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NOTE

From: Presidency
To: Delegations

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

Delegations will find attached a paper by the Presidency addressing four issues regarding Council Framework Decision 2008/909/JHA on custodial sentences.

Presidency Paper

Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union had to be implemented by 5 December 2011. Only one Member State has not complied with this requirement yet.

This Framework Decision replaces the corresponding provisions of the widely and internationally accepted Convention on the Transfer of Sentenced Persons of 21 March 1983 and the Additional Protocol of 18 December 1997, which created a legal basis for the transfer of prisoners to the country of their citizenship against their will.

The application of the Framework Decision has already been discussed in various forums, especially in meetings of the EJM and at EuroPris.

The Presidency wants to open a discussion on the practical problems arising in the application of this Framework Decision in relation to the following issues:

1. Time limits

Article 12(2) reads as follows:

'Unless a ground for postponement exists under Article 11 or Article 23(3), the final decision on the recognition of the judgment and the enforcement of the sentence shall be taken within a period of 90 days of receipt of the judgment and the certificate.'

Even without specific statistics, it seems that recognition within 90 days is the exception. There are lengthy proceedings, especially in cases where the prisoner explicitly opposes his or her transfer. Therefore, the reasons for these lengthy proceedings should be analysed.

If the delays are due to practical issues, best practices could be discussed and developed to reduce the length of proceedings.

2. Continuing enforcement of two or more sentences

Point (h) of Article 9(1) reads as follows:

'The competent authority of the executing State may refuse to recognise the judgment and enforce the sentence, if:

(h) at the time the judgment was received by the competent authority of the executing State, less than six months of the sentence remain to be served'.

The enforcement of two or more sentences occurs where a court revokes a conditional release or a conditional sentence without including the revoked sentences in the new judgment and new sentence. Furthermore, criminal activities of a sentenced person in the prison facility could lead to an additional sentence. In these cases, it is very likely that less than six months have to be served before or after a long-term sentence.

Point (h) of Article 9(1) is an optional ground for non-recognition.

It should be discussed whether or not in these scenarios (where one certificate complies with point (h) of Article 9(1) because of a long-term sentence but the other certificates do not because a conditional sentence or release has been revoked) Member States can accept certificates concerning the enforcement of less than six months, leading to the result that the two certificates are treated as one continued penalty adding together the length of the two parts of the inflicted penalty.

3. Translations

Article 23 reads as follow:

'(1) The certificate shall be translated into the official language or one of the official languages of the executing State. [...]

(2) Subject to paragraph 3, no translation of the judgment shall be required.

(3) Any Member State may, on adoption of this Framework Decision or later, in a declaration deposited with the General Secretariat of the Council state that it, as an executing State, may without delay after receiving the judgment and the certificate, request, in cases where it finds the content of the certificate insufficient to decide on the enforcement of the sentence, that the judgment or essential parts of it be accompanied by a translation into the official language or one of the official languages of the executing State or into one or more other official languages of the Institutions of the European Union. Such a request shall be made, after consultation, where necessary, to indicate the essential parts of the judgments to be translated, between the competent authorities of the issuing and the executing States. [...]'

At least 15 Member States have made a declaration under Article 23(3). Some declarations are fully in line with Article 23(3) because they have the same wording and requirements. Other declarations seem to require a translation of the judgment in all cases. Based on these declarations, some Member States require a translation of the judgment in every case.

In the view of the Presidency, there should be specific reasons for requesting the translation of the whole judgment. The executing State should indicate why translation of the whole judgment (verdict and reasons) is required in addition to the content of the certificate. The Presidency is of the opinion that Article 23(3) does not justify a request for translation in each and every case.

4. Non-recognition based on lack of social rehabilitation

Recitals (9) and (10) read as follows:

'Enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation of the sentenced person. [...] Provisions of Articles 4(4) and 6(3) do not constitute a ground for refusal on social rehabilitation.'

It seems that some Member States have problems in accepting and enforcing foreign sentences based only on the citizenship of the convicted person and a deportation order, in particular in cases where that person did not have permanent residence in the executing State in recent years.

Especially where the sentenced person has already served sentences in other Member States or abroad or lived in other States only for a specific period of time, other requirements of Article 4(7) are not fulfilled. It becomes more problematic where the sentenced person strongly opposes his or her transfer. Non-recognition and non-enforcement decisions are based on a lack of jurisdiction (because the person did not have residence) and on a lack of social rehabilitation, because the person is linked to the executing State only by citizenship.

It is undisputed that social rehabilitation and successful reintegration of the sentenced person into society are difficult in both the issuing and the executing State, but a lack of social rehabilitation is still not a ground for refusal. The criteria exclusively follow point (b) of Article 4(1) without room for consultation under Article 4(4).

Delegations are invited to share their views on the four issues mentioned above.