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NOTE

From:	Presidency
To:	Delegations
Subject:	Draft final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty

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

Due to the broad range of legal instruments in the field of mutual recognition and their wide scope, it was agreed at the CATS meeting on 12 February 2019 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').

The draft final report on the ninth round of mutual evaluations was prepared by the General Secretariat of the Council on behalf of the Presidency, after a thorough and comparative examination of all previously adopted reports for each individual Member State, in particular of the key findings, main conclusions and recommendations, for the purpose of summarizing and analysing the outcome of the 9th mutual evaluation round,, with a view to having an overview of the measures to be undertaken at national and EU level to enhance the use of the legal instruments covered by this round.

The Presidency intends to present and have exchange of views on the above-mentioned draft report, as set out in the Annex to this document, at the COPEN meeting on 28 October 2022, with a view to its subsequent submission to CATS and then to the Justice and Home affairs Council on 8- 9 December 2022 for endorsement.

Delegations who wish to submit written comments on the draft final report of the 9th evaluation round set out in the Annex to this document, are invited to do so **at the latest by 7 November 2022,** by sending them to the General Secretariat of the Council at the following email addresses: jai.mutual.evaluation@consilium.europa.eu and giovanna.giglio@consilium.europa.eu.

In accordance with Article 8(4) of Joint Action 97/827/JHA, the final report of the 9th mutual evaluation round, following endorsement by the Council, will also be forwarded to the European Parliament for information.

ANNEX

DRAFT FINAL REPORT ON THE 9TH ROUND OF MUTUAL EVALUATIONS ON MUTUAL RECOGNITION LEGAL INSTRUMENTS IN THE FIELD OF DEPRIVATION OR RESTRICTION OF LIBERTY

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I- INTRODUCTION

The principle of mutual recognition was enshrined as a cornerstone of judicial cooperation in the EU by the European Council of Tampere in 1999. The need to make the implementation of mutual recognition legal instruments more effective has "inter alia" been underlined by the Council in its conclusions of 7 December 2018 on "Promoting mutual recognition by enhancing mutual trust'. Furthermore, in its Conclusions on "The European arrest warrant and extradition procedures - current challenges and the way forward", the Council agreed "inter alia" that there is scope for improvement as regards the national transposition and the practical application of the EAW FD, for addressing certain aspects of the procedure in the issuing and in the executing Member State and for strengthening EAW surrender procedures in times of crisis. Finally, the Council, in its conclusions on alternative measures to detention of December 2019, invited the Commission to continue to enhance the implementation of the EU Framework Decisions on probation and alternative sanctions (2008/947/JHA) and on the European Supervision Order (2009/829/JHA), taking into account the information gathered during the ninth round of mutual evaluations.

Due to the broad range of legal instruments in the field of mutual recognition and their wide scope, it was agreed at the CATS meeting on 12 February 2019 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 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/JHA on probation and alternative measures and FD 2009/829/JHA on the European Supervision Order (ESO), it was decided that the evaluation ad to be of a rather general nature and endeavour to establish the reasons that have led to those two Framework Decisions being applied only infrequently.

Owing to the pandemic, it was not possible to follow the order of visits to the Member States adopted by CATS on 13 May 2019, as several on-the-spot visits were repeatedly postponed, thus delaying significantly the finalization of the 9th evaluation round. The on-the-spot visits that began in November 2019 were therefore only concluded in April 2022. In accordance with Article 3 of the above Joint Action, the Presidency has drawn up a list of experts in the evaluations to be carried out, based on the designation by the Member States of experts with substantial practical knowledge in the area subject to the evaluation. The evaluation teams consisted of three national experts, supported by one or more members of staff from the General Secretariat of the Council and, at several occasions, by observers (the European Commission and Eurojust).

The aim of the ninth mutual evaluation round has been to provide added value by offering the opportunity, via on-the-spot visits, to consider not only the legal issues, but also – and in particular – relevant practical and operational aspects linked to the implementation of those instruments by practitioners in the context of cross-border criminal proceedings.

This draft report, prepared by the General Secretariat of the Council, on behalf of the Presidency, summarizes the key findings, conclusions and recommendations in the individual country reports and formulates recommendations to the Member States and to the EU institutions and bodies, taking into account the recommendations identified as most relevant and/or recurrent on the basis of the reports on the 27 evaluated Member States, where shortcomings and areas for improvement were identified. The text of the report also highlights some best practices identified in the context of the 9th round, that can be shared among Member States, with a view to contributing towards ensuring a more effective and coherent application of the principle of mutual recognition at all stages of criminal proceedings throughout the Union.

More generally, this exercise is expected to promote the coherent and effective implementation of this package of legal instruments at its full potential, to contribute towards enhancing mutual trust among the Member States' judicial authorities, thus allowing a better functioning of cross-border judicial cooperation in criminal matters within the Area of Freedom, Security and Justice.

II- FRAMEWORK DECISION 2002/584/JHA

A) PROPORTIONALITY

KEY FINDINGS

The principle of proportionality, which is a key factor for the effective cooperation in the Area of Freedom, Security and Justice, is a general principle of criminal law, not explicitly mentioned in the legislation of all Member States and in some of them deriving from their Constitutions, mainly from the principle of the rule of law and the protection of human rights and fundamental freedoms.

In more general terms, the rule of proportionality this involves balancing any intervention in the rights of an individual within the framework of criminal proceedings against the interest of the society in detecting and apprehending the perpetrators of a criminal activity. In practice, it requires that detention should be limited to cases not involving serious criminal offences, Bearing in mind the consequences that the execution of an EAW has on the requested person's liberty and the restrictions to free movement, it is important that the issuing judicial authorities consider a number of factors in order to determine whether issuing an EAW is justified.

Though the principle of proportionality is well-established in the EU legal system, in the case-law of the European Court of Human Rights, as well as in the national systems, it is not explicitly laid down in EU legislation. Article 2(1) of Framework Decision 2002/584/JHA, only establishes thresholds for an European arrest warrant to be issued. It stipulates that an EAW for the purpose of prosecution can only be issued in respect of acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months, and that an EAW for the purpose of executing a sentence can only be issued in respect of sentences of at least four months.

A common understanding of the proportionality principle is reflected in the European Commission's *Handbook on how to issue and execute a European arrest warrant* , which contains extensive explanations on the issue of proportionality and the criteria to be applied by the issuing authorities in this respect (points 2.4 and 2.5): the seriousness of the offence, the likely penalty that could be imposed, the likelihood of detention of the person after surrender or the interest of the victim.

Most Member States when acting as issuing Member States consider whether, instead of issuing the EAW, it is possible to use other instruments of judicial cooperation in criminal matters which are also effective but less coercive, especially if
the person is not requested for prosecution purposes or for the enforcement of a custodial sentence, but merely to further pending investigations, e.g., for a hearing of the suspects/accused persons located in other Member States. In the latter case, a European Investigation Order (EIO) for the purposes of a videoconference, or, if applicable, a European Supervision Order (ESO), could be issued. This facilitates avoiding that EAWs would not be misused for trivial offences, but issued as a last resort where no less invasive option is available to ensure that an accused person located abroad would participate in criminal proceedings in the issuing Member State.

The 9th evaluation round has shown that in practice, in the absence of a legal definition of the proportionality principle at EU level and of a single model for all the jurisdictions, Member States apply it in different ways and the criteria used in practice to assess the proportionality of EAWs are not uniform in all the Member States. The most common criteria applied are the seriousness of the offence, the length of time since the crime was committed, the damage caused, the interest of the victim, the expected punishment, the age and behaviour of the person concerned and other circumstances of the case, etc. Some Member States also check the criminal records and the history of criminal proceedings against the person, to include all prosecutions in one EAW and avoid subsequent requests to extend the scope of the prosecution. In one evaluation report another aspect of proportionality is underlined, namely that the financial costs associated with implementing an EAW are not negligible and should be proportionate to the seriousness of the offence.

Some Member States have issued national handbooks or guidelines to facilitate the assessment of proportionality by their competent authorities.

As outlined in a number of evaluation reports of the 9th round, the proportionality check should be done exclusively by the issuing State. Indeed, almost all Member States do not assess proportionality when executing an EAW. However, a few Member States' authorities are of the view that Member States' issuing authorities do not always assess proportionality correctly before issuing EAWs that seem to be disproportionate to the seriousness of the offence; they assess proportionality also when acting as executing authorities, and in certain cases suggest that the issuing State should withdraw the EAW or refuse its execution, if they believe it is not justified by the seriousness of the offence. Nevertheless, these Member States mentioned they make such assessment very rarely. As underlined in the respective reports, this approach may result in the creation of a new ground for refusal to surrender that is not provided for in Framework Decision 2002/584/JHA on the EAW and therefore is not in line with the mutual recognition and mutual trust principles.

It has also to be taken into account that Ireland did not opt into the EIO and Denmark is not party to the European Investigation Order. Therefore, if the competent authorities of these Member States do not use an EAW, they would have to seek and provide criminal legal assistance pursuant to other instruments, such as the Council of Europe Convention on Mutual Legal Assistance (MLA) and relevant EU instruments, such as the Convention of 29 March 2000 on Mutual assistance in criminal matters between the Member States of the European Union.

An additional problem in relation to the choice between the EAW and EIO may arise in relation to the grounds for refusal in the context of an EIO, e.g., if the executing Member State does not accept videoconference for the interrogation of suspects/accused persons.

Against this background, in most Member States the principle of proportionality is implemented satisfactorily: in a few of them their approach in this respect was identified as a best practice and only a few Member States were recommended to further develop the principle of proportionality in their national EAW proceedings.

RECOMMENDATIONS

- ***Member States are encouraged to ensure that their competent authorities, when acting as issuing authorities in EAW proceedings, always perform the proportionality test by carrying out a careful assessment of the circumstances of every case, to decide whether, instead of issuing the EAW, it is possible to use alternative less intrusive instruments of judicial cooperation in order to achieve the same aim.***

- ***Member States are recommended to ensure that their competent authorities, when acting as executing authorities in EAW proceedings, do not consider the lack of proportionality in EAWs issued by the requesting Member State, as a ground for refusing the surrender.***

III- FRAMEWORK DECISION 2002/584/JHA

B) JUDGEMENTS *IN ABSENTIA*

KEY FINDINGS

Council Framework Decision 2009/299/JHA, that introduced Article 4a in FD 2002/584/JHA, provides for an optional ground of refusal for judgements rendered *in absentia*, as well as for four exceptions under which an EAW may not be refused, as the awareness of the trial by the requested person is presumed.

In some Member States, the national legislation does not allow for *in absentia* judgments or submits them to certain conditions, limiting the possibility of issuing this type of judgements to exceptional cases. Nevertheless, these Member States, when acting as executing Member States, have had to deal with cases where judgments *in absentia* had been handed down in the issuing State. Generally speaking, the 9th evaluation round outlined that this does not seem to be an obstacle in the application of Article 4a of FD 2002/584/JHA.

Furthermore, the requirements for rendering judgments in the absence of the requested person at the trial and the criteria under which a judgment is classified as *'in absentia'* vary considerably in the Member States. In a few Member States, pursuant to the relevant national legislation, it is considered sufficient to summon the accused person with a notification served at the designated address, regardless of whether the person concerned personally actually receives the summons and is aware of the trial.

For the majority of Member States, the 9th evaluation round did not highlight any major problems regarding judgements *in absentia.* However, some recurrent difficulties arising in most Member States are associated with:

a) the use and interpretation of Part d) of the EAW form, namely the use of the version prior to the entry into force of Framework Decision 2009/299/JHA, or the incorrect or incomplete or contradictory information in the current version of this form. Most Member States pointed out that often it is not clear from the content of the EAW received 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 the details given are not sufficient.

b) differences in the interpretation of the concept of judgment in absentia and its characteristics: adversarial judgment, final judgment, the possibility of appeal, etc. The different legal requirements in the various Member States regarding the service of judgments and summons for judicial proceedings may complicate the recognition process. Both some Member States' practitioners some and evaluation teams have expressed the view that it would be useful to establish common practices at EU level on the handling of judgements *in absentia* in the context of EAW proceedings.

c) the differences in the transposition by the Member States of Framework Decision 2009/299/JHA and, more particularly, the mandatory or optional nature of the grounds for refusal. Indeed, a few Member States have transposed this ground for refusal as mandatory, whereas it is foreseen in Article 4a of FD 2002/584/JHA as optional.

In the light of the above, the executing authorities often request additional questions to the issuing Member State, in accordance with Article 15 of Framework Decision 2002/584/JHA, in order to obtain the missing information on *in absentia* procedures in those Member States and clearly ascertain the position on the requested person's presence at the criminal proceedings, such as: the way he/she was summoned, whether he/she was present at the hearing, whether the defence lawyer represented him/her or not, whether the judgment rendered *in absentia* had become final and the right to a retrial. A few Member States also require the relevant national decisions from the issuing State.

As pointed out by some Member States' authorities, after the adoption of FD 2009/299/JHA, and especially after the Tupikas[1], Zdziaszek[2] and Ardic[3] judgments, the number of requests for additional information has increased, especially in cases where the EAW is based on more than one judicial decision; in some cases, this was also the reason for non-observance of the time limits set out in Article 17 of FD 2002/584/JHA or for an increase in the number of refusals of EAWs. Many refusals, in line with the CJEU case-law, seem to occur in cases where the national legislation of the issuing Member States does not allow for a retrial. Taking into account the different interpretations given by the Member States to the above-mentioned case law, in some reports it has been observed that guidance at EU level would be useful wit a view to a harmonized approach.

Indeed, such requests for supplementary information may be time-consuming and lead to delays in the procedures and/or in failure to respect the deadlines. Therefore, it would be very useful if the information provided by the issuing Member State in connection with judgments *in absentia* regarding the convicted person's knowledge of the trial and other relevant information would more extensive and precise, and available from the very beginning, so as to avoid the need for requesting additional information.

The situation may be more complex to assess when the final decision on culpability follows proceedings which have been through several levels of the courts and the person was not present at each stage of the criminal judicial proceedings. In the light of the above-mentioned EUCJ case-law on judgments in absentia, it is important to take into account the appearance of the accused at all instances of the criminal proceedings; some Member States adapted their legislation in order to comply with these judgements, whereas the need of doing so for other Member States has ben underlined in the respective evaluation reports.

1Judgment of 10 August 2017, *Openbaar Ministerie* v *Tadas Tupikas*, C-270/17 PPU, EU:C:2017:628.

2Judgment of 10 August 2017, *Openbaar Ministerie v Sławomir Andrzej Zdziaszek*, C-271/17 PPU, EU:C:2017:629.

3 Judgment of 22 December 2017, *Samet Ardic*, C-571/17PPU, EU:C:2017:1026.

RECOMMENDATIONS

- ***Member States' issuing authorities should provide clear and comprehensive information in box d) of the EAW form whenever Article 4a of FD EAW applies, as judgements have been rendered without the presence of the defendant, in particular about the national system regarding trials 'in absentia' and the manner in which the requested person was made aware of the trial.***

- ***The European Commission is invited consider issuing guidelines on how to deal with judgments in absentia in the context of the EAW proceedings and of FD 2008/909/JHA, with a view to harmonizing the interpretation and application of Article 4a of FD EAW across the Union, in line with the relevant CJEU case-law, following, as appropriate, relevant discussions at the competent Council's instances.***

- ***The European Judicial Network (EJN), in cooperation with the Member States, is invited to consider including in its website specific information on national legislation and procedural implications in the Member States relating to judgments in absentia.***

IV- FRAMEWORK DECISION 2008/909/JHA

A) ASSESSMENT OF SOCIAL REHABILITATION

KEY FINDINGS

Pursuant to recital 9 and Article 4(2) Framework Decision 2008/909/JHA, the competent authority of the issuing State needs to be "satisfied that the enforcement of the sentence by the executing State would serve the purpose of facilitating the social rehabilitation and the successful reintegration of the sentenced person into the society". This assessment is a key aspect in the framework of proceedings under of FD 2008/909/JHA, as it facilitates the educational and preventive objectives of the punishment to be achieved to a greater extent.

Accordingly, as outlined in some reports, the sentenced person's interest in social rehabilitation should be given a sufficient weight by the issuing authorities when deciding on whether to request the transfer of the enforcement of the sentence to another Member State, and by the executing authorities when deciding whether or not to accept such transfer. Nevertheless, this interest in social rehabilitation needs to be balanced with the justice system's interest in effectively enforcing the penalty within one Member State.

A few Member States have also highlighted the importance of victims' rights in the application of Framework Decision 2008/909/JHA, namely that attention should also be paid to ensuring that the injured parties are actually compensated when the person concerned is transferred to another Member State, because in practice it has been found that in certain cases such compensation ceases as soon as the sentenced person is serving his or her sentence in another Member State.

FD 2008/909/JHA does not define the meaning of 'social rehabilitation'; in some Member States, guidelines on the specific criteria for the assessment of the prospects of social rehabilitation before issuing a certificate have been issued, whereas in other Member States it is up to the judge to assess in each individual case whether the circumstances seem to facilitate social rehabilitation.

According to the Handbook on the transfer of sentenced persons and custodial sentences in the European Union (2019/C 403/02), the assessment of the facilitated social rehabilitation may not be restricted to the mere establishment of a geographical connection, but needs to be based on a thorough case-by-case evaluation.

The 9th evaluation round has outlined that the majority of Member States' authorities carefully assess the prospects of the sentenced person's social rehabilitation in case of transfer to another Member State to serve the sentence, using to a certain extent similar criteria, though the full range of parameters used may vary. Though in most cases social rehabilitation is likely to be facilitated by a transfer to the State of origin, in order to ascertain such concrete possibility, an overall case-by-case assessment may be necessary.

This refers to several factors and circumstances characterizing the individual person's situation, on the basis of which a reasonable conclusion may be drawn on whether a transfer is appropriate in the light of the social rehabilitation criterion. In the majority of the Member States, particular consideration is given to the social environment of sentenced persons eligible for transfer to the executing State, namely the social, economic, cultural, linguistic, family and other ties that the person has with this Member State. Other criteria for the assessment of the factors that could create favourable conditions for social rehabilitation may include: the duration, nature and conditions of the person's residence, of his/ her financial situation, the language spoken by the person, whether he/she has a job in the executing Member State, the availability of an accommodation. In a few Member State, the competent authorities refer to other criteria, such as the location of the centre of vital interests, health considerations, length of sentence remaining to be served and the possibility of early release, etc. The opinion of the sentenced person has also usually a significant weight with respect to the final decision on the transfer of the sentence.

The information included in the national file (outgoing requests) or in the certificate (incoming requests) may be insufficient to establish whether the sentence would serve the purpose of facilitating the social rehabilitation and the successful reintegration of the sentenced person into society and additional information may therefore be needed., in particular to ascertain person's links with the Member State to which he/she is supposed to be transferred.

To this end, Article 4(3) of Framework Decision 2008/909/JHA provides for the possibility for the issuing Member States to consult the executing Member State before sending the certificate and the judgment. However, this possibility is not used by the Member States to the same extent, and just a few of them do so on a regular basis. Other Member States consult the executing State only in very specific cases, such as where its consultation or previous consent is needed. Though such consultation is not mandatory, except for cases referred to in par. 1 (c) of Article 4 of FD 2008/909/JHA some expert teams have expressed the view that prior consultation with the executing Member State is useful for the issuing Member State to obtain all the relevant information in order and to decide whether or not to issue a certificate under FD 2008/909/JHA. Furthermore, as this facilitates a smooth cooperation with the executing Member State during the further steps of the proceedings, not only in terms of assessing the possibility of social rehabilitation, but also in relation to other issues regarding the transfer, they believe that this practice should be promoted.

Reasoned opinions stating that the enforcement of the sentence in the executing State would not serve the purpose of facilitating the person's rehabilitation and reintegration into society, based on Article 4(4) of FD 2008/909, may be issued by the executing authorities and sent to the issuing authorities. However, the 9th evaluation round has highlighted that such opinions are not issued very frequently. It has also to be underlined that if such an opinion is received, it is not binding for the issuing Member States' authority and does not always lead to the withdrawal of the certificate.

RECOMMENDATIONS

- ***All Member States, when acting as issuing Member States, are encouraged to ensure that their competent authorities make the best possible use of the opportunity offered by Article 4(3) of Framework Decision 2008/909/JHA, to consult the executing Member State, with a view to gathering relevant information as regards the concrete prospects of social rehabilitation for the sentenced person eligible for a transfer under FD 2008/909/JHA.***

V- FRAMEWORK DECISION 2008/909/JHA

B) PARTIAL RECOGNITION and ADAPTATION

KEY FINDINGS

In the absence of harmonization of EU substantive criminal law in terms of criminal typologies and penalties beyond the so-called "euro crimes", the nature and length of custodial sentences for the same criminal activities varies significantly between the different Member States; for this reason, the recognition and enforcement of a custodial sentence in another Member State under Framework Decision 2008/909/JHA may involve partial recognition or adaptation of the sentence, as foreseen respectively in Articles 8 and 10 of this Framework Decision.

In general terms, based on the outcome of the 9th evaluation round it may be assumed that in the majority of Member States partial recognition and adaptation of the sentence do not raise any major challenges in the application of FD 2008/909/JHA and do not prevent this legal instrument and the mutual recognition principle to display their facilitating role in judicial cooperation in criminal matters across the EU. However, the evaluation has outlined certain issues for consideration in this respect, as described below.

1) Partial recognition

Article 10 of Framework Decision 2008/909/JHA states that if the competent authority of the executing Member State deems it appropriate to consider recognition of the judgment and enforcement of the sentence in part, it may, before deciding to refuse recognition of the judgment and enforcement of the sentence in its entirety, consult the competent authority of the issuing Member State, with a view to finding an agreement, as provided for in paragraph 2 of the same Article. The competent issuing and executing authorities may agree, on a case-by-case basis, to the partial recognition and enforcement of a sentence, provided that this does not result in the aggravation of the sentence.

If a consensus is not reached on a solution which satisfies the issuing authority, the final decision taken by the issuing authority may be to withdraw the certificate, if they deem that the sentence would not be served properly.

The 9th evaluation round has outlined that in the majority of the Member States, partial recognition does not occur frequently. Some Member States had not encountered any cases of partial recognition of the judgments under Article 10 of FD 2008/909/JHA, either as issuing or as executing Member States and only some Member States have reported situations where sentences handed down by the issuing Member State have been partially recognised. Despite the absence of or little practical experience with this issue, generally the practitioners seem to be aware of the procedure to be followed in accordance with Article 10 of FD 2008/909/JHA, including the possible consultation with the competent authorities of the issuing Member State and the need to agree with the latter on the conditions of partial recognition and enforcement, provided that the sentence would not be aggravated.

Usually neither the national legislation nor other formal acts lay down specific criteria on how to decide whether to recognise the judgment and execute the sentence only in part, namely how to assess whether this is possible or not, what should be taken into account for this purpose, or in which cases the judicial authorities should or should not withdraw the certificate. Such assessment is mainly left to the discretion of the competent authority.

Often partial recognition of judgments is applied in cases where the person has been sentenced for multiple concurrent offences, the act is decided upon separately, and the conditions are met only for a part of the offences, but one or more offenses are not punishable in the executing State. This may in particular occur for offences (such as financial, drug, traffic offences, etc.) which in some Member State fall within the remit of the administrative authorities.

In order to assess whether the partial recognition in the executing State is acceptable or to withdraw the certificate, it is important for the issuing State to ascertain the reduction of the sentence after the partial recognition. As highlighted in some reports, in rare cases, if this reduction is deemed important, partial recognition may lead to the withdrawal of the certificate.

A few Member States pointed out some difficulties stemming from the differences between legal systems. They referred mainly to the incompatibility of some measures with the law of the executing State, to the different criteria and methods used by each Member State to calculate the final sentence and to the principle of aggregation of penalties imposed; this may occur when one of the basic penalties relates to a behaviour which is not criminalized in the executing State and it may be difficult to determine afterwards what part of the sentence was imposed for that specific offense, and therefore detailed information concerning the determination of the resulting penalty for multiple offences may be required.

Most Member States have not encountered any significant difficulties in the consultation process established under Article 10 (1) of Framework Decision 2008/909/JHA; an agreement is often reached between the issuing and the executing State on the partial recognition of the judgment and the enforcement of the sentence. However, if difficulties in this process would arise, they can be solved with the intervention of the EJN contact points as facilitators.

2) Adaptation

It has to be recalled 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. As an exception to this rule, Article 8(2) and (3) FD 2008/909/JHA allow adaptation of the sentence in two specific situations:

- The executing Member State, in line with Article 8(2) of Framework Decision 2008/909/JHA, where the sentence is incompatible with its legal system in terms of duration, because it exceeds the maximum term provided for similar offences under the law in force at the time, may adapt it by imposing the maximum sentence applicable in its legal system.
- The executing Member State, in line with Article 8(3) of Framework Decision 2008/909/JHA, where the sentence is incompatible with its legal system in its nature, the competent executing authority may adapt it to the punishment or measure which corresponds as closely as possible to the custodial sentence imposed in the issuing Member State. A criminal sanction involving deprivation of liberty must not be converted into a fine or other penalty of a pecuniary nature.

In such cases, the executing authorities need to assess what constitutes a 'similar offence', as referred to in Article 8 of FD 2008/909/JHA, with a view to identifying a comparable offence, close in its objective and subjective features to the offence committed in the issuing Member State, for which a punishment could theoretically have been imposed in an analogous situation in its the criminal law system.

FD 2008/909/JHA neither defines the notion of "similar offence" nor specifies which mandatory criminal law provisions should apply with regard to the determination of the penalty and only refers in this respect to the law of the executing State. One expert team highlighted that different Member States have chosen different ways of interpreting the term 'similar offence'. This may involve that some Member States adapt sentences to the general maximum prison sentence under their legislation, while others adapt them to the maximum sentence for the set of similar offences.

In any cases, a legal analysis needs to be carried out in order to establish a match between the factual elements constituting an offence which gave rise to the conviction by the issuing authority and the criminal classification under the national law of the executing State.

The evaluation has shown that Member States, when acting as executing Member States, assess what can constitute a 'similar offence' under Article 8 of FD 2008/909/JHA, using similar criteria, such as the constituent elements of the offence, the type of crime and the duration of the sentence, the facts of the case as described in the certificate and the legal classification of the offence according to the issuing State.

Nevertheless, it appears that the notion of 'similar offence' in Article 8(2) of FD 2008/909/JHA may cause difficulties where the information pertaining to the offence contained in the certificate (point h) forwarded by the issuing State is not consistent with the judgement or the description in the certificate or the facts described in the certificate are unclear or insufficient to establish an equivalent qualification of facts. In these cases, additional information or a copy of the judgment may be requested by the executing Member State from the issuing Member State.

In some evaluation reports it has been outlined that, independently from the stage procedure under FD 2008/909/JHA - recognizing the relevant judicial decision, enforcing it or sending it for enforcement to another Member State -, prior consultation between the issuing and the executing authorities may be useful in order to avoid certificates being withdrawn because of adaptation requirements in the executing Member State.

Some reports have outlined that when adaptation takes place due to the nature of the measure, and concerns sentences imposing a psychiatric or health care, involving deprivation of liberty, but not constituting regular imprisonment, it is often problematic to change the nature of sentence, as a result of differences between national systems in terms of the competent authorities (in several Member States, this measure would not fall within the remit of the criminal justice system but rather that of the health authorities), the compulsory nature of the psychiatric treatment, the duration of the confinement, etc.

In some reports, it was highlighted that problems can arise in relation to the calculation of the remainder of the sentence to be served, as that the different legal systems vary and these calculation methods may differ, as some Member States calculate the deprivation of liberty in years and months, whereas others do it in days; this makes it more difficult to calculate the exact duration of the sentence or of the remaining part to be served; in these cases, additional information may be requested from the issuing authorities. Despite such difficulties, refusal on these grounds, nevertheless, remain exceptional.

Apart from what mentioned above, the majority of the Member States did not report any further practical difficulties in this area; furthermore, a number of Member States did not encounter situations in which it was necessary to adapt the sentence because its length or nature was incompatible with the law of the Member State concerned, or experienced situations where the sentences were adapted in a limited number of cases. Most Member States rarely encountered cases in which certificates were withdrawn owing to an excessively lenient sentence.

RECOMMENDATIONS

- ***Member States, acting as issuing and executing States, in cases when full recognition of a sentence under Framework Decision 2008/909/JHA is not possible, are encouraged to ensure that their competent authorities conduct consultations on the basis of Article 10 (1) of this Framework Decision, with a view to reaching an agreement as regards the possibility of partial recognition of the judgment and enforcement of the sentence, as this can facilitate mutual recognition.***

- ***Member States are encouraged to ensure that their competent authorities, acting as issuing authorities in proceedings under FD 2008/909/JHA, when filling point h) of the certificate, draw up a statement of facts as complete and precise as possible, so as to complement, where appropriate, the information contained in the judgement, in order to avoid any difficulties in the executing authorities' assessment of the offence.***

VI- FRAMEWORK DECISION 2008/909/JHA

C) INFORMATION, OPINION AND CONSENT TO THE TRANSFER OF THE SENTENCED PERSON

KEY FINDINGS

Proceedings to forward the judgment and the certificate to another Member State under FD 2008/909/JHA may be initiated *ex officio* by the issuing State, or on request of the executing State or of the sentenced person. However, a few Member States do not initiate such proceedings if the sentenced person or the executing State do not request to do so,or initiate them only when the sentenced person consents to the transfer.

The evaluation reports have highlighted that these practices do not appear to be in line with the spirit of FD 2008/909/JHA and that the competent issuing authorities should, where applicable in order to facilitate the sentenced person's social rehabilitation, consider starting such proceedings 'ex officio'.

In one Member State, there is the possibility of seeking recognition and enforcement of a custodial sentence from the hearing stage or with a view to preparing the hearing, that has been considered useful by the expert team. They have expressed the view that this practice could become widespread, so that defendants, from an early stage of the proceedings and in the presence of their lawyer, who can explain the possibilities offered by FD 2008/909/JHA and what is mentioned by the judicial authorities in this respect, and, if necessary, of an interpreter, can more easily consider if they are interested in the transfer.

1) Issuing State

The evaluations have highlighted that sentenced persons who are nationals from or have their habitual residence in another Member State than the Member State where they have been sentenced, are not necessarily aware of their right to be transferred to serve the sentence in his/her State of nationality or habitual residence or in another Member State. Therefore, in the majority of the Member States, within FD 2008/909/JHA-related proceedings, when in custody, the persons concerned are informed of the possibility of being transferred to another Member State, on the procedures to be followed for this purpose and on the legal implications of such transfer, such as the speciality rule.

In most Member States this is done in written form, by means of a form or leaflet, that, however, are most often not available in all EU official languages; as outlined in several reports, this would be advisable in order to ensure that the relevant information is understandable to the persons concerned. In one Member State, where written notification/information is not provided to the prisoners, but they are informed orally, the evaluation team underlined that this is not sufficient and that all the prisoners should be informed about the possibility to serve the sentence in another Member State and about relevant procedure for the transfer in a written form.

For the same purpose, it was also underlined that, as prisoners are not usually familiar with procedural law, it is also appropriate to ensure that such information is clear and accessible, as this would enhance the prisoner's understanding of the possibilities offered by FD 2008/909/JHA. One evaluation team considered that an EU-standardised information sheet could be distributed among inmates in all Member States' prisons in all EU languages.

In accordance with Article 6(3) of FD 2008/909/JHA, the procedure to be followed by the issuing Member States requires that, in all cases when the sentenced person is still in their territory and there is a final judgment, the person shall also be given the opportunity to state his or her opinion as to whether or not he/she agrees to the transfer, even if his or her consent is not required. The procedure to allow the sentenced persons to state their opinion varies in the Member States and can be written and/or oral; however, if the opinion of the sentenced person is given orally, a written record is usually made. In one report it has been outlined that often it may be difficult in practice to double check the information obtained from the convicted person (interviews with family, neighbours, employer).

The opinion of the sentenced person plays an important role in the decision on whether or not to issue a certificate and is usually taken into due consideration, together with other elements of the case and the legal requirements, by the Member States' issuing authorities when deciding whether to forward the judgment together with the certificate in accordance with Articles 4 and 5 of FD 2008/909/JHA; such opinion is usually taken into consideration by the competent authorities, though it is not decisive as regards the decision on the transfer.

In accordance with Article 6(1) of FD 2008/909/JHA, the sentenced person's consent shall be obtained, except for the cases referred to Article 6(2) of this provision, namely if a person eligible for transfer is a citizen of a Member State to which he or she would be transferred to serve a sentence or a deportation order will be applied or he/she absconded or returned to that Member State, whilst being prosecuted or sentenced in the issuing State. In relation to the derogation to this rule made in one Member State in cases where the sentenced person requests to start the procedure for forwarding the certificate to another Member State, presuming that consent to the transfer is inherent in such a request, the evaluation team expressed the view that this practice seems to disregard the fact that FD 2008/909/JHA requires sentenced persons to have explicitly given their consent and to have been informed of the legal consequences of such consent.

In the context of some evaluations, it was pointed out that in cases where the sentenced person will be deported to the Member State of nationality on the basis of an expulsion or deportation order, once released from enforcement of the sentence, the certificate is forwarded to the Member State of nationality, whether or not the sentenced person agrees to the transfer.

The competent issuing authorities, in accordance with Article 6(4) of FD 2008/909/JHA, have to inform the sentenced person, in a language which he or she understands, of the decision to forward the judgment, together with the certificate, to the executing State, using the standard notification form set out in Annex II to the same Framework Decision. When the sentenced person is in the executing State at the time of that decision, that form is transmitted to the executing State, which shall notify the sentenced person accordingly.

Though Framework Decision does not provide for the necessity of legal remedies to challenge the decision on transferring the execution of the sentence, whether it is a positive or negative, some Member States provide for such a possibility in their national law

2) <u>Executing State</u>

When the sentenced person is not in the executing State, unless he/she has already been heard in the issuing State, the executing State most often rely on the issuing State to provide in writing the opinion and, when requested, the consent to the proposed transfer of the convicted person. A few executing Member States, however, ask directly in writing the opinion and the consent of the sentenced person in the issuing State.

When the sentenced person is in the executing State, all Member States have procedural arrangements to receive the opinion and, when requested, the consent to the transfer by the sentenced person. In most Member States, the sentenced persons or the person responsible for assisting or representing them, if they are a minor or are under legal protection, will be summoned to a court hearing and will give their opinion and, when requested, consent. He/she will be assisted by a lawyer and, if necessary, by an interpreter. In some other Member States this procedure is carried out in writing.

Regardless of whether a Member State is acting as the issuing or the executing State, it has to notify the person about all judicial decisions from the competent authority, using the notification form in Annex II to Framework Decision 2008/909/JHA. When the person is still in the issuing State, the decision is sent to him/her by the executing authorities via the competent authority of that State or directly. Annex II to the Framework Decision 2008/909/JHA is widely used by the Member States.

In several reports it is indicated that the decision regarding the recognition and enforcement of the custodial sentence by the executing Member State can be challenged by filing an appeal.

RECOMMENDATIONS

- ***All Member States are encouraged to ensure that their competent authorities inform the sentenced person about the possibility to serve the sentence in another Member State, in accordance with Framework Decision 2008/909/JHA, the relevant procedure for the transfer and its legal implications, in a simple and accessible way.***

- ***All Member States are recommended to ensure that the relevant information regarding the transfer for serving the sentence in another Member State is given to the person eligible for such transfer in writing by means of a form or leaflet, available in all EU official languages, in order for this information to be understandable to the persons concerned.***

VII- FRAMEWORK DECISIONS 2002/584/JHA and 2008/909/JHA

A) GROUNDS FOR REFUSAL

KEY FINDINGS

Grounds for refusal have been provided for in Framework Decisions 2002/584/JHA and 2008/909/JHA, respectively for the execution of a surrender and for the transfer of a custodial sentence, as exceptions to the general rule of mutual recognition of judgements and judicial decisions, which is based on the principle of mutual trust and, in line with the relevant CJEU case-law, are exhaustive.

1) Framework Decision 2002/584/JHA

1.a - Optional and mandatory grounds for refusal

Article 3 FD 2002/584/JHA provides for three mandatory grounds for non-execution of the EAW, based on which the executing judicial authorities have the obligation to refuse the surrender of the requested person to the issuing State. Such mandatory grounds for the refusal are: amnesty, *ne bis in idem* and exclusion of criminal responsibility due to age.

Article 4 provides for seven optional grounds for non-execution, based on which the executing judicial authorities may refuse the surrender. However, in this respect, there are differences in the national transposing legislation of FD 2002/584/JHA, as in a number of Member States some grounds for non-execution foreseen as optional in the above Framework Decision, have been transposed in national legislation as mandatory. In one Member State, the national legislation transposing FD 2002/584/JHA does not distinguish between mandatory and optional grounds for refusal.

Some expert teams involved in the evaluations, upholding the approach of the previous evaluation round on the EAW, criticized these practices, highlighting "inter alia" that they deprive the executing judicial authorities of the possibility to assess on a case-by-case basis whether or not they should apply the grounds for refusal, where such grounds have been considered as optional in the Framework Decision. They underlined in this respect that, in line with the relevant case-law of the CJEU related to the EAW (judgment C-665/20 PPU of 29 April 2021), though the Member States should enjoy a certain margin of discretion in order to determine whether or not it is appropriate to refuse to execute a European arrest warrant, it is not for the legislator, but for the judicial authority examining a specific case to exercise this margin of discretion.

They consequently expressed the view that all Member States' national legislation should be aligned with FD 2002/584/JHA as regards mandatory and optional grounds for refusal and should be consistent across the EU.

In a few Member States, the national legislation provides for a ground for refusal not provided for in the Framework Decision 2002/584/JHA, where fundamental rights. as enshrined in Article 6 of the TEU might be violated; this may occur e.g; if the judgment was rendered in the course of proceedings in which fundamental human rights and freedoms were violated, or where the person was sentenced on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political conviction or sexual orientation.

Some Member States limit the possibility to surrender their nationals and residents or submit it to certain conditions (such as the consent of the requested person or a guarantee of return by the issuing State for the surrender to be granted), beyond those laid down in the above-mentioned Framework Decision. In such cases, the expert teams recommended these Member States to reconsider such possibility, believing that also in these cases the related national legislation is not in line with FD 2002/584/JHA.

The evaluation teams observed that this approach extend the scope of the above-mentioned Framework Decision and reduce the number of EAWs actually executed and constitutes an obvious barrier to the proper functioning of judicial cooperation in criminal matters based on mutual trust. They also underlined the inconsistency with the CJEU case-law, which states that the executing judicial authorities may, in principle, refuse to execute such a warrant only on the grounds for non-execution exhaustively listed by the EAW Framework Decision. Accordingly, while the execution of the EAW constitutes the rule, refusal to execute it is intended to be an exception, which must be interpreted strictly (C-354/20 PPU and C-412/20 PPU).

In one Member State, the nationality is a mandatory ground for refusal to execute an EAW issued to enforce a custodial sentence, whereas the residence is an optional ground for refusal, thus imposing a different treatment to citizens and residents, which the respective evaluation team found not to be in line with Article 4 (6) of FD2002/584/JHA, which provides that both nationality and residence are optional ground for non-execution.

1.b - <u>Double criminality</u>

One of the most common grounds for non-execution of the EAWs is double criminality, as laid down in Article 4 (1) FD 2002/584/JHA, as an optional ground for refusal. In such a case, if an EAW is issued in respect of offences that constitute a criminal offence under the legislation of the issuing State, but not under the legislation of the executing State, the surrender may be refused by the latter, unless the offence is listed among the 32 offences under Article 2 (2) of Framework Decision 2002/584/JHA, which are exempted from the verification of double criminality with a view to surrender.

The most common offences leading to refusal of surrenders for lack of double criminality are petty crimes, drug and traffic offences, abduction of minors, etc.

Whereas some Member States stated they do not or only rarely encounter difficulties in relation to double criminality, for several Member States the description of the offence provided by the issuing authorities in the EAW form poses as a recurrent problem. The information therein is often deemed insufficient by the executing authorities in order to establish a legal classification of the acts for which they have to assess if they constitute a criminal offence according to their national legislation.

For this purpose, the executing authorities have to determine whether the essential features of the criminal offence punishable by a criminal penalty, if it had occurred in their territory, exist under national legislation and should therefore be able to compare a factual description of the criminal offence, as indicated in section (e) of the EAW form, with the factual description of the equivalent offence under a concrete provision of their national criminal law.

However, relevant information in this respect, such as a detailed description of the constituent elements of the alleged offence, of the criminal offence for which the person has been sentenced, of the factual elements and circumstances of the crime, including the time and place of the offence, or the degree of alleged involvement of the requested person, is sometimes missing. In the absence of the above-mentioned elements, when a double criminality check is required, additional information may be requested by the executing authorities from the issuing authorities pursuant to Article 15 of FD2002/584/JHA, to facilitate the decision on the surrender.

Obviously, a more succinct description of the facts is sufficient in the case of the 32 offences under Article 2 of FD 2002/584/JHA, that are not subject to verification of double criminality. One Member State, however, has reported that some executing Member States still check double criminality, even if the offence in question falls within the category of offences for which a double criminality check is not required, which is not in line with the above-mentioned Framework Decision.

Issues linked to the lack of sufficient information can also arise and cause complications where the case is likely to involve a number of alternative offences. There may be a lack of double criminality for any of the offences, but, in the absence of sufficient information, it becomes challenging to determine which offences are covered by the double criminality requirement, as well as to enforce other parts of the sentence, which relate to other offences. In such situations, the competent authorities of one Member State, request to the issuing State whether the sentence can be split. If this is not accepted, the surrender is refused.

In order to make the case easily understandable by the executing authorities, Annex III of the Commission's Handbook on how to issue and execute a European Arrest Warrant contains guidelines on how to fill the EAW form, including section e), concerning how to describe the crime in detail, so that the executing authority can receive a clear picture of the facts and may, e.g., assess double criminality (if needed) easily and also possible "ne bis in idem" situations (see following sub-chapter).

Nevertheless, according to the statement of some practitioners, the number of EAWs denied because of the ground for refusal based on double criminality is relatively low, which seems to show that the additional information usually overcomes the difficulties encountered by the executing authorities, though it may be a delaying factor for the EAW proceedings.

One Member State pointed out that these problems may also be solved with the assistance of the EJN contact point, in order to ascertain whether the acts mentioned are also punishable in the executing State. However, this may apply only when the surrender of a person from an identified Member State is required and not when the whereabouts of the person sought are unknown.

One Member State's authorities pointed out that, in relation to the verification of double criminality, it seems that Member States apply different practices as regards the link between this check and the verification of the lack of a statutory limitation, as according to some Member States, the verification of double criminality does not involve verifying if the limitation period for enforcement under the law of the requested Member State has expired (Article 4(4) of FD 2002/584/JHA).

One Member State's authorities pointed out that in some Member States there is a judicial practice involving the examination of double criminality by assessing the merits of the case through a full application of the specific parameters of their national legislation, that, as they underlined, could weaken mutual trust and negatively influence judicial cooperation across the Union.

1.c - Ne bis in idem

The *ne bis in idem* principle, laid down in Article 3(2) of FD 2002/584/JHA as a mandatory ground for refusal, has not been raised often in most Member States in the context of the execution of an EAW, and, if raised, rarely resulted in a refusal to surrender. According to the statements of some practitioners, the number of EAWs denied because of this ground for non-execution appears to be quite low, with even fewer refusals than in case of double criminality (see previous sub-chapter)

In the majority of the Member States, no major difficulties have been experienced by the judicial authorities as regards the *ne bis in idem* principle. However, one issue that can be a challenge in respect of this ground for refusal refers to the assessment of the 'same acts'. From a legal point of view, when assessing the concept of the 'same acts', reference can be made, in addition to Article 3(2) of the EAW FD, to the CJEU ruling in C-261/09, (Mantello) and to Article 54 of the Convention Implementing the Schengen Agreement (CISA).

From a practical point of view, however, such assessment may be problematic if the issuing authority has provided very few details of the 'same acts' on which a decision had been made. Indeed, in some cases, the executing authorities have to ask for supplementary information concerning the description of the facts (nature, date, place, etc.) on which the EAW is based, in order to assess whether or not the *ne bis in idem* principle should have been applied to the relevant case.

Nevertheless, as for double criminality, also in these cases it seems that the additional information usually contributes to overcome the difficulties encountered by the executing authorities.

1) Framework Decision 2008/909/JHA

As for the EAW, during the evaluation process it was found that in several Member States all or parts of the grounds for non-recognition and non-enforcement provided for by Article 9 of FD 2008/909/JHA are transposed as mandatory, contrary to this Framework Decision, that provides for all of them as optional; the same considerations expressed in this respect regarding FD 2002/584/JHA also apply to FD 2008/909/JHA.

The most recurrent grounds for the non-recognition or non enforcement of other Member States' judgments applied by the executing authorities under FD 2008/909/JHA, in most Member States are the lack of double criminality, cases set out in Article 9 (1)(i), where the judgment was rendered *in absentia* and in Article 9(1)(h), where the length of the sentence remaining to be served at the time the judgment is received is less than six months;.other grounds for refusal applied quite frequently are based on: the issuing authority having not provided the required documentation, namely the certificate duly completed, (Article 9(1)(a) of FD 2008/909/JHA), the sentenced person not being a national of the executing State (Article 4(1)(c) of FD 2008/909/JHA) and/or the facilitation of social rehabilitation not established due to the absence of a link to the executing State (Article 9(1(b)) of FD 2008/909/JHA), as well as the enforcement of the sentence being statute-barred (Article 9(12)(e) of FD 2008/909/JHA); other grounds for the non-recognition or non-enforcement are more rarely used.

RECOMMENDATIONS

- ***Member States should ensure that the national transposing legislation of FD 2002/584/JHA is formulated in a way that it neither provides for optional grounds for refusal as mandatory nor opens the way to possible grounds for refusal other than those provided for in the above-mentioned Framework Decision, in line with the CJEU's relevant case-law.***

- ***Member States are encouraged to ensure that, while filling section (e) of the EAW form, their competent issuing authorities describe the constituent elements and circumstances of the crime in detail and in a clear language, so as to facilitate the assessment by the executing authorities of possible grounds of non-recognition and non enforcement based on double criminality and non bis idem.***

- ***Member States should ensure that their competent executing authorities do not perform a double criminality check when the offences in question fall within the 32 categories under Article 2 of Framework Decision 2002/584/JHA, for which verification of double criminality is not required.***

VIII- FRAMEWORK DECISIONS 2002/584/JHA and 2008/909/JHA

B) ISSUES LINKED TO DETENTION CONDITIONS

KEY FINDINGS

1) Framework Decision 2002/584/JHA

Whereas in other subsequent EU mutual recognition instruments, the potential risk of violation of fundamental rights has been provided for as ground for refusing execution, FD 2002/584/JHA does not specifically incorporate this ground for non-recognition or non-enforcement in EAW proceedings, and only contains a generic reference to Fundamental Rights in recital 12 and Article 1(3).

Nevertheless, taking into account that the the principle of mutual trust, which underpins the principle of mutual recognition of judicial decisions, does not *a priori* automatically remove the risk of violation of fundamental rights, detention conditions in the issuing Member State of an EAW play a major role in the context of EAW proceedings.

Therefore, from the perspective and within the boundaries set by CJEU case-law:(C- 404/15 Aranyosi and Caldararu, CJEU C-120/18 ML and C-128/18 Dorobantu), in most Member States, the executing authorities of an EAW carry out a specific assessment of the risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, exceptionally and on the basis of a two-step test. Systemic risk should not be considered as sufficient; instead, there is a requirement for real exposure to a risk of violation of fundamental rights to be ascertained with regard to the specific circumstances of the particular case.

In so doing, the competent executing authorities take into consideration reliable information concerning specific poor detention conditions in the issuing State or poor detention conditions in specific penitentiary facilities or of groups of prisoners. Such information may be based on: judgments handed down by the ECHR[4] and the CJEU, decisions or reports issued by international organisations (UN and Council of Europe, in particular the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT)), reports issued by the Ombudsman and by authoritative human rights NGOs (e.g. Amnesty International, Human Rights Watch, etc.). and judgments of national courts, as well as the assurances provided by the issuing State.

In some reports, it is indicated that the competent executing authorities may also rely on information received through various EU networks/Agencies, such as the European Judicial Network, Eurojust and the Fundamental Rights Agency (FRA), and on specific tools, in particular the FRA Criminal Detention Database recently created, which may be expected to be a very useful tool for judicial authorities, when confronted with issues concerning detention conditions, and the FRA's report 'Criminal detention conditions in the European Union: rules and reality', which outlines selected minimum criminal detention standards. Other possible sources are open-source research and the information supplied by the requested person.

The elements to be taken into account by the national judicial authorities as regards detention conditions have been defined by the CJEU in its judgement in case *Dorobantu* (C- 128/18) and refer to certain physical aspects of the prison facilities in accordance with the standards set out by the ECHR. Some Member States take into consideration also other more specific factors, such as activity for prisoners (recreational, educational and work facilities), rehabilitation programmes, privacy, access to natural light, duration of stay inside and outside the prison cell, duration of the detention, etc.

- [4] *Mursic v. Croatia, Sylla, Nollomont v. Belgium, Torreggiani and others v. Italy*, *Bivolaru and Moldovan v. France,* etc.

In cases where there are reasonable grounds to believe that the person sought might be subject to inhuman or degrading penitentiary treatment, the executing judicial authority requests the necessary additional information on the actual conditions in which the individual concerned will be detained in the issuing Member State, pursuant to Article 15(2) of Framework Decision 2002/584/JHA; this postpones the decision on the execution of the EAW until the executing authorities receive information and guarantees that enable them to rule out the real risk of inhuman or degrading treatment. In these cases, additional information is needed: most of the times, this concerns information on a specific prison or guarantees that the sought person (or the prisoner) won't serve his/her sentence in a specific prison. When arguments related to detention conditions are raised, this may lead to delays in the EAW proceedings, especially if the competent issuing authority do not have the sufficient knowledge to reply within a reasonable time to such requests, especially when the competence is decentralised and, there is a need to ask for more information to the MoJ or the Prison department in the issuing State.

If the executing authorities do not receive the requested information or guarantees, they may refuse the surrender. In practice, however, cases of refusal occur very rarely.

Member States no dot apply the above-mentioned CJEU's case-law on the basis of a uniform interpretation and approach. Most Member State assess *"ex officio"* if there are reasonable indications that the person to be surrendered might face inhuman or degrading detention conditions, regardless of whether the person concerned consents to the surrender or no; in one report, reference is made by the evaluated Member State to the rights enshrined in Article 6 of the ECHR. Other Member States asses the detention conditions in the issuing State only if the issue is raised by the sentenced person or his/her defence lawyer and/ or if the person has given his/her consent to the surrender. Several evaluation teams voiced for a need at EU level to clarify the CJEU's jurisprudence in this respect.

As outlined in some reports, the quality of prison facilities undoubtedly varies across the EU. Many Member States, when acting as executing authorities of an EAW, were never asked about detention conditions in their prisons. Such information is requested frequently for a few Member States, where it is considered that there is still room for improvement with regard to detention conditions, including in particular, in respect if overcrowding; the evaluations, however, outlined that some of these Member States have taken or are considering initiatives to improve the situation, so as to avoid refusals of surrender by other Member States.

One Member State has carried out visits in the prisons of other Member States, that the evaluation team has considered as a good practice that could enhance mutual trust in this field.

In the context of the evaluations, it has been underlined that in cases where the surrender procedures are suspended or even completely halted as a result of the Aranyosi & Căldăraru two-step test on detention conditions, efforts should be made by the competent Member States' authorities to identify alternative solutions and avoid impunity,.

Though the standards actually taken into account to proceed with the execution of the EAW may differ, the case law of the CJEU has clarified that there is no scope for the executing State to grant more extensive fundamental rights to the accused than those provided by EU law.

2) **Framework Decision 2008/909/JHA**

As in the EAW procedures, several Member States, when issuing a certificate to transfer a prisoner to another Member State under Framework Decision 2008/909/JHA take into consideration fundamental rights in relation to detention conditions and assess whether the prison conditions in the executing Member State are satisfactory. In this context, they refer to the CJEU's case-law (especially the *Aranyosi and Căldăraru* judgement), as a guidance for interpretation also in the context of proceedings for the transfer of a custodial sentence, even though this case-law did not refer to FD 2008/909/JHA.

However, the evaluations outlined that, in practice, cases of a transfer under FD 2008/909/JHA not being finalised or initiated due to unsatisfactory prison conditions in the executing State are quite rare. Observations from the different evaluation teams regarding this practice have been different.

RECOMMENDATIONS

- ***Member States, when acting as executing States of an EAW, should ensure that their judges and prosecutors involved in EAW proceedings proactively take the initiative to evaluate the detention conditions in the issuing Member State, in accordance with the relevant CJEU case law, in all relevant cases, and not only when this is requested by the sought persons (or by their lawyer) and irrespectively of his/her consent.***

- ***Member States, when acting as executing authorities in EAW proceedings, should take into account the prison conditions to ascertain a risk of inhuman or degrading treatment, as laid down by the CJEU case law, in accordance with the ECHR standards, thus avoiding that higher standards in their national system could give rise to a refusal to surrender.***

IX- FRAMEWORK DECISIONS 2002/584/JHA and 2008/909/JHA

C) ISSUES LINKED TO TRANSLATION

KEY FINDINGS

Translation of judicial and other supporting documents is of paramount importance for Member States' practitioners involved in cross-border criminal proceedings, as it allows them understanding the relevant EU legal framework, including the EU mutual recognition instruments covered by the 9th evaluation round, that are quite complex and not easy to use.

Several Member States have centralized translation systems or lists of judicial translators, whereas others make use of the services of private translators. Sometimes, translators are not available for all languages and a double translation is done: first into English and then into the other language.

Translation issues are a main contributing factor to increase the lengthy of the procedures related to the application of the legal instruments covered by the 9th evaluation round and often cause non-respect of the deadlines. Some Member States make use of IT tools, namely of software allowing automated translation, however, with limitations in terms of adequacy, accuracy and, sometimes, meaning/mistranslation, including due to inappropriate legal terminology. In all cases, where documents forwarded by issuing Member States are not of good quality, the executing authorities of some Member States, in order to speed up the process, send the documents received to be re-translated by local translators, instead of requesting a new translation from the issuing authority.

1) Framework Decision 2002/584/JHA

Some Member States accept the EAWs only in their national language. Practice shows however, that it could be sometimes challenging to receive the translated EAW in the language of the executing State during the arrest stage, especially in those issuing Member States which have strict time-limits for this purpose, as it may be difficult to find a translator within this short timeframe. Failure by the issuing State to produce a translation within the time-limits may result in the termination of the procedures, and lead to the release of the person sought, unless the court chooses to translate the EAW at its own expenses.

Pursuant to Article 8(2) of the Framework Decision 2002/584/JHA, any Member State may state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Union.

Some Member States apply this provision and also accept EAWs in a language other than their national one. In these cases, a translation of the EAW is sent by the issuing authorities to the executing judicial authority of a Member State that has made such a declaration, also in another language than its official language/s, most frequently in English.

This is also a new approach followed in the latest EU criminal law instruments, like the EIO Directive or the Regulation on freezing and confiscation orders, where the Members States are obliged to accept documents in more than one (its own) language.

Some Member States, when acting as executing States. stated that they accept a translation of an EAW in another language than their national one in urgent cases or under special circumstances on condition of reciprocity, namely, that the Member State transmitting a decision in another language also recognises EAWs issued by the first Member States in their national language. In these cases, some expert teams considered this possibility as a best practice.

The evaluation teams find the flexibility of the language regime and the open attitude by those Member States accepting EAWs in another language than their national language a good practice, which is worth spreading among the Member States, as it involves a great advantage, by speeding up the EAW proceedings.

A number of Member States, when acting as issuing States, translate the outgoing EAW forms into English before entering them into the SIS. This was also considered as a good practice, as it allows a version generally understandable by all Member States to be always available, regardless of the need to translate it into the accepted language of the executing Member State.

A few Member States practitioners declared that, although the official language in court hearings is the national language, they prefer to receive EAWs in English because the translations are sometimes of poor quality. Nonetheless, the EAW must then be translated into the language of the proceedings before the case can be brought before a Court.

Regarding the exchange of information, it happens that some Member States make or reply to requests for additional information in their original language, with regard to outgoing EAWs'. In such cases, the request for additional information must be translated and this can delay the proceedings.

Some Member States pointed out that they face problems when asking for additional information when certain Member States do not frequently use languages of common use. A few Member States do not make use of direct contacts with the authorities of the other Member States, but go through their central authorities, due to not feeling comfortable to use one of the most common languages.

Other Member States stated that communication between the issuing and executing authorities could also occur in a language other than the national language of the respective States, and English is generally used in these cases.

2) Framework Decision 2008/909/JHA

Pursuant to Framework Decision 2008/909/JHA, the documents that have to be forwarded to the executing Member State for recognising the judgement and executing the sentence are: a copy of the certificate, a copy of the judgment, and a translation of the certificate into the official language/s of the executing State or, where applicable, into an official language of the Union, which is accepted by that State.

Pursuant to Article 23 (2) of FD 2008/909/JHA, as a principle, no judgment's translation shall be required; accordingly, the legislations of several Member States does not require a translation of the judgments.

Pursuant to this par 3 of this provision, only Member States that deposited a declaration with the General Secretariat of the Council, as executing States, in cases where they find the content of the certificate insufficient to decide on the recognition and enforcement of the sentence, may request that the judgment or essential parts of it be accompanied by a translation into their official language. Member States who have not made such a notification, where the translation is required., (i.e. in more complicated judgments), arrange for it without recourse to the issuing State.

Against this background, though a translation of the sentencing decisions is not requested from the issuing State, for certain Member States, it is a requirement under the criminal procedure legislation to use the official language in legal proceedings. Therefore, in practice, the competent authorities of some Member States consider the translation of the judgment desirable and often request it or, if they do not receive it by the issuing Member State, frequently have it translated at their own expenses.

A complete translation of the judgement maybe considered necessary in cases where the content of the certificate appears inadequate for the purpose of deciding on the execution of the sentence, and a more detailed examination of potential grounds for refusal or possible need for adaptation is needed. In addition, some Member States also ask for the translation of all supporting documents.

In these cases, consultations between the competent authorities of the two Member States may take place and may result in a compromise in view of the different legislation in the other Member State, namely that the issuing State is asked to provide a translation only of the relevant parts of the judgment (i.e. the examination of the offences, and the assessments made by the court in relation to the choice and length of the sentence) or on the submission of a summary judgment rather than the full judgment; as translation of the whole judgements are usually costly and time-consuming, these arrangements can save time and the unnecessary allocation of resources.

Clearly, where a request for translation of the sentencing decision and where appropriate of the supporting documents is made, some Member States often fail to comply with the established time limits, and the effect is the postponement of the decision to recognise and enforce the judgment.

A few Member States, when acting as executing States, do not regularly require the translation of the judgment and of the additional documents into their language and/or accept it in English, which has been considered by the expert teams a good practice.

A few Member States, when acting as issuing States, usually forward to the executing Member State the judgment and the certificate translated into a language accepted by that Member State, although it is not required and independently from a specific request, which is also a good way to facilitate and speed-up the proceedings.

In some cases where the certificate received is not translated into its language or where no translation of the decision or its essential elements was provided and the content of those documents is not sufficient for a decision to be taken, the competent authorities of the executing State may refuse to recognise a judgment of the other Member State imposing a custodial sentence and the procedures are terminated.

RECOMMENDATIONS

- ***Member States, when acting as executing States of an EAW, are encouraged to consider a flexible approach to language requirements and possibly make greater use of Article 8(2) of FD 2002/584/JHA, with a view to accepting EAWs in other languages than their original language, as this could contribute to facilitate the EAW proceedings.***

- ***Member States, when acting as executing States under Framework Decision 2008/909/JHA, should ensure that their competent authorities limit requests for the translation of the whole judgments to cases where they find the content of the certificate insufficient to decide on the enforcement of the sentence, and, where appropriate, after consultation with the competent authorities of the issuing States, with a view to assessing if it would be sufficient that only the essential parts of the judgments be translated according to Article 23 (3) of the above Framework Decision.***

X- FRAMEWORK DECISIONS 2002/584/JHA and 2008/909/JHA

D) DEADLINES

KEY FINDINGS

The 9th evaluation round outlined that on several occasions possible delays may occur in proceedings under Framework decisions 2002/584/JHA regarding the EAW and 2008/909/JHA or the transfer of custodial sentence, not only due to the need by the executing authorities for supplementary information or guarantees, but also because of translation, the lengthy and complexity of national proceedings, the high workload of the competent judicial authorities and other issues, as indicated below. As some evaluators underlined, missed deadlines can be detrimental to mutual trust between the competent authorities of the different Member States involved, and can cause the risk of a decrease in the use of these instrument in future cases, if practitioners feel that the procedures are time-consuming and inefficient.

1) Framework Decision 2002/584/JHA

Where the information communicated by the issuing Member State in the EAW is insufficient, and additional information is necessary to enable the competent executing authorities to decide on the surrender, the missing information is requested by the issuing judicial authority on the basis of Article 15(2) of FD 2002/584/JHA and a deadline is usually set for the receipt thereof, taking into account the need to observe the time limits as provided for in Article 17 of the same Framework Decision: in cases where the requested person consents to his surrender, 10 days after consent has been given, and in other cases within a period of 60 days after the arrest of the requested person.

The above-mentioned time-limits are usually met by Member States' executing authorities in cases where additional information does not need to be requested or is sent in due time. Such additional information may also concern detention conditions in the issuing Member State in the light of the *Aranyosu Caldararu* and *Dorobantu* case-law.

Nevertheless, in certain Member States the processing of EAWs requires a great deal of time due to, the process of examining the information relating to an EAW, that may be time-consuming, and in cases of insufficient additional information or failure to give the correct response to the questions posed in the original request, reminders to the issuing authorities may be needed. Other reasons for possible delays are linked to judgments *in absentia,* due mainly to the lack of necessary and correct information or to requests for information, and to cases in which questions are referred to the Court of Justice of the European Union for a preliminary ruling.

In these cases, where the deadline for submitting the additional information is not met, the time-limits set under Article 17(3) of FD 2002/584/JHA are frequently exceeded. In some reports, it is observed that failure to comply with a deadline or to provide the requested information may result in the release of the person sought or even led to the judicial authority's ultimate refusal to execute an EAW.

In many cases of delay, the executing Member State has provided information regarding the reasons for the delay. A few Member States' executing authorities, stated that if they do not receive an answer after several reminders, they contact the EJN contact point and, in urgent or more complex cases, their Eurojust representatives, to assist them in getting the required information.

As indicated in some reports, the information regarding a delay and the estimated time needed for making the decision, is provided spontaneously to the issuing State only in rare cases. In this respect, the authorities of one Member State stated that, since delays are almost always due to a requirement for consultations with or supplementary documentation from the issuing State, consequently the executing authority is not responsible for it. The expert teams, however, considered that this practice is not fully in line with Framework Decision 2002/584/JHA as its Article 17(4) states that when the EAW cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority must immediately inform the judicial issuing authority thereof and give the reasons for the delay.

In one evaluation report, it was pointed out that in order to enable the issuing authorities to comply with the deadlines set for the provision of the required further information, such deadlines should be rather short, but reasonable. In this respect, in some reports it has been underlined the importance to strike a balance between, on the one side, the need for the prompt execution of the EAW and the thoroughness of the examinations performed by the executing authorities, and, on the other side, the necessity to give the issuing authority the time to respond to the request, including where there is a double level of jurisdiction.

As observed in one evaluation report, the EAW procedures could be improved if cooperation between Member States would be streamlined in terms of provision of supplementary information or documentation relevant to the final decision, so this would contribute to speed up the decision-making process and facilitate compliance with the deadlines set out in Article 17 of FD 2002/584/JHA.

In another evaluation report, it was stressed that in order to strengthen mutual cooperation and make the EAW even more successful, it might be helpful to have a clearer definition of the 'unforeseen circumstances' that can make it impracticable to surrender the person by the deadline set.

In a few reports, it was pointed out that though *Tupikas, Zdziaszek and Ardic* judgments provided useful guidance on determining the scope of the Article 4a of FD 2002/584/JHA, they expanded the need for supplementary information not specifically requested in the EAW certificate, that has undoubtedly led to an increase in requests for additional information and non-compliance with the time limits provided to under Article 17 of Framework Decision 2002/584/JHA.

In cases of repeated non-compliance with the deadlines laid down in Article 17 of Framework Decision 2002/584/JHA the previous paragraph, in the execution of EAWs, some Member States notify Eurojust accordingly. Other Member States in these cases do not inform Eurojust. Some evaluation teams pointed out that there is an obligation to inform when exceptionally the time limits is provided for in Article 17(7) of Framework Decision 2002/584/JHA are no met.

3) Framework Decision 2008/909/JHA

Several Member States, when acting as executing States, experience difficulties with complying with the 90-day time-limits set out in Article 12(2) of the above-mentioned Framework Decision as regards the decision on the recognition of the judgment and enforcement of the sentence after receipt of the final judgment and the certificate, and consequently such time-limit is frequently not complied with.

The 9th evaluation round has assessed that challenges in relation to timely responses from the relevant executing authorities in other jurisdictions arise especially when information is missing from the certificate or certain aspects need to be clarified (mainly referring to the sentence imposed, missing documents, incomplete identification data of the sentenced person etc.) or a translation of documents is needed. These issues often result in delays and the time limits may not be complied with in accordance with Article 12 (2) of Framework Decision 2008/909/JHA.

This may be particularly relevant in cases where the certificate concerns several judgments, or the judgment has been delivered with regard to a plurality of criminal offences, as the process will take longer due to the number of authorities involved and the separate appeals that can be interjected This may not be a particular problem in a few Member States, where deadlines for submitting a legal remedy are quite short. Difficulties in meeting the time-limits may also occur when the sentence needs to be adapted.

In the event that the deadline laid down by Article 12(2) of FD 2008/909/JHA cannot be met, some Member States should notify the issuing State immediately, regarding the underlying reasons for non-compliance with the deadlines set and the estimated time needed for the final decision, but in practice not all Member States do so.

In some cases, based on the outcome of the 9th evaluation round, 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.

RECOMMENDATIONS

- ***Member States both when acting as issuing and executing State, are invited to make all best possible efforts in their decision-making process and relevant proceedings to ensure respect of the deadlines set out in the Framework Decisions 2002/584/JHA and 2008/909/JHA, despite the complexity of the procedures. For this purpose, Member States when acting as issuing States, are recommended to provide supplementary information requested in due time, so as to avoid unnecessary delays.***

- ***Member States, when acting as executing Member States under Framework Decisions 2002/584/JHA and 2008/909/JHA, are recommended to inform the issuing judicial authority immediately when the request cannot be executed within the time limits laid down in the above-mentioned legal instruments, giving the reasons for the delay, so that all time limits imposed by these Framework Decisions can be respected.***

XI - FRAMEWORK DECISIONS 2002/584/JHA and 2008/909/JHA

E) TRANSIT OF THE REQUESTED OR SENTENCED PERSON

KEY FINDINGS

Transit through the territory of a Member State other than the executing State, for the purpose of surrender pursuant to Article 25 Framework Decision 2002/584/JHA and for the purpose of transferring a sentenced person to another Member State on the basis of Framework Decision 2008/909/JHA, is an essential element, with a view to finalizing the proceedings under these Framework Decisions.

In most Member States, the Ministry of Justice is the competent authority for dealing with transit, namely for deciding on requests for transit from a Member State to another Member State through its national territory and if permission is required for the transit through the territory of another Member State. Requests for transit are made through SIRENE and in some cases through Interpol. The practical arrangements for the execution of the actual transit, are organized in cooperation with the police who is responsible for the operational aspects.

Transit permissions are often an urgent matter, but they are time-consuming, especially if the transfer request needs to be translated into the national language of the requested Member State.

Within the 9th evaluation round, it was assessed that the majority of Member States have encountered no major problems in the transit of requested persons, from either a legal or practical perspective.

However, some practical challenges can arise when organising the transit, especially those linked with the very tight transit deadlines - ten days allowed to carry out the actual handover of the person -, and in these cases, the frequent delays in response time that may lead to postponement of the operation, as receiving the transit request at very short notice before transit date can minimize the time to arrange the surrender.

Other practical difficulties may concern identifying the competent authority of the other Member State in charge of transit; in this respect, some practitioners and expert teams pointed out that it would be useful if the EJN Atlas contained this information and recommended that the EJN website be updated to that end.

Issues may also arise with regard to documentary and translation requirements for authorizing the transit, as in some cases, transit requests are submitted in incomplete form and there are a few Member States that require the translation of such requests into their language, and in some instances a translation of both the transit request and the EAW. The Fiches Belges in the EJN website, when updated, could help to identify the requirements regarding the necessary documents, timeframe and accepted languages

Possible disruption of air traffic, requiring to quickly arrange a new date has also been indicated by some Member States, as an additional practical difficulty in executing the transit.

Several Member States indicated problems in cases where the executing State ordered the surrender of the requested persons without taking any precautionary measures to ensure their availability, merely notifying the person of the date for surrender (to present themselves willingly). Sometimes, a person being surrendered, to whom a detention order has not applied, does not appear at the pick-up place, so the convoy has to be organised repeatedly.

From a logistical point of view, extensive preparations are needed in order for the actual transfer to take place. Moreover, the geographical location of some Member States can create challenges due to long distances and the lack of direct flights.

It has also to be underlined that during the COVID period all Member States faced problems with cross-border transport of persons trough the territory of Member States other than neighboring countries due to significant restrictions on travel by air and other methods of transportation, which often required transit through other States.

Generally speaking, bilateral talks with the most relevant neighboring and partner Member States, have proven useful to improve the practical implementation of the transit.

EJN contact points can assist to speed up the procedure and this helps in establishing flexible and quick contacts with the competent authorities.

RECOMMENDATIONS

- ***EJN, in cooperation with the Member States, is invited to ensure that updated information is available in the EJN Atlas as regards the competent authorities responsible for authorizing transit in order to allow their easy identification, and the Fiches Belges, in order to enable rapid identification of the requirements regarding the necessary documents, timeframe and accepted languages***.

XII - FRAMEWORK DECISIONS 2002/584/JHA and 2008/909/JHA

F) LINKS BETWEEN FDs 2002/584/JHA and 2008/909/JHA

KEY FINDINGS

The functional relationship and complementarity between Article 4(6) and (5)(3) of FD 2002/584/JHA on the one side, and FD 2008/909/JHA on the other side, are quite complex to manage, especially in the Member States' national systems where the competence for these two instruments belongs to different authorities, which is the case in the majority of Member States.

In most Member States, there is no specific memorandum of understanding between these authorities; some experts made recommendations to some Member States to draft guidelines defining how this co-operation should take place.

Only in a few Member States in cases when Article 4(6) of FD 2002/584/JHA is applied, the same authorities decide on the recognition of the judgment within the same proceedings.

In cases where the execution of an EAW is refused under Articles 4(6) of Framework Decision 2002/584/JHA or made conditional under Article (5)(3) of the same Framework Decision, the decision as to whether to issue an EAW or a certificate under FD 2008/909/JHA may not be easy.
Only a few Member States have issued guidelines or fact sheets explaining to practitioners in which circumstances the enforcement of a judgment should be ensured either through the surrender of the person concerned or through recognition in view of enforcement of the judgment, that were considered by the experts as best practices.

In most Member States, no specific criteria for assessing whether an EAW or a certificate on the basis FD 2008/909/JHA should be issued are laid down in the legislation or in administrative guidelines, though in some cases such criteria are well-identified. The choice is made by the practitioners on a case-by-case basis. Generally speaking, however, when the whereabouts of the sentenced person are unknown, an EAW is usually issued, whereas, if the sentenced person is located a certificate under FD 2008/909 JHA can be issued.

Among the criteria for choosing the appropriate mutual recognition instrument, some Member States' authorities mentioned the possibilities for actual enforcement of the sentence, the citizenship and place of residence of the sentenced person, the links between the person and the executing State and the possibilities for facilitating social rehabilitation and integration, as well as the need to avoid impunity.

Given the complexity of a decision to refuse a surrender based on Article 4(6) of FD 2002/584/JHA, some expert teams underlined the need for the issuing authorities to carry out a thorough and careful reflection as to whether to issue an EAW or a certificate, in a way to strike a balance between the need for enforcement of the sentence and the need to ensure the social rehabilitation of sentenced persons, and to give appropriate weight to the relevant criteria.

In some reports, it was highlighted that communication and consultations with the competent authorities of other Member States can be useful in order to clarify whether the surrender of the person concerned under FD 2002/584/JHA is the most appropriate procedure, or whether a certificate issued on the basis of FD 2008/909/JHA would be more suitable. If this turns to be complicated, the intervention of the EJN contact points could also be considered in order to facilitate these consultations. In one evaluation report, the holding of bilateral meetings with the other Member State's competent authorities, with a view to establishing arrangements regarding the possible conversion of an EAW procedure into a procedure for the recognition of a judgment under FD 2008/909/JHA, was considered a good practice.

Article 4(6) of FD 2002/584/JHA before the decision on mutual recognition of the decision or order imposing a sentence has become final, and without enforcement of the sentence being guaranteed at the time of refusing surrender; the evaluation team considered that this practice should be changed in light of Article 25 of FD 2008/909/JHA, as interpreted by the CJEU. In one Member State, the opposite practice to always postpone their refusal decision up till to the decision to enforce the sentence based on FD 2008/909/JHA, was considered a good practice.

In cases referred to in Article 4(6) of 2002/584/JHA and in those referred to in Article 5(3) of FD 2002/584/JHA, there is no common practice and divergencies exist among the Member States as to whether to issue or require a certificate under FD 2008/909/JHA.

Indeed, some Member States, on the basis of Article 4(6) of Framework Decision 2002/584/JHA, always require a certificate to be issued in accordance with Framework Decision 2008/909/JHA in order to establish a legal basis for enforcement of the sentence of another |Member State. Some practitioners expressed the view that, although this practice can delay the execution of the judgment, it provides more guarantees than 'direct' execution without a certificate. In one report, it is also pointed out that it is helpful in practice to forward also the certificate, as it contains very valuable information which it may subsequently be necessary to request from the authority that rendered the judgment handing down the conviction with a view to further proceedings, e.g. the duration of custody, if the person was detained during the proceedings, legal provisions, whether the State of conviction requires provision of information regarding the conditional release, etc. It is recalled a that a case addressing this issue (C- 179/22) is currently pending before the CJEU.

Other Member States do not proceed in the same way, and, after refusing the surrender, directly enforce the issuing Member State's judgment on the basis of the information contained in the EAW, especially in cases the EAW has been issued for the execution of a custodial sentence or detention order, and the requested person is a national of or legally resident in the issuing State. In these cases, the recognition and execution of the judgment is considered to result automatically from the refusal of surrender.

Despite the fact that, from a purely practical point of view, this ensures the fast execution of sentences, in the context of the 9th evaluation round, both some evaluation teams and some practitioners were not in favour of this option, stressing inter alia that it deprives the issuing authorities, who might not want the sentence to be executed in the executing State, of their power to decide whether to withdraw the certificate, as provided in FD 2008/909/JHA. In these cases, it was therefore recommended that the executing authorities request and obtain a certificate from the issuing authority before taking-over the custodial sentence. However, it has also to be highlighted that, as underlined in some reports, such practice facilitates avoiding the sought person absconding, thus contributing to avoid impunity.

In one report it is considered that these divergencies may stem from a certain level of ambiguity in FD 2008/909/JHA on this point. In this respect, it is observed that Article 25 stipulates that, without prejudice to FD 2002/584/JHA, the provisions of FD 2008/909/JHA apply, mutatis mutandis, to the extent they are compatible with the provisions of the latter (Article 4(6) of FD 2002/584/JHA), or where the surrender is subject to the condition of the person's subsequent return (Article 5(3) of FD 2002/584/JHA). Based on the formulation 'without prejudice to FD 2002/584/JHA' and then 'to the extent [the provisions] are compatible with provisions of [FD 2002/584/JHA]', it was observed that it seems that FD 2002/584/JHA should prevail. In the same legal text, however, recital 12 states that 'the executing State could verify the existence of grounds for non-recognition and non-enforcement, as provided in Article 9 of FD 2008/909/JHA'. This legal uncertainty is reflected in the different practices and in the domestic laws of the Member States.

It may also be recalled that the Poplawski I and II case-law, stating that the executing State must guarantee to effectively undertake the execution or the surrender, is not interpreted and applied in a uniform way across the EU.

The need for a clarification at EU level as regards the implications of the combined application of Article 4(6) of FD 2002/584/JHA and FD 2008/909/JHA, in particular on whether it is possible or not to directly enforce a sentence after having refused surrender on the basis of the information contained in the EAW without a certificate, was stressed in the context of the 9th evaluation round, both by certain practitioners and by some expert teams. As already mentioned, a case addressing this issue (C- 179/22) is currently pending before the CJEU.

When the surrender was agreed with a guarantee of return on the basis of Article (5)(3) of Framework Decision 2008/909/JHA, it seems that the majority of Member States can agree on the need to issue a certificate after the sought person is sentenced in the issuing State.

Another relevant issue regarding the combined application of FD 2002/584/JHA and FD 2008/909/JHA is linked to the question of what would happen to the detained person between the refusal to surrender and the recognition of a custodial sentence.

For the Member States which directly enforce the sentence, this issue is not relevant. Other Member States, postpone their decision on the surrender while waiting for the certificate to be received; in these cases, between the implementation of these two mutual recognition instruments there is a time gap during which the person can possibly flee. Some of these Member States while waiting for the issuing State to issue the certificate, keep the sought person under provisional detention pursuant to Article 14 of Framework Decision 2008/909/JHA. It was underlined in the context of the evaluation, that such an approach avoids the possibility of the wanted person absconding pending recognition of the custodial sentence and thus promotes mutual trust.

In other Member States, such provisional arrest is not applied. In this connection, the experts recommended that the national authorities make use of Article 14 of FD 2008/909/JHA if surrender under an EAW for the purpose of executing a sentence is refused, in order to avoid any risk of impunity.

RECOMMENDATIONS

- ***Member States are invited to ensure that, before issuing an EAW for the purpose of enforcing a sentence, the competent judicial authorities thoroughly check whether it would be more appropriate to follow the procedures provided for in FD 2008/909/JHA.***

- ***Member States are encouraged to draft guidelines on the combined application of Framework Decisions 2008/909/JHA and 2002/584/JHA, and in particular on the process and criteria to follow in order to choose between issuing an EAW and sending a certificate for the execution of the sentence in another Member State.***

- ***Member States are recommended to make use of provisional detention, as provided for in Article 14 of Framework Decision 2008/909/JHA, if surrender under an EAW for the purpose of executing a sentence is refused, in order to avoid any risk of impunity.***

- ***The EU institutions are encouraged to analyse the functional relationship and complementarity between Article 4(6) of FD 2002/584/JHA and FD 2008/909/JHA and the implications of their combined application, with a view to establishing more consistency in Member States' practices regarding whether or not a certificate under FD 2008/909/JHA should be issued in these cases.***

XIII - FRAMEWORK DECISIONS 2008/947/JHA and 2009/829/JHA

LACK OF APPLICATION OF FRAMEWORK DECISIONS 2008/947/JHA and 2009/829/JHA

KEY FINDINGS

1) General remarks

The level of application of Framework Decisions 2008/947/JHA on the transfer of non-custodial sentences and 2009/829/JHA, on the European Supervision Order (ESO), is quite low across the Union: the mechanisms established by these mutual recognition instruments are not as widespread as some others at EU level, especially in comparison to FD 2002/584/JHA and FD 2008/909/JHA, and the number of both outgoing and incoming requests based on these Framework Decisions is extremely low in almost all the Member States.

Based on the outcome of the 9th evaluation round, it can be assessed that the reasons for the lack of application of FDs 2008/947/JHA and 2009/829/JHA do not lie with the way these Framework Decisions have been transposed, as most of the practitioners interviewed in the context of the above-mentioned round, usually find the national transposing legislation comprehensive and understandable.

The reasons for the scarce use of FDs 2008/947/JHA and 2009/829/JHA appear to be multifaceted and linked to the coexistence of several factors, discouraging the competent national authorities from making use of these legal instruments. Some of these factors had already been identified some time ago in the context of discussions among practitioners from all Member States under the auspices of the EJN (ST 14754/18). The main points raised were that the instruments are not widely known among EU practitioners, and this has led to a lack of experience and delays in execution. Another problem raised was the difficulty in identifying the correct authority to address in the other Member States.

The 9th evaluation round offered the opportunity to look in depth at these and other circumstances underlying the rare use of Framework Decisions 2008/947/JHA and 2009/829/JHA and to identify possible ways for improvement, as outlined in more details below. Certain issues and challenges common to both Framework Decisions are dealt with in this sub-chapter, whereas others which are specific to each legal instrument are dealt with in the following sub-chapters.

Apart from the recent implementation of these instruments, the evaluation highlighted as a recurrent problem, the lack of sufficient awareness, knowledge and experience of FDs 2008/947/JHA and 2009/829/JHA among Member States' practitioners, not only judges and prosecutors, but also other staff involved, including the probation services, as well as defence lawyers, who should be key players in this field, along with a lack of sufficient training on these instruments.

This shortcoming is common to the majority of Member States and clearly indicates that initiatives are needed to promote the knowledge and use of these Framework Decisions among all relevant stakeholders involved in their application, by ensuring training, exchange of information and good practices among practitioners at both national and EU level. Moreover, as the absence of specific procedural guidelines in most Member States may cause a certain reluctance from judges to use these legal instruments, it would be useful to provide practitioners with handbooks for the practical implementation of these instruments both at EU and at national level.

Furthermore, from a practitioners' general perspective, the need to apply Framework Decisions 2008/947/JHA and 2009/829/JHA does not seem to be as great as the need to apply Framework Decisions 2002/584/JHA and 2008/909/JHA. In this perspective, it has been observed that the very limited use of both these mutual recognition instruments underlined by the practitioners in the context of the evaluations, is also due to the lengthy and complexity of the related procedures. As a consequence, the judicial authorities most often opt for simpler solutions rather than using complex and time-consuming mechanisms. Therefore, in the opinion of some practitioners, a possible measure to promote their greater use that could be considered at EU level, would be to simplify the procedures.

In addition, practitioners have pointed out that there is a limited number of cases where it would be appropriate or expedient to effectively use these instruments, including for the absence of cross-border implications.

A significant obstacle to the use of FDs 2008/947/JHA and 2009/829/JHA that was clearly identified in the 9th evaluation round lies with the significant differences between national systems in terms of the nature and duration of the applicable probation, alternative and control measures; the measures covered by these Framework Decisions may even not exist in certain Member States' jurisdictions. Moreover, sometimes the information provided by the issuing State is incomplete or the certificate is not sent to the executing authorities.

The 9th evaluation round has clearly identified that the diversity of the above-mentioned measures in the national legal systems makes it difficult to transfer such measures to another Member State. The knowledge of the other judicial systems and national practices as regards pre-trial and post-trial measures is not widespread among Member States' practitioners and this may have an impact on mutual trust between competent judicial authorities, which is a pre-requisite to the good functioning of mutual recognition, including on the basis of Framework Decisions 2008/947/JHA and 2009/829/JHA.

In order to remedy such problem, in the context of the 9th round of mutual evaluations, it has been underlined that it would be very helpful to have a single source of information on the non-custodial measures in the legal systems of all the Member States, for example in the EJN website. In order to facilitate the application of FDs 2008/947/JHA and 2009/829/JHA, which are not used on a daily basis, by allowing efficient direct contacts between the competent authorities, it has also been stressed that Member States should update, on the EJN website (EJN Atlas), the competent authorities dealing with the above-mentioned mutual recognition instruments.

Another common issue regarding both FD 2008/947/JHA and FD 2009/829/JHA is the lack of awareness among the persons eligible to the measures within the scope of these legal instruments, of the possibilities they offer. Therefore, it has been recommended that the competent national authorities effectively provide information in this respect, during the hearing or the trial, to the prosecuted or sentenced person about these possibilities. In one report, it has been pointed out that regular meetings between the judiciary, public prosecutors and the other authorities involved could be held in order to identify cases where FD 2008/947/JHA can be applied at an early stage of the proceedings and to coordinate their action at national level; it could be done similarly in relation to FD 2009/829/JHA.

2) Framework Decision 2008/947/JHA - Specific remarks

Though acknowledging that Framework Decision 2008/947/JHA, which is a post-trial mutual recognition instrument, aimed at enhancing the prospects of reintegration of the sentenced person into the society, is relatively recent, the 9th evaluation round has outlined its scarce use. In one report it is observed that up to now this did not make it possible to actually increase the number of alternative sanctions imposed on non-residents, that is the primary aim of this legal instrument.

As already underlined above, the differences in the Member States' penal systems, including in how probation sentences are structured, give rise to practical problems. While Member States can recognise prison sentences fairly simply, it seems far from straightforward to do so with alternative and probation sanctions involving particular types of care or prohibition, for which the executing authority may have no equivalent in its national system. Therefore, in order to improve practitioners' knowledge and facilitate transfers, more information should be gathered on the non-custodial sentences imposed in different Member States, possibly in the EJN website, as mentioned above under the previous sub-chapter.

Furthermore, the fact that there are multiple national authorities competent to implement FD 2008/947/JHA also makes matters more complex and causes uncertainty as to which authority should be contacted at different stages of the procedure, as well as difficulties in identifying them in the EJN Atlas, that, among others, currently does not include information on the probation authorities.

Moreover, when the duration of probation measures is short, by the time the issuing authority has taken the necessary steps to adopt the measure, the time has often already expired or is just about to expire; it may also occur that a decision on the recognition of a measure arrives after the probation period has finished.

As pointed out in one report, efficient and timely communication between the competent authorities of the Member States, with a view to securing the successful and timely transfer of the supervision of probation or alternative measures in accordance with FD 2008/947/JHA, is of the utmost importance to promote the application of the principle of mutual recognition to judgements and probation decisions. Nevertheless, some expert teams have identified several cases of inefficient communication between competent authorities of the Member States, that may cause delays and a lack of compliance with the time limits to complete transfers. One Member States' authorities have suggested that contacts between probation services dealing with FD 2008/947/JHA from all Member States could be enhanced at EU level, as this would facilitate consultation and cooperation on specific cases, when needed.

In addition, the particular scope of FD 2008/947/JHA, i.e. probation measures and alternative sanctions, calls for specific monitoring and supervision of sentenced persons. Effective monitoring requires great trust between the competent authorities of other Member States and therefore knowledge of other judicial systems. However, there seems tom be rom for improvement in this respect as some national judicial authorities prefer to keep the execution of the penalty/measure, even at a distance, under the responsibility of their national services, rather than with cross-border supervision, as they believe this facilitates a more efficient monitoring of the measures.

In some reports, in order to give more visibility at EU level to FD 2008/947/JHA, it has been suggested to create a working group made up of the relevant Member States' authorities in order to share experience and best practices and find common solutions when using this legal instrument.

One step in this direction is the METIS project, which aims to promote "inter alia" the use of Framework Decision 2008/947/JHA by developing practical tools for both practitioners and sentenced persons and their lawyers. The Member States involved in the METIS project are also drawing up a table comparing probation sentences. Some experts considered that this project will promote the use of this mutual recognition instrument and, more broadly, reinforce mutual trust between Member States. If other Member States would take part in the project as a follow-up to the METIS project, this might allow to spread the results of the work in the other Member States through similar or larger projects.

3) Framework Decision 2009/829/JHA – Specific remarks

Some of the conclusions regarding Framework Decision 2008/947/JHA, as illustrated in the previous sub-chapter, may also be applied to Framework Decision 2009/829/JHA, which is a pre-trial mutual recognition instrument providing for the transfer of supervision measures to another Member State, with a view to preventing inequalities between residents and non-residents in the trial State, taking into account that in similar circumstances non-residents are remanded in custody more often than residents.

One explanation for the reluctance by judges to apply FD 2009/829/JHA is linked to the difficulty in identifying cases where it would be effective and appropriate to issue a European Supervision Order (ESO). Some Member States' practitioners expressed the view that the added value of ESO is questionable, as it does not suit the needs of criminal proceedings, namely because the time required to set up the related procedures is not compatible with the deadlines for hearings on provisional detention. Indeed, the decision to place a person under provisional detention must be taken within a short time and it is not possible in this timeframe to issue an ESO and receive a reply from the executing Member State.

Furthermore, the competent authorities are often not willing to allow the suspect/accused person to leave the country whenever his/her presence is going to be needed in the course of the criminal proceedings and consider that the EAW and detention are sufficient as measures for restraining freedom for this purpose.

In this respect, some Member States' practitioners expressed the views that when pre-trial investigation may be completed rather quickly it would not be appropriate to issue an ESO, as this could make the cases more complicated to manage and that a better option for solving faster a criminal case seems to be that the foreign person is briefly kept under provisional detention rather than released to come back for further investigation or a trial.

Regarding more complex and time-demanding investigations, different views have been expressed by some practitioners and expert teams. For such investigations, where suspects are usually in detention, in the opinion of some practitioners, the ESO might jeopardize the investigation.

One expert team expressed the opposite view that in long-drawn-out criminal cases, the positives of Framework Decision 2009/829/JHA - enhancing the presumption of innocence and the right to liberty – should prevail.

More generally the 9th evaluation round outlined that a certain reluctance to use the ESO is also due to the uncertainty for the issuing authority on how effectively the supervision measure is monitored by executing authorities. In the opinion of some practitioners, ongoing interaction and communication between these authorities to monitor compliance with the measures imposed, in practice seems to be not easy.

Finally, the costs of supervision measures, not justifying recourse to such measures only for minor offences, have also been mentioned by the competent authorities of one Member State as reasons for the infrequent use of FD 2009/829/JHA.

RECOMMENDATIONS

Member States are invited to take appropriate measures to increase the national practitioners' awareness and use of FD 2008/947/JHA and FD 2009/829/JHA and the legal possibilities they offer, and, accordingly, to include information on these legal instruments in the training programmes for all relevant stakeholders, as well as to draw up specific guidelines to facilitate and promote the use of these instruments.

The European Commission is recommended to take concrete measures to enhance the application of the EU Framework Decisions 2008/947/JHA on probation and alternative sanctions) and 2009/829/JHA on the European Supervision Order, taking into account the information gathered during the ninth round of mutual evaluations.

The European Commission, where appropriate in cooperation with EJN and Eurojust, is encouraged to consider providing practitioners with EU Handbooks with practical guidance on the application of Framework Decisions 2008/947/JHA and 2009/829/JHA.

The European Judicial Network (EJN), in cooperation with the Member States, with a view to facilitating the application of FD 2008/947/JHA and FD 2009/829/JHA (ESO) is encouraged to make available on the EJN website relevant information on the other national systems and the non-custodial measures they provide for, as well as updated information on all Member States' authorities competent to apply these Framework Decisions.

XIV - FRAMEWORK DECISIONS 2002/584/JHA, 2008/909/JHA, 2008/947/JHA and 2009/829/JHA

A) TRAINING AND SPECIALIZATION

KEY FINDINGS

1) Training

Most Member States have quite comprehensive and organized systems for training of judicial practitioners in the field of judicial cooperation; a few of them, taking advantage of new and modern IT tools, also offer e-learning training courses. Nevertheless, extra efforts to ensure continuous training for magistrates at all stages of their career on all the mutual recognition instruments covered by the 9th evaluation round seem necessary, as outlined below.

First of all, it has to be noted, that, whereas Framework Decision 2002/584/JHA on the EAW has existed for a long time and is by now more or less an everyday tool for practitioners across the EU, and Framework Decision 2008/909/JHA on the transfer of custodial sentences is also known and applied to a quite satisfactory extent, there is a lack of knowledge and experience by practitioners on Framework Decisions 2008/947/JHA on probation and alternative sanctions and 2009/829/JHA on the European Supervision Order (ESO), which is an obstacle to a more frequent application of these instruments.

The 9th evaluation round assessed that in the majority of the Member States, apart from a few exceptions, regular training activities mostly cover Framework Decisions 2002/584/JHA and that training on FD 2008/909/JHA is often provided, but not systematically; training on FDs 2008/947/JHA and 2009/829/JHA, is most often not available, except from a few "ad hoc" initiatives in some Member States.

This highlights that there is room for improvement by increasing the training activities for judges, prosecutors, lawyers, and other staff involved in the application of all the mutual recognition instruments covered by the 9th evaluation round, as this would encourage their use, raise awareness, and increase the possibility to share practical experience and relevant case-law developments. More generally, in the context of the 9th evaluation round, it was repeatedly recommended that specific and regular training on all the above-mentioned legal instruments should be organized both at national and at EU level for all the authorities involved in their implementation.

This need concerns especially the lesser-known FDs 2008/947/JHA and 2009/829/JHA. The lack of specific training has been identified as one of the main obstacles to the widespread use of these Framework Decisions. In order to be able to make use of their full potential, it is therefore important to raise awareness and enhance the knowledge of these Framework Decisions among practitioners.

Against this background, in the context of the 9th evaluation round several evaluation teams as well as many practitioners have stressed that there is a clear need of training related to FDs 2008/947/JHA and 2009/829/JHA to be provided in a regular manner, targeting all relevant stakeholders in order to make the aware of the objectives and the possibilities offered by these mutual recognition instruments. It was also underlined that in addition it would be useful to distribute guidelines or handbooks on these Framework Decisions to practitioners involved in their application.

The 9th evaluation round has outlined that, in the majority of the Member States, training programmes on all the above-mentioned Framework Decisions for defense lawyers are insufficient or not available and that, as a result, there are no specialized lawyers for EU mutual recognition instruments; therefore, there is also a clear need to promote ways of upgrading the knowledge of these instruments by defense lawyers, so as to enable them to provide their clients with quality counsel in this field.

In a number of reports, it has been suggested that joint training for judges, prosecutors and lawyers and other relevant stakeholders could be organized, with a view to sharing experience and solving practical issues. As regards FD 2008/947/JHA, it would be useful to include in such joint training probation and prison staff.

A few Member States have organized joint training with neighboring countries, that was considered by the expert teams useful to solve practical problems, understand the differences between different judicial systems and strengthen mutual trust.

Judges and prosecutors can also participate in training events at EU level on EU mutual recognition instruments provided for by institutions, such as the European Judicial Training Network (EJTN) and the Academy of European Law (ERA). Other EU-wide training opportunities are those offered by the Association for Criminal Justice Research and Development (ACJRD), as well as training or seminars organised by Eurojust or the EJN.

Lawyers can also participate in training events organised at EU level, insofar as these are known and accessible to them, namely the training programmes offered by ERA, since those of the EJTN are intended only for members of the judicial service.

However, at the time of the evaluation, these possibilities of training at EU level did not cover all the EU mutual recognition instruments subject to the 9th round, in particular not including FDs 2008/947/JHA and 2009/829/JHA, and were not used by all the Member States at their full extent.

Nevertheless, as outlined in some reports, EU training programmes have particular advantages which go beyond the pure transmission of knowledge and awareness-raising on the practical application of the EU instruments, as they offer an excellent opportunity for practitioners of networking and sharing experiences with colleagues from other Member States. In this perspective, the importance of training at EU level, especially in the field of FDs 2008/947/JHA and 2009/829/JHA, has also been expressed in several evaluation reports.

In addition, there are projects and initiatives aiming at enhancing judicial cooperation at EU level. CrossJustice platform provides a legal information service primarily intended for legal practitioners - judges, prosecutors, investigating magistrates and lawyers -, but also accessible to law students, NGOs and all EU citizens, that is expected to be extended to the mechanisms for cooperation among the Member States in criminal matters, including the EAW. Regarding Framework Decisions 2008/947/JHA and 2009/829/JHA, the Confederation of European Probation (CEP) (www.cep-probation.org) has an open expert network group dedicated to these Framework Decisions. They share expertise, experience and knowledge and promote the use of these Framework Decisions among probation services and professionals. The PONT project (www.probationobservatory.eu) funded by the European Commission's Justice programme, has a range of free online training courses on the application of FDs 2008/947/JHA and 2009/829/JHA, the completion of required documentation and the management of adaptation and of transfer processes.

Several Member States' practitioners stressed that EU Handbooks with guidance on the application of Framework Decisions 2008/947/JHA and 2009/829/JHA, for which the application is not frequent and the experience is limited, like the Commission's Handbooks on Framework Decisions 2002/584/JHA and 2008/909/JHA, would be an important resource for them.

Several Member States are aware of the work done in Europris and participate in its activities, in particular as regards Framework Decision 2008/909/JHA, and to a less extent of the work of the Confederation of European Probation (CEP), as regards Framework Decision 2008/947/JHA. The outcome of meetings held in Europris and CEP are generally spread in the Member States by the practitioner who attended them.

2) Specialization

Member States have different organizational approaches in terms of attribution of competencies for handling the EU mutual recognition instruments, having established either a centralized or a decentralized system for one or all these instruments. Generally speaking, centralised bodies, that in most Member States are the Ministry of Justice, but can also be other authorities, are usually highly specialised in the use of EU mutual recognition instruments (acting both issuing and executing authority), and can advise and support local practitioners in this respect. In local Courts, specialization may be more difficult to achieve and the practitioners are frequently not specialised in the use of EU the mutual of recognition instruments, as each prosecutor or criminal court can deal with them among other tasks. In the context of the 9th evaluation round, these Member States have been encouraged to consider the possibility of establishing courts specialising in matters relating to international judicial cooperation, including the EAW and the other EU mutual recognition instruments covered by the 9th evaluation round or to increase the number of magistrates working exclusively on processing cases related to these instruments, as well as to provide adequate specialist training on these instruments, as possible ways of improving specific expertise in this field.

Nevertheless, in some Member there is, to a different extent, a certain degree of specialization at various levels of jurisdiction, as some magistrates and/or certain courts, more often those located in the larger jurisdictional districts, have a certain level of specialization. This is more frequent for FD 2002/584/JHA, as the EAW has been widely used for a significant length of time and practitioners have gained experience on related proceedings, and to a less extent FDs2008/909/JHA on the transfer of sentenced persons, as only a few Member States have separate specialised departments handling cases under this Framework Decision. No specialization exists as regards FD 2008/947/JHA and FD 2009/829/JHA

In one Member State, the structure of the competent authorities is based on territorial specialization in dealing with the specific instruments, with the benefits of the high level of experience and expertise of the judges, magistrates and administrative staff involved. In one Member State, a specialised court performs a check of the EAW before it is issued, which may minimise the risk of an incomplete form, In some Member States, there are networks of practitioners or working groups specialising in international judicial cooperation in criminal matters, who meet regularly to discuss relevant issues in the field of judicial cooperation and can provide guidance and assistance to other practitioners in issuing and executing mutual recognition requests. Moreover, the EJN contact points have usually the knowledge and experience to advise their colleagues.

In almost all the Member States, there are no specialised lawyers for EU mutual recognition instruments and in certain cases lawyers are not even sufficiently aware of the EU legislation and of the case law of the CJEU in this field. In some Member States, however, some lawyers have a certain knowledge of the EAW and fewer of FD/2008/909/JHA, but there is no specialization among lawyers in FDs 2008/947/JHA and 2009/829/JHA. Taking also into account that they are usually appointed "ex officio", this may entail the risk that a lawyer who is not specialised in a given area can adequately protect a convicted or suspected persons' rights and legitimate interests.

RECOMMENDATIONS

- ***Member States are encouraged to provide regular and systematic specialized training on Framework Decisions 2002/584/JHA, 2008/909/JHA, 2008/947/JHA and 2009/829/JHA and related case-law of the CJEU to all practitioners involved in their application, including joint training for judges, prosecutors and lawyers, and other relevant staff.***

- ***Member States are encouraged to promote participation by practitioners dealing with the above-mentioned EU mutual recognition instruments in training activities available at EU level, so as to enhance the opportunities to increase knowledge and share experiences offered by this type of training.***

- ***The EJTN is encouraged to increase its efforts to offer training to practitioners on EU mutual recognition instruments including Framework Decisions2008/947/JHA on probation and alternative sanctions and 2009/829/JHA on the European Supervision Order (ESO) and to give greater visibility to its training programme.***

- ***Member States are encouraged to ensure an adequate level of specialization of practitioners dealing wit all the EU mutual recognition instruments involving deprivation or restriction of liberty, subject to the 9th evaluation round, including lawyers, by offering specialized training, considering the possibility of establishing courts, and promoting networks of magistrates specializing in this area.***

XV - FRAMEWORK DECISIONS 2002/584/JHA, 2008/909/JHA, 2008/947/JHA and 2009/829/JHA

B) STATISTICS

KEY FINDINGS

A common issue identified in the context of the ninth evaluation round in almost all the Member States is the lack of reliable and detailed statistical data collected regularly at central level about outgoing and incoming requests for all four mutual recognition instruments covered by this evaluation, namely Framework Decisions 2002/584/JHA, 2008/909/JHA, 2008/947/JHA and 2009/829/JHA.

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Other challenges seem to be data aggregation, collection and processing of statistics at central level. These shortcoming and deficiencies are even more serious in the Member States that have decentralised systems, which face more difficulties in gathering data from different authorities at different levels, rather than from a single one.

Only a number of Member States keep annual statistics as regards the above-mentioned legal instruments at central level, but in most cases, they are collected and elaborated manually and there is therefore no digital record of the related cases. In addition, these calculations are time-consuming, not accurate and fragmented,

In one Member State the Ministry of justice (MoJ) is responsible for the collection of statistics under the general reporting obligation for judges or courts and prosecutors, wherever they are competent-to transmit or execute a decision on the basis of the mutual recognition instruments to send a copy to the MoJ, which the evaluation team considered to be good practice.

Most Member States' authorities were able to provide the respective evaluation teams with general figures, such as the number of measures issued or executed for the different instruments, but do not collect such data systematically and face difficulties if it is necessary to provide more detailed statistics,

Statistics on the EAW are collected by all Member States, with a view to the obligation to provide them to the European Commission. However, usually such statistics concern EAWs received and executed and do not go into more details, such as time limits, grounds for refusal or the length of the procedure, are usually not readily available.

A number of Member States collect and compile statistics on FD 2008/909/JHA, but apart from a few exceptions, no detailed information on the outcome of the procedure (on how many requests have been recognised and how many have been refused) is usually available. As regards FD 2008/947/JHA and FD 2009/829/JHA, in most Member States there are no registered statistics.

The ninth round of mutual evaluations has highlighted that a well-functioning nd comprehensive statistical system would give a better picture and monitoring of the use of the various Framework Decisions referred to in this round, allow the analysis of their application and of the difficulties encountered, either as issuing or as executing authority and the reasons for possible refusals, with a view to more precise guidance on their application and the adaptation of policies and working methods accordingly, so that tools for mutual international cooperation can become more effective.

Furthermore, in the context of the 9th evaluation round, it was observed that the lack of computer records could lead to inadequate follow-up. Only few Member States currently use electronic tools for statistical purposes. A few Member States have case-management systems, that if coordinated with other data collection systems or further developed, might contribute to a better management of the above-mentioned Framework Decisions.

As mentioned in one report, automated systems could allow both to provide an accurate reflection of the use of the instrument for mutual recognition of custodial sentences, to establish with which Member States cooperation is more difficult, the length of the proceedings or the main grounds for refusal to recognize a sentence, etc. as well as to manage the follow-up of requests sent to executing Member States.

In one Member State a project on-going regarding the EAW, that with appropriate adaptations, if necessary, can be considered as a starting point to centralise the collection of statistics concerning the other mutual recognition instruments covered by this evaluation. In another Member State, arrangements for a disaggregated collection of 'European arrest warrant' cases, so that in the near future it will be possible to provide statistical indicators on the latter, is also on-going.

RECOMMENDATIONS

- ***Member States are recommended to establish an efficient and reliable system for the centralised collection of statistics about the use of Framework Decisions 2002/584/JHA, 2008/909/JHA, 2008/947/JHA and 2009/829/JHA, in order to facilitate the analysis of their application and adapt policies and working methods accordingly. In doing so, they are encouraged to consider using electronic tools, so as to save time for all the competent authorities and obtain a better picture of the use of the above-mentioned legal instruments.***

XVI - FRAMEWORK DECISIONS 2002/584/JHA, 2008/909/JHA, 2008/947/JHA and 2009/829/JHA

C) CENTRAL AUTHORITY, COOPERATION AND EXCHANGE OF INFORMATION

KEY FINDINGS

1) Central authority and direct contacts under Framework Decision 2002/584/JHA

According to Article 7 (1) of Framework Decision 2002/548/JHA, each Member State might designate a central authority or, when its legal system so provides, more than one central authority. Member States may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants, as well as for all other official correspondence relating thereto. One Member State has designated two bodies as the central authorities.

Just in a few Member States no central authority within the meaning of Article 7 (1) of FD 2002/584/JHA has been appointed. Regarding the Member States that have appointed a central authority, most of them have appointed their Ministry of justice (MoJ) and few of them a national authority other than the Ministry of Justice (a judicial authority).

In almost all the Member States, the central authority (CA) has a limited role and intervenes only when requested to do so. It does not interfere in relations between judicial authorities and does not maintain contacts with other Member States' judicial authorities, although it does maintain contacts with the ministries of justice of other Member States. Usually, the central authority provides assistance to the issuing and executing judicial authority, especially in the most complex cases, for instance, by facilitating communication with the judicial authorities of the Member States concerned or in the event of difficulties arising that cannot be resolved directly with the competent authorities of other Member States, e.g. identifying the competent foreign or central authority, sending documentation or verifying its authenticity. Often it produces materials to support competent authorities (handbook, intranet, guidelines, circulars…) or handles statistics. In some cases, it can also carry out a quality check with a view to issuing an EAW.

In some reports, it was observed that the role of the central authorities in providing assistance in EAW proceedings has recently been decreasing and recourse to their assistance is most often limited to those situations where the problematic issue in question cannot be resolved through direct contacts between the judicial authorities concerned. In some cases, this change has resulted from the follow-up to the recommendations in the 4th round of mutual evaluations, whereas in other cases it may be due to a greater awareness of the scope and the experience gained by the judicial authorities in the practical application of FD 2002/584/JHA, by issuing and executing EAWs.

There are, however, a few exceptions regarding certain Member States, where the central authority continues to play an important role in the main aspects of the surrender procedure, going beyond the administrative, practical and methodological tasks assigned to them by Article 7 (1) and (2) of FD 2002/584/JHA, as it is enabled *inter alia* to issue and execute the EAWs or is designated as the unique channel through which all communications with and requests to other Member States should go or is also authorized to request supplementary information from the issuing competent authority on the basis of Article 15(2) of Framework Decision 2002/584/JHA, thus exercising tasks that are usually performed by the judiciary.

These Member States have been recommended to take measures to limit the role of their central authorities, and to promote direct contacts between competent authorities in line with the principle of mutual recognition. In this respect, in the context of the 9h evaluation round, it has been emphasised that this new model of judicial cooperation entails a radical change in relations between the EU Member States, replacing the former approach of communication between central or governmental authorities with direct communication between Member States' judicial authorities, with the aim of facilitating judicial cooperation, without the involvement of executive bodies.

A few practitioners pointed out that in certain cases they are discouraged from establishing such direct contacts due to language limitations, fear of not identifying the correct authority, etc In this respect, it was stressed by the expert team that though linguistic barriers can be an obstacle to efficient direct contacts, since the latter are a core element of mutual recognition, measures should be taken to overcome such difficulties.

2) Central authority and direct contacts under Framework Decision 2008/909/JHA

Pursuant to Article 23 of Framework Decision 2008/909/JHA, the central authority assists the judicial authorities for cooperation in proceedings related to receiving and transmitting the certificates and judgments, as well as any official correspondence relating to them. It may also assist the competent authorities in the procedures under FD 2008/909/JHA by providing advice or information on the procedures.

Not all Member States, however, have designated a central authority for the purpose of this Framework Decision.

Usually, the articulation between the principle of direct contacts between judicial authorities and the role of the central authorities under Framework Decision 2008/909/JHA mirrors the attribution of competencies in the context of EAW proceedings; therefore, reference is made to what indicated above in this respect.

3) Central authority and direct contacts under Framework Decisions 2008/947/JHA and 2009/829/JHA

Many Member States have not designated a central authority, as either the issuing or executing authority, for the purpose of issuing and forwarding decisions and certificates pursuant to Framework Decisions 2008/947/JHA and 2009/829/JHA. However, the Ministry of Justices usually assists the competent judicial authorities in the case of difficulties that cannot be resolved directly with the competent authorities of other Member States.

4) Cooperation and exchange of information

The exchange of information between judicial authorities is of vital importance in the context of procedures related to all EU mutual recognition legal instruments involving deprivation or restriction of liberty subject to the 9th evaluation round. Additional information may be needed by the executing State further to the information already sent by the issuing State. However, in the context of the 9th mutual evaluation round, it was observed that sometimes the requested additional information is not relevant or unnecessary, as it goes beyond the requirements set out in the respective legal instrument, with the result that the duration of the proceedings may unjustifiably be extended.

In the context of the 9th round, the issue of the exchange of information has been dealt with mainly in relation to FD 2002/584/JHA and to a more limited extent in relation to FD 2008/909/JHA.

As regards the EAW, the information communicated by the issuing Member State may be insufficient for deciding on surrender. The most common types of information deficit when receiving an EAW are due to the inadequate description of the facts and the circumstances of the crime in sufficient detail, such as the place where and time when individual acts were committed to the extent required to distinguish the acts concerned from other acts, making it more challenging to verify double criminality, *ne bis in idem* or *in absentia* judgments, as well as detention conditions in the issuing State. Other missing information may concern other elements, such as, in the case of some EAWs issued for the enforcement of a judgment, the indication of the length of the sentence or whether the person in question was notified about the time of the court hearing.

In the vast majority of cases, when a need for additional information occurs, in accordance with Article 15(2) of Framework Decision 2002/584/JHA, the issuing judicial authorities are requested to provide the relevant information within a set deadline. Such deadlines, if reasonable, are most often, though not always, adhered to by the issuing judicial authorities and responses are usually timely and appropriate.

However, in certain cases, where such deadlines are short and difficult to be complied with or where repeated requests for additional information are necessary, as the issuing State fails to reply on time or to give the correct response, this may result in proceedings being prolonged and respect of the time limits set by Article 17 of Framework Decision 2002/584/JHA being a challenge. Furthermore, there have been situations where the requested information has not been provided by the issuing State and the surrender has been refused by the executing State.

This issue of information exchange does not end with the surrender of the person as the executing authorities are also expected to send the surrender decisions and other relevant follow-up information after a decision on the EAW has been taken, in particular on the period of detention served, using the standard form set out in Annex VII to the Commission's Handbook on how to issue and execute a European arrest warrant. However, not all executing States send such follow-up information regularly and it is sometimes necessary for the issuing State to request it.

As regards FD 2008/909/JHA, aadditional information may be requested in case of incomplete or incorrectly filled certificates. This may concern different types of information, such as: legal classification and designation of the offence, the exact duration of the time spent in provisional custody and the unserved part of the sentence, the applicable scheme for conditional release, etc. In general, however, the information included in the certificate sent from the issuing state is sufficient.

In the context of proceedings under FD 2008/909/JHA consultations may or shall be carried out between the competent authorities of the issuing and the executing State, in order to establish whether the sentence would serve the purpose of facilitating the social rehabilitation and the successful reintegration of the sentenced person into society. Such consultations are not always mandatory. There is no need for consultations with the executing authorities on the basis of Article 4(4) and (5), whereas in cases described in point (c) of Article 4(1) consultation is mandatory. When the sentenced person is not a citizen of or is not deported to the executing state, the executing authorities need to be consulted in order to obtain consent for forwarding the certificate The issuing authorities do not always make prior contact with the executing Member States' authorities, except where their consent is needed. However, some expert teams have observed that prior consultation with the executing Member State could be useful in order to obtain all the relevant information needed to decide whether to issue a certificate under FD 2008/909/JHA. For more details see chapter on the assessment of social rehabilitation.

The competent judicial authorities of the executing State have the obligation laid down in Article 21 of FD 2008/909/JHA 909 to provide the information listed in this provision to the issuing State without delay; however, not all Member States comply with this obligation.

The exchange of information or the consultations are carried out through various channels. The general rule, in line with the principle of mutual trust - which is a fundamental element of the system of mutual recognition instruments in the EU - is that the competent Member States' authorities communicate directly with the competent authorities of other Member States. Based on the outcome of the 9th evaluation round, the direct contacts between judicial authorities are generally satisfactory, allowing difficulties that may arise when executing EAWs to be resolved quickly, and do not give rise to any major problems. A few Member States request additional information through their central authorities.

Communication may take place by ordinary mail or phone, fax, electronic mail, etc. With a view to facilitating the application of FD 2008/909/JHA, some Member States' authorities have agreed to send transfer requests and any follow-up elements (relevant documents, recognition decisions, additional information) electronically. Some Member States are also involved in the development of the e-Codex project for the use of EU mutual recognition instruments.

The more widespread use and availability of new technologies contributes to speed up interaction, but at the same time require the ENJ Atlas with the email addresses of judicial and central authorities to be kept up to date.

In some cases, the channels of Eurojust and the EJN may be useful to establish quick and effective communication, especially in urgent cases and/or where no reply is received or in order to circumvent difficulties deriving from language barriers. In relation to those Member States that use the Schengen Information System, communication may occasionally also take place via the SIRENE Unit and, in relation to those Member States which do not use the Schengen Information System, via the INTERPOL Unit.

RECOMMENDATIONS

– ***Member States are recommended to ensure the role of their central authorities is limited to what provided for by each EU mutual recognition instruments subject to the 9th mutual evaluation round, and to promote direct contacts between competent authorities in line with the principle of mutual recognition of judgments and judicial decisions, set out in Article 82(1) TFEU.***

– ***Member States, when acting as issuing States for the purposes of Framework Decisions 2002/548/JHA and 2008/909/JHA, are recommended to ensure that their competent authorities transmit to the competent authorities of the executing State all information necessary to decide on the execution of the request, and when the latter requires additional information, to provide such information in the best possible delay.***

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XVII - FRAMEWORK DECISIONS 2002/584/JHA, 2008/909/JHA, 2008/947/JHA and 2009/829/JHA

D) COOPERATION WITH EUROJUST AND EJN

KEY FINDINGS

Assistance either from Eurojust or the EJN may be considered by Member States' authorities when applying EU mutual recognition instruments depending on the merits of the case, in particular taking into account its complexity and urgency. Theoretically, they can provide different but complementary means of assistance when a difficulty in contacts with a judicial authority of another Member State arises. The EJN contact points are usually requested to provide assistance with a view to facilitating and streamlining communication, and obtaining the information necessary to render a decision, whereas in complex and problematic cases concerning serious criminal activity or where more Member States are involved in a case, the national member of Eurojust may be contacted for the purpose of facilitating cooperation.

However, to a certain extent, it is not always easy to establish a clear dividing line between their role, as in practice Member States' authorities seek alternatively the assistance of Eurojust or of the European Judicial Network (EJN) or of national EJN contact point, in situations where there is a need to establish contacts, as this is difficult or problematic, including for linguistic reasons, or when problems arise in getting the supplementary information or documents from the issuing State. Indeed, the mechanism for the request for additional information based on Article 15(2) of the EAW FD can involve consultations through various channels, including with the assistance of Eurojust and EJN.

As regards in particular FD 2002/584/JHA, the channels of Eurojust and the EJN are both considered helpful, as they allow effective and quick contacts with the issuing authority of the EAW. Compliance with the deadlines is also often achieved thanks to the help of the EJN contact points and, in urgent or more complex cases, with the assistance of the National Desk at Eurojust.

As regards the EAW, Eurojust channels are used for rapidly solving problems, i.e. difficulties in the execution of the request or jurisdiction conflicts in the event of multiple competing requests to surrender against a requested person issued by the judicial authorities of several Member States (Article 16 of FD 2002/584/JHA.). Whilst this is not an obligation, it is a possibility that can quickly provide the executing authority with coordinated and well-informed advice according to which an EAW should be executed (first), taking into consideration all relevant aspects. In one report, the experts would stress how helpful Eurojust can be in this case, with the use of the existing guidelines and the possibility of reaching an agreement shared by all stakeholders within a limited time frame.

Eurojust can also assist when some problems occur as an EAW under execution is related to other mutual recognition instruments, e.g. a EIO, to be carried out in parallel or immediately after the requested person's arrest, or simultaneously, as the different instruments are dealt with by different authorities.

Eurojust's involvement in EAW proceedings is also relevant in cases where in exceptional circumstances which could lead to delays in the execution of EAW, the judicial authority has to notify Eurojust, giving the reasons for the delay. in accordance with Article 17(7) of FD 2002/584/JHA.

In one report the added value of the coordination meetings organised by Eurojust, especially in cases where different EU legal instruments are applicable, has also been underlined.

The inquiries aimed at identifying the competent authorities of other Member States are mainly carried out in the context of the EJN, e.g. with the assistance of the experts designated as EJN contact point. It has proven helpful in practice to call upon the EJN's contact points when the process of obtaining information from the executing authority is delayed or if the information provided is insufficient to receive assistance with further inquiries or in speeding up the matter.

Cooperation via the EJN is highly valued by the practitioners.as the EJN contact points usually can advise their colleagues on the handling of EAW cases and distribute all the relevant information, including information about recent CJEU judgments, to other practitioners, judges and prosecutors.

In many Member States, magistrates are aware of the existence of the EJN website and online resources, use them on a regular basis and consider them as extremely practical and indispensable tools for the efficient and easy drafting of both requests and the submission of responses among practitioners of different Member States.

In some Member States, on the contrary, EJN tools are not sufficiently known and used by practitioners and there is a need for awareness-raising concerning such tools that can facilitate cross-border judicial cooperation.

The EJN instrument most frequently used and deemed most important is the EJN Atlas, which facilitates identifying the competent authorities. However, in the context of the 9th round it has been highlighted that contact details in the EJN Atlas are sometimes outdated or incomplete and do not include all Member States' judicial authorities' email addresses. Therefore, it has been stressed that the information on the Atlas platform should be regularly updated for all Member States.

Other ENJ tools are: the 'Fiches Belges', that provide practical information on specific sets of measures that are covered by judicial cooperation in criminal matters; the Judicial Library that allows to check the status of implementation of the different legal instruments and the declarations made by the Member States on them; the Compendium that provides support for drafting requests for judicial cooperation'; the report 'Criminal detention conditions in the European Union: rules and reality', which outlines selected minimum criminal detention standards at the international and European level, such as the size of the premises, sanitation (access to toilet and bathroom facilities), length of stay of detainees outside, etc.) and reports from various institutions in Europe concerning these conditions, and how they transposed into national law.

EJN has also a secure telecommunication system that can be used in criminal matters including for the transmission of. European arrest warrants.

In one report, it was recommended that templates to be used in the implementation of legal instruments of judicial cooperation, could, like those for the EAW, be translated into all EU languages and made available on the EJN website.

Based on the outcome of the 9th evaluation round, the overall general knowledge by the competent national authorities about the competence of Eurojust and European Judicial Network (henceforth 'EJN') in the field of judicial cooperation and of the possibilities they offer, is of a rather good level and the assistance they provide is generally assessed as valuable and necessary by Member States' practitioners. Eurojust and EJN are considered the most efficient channels of communication in related cross-border proceedings and generally reported to be very effective, as they contribute to strengthening cooperation and mutual trust among judicial authorities of different Member States. Only a limited number of Member States do not involve Eurojust and EJN in cross-border cases related to mutual recognition procedures as much as they could, in order to expedite proceedings.

RECOMMENDATIONS

- ***Member States are encouraged to promote awareness and use of Eurojust and EJN assistance and the tools they offer to the best possible extent it, taking into account the added value they can provide in order to overcome difficulties in the issuing and execution of EU mutual recognition instruments and, more generally, to improve the effectiveness of judicial cooperation with other EU Member States.***

- ***EJN, in cooperation with the Member States, is invited to ensure a regular update of its website, that is an essential and valuable central resource, and in particular of the contact points and details in the Atlas, in order to properly ensure the identification by Member States' practitioners of the competent authorities of other Member States in cross-border cases involving EU mutual recognition instruments.***