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NOTE

from:	Austrian delegation
to:	Working Party on Cooperation in Criminal Matters (Mutual recognition experts)
Subject:	Council Framework Decision 2008/909/JHA

Framework Decision 2008/909/JHA (Transfer of Prisoners) has been implemented so far by 18 Member States (see information available at the website of the EJN).

The following problems have been encountered on a regular basis when applying the new regime for the transfer of prisoners under the FD 2008/909/JHA:

1. The Framework Decision aims at facilitating the procedure of cross-border enforcement of sentences by **reducing the number of documents** which have to be provided by the issuing State to the executing State in comparison with previous existing legal instruments (see especially the Convention of 21 March 1983 on the Transfer of Sentenced Prisoners – CETS 112 and its Additional Protocol – CETS 167). Though the Framework Decision does not contain an obligation to provide an existing **expulsion or deportation order**, frequently the competent authorities of the executing States request not only

a transmission of the certificate, the judgment and the statement of the sentenced person, but also of the expulsion or deportation order. According to the text in the certificate (g.b.) however only the name of the authority that issued that order, the date of issue and, if available, the reference number have to be provided. In addition sometimes not only the certificate in the language of the executing State, but also the original of the certificate (in the language of the issuing State) is requested. Due to this practice the objective of the Framework Decision to facilitate the cross-border enforcement of sentences is not achieved. In fact the proceedings have become more cumbersome due to the new legal framework.

2. Article 5 of the Framework Decision provides that the judgment or a certified copy of it, together with the certificate shall be forwarded, by the competent authority of the issuing State directly to the competent authority of the executing State by any means which leaves a written record under conditions allowing the executing State to establish its authenticity. Within a judicial European area based on mutual trust the **authenticity of a judgment** should be acknowledged when the **sender** of the judgment can be established without any doubt as **the competent authority of the issuing State** according to Article 2 (1) of the Framework Decision.
3. A further facilitation of procedure is expected due to **restricted translation requirements** under Article 23 of the Framework Decision. In principle only the certificate has to be translated in the/an official language of the executing State. The **judgment** or essential parts of it have only to be accompanied by a translation into the/an official language of the executing State, where the respective Member State made a declaration according to Article 23, para. 3 of the Framework Decision and where it finds the **content of the certificate insufficient** to decide on the enforcement of the sentence.
Though the certificate contains on a regular basis already all required relevant information for a decision on the enforcement, a translation also of the judgment is requested in most cases.

4. Though the Framework Decision does not contain such a **ground for non-recognition and non-enforcement**, a request according to Article 4, para. 1b of the Framework Decision to the Member State of nationality, to which, while not being the Member State where the sentenced person lives, but he or she will be deported once released from the enforcement of the sentence on the basis of an **expulsion or deportation order**, is very often refused due to considerations that such a transfer would not serve the purpose of social rehabilitation of the sentenced person. The Framework Decision however provides that the final assessment, that the enforcement of the sentence by the executing State would serve the purpose of facilitating the social rehabilitation of the sentenced person, falls within the responsibilities of the issuing State. A higher level of imprisonment (related to work and skills training, education, medical treatment, accommodation, etc.) cannot serve as a ground for non-recognition due to reduced prospects of social rehabilitation in the executing State. A single European Justice area governed by the principle of mutual recognition and enforcement requires an approximation of standards in the prison systems of all Member States.
5. The **time limits** in Article 12 para 2 and Article 15 para 1 of the Framework Decision are not respected in most cases. To meet the time limit established in Article 15 para 1 an immediate confirmation of the proposed date/circumstances of the **transfer** is requested.
6. The **EJN website** is designated to provide to practitioners in the field of international judicial co-operation in criminal matters essential, comprehensive and accurate information about all relevant EU instruments. As the Framework Decision 2008/909 provides for direct communication between the competent authorities in the Member States, not only comprehensive and up-dated information on the implementation of the Framework Decision and on declarations made by Member States would facilitate the co-operation in practice, but also an adjusted **Atlas** at the website of the EJN should be provided in order to **allow an immediate identification of the competent authority** in the respective executing State.
