covered in the events mentioned above (cf. 8.1).

Since the MoJ does not always have access to the detailed programmes of the seminars, it is not possible to provide reliable information on the number of annual participants at events dealing (partially) with the EAW. Participation at these events is however open to all judges and public prosecutors and is considered as working time.

When selecting speakers, attention is paid to ensuring they have a high level of expertise and sound practical experience. The subsequent quality control is carried out by the organiser and is essentially based on participant feedback. In the vast majority of cases the quality of the training is assessed as excellent.

In addition, the EAW is also regularly covered as part of training for trainee judges.

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<sup>21</sup> Art. 57 Para. 1 Act on Judges' and Prosecutors' Service Law (Richter- und Staatsanwaltschaftsdienstgesetz – RStDG)

### **8.2.2** *Training on EUCJ case-law*

Austria organises training on recent EU case-law. For example, the seminar on ‘The EU Charter of Fundamental Rights in practice in criminal law’, organised by the MoJ in cooperation with the Ludwig Boltzmann Institute of Human Rights, took place in April 2018. At the seminar participants were familiarised with the basic principles of the applicability of the EU Charter of Fundamental Rights at national level and with the current state of ECJ case-law. Practical case studies, including in the field of the EAW, were explained.

As part of a seminar held by the Linz Higher Regional Court, ‘European law for judges and public prosecutors’ (27 November 2019), a lecture was given on the topic of ‘European criminal law’, in which the current case-law of the ECJ on the topics of ‘detention conditions’ and ‘issuing judicial authority’ was covered in detail.

### **8.2.3** *Dissemination of content*

The MoJ provides all staff with documents and information on the topic of the EAW on its intranet site, such as the Handbook on how to issue and execute an EAW, various EAW circulars and links to the European e-justice portal and the EJN.

## **8.3 Training related to 2008/909/JHA**

### **8.3.1** *Training on the 2008/909 instrument*

A training event, organised by the MoJ, on the subject of ‘Enforcement of sentences in the country of origin’ - which also covered the relevant FD - was organised for prison managers in April 2019.

Since 2015, twice a year, prison staff are trained on FD 2008/909/JHA. They learn how to fill in the certificate, who to inform and how.

### **8.3.2 Dissemination of content**

The Austrian competent authorities are aware of EuroPris's work. Representatives from the MoJ regularly participate in the expert meetings organised by EuroPris concerning Framework Decision 2008/909/JHA.

The information gathered in Europris' meetings is circulated through the electronic file management system of the MOJ to the members of the unit competent to issue certificates based on FD 2008/909/JHA. If the information is also relevant for domestic courts dealing with the execution of sentences, it is inserted in the Intranet into the so called "Country information" database. This database is accessible by all courts, public prosecution services and other entities.

EuroPris/CEP's knowledge relevant for prison administration is also forwarded to the prison system/prisons and to the Directorate-General for the enforcement of sentences, directly or via the MoJ electronic file system. In addition, this information is disseminated during the twice-yearly training for prison staff (cf. 8.3.1).

The prison staff find the manual 'Resource Book on the Transfer of Sentenced Prisoners under EU Framework Decision 909' very helpful. However, there have been calls for the website to be made more user-friendly so that information on the Framework Decision can be found more quickly. However, Austrian authorities underlined that this was before the Beta version of the site was made available recently.

In addition, some judges explained that they did not know about the existence of the Commission handbook on FD 2008/909/JHA

## **8.4 Training related to 2008/947/JHA and 2009/829/JHA**

The training providers within the Austrian judiciary periodically offer training events covering topics such as probation. Austrian practitioners are also encouraged to participate in international training events on such topics provided for by institutions such as EJTN and ERA.

## 8.5 Conclusions

The model of training is decentralised, divided among several authorities. Practitioners rely on close cooperation with the MoJ when a problem occurs and information is needed. Other possibilities are covered by the European courses within the EJTN or ERA. This range of training is considered sufficient by the practitioners for whom it is intended. However, it might be helpful to have a specialised institution covering the whole spectrum of judicial training for practitioners. The experts believe that Austria should consider establishing a specialised institution covering and arranging the training for judicial staff on the domestic and international area which can offer not only lectures by national specialists but also by foreign practitioners from different legal areas (lawyers, judges, prosecutors, prison staff, police officers...) The aim is to link all the training possibilities provided by national and European judicial training centres in one single platform.

Austrian authorities periodically organise training for practitioners dealing with FD 2008/909/JHA. The experts noted that these trainings events are not held on a regular basis. In case of problems, courts will consult the MoJ. In these aspects it could be advisable to create the e-learning course and put all necessary information about the use of FD 2008/909/JHA in one official webpage. This would be particularly useful as courts, when acting as executing authorities, are not really specialised in FD 2008/909/JHA.

The evaluating team has to highly emphasise superior approach to training of prison staff in area of FD 2008/909/JHA, which is realized twice a year. Prison staff appears to be highly trained and appears *de facto* as a help for the MoJ. Such approach could be taken in account by the other MSs.

Experts want also to mention the combined training between Austria and Germany in the field of FDs 2008/909/JHA and 2008/947/JHA. They consider this approach as efficient to solve practical problem with neighbouring countries, understand the differences between different judicial systems and strengthen mutual trust.

The evaluation team has found that trainings on FDs 2008/947/JHA and 2009/829/JHA are rarely organised. To facilitate better understanding and reach a practical implementation of these FDs it could be advisable to create e-training. It would help practitioners follow remotely training whenever they want.

The experts consider that lawyers should set up training on FDs 2008/909/JHA, 2008/947/JHA and 2009/829/JHA, since training currently focuses on the EAW and does not cover the other three FDs.



## **9 FINAL REMARKS, RECOMMENDATIONS AND BEST PRACTICES**

### **9.1 Suggestions from Austria**

#### ***9.1.1 Regarding Framework Decision 2002/584/JHA***

Even if the Austrian authorities consider that, on the whole, the EAW works very well, they believe that the EAW form is sometimes perceived as unclear and confusing, and that simplification would be welcome.

They add that the short and varying deadlines for sending the translated EAW in the event of a hit are seen to be problematic. In this context Austria suggests introducing a minimum time-limit of 10 days for sending the translated EAW. The introduction of an on-call service by public prosecutors in all MS could allow simple clarifications to be provided even at the weekend or outside working hours.

For the issuing of EAWs by Austria, it would be preferable to make judicial authorisation visible directly as an integral part of the form, which is not possible in the current form.

Against the background of the CJEU's case-law in joined cases C-508/18 and C-82/19 PPU and in case C-509/18, one Austrian judicial authority suggested that a centrally available country overview should be created, indicating the national legal provisions of the MS with regard to judicial authorisation of EAWs.

#### ***9.1.2 Regarding Framework Decision 2008/909/JHA***

As issuing authorities, Austrian authorities think it might be helpful if additional documents and translations were requested only where this is essential for the decision.

At the same time, they add that it should never be necessary to request a translated written record and/or a translated ban on residence, especially since no provision is made for this in the FD.

Generally speaking, Austria is convinced that efforts should be made to speed up procedures, and that the deadlines laid down in the FD as regards the duration of proceedings and surrender should be adhered to in practice.

At EU level, Austria would like actions to improve detention conditions in some Member States.. As far as those Member States are concerned, the detention facility in which the sentenced person will be incarcerated following his or her transfer must be identified prior to a final decision on the request for enforcement; it must also be clarified whether the detention conditions there comply with Article 3 ECHR. Once that information has been provided, the relevant CJEU and ECHR case-law and the CPT's reports are examined by the Austrian competent authorities in order to determine whether the request can be upheld. Of course, this procedure also leads to delays.

In addition, Austria considers that it would be beneficial for up-to-date information on conditions in Member States' detention facilities to be made readily available.

Austria would also be in favour of meaningful exchanges between experts involved in applying the mutual recognition and enforcement instruments. Bilateral meetings held in the past with - in particular - representatives of the Romanian, Slovakian and Hungarian judicial authorities have led to improved mutual understanding and faster procedures.

### *9.1.3 Regarding training*

According to the Austrian authorities, within the EJM website, the differing terminology used, and the different legal systems, in the MS sometimes result in unclear information that is difficult to understand; improved linking of the national terms to their international counterparts would be helpful. Contact details in the EJM Atlas are sometimes outdated or incomplete.

Austria suggests the organisation of training events at national and European level, and exchanges of experience with the competent authorities of those Member States in which FDs 2008/947/JHA and 2009/829/JHA are applied more frequently.

Austrian authorities added that more training to familiarise practitioners with European instruments in the field of criminal law, especially at EU level, would be most welcome. One particular advantage of training at EU level which goes beyond the pure transmission of knowledge at national level is the excellent opportunity it provides for networking with colleagues from other Member States.

## **9.2 Recommendations**

As regards the practical implementation and operation of the Directives and the Regulation, the expert team involved in the evaluation of Austria was able to satisfactorily review the system in Austria.

Austria should conduct an 18-month follow-up on the recommendations mentioned below after the adoption of this report in the Working Party concerned.

The evaluation team thought fit to make a number of suggestions for the attention of the Austrian authorities. Furthermore, based on the various good practices, related recommendations to the EU, its institutions and agencies, Eurojust and EJM in particular, are also put forward.

### **9.2.1 Recommendations to Austria**

#### **9.2.1.1 Regarding Framework Decision 2002/584/JHA**

Recommendation No 1: Although it may constitute a considerable intervention in its legislation, Austria, as executing State, should consider the possibility to surrender its nationals to other Member States regardless of their consent, at least for criminal prosecution, as this was one of the objectives set for the EAW (cf. 3.6.3).

Recommendation No 2: Austria, when issuing an EAW, should consider inserting the national identification number of the requested person in the A form, in case such information is available. (cf. 3.6.2)

Recommendation No 3: Austria should raise awareness of the role of Eurojust in the case of competing European Arrest Warrants, following Article 16 FD 2002/584/JHA. (cf. 3.6.3)

Recommendation No 4: Austria, as executing State, should clearly mention who is the competent authority to end the surrender proceedings when it is clear that the surrender will be refused, notably when there is a lack of double criminality. (cf. 3.6.3)

Recommendation No 5: Austria is encouraged to create software to help police officers when analysing the incoming SIS alerts. (cf. 3.6.3)

#### 9.2.1.2 Regarding Framework Decision 2008/909/JHA

Recommendation No 6: Even though Framework Decision 2008/909/JHA does not expressly provide for it, Austria may consider the possibility of creating a legal remedy for the prisoner when the MoJ refuses to issue a certificate. (cf. 4.11.1)

#### 9.2.1.3 Regarding training

Recommendation No 7: Austria should strengthen its capacity to provide training on Framework Decisions 2008/947/JHA and 2009/829/JHA. (cf. 8.5)

Recommendation No 8: Austria should consider creating e-learning tools to provide training to the competent practitioners in the area of the four FDs which are the subject of the ninth round of mutual evaluations and, regarding Framework Decision 2008/909/JHA, combine this e-learning with the current training for prison staff. (cf. 8.5)

Recommendation No 9: Austria should consider establishing a specialised institution covering and arranging the training for judicial staff on the domestic and international area. (cf. 8.5)

#### 9.2.1.4 Regarding the four Framework Decisions which are the subject of the ninth round of mutual evaluations

Recommendation No 10: Austria is encouraged to follow its ongoing internal process of reconsidering the power granted to the Minister of Justice to give instructions in individual criminal cases. (cf. 3.6.1)

Recommendation No 11: Austria should consider the use of all available channels (EJN and Eurojust) to contact the foreign competent authorities to ensure that additional information requested is received. (cf. 4.1.2 and 4.11.2)

Recommendation No 12: Austria should improve its way it collects statistical data in the field of the four Framework Decisions covered by the ninth round of mutual evaluations in order to obtain a better picture of the use of these instruments. (cf 3.6.1, 4.11.2, 6.3 and 7.3)

Recommendation No 13: Austria should set up a clear system which makes it easy to find the email addresses of its competent authorities for the purpose of direct contact between Member States and indicate in the EJN Atlas a general email address for the competent authorities for the four Framework Decisions covered by the ninth round of mutual evaluations. (cf. 3.6.1)

### **9.2.2** *Recommendations to the European Union and its institutions*

Recommendation No 14: The EU institutions should clearly specify whether it is possible to directly enforce a sentence after refusing surrender on the basis of the information contained in the EAW. (cf. 5.2)

Recommendation No 15: The EU institutions should issue clear guidelines on how to calculate the days of the sentence remaining to be served. (cf. 4.11.1)

Recommendation No 16: The EU institutions should create a specific form related to transit. (cf. 3.6.3)

### **9.2.3** *Recommendations to the other Member States*

Recommendation No 17: Member States should properly fill in the contact details in the EAW form so that the additional information containing the numbers of ID Cards or passports (at least at the beginning of the process in the A-Form) for maximal effectiveness in executing the EAW. (cf. 3.6.2)

Recommendation No 18: Member States should accept mutual recognition forms signed electronically. (cf. 3.6.2)

### 9.3 Best practices

Only the best practices that are suggested to be adopted by other MSs are listed.

The Member States:

1. Should implement the principle of proportionality in their national law just as Austria does. (cf. 3.6.2)
2. Should organise combined training with neighbouring countries just as Austria does in the field of Framework Decisions 2008/909/JHA and 2008/947/JHA. (cf. 8.5)
3. Should use an IT system to identify prisoners eligible for a transfer, consider the possibility of consulting an interpreter swiftly and use a leaflet containing all the information regarding social rehabilitation as Austria does. (cf. 4.11.1)
4. Should provide regular training for prison staff on Framework Decision 2008/909/JHA as Austria does. (cf. 8.5)
5. When there are repeated problems with another MS, conduct bilateral talks in order to solve them, as Austria has done in the field of FD 2008/909/JHA (cf. 4.11.1)

## ANNEX A: PROGRAMMES FOR THE PREPARATORY WORK AND ON-SITE VISIT

### **Preparatory work, 23 June 2021**

- 9:30: Welcome by the main competent units
- 10:00: Presentation on the legal system and judicial bodies in Austria, focusing on criminal law
- 11:00: Experience with the European Supervision Order (FD 2009/829/JHA) and Alternative sanctions (FD 2008/947/JHA)
- 12:30: Presentation on the Austrian justice training system
- 13:30: Discussions on the onsite evaluation programme

### **Onsite evaluation, 7 to 11 March 2022**

#### Tuesday, March 8th, 2022:

10:00 : Welcoming of the Evaluation Team at the Austrian Ministry of Justice;

- introduction of the AT experts and of the evaluation team;
- brief presentations by representatives of the competent units of the Ministry of Justice as well as by a representative of SIRENE AT about their respective functions regarding (some of) the FDs in question;

11:00: Coffee break

11:15: Framework Decision on the EAW:

- update on the amendments to the AT implementing legislation in view of the recent case-law of the European Court of Justice;
- discussions between the evaluation team and representatives of the Ministry of Justice unit responsible for handling individual cases under the FD in question;

12:30 – 13:30: drinks, followed by lunch in the Banquet Halls of the AT Ministry of Justice;

13:30 – 15:30: Framework Decision 2008/909/JHA:

- brief presentation of the AT implementing legislation;
- discussions between the evaluation team and representatives of the Ministry of Justice unit responsible for handling individual cases under the FD in question;

15:30: Coffee break;

15:45 – 16:30: FD 2008/947/JHA and FD 2009/829/JHA:

discussions between the evaluation team and representatives of the Ministry of Justice unit responsible for handling individual cases under the FDs in question, on the reasons for their less frequent application.

Wednesday, March 9th, 2022:

Transportation of the evaluation team to Korneuburg;

10:00 – 12:00: discussions between the evaluation team and representatives of the Korneuburg Office of Public Prosecutions and with judges of the Regional Court of Korneuburg responsible for handling individual cases under the FD on the European Arrest Warrant and under FD 2008/909/JHA;

12:00 – 13:30: Lunch break at the Korneuburg Prison Facility;

14:00 – 16:00: visit to the Korneuburg Prison Facility; demonstration of the role of the prison authorities with regard to FD 2008/909/JHA;

16:00: transportation of the evaluation team to the hotel.



Thursday, March 10th, 2022:

10:00 – 14:45: (with coffee break and lunch break) discussions between the evaluation team and representatives of the Vienna Office of Public Prosecutions and with judges of the Regional Court of Vienna responsible for handling individual cases under the FD on the European Arrest Warrant and under FD 2008/909/JHA;

15:00 – 16:30: discussions via ZOOM between the evaluation team and AT lawyers with expertise in the field of mutual recognition in criminal matters.

Friday, March 11th, 2022:

10:00 – 12:00: wrap-up session between the evaluation team and representatives of the competent units of the Austrian Ministry of Justice.

## ANNEX B: PERSONS INTERVIEWED/MET

**23 June 2021**

*Venue: virtual meeting*

<b>Person interviewed/met</b>	<b>Organisation represented</b>
Mr. Fritz Zeder	Federal Ministry of Justice, Head of Unit IV.2
Ms. Judith Herrnfeld	Federal Ministry of Justice, Unit IV.2
Mr. Johannes Martetschläger	Federal Ministry of Justice, Head of Unit V.1
Ms. Judith Wimmer	Federal Ministry of Justice, Directorate for European and International Affairs
Mr. Fritz Forsthuber	President of the Vienna Criminal Court
Ms. Martina Spreitzer-Kropiunik	Vicepresident of the Vienna Criminal Court
Ms. Petra Poschalko	Judge at the Vienna Criminal Court
Ms. Sylvia Primer	Judge at the Vienna Criminal Court
Mr. Bernd Gläser	NEUSTART (Association in charge of probation service on behalf of judicial authorities)
Mr. Walter Hammerschick	Director of the Institute for Sociology of Law and Criminology
Mr. Albu Calin-Dimitrie	Federal Ministry of Justice, Unit III.7

**8 March 2022**

*Venue: MoJ (1070 Vienna, Museumstrasse 7, Room Nr. 553)*

<b>Person interviewed/met</b>	<b>Organisation represented</b>
Mr. Wolfgang Pekar	Deputy Head of Department for Multilateral agreements
Ms. Katharina Steininger	Expert of Department for Multilateral Agreements
Mr. Johannes Martetschläger	Head of Department for International Criminal Law
Ms. Andrea Rohner	Deputy Head of Department for International Criminal Law
Ms. Christine Gödl	Expert of Department for international Criminal Law
Ms. Monika Moitzi	Expert in the SIRENE Bureau

**9 March 2022**

*Venue: Regional Court of Korneuburg (Landesgerichtsstraße 1, 3 Stock, Raum LG 365)*

<b>Person interviewed/met</b>	<b>Organisation represented</b>
Ms. Andrea Hahn	President of the Regional Court of Korneuburg
Mr. Martin Bodner	Judge
Mr. Rainer Klebermaß	Judge
Ms. Claudia Ilsinger	Judge
Ms. Katharina Fussi	Judge
Ms. Katharina Schmid-Benner	Prosecutor
Mr. Stefan Dunkel	Prosecutor

Mr. Wolfgang Turner	Korneuburg Prison Chief
Mr. Christian Scheuer	Korneuburg Deputy Prison Chief
Ms. Petra Pavlas	Directorate for the penitentiary system
Mr. Wolfgang Pikel	Deputy Head of Department for Multilateral agreements
Ms. Katharina Steininger	Expert of Department for Multilateral Agreements

**10 March 2022**

*Venue: morning Vienna Regional Court of Justice (Landesgerichtsstrasse 11)/ afternoon MoJ*

<b>Person interviewed/met</b>	<b>Organisation represented</b>
Mr. Fritz Forsthuber	President of Vienna Criminal Court
Ms. Sylvia Primer	Judge
Ms. Corinna Huber	Judge
Ms. Marie-Luise Nittel	Chief Prosecutor
Ms. Nina Bussek	Deputy Chief Prosecutor
Mr. Michael Schietz	Prosecutor
Mr. Rupert Manhart	Lawyer
Mr. Wolfgang Pikel	Deputy Head of Department for Multilateral agreements
Ms. Katharina Steininger	Expert in Department for Multilateral Agreements

11 March 2022


*Venue:* MoJ

Person interviewed/met	Organisation represented
Mr. Wolfgang Pekel	Deputy Head of Department for Multilateral agreements
Ms. Katharina Steininger	Expert of Department for Multilateral Agreements
Mr. Johannes Martetschläger	Head of Department for International Criminal Law
Ms. Andrea Rohner	Deputy Head of Department for International Criminal Law

## ANNEX C: LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

<b>LIST OF ACRONYMS, ABBREVIATIONS AND TERMS</b>	<b>AUSTRIAN OR ACRONYM IN ORIGINAL LANGUAGE</b>	<b>ENGLISH</b>
ARHG	Österreichisches Auslieferungs- und Rechtshilfegesetz	Austrian Extradition and Mutual Assistance Act
CPT		European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment's
ECHR		European Court of Human Rights
EJN		European Judicial Network
EJTN		European Judicial Training Network
ERA	Europäische Rechtsakademie	European Academy of Law
ESO		European Supervision Order
EUCJ		European Union Court of Justice
EU-JZG	Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union	Federal Law on judicial cooperation in criminal matters with the Member States of the EU
MoJ		Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice
MS		Member State
StGB	Strafgesetzbuch	Austrian Criminal Code
StPO	Strafprozessordnung	Code of Criminal Procedure
WKStA	Wirtschafts- und Korruptionsstaatsanwaltschaft	The Central Public Prosecutor's Office for the Prosecution of Economic Crimes and Corruption

## ANNEX D: THE IMPACT OF COVID19 ON JUDICIAL COOPERATION IN CRIMINAL MATTERS

<p style="text-align: center;"><b>AUSTRIA</b></p> 	
<p><b>EAW</b></p> <ul style="list-style-type: none"> <li>-issuing of EAWs <i>(suspension; impact on already issued EAWs; prioritization in issuing new EAWs + criteria)</i></li> <li>- execution and postponement of the actual surrender <i>(legal bases, adequacy, release of surrendered person, measures to prevent released persons from absconding)</i></li> <li>-expected resuming of surrenders</li> <li>-transit</li> </ul>	<p><b>Impact on the issuing of EAWs</b></p> <p>The prosecution services were invited to more thoroughly assess whether pre-trial detention is really needed given the risk of absconding, the seriousness of the crime and the punishment that could be expected. This assessment applies also in the domestic proceedings – so in a case-by-case decision the prosecution service will decide whether a domestic arrest warrant – and subsequently an EAW – has to be issued.</p> <p>As a consequence of the above-mentioned reassessment of the grounds for pre-trial detention also in domestic cases the number of EAWs issued may be reduced. As long as the public health restrictions remain necessary, this temporary suspension will also have to be applied.</p> <p><b>Impact on the execution of EAWs and postponement of the actual surrender</b></p> <p>The decision on the execution of the EAW lies within the competence of the Courts, on the request of the Public Prosecutors; in the light of the dangers of spreading COVID-19 in the penitentiaries the Public Prosecutor’s Offices were requested to reassess the grounds for detention pending surrender. With regard to actual surrender of the persons, Austrian Courts have started to apply Art 23 FD EAW due to the extraordinary situation. Surrenders by air are now possible as the airlines have restarted their services. Surrender by land is possible to the neighbouring states. Surrender by land to non-neighbouring states is also possible since some neighbouring states have started to grant transit again.</p> <p><b>Impact on surrender, extradition, transfer by land</b></p> <p>We had a lot of problems with the execution of surrenders, extraditions and transfers without a clear line as to what conditions we had to adhere to. Also with the other MS. On the one hand there were no COVID tests needed and on the other hand we had to do the testing.</p> <p><b>Legal basis for postponing the actual surrender</b></p> <p>Both grounds of postponement -Articles 23(3) and 23(4) EAW FD- are implemented in Austrian law – the Courts competent for the decision on surrender use both grounds alternatively in the current situation – with a slight tendency to invoke force majeure, especially in cases where flight restrictions lead to a postponement. No problems have been reported in this regard.</p>

	<p><b>Meaning of ‘circumstances beyond the control’</b></p> <p>The current pandemic situation is considered to be force majeure and therefore beyond the control of the Member States.</p> <p>The Ministry of Justice first issued on 19 March 2020 a circular letter informing our judicial authorities about the factual situation concerning surrenders, inviting them to consider applying Art 23. This circular letter has been updated several times, taking into account the changes in the relevant restrictions.</p> <p><b>Releases of requested persons following the postponement of the surrender</b></p> <p>There were individual cases of that kind as a consequence of the abovementioned reassessment.</p> <p><b>Measures to prevent released persons from absconding</b></p> <p>The Austrian Code of Criminal Procedure provides for several measures to be imposed (also in domestic situations as alternatives to pre-trial detention) to ensure the presence of a person, such as an undertaking not to abscond, go into hiding or leave the place or residence without permission of the prosecution authority, usually imposed together with an amount of bail, or the temporary removal of identity documents, motor vehicle documents or other licences. Any of these measures have already been imposed in cases described above.</p> <p><b>Expected resuming of the surrender</b></p> <p>The Austrian Courts competent to order the physical surrender/extradition are checking regularly if a change in the circumstances and restrictions make a surrender possible. The number of surrenders has now significantly increased, especially with neighbouring countries. Starting with the middle of June the situation is going to be better in terms of obtaining flights.</p> <p><b>Transit</b></p> <p>Transit permissions are given without restrictions.</p> <p>In cases of transit of persons through the territory of Austria - including Vienna International Airport – Austria requests a medical certificate not older than four days confirming that the transiting person has tested negative for the COVID-19-virus, only from countries where general travel restrictions are still in force.</p>
<p><b>Precautionary measures for surrender, extradition and transfer</b></p> <ul style="list-style-type: none"> <li>- COVID19 test</li> <li>- health certificate</li> <li>- quarantine</li> <li>- facial masks</li> </ul>	<p><b>Precautionary measures</b></p> <p>For the surrender of persons to Austria no matter on which legal ground (EAW, Extradition, Temporary Surrender or Surrender for Enforcement of a Custodial Sentence) Austria no longer requests a medical certificate confirming that the person as well as the escorting officers have tested negative for the COVID-19-virus. All incoming persons who have to be kept in custody have to undergo a two-week quarantine which is carried out within the detention facilities.</p> <p>The person and the officers who carry out the escort need to wear mouth-nasal protection. On public transport the officers need to wear mouth-nasal protection and if there is a planned overnight stay they have to fulfill the requirements established in hotels.</p>



<b>Extradition</b> -suspension -legal basis -third countries involved -expected duration of suspension	<b>Impact on extradition procedures</b> Extradition procedures with third States continue to be conducted, but the restrictions due to COVID-19 lead also in this context to a postponement of surrender (usually using Art 18 para 5 of the European Convention on Extradition, ETS No. 024, where applicable). The exchange of information with third States within the Council of Europe is supported by the information platform at the PC-OC-Website.
<b>Transfer of sentenced persons</b> -impact; prioritization in issuing/execution	<b>Impact on the issuing of requests for transfer of sentenced persons</b> Austria issues certificates under FD 2008/909/JHA taking into account that the time needed to take a positive recognition decision in the executing state might be longer than the duration of the current COVID-19-measures.  <b>Impact on the execution of transfers of sentenced persons</b> Austria has restarted the surrender of all persons under FD 2008/909/JHA, invoking Art 15 para 2 of this FD.
<b>SIRENE Bureaux</b> -working of SIS bureau -exchange of information with other SIS Bureaux	<b>Impact on the working of the SIRENE Bureau</b> From the beginning of June our Sirene Bureau is working with full staff. The only challenge we have over the coming months is retirement and a sabbatical.  <b>Impact on the exchange of information with other SIRENE bureaux</b> There was no problem with the exchange of information with other MS.
<b>EIO and MLA</b> -prioritization in issuing/execution -electronic transmission -whom to contact	<b>Impact on the execution of EIOs and MLA requests</b> EIO and other MLA requests are executed normally. Due to some restrictions in the available staff at the executing Prosecutor's Offices and Courts urgent cases will still be prioritised. With regard to EIOs, Austria as executing State is trying to prioritise incoming requests which are marked as urgent and makes all efforts to execute all the requests as soon as possible.  <b>Electronic transmission and contact details</b> EIO/MLA requests should be sent by email. The decentralised email addresses of the Austrian executing authorities are not included in the Atlas but will be provided to all CPs of the EJM for the use of judicial authorities only. <a href="#">Links to the email addresses are also provided here (password protected)</a> They should not be sent to a central authority. Only if a decentral mail address is not working or available, the competent office of the Federal Ministry of Justice can be reached under <a href="mailto:team.s@bmj.gv.at">team.s@bmj.gv.at</a> .
<b>Freezing and confiscation orders</b> -prioritization in issuing/execution	<b>Impact on the execution of freezing and confiscation orders</b> With regard to Freezing Orders and Confiscation Orders, Austria as executing State is trying to prioritise incoming requests which are marked as urgent and makes all efforts to execute all the requests as soon as possible given the reduced capacities at the judicial authorities.
<b>JITs</b> -prioritization and alternative	<b>Impact on JITs</b> The work of Joint Investigation Teams has to be continued respecting the health-related measures, using technical means of communication replacing face-to-face meetings.

telecommunication solutions	
<b>Recommended channels for transmission of</b> -urgent requests -information exchange	The EJM has already proved to be an excellent channel of communication for judicial authorities with regard to consequences of COVID-19 measures, both in individual cases and in general. Further exchange of information happens – as always in EAW cases – through SIRENE and Interpol.  For the transmission of EIOs and MLA requests, <i>see</i> above, ‘EIO and MLA’.
<b>Any other relevant information</b>	N/A

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