The Transfer of Prisoners in the European Union

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

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The Road Ahead: Proposals for Improving the Implementation of Framework Decision 2008/909/JHA

Stefano Montaldo, Alexandru Damian and José A. Brandariz *

Abstract: *The chapter gathers together some of the findings of the RePers project in relation to possible improvements in the implementation of Framework Decision 2008/909/JHA, particularly in light of the Italian, Romanian and Spanish experiences and perspectives. The analysis addresses the main phases of the cross-border transfer procedure, from the identification of the potential transferee to the decision on recognition and the possible overlap with other procedures, such as the European Arrest Warrant.*

Keywords: *Framework Decision 2008/909/JHA, implementation, certificate, prisoner, mutual recognition.*

1. *Introduction*

The book has thus far provided a cross-sectional analysis of the main advances and shortcomings concerning cross-border transfers within the European Union. Specific attention has been paid to three national case studies, namely Italy, Romania and Spain, which were the focus of the activities performed in the context of the RePers project. In fact, as demonstrated in previous chapters,

* Stefano Montaldo drafted this chapter in its entirety. Both Alexandru Damian and José A. Brandariz amended the parts relating to the Romanian and Spanish legal orders.

these Member States represent an important test bed for the material functioning of the cooperation mechanism set out in Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ L 327, 5.12.2008, pp. 27-46, hereinafter, the 'Framework Decision') for two principal and closely related reasons. Firstly, the prison systems of these Member States have high rates of foreign EU nationals serving prison sentences. Secondly, and consequently, as already discussed in the book, the relevant national authorities have enacted extremely diversified normative and operational strategies to cope with this phenomenon, including considerable efforts to facilitate cross-border transfers.

Building on the analysis developed thus far, this closing chapter focuses on some proposals for material improvements to the conduct of cross-border transfer procedures. In fact, the RePers project activities were designed with a view to distilling existing best practices and possible future steps concerning the implementation of the Framework Decision in the three Member States involved and, possibly, beyond. As such, this operational perspective is a direct complement to the analysis of the normative layer developed in the preceding chapter.

Due to the focus on Italy, Romania and Spain, the proposals presented here are not all-encompassing but often stem from the specific features of the domestic legal orders under consideration and from the expertise developed by the relevant competent national authorities. At the same time, many of the pitfalls we identify represent generalised flaws in transfer procedures; accordingly, the respective improvement proposals could be effectively replicated in other Member States, with the due adjustments.

The structure of the chapter is modelled in terms of the timeline of the transfer procedure codified in the Framework Decision and in the national implementing legislations, in relation to certain aspects of the procedure. Therefore, the analysis firstly considers the organisational measures to ensure that potential transferees are appropriately identified and provided with adequate and reliable information on the relevant rules and procedures in the pre-transfer context (Section 2). Section 3 addresses the prisoner's role, with a specific focus on his or her opinion and consent to the cross-border transfer, whereas the following Section 4 deals with more practical issues concerning the filling out of the certificate, which can have a significant effect on the outcome of the procedure. Section 5 addresses another important practical aspect, namely the forwarding of the certificate and the judgment, along with a translation of the latter document into the official language of the executing State. As already discussed in previous chapters, a key aspect of the entire cross-border transfer mechanism is its objective of enhancing the prisoner's chances

of social rehabilitation: Section 6 addresses this topic, by highlighting possible solutions to the current loopholes identified in the three Member States involved. Section 7 analyses the possible overlap of the transfer procedure and the European Arrest Warrant, in light of the provisions of the Framework Decision and of the relevant practice.

Lastly, but most importantly, we must provide some words of thanks. In drafting this chapter, we benefited greatly from the crucial contribution of the practitioners and experts involved in the RePers project activities, to whom we are profoundly indebted. They provided vital contributions to many of the research activities we carried out in preparing this chapter and the book as a whole. Aside from a great deal of desk research, this analysis stems from fieldwork conducted in cooperation with a number of national groups of practitioners. The Italian team consulted archives and documents on transfer procedures. In addition, almost one hundred key practitioners answered a questionnaire that was prepared to ascertain their views on the shortcomings and pitfalls of the Framework Decision's procedures. Some of these practitioners were also interviewed. Moreover, this research benefited greatly from the debates raised and the conclusions reached in the framework of a number of mutual learning activities, in which dozens of Italian, Romanian and Spanish judges, public prosecutors, ministerial officials and scholars took part. In short, the comments and perspectives of these selected groups of practitioners were extremely useful and inspiring.

2. *Identification and Selection of Potential Transferees*

Identifying and selecting potential transferees is as complex as strategic tasks, which can have a significant effect on the (quantitative) success of Framework Decision 2008/909/JHA. Some recurring factors affect the activity of the competent authorities and the expectations of prisoners in this pre-transfer phase.

Firstly, these critical tasks fall outside the scope of the Framework Decision and of the domestic rules of implementation. This normative vacuum means that no minimum common standards apply. The procedure is, in principle, initiated *ex officio* by the domestic judicial authorities, but several factors influence the effectiveness of this phase. For instance, the dialogue between judicial authorities and prison administrations is often poor, limiting the former's opportunities for identifying potential transferees. Moreover, prisoners often lack appropriate legal support, with a view to facilitating the communication to the competent judicial authorities of their will to be transferred. This is even more complicated in cases where the sentenced person is kept in a pri-

son facility which is very distant from the place where he or she was convicted. Prisoners might also be transferred *in itinere* to other detention locations, thereby further blurring their contacts with the relevant stakeholders.

Consequently, this essential preliminary step is dealt with by national authorities in an uncoordinated fashion, very often through unilateral strategies based on soft-law measures and extemporary operational solutions. Moreover, the latter usually lack continuity over time and largely depend on the changing landscape of political priorities and the availability of public funds. Therefore, a key prerequisite for triggering the transfer procedure is left to the goodwill of the domestic authorities – usually national governments and more specifically the Ministry of Justice – in stark contrast with the structure of EU judicial cooperation in criminal matters, which primarily relies on principles of mutual trust and mutual recognition between judicial authorities.

Secondly, in line with existing literature,[1] the RePers project activities demonstrated the limited awareness and knowledge of the existence of a legal framework allowing for fast-track cross-border transfers. This phenomenon is cross-sectional and involves all relevant players, namely prisoners, lawyers, prison staff, public prosecutors and members of the judiciary. This situation is further compounded by a widespread lack of knowledge on the actual functioning of intra-EU prisoner transfers. On the one hand, lawyers very seldom provide appropriate assistance to their clients in this area of the criminal execution phase. On the other hand, judges and public prosecutors often perceive these procedures as an additional burden to their – already heavy – workload, especially in smaller districts, which have no specific units for dealing with international cooperation cases.[2] Moreover, this obstacle is further heightened by the fact that the execution phase is the most disregarded part of the criminal adjudication process, by both judicial authorities and lawyers.

Thirdly, both the prisoners and the professionals concerned suffer from a knowledge gap regarding foreign penitentiary regimes, covering both the main features of in-prison treatment and the rules governing post-sentence criminal law enforcement, as well as post-release re-socialisation programmes of former inmates. This situation highlights the persistent barriers fragmenting the

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[1] *See inter alia* V. Ferraris, 'L'implementazione del d.lgs. 161/2010 sul riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento', *La legislazione penale*, 2019, pp. 1-15. Retrieved on 17 September 2019 from http://www.lalegislazionepenale.eu/limplementazione-del-d-lgs-161-2010-sul-reciproco-riconoscimento-delle-sentenze-di-condanna-a-pena-detentiva-un-caso-di-doppio-fallimento-valeria-ferraris/.

[2] In some Member States, specific organisational measures have been enacted to cope with these procedures. In Romania, for instance, the competence for cross-border transfers is conferred to the Court of Appeals, with designated judges for international cooperation matters. However, the heavy workload is a persistent concern, which deprives the identification of specialised judicial authorities of its actual effectiveness.

European judicial space. Beyond the surface of mutual trust and mutual recognition, the actual grip of these principles is challenged by the fragmentation of national legal orders and practices, which reaches its peak in the criminal execution phase.

In this context, besides the ordinary support from prison staff, two main practices have been developed in Italy, Romania and Spain.

Firstly, in Italy, screening activity has been conducted since 2015 by the penitentiary authorities, on a yearly basis, to ascertain whether any foreign national detainees are willing to be transferred. The penitentiary staff members distribute a form among these detainees and then send the forms they collect to the Ministry of Justice, which has been identified as the central authority for the purposes of the Framework Decision.

Data show that this screening has contributed to boosting the phenomenon of consensual transfers. However, this approach – although promising – requires some adjustments. Firstly, the final recipient of the forms is not properly identified. On many occasions, the Ministry of Justice is perceived to be the natural addressee of the forms submitted at local level. This situation has two main pitfalls. On the one hand, the office for international judicial cooperation of the Justice Affairs Department at the Ministry of Justice is overloaded by too many files, which its staff members are simply unable to handle promptly and efficiently. On the other hand, this approach unnecessarily duplicates the institutional layers, since the central authority is then expected to alert the competent judicial authority at territorial level, thus wasting time and resources, and exacerbating the risk of unfruitful procedures. In fact, the Italian experience reveals that the competent judicial authority is sometimes not willing to deal with the transfer procedure, or at least to deal with it swiftly, as it ought to do. In other cases, the judicial authority receives no further feedback from the prison service, with which it has limited contacts, and eventually decides to leave the case in limbo, with the passing of time making the transfer increasingly unlikely.

A similar situation occurs in Spain, where the Prison Service Office has not traditionally played an active part in the transfer procedure. The Office's role in this regard is somewhat irrelevant, as it merely informs the Ministry of prisoners who meet the conditions for being transferred. Again, the subsequent institutional steps could be made simpler and smoother.

Secondly, the forms undergo no preliminary selection on the basis of some objective parameters such as duration of the sentence, length of the sentence remaining to be served, or factors regarding the prisoner's personal situation. Therefore, these documents include cases that seemingly justify the start of the relevant procedure, but have no actual chance of reaching a positive conclusion. This situation entails a mismatch between time, resources and costs, the

first two usually being very limited in comparison with the significant expenses related to – *inter alia* – the ministerial staff involved and the translation of the certificate and the judgment.

Thirdly, the form leaves very limited room for an appropriate explanation of the prisoner's opinion and personal and family situation. This is paradoxical, as prison staff members have access to a plethora of information deriving from the treatment and supervision of the inmate, including the activities in which he or she is involved, the rehabilitation programmes and the expectations regarding his or her post-release life. This body of information remains untouched, even though it could be useful in the subsequent steps of the transfer procedure.

In conclusion, periodic screening performed by the prison administration at territorial level could play a significant role in increasing the number of cross-border transfers. However, this screening should be carefully structured at local level, establishing clear and direct communication channels between prison staff and the competent judicial authorities. Moreover, the collection of the forms should be followed by a case-by-case preliminary assessment of the actual chances of successfully completing the transfer procedure. This selection could be made on the basis of objective criteria, such as the duration of the sentence, the length of the sentence remaining to be served, correlation between the rest of the sentence to be served and the duration of the transfer procedure and the rehabilitation programmes in which the prisoner is involved at that time. Lastly, the form should pay specific attention to the prisoner's opinion and situation, with a view to avoiding unnecessary hasty references to this additional information at subsequent steps of the procedure. Clear-cut evidence on the centre of gravity of the person concerned could also be considered, as a way of supporting the activity of the competent judicial authority and helping it to make informed decisions on the transfer proposals.

Another key issue in this preliminary phase of the mechanism refers to the 'if' and to the 'how' prisoners are informed of the possibility of opting for a cross-border transfer, as well as of the main features and requirements of the procedure and the relevant legal regime in the destination Member State. This is a deep-rooted concern regarding the implementation of the Framework Decision which has been ongoing since the very early years after its adoption. Scholars have repeatedly pointed out the need to provide prisoners with a clear set of information, as a way of fostering both the effectiveness of the judicial cooperation mechanism and the prisoner's prospects of rehabilitation. As discussed in-depth by Faraldo-Cabana in this book, timely and substantially complete information is essential to the start of a transfer procedure and to the achievement of its inherent purpose of fostering the prisoner's chances of social rehabilitation.

In this respect, Italy, Romania and Spain display remarkable convergence. In these Member States measures have been adopted to provide proper information support to prisoners who are foreign EU nationals. In Romania, these detainees receive general information on the domestic legal order and on the competent judicial and governmental authorities both in Romania and in the possible State of destination.

In Spain, since 14 February 2019, following an internal order of the Head of the Central Prison Administration, prison staff members have been obliged to inform foreign inmates about transfer procedures immediately as soon as they enter a prison facility. This information includes an explanation of the relevant procedures at national level and the main aspects of the domestic legislation of some key Member States. Prisoners are also provided with useful contacts if they want to request further information from the authorities of their Member State of nationality or residence. Moreover, due to the high incidence of Romanian cases, the Spanish and Romanian authorities have issued a common document providing the relevant information on key aspects of the Romanian legal order.

Finally, the Italian Ministry of Justice has very recently prepared a booklet on the Framework Decision and its implementation at national level. This booklet is currently being printed and will be made available, as a rule, to prisoners who are foreign EU nationals. This tool also includes some information on foreign legal orders, with a specific focus on Romania. However, the information contained in the booklet has not been discussed and agreed in advance with the Romanian authorities.

These sources of information appear to be fit for purpose, as they inform potential transferees of the availability of cross-border transfers at EU level and may trigger requests for further details addressed to institutional players (namely, the prison administration, the competent judicial authority, the central authority) or professionals (primarily lawyers and social assistants).

In conclusion, upon entering a prison facility, foreign EU nationals should be provided with information on the availability of the cross-border transfer mechanism. This information should include the general features of the procedure itself, its scope and its pre-conditions. Prisoners should also be provided with useful institutional contacts (*e.g.* competent judicial authority, relevant office of the central authority, prison ombudsman) as well as with general information on the criminal execution phase and penitentiary rules in the possible destination state.

3. *The Prisoner's Opinion and His or Her Consent*

The project activities revealed the extent of the fragmentation and diversity of the scenario – at least in Italy, Romania and Spain – in relation to obtaining the prisoner's opinion and his or her consent to the transfer. This variety of approaches and practices is often due to two converging factors. On the one hand, the Framework Decision does not provide specific requirements and common standards for obtaining the prisoner's opinion. On the other hand, the initial phases of the procedure are usually highly decentralised: prison staff, courts and public prosecution offices (and sometimes even each public prosecutor within a single office) develop their own methodologies and pursue their theoretical preferences and priorities.

In some cases, as recalled above in relation to Italy, the prisoner's opinion is summarised in a form, which merely contains generic statements on the social environment of the person concerned or his or her view on a cross-border transfer. In other legal orders, such as in Sweden, the prisoner is heard by a judge during a hearing. In most cases, no clear rules are provided and the opinion may be obtained either orally or in writing. Be that as it may, usually no real and in-depth information on this aspect is made available to the competent judicial authorities in the issuing and executing Member States: unless the latter requires additional clarifications, the prisoner's opinion takes the shape of a yes/no tick in a box on the certificate.

As discussed earlier in this book,[3] it follows that a decision on transfer is often taken without any clear indication of the prisoner's actual preferences. This situation fragments the implementation of the Framework Decision into as many bits and pieces as the varied domestic practices and endangers the achievement of the primary objective of cross-border transfers, namely offenders' social rehabilitation.

At the same time, the lack of clear normative standards leaves room for radically opposing approaches. As demonstrated by the interviews we conducted, some judicial authorities at territorial level – particularly in Spain and Romania – deem the prisoner's consent to be a *de facto* pre-condition for forwarding a certificate, as it is considered an essential component of the inmate's journey towards rehabilitation. Even though this practice might appear in line with the rationale of a cross-border transfer, it is in plain contrast with the wording of the Framework Decision, which removes the requirement for consent in many cases, as already discussed in the previous chapters.[4]

Therefore, both situations raise concerns as to their compliance with the

[3] *See* Faraldo-Cabana's chapter in this book, addressing this topic extensively.

[4] *Ibidem*.

Framework Decision. On the one hand, the prisoner's opinion should be taken into due consideration. On the other hand, it cannot amount to an additional and automatic ground for pre-selecting transfer procedures.

In conclusion, the competent judicial authorities should – as a rule – insist upon obtaining a complete, specific and informed opinion from the person concerned. To do so, some converging measures could be useful:

– improved set of information available to the prisoner (*see* Section 2 above);

– the prisoner should be granted *ex ante* support from a lawyer;

– the obtaining of a written statement from the prisoner or the transcription of his or her oral statements in full. For this purpose, increased importance should be given to this aspect in communications between the institutional players and the professionals involved;

– where possible, the reliability of the prisoner's opinion should be supported by relevant documents and/or the indication of personal contacts;

– the forwarding of the complete prisoner's opinion to the central authority tasked with coordination and communication with the State of transfer, also with a view to minimising the multiplication of *in itinere* requests for clarifications and additional information between the executing and issuing authorities;

– all relevant information and documents should be included in the certificate or attached to it, also depending on the specific circumstances of each case.

4. *Filling out of the Certificate*

4.1. *Determination of the Sentence and Explanation of the Part of It Remaining to Be Served in the State of Transfer*

The correct, complete and clear filling out of the certificate is a recurring concern in the practice of the Member States involved in the project. Incomplete or imprecise information compels the executing judicial authority to undergo consultations and submit requests for clarifications and amendments, thereby delaying the procedure. In some cases, inaccurate certificates and the subsequent need for *in itinere* bilateral consultations trigger dilatory strategies on the part of the executing authority. In other circumstances, this situation affects the prisoner, who has no effective remedies for overcoming such institutional stumbling blocks.

The analysis of bilateral relationships between Italy and Romania shows that the determination of the sentence is the most critical issue, on two main grounds.

Firstly, the overall length of the sentence is often the outcome of complex domestic legal regimes involving various provisions of criminal law and criminal procedural law (aggravating and alleviating circumstances, specific rules on reoffending, procedural rules on plea bargaining or other deflation mechanisms, rules on parole and early release, incidence of the provisions regarding the application of the more favourable criminal law, determining the resulting punishment for competing offenses, etc.). Multiple legal layers contribute to either scaling up or scaling down the penal tariff provided by the main substantive criminal rule, as the cumulated sentence is rarely a mathematical operation. In Romania, a penalty increase is added to the sentence bearing the harshest punishment (main punishment).

These legal complexities might not be easy to grasp for the executing judicial authority, even if the issuing authority attempts to explain them in the certificate. Secondly, some prison benefits apply *in itinere* and therefore lead to a slight decrease of the sentence remaining to be served while the transfer procedure is pending. This requires the issuing authority to forward additional notices complementing the certificate, with a view to updating the situation of the prisoner concerned. On many occasions, the Romanian authorities, soon before recognising an Italian judgment, ask the issuing authorities whether last-minute updates should be taken into consideration. These additional exchanges of information are necessary but amplify the risk of mistakes and – again – slow down the procedure.

Due to the non-unitary judicial practice in Romania, which often needs to be settled by the High Court of Cassation and Justice, Romanian authorities are often confronted with the issue of determining the remaining sentence to be served in Romania, which delays the transfer process. This has happened predominantly in Romania's relationships with Italy as it was unclear if days of early release granted to sentenced persons or the length of sentence considered to have been served, based upon work carried out and good conduct, were applicable to the remainder of the sentence in Romania. Following a decision by the High Court of Justice, after recognising the decision and transfer of the sentenced person, Romania does not deduct from the sentence to be served in Romania the duration considered served by the sentencing state on the basis of work performed and good conduct.

These difficulties are not confined to Italy and Romania, as the criminal execution phase and the rules governing the imposition of a sentence fall under the exclusive competence of the Member States and therefore follow very different patterns.

Conversely, the Spanish legal order is an exception to this scenario, as *in itinere* reductions in sentences or early release procedures do not condition the execution of the sentence abroad once the final judgment has been issued;

therefore, the custodial sentence remains basically unchanged during the execution phase. As in any other EU member state, Spanish prison law provisions include parole and early release measures. However, in practice, this national regulation does not affect mutual cooperation procedures and does not obstruct prisoner transfers.

The project activities confirmed that the problems stemming from incomplete or incorrect certificates – particularly with regard to the determination of the sentence and the part of it remaining to be served – are crucial factors in the unsatisfactory application of the Framework Decision. Measures should therefore be taken to prevent unnecessary additional exchanges of information and to inform the executing judicial authority of any update on the length of the sentence remaining to be served.

In particular,

– when filling out the certificate, the issuing judicial authority should pay particular attention to describing the rules that have been applied in determining the custodial sentence. It should also describe step-by-step the sequence of steps followed to reach such a final outcome. The text of the relevant provisions should be included in the certificate;

– in the event of *in itinere* changes to the sentence remaining to be served, prompt updates should be sent to the executing judicial authority (through the central authority, if such a task falls under its remit), with a view to complementing the forwarded certificate. No new, additional or revised certificates should be sent or requested.

4.2. *Filling out of the Certificate: Cases of Accumulation of Sentences and Continuation of Offences*

The absence of a clear and uniform operational approach towards explaining to the executing authorities the determination of the length of the sentence – and of the part remaining to be served – in cases of accumulation of sentences and continuation of offences is another recurring obstacle which hampers the effectiveness of transfer procedures.

Accumulation of sentences – particularly as far as the Romanian, Italian and Spanish legal orders are concerned – refers to those situations where multiple sentences for different offences are added together, in order to calculate the overall amount of detention period to be served. As such, it is essentially an operation that clarifies the duration of the future deprivation of liberty, but it has no implications on the formal autonomy of each sentence involved. Therefore, in these cases, the judicial authorities face a variety of judgments contributing to the total detention period.

Continuation of offences, on the other hand, involves a formal connection between two or more distinct offences, which are deemed to fall under the umbrella of the same criminal programme. Continuation of offences can be ascertained and declared in the trial or, in some legal orders, during the execution phase.[5] In the former situation, the outcome is a single judgment issued in relation to a plurality of interrelated offences. In the latter case, previously distinct judgments are *ex post* reciprocally and formally connected by the judicial authority competent for the criminal execution phase. This decision *in executivis* influences the sentence remaining to be served, as it involves a slight reduction of the total sentence (namely, the sum of each custodial sentence). Therefore, judicial authorities are faced with a single order formally unifying various judgments, which were previously autonomous and are now merged in a new judicial decision which replaces them all. In addition, this merged sentence usually re-determines the length of the period of deprivation of liberty, based upon criteria pre-defined by national substantive or procedural criminal law.

In both cases, the key question is whether multiple certificates – one for each judgment – or a single certificate should be sent to the executing judicial authority. Clearly, the existence of these alternatives amplifies the risk of diversified solutions on both sides of the judicial cooperation mechanism. On the one hand, different authorities within a given issuing State may opt for the solution they unilaterally consider to be more effective (probably adjusting it further according to their habits or preferences). On the other hand, the central and judicial authorities in the executing Member State may be willing to impose a preferred approach upon any issuing State, regardless of how its authorities deal with this legal loophole and irrespective of the relevant domestic legal background. For instance, in Italy, prosecution offices at district court level follow both approaches, depending on the magistrates involved. This diversified practice is further exacerbated by the Romanian authorities, which sometimes ask for one certificate to be sent for each judgment, basically because they want to check if all of them can be recognised and determine the resulting punishment for competing offences (even though in cases of continuation *in executivis* the merged judgment formally replaces the pre-existing ones).

Following the example of other Member States – e.g. Germany – the Ministries of Justice of Italy and Romania are now pushing for the most efficient and less time-consuming solution, namely the forwarding of a single certificate, in both cases of accumulation of sentences and continuation of crimes.

In order to respond to concerns regarding the possibility of partial recognition, the certificate at issue should be carefully filled out. In particular, it

[5] That is the case for Italy and Romania, but not for Spain, where there is no further and subsequent judicial decision in the case of continuation of offences. The continued nature of the perpetrated acts is taken into account within the single decision, assessing and sentencing those offences.

should include a detailed explanation of its various components, both in terms of legal and factual descriptions of the offences involved and in terms of calculating the duration of the custodial sentence. Moreover, in cases of accumulation of sentences, all relevant judgments could be attached to the certificate, for the sake of transparency and clarity. This would allow the executing judicial authority to pinpoint the specific part of the overall certificate which refers to a partial sentence that cannot be recognised.

However, from an issuing State perspective, this solution is not completely conclusive for those States – such as Italy – where continuation of offences leads to the issuance of an entirely new and autonomous judicial decision which replaces the sentences merged into it. In principle, since the judicial decision declaring the continuation formally unifies previously autonomous judgments, there should be no room for partial non-recognition. Moreover, the principle of mutual recognition binds the executing judicial authority to accept the judicial decision issued abroad, even if the application of domestic rules would have led to a different outcome. Therefore, in these situations the executing judicial authority should be expected to take into consideration only the last judicial decision. At the same time, this approach could lead to a side-effect, as it could trigger refusals of recognition of the entire judgment even in those cases where recognition is barred only for some of the offences involved. These exceptional situations could be solved by way of the possibility of mutual exchanges of information, leading the issuing authority to expunge the offence at stake from the single certificate for the sole purposes of completing the judicial cooperation mechanism.

In any event, preliminary consultations between the judicial authorities involved represent an effective form of support in these situations.

In conclusion,

– in both cases of accumulation of sentences and continuation of offences (in trial or *in executivis*) only one certificate should be filled-in and forwarded. The certificate should provide clear information on the substantive criminal rules describing the offences involved, the factual background and the specific conduct of the transferee. Moreover, in the event of accumulation of sentences, all relevant judgments should be attached to the certificate, unless agreed otherwise with the executing judicial authority;

– the issuing judicial authority should pay particular attention to the description of how the final length of the sentence to be served has been calculated and to the relevant national legal provisions;

– in the event of partial recognition, the executing authority should clearly point out in relation to which offence and judgment the recognition is denied. In the case of continuation of crimes *in executivis*, a specific solution should be agreed by the judicial authorities involved;

– any doubt or unclear aspect should be solved by means of bilateral consultations between the competent judicial authorities.

5. *Transmission of the Judgment and of Its Translated Version*

On many occasions, judgments are lengthy and involve several persons having participated in a crime. This raises the question as to what extent the transmission of the whole text of the judgment is actually essential for the purposes of recognition by the executing Member State. Besides the implications in terms of the principles of mutual trust and mutual recognition, much more operational concerns related to data protection – and in particular data minimisation – and to the principle of proportionality suggest that the forwarding of the whole judgment is not always an absolute pre-condition. On the other hand, where possible, the issuing authority should be allowed to attach to the certificate only those parts of the judgment that refer to the transferee and are actually relevant for determining its situation for the purposes of the judicial cooperation procedure.

Another issue refers to the translation of the foreign judgment. From this point of view, Article 23 of the Framework Decision provides that (only) the certificate must be translated into the official language of the executing Member State. Conversely, as clarified by para. 2 of the same article, "no translation of the judgment [attached to the certificate for the purposes of recognition] shall be required".

Despite this unequivocal wording, the approach of the Member States varies extensively. Some Member States request, on a regular basis, that the complete translation of the judicial decision be sent in their official languages. This practice derives from a declaration submitted by some Member States (Romania is a key example)[6] on the occasion of the transposition of Framework Decision 2008/909/JHA. According to this declaration, the authorities of these Member States – when acting in their capacity as executing authorities – are always entitled to seek the full translation of the judgment. However, as demonstrated by some cases involving Romania as an executing Member State, such translations are time consuming and very expensive, and can influence the effectiveness of the judicial cooperation procedure.

In this respect, in the second half of 2018, the Austrian Presidency of the EU Council expressed doubts on the compatibility of these declarations with

[6] For a comprehensive view on these declarations, *see* the page dedicated to the Framework Decision on the website of the European Judicial Network, retrieved on 23 September 2019 from https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat/EN/36.

the founding pillars of judicial cooperation in criminal matters across the EU. In addition, and more specifically, the Austrian Presidency – with the support of some Member States – complained that this practice is not in line with Article 23(3) of the Framework Decision, which is the legal basis for the submission of such declarations. In fact, this provision states that:

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

In fact, the wording of the Framework Decision is very clear in providing that the submission of a declaration does not amount to an absolute right to impose the burden of translation of the judgment on the issuing authority. On the other hand, even after a declaration is deposited, the request for translation of the foreign judgment cannot be considered a general rule. In principle, such requests may be made only when the content of the certificate is insufficient for deciding upon the enforcement of the sentence. Accordingly, before requesting the translation, the executing State should undergo preliminary consultations, to agree with the issuing Member State (meaning the issuing judicial authority or the central authority depending on each national case) the essential parts of the judgment that actually need to be translated. In any event, the full translation of the judgment is an exceptional and last resort, to be taken when no less demanding measures are feasible or proportionate in the relevant circumstances.

On the occasion of the meetings of the project experts, the representatives of Italy, Romania and Spain shared the view that the proper and complete compilation of the certificate is an essential pre-requisite and may minimise the need for translations and further information. This applies, in particular, to those sections of the certificate concerning the relevant domestic provisions of substantive criminal law, the determination of the sentence, and the description of the facts of the case.

In principle, the Romanian representatives expressed the intention to stick to the declaration of their government. Nonetheless, they acknowledged that, despite the declaration itself, there are cases where Romanian judicial authorities are satisfied with the partial translation of a foreign judgment, as long as it

is essential for the purposes of recognition, in line with Article 23(3) of the Framework Decision.

In this context, the experts involved in the RePers project identified the possible content of the notion of 'essential parts' of a judgment, worthy of being translated into the official language of the executing State, namely the parts providing a more precise understanding of:

– the relevant national legislation;
– the elements of the offence(s);
– the offenders' conduct;
– the operative section of the judgment, including the determination of the punishment.

The experts also agreed on the fact that a solution on a case-by-case basis should be sought, for instance through preliminary consultations between the issuing and the executing authorities pursuant to Articles 4(2), 9(4) and 10(1) of the Framework Decision, especially in cases of very long judgments, judgments involving many offenders, judgments concerning highly sensitive personal information of third parties, and repetitive judgments issued in relation to minor offences.

Another important and very practical issue refers to the costs of such translations. The Framework Decision is not unequivocal on who must bear the (heavy) burden of these translations. Whereas the final part of Article 23(3) of the Framework Decision seems to allocate these expenses to the issuing authority, unless the executing one decides differently, Article 24 states that the costs stemming from the application of the Framework Decision shall be borne by the State of execution "except for the costs of the transfer of the sentenced person to the executing State and those arising exclusively in the sovereign territory of the issuing State". Once again, normative gaps leave room for diversified practices. The example of the Italy-Romania bilateral cooperation can be used, as Italy always bears the expenses of the translations imposed by the Romanian authorities as a pre-condition for recognition. Conversely, in Spain, the costs of translation services are allocated to the foreign judicial authority which requests them.

In conclusion, as a rule, for the purposes of recognising a foreign judicial decision, the executing judicial authority should be satisfied with the content of the certificate, provided that the latter is clear and complete.

On the other hand, the full translation of the judgment(s) should be considered an exceptional and last resort measure. If this service is needed, the translation of selected (essential) parts of the judgment should be prioritised. For this purpose, the essential parts of the judgments are considered to be the relevant national legislation; the elements of the offence(s); the offenders' conduct; and

the operative section of the judgment, including the determination of the punishment.

In any event, particularly in complex cases involving many offenders and/or characterised by very lengthy judgments, the judicial authorities involved could undertake bilateral consultations on a case-by-case basis, in order to identify more carefully the parts of the judicial decision worthy of translation.

Moreover, in cases where third parties are involved, attention should be paid to data protection principles and duties (e.g. data minimisation and the need to process sensitive data).

6. *Assessing the Chances of Social Rehabilitation*

The project activities have repeatedly addressed the issue of how the prisoner's future chances of social rehabilitation are and should be assessed by the competent judicial authorities. This topic has been widely addressed earlier in this book by Faraldo-Cabana, so we focus here only on some specific aspects of the complex set of measures and factors that contribute to achieving the primary objective of the Framework Decision.

Understandably, practices regarding the assessment of the prisoner's prospects of social rehabilitation are extremely varied. Once again, the lack of common normative standards offers leeway to the national authorities, both in terms of methods and of criteria for evaluating an inmate's situation. As extensively noted by scholars,[7] the discretion entrusted to the domestic authorities leaves room for the 'managerial ambitions' of the Member States.

Aside from any theoretical analysis concerning the actual rationale underpinning the implementation of the Framework Decision, practice demonstrates that the issuing Member State usually lacks clear evidence on the prisoner's personal situation, especially when it comes to his or her family and societal environment in the executing Member State. As Italy and Romania both face overcrowded prisons, there have been cases where Italy has requested transfers of prisoners to Romania despite their connection with Romania being minimal, a procedure that depended solely on the citizenship of each individual (in this case, Romanian), not taking into consideration the chances of social rehabilitation.

Moreover, the competent judicial authorities are sometimes bewildered by the specific features of the cross-border assessment they are expected to per-

[7] V. Mitsilegas, 'The Third Wave of Third Pillar Law', *European Law Review*, Vol. 34, Issue 3, 2009, p. 523, and 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, Issue 1, 2018, p. 49.

form, as it is inherently different from ordinary checks made at domestic level by prison supervision courts. In the latter case, the competent judicial authorities can use a significant series of reliable documents, such as the reports of prison staff and the notices of social assistance services. Many of these documents have little relevance in cross-border cases, unless they are used from a negative perspective, namely to demonstrate that the prisoner's centre of gravity is in the issuing Member State.

These difficulties are further exacerbated by the widespread absence of the technical support of defence lawyers. In addition, the analysis of the state of the art has shown that the role of the detainees' ombudsmen is also, generally, limited.

Bearing in mind this scenario, the project activities have been focused on discussing the most promising criteria and tools (and their respective order of priority/importance) for assessing a prisoner's prospects of rehabilitation abroad, also in light of the practice of the experts involved.

In particular, the issuing judicial authority should take into due consideration the objective and subjective factors capable of demonstrating that the prisoner's social bonds are essentially focused on the issuing Member State. Particular attention must be paid to the relationship between Romania and Italy due to the high number of Romanian citizens involved in the Italian prison system with minimal or inexistent connections to Romania at the time of sentencing.

For this purpose, a reliable body of information, such as the reports of prison staff and of social assistance services, should play a prominent role. In order to assess the actual chances of social rehabilitation abroad, the issuing judicial authority should consider: the prisoner's current nationality/residence/domicile; the grounds on which he or she resides/lives in the issuing State and the duration of such a situation; the previous residence(s)/domicile(s) and their duration; the family situation (if there are minor children, special consideration should be given to their best interests); the current and previous work activities and the possibility of finding a job in the issuing or executing Member State (if any information is provided/available on the latter aspect); the prisoner's opinion; whether the prisoner will be deported after the sentence has been served; the knowledge of the language of the issuing State; the social environment in the issuing and executing Member States; any other economic, cultural and social links in the issuing and executing Member States.

Even though this list reflects the importance usually attached to the criteria listed therein by the experts involved, the actual importance of each of these factors should be assessed on an individual basis, depending on the circumstances of each case.

7. Coordination with the European Arrest Warrant

Another recurring stumbling block to bilateral cooperation is the overlapping of the scope of application of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, pp. 1-20) and Framework Decision 2008/909/JHA. The subject is partially covered by Article 25 of the latter instrument, which provides that:

> Without prejudice to Framework Decision 2002/584/JHA, provisions of this Framework Decision shall apply, mutatis mutandis to the extent they are compatible with provisions under that Framework Decision, 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, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned.

However, the two Framework Decisions do not provide specific rules for cases in which the respective procedures overlap. This happens when a State issues a European Arrest Warrant (hereinafter, 'EAW') but then seeks a transfer in the State of execution of the EAW, while surrender is pending or is about to be performed.

Again, the Italian-Romanian experience is illustrative, as, on many occasions, the Italian judicial authorities issue two parallel certificates, the first pursuant to Framework Decision 2002/584/JHA and the second under Framework Decision 2008/909/JHA, with a view to soliciting the arrest of the requested person and in the meantime allocating the execution of the sentence in the Member State where he or she lives. In other cases, the Italian authorities have submitted a request for suspension of the surrender, with a view to forwarding a new certificate under Framework Decision 2008/909/JHA, to replace the EAW. These approaches concretely go right to the heart of the problem, but raise several concerns as to their actual compliance with the Framework Decisions under consideration. For instance, no such ground for suspending the surrender is provided by Framework Decision 2002/584/JHA. Moreover, a certificate under Framework Decision 2008/909/JHA cannot automatically replace an EAW: They are two complementary but different procedures and any certificate requires formal recognition from the executing authority. Since the two mechanisms pursue very different purposes, a judgment could be recognised for the purposes of an EAW, but not in the framework of a cross-border transfer. In addition, the Framework Decision on the EAW imposes strict deadlines for keeping the requested person in custody. Any suspension

or undue delay may see the executing authorities being forced to release the person concerned, thereby increasing the risk of absconding and impunity.

On the other hand, considering the aforementioned relationship between Romania and Italy, the Romanian authorities consider that they are overburdened with two overlapping procedures: The European Arrest Warrant procedure and the transfer based upon the Framework Decision 2008/909/JHA, which have different conclusions: surrender to Italy or delegation (transfer of enforcement) to Romania. The Romanian authorities consider that it would be better for only one procedure to be requested by the Italian authorities: either on the basis of the EAW, or delegation of the procedure on the basis of Framework Decision 2008/909/JHA.

The handbook on the issuing and the execution of EAW allows the issuing authorities to forward directly a certificate under Framework Decision 2008/909/JHA, without a previous EAW having been issued. The handbook is not clear-cut in describing which situations could lead to this straightforward solution. However, the inherent differences between the two instruments lead us to believe that such an outcome should apply when:

– the requested person is in the territory of the State of execution, and
– having due regard to the maximisation of the requested person's chances of social rehabilitation, it seems more appropriate to allocate the enforcement of the custodial sentence in the executing Member State itself.

The approach suggested by the European Commission handbook avoids cumbersome overlapping of different mechanisms and too lengthy procedures. In addition, it is in line with the rationale of the two instruments. In fact, while Framework Decision 2008/909/JHA is entirely devoted to enhancing the prisoner's chances of social rehabilitation, Article 4(6) of Framework Decision 2002/584/JHA provides for a specific optional ground for refusing surrender if the wanted person is a national of the executing State or lives or resides therein. As the Court of Justice has clarified,[8] the latter provision is precisely intended to prioritise the person's centre of gravity and to avoid his or her family and societal environment being plainly disrupted due to surrender.

The issuing authority is then expected to assess whether issuing an EAW or a certificate pursuant to Framework Decision 2008/909/JHA better fits the circumstances of a given case. The choice ultimately reflects the identification of the place in which the sentence should be served, in light of the future opportunities of rehabilitation in a post-release era. If the executing State is considered the best option, the issuing authority should start a cross-border transfer

[8] *See*, for instance, Judgment of 6 October 2009 in *case C-123/08*, *Dominic Wolzenburg*, [2009] ECLI:EU:C:2009:616.

procedure, even though the person concerned is already in the territory of the destination State.

In conclusion, the parallel issuing of an EAW and of a certificate under Framework Decision 2008/909/JHA should be avoided. The issuing authority should give priority to the certificate under Framework Decision 2008/909/JHA, if it deems that the enforcement of the sentence in the Member State in which the requested person is/resides/lives would better suit the rehabilitation goals underpinning transfer procedures. For this purpose, the issuing authority could undergo preliminary consultations with the competent judicial authorities in the executing Member State.

8. *Concluding Remarks*

The general, everyday implementation of the principle of mutual recognition puts mutual trust under stress. Besides theoretical assumptions, the daily practice unveils multi-faceted approaches to centrally harmonised judicial co-operation procedures within the EU. This variety of domestic practices and strategies reflects differences which are inherent to the construction of the European judicial space and to the different legal cultures converging under the aegis of the Union. From this point of view, the practical and legal difficulties raised by the implementation of the Framework Decision highlight the core of potential flaws and centrifugal forces affecting the mutual trust and mutual recognition paradigm.

Four main aspects are worthy of attention in this brief concluding section.

Firstly, the system of cross-border transfers relies heavily on the organisational capacity and efficiency of the Member States. Several converging factors, such as the variety of stakeholders involved and the complex dynamics of prison life, often make it very difficult to identify inmates who are suitable for a transfer (and, hopefully, willing to be transferred) and to conduct the procedure appropriately. Crucially, today's practice shows that the Member States – or at least those involved in this research – face the risk of being unable to transfer rapidly prisoners asking for their removal.

Secondly, notwithstanding the wording of the Framework Decision and the increasing debate on this issue, the social rehabilitation objective underpinning cross-border transfers still raises concern. The use of cross-border transfers with a view to deflating prison overcrowding and expelling undesired Union citizens is a recurring challenge to the mechanism at issue, as confirmed by the interviews held with practitioners during the project. The spectre of public order and budgetary concerns may trigger abuses of the Framework Decision and thus require appropriate checks and judicial remedies.

Thirdly, legal fragmentation – which reaches its peak precisely in the domain of the criminal execution phase – is still today one of the most pressing factors of departure from mutual trust and mutual recognition. Whether it is how prison benefits are regulated, the normative standards for determining prison conditions, or the regime of reductions and remissions in sentence, the differences (and the often related lack of mutual knowledge and awareness) between the legal orders of the Member States involved is a recurring concern. While it seldom blocks cooperation *per se*, legal fragmentation triggers several obstacles, such as incomplete or ineffectively filled out certificates, repeated clarification requests, and requests for various updates *in itinere* on the sentence remaining to be served, thereby slowing down the procedure and discouraging the already overloaded judicial authorities.

Finally, various problems of interconnection of the Framework Decision with other parallel and complementary instruments are gradually emerging. As we have seen, the choice between issuing a certificate under Framework Decision 2008/909/JHA or an EAW requires the competent authority to make a difficult preliminary assessment, without conclusive normative and jurisprudential guidance. This issue is just one example of a new future branch of litigation in this domain. Thus far, the overarching success of the EAW has led national courts and the Court of Justice of the European Union to focus almost exclusively on this instrument. However, the increasing practice of cross-border transfers and the introduction of other instruments such as Framework Decisions 2008/947/JHA of 27November 2008 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 (OJ L 337, 16.12.2008, pp. 102-122) and 2009/829/JHA of 23 October 2009 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 (OJ L 294, 11.11.2009, pp. 20-40) will put to the test the internal coherence of the judicial cooperation system set up by the EU legislature.

All these aspects – which highlight just some of the issues raised by cross-border transfers – have a key common denominator, namely the need for tailor-made conduct of the transfer procedure, in light of the circumstances of each individual case. This is actually one of the most challenging aspects of the implementation of Framework Decision 2008/909/JHA. The RePers activities have led the research consortium to stress how the combination of diversified domestic legal solutions and informal implementation strategies with the specific situation of the prisoner concerned makes it difficult to identify all-encompassing and easily replicable solutions to existing problems. This factor further requires the judicial authorities and professionals involved to take their tasks seriously on a case by case basis.