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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	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, the Coordinating Committee in the area of police and judicial cooperation in criminal matters ('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 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 summarising and analysing the outcome of the 9th round of mutual evaluations, 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.

At its meeting on 16 February 2023, CATS endorsed the abovementioned report. Coreper/Council is informed of the results of the 9th round of mutual evaluations as included in the final report set out in the Annex.

In accordance with Article 8(4) of the abovementioned Joint Action, the final report will also be forwarded to the European Parliament for information.

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

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1. EXECUTIVE SUMMARY

The ninth round of mutual evaluations was dedicated to four mutual recognition instruments in the field of judicial cooperation in criminal matters, relating to deprivation or restriction of liberty. The final report contains key recommendations addressed to the Member States and to EU institutions and agencies, aiming to further enhance application of the instruments on which the evaluations focused. No particular need for legislation at EU level was highlighted during the round.

Judicial cooperation among Member States based on **Framework Decision 2002/584/JHA on the European arrest warrant (EAW)** and **Framework Decision 2008/909/JHA on custodial sentences** works well in practice. However, there is room for development in some key areas. The functional relationship and complementarity between these two instruments being quite complex, the recommendations addressing this specific connection are aiming for more clarity across the EU.

Framework Decision 2002/584/JHA on the EAW was the subject of the fourth round of mutual evaluations, with the final report adopted in 2009[1]. Considering the importance and frequent use of this instrument, as well as the steadily increasing number of requests for preliminary rulings to the CJEU, some key topics were chosen to be the subject of the evaluation at hand.

Regarding the grounds for refusal, the evaluation showed that, in several Member States, some grounds for non-execution which are optional in the Framework Decision are mandatory in national legislation. This approach reduces the number of EAWs actually executed and impedes the proper functioning of judicial cooperation in criminal matters based on mutual trust.

In line with the relevant case-law of the CJEU relating to the EAW (Judgment C-665/20 PPU of 29 April 2021), the executing judicial authority must itself have a margin of discretion as to whether or not it is appropriate to execute the EAW on the grounds for optional non-execution. Following the initiation of infringement proceedings, some Member States are currently reviewing their legislation, including the provisions on grounds for refusal.

[1] ST 8302/4/2009

Regarding the recurring issues concerning the application of the proportionality principle, it is worth noting that a significant improvement could be observed compared to the findings of the fourth round of mutual evaluations. However, in a few Member States, proportionality is still assessed by executing authorities. This approach may result in the creation of a new ground for refusal to surrender that is not in line with Framework Decision 2002/584/JHA and conflicts with the principles of mutual recognition and mutual trust.

In most Member States, the executing authorities, following CJEU case-law[2], carry out a specific assessment of the risk of inhuman or degrading treatment. Since Member States do not apply the abovementioned CJEU case-law in a uniform or consistent manner, several evaluation teams pointed to a need to clarify the relevant CJEU jurisprudence at EU level. The evaluations also showed that the Member States affected by issues relating to detention conditions, including overcrowding, have taken or are considering initiatives to improve the situation. In the context of the evaluations, it was emphasised that in cases where surrender procedures are suspended or halted because of the *Aranyosi and Căldăraru* two-step test on detention conditions, efforts should be made by the competent Member States' authorities to avoid impunity.

In the case of **Framework Decision 2008/909/JHA on custodial sentences,** among other aspects, the assessment of social rehabilitation was analysed, since this should be one of the aims of the mechanism. Yet this interest needs to be balanced with the justice system's interest in effectively enforcing the penalty within one Member State.

The evaluations also showed that in the majority of Member States the issue of partial recognition and adaptation of the sentence does not raise major challenges in the application of this Framework Decision. However, difficulties stem from the differences between legal systems, such as: the incompatibility of some measures with the law of the executing Member State; the different criteria and methods used by each Member State to calculate the final sentence; and the application of the principle of aggregation of penalties imposed. It has to be underlined that several Member Sates experience difficulties in complying with the deadlines set out in this Framework Decision, and Member States should therefore make efforts to speed up their decision-making process.

[2] C-404/15 *Aranyosi and Căldăraru*, C-220/18 *ML* and C-128/18 *Dorobantu*

The ninth round of mutual evaluations confirmed that there is a significant lack of application of **Framework Decisions 2008/947/JHA and 2009/829/JHA,** concerning non-custodial measures respectively in the post-trial and pre-trial stages of criminal proceedings. Several common reasons were identified: lack of awareness and knowledge among practitioners, complexity and length of the proceedings, and the low number of cases with cross-border implications. More specifically, the scant use of **Framework Decision 2008/947/JHA** is due primarily to the significant differences between national systems regarding the nature and duration of the applicable probation and alternative measures. For **Framework Decision 2009/829/JHA**, the infrequent application is usually linked to the difficulty in identifying cases where it would be effective and appropriate to issue a European Supervision Order, as it does not necessary fit the purposes of the criminal procedure. The recommendations aim at raising awareness of these two Framework Decisions, and at providing guidance and tools for practitioners on their application, with a view to promoting and enhancing their respective use.

Cooperation with Eurojust and the European Judicial Network in criminal matters (EJN) can significantly contribute to effective judicial cooperation in criminal matters across the EU, especially in complex cases with cross-border implications or when information is needed to identify the competent authorities or the applicable rules in other Member States. However, the ninth round of mutual evaluations showed that more extensive use of assistance provided by Eurojust and by the EJN across all the Member States would significantly contribute to resolving cases more easily and speedily and could lead to further enhancing cross-border judicial cooperation in the EU.

2. 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 national transposition and the practical application of the Framework Decision 2002/584/JHA, 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 of December 2019 on alternative measures to detention, 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 of mutual recognition to decisions on supervision measures as an alternative to provisional detention ('ESO').

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

Referring to Framework Decision 2008/947/JHA on probation and alternative measures and Framework Decision 2009/829/JHA on the European Supervision Order (ESO), it was decided that the evaluation had to be of a rather general nature and should endeavour to establish the reasons that have led to those two Framework Decisions being applied only infrequently.

Due 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 finalisation of the ninth round of evaluations. The on-the-spot visits that began in November 2019 were therefore only concluded in April 2022. In accordance with Article 3 of Joint Action 97/827/JHA of 5 December 1997, the Presidency drew up a list of experts for the evaluations to be carried out, based on the designation by the Member States of experts with substantial practical knowledge in the area covered by 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, on several occasions, by observers (from the European Commission and Eurojust).

The aim of the ninth round of mutual evaluations was 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 report, prepared by the General Secretariat of the Council on behalf of the Presidency, summarises 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 this round of mutual evaluations that can be shared among Member States, with a view to ensuring 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 to realise its full potential and to enhance mutual trust between Member States' judicial authorities, thus improving the functioning of cross-border judicial cooperation in criminal matters within the area of freedom, security and justice.

3. FRAMEWORK DECISION 2002/584/JHA

3.1 Proportionality

The principle of proportionality, a key factor for effective cooperation in the area of freedom, security and justice, is a general principle of criminal law that is not explicitly mentioned in the legislation of all Member States: in some, it derives 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 principle of proportionality involves balancing any intervention in the rights of an individual in the context of criminal proceedings against the interests of society in detecting and apprehending perpetrators of a criminal offence. In practice, it requires that detention should be limited to cases 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 on 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.

The principle of proportionality is well established in the EU legal system, in the case-law of the Court of Justice of the European Union and the European Court of Human Rights, and in Member States' national legislation. Nevertheless, Article 2(1) of Framework Decision 2002/584/JHA only establishes thresholds for issuing a European arrest warrant. 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 articulated 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: the seriousness of the offence, the penalty that is likely to be imposed, the likelihood of the person being detained after surrender, and the interests of the victim.

Most Member States, when acting as issuing Member State, consider whether, instead of issuing an EAW, it is possible to use other instruments of judicial cooperation in criminal matters which are also effective but less coercive, especially if the surrender is requested for the purpose of hearing the suspect/accused person during the investigation and not yet for his or her prosecution or for the enforcement of a custodial sentence In this case, a European Investigation Order (EIO) for the purposes of hearing the suspect/accused via videoconference or of a temporary transfer could be issued. This plays a key role in avoiding the misuse of the EAW in cases where less invasive options are available to ensure that an accused person located abroad will participate in criminal proceedings in the issuing Member State and detention is not absolutely necessary.

In the absence of a legal definition in Framework Decision 2002/584/JHA and of a single model for all jurisdictions, Member States apply the proportionality principle in different ways, and the criteria used in practice to assess the proportionality of EAWs are not the same in all 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 interests of the victim, the expected punishment, the age and behaviour of the person concerned and other circumstances of the case, etc. In one evaluation report, another aspect of proportionality is emphasised, 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.

As outlined in a number of evaluation reports in the ninth round, the proportionality check should be carried out exclusively by the issuing State. Indeed, almost no Member States 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 also assess proportionality when acting as executing authorities, and in certain cases, if they believe it is not justified by the seriousness of the offence, suggest that the EAW should be withdrawn or refuse its execution.

Nevertheless, these Member States very rarely make such assessments. As emphasised in the respective reports, this approach may result in the creation of a new ground for refusal to surrender that is not in line with Framework Decision 2002/584/JHA and also goes against the principles of mutual recognition and mutual trust.

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

It must also be taken into account that Ireland and Denmark are 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 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union.

Against this background, a significant improvement could be observed when compared to the findings of the fourth round of mutual evaluations where proportionality was a serious issue. Now, in most Member States the principle of proportionality is implemented satisfactorily. The approach of a few Member States in this respect was identified as a best practice and only a few Member States were encouraged 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 less intrusive instruments of judicial cooperation.***

– ***Member States are advised 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 to execute the EAW.***

3.2. Judgments in absentia

Framework Decision 2009/299/JHA, which amends Framework Decision 2002/584/JHA with, *inter alia*, the insertion of Article 4a, provides for an optional ground of refusal for judgments rendered *in absentia*, as well as for four exceptions under which an EAW may not be refused, as the requested person is presumed to have been aware of the trial.

In some Member States, national legislation does not allow for *in absentia* judgments or submits them to certain conditions, limiting the possibility of issuing this type of judgment 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 ninth round of mutual evaluations demonstrated that this does not seem to be an obstacle in the application of Article 4a of Framework Decision 2002/584/JHA.

In addition, 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 actually personally receives the summons and is aware of the trial.

For the majority of Member States, the ninth round of mutual evaluations did not highlight any major problems regarding judgments *in absentia.* However, there are some recurrent difficulties arising in most Member States, associated with:

a) the use and interpretation of section (d) of the EAW form, namely the use of the version prior to the entry into force of Framework Decision 2009/299/JHA, or incorrect, incomplete or contradictory information in the current version of the EAW 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 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 Member States regarding the service of judgments and summons for judicial proceedings may complicate the recognition process. Some Member States' practitioners and also some evaluation teams expressed the view that it would be useful to establish common practices at EU level on the handling of judgments *in absentia* in the context of EAW proceedings;

c) the differences in the transposition of Framework Decision 2009/299/JHA in the Member States 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 Article 4a of Framework Decision 2002/584/JHA provides for an optional ground for refusal.

In the light of the above, the executing authorities often request additional information from 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 details regarding the requested person's presence at the criminal proceedings. Such details are: the way the person was summoned, whether the person was present at the hearing, whether the person was represented by a defence lawyer, whether the judgment rendered *in absentia* had become final, and the right to a retrial. A few Member States also request the relevant national decisions from the issuing State.

As pointed out by some Member States' authorities, after the adoption of Framework Decision 2009/299/JHA, and especially after the *Tupikas*[3], *Zdziaszek*[4] and *Ardic*[5] judgments of the Court of Justice of the European Union**,** 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 failure to comply with the time-limits set out in Article 17 of Framework Decision 2002/584/JHA or for an increase in the number of refusals of EAWs.

Some refusals, in line with CJEU case-law, seem to occur in cases where the national legislation of the issuing Member State does not allow for a retrial. Taking into account the different interpretations of the abovementioned case-law, some reports observed that guidance at EU level would be useful with a view to a harmonised approach.

Indeed, such requests for supplementary information may be time-consuming and lead to delays in the procedure and/or in failure to comply with 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 were more extensive and precise, and available from the very beginning, so as to avoid the need to request additional information.

The situation may be more complex where the final decision follows proceedings which have been through several instances and the person was not present at each stage of the criminal judicial proceedings. In the light of the abovementioned CJEU 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 have adapted their legislation in order to comply with these judgments, whereas the need for other Member States to do so was emphasised in the respective evaluation reports.

[3] Judgment of 10 August 2017, *Openbaar Ministerie* v *Tadas Tupikas*, C-270/17 PPU, EU:C:2017:628.
[4] Judgment of 10 August 2017, *Openbaar Ministerie v Sławomir Andrzej Zdziaszek*, C-271/17 PPU, EU:C:2017:629.
[5] 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 section (d) of the EAW form whenever Article 4a of Framework Decision 2002/584/JHA applies as a result of judgments rendered in the absence of the defendant, in particular regarding the national system for trials* in absentia *and the manner in which the requested person was made aware of the trial.***

– ***The European Commission is invited to consider issuing guidelines on how to deal with judgments in absentia, focusing on the interpretation and application of Article 4a of Framework Decision 2002/584/JHA across the Union, in line with relevant CJEU case-law, following, as appropriate, relevant discussions in the competent Council bodies.***

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

3.3. Grounds for refusal

3.3.1. Optional and mandatory grounds for refusal

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

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

Some expert teams involved in the evaluations, in line with the fourth evaluation round on the EAW, criticised 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 are considered to be optional in the Framework Decision. They underlined that, in line with the relevant case-law of the CJEU related to the EAW (Judgment C-665/20 PPU of 29 April 2021), 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, nonetheless, 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 Framework Decision 2002/584/JHA as regards mandatory and optional grounds for refusal and thus should be consistent across the EU.

In a few Member States, national legislation provides for a ground for refusal not specified in Framework Decision 2002/584/JHA, where fundamental rights as enshrined in Article 6 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 their 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 subject it to certain conditions (such as the consent of the requested person or a guarantee of return by the issuing Member State) beyond those laid down in Framework Decision 2002/584/JHA. In such cases, the expert teams recommended that these Member States reconsider this possibility, believing that in such cases the national legislation is not in line with Framework Decision 2002/584/JHA.

The evaluation teams observed that this approach extends the scope of Framework Decision 2002/584/JHA, reduces 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 CJEU case-law, which states that the executing judicial authorities may, in principle, refuse to execute such an EAW only on the grounds for non-execution exhaustively listed by the EAW Framework Decision. Accordingly, while execution of the EAW is the rule, refusal to execute it is intended to be an exception, which must be interpreted very strictly (C-354/20 PPU and C-412/20 PPU).

In one Member State, nationality is a mandatory ground for refusal to execute an EAW issued to enforce a custodial sentence, whereas residence is an optional ground for refusal, thus treating citizens and residents differently. The evaluation team found this to be inconsistent with Article 4(6) of Framework Decision 2002/584/JHA, which provides that both nationality and residence are optional grounds for non-execution. It has to be underlined that in some Member States there is ongoing legislation including but not limited to grounds for refusal, following the initiation of infringement procedures.

3.3.2 Double criminality

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

The most common offences leading to refusal of surrender due to a lack of double criminality are petty crimes, drug and traffic offences, abduction of minors, etc. Whereas some Member States stated that 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 a recurring problem.

The information therein is often deemed to be insufficient to establish whether the act constitutes a criminal offence according to the national legislation of the executing Member State. The executing authorities have to determine whether the essential features of the criminal offence exist under national legislation and would be punishable by a criminal penalty if it occurred in their territory. If so, they should 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 specific provision of their national criminal law.

However, relevant information (detailed description of the constituent elements of the alleged 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 abovementioned elements, when a double criminality check is required, additional information may be requested by the executing authorities pursuant to Article 15 of Framework Decision 2002/584/JHA in order to facilitate the decision on the surrender.

Obviously, a more concise description of the facts is sufficient in the case of the 32 offences under Article 2 of Framework Decision 2002/584/JHA that are not subject to a verification of double criminality. One Member State, however, has reported that some executing Member States still check double criminality, even in case of a so called "list offence", which is not in line with Framework Decision 2002/584/JHA.

Issues linked to a lack of sufficient information can also arise and cause complications where the case involves a number of alternative offences. There may be no 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 that relate to other offences. In such situations, the executing authorities ask the issuing State whether the sentence can be split. If this is not accepted, surrender is refused.

In order to ensure that the case is easily understood 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 complete the EAW form, including section (e) on how to describe the crime in detail. This way, the executing authority gets a clear picture of the facts and is able, if necessary, to easily assess double criminality and any *ne bis in idem* situations (see the following sub-chapter).

Nevertheless, according to some practitioners, the number of EAWs refused on the basis of double criminality is relatively low, which suggests that the supply of additional information usually solves the problems, although it may be a delaying factor for the EAW proceedings.

Some Member States pointed out that Eurojust or the relevant EJN contact point can also assist in ascertaining double criminality.

One Member State's authorities pointed out that Member States seem to apply different practices as regards the link between the check on double criminality and a check on statutory limitation; in some Member States, the former does not involve verifying whether the limitation period for enforcement under the law of the executing Member State has expired, in accordance with Article 4(4) of Framework Decision 2002/584/JHA.

One Member State's authorities pointed out that some Member States examine double criminality by assessing the merits of the case through a full application of the specific parameters of their national legislation and underlined that this practice could weaken mutual trust and negatively influence judicial cooperation across the EU.

3.3.3. Ne bis in idem principle

According to some practitioners, the number of EAWs denied on the basis of the *ne bis in idem* principle, laid down in Article 3(2) of Framework Decision 2002/584/JHA as a mandatory ground for refusal, appears to be quite low, with even fewer refusals than in the case of double criminality.

In most Member States, no major difficulties have been experienced by the judicial authorities as regards the *ne bis in idem* principle. However, one possible issue 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 Framework Decision 2002/584/JHA, to the CJEU ruling in C-261/09, (Mantello) and C-665/20 PPU (X - Mandat d'arrêt européen - Ne bis in idem) 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 has been made. Indeed, in some cases, the executing authorities have to ask for additional information concerning the description of the facts (nature, date, place, etc.), in order to assess whether or not the *ne bis in idem* principle should be applied to the relevant case. Nevertheless, as for double criminality, in these cases it seems that the additional information requested usually solves the problems encountered by the executing authorities.

RECOMMENDATIONS

– ***Member States should ensure that grounds for refusal which are laid down as optional in Framework Decision 2002/584/JHA are not defined as mandatory in the implementing legislation. Furthermore, no grounds for refusal other than those provided for in the abovementioned Framework Decision should be established, in line with the CJEU's relevant case-law.***

– ***Member States are encouraged to ensure that, when completing section (e) of the EAW form, their competent issuing authorities provide for the factual description of the offence in detail and in clear language, so as to facilitate the assessment of possible grounds for non-recognition and non-enforcement based on double criminality and ne bis in 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 the verification of double criminality is not required.***

3.4 Detention conditions

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

Nevertheless, taking into account that 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 play a major role in the context of EAW proceedings.

Therefore, from the perspective of and within the boundaries set by CJEU case-law (C- 404/15 *Aranyosi and Căldăraru*, CJEU C-220/18 ML and C-128/18 *Dorobantu*), in most Member States, the executing authorities 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 for specific groups of prisoners. Such information may be based on: judgments handed down by the ECHR[6] and the CJEU; decisions or reports issued by international organisations (the UN and the Council of Europe (in particular the European Committee for the Prevention of Torture and Inhuman 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 Member State.

- [6] *Muršić v. Croatia; Sylla and Nollomont v. Belgium; Torreggiani and Others v. Italy*; *Bivolaru and Moldovan v. France*, etc.

In some reports, it is indicated that the competent executing authorities may also rely on information received through various EU networks/agencies (the European Judicial Network, Eurojust and the Fundamental Rights Agency (FRA), etc.) and on specific tools, in particular the recently updated FRA Criminal Detention Database, which is expected to become a very useful tool for judicial authorities when faced with issues concerning detention conditions, and the FRA report 'Criminal detention conditions in the European Union: rules and reality', which outlines selected minimum criminal detention standards.

The elements to be taken into account by the national judicial authorities as regards detention conditions have been defined by the CJEU in its judgment in *Dorobantu* (C- 128/18) and refer to certain physical aspects of prison facilities in accordance with the standards set out by the ECHR. The Member States also take into consideration various factors, such as activities 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.

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.

Considerations related to detention conditions may lead to delays in the EAW proceedings, especially if the competent issuing authority does not have sufficient information to reply within a reasonable time. This can be the case when competence is decentralised and there is a need to ask the Ministry of Justice or prisons administration in the issuing State for more information. 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.

It has to be underlined that Member States do not apply the abovementioned CJEU case-law on the basis of a uniform interpretation and approach. Most Member States assess *ex officio* if there are reasonable indications for inhuman or degrading detention conditions, regardless of whether the person concerned consents to the surrender or not. In one report, reference is made by the Member State under evaluation to the rights enshrined in Article 6 of the ECHR. Other Member States assess detention conditions in the issuing State only if the issue is raised by the sentenced person or their defence lawyer and/or if the person has given their consent to the surrender. Several evaluation teams pointed to a need at EU level to clarify the CJEU 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 issuing authorities, had never been 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, in particular to overcrowding. The evaluations, however, showed 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.

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

It also has to be underlined that, in accordance with the relevant CJEU case-law, there is no scope for the executing State to grant more extensive fundamental rights to the person sought than those provided by EU law.

RECOMMENDATIONS

- ***Member States, when acting as an executing State for an EAW, should ensure that their judges and prosecutors involved in EAW proceedings take the initiative, where appropriate, to evaluate the detention conditions in the issuing Member State, in accordance with the relevant CJEU case-law, and not only when this is requested by the person sought (or by their lawyer) and irrespective of their consent.***

- ***Member States as executing authorities in EAW proceedings should take into account the CJEU case-law, in accordance with the ECHR standards, when considering the prison conditions which might pose a risk of inhuman or degrading treatment, in order to avoid higher national standards giving rise to refusal to surrender.***

3.5 Issues linked to translation

Some Member States accept EAWs only in their own official language. Practice shows, however, that it can sometimes be challenging to provide an EAW translated into the language of the executing State during the provisional arrest, especially in Member States which have strict time-limits, as it may be difficult to find a translator within this short time frame. Failure by the issuing State to produce a translation within the time-limit may result in the termination of the EAW proceedings and lead to the release of the person sought, unless the court chooses to translate the EAW at its own expense.

Pursuant to Article 8(2) of 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 own. This is a new approach, which is also followed in the latest EU criminal law instruments, such as the EIO Directive or the Regulation on freezing and confiscation orders, where the Member States are encouraged to accept documents in more than one language.

Some Member States stated that, when acting as executing State, they accept a translation of an EAW in a language other than their own in urgent cases or on condition of reciprocity. In the latter case, an executing Member State may recognise EAWs in any official language of any issuing State which recognises EAWs in the official language of said executing Member State. Some expert teams considered this possibility to be a best practice.

A flexible language regime, and the open attitude displayed by those Member States that accept EAWs in a language other than their own, is considered to be a good practice worth being applied more widely among the Member States, as it has the great advantage of speeding up EAW proceedings.

A number of Member States, when acting as issuing State, 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 into the official language of the executing Member State are sometimes of poor quality. Nonetheless, the EAW must then be translated into the language of the criminal procedure before the case can be brought before a court.

When exchanging information, some Member States make or reply to requests for additional information about EAWs in their own language. In such cases the request for additional information must be translated, and this can delay the EAW proceedings.

Some Member States pointed out that problems can arise when asking for additional information when certain Member States do not frequently use languages that are widely understood. A few Member States do not contact the authorities of the other Member States directly, but go through their central authorities, due to not feeling comfortable using certain languages. Other Member States stated that communication between the issuing and executing authorities could also take place in a language other than the respective Member States' official language, and English is generally used in these cases.

RECOMMENDATION

– ***When acting as executing States, Member States are encouraged to consider a flexible approach to language requirements and make greater use of Article 8(2) of Framework Decision 2002/584/JHA, with a view to accepting EAWs in languages other than their official language.***

3.6 Deadlines

The time-limits provided for in Article 17 of that Framework Decision 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.

Where additional information is necessary to enable the competent executing authorities to decide on the surrender, the missing information is requested by the executing judicial authority on the basis of Article 15(2) of Framework Decision 2002/584/JHA. A deadline is usually set for the receipt thereof, taking into account the need to observe the time-limits provided for in Article 17 of that Framework Decision.

Nevertheless, in some Member States, the processing of EAWs requires a great deal of time due to the process of examining the information relating to an EAW, 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*, mainly due 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 Framework Decision 2002/584/JHA are frequently exceeded. In some reports, it was 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 lead to the judicial authority's ultimate refusal to execute the EAW.

In many cases of delay, the executing Member State provides information regarding the reasons for the delay. Several Member States stated that, as executing authorities, if they do not receive an answer after several reminders, they contact the relevant EJN contact point and, in urgent or more complex cases, their national member of Eurojust, to assist them in getting the required information.

As indicated in some reports, the information regarding a delay and the estimated time needed to make the decision on the execution of the EAW is rarely provided spontaneously to the issuing State. 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 reasons for the delay.

In some reports it was emphasised that it is important to strike a balance between, on the one hand, the need for the prompt execution of the EAW and the thoroughness of the examinations performed by the executing authorities, and, on the other hand, the need to give the issuing authority sufficient time to respond to the request, including a possible appeal process.

As observed in one evaluation report, the EAW procedings could be improved if cooperation between Member States were streamlined in terms of the provision of supplementary information relevant to the decision, which would speed up the decision-making process and facilitate compliance with the deadlines set out in Article 17 of Framework Decision 2002/584/JHA.

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

In cases of non-compliance with the deadlines laid down in Article 17 of Framework Decision 2002/584/JHA, only some Member States notify Eurojust of non- compliance with the time-limits and the reasons for the delay. It also has to be underlined that there is an additional obligation in case of repeated non-compliance under Article 17(7): a Member State which has experienced repeated delays on the part of another Member State in the execution of EAW is required to inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.

RECOMMENDATIONS

– ***Both when acting as issuing and executing State, Member States should make the best possible efforts in their decision-making process and relevant proceedings to ensure compliance with the deadlines laid down in Framework Decisions 2002/584/JHA, despite the complexity of the procedures. For this purpose, when acting as issuing State, it is recommended that Member States provide supplementary information requested in due time, so as to avoid unnecessary delays.***

– ***When acting as executing Member State under Framework Decisions 2002/584/JHA, it is recommended that Member States inform the issuing judicial authority and Eurojust when the request cannot be executed within the time-limits.***

4. FRAMEWORK DECISION 2008/909/JHA

4.1. Grounds for refusal

In several Member States all or some of the grounds for non-recognition and non-enforcement provided for by Article 9 of Framework Decision 2008/909/JHA have been transposed as mandatory, although in the Framework Decision itself all these grounds are optional. The same considerations expressed regarding Framework Decision 2002/584/JHA also apply to Framework Decision 2008/909/JHA.

In most Member States, the most recurrent grounds for the non-recognition or non-enforcement of other Member States' judgments under Framework Decision 2008/909/JHA are the lack of double criminality; judgments rendered *in absentia* ; and a length of sentence remaining to be served of less than six months. Other frequently applied grounds for refusal are: no duly completed certificate has been provided by the issuing authority; the sentenced person is not a national of the executing State; the facilitation of social rehabilitation has not been established due to the absence of a link to the executing State; the enforcement of the sentence is statute-barred. Other grounds for non-recognition or non-enforcement are more rarely used.

4.2 Issues linked to detention conditions

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

However, the evaluations showed that, in practice, cases in which a transfer under the Framework Decision 2008/909/JHA is not finalised or initiated due to unsatisfactory prison conditions in the executing State are quite rare.

4.3 Assessment of social rehabilitation

Pursuant to recital 9 and Article 4(2) of 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 successful reintegration of the sentenced person. This assessment is a key aspect in the context of proceedings under Framework Decision 2008/909/JHA, as it allows 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 sufficient weight by the issuing authorities when deciding whether to request the transfer of enforcement of the sentence to another Member State, and by the executing authorities when deciding whether or not to accept such a 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. In their opinion, 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 their sentence in another Member State.

Framework Decision 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 transfer will 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 limited to merely establishing a geographical connection, but needs to be based on a thorough case-by-case evaluation.

The ninth round of mutual evaluations has demonstrated that the majority of Member States' authorities carefully assess the prospects of the sentenced person's social rehabilitation in the event of a transfer to another Member State to serve the sentence, using, to a certain extent, similar criteria, although the full range of parameters used may vary. Although in most cases social rehabilitation is likely to be facilitated by a transfer to the Member State of origin, in order to ensure that this is indeed the case, an overall case-by-case assessment may be necessary.

This refers to several factors and circumstances of the individual person's situation, on the basis of which a reasonable conclusion may be drawn as to whether a transfer is appropriate in the light of the social rehabilitation criterion. In most 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, their financial situation, the language they speak, whether they have a job in the executing Member State, and the availability of accommodation.

In a few Member States, the competent authorities refer to other criteria, such as the location of the centre of vital interests, health considerations, the length of sentence remaining to be served and the possibility of early release, etc. The opinion of the sentenced person usually also carries significant weight with respect to the final decision on the transfer of the sentence.

The information included in the national file or in the certificate may be insufficient to establish whether the sentence would serve the purpose of facilitating social rehabilitation and the successful reintegration of the sentenced person into society and additional information may therefore be needed, in particular to ascertain the person's links with the Member State to which they are 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 only a few do so on a regular basis. Other Member States consult the executing State only in very specific cases, such as where consultation or previous consent is needed.

Although such consultation is not mandatory, except for cases referred to in paragraph 1(c) of Article 4 of Framework Decision 2008/909/JHA, some expert teams 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 to decide whether or not to issue a certificate under Framework Decision 2008/909/JHA. This also facilitates 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.

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 Framework Decision 2008/909, may be issued by the executing authorities and sent to the issuing authorities. However, the ninth round of mutual evaluations has highlighted that such opinions are not issued very frequently. It should also be pointed out 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 State, 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 actual prospects of social rehabilitation for the sentenced person eligible for a transfer under Framework Decision 2008/909/JHA.***

4.4. Information, opinion and consent to the transfer of the sentenced person

Proceedings to forward the judgment and the certificate to another Member State under Framework Decision 2008/909/JHA may be initiated *ex officio* by the issuing State, or at the request of the executing State or the sentenced person. However, a few Member States do not initiate such proceedings if the sentenced person or the executing State do not request that they 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 Framework Decision 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 it is possible to seek recognition and enforcement of a custodial sentence even at as early a stage as the hearing of the suspect, or even when preparing the hearing; this was considered useful by the expert team. They expressed the view that this practice could be adopted in other Member States, so that from an early stage of the proceedings and in the presence of a lawyer, who can explain the possibilities offered by Framework Decision 2008/909/JHA and the judicial authorities, and, if necessary, of an interpreter, the suspect can come to a more reasoned decision as to whether they would benefit from a transfer.

4.4.1. The situation in the issuing Member State

The evaluations have highlighted that sentenced persons who are nationals of 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 their State of nationality or habitual residence or in another Member State. Therefore, in most Member States during Framework Decision 2008/909/JHA-related proceedings, when in custody, the person concerned is informed about the possibility of a transfer to another Member State, the procedures to be followed for this purpose and the legal implications of such a transfer, such as the speciality rule.

In most Member States this is done in a written form, by means of a form or leaflet which, however, is very often not available in all EU official languages. As outlined in several reports, this would be advisable in order to ensure that the person concerned can understand the relevant information. In one Member State, where written information is not provided to the prisoners, but they are informed only orally, the evaluation team emphasised that this is not sufficient and that all prisoners should be informed in writing about the possibility to serve the sentence in another Member State and about the relevant procedure for the transfer.

For the same purpose, it was also emphasised that, as prisoners are not usually familiar with procedural law, it should be ensured that such information is clear and accessible, as this would enhance the prisoner's understanding of the possibilities offered by Framework Decision 2008/909/JHA. One evaluation team suggested 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 Framework Decision 2008/909/JHA, the procedure to be followed by the issuing Member State requires that, in all cases where the sentenced person is still in their territory and there is a final judgment, the person shall also be given the opportunity to state whether or not they agree to the transfer, even if their consent is not required. The procedure to allow the sentenced person to state their opinion varies between Member States and can be in written and/or oral form; however, if the opinion of the sentenced person is given orally, a written record is usually made. One report noted 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. This opinion is usually taken into due consideration, together with other elements of the case and the legal requirements, although it is not decisive as regards the decision on the transfer.

In accordance with Article 6(1) of Framework Decision 2008/909/JHA, the sentenced person's consent must be obtained, except in the cases referred to in Article 6(2), namely if a person eligible for transfer is a citizen of a Member State to which they would be transferred, or a deportation order is to be applied, or they absconded or returned to that Member State whilst being prosecuted or sentenced in the issuing Member State. In one Member State, in cases where the sentenced person requests to start the procedure for forwarding the certificate to another Member State, it is presumed 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 Framework Decision 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 some of the reports, it was pointed out that in cases where the sentenced person is to be deported to the Member State of nationality on the basis of an expulsion or deportation order, once released from the 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 Framework Decision 2008/909/JHA, have to inform the sentenced person, in a language which they understand, of the decision to forward the judgment, together with the certificate, to the executing Member State, using the standard notification form set out in Annex II to that Framework Decision. If the sentenced person is in the executing Member State at the time of that decision, that form is transmitted to the executing Member State, which is required to notify the sentenced person accordingly.

Although Framework Decision 2008/909/JHA does not provide for legal remedies to challenge the decision on transferring the execution of the sentence, some Member States provide for such a possibility in their national law.

4.4.2. Situation in the executing Member State

When the sentenced person is not in the executing Member State, unless they have already been heard in the issuing State, the executing State most often relies on the issuing State to provide, in writing, the sentenced person's opinion and, when requested, consent to the proposed transfer. A few executing Member States, however, ask directly in writing for the sentenced person's opinion and consent.

When the sentenced person is in the executing Member State, all Member States have procedural arrangements for receiving the sentenced person's opinion and, when requested, consent to the transfer. In most Member States, the sentenced person 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 to give their opinion and, when requested, their consent. They 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 Member 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. If the person is still in the issuing State, the decision is sent to them 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.***

– ***It is recommended that all Member States ensure that the relevant information regarding a transfer in order to serve a sentence in another Member State is given to the person eligible for such a transfer in writing by means of a form or leaflet, preferably available in all EU official languages, in order for this information to be understood by the person concerned.***

4.5. Adaptation and partial recognition

The nature and length of custodial sentences varies significantly amongst 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 adaptation or the partial recognition of the sentence, as provided for in Articles 8 and 10 respectively of Framework Decision 2008/909/JHA.

Based on the outcome of the ninth round of mutual evaluations, it may be assumed that in the majority of Member States the issue of partial recognition and adaptation of the sentence does not raise any major challenges in the application of Framework Decision 2008/909/JHA or the mutual recognition principle and is not an obstacle to their facilitating role in judicial cooperation in criminal matters across the EU. However, the evaluation flagged up certain issues for consideration, as described below.

4.5.1. Adaptation

It should be noted that the system of Framework Decision 2008/909/JHA is based on the principle of mutual recognition and thus Article 8(1) of Framework Decision 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) of Framework Decision 2008/909/JHA provide for an adaptation of the sentence in two specific situations:

- in line with Article 8(2) of Framework Decision 2008/909/JHA, where the sentence is incompatible with the legal system of the executing Member State in terms of duration, because it exceeds the maximum term provided for similar offences under the law in force at the time. The executing Member State may adapt the sentence by imposing the maximum sentence applicable in its own legal system;

– in line with Article 8(3) of Framework Decision 2008/909/JHA, where the sentence is incompatible in its nature with the legal system of the executing Member State, the competent executing authority may adapt it to the punishment or measure which most closely corresponds 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 Framework Decision 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 similar situation in their own criminal law system.

Framework Decision 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'. 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 all cases, a legal analysis must be carried out in order to establish a match between the factual elements constituting the offence 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 Framework Decision 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 Framework Decision 2008/909/JHA may cause difficulties where the information pertaining to the offence contained in the certificate (section (h)) is not consistent with the judgment 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, the executing State may request additional information or a copy of the judgment from the issuing Member State.

Some evaluation reports mention that 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 at any stage of the procedure (recognising the relevant judicial decision, enforcing it or sending it for enforcement to another Member State) under Framework Decision 2008/909/JHA.

Some reports have mentioned that the adaptation of sentences imposing a psychiatric or health care requirement involving the deprivation of liberty but not constituting regular imprisonment is often problematic, as a result of differences between national systems in terms of the competent authorities, the compulsory nature of the psychiatric treatment or the duration of the confinement.

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 the different legal systems vary and their calculation methods may differ. Some Member States calculate the deprivation of liberty in years and months, whereas others calculate 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 such cases, additional information may be requested from the issuing authorities. Despite such difficulties, refusals on these grounds nevertheless remain exceptional.

Other than the issues mentioned above, most Member States did not report any further practical difficulties in this area. Indeed, some Member States had not encountered the need to adapt the sentence because its length or nature was incompatible with their own national law or had experienced such situations in only a limited number of cases. Most Member States rarely encountered cases in which certificates were withdrawn due to an excessively lenient sentence.

4.5.2. 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,. 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 ninth round of mutual evaluations has demonstrated that in most Member States, partial recognition does not occur frequently. Only a few Member States reported situations where sentences handed down by the issuing Member State had been partially recognised. Despite a lack of practical experience with this issue, practitioners seem to be aware of the procedure to be followed in accordance with Article 10 of Framework Decision 2008/909/JHA, including 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 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 some of the offences, with one or more offences not punishable in the executing State. This may in particular occur for offences (such as financial, drug, traffic offences, etc.) which in some Member States fall within the remit of the administrative authorities.

In order to assess whether partial recognition in the executing State is acceptable, or whether the certificate should be withdrawn, it is important for the issuing State to ascertain the reduction of the sentence after partial recognition. As highlighted in some reports, in rare cases, if this reduction is deemed to be significant, 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 criminalised in the executing State and it may be difficult to determine afterwards what part of the sentence was imposed for that specific offence, 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 arise, they can be resolved with the intervention of Eurojust or the EJN contact points as facilitators.

RECOMMENDATIONS

– ***Member States, acting as issuing and executing State, in cases where 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 Framework Decision 2008/909/JHA, when filling in point h) of the certificate, draw up a statement of facts which is as complete and precise as possible, so as to complement, where appropriate, the information contained in the judgment in order to avoid any difficulties in the executing authorities' assessment of the offence.***

4.6. Issues linked to translation

Pursuant to Framework Decision 2008/909/JHA, the documents that have to be forwarded to the executing Member State for recognising the judgment 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 Member State or, where applicable, into an official language of the Union that is accepted by that Member State.

Pursuant to Article 23(2) of Framework Decision 2008/909/JHA, as a principle, no translation of the judgment is required; accordingly, the legislation of several Member States does not require a translation of the judgment.

Pursuant to paragraph 3 of this provision, only Member States that have deposited a declaration with the General Secretariat of the Council may, as executing States, in cases where they find the content of the certificate insufficient to decide on the recognition and enforcement of the sentence, 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 translation is required (i.e. in more complicated judgments), may arrange for it without recourse to the issuing Member State.

In such cases, although a translation of the judgement has not been requested from the issuing State, it is a requirement under the criminal procedure legislation of some Member States 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 from the issuing Member State, frequently have it translated at their own expense.

A complete translation of the judgment may be 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 the need for adaptation is required. 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. The issuing Member State may be 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 to submit a summary judgment rather than the full judgment, as the translation of whole judgments is 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 within the established time limits, leading to a postponement of the decision to recognise and enforce the judgment.

A few executing Member 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 was considered by the expert teams to be a good practice.

A few issuing Member 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 of a specific request, which is also a good way to facilitate and speed up proceedings.

In some cases where the certificate received is not translated or where no translation of the decision or its essential elements is 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 procedure is terminated.

RECOMMENDATIONS

– ***When acting as executing Member State under Framework Decision 2008/909/JHA, Member States should ensure that their competent authorities limit requests for the translation of 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 State, with a view to assessing whether it would be sufficient for only the essential parts of the judgments be translated in line with Article 23(3) of Framework Decision 2008/909/JHA.***

4.7. Deadlines

Several Member States, when acting as executing States, experience difficulties in complying with the 90-day time-limit set out in Article 12(2) of the Framework Decision 2008/909/JHA as regards the decision on the recognition of the judgment and enforcement of the sentence.

The ninth round of mutual evaluations has shown that challenges in relation to timely responses from the relevant executing authorities arise especially when information is missing from the certificate or certain aspects need to be clarified (mainly relating 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 under Article 12 (2) of Framework Decision 2008/909/JHA may not be met.

This may be particularly relevant in cases where the certificate concerns several judgments, or the judgment covers several criminal offences, as the process will take longer due to the number of authorities involved and the separate appeals that can be launched. This may not be a particular problem in some 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 Framework Decision 2008/909/JHA cannot be met, executing Member States should notify the issuing Member State immediately, giving 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 ninth round of mutual evaluations, this has led to a certificate being withdrawn on account of the imminent (conditional) release of the sentenced person, or because the sentenced person has already been released.

RECOMMENDATIONS

– ***Both when acting as issuing and executing State, Member States should make the best possible efforts in their decision-making process to ensure the respect of the deadlines set out in Framework Decision 2008/909/JHA, despite the complexity of the procedures. For this purpose, when acting as issuing State, it is recommended that Member States provide supplementary information requested in due time, so as to avoid unnecessary delays.***

– ***When acting as executing Member State it is recommended that Member States inform the issuing judicial authority when the request cannot be executed within the time-limit laid down in Framework Decision 2008/909/JHA, giving the reasons for the delay and the estimated time needed for the final decision to be taken.***

5. LINKS BETWEEN FRAMEWORK DECISIONS 2002/584/JHA AND 2008/909/JHA

The functional relationship and complementarity between Article 4(6) and Article 5(3) of Framework Decision 2002/584/JHA on the one hand, and Framework Decision 2008/909/JHA on the other hand, are quite complex to manage, especially in Member States where the competence for these two instruments lies with different authorities, which is the case in most Member States. In most Member States there is no specific memorandum of understanding between these authorities; the experts made recommendations to some Member States to draft guidelines defining how this cooperation should be organised.

In only a few Member States do the same authorities decide on the recognition of the judgment within the same proceedings in cases where Article 4(6) of Framework Decision 2002/584/JHA is applied.

In cases where the execution of an EAW is refused under Article 4(6) of Framework Decision 2002/584/JHA or made conditional under Article 5(3) of that Framework Decision, the decision as to whether to maintain the EAW or issue a certificate under Framework Decision 2008/909/JHA may not be easy.

Only a few Member States have issued guidelines or factsheets explaining to practitioners the circumstances in which a judgment should be enforced either through the surrender of the person concerned or through recognition of the judgment; this was considered by the experts to be best practice.

In most Member States, no specific criteria for assessing whether an EAW or a certificate on the basis of Framework Decision 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. However, when the whereabouts of the sentenced person are unknown, an EAW is usually 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 Framework Decision 2002/584/JHA, some expert teams underlined the need for the issuing authorities to reflect thoroughly and carefully on whether to issue an EAW or a certificate under Framework Decision 2008/909/JHA, to strike a balance between the need for enforcement of the sentence and the need to ensure the social rehabilitation of the sentenced person, 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 when deciding which instrument to apply. Support from Eurojust or the EJN contact points could also be considered, if need be, in order to facilitate these consultations. In one evaluation report, holding 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 Framework Decision 2008/909/JHA, was considered good practice.

Some Member States refuse surrender under Article 4(6) of Framework Decision 2002/584/JHA before the decision on mutual recognition of the judgment or order imposing a sentence has become final, without guaranteeing the enforcement of the sentence. The evaluation teams considered that this practice should be changed in light of Article 25 of Framework Decision 2008/909/JHA, as interpreted by the CJEU.

In cases under Article 4(6) and Article 5(3) of Framework Decision 2002/584/JHA, there is no common practice among the Member States as regards issuing or requiring a certificate under Framework Decision 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 the enforcement of a sentence imposed by another Member State. Some practitioners expressed the view that the certificate under Framework Decision 2008/909/JHA provides more guarantees than 'direct' execution without a certificate, although this practice can delay the execution of the judgment.

In one report it is also pointed out that the certificate contains very valuable information which may subsequently have to be requested 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. A case addressing this issue (C-179/22) is currently pending before the CJEU.

Other Member States, after refusing the surrender, directly enforce the executing Member State's judgment on the basis of the information contained in the EAW, especially in cases where the requested person is a national of or legally residing in the issuing Member 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 swift execution of sentences, in the context of the ninth round of mutual evaluations some evaluation teams and some practitioners in the evaluated Member States 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 for in Framework Decision 2008/909/JHA.

In these cases, it was recommended that the executing authorities request and obtain a certificate from the issuing authority before taking over the custodial sentence. However, it should also be highlighted that, as emphasised in some reports, such practice avoids the risk of the requested person absconding, thus helping to avoid impunity.

In one report it is considered that these differences may stem from a certain level of ambiguity in Framework Decision 2008/909/JHA on this point. Article 25 stipulates that, without prejudice to Framework Decision 2002/584/JHA, the provisions of Framework Decision 2008/909/JHA apply, *mutatis mutandis* to the extent they are compatible with the provisions of Framework Decision 2002/584/JHA, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that Framework Decision, or where the surrender is subject to the condition that the person subsequently has to be returned (Article 5(3) of Framework Decision 2002/584/JHA). Based on the wording 'without prejudice to Framework Decision 2002/584/JHA' and then 'to the extent [the provisions] are compatible with provisions [of Framework Decision 2002/584/JHA]', it was observed that it seems that Framework Decision 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 this Framework Decision'. This legal uncertainty is reflected in the different practices and domestic laws of the Member States.

It should also be noted that the *Popławski* 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 clarification at EU level as regards the implications of the combined application of Article 4(6) of Framework Decision 2002/584/JHA and Framework Decision 2008/909/JHA, in particular as regards whether or not it is possible 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 ninth round of mutual evaluations, by both practitioners in the evaluated Member States and expert teams.

When the surrender has been agreed with a guarantee of return on the basis of Article 5(3) of Framework Decision 2002/584/JHA, it seems that most Member States can agree on the need to issue a certificate after the requested person is sentenced in the issuing State.

Another relevant issue regarding the combined application of Framework Decision 2002/584/JHA and Framework Decision 2008/909/JHA is the question of what happens 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 delivered; in these cases, there is a time gap during which the person could possibly abscond. Some of these Member States keep the requested person under provisional arrest while waiting for the issuing State to issue the certificate, pursuant to Article 14 of Framework Decision 2008/909/JHA. It was emphasised in the context of the evaluation that such an approach avoids the possibility of the requested 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 case, the experts recommended that national authorities make use of 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.

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 Framework Decision 2008/909/JHA.***

- ***It is recommended that Member States make use of provisional arrest, 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.***

- ***Eurojust, together with the EJN, is invited to provide guidance on the functional relationship and complementarity between Article 4(6) of Framework Decision 2002/584/JHA and Framework Decision 2008/909/JHA and the implications of and possible problems with their combined application, with a view to establishing more consistency in Member States' practices, depending on the outcome in case C-179/22 before the Court of Justice of the European Union.***

6. FRAMEWORK DECISIONS 2008/947/JHA AND 2009/829/JHA

6.1 Lack of application

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 EU.

Based on the ninth round of mutual evaluations, it seems that the reasons for the lack of application of Framework Decisions 2008/947/JHA and 2009/829/JHA do not lie with the way these Framework Decisions have been transposed. Most of the practitioners interviewed in the context of this round of mutual evaluations usually find the national transposing legislation comprehensive and understandable.

The reasons for the infrequent use of Framework Decisions 2008/947/JHA and 2009/829/JHA appear to be multifaceted and linked to the coexistence of several factors. Some of these were already 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 competent authority to address in the other Member States.

This round of mutual evaluations offered an 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 to improve the situation. 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 fact that these instruments are relatively recent additions, the evaluation highlighted that a recurrent problem is insufficient awareness and knowledge of, and experience with, Framework Decisions 2008/947/JHA and 2009/829/JHA among Member States' practitioners – not only judges and prosecutors, but also the probation services and defence lawyers, who should be key players in this field. Another issue is insufficient training on these instruments.

These shortcomings are common to most Member States and clearly indicate that initiatives are needed to promote knowledge and use of Framework Decisions 2008/947/JHA and 2009/829/JHA among all relevant stakeholders involved in their application, by ensuring training and exchange of information and good practices among practitioners at both national and EU level. Moreover, it would be useful to provide practitioners with handbooks for the practical implementation of these instruments at both EU and national level as the absence of specific national procedural guidelines may cause a certain reluctance among judges to use these legal instruments.

It has been observed that the very limited use of Framework Decisions 2008/947/JHA and 2009/829/JHA is also due to the length 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 at EU level to promote their greater use could 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 use these instruments. As a starting point, there seems to be a relatively low number of cases with relevant cross-border implications.

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

This round of evaluations has clearly identified that the differences between national legal systems make it difficult to transfer such measures to another Member State. 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 for the proper functioning of mutual recognition, including on the basis of Framework Decisions 2008/947/JHA and 2009/829/JHA.

In the context of this round of mutual evaluations it was emphasised that, in order to remedy such problems, 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 on the EJN website. It was also stressed that, in order to facilitate the application of Framework Decisions 2008/947/JHA and 2009/829/JHA, Member States should update the information on the EJN website (EJN Atlas) on the competent authorities that deal with the abovementioned mutual recognition instruments, allowing efficient direct contact between the competent authorities.

Another common issue regarding Framework Decisions 2008/947/JHA and 2009/829/JHA is a lack of awareness among the persons eligible for the measures provided for by these legal instruments of the possibilities they offer. Therefore, it was recommended that the competent national authorities provide information on these possibilities to the prosecuted or sentenced person during the hearing or the trial in a more effective manner. In one report it was pointed out that regular meetings between the judiciary, public prosecutors and the other authorities involved could be held in order to identify cases where Framework Decision 2008/947/JHA could be applied at an early stage of the proceedings and to coordinate their action at national level. The same applies to Framework Decision 2009/829/JHA.

6.2 Framework Decision 2008/947/JHA

While acknowledging that Framework Decision 2008/947/JHA, which is a mutual recognition instrument aimed at enhancing the prospects of reintegration of the sentenced person into society post-trial, is relatively recent, this round of evaluations has revealed how rarely it is used.

As already pointed out above, the differences in the Member States' penal systems, including in how alternative sanctions and probation measures 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 sanctions and probation measures 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 on the EJN website, as mentioned above in the previous sub-chapter.

Furthermore, the fact that there are multiple national authorities that are competent to implement Framework Decision 2008/947/JHA also makes matters more complex and causes uncertainty as to which authority should be contacted. There are also difficulties in identifying the competent authorities in the EJN Atlas, which, *inter alia*, does not currently include information on 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 probation period has often already expired or is just about to expire; a decision on the recognition of a measure may also arrive after the end of the probation period.

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 Framework Decision 2008/947/JHA, is of the utmost importance to promote the application of the principle of mutual recognition to judgments and probation decisions. Some expert teams identified several cases of inefficient communication between competent authorities of the Member States that caused delays and non-compliance with the time limits to complete transfers. One Member State's authorities suggested that contacts between probation services dealing with Framework Decision 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 Framework Decision 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 different Member States and therefore knowledge of other judicial systems. However, there seems to be room 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 accept cross-border supervision, as they believe this ensures more efficient monitoring of the measures.

In order to give more visibility at EU level to Framework Decision 2008/947/JHA, some reports suggested creating a network made up of the Member States' relevant 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, *inter alia*, to promote 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 measures. Some experts considered that this project would promote the use of this mutual recognition instrument and, more broadly, reinforce mutual trust between Member States.

6.3 Framework Decision 2009/829/JHA

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

One explanation for the reluctance among judges to apply Framework Decision 2009/829/JHA is 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 the ESO is questionable as it does not meet 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. The decision to place a person in provisional detention must be taken within a short time and it is not possible to issue an ESO and receive a reply from the executing Member State within that time frame.

Furthermore, the competent authorities are often not willing to allow the suspect / accused person to leave the country when their presence will be needed in the course of the criminal procedure, as they consider that detention, and therefore an EAW, is necessary.

Some Member States' practitioners expressed the view that when a pre-trial investigation can be completed fairly swiftly, it would not be appropriate to issue an ESO, as this could make the case more complicated to manage. A better option for faster resolution of a criminal case is to briefly keep the person concerned under provisional arrest rather than releasing them to return for further investigation or a trial.

Regarding more complex and time-consuming investigations, different views were expressed by some practitioners and expert teams. Some practitioners believe that for such investigations, where suspects are usually in detention, an ESO might jeopardise the investigation.

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

More generally, this round of evaluations has demonstrated that the reluctance to use the ESO is also due to the issuing authorities' uncertainty as to how effectively the supervision measure is monitored by executing authorities. In the opinion of some practitioners, interaction and communication between these authorities to monitor compliance with the measures imposed seems to be quite difficult in practice.

Finally, another reason given by the competent authorities of one Member State for the infrequent use of Framework Decision 2009/829/JHA is that the cost of supervision measures means that their use is not justified in the case of minor offences.

RECOMMENDATIONS

- ***Member States are invited to take appropriate measures to increase practitioners' awareness of Framework Decisions 2008/947/JHA and 2009/829/JHA 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.***

- ***It is recommended that the European Commission take concrete non-legislative measures to enhance the application of Council 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 this round of mutual evaluations.***

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

- ***With a view to facilitating the application of Framework Decisions 2008/947/JHA and 2009/829/JHA, the EJN, in cooperation with the Member States, is encouraged to include relevant information on all national systems and the non-custodial measures they provide for, as well as up-to-date information on all Member States' authorities competent to apply these Framework Decisions, on the EJN website.***

7. HORIZONTAL ISSUES

7.1 Central authority and direct contacts

7.1.1. Central authority and direct contacts under Framework Decision 2002/584/JHA

According to Article 7(1) of Framework Decision 2002/584/JHA, each Member State may 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 their internal judicial system, make their central authority or authorities responsible for the administrative transmission and reception of EAWs, as well as for all other official correspondence relating thereto.

One Member State has designated two bodies as the central authorities. In just a few Member States, no central authority within the meaning of Article 7(1) of Framework Decision 2002/584/JHA has been appointed. Of those Member States that have appointed a central authority, most have appointed their Ministry of Justice, while a few have appointed a national (judicial) authority other than the Ministry of Justice.

In almost all Member States, the central authority has a limited role and intervenes only when asked 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 or central authority, sending documentation or verifying its authenticity. Often it produces materials to support competent authorities (handbook, intranet, guidelines, circulars, etc.) or handles statistics. In some cases, it can also carry out a quality check before 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 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 of the fourth round of mutual evaluations, whereas in other cases it may be due to greater awareness of the scope and the experience gained by the judicial authorities in the practical application of Framework Decision 2002/584/JHA.

There are, however, a few 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 Framework Decision 2002/584/JHA. For instance, the central authority is authorised *inter alia* to issue and execute EAWs, or is designated as the sole channel through which all communications with and requests to other Member States should go, or is also authorised to request supplementary information from the issuing competent authority on the basis of Article 15(2) of Framework Decision 2002/584/JHA, thus performing tasks that are usually performed by the judiciary. These Member States have been advised to take measures to limit the role of their central authority, and to promote direct contacts between competent authorities in line with the principle of mutual recognition.

In the context of the ninth round of mutual evaluations it has been emphasised that this new model of judicial cooperation entails a radical change in relations between the 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 barriers, fear of not correctly identifying the competent authority, etc. It was stressed by the expert team that, although linguistic barriers can be an obstacle to efficient direct contacts, the latter are a core element of mutual recognition and measures should therefore be taken to overcome such difficulties.

7.1.2. Central authority and direct contacts under Framework Decision 2008/909/JHA

The central authority assists the judicial authorities in procedures related to receiving and transmitting certificates and judgments, as well as any official correspondence relating to them. It may also assist the competent authorities in the procedures under Framework Decision 2008/909/JHA by providing advice or information on them. However, not all Member States have designated a central authority for the purpose of this Framework Decision.

Usually, the relationship between the principle of direct contacts between judicial authorities and the role of the central authorities under Framework Decision 2008/909/JHA mirrors the allocation of competencies in the context of EAW proceedings; see, therefore, the relevant chapter above in this respect.

7.1.3. 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 Justice usually assists the competent judicial authorities in the event of difficulties that cannot be resolved directly with the competent authorities of other Member States.

7.2. Specialisation of the competent authorities

Member States have different organisational approaches when allocating responsibility for handling the EU mutual recognition instruments. Some have established a centralised system for one or all of these instruments, while others take a decentralised approach. Centralised bodies – in most Member States the Ministry of Justice – are highly specialised in the use of EU mutual recognition instruments (acting as both issuing and executing authority) and can advise and support local practitioners.

In local courts, specialisation may be more difficult to achieve, and the practitioners are frequently not specialised in the use of EU mutual recognition instruments, as each prosecutor or criminal court deals with them among other tasks. In the context of this round of evaluations, these Member States have been encouraged to consider establishing specialised units at courts that specialise in matters relating to international judicial cooperation, or alternatively to increase the number of magistrates working exclusively on 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 States there is, to differing extents, a certain degree of specialisation at various levels of the judiciary, as some magistrates and/or courts – more often those located in the larger districts – have some level of specialisation.

This is more frequently the case for Framework Decision 2002/584/JHA, as the EAW has been widely used for a significant length of time and practitioners have gained experience, and to a lesser extent for Framework Decision 2008/909/JHA, as only a few Member States have separate specialised departments handling cases under this Framework Decision. There is no specialisation in Framework Decision 2008/947/JHA and Framework Decision 2009/829/JHA.

In one Member State the structure of the competent authorities is based on territorial specialisation in specific instruments, with the benefit of a high level of expertise of the judges, magistrates and administrative staff involved. In one Member State a specialised court checks the EAW before it is issued, which minimises the risk of issuing 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 usually have the knowledge and experience to be able to advise their colleagues.

Almost no Member State has lawyers who specialise in EU mutual recognition instruments. Moreover, lawyers are not even sufficiently aware of EU legislation and the case-law of the CJEU in this field. Some Member States, however, have lawyers with some knowledge of the EAW and, to a lesser extent, knowledge of Framework Decision 2008/909/JHA, but there is no specialisation in Framework Decisions 2008/947/JHA and 2009/829/JHA among lawyers. Furthermore, given that these lawyers are usually appointed *ex officio*, there is a risk that lawyers who do not specialise in a given area are not able to adequately protect a convicted or suspected person's rights and legitimate interests.

RECOMMENDATIONS

- ***Member States are encouraged to ensure an adequate level of specialisation of practitioners dealing with all the EU mutual recognition instruments involving deprivation or restriction of liberty covered by the ninth round of mutual evaluations, including lawyers if possible, by offering specialist training and promoting networks of magistrates specialising in this area.***

7.3. 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 instruments involving deprivation or restriction of liberty covered by the ninth round of mutual evaluations. Additional information may be needed by the executing State further to the information already sent by the issuing State. However, in the context of this round of evaluations it was observed that sometimes the requested additional information is irrelevant 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 be unjustifiably extended.

In the context of this round of mutual evaluations the issue of the exchange of information has been dealt with mainly in relation to Framework Decision 2002/584/JHA and to a more limited extent in relation to Framework Decision 2008/909/JHA.

As regards the EAW, the information communicated by the issuing Member State is sometimes insufficient to decide on the execution of the EAW. One of the most common issues is an insufficiently detailed description of the facts and circumstances of the crime, including where and when the individual acts were committed. The information given should be detailed enough to distinguish the acts in question from other acts, which is vital to verify double criminality, *ne bis in idem* or *in absentia* judgments. In other cases there is not enough information on the detention conditions in the issuing Member State. In the case of EAWs issued for the enforcement of a judgment, information on the length of the sentence or whether the person in question was notified about the time of the court hearing is sometimes missing.

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

However, in some cases, where such deadlines are short and difficult to meet or where repeated requests for additional information are necessary because the issuing State fails to reply on time or to give the correct response, this can result in proceedings being prolonged and compliance with 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 after a decision on the EAW has been taken the executing authorities are also expected to send the surrender decisions and other relevant follow-up information, 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 Member States send such follow-up information regularly and it is sometimes necessary for the issuing State to request it.

As regards Framework Decision 2008/909/JHA, additional information may be requested in the event of incomplete or incorrectly completed certificates. This may include various types of information, such as the legal classification and designation of the offence, the exact length of time spent in 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 by the issuing State is sufficient.

In the context of Framework Decision 2008/909/JHA, consultation may – and in some circumstances must – take place between the competent authorities of the issuing and executing States in order to establish whether the sentence would serve the purpose of facilitating the social rehabilitation of the sentenced person and their successful reintegration into society. Such consultations are not always mandatory. The issuing authorities do not always make prior contact with the executing Member State's 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 Framework Decision 2008/909/JHA. For more details, see the chapter on the assessment of social rehabilitation.

The competent judicial authorities of the executing State are obliged to provide the information listed in Article 21 of Framework Decision 2008/909/JHA to the issuing State without delay; however, not all Member States comply with this obligation.

The exchange of information or the consultations take place via 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 State authorities communicate directly with the competent authorities of other Member States. Based on the ninth round of mutual evaluations, the direct contact between judicial authorities is generally satisfactory. A few Member States request additional information through their central authorities.

Communication may take place by ordinary mail, email, phone, fax, etc. With a view to facilitating the application of Framework Decision 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.

More widespread availability and use of new technologies helps to speed up interaction, but at the same time requires that the EJN Atlas, which contains the email addresses of judicial and central authorities, be kept up to date.

In some cases, Eurojust and the EJN may be useful channels for establishing quick and effective communication, especially in urgent cases and/or where no reply is received or in order to circumvent difficulties arising from language barriers. Where relevant, communication may occasionally also take place via the SIRENE bureaux, for those Member States that use the Schengen Information System, or via the Interpol bureaux, for those Member States that do not use the Schengen Information System.

RECOMMENDATIONS

– ***Member States are advised to ensure that the role of their central authorities is limited to what is provided for by each EU mutual recognition instrument covered by the ninth round of mutual evaluations, 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.***

– ***When acting as issuing States for the purposes of Framework Decisions 2002/584/JHA and 2008/909/JHA, Member States are advised to ensure that their competent authorities transmit to the competent authorities of the executing State all the information necessary to decide on the execution of the request, and when the latter require additional information, to provide such information as soon as possible.***

7.4. Transit of the requested or sentenced person

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

In most Member States, the Ministry of Justice is the competent authority for dealing with transit, for both incoming and outgoing cases. Requests for transit are made through the SIRENE bureaux and in some cases through the Interpol bureaux. The practical arrangements for the execution of the actual transit are organised in cooperation with the police, who are responsible for the operational aspects.

Most Member States have not encountered major problems in the transit of requested persons. However, some practical challenges can arise when organising the transit, especially as a result of the very tight transit deadlines (the handover must be completed within ten days), and delayed responses can lead to postponement of the operation, as receiving the transit request at very short notice before the transit date means there is very little time to arrange the surrender. Other practical difficulties include identifying the competent authority of the other Member State responsible for transit. 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 can also arise with regard to documentation and translation requirements for authorising the transit.

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

In some cases, transit requests are incomplete. There are a few Member States that require a translation and in some instances a translation of both the transit request and the EAW is required. The *Fiches Belges* on the EJN website, when updated, could help to identify the requirements regarding the necessary documents, time frame and accepted languages. Disruption of air traffic was also mentioned by some Member States as an additional practical difficulty when executing the transit. Several Member States mentioned problems in cases where the executing State ordered the surrender of the requested person without taking any precautionary measures to ensure their availability, merely notifying the person of the date for surrender, for them to present themselves voluntarily. Sometimes a person being surrendered who has not been placed in detention does not appear at the pick-up place, so the transit has to be reorganised, sometimes several times.

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 a lack of direct flights. Generally speaking, bilateral talks with the most relevant neighbouring and partner Member States have proved useful in improving the practical implementation of transit. EJN contact points can help to speed up the procedure and establish flexible and swift contacts with the competent authorities.

It should also be emphasised that during the COVID period all Member States faced problems with cross-border transport of persons to Member States other than neighbouring Member States due to significant restrictions on air travel and other methods of transportation.

RECOMMENDATIONS

– ***In cooperation with the Member States, the EJN is invited to ensure that up-to-date information on the competent authorities responsible for authorising transit and on the necessary documentation, time frame and accepted languages is available in the EJN Atlas and the Fiches Belges, in order to facilitate and speed up the process***.

7.5. Cooperation with Eurojust and the EJN

Based on the ninth round of mutual evaluations, the competent national authorities are generally well informed as regards the competence of Eurojust and the European Judicial Network in the field of judicial cooperation and the possibilities they offer, and the assistance they provide is generally regarded by Member States' practitioners as valuable and necessary. Eurojust and the EJN are considered the most efficient channels of communication in cross-border proceedings and are generally reported to be very effective, helping to strengthen cooperation and mutual trust among the judicial authorities of different Member States.

Only a limited number of Member States do not involve Eurojust and the EJN in cross-border cases related to mutual recognition procedures as much as they could, in order to expedite proceedings.

Assistance from either Eurojust or the EJN may be considered by Member States' authorities when applying EU mutual recognition instruments, depending on the merits of the case and in particular its complexity and urgency. Theoretically, they can provide different but complementary means of assistance. The EJN contact points are usually asked to provide assistance with a view to facilitating and streamlining communication and obtaining the information necessary to take a decision, whereas in urgent or more complex 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, it is not always easy to establish a clear distinction between their respective roles. In practice Member States' authorities seek the assistance of either Eurojust or the national EJN contact points in situations where establishing contacts is difficult or problematic, including for linguistic reasons, or when problems arise in obtaining supplementary information or documents from the issuing State.

As regards in particular Framework Decision 2002/584/JHA, Eurojust and the EJN are both considered helpful channels, 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, the assistance of the national desk at Eurojust.

As regards the EAW, Eurojust channels are used for rapidly solving problems, e.g. difficulties in the execution of the request or the existence of multiple competing requests to surrender a requested person issued by the judicial authorities of several Member States (Article 16 of Framework Decision 2002/584/JHA). Whilst this is not an obligation, involving Eurojust is a possibility that can quickly provide the executing authority with coordinated and well-informed advice on which of the competing EAWs should be executed, taking into consideration all relevant aspects. In many reports the experts stressed how helpful Eurojust can be in such cases, with the use of existing Eurojust guidelines for deciding on competing requests for surrender and extradition (revised in 2019) and the possibility of reaching an agreement acceptable to all stakeholders within a limited time frame. In many Member States this option is not included in national law or is very rarely used in practice. Several reports include recommendations to involve Eurojust more often in relation to competing EAWs.

Eurojust can also be very helpful when problems occur when an EAW is related to other mutual recognition instruments, e.g. an EIO, to be carried out in parallel with or immediately after the requested person's arrest, or simultaneously, since the competent authorities for the individual instruments could be different.

Eurojust's involvement in EAW proceedings is also relevant in cases where, in exceptional circumstances which could lead to delays in the execution of the EAW, the judicial authority has to notify Eurojust, giving the reasons for the delay in accordance with Article 17(7) of Framework Decision 2002/584/JHA. Some reports also emphasised the added value of the coordination meetings organised by Eurojust, especially in cases where different EU legal instruments are applicable, and of coordination centres when EAWs and other measures have to be executed simultaneously in several Member States.

Enquiries aimed at identifying the competent authorities of other Member States are mainly carried out by the EJN, e.g. with the assistance of the experts designated as EJN contact points or with Eurojust. It has proved helpful in practice to call upon the EJN's contact points or Eurojust especially in urgent cases, when there are delays in obtaining information from the executing authority or if the information provided is insufficient, in order to receive assistance with further enquiries or to speed up the matter.

Cooperation via the EJN is highly valued by practitioners, as the EJN contact points can usually advise their colleagues on the handling of EAW cases and distribute all the relevant information, including information about recent CJEU judgments, to other practitioners. In several reports the evaluation teams highlighted the usefulness of the Eurojust overview of the CJEU case-law on the EAW, and other Eurojust products.

In many Member States, magistrates are aware of the existence of the EJN website and online resources, use them on a regular basis and find them to be extremely practical and indispensable tools for the efficient and easy drafting of both requests and responses. In some Member States, however, there is insufficient knowledge and use of EJN tools among practitioners and there is a need to raise awareness of the tools that can facilitate cross-border judicial cooperation.

The EJN tool most frequently used and deemed most important is the EJN Atlas, which facilitates identification of the competent authorities. However, in the context of the ninth round of mutual evaluations it was highlighted that contact details in the EJN Atlas are sometimes out of date or incomplete and not all Member States' judicial authorities' email addresses are included. Therefore, it was stressed that the information on the Atlas platform should be regularly updated for all Member States. The EJN also has 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 the templates used in the implementation of legal instruments of judicial cooperation could be translated into all EU languages and made available on the EJN website, as is already the case for the EAW.

Other EJN tools are:

- the *Fiches Belges*, which provide practical information on specific sets of measures that are covered by judicial cooperation in criminal matters;
- the Judicial Library, which enables practitioners to check the status of implementation of the various legal instruments and the declarations made by the Member States on them;
- the Compendium, which 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 international and European level, such as the size of the premises, sanitation (access to toilet and bathroom facilities), the length of time spent by detainees outside, etc., and reports from various institutions in Europe concerning these conditions.

RECOMMENDATIONS

– ***Member States are encouraged to raise awareness and promote the use of Eurojust and the EJN and the tools they offer, taking into account the added value they can provide in overcoming difficulties in the application of EU mutual recognition instruments and, more generally, improving the effectiveness of judicial cooperation with other EU Member States.***

In cooperation with the Member States, the EJN is invited to ensure that its website, which is an essential and valuable central resource, is regularly updated, and in particular to keep the contact details of judicial authorities in the Member States and the section on contact points in the Atlas up to date, so that Member States' practitioners can easily identify the competent authorities of other Member States in cross-border cases involving EU mutual recognition instruments.

7.6. Training

Most Member States have quite comprehensive and well-organised systems for the training of practitioners in the field of judicial cooperation; some Member States make the most of new and modern IT tools to offer e-learning training courses. Nevertheless, extra efforts seem necessary to ensure continuous training for magistrates at all stages of their career on all the mutual recognition instruments covered by this round of evaluations, as outlined below.

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. Framework Decision 2008/909/JHA on the transfer of custodial sentences is also known and applied to a fairly satisfactory extent. There is, however, a lack of knowledge and experience among practitioners as regards 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 more frequent application of these instruments.

This round of evaluations found that training activities on Framework Decision 2002/584/JHA take place regularly in most Member States and that training on Framework Decision 2008/909/JHA is often provided, although not systematically. However, training on Framework Decisions 2008/947/JHA and 2009/829/JHA is seldom available, with the exception of a few ad hoc initiatives in some Member States.

There is clearly 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 this round of evaluations, as this would encourage their use, raise awareness, and increase the possibility of sharing practical experience and relevant case-law developments. In the context of this round of evaluations, it was repeatedly recommended that specific and regular training on all the abovementioned legal instruments be organised both at national and at EU level for all the authorities involved in their implementation.

This need concerns especially the lesser-known Framework Decisions 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 important to raise awareness and enhance knowledge of these Framework Decisions among practitioners.

Several evaluation teams and many practitioners in the evaluated Member States stressed that there is a clear need for training related to Framework Decisions 2008/947/JHA and 2009/829/JHA to be provided regularly, targeting all relevant stakeholders, in order to make them aware of the objectives of and possibilities offered by these mutual recognition instruments. It was also emphasised that it would be useful to have guidelines or handbooks on these Framework Decisions.

This round of evaluations has demonstrated that, in the majority of the Member States, training programmes for defence lawyers on all the abovementioned Framework Decisions are insufficient or unavailable. There are no lawyers who specialise in EU mutual recognition instruments; therefore, there is a clear need to promote ways of upgrading defence lawyers' knowledge of these instruments, so as to enable them to provide their clients with good-quality counsel in this field.

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

A few Member States have organised joint training with neighbouring countries; this was considered by the expert teams to be helpful in solving practical problems, improving understanding of the differences between judicial systems and strengthening mutual trust.

Judges and prosecutors can also participate in training events at EU level on EU mutual recognition instruments provided 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), and training and seminars organised by Eurojust or the EJN.

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

However, at the time of the evaluation, these training possibilities at EU level did not cover all the EU mutual recognition instruments covered by this round of mutual evaluations, in particular Framework Decisions 2008/947/JHA and 2009/829/JHA, and were not used by all the Member States to their full extent.

Nevertheless, as outlined in some reports, EU training programmes have particular advantages which go beyond mere awareness-raising and transmission of knowledge on the practical application of the EU instruments, as they offer an excellent opportunity for practitioners to network and share experience with colleagues from other Member States. In this sense, the importance of training at EU level, especially in the field of Framework Decisions 2008/947/JHA and 2009/829/JHA, was also expressed in several evaluation reports.

In addition, there are projects and initiatives which aim to enhance judicial cooperation at EU level. The CrossJustice platform provides a legal information service which is primarily intended for legal practitioners (judges, prosecutors, investigating magistrates and lawyers) but also accessible to law students, NGOs and all EU citizens, and is expected to be extended to include 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 funded by the European Commission's Justice Programme has a range of free online training courses on the application of Framework Decisions 2008/947/JHA and 2009/829/JHA, the completion of required documentation and the management of adaptation and of transfer processes.

Practitioners in several Member States stressed that EU handbooks containing guidance on the application of Framework Decisions 2008/947/JHA and 2009/829/JHA, which are not frequently applied and on which there is therefore limited experience, similar to those that already exist for Framework Decisions 2002/584/JHA and 2008/909/JHA, would be an important source of information.

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 lesser extent of the work of the CEP as regards Framework Decision 2008/947/JHA. The outcomes of meetings held by EuroPris and the CEP are generally disseminated in the Member States by the practitioners who attended them.

RECOMMENDATIONS

– ***Member States are encouraged to provide regular and systematic specialist 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, if possible, considering the independence of the legal professions according to national law, lawyers and other relevant staff.***

– ***Member States are encouraged to promote the participation of practitioners dealing with the abovementioned EU mutual recognition instruments in training activities available at EU level, so as to enhance the opportunities to increase knowledge and share experience 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 Decisions 2008/947/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.***

7.7. Statistics

A common issue identified in almost all the Member States in the context of this round of evaluations is the lack of reliable and detailed statistical data, collected regularly, on outgoing and incoming requests for all four mutual recognition instruments covered by this round of evaluations.

Other challenges are data aggregation and collection and the processing of statistics at central level. These shortcomings and deficiencies are even more serious in the Member States that have decentralised systems, as it is more difficult to gather data from different authorities at different levels than from one single body.

Only a few Member States collect annual statistics on the abovementioned legal instruments at central level, and these are usually collected and processed manually, so there is no digital record of the related cases. In addition, the manual collection and processing of information is consuming, and can lead to inaccurate and fragmented results.

In one Member State the Ministry of Justice is responsible for the collection of statistics, and the judges, courts and prosecutors responsible for transmitting or executing decisions on the basis of the mutual recognition instruments have an obligation to send a copy of each decision to the Ministry of Justice. The evaluation team considered this 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 they do not collect such data systematically and were often unable to provide more detailed statistics.

Statistics on the EAW are collected by all Member States, as they are obliged to provide these statistics to the European Commission. However, such statistics usually simply provide the number of EAWs received and executed; further details on time limits, grounds for refusal or the length of the procedure are usually not available.

A number of Member States collect and compile statistics on Framework Decision 2008/909/JHA but, with a few exceptions, detailed information on the outcomes of the procedures (how many requests have been recognised and how many have been refused) is not usually available. As regards Framework Decisions 2008/947/JHA and 2009/829/JHA, in most Member States there are no registered statistics.

The ninth round of mutual evaluations has highlighted that a well-functioning and comprehensive statistical system would give a better picture of the use of the various Framework Decisions, allowing monitoring and analysis of their application, the difficulties encountered, and the reasons for refusals, with a view to the provision of more precise guidance on their application and the adaptation of policies and working methods. Such a statistical system could enhance the efficiency of the mutual recognition instruments for judicial cooperation in criminal matters.

Furthermore, it was observed that the lack of computer records could lead to inadequate follow-up. Currently, only a few Member States 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 better application of the Framework Decisions covered by this round of mutual evaluations.

As mentioned in one report, automated systems could help to provide an accurate picture of the use of the instrument for mutual recognition of custodial sentences, the length of the proceedings, the main grounds for refusal to recognise a sentence, etc., as well as to manage the follow-up of requests sent to executing Member States.

In one Member State there is an ongoing project on the EAW that, with appropriate adaptations if necessary, could be a starting point for centralising the collection of statistics on the other mutual recognition instruments covered by the evaluation. In another Member State arrangements are also being made for disaggregated collection of EAW data, so that in the near future it will be possible to provide statistical indicators on EAW cases.

RECOMMENDATIONS

– ***It is recommended that Member States establish an efficient and reliable system for the collection of statistics on the use of Framework Decisions 2002/584/JHA, 2008/909/JHA, 2008/947/JHA and 2009/829/JHA, in order to facilitate analysis of their application and adapt policies and working methods accordingly. They are encouraged to consider using electronic tools for this, so as to save time for all the competent authorities and obtain a better picture of the use of the abovementioned legal instruments.***