

The Transfer of Prisoners in the European Union

Challenges and Prospects in the Implementation
of Framework Decision 2008/909/JHA

Editor

STEFANO MONTALDO



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© Copyright 2020
ELEVEN INTERNATIONAL PUBLISHING
ISBN 978-94-6236-997-9
<http://www.elevenpub.com>

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G. GIAPPICHELLI EDITORE
ISBN/EAN 978-88-921-8499-2
<http://www.giappichelli.it>

*Sold and distributed
by Eleven International Publishing*

P.O. Box 85576
2508 CG The Hague
The Netherlands
Tel.: +31 70 33 070 33
Fax: +31 70 33 070 30
e-mail: sales@elevenpub.nl
www.elevenpub.com

Sold and distributed in USA and Canada

Independent Publishers Group
814 N. Franklin street
Chicago, IL 60610, USA
Order Placement: +1 800 888 4741
Fax: + 1 312 337 5983
orders@ipgbook.com
www.ipgbook.com

Eleven International Publishing is an imprint of Boom uitgevers Den Haag.



This book is published in the framework of the project RePers - Mutual Trust and Social Rehabilitation into Practice (GA 766441), funded by the European Union Justice Programme 2014-2020 - www.eurehabilitation.unito.it. The content of this book represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

Table of Contents

	<i>pag.</i>
<i>Affiliations</i>	vii
<i>Introduction.</i> <i>The Repers Project, Framework Decision 2008/909/JHA and the Cross-Border Transfer of Prisoners in the EU</i>	1
STEFANO MONTALDO	
<i>National Competence Rules in the Application of Framework Decision 2008/909/JHA. The Case of Spain</i>	9
ANA NEIRA-PENA	
<i>Framework Decision 2008/909/JHA and Fundamental Rights Concerns: In Search of Appropriate Remedies</i>	37
STEFANO MONTALDO	
<i>Transferring Non-Consenting Prisoners</i>	61
PATRICIA FARALDO-CABANA	
<i>Framework Decision 2008/909/JHA in Context: Interplay with the European Arrest Warrant and (EU) Extradition Law</i>	79
ALESSANDRO ROSANÒ	
<i>Framework Decision 2008/909/JHA and Deportation of EU Citizens: Encroaching Different EU Law Tools</i>	95
JOSÉ A. BRANDARIZ	
<i>Implementation Strategies: Distinctive Features, Advances and Shortcomings in the Application of Framework Decision 2008/909/JHA in Italy, Romania and Spain</i>	121
CRISTINA FERNÁNDEZ BESSA, VALERIA FERRARIS AND ALEXANDRU DAMIAN	

	<i>pag.</i>
<i>The Road Ahead: Proposals for Improving the Implementation of Framework Decision 2008/909/JHA</i>	141
STEFANO MONTALDO, ALEXANDRU DAMIAN AND JOSÉ A. BRANDARIZ	
<i>Bibliography</i>	163

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Introduction.
The Repers Project, Framework Decision
2008/909/JHA and the Cross-Border Transfer
of Prisoners in the EU

Stefano Montaldo

This book is one of the outcomes of the RePers - Mutual Trust and Social Rehabilitation in Practice research project, co-funded by the European Union Justice Programme 2014-2020. The project was led by the Law Department of the University of Turin and involved a set of academic, institutional and civil society organisations, namely the University of A Coruña, the Italian Ministry of Justice, the Italian association Amapola - Progetti per la sicurezza delle persone e delle comunità, the think-tank Romanian Centre for European Policies, and the Romanian association Liderjust.

The collection contains original contributions regarding Framework Decision (hereinafter ‘the Framework Decision’) 2008/909/JHA on the cross-border transfer of prisoners in the EU, with a specific focus on its implementation and application in Italy, Romania and Spain, the three Member States covered by the project.

The Framework Decision in question applies 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 another Member State.¹

The judicial cooperation mechanism established by this act aims to identify the most appropriate place for serving a sentence, with a view to maximising the chances of the convict’s social rehabilitation. As such, it allows the prisoner to be transferred to the Member State in which his or her (societal, family, work, cultural, ...) centre of gravity is located, in order to facilitate his or her social reinsertion in a post-release era and avoid recidivism.

¹ Council 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.

Building on the premise of mutual trust between domestic judicial authorities, this Framework Decision replaces the intergovernmental footprint of pre-existing conventions and obliterates the role of the political branch. As is the case for other EU judicial cooperation instruments, this advanced mechanism is centred on horizontal cross-border judicial dialogue between the issuing and executing authority. More specifically, the authorities identified as competent by the issuing (i.e. sentencing) State adopt a decision on transfer and forward it to those of the executing Member State. The latter may be the convict's State of nationality, the Member State to which he or she will be deported or any other Member State, but in this case the relevant authorities must express their consent to the forwarding.

The procedure is, in itself, simple and rapid, as it keeps the formalities to a minimum and sets clear deadlines.² The issuing State transmits a certificate, the template of which is attached to the Framework Decision. This document contains all relevant information, ranging from the identity of the person concerned to the facts of the case, their legal qualification and the sentence imposed. In addition, the judgment is attached to the certificate.³ On this basis, the authority of the executing State is, in principle, expected to recognise the foreign judgment and order its enforcement, making any adaptation with regard to the duration or nature of the sentence, so long as it is actually compatible with national law.⁴

The Framework Decision reiterates two major recurring features in this domain of EU law: the abolition of the double criminality check in relation to a list of serious offences⁵ and the provision of an exhaustive list of optional grounds for denying recognition.⁶

The role of the sentenced person is also a distinctive aspect. In fact, whereas his or her consent is, in principle, a mandatory condition for the transfer, this requirement is lifted in three situations. Crucially, these are by far the most recur-

² Except in the case of postponement, recognition should occur as soon as possible and, in any case, within ninety days from receipt of the judgment and the certificate (Art. 12 (1) and (2)). Recognition may be postponed if the certificate is incomplete or does not correspond to the judgment (Art. 11).

³ The certificate must be translated into the official language or one of the official languages of the executing State.

⁴ In any case, the adapted sentence cannot aggravate the sentence passed in the issuing State (Art. 8). In addition, partial recognition and execution are allowed (Art. 10).

⁵ Art. 7(1)(2) Framework Decision 2008/909/JHA, which reflects corresponding provisions included in most of the EU secondary acts in this domain.

⁶ Art. 9 Framework Decision 2008/909/JHA. Art. 10 also allows for partial recognition and execution. In addition, Art. 11 provides for postponement of execution if the certificate is incomplete or does not correspond to the judgment. Another key departure from the previous intergovernmental regime is the provision of strict deadlines for handling the procedure and issuing a final decision: *see* Art. 12(1)(2) and 15(1).

ring cases of cross-border transfers: consent is not required when the judgment is forwarded to the Member State of nationality in which the prisoner lives or to which he or she will be deported, or the Member State to which he or she has fled or returned before the conclusion of the proceedings or following the conviction in the issuing State. However, the sentenced person has the right to express his or her opinion on the transfer, which must be taken into account by the authority of the sentencing State when deciding whether or not to issue a transfer request.

More than ten years after its adoption, this instrument is increasing in importance in the scenario of the European judicial space, albeit that its practical application by the national judicial authorities is still not entirely satisfactory.⁷ The unexplored potential of transfer procedures has led to a very limited body of EU and national case law and has further fuelled the silence of legal scholars. As a consequence, most of the significant theoretical knots in this Framework Decision are still to be undone.

This is due to several converging factors, which are addressed from different perspectives in this book.

Firstly, the implementation of the Framework Decision was belated in many Member States, most of which failed to comply with the transposition deadline of December 2011.

Secondly, the wording of this act represents the result of three years of heated negotiations within the Council. The imminent entry into force of the Lisbon Treaty was actually the most effective impetus towards achieving an agreement, under pressure of the planned eradication of the third pillar, along with the intergovernmental nature of its legal sources.⁸ This final hastiness led to inevitable compromises affecting the internal coherence and conceptual accuracy of the act.⁹ For example, the Framework Decision provides no guidance on the scope of the notion of offenders' rehabilitation, the elusiveness of which blurs the purpose and content of the cooperation duties incumbent upon the issuing and executing Member States.

Thirdly, although apparently confined to an advanced and specialised segment of criminal (procedural) law, the Framework Decision reveals crucial con-

⁷ European Union Agency for Fundamental Rights, 'Criminal Detention and Alternatives: Fundamental Rights Aspects in EU Cross-Border Transfers' (2016), also available online at <https://fra.europa.eu/en/publication/2016/criminal-detention-and-alternatives-fundamental-rights-aspects-eu-cross-border> (accessed 5 March 2019).

⁸ V. Mitsilegas, 'The Third Wave of Third Pillar Law', *European Law Review*, Vol. 34, No. 4, 2009, pp. 523-60.

⁹ A. Martufi, 'Assessing the Resilience of 'Social Rehabilitation' as a Rationale for Transfer: A Commentary on the Aims of Framework Decision 2008/909/JHA', *New Journal of European Criminal Law*, Vol. 9, No. 1, 2018, pp. 49-51.

nections with other key aspects of EU law, such as the protection of fundamental rights, the limits of Union competences, the freedom of movement of EU citizens and the European Union migration policy. This inherent systemic complexity poses significant legal and political challenges. From the latter point of view, for instance, a closer look at the preparatory works to the Framework Decision and at the practice of some Member States¹⁰ reveals that this act is not immune from *de facto* managerial uses, as it adds a new instrument to the national authorities' toolbox of forms of control over – and removal of – undesired EU citizens.

Fourthly, Framework Decision 2008/909/JHA covers the criminal execution phase, which is one of the most delicate fields in judicial cooperation procedures. This domain is still now perceived as a secret garden of the Member States, where the process of Europeanisation of penal justice comes up against a solid barrier, delimiting exclusive national competences. The limited room for EU intervention entails the absence of harmonisation measures and a subsequent high degree of fragmentation of domestic legal orders. The wide variety of penitentiary benefits, alternatives to detention and related measures, pursuing the goal of enhancing the inmate's chances of successful re-socialisation after conviction, is an illustrative example, which goes straight to the core of the scope and rationale of transfer procedures.¹¹

The outlined combination of elusive notions of EU law, opposing teleological priorities and legal fragmentation represents a favourable breeding ground for the many facets of the dark side of mutual trust: mutual distrust, mutual mistrust, or even just a lack of confidence in the feasibility and usefulness of judicial cooperation procedures. It follows that, at this stage, several substantive and procedural hurdles block the full effectiveness of this Framework Decision, from both the quantitative (number of transfers) and qualitative (genuine attempt to pursue social rehabilitation goals) perspectives.

In this scenario, the varied practice of the national judicial and governmental authorities is clearly a key factor, as it can amplify or neutralise the above described concerns. In fact, beyond mere effectiveness-oriented arguments, a closer look at how cross-border transfers work at domestic level provides illustrative insights into how judicial cooperation mechanisms are perceived by the authorities concerned and into the degree of consistency between expected EU patterns and law in action within the national realm.

¹⁰ S. Neveu, *Le transfert de l'exécution des peines alternatives et restrictives de liberté en droit européen. A la recherche d'un équilibre entre intérêts individuels et collectifs*, Anthemis, Limal, 2016, p. 440.

¹¹ See the analysis of the legislation of the Member States annexed to G. Vermeulen, *et al.*, *Cross-border Execution of Judgments Involving Deprivation of Liberty in the EU. Overcoming Legal and Practical Problems through Flanking Measures*, Maklu, Anvers, 2011, pp. 236-54.

In this context, Italy, Romania and Spain represent promising test-beds for assessing the advances and shortcomings of cross-border transfer procedures, on two main grounds. Firstly, Italy and Spain are among the countries with the highest rate of Romanian prisoners in Europe. To a lesser extent, this also applies to Italian and Spanish prisoners in Spain and Italy, respectively. This basically entails remarkable (quantitative) opportunities for resorting to transfer mechanisms and ensuing enhanced institutional efforts to cope with this phenomenon. Secondly, these Member States share the common problem of prison overcrowding, albeit at differing degrees of intensity. Deficiencies concerning detention conditions have triggered diversified formal and informal reactions, which, in one way or another, influence the scope of cross-border transfers. In Italy, the *Torreggiani* pilot judgment,¹² in which the Strasbourg Court urged Italy to take action to solve this structural criticism, led the Ministry of Justice to encourage the judicial authorities to use Framework Decision 2008/909/JHA as a means for deflating prison overcrowding. Conversely, Romania has enacted new legislation allowing for a reduction in sentence for each detention period suffered in inhumane or degrading conditions. For its part, Spain reveals a generalised preference for deportation measures, which to some extent erode the domain of cross-border transfers.

The book addresses the main legal challenges raised by Framework Decision 2008/909/JHA in general and as reflected in the Italian, Romanian and Spanish experiences. As such, on the one hand, the analysis is closely connected to the experience of these Member States and is not intended to provide an all-encompassing study of domestic trends, implementation strategies and practices regarding cross-border transfers. On the other hand, these case studies provide added value to the analysis, as, in all chapters, the theoretical approach is combined with a detailed study on how the cross-border transfer procedure is actually dealt with by the judicial authorities.

This mutually beneficial combination is particularly evident in Ana Neira-Pena's chapter, which focuses on the identification and designation of the issuing and executing domestic authorities. The author offers an overview of the different competence models existing in Member States and critically addresses the leeway left to Member States in this regard. With this aim, she provides an in-depth analysis of the advances and shortcomings of the Spanish model, which she criticises for being fragmented and inconsistent.

The following chapter frames Framework Decision 2008/909/JHA within the general quest for enhanced fundamental rights protection in the implementation of EU judicial cooperation instruments in criminal matters. I present the case law developed by the Court of Justice in relation to the EAW and discusses

¹² *Torreggiani and Others v Italy*, App. No. 43517/09 *et al.* (ECHR, 8 January 2013).

its relevance to cross-border transfer procedures. I contend that the peculiarities of Framework Decision 2008/909/JHA make it difficult to extend the Court findings to the subject matter under consideration, especially in relation to the denial of execution of a cooperation request in the event of a serious risk of violation of a right. This entails an urgent need for effective judicial remedies both in the issuing and executing States, to avoid abusive transfers and challenge any undue rejection of a prisoner's request to be transferred abroad.

Patricia Faraldo-Cabana's contribution builds on these premises and discusses the more specific aspect of the prisoner's rights in the event of a forced transfer. The rationale behind the Framework Decision is that allowing prisoners to serve their sentence close to home is a significant instrument in improving their chances of social rehabilitation. Framework Decision 2008/909/JHA removes the previous veto right of the sentenced persons in the 1983 Council of Europe Convention. This change has a significant impact on the position of the sentenced person and questions the coherence between the transfer of non-consenting prisoners and the rehabilitation perspective, given that social rehabilitation intrinsically requires the cooperation of the person involved. The author contends that the abolition of the prisoner's right to veto makes the European instrument appear more concerned with the needs of the issuing states than with those of the affected individuals.

The following two chapters make a step forward and focus on the interplay of the Framework Decision in question with other parallel instruments of EU law. Alessandro Rosanò discusses the coordination of Framework Decision 2008/909/JHA with the EAW Framework Decision and another two complementary instruments, namely Framework Decision 2008/947/JHA and Framework Decision 2009/829/JHA. Although apparently clear-cut, the interconnections between these instruments can be difficult to manage in practice, for instance due to their diverging objectives and the possible evolution *in itinere* of a case, which could trigger a parallel shift of legal regime. José Angel Brandariz addresses the much debated role of Framework Decision 2008/909/JHA in the wider set of measures stemming from EU law, allowing for an undesired EU citizen to be returned his or her home country. To do so, the author provides an overview of the main domestic approaches to the deportation of aliens within the Union. He then discusses if and to what extent the momentum recently gained by the deportation of EU nationals has contributed to hampering the expected consolidation of an Framework Decision 2008/909/JHA-based prisoner transfer system.

The final two chapters distil some of the outcomes of the RePers project activities concerning the Italian, Romanian and Spanish legal orders. The first focuses on the implementation of Framework Decision 2008/909/JHA in these Member States, covering both formal transposition measures and the ensuing

practices. The chapter also provides relevant statistics and discusses domestic institutional arrangements for dealing with cross-border transfer procedures. The final chapter puts forward some recommendations and proposals with a view to improving the application of Framework Decision 2008/909/JHA in the three Member States concerned and – hopefully – beyond. The analysis addresses a limited set of issues that have proven to be particularly sensitive for the judicial authorities of the countries concerned, such as the identification of potential transferees, the burden of proof regarding the prisoner's centre of gravity, the appropriate filling out of the certificate, the translation of the sentence, and the coordination with the EAW.

The RePers project activities were oriented towards fostering the improvement of transfer procedures both in terms of their effectiveness and their compliance with fundamental rights standards and social rehabilitation goals. From a methodological point of view, the activities combined a varied set of approaches. Following a preliminary desk review phase of existing studies and literature, each unit distributed an online survey. The survey was sent to selected categories of recipients, namely members of the judiciary and public prosecution offices, ministerial officers, prison administration staff, lawyers and academics. About one hundred replies were collected from the three Member States involved. The survey results provided a general picture of the degree of knowledge and awareness of the main features of the Framework Decision, and illustrated reactions on personal perceptions and views as to the main hurdles to the implementation of this act.

The interim outcomes of this activity were then used to hold *ad hoc* interviews with key stakeholders from the national judiciary and the Ministries of Justice, with a view to investigating further some of the issues broadly raised by the participants in the survey. This activity was supported by quantitative research on the overall number of transfers involving Italy, Romania and Spain in their capacity as issuing or executing States. Official statistics were collected and analysed, thanks to the invaluable cooperation of the Ministries of Justice of the Member States concerned.

The third step of the research entailed both qualitative research of the data collected and a more in-depth analysis of specific files. In particular, the Romanian Ministry of Justice granted access to specific landmark cases, which are illustrative of the main trends in Romanian practice. The Italian Ministry of Justice, which is party to the project consortium, authorised the research unit of the University of Turin and Amapola to analyse the documentation concerning pending and concluded transfer procedures. About 400 files were considered, covering most of the transfers processed in 2016 and 2017 and in the first-half of 2018 by the competent ministerial department. Whilst performing this analysis, specific attention was paid to a series of key factors,

namely: the actual role of social rehabilitation concerns, the prisoners' consent/opinion and the way it is expressed and collected, exchanges of information between the issuing and executing authorities, the role of the lawyer (if any), the length of the transfer procedure and its link with the sentence remaining to be served, the outcome of the transfer procedure.

This remarkable body of information fuelled the fourth and final phase of the research. The consortium conducted a series of mutual learning meetings involving selected experts and practitioners from Italy, Romania and Spain. Initially, these meetings were aimed at allowing the national authorities to share their concerns and views on the shortcomings of cross-border transfers. At a later stage, they became fruitful for an in-depth discussion on possible shared best practices and solutions to common problems, which could also be beneficial for other Member States in the long run.