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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**on the implementation by the Member States of the Framework Decisions
2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial
decisions on custodial sentences or measures involving deprivation of liberty, on
probation decisions and alternative sanctions and on supervision measures as an
alternative to provisional detention**

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1. INTRODUCTION

In a common European area of justice based on mutual trust, the EU has taken action to ensure that non-residents subject to criminal proceedings are not treated differently from residents. This is particularly important in view of the important number of EU citizens who are imprisoned in other Member States.

It is in this spirit that the EU adopted in 2008 and 2009 three complementary Framework Decisions whose respective transposition deadlines have expired:

- Council Framework Decision 2008/909/JHA¹ on the application of the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty (*Transfer of Prisoners*) had to be implemented by 5 December 2011. On the one hand, it allows a Member State to execute a prison sentence issued by another Member State against a person who remains in the first Member State. On the other hand, it establishes a system for transferring convicted prisoners back to the Member State of nationality or habitual residence (or to another Member State with which they have close ties) to serve their prison sentence.
- Council Framework Decision 2008/947/JHA² on the application of the principle of mutual recognition of probation decisions and alternative sanctions (*Probation and Alternative Sanctions*) had to be implemented by 6 December 2011. It applies to many alternatives to custody and to measures facilitating early release (e.g. an obligation not to enter certain localities, to carry out community service or instructions relating to residence or training or professional activities). The probation decision or other alternative sanction can be executed in another Member State, as long as the person consents.
- Council Framework Decision 2009/829/JHA³ on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (*European Supervision Order*) had to be implemented by 1 December 2012. It concerns provisional release in the pre-trial stage. It will enable a non-custodial supervision (e.g. an obligation to remain at a specified place or an obligation to report at specified times to a specific authority) to be transferred from the Member State where the non-resident is suspected of having committed an offence to the Member State

¹ Council Framework Decision 2008/909/JHA adopted on 27 November 2008 (OJ L 327, 5.12.2008, p. 27).

² Council Framework Decision 2008/947/JHA adopted on 27 November 2008 (OJ L 337, 16.12.2008, p.102).

³ Council Framework Decision 2009/829/JHA adopted on 23 October 2009 (OJ L 294, 11.11.2009, p. 20).

where he is normally resident. This will allow a suspected person to be subject to a supervision measure in his home Member State until the trial takes place in another Member State, instead of being placed into pre-trial detention.

The assessment of the numerous replies to the Commission Green Paper of June 2011 on the application of EU criminal justice legislation in the field of detention⁴, showed that the proper and timely implementation of the Framework Decisions should have absolute priority.

The purpose of this report is therefore twofold: firstly, to assess the state of implementation of the Framework Decisions against the background of the powers of the Commission to start infringement procedures as of 1 December 2014⁵; secondly, to provide a preliminary evaluation of the national transposition laws already received by the Commission.

2. BACKGROUND TO THE FRAMEWORK DECISIONS: A COHERENT AND COMPLEMENTARY LEGISLATIVE PACKAGE

Each year tens of thousands of EU citizens are prosecuted for alleged crimes or convicted in another Member State of the European Union. Very often, criminal courts order the detention of non-residents because there is a fear that they will not turn up for trial. A suspect who is resident in the country would in a similar situation often benefit from a less coercive supervision measure, such as reporting to the police or a travel prohibition.

The Framework Decisions have to be seen as a package of coherent and complementary legislation that addresses the issue of detention of EU citizens in other Member States and has the potential to lead to a reduction in pre-trial detention or to facilitate social rehabilitation of prisoners in a cross border context. There are in fact operational links between the three Framework Decisions, but also between the Framework Decisions and the Framework Decision on the European arrest warrant⁶.

Proper implementation of the *European Supervision Order* by all Member States will allow suspected persons who are subject to a European arrest warrant to swiftly go back to their country of residence while they are awaiting trial in another Member State. This will avoid long pre-trial detention in a foreign country following the execution of a European arrest warrant and before the actual trial takes place. Moreover, proper implementation of the *Probation and Alternative Sanctions* will encourage judges, who can be confident that a person will be properly supervised in another Member State, to impose an alternative sanction to be executed abroad instead of a prison sentence.

There is also a link between the *European Supervision Order* and the *Probation and Alternative Sanctions*. Indeed, once the accused person has already been sent back under the *European Supervision Order* in the pre-trial stage and has shown that he complies with conditions imposed upon him in the pre-trial stage, the judge will naturally be more inclined to impose an alternative sanction (instead of imprisonment) which can be executed abroad for the post-trial stage.

⁴ COM (2011) 327 final: http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm.

⁵ Date of expiry of the transitional period under Protocol 36 to the Lisbon Treaty (see section 5).

⁶ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (*European arrest warrant*), OJ L 190, 18.7.2002, p. 1.

In addition, Article 25 of the *Transfer of Prisoners* provides for a link to the *European arrest warrant*. This provision, in conjunction with Article 4(6) and 5(3) of the *European arrest warrant*, allows a Member State to refuse to surrender its nationals or residents or persons staying in that Member State if that Member State undertakes to enforce the prison sentence in accordance with the *Transfer of Prisoners*.

The full use of the potential of this legislative package requires proper transposition of the Framework Decisions into national legislation.

3. STATE OF PLAY OF IMPLEMENTATION AND CONSEQUENCES OF NON-TRANSPOSITION

At the time of writing, respectively 10, 14 and 16 Member States have not yet transposed the Framework Decisions more than 2 years and 1 year after the implementation date. The Commission had received notifications on the national transposition laws only from the following Member States:

- *Transfer of Prisoners*: from **DK, FI, IT, LU and UK** by the implementation date and from **AT, BE, CZ, FR, HR, HU, LV, MT, NL, PL, RO, SI and SK** after the implementation date.
- *Probation and Alternative Sanctions*: from **DK and FI** by the implementation date and from **AT, BE, BG, CZ, HR, HU, LV, NL, PL, RO, SI and SK** after the implementation date.
- *European Supervision Order*: from **DK, FI, LV and PL** by the implementation date of and from **AT, CZ, HR, HU, NL, RO, SI and SK** after the implementation date.

No notification has been received from the following Member States⁷:

- *Transfer of Prisoners*: **BG, CY, DE, EE, EL, ES, IE, LT, PT and SE.**
- *Probation and Alternative Sanctions*: **CY, DE, EE, EL, ES, FR, IE, IT, LT, LU, MT, PT, SE and UK.**
- *European Supervision Order*: **BE, BG, CY, DE, EE, EL, ES, FR, IE, IT, LT, LU, MT, PT, SE and UK.**

A table on the state of play of implementation of the Framework Decisions can be found in the annexed Staff Working Document together with a table with the declarations made by Member States in this context.

Framework Decisions have to be implemented by Member States as is the case with any other element of the EU *acquis*. By their nature, Framework Decisions are binding upon the Member States as to the result to be achieved, but it is a matter for the national authorities to choose the form and method of implementation. Framework Decisions do not entail direct effect. However, the principle of conforming interpretation is binding in relation to Framework Decisions adopted in the context of Title VI of the former Treaty on European Union⁸.

The non-implementation of the Framework Decisions by some Member States is very problematic since those Member States who have properly implemented the

⁷ Some Member States informed the Commission of the process of preparing relevant legislation at national level. However, none of these Member States adopted the legislation or notified the Commission before December 2013.

⁸ See judgment of the Court of Justice of the EU, 16 June 2005, Case C-105/03, *Pupino*.

Framework Decisions cannot benefit from their co-operation provisions in their relations with those Member States who did not implement them in time. Indeed, the principle of mutual recognition, which is the cornerstone of the judicial area of justice, requires a reciprocal transposition; it cannot work if instruments are not implemented correctly in the two Member States concerned. As a consequence, when cooperating with a Member State who did not implement in time, even those Member States who did so will have to continue to apply the corresponding conventions of the Council of Europe when transferring EU prisoners or sentences to other Member States.

4. PRELIMINARY EVALUATION OF THE TRANSPOSITION LAWS RECEIVED

During Experts' meetings with Member States, it became clear that some issues and legal provisions need further attention. This was also confirmed by a preliminary analysis of the implementing legislation of Member States already received by the Commission.

This report therefore focuses on selected Articles that form the core part of the Framework Decisions in the light of their aims. Since this report covers the three Framework Decisions, the Articles are grouped by subject matter.

As this is a preliminary evaluation, it is too early to draw general conclusions on the quality of implementation. This is also due to the fact that many Member States have not yet complied with their obligation to transpose the Framework Decisions.

Moreover, Member States have little practical experience in the application of the Framework Decisions so far. At the time of writing, the Commission had received limited indicative information on the practical application of the Framework Decisions from three Member States (BE, FI and NL). The limited figures available show that the *Transfer of Prisoners* is already used whereas no transfers have yet taken place under *Probation and Alternative Sanctions* and *European Supervision Order*.

The efforts of the Member States that implemented the Framework Decisions in time should be underlined and the comments relating to those Member States should be understood in the light of the approach of the Commission to provide assistance in the implementation process.

4.1. Role of the person concerned in the transfer process

(Article 6 Transfer of Prisoners, Article 5 Probation and Alternative Sanctions and Article 9 European Supervision Order)

Because of the importance of social rehabilitation as a leading principle of the Framework Decisions, Member States' implementing legislation must ensure that the person concerned is properly consulted in transfer decisions.

However, Article 6 *Transfer of Prisoners* provides for the possibility of transfer without the consent of the sentenced person under certain circumstances. As this is a new aspect in comparison to the Council of Europe Convention of 1983⁹, it is important that Member States have properly transposed this provision. The implementing legislation should provide for a transfer of the sentenced person

⁹ The Additional Protocol of 1997 to this Convention already provided for the transfer of prisoners without their consent in limited circumstances. However, this Protocol was not ratified by all Member States.

without his consent only in the three limited circumstances as indicated in this Article. There should as a minimum be provisions on the taking into account the opinion of the sentenced person (where he is still in the issuing State); on giving information to the sentenced person; on consultation between the Competent Authorities; and on the possibility for the authorities of the executing State to give a reasoned opinion.

From a preliminary analysis of the Member States' implementing legislation, it appears that it is not always expressly provided for that the person should be notified and that he should be given an opportunity to state his opinion, which needs to be taken into account.

Under the *Probation and Alternative Sanctions* consent of the sentenced person is always required, unless the person has returned to the executing State, when his consent is implied. This is important as this Framework Decision cannot be used against the will of the person concerned. The reason for this is that this Framework Decision only comes into play if the person has already been released in the issuing State and wants to return as a free person to his home country and is ready to cooperate with the supervising authorities. The same applies to the *European Supervision Order* which relates to the pre-trial stage where the person is still presumed innocent.

The Commission will assess whether Member States correctly set out in their implementing legislation an effective procedure to give a role to the sentenced person in the transfer process.

4.2. Principle of mutual trust: in principle no adaptation of the sentence

(Article 8 Transfer of Prisoners, Article 9 Probation and Alternative Sanctions and Article 13 European Supervision Order)

It is important to find the right balance between respect of the sentence originally imposed and the legal traditions of Member States so that conflicts that could adversely affect the functioning of the Framework Decisions do not arise. As the Framework Decisions are based on mutual trust in other Member States' legal systems, the decision of the judge in the issuing State should be respected and, in principle, there should be no revision or adaptation of this decision. Only where the duration or nature of the sentence is not compatible with the national law of the executing State (such as a statutory maximum sentence), may the sentence be adapted. However, the adapted sentence must correspond as closely as possible to the original sentence. An adaptation cannot aggravate the sentence passed in the issuing State in terms of its nature or duration.

Some Member States widened the possibilities of adaptation by adding additional conditions (PL, LV). This opens the possibility for the executing State to assess whether the sentence imposed in the issuing State corresponds to the sentence that would normally have been imposed for this offence in the executing State. This is contrary to the aims and spirit of the Framework Decisions.

With respect to non-custodial sentences, the *Probation and Alternative Sanctions* ensures that an alternative sanction can be transferred even if this type of sanction would not be imposed for a similar offence in the Member State of execution. Moreover, as Member States have to provide for at least the probation measures and alternative sanctions as mentioned in Article 4(1) of this Framework Decision, a positive side effect will be the promotion and approximation of alternatives to

detention in the different Member States. A preliminary assessment of the legislations shows that some Member States have not implemented all mandatory measures (BG, PL).

The same applies to the *European Supervision Order* under which Member States have to provide at least for the six mandatory measures as mentioned in Article 8(1). HU only allows for the transfer of three supervision measures.

4.3. Subsequent decisions: differences in the execution of the sentence

(Article 17 Transfer of Prisoners, Article 14 Probation and Alternative Sanctions and Article 18 European Supervision Order)

How much time the sentenced person will actually spend in prison depends largely on the provisions on early and conditional release in the executing State. The differences between Member States are considerable in this respect: in some Member States the sentenced person is released after two thirds of the sentence, in others after one third of the sentence.

Article 17 of the *Transfer of Prisoners* provides that the enforcement of a sentence including the grounds for early and conditional release shall be governed by the law of the executing State. However, this Member State must inform, upon request, the Member State that imposed the original sentence of the executing States' rules on early or conditional release. If the issuing State fears that transfer would lead to what they would regard as a premature release, it may decide not to transfer the person concerned and to withdraw the certificate. It is therefore important that Member States have properly implemented this duty to provide this information upon request before transfer and execution of the sentence, which is not the case in some Member States' implementing legislation.

The Commission will encourage the exchange of information on early and conditional release through databases in cooperation with Member States and stakeholders.

4.4. An obligation to accept a transfer, unless grounds for refusal apply

(Article 9 Transfer of Prisoners, Article 11 Probation and Alternative Sanctions and Article 15 European Supervision Order)

One of the new aspects of the Framework Decisions is that they impose in principle an obligation to accept requests for transfer. This comes from the principle of mutual recognition upon which the Framework Decisions are based and is reflected in the provision common to the Framework Decisions that the executing State *shall* recognise a judgment which has been forwarded by the issuing State. Transfers can only be refused in limited circumstances, namely if the grounds for refusal as mentioned in the different Framework Decisions apply. On the contrary, there is no obligation for the issuing State to forward a judgment (see Article 4(5) *Transfer of Prisoners*).

A preliminary analysis of the implementing legislation in the Member States shows that wide variations exist in the transposition of the grounds for refusal. Some Member States have not implemented all grounds for refusal as indicated in the Framework Decisions (HU, LU, NL, DK, LV) others have added additional grounds (AT, BE, DK). Some Member States have correctly implemented the grounds for refusal as optional for the competent authority (FI, LV, BG), others have implemented them as mandatory (AT, IT, MT, SK) and in a third group the final

result consists of a mix of optional and mandatory grounds (BE, DK, HU, LU, NL, PL).

Implementing additional grounds for refusal and making them mandatory seem to be both contrary to the letter and spirit of the Framework Decisions.

On the question as to whether the application of the grounds for refusal should be optional for the competent authorities, who will take the decision on recognition and enforcement, the text of the Framework Decisions clearly states that the competent authority "may" refuse to recognise the judgment and enforce the sentence if the grounds for refusal apply. This wording indicates that the competent authority should have the discretion to decide on a case by case basis whether or not to apply a ground for refusal taking into account the social rehabilitation aspect which underpins all three Framework Decisions. The grounds for refusal should therefore be implemented as optional for the competent authority.

This approach is in the spirit of the Framework Decisions, which require that the transfer must enhance the prospects of social rehabilitation and may take place at the explicit request of the accused or sentenced person. In such a case, an obligation to refuse such a transfer because one of the grounds for refusal applies would normally not be in the interest of the sentenced person himself.

4.5. Time limits

(Article 12 Transfer of Prisoners, Article 12 Probation and Alternative Sanctions and Article 12 European Supervision Order)

The Framework Decisions establish a new simplified and more effective system for the transfer of sentences to facilitate and accelerate judicial cooperation. Therefore, they provide for fixed time-limits for a transfer to take place.

The time limits should be implemented by the Member States in such a way that as a general rule, the final decision, including an appeal procedure, is completed within the set time limit. Exceeding the time limit may only occur in exceptional circumstances.

Although it is common cause that all Member States should ensure that sentenced persons can access legal rights and remedies in accordance with their national law, AT, HU and LV did not make provision in their implementing legislation for a maximum time limit for court's decisions in appeal procedures on transfers.

Member States should ensure that incorporating remedies in their system should be balanced with the importance of respecting the time limits in the Framework Decisions¹⁰.

4.6. Link between Framework Decisions and the European arrest warrant

(Article 25 Transfer of Prisoners and Article 21 European Supervision Order)

Article 25 of the *Transfer of Prisoners* in conjunction with Article 4(6) and 5(3) of the *European arrest warrant* allows a Member State to refuse to surrender a person under a European arrest warrant (or allow for a surrender under the condition that the person has to be returned to that Member State) where the requested person is a national, a resident or is staying in that Member State if that Member State

¹⁰ See judgment of the Court of Justice of the EU, 30 May 2013, Case C-168/13 PPU, *Jeremy F. v. Premier ministre*.

undertakes to enforce the prison sentence in accordance with the *Transfer of Prisoners*.

Some Member States did not indicate in their implementing legislation that their domestic provisions transposing the *Transfer of Prisoners* should apply in the above situations (DK, HU, LU, LV, MT and SK). AT only provides for this possibility when the surrender request relates to its own nationals. Instead of respecting the obligation to enforce the sentence as it has been imposed in the issuing State, NL has reserved the right to make an assessment as to whether the custodial sentence imposed corresponds to the sentence which would have been imposed in the Netherlands for this offence. This seems to be contrary to the letter and spirit of the Framework Decisions.

Article 21 of the *European Supervision Order* provides for the possibility to issue a European arrest warrant to bring back the person once he is required to stand trial or if he is required to return because he does not fulfil the conditions as imposed by the European Supervision Order. Not all Member States have implemented Article 21 (HU, LV and PL).

This is to be regretted given the fact that by its nature a European Supervision Order would be very useful to allow persons awaiting trial for relatively minor offences to go home. In recognition of this reality, Article 21 of the *European Supervision Order* expressly dispenses with the normal European arrest warrant requirement that the offence for which the European arrest warrant is issued is punishable by a custodial sentence for a maximum period of at least 12 months¹¹.

4.7. Declarations on transitional provision

(Article 28 *Transfer of Prisoners*)

Article 28 of the *Transfer of Prisoners* allows Member States, on the adoption of the Framework Decision, to make a declaration indicating that, with respect to final judgments issued before a specified date (which can be no later than 5 December 2011), they will continue to apply the existing legal instruments on the transfer of sentenced persons. The date of adoption of this Framework Decisions was 27 November 2008.

It appears from the information as sent to the Commission that four Member States (IE, MT, NL and PL) have made such declarations. However, according to the latest information received by the Commission IE, MT and PL have done so after the date of adoption of this Framework Decision, i.e. 27 November 2008. In the Commission's view, these declarations are not valid and the time limitation should be removed by Member States from their existing or proposed implementing legislation forthwith.

5. A NEW LEGAL ENVIRONMENT TO ENSURE THAT THIRD PILLAR LAW IS APPLIED IN PRACTICE

The Framework Decisions which have been adopted under the so-called "third pillar" have been agreed upon unanimously by all Member States who committed themselves to implement them before the expiry of the transposition date.

¹¹ See Article 2(1) of the *European arrest warrant*.

Member States have therefore created a legal order which is binding upon them as in other areas of EU law, even if no enforcement mechanism is available until the expiry of the transitional period under Protocol 36 to the Lisbon Treaty.

It is common cause that the executive force of EU law, including measures adopted under the third pillar, cannot vary from one Member State to another depending on the level of implementation into the national legal order, without jeopardizing the attainment of effective judicial cooperation.

As of 1 December 2014, the Court of Justice of the EU will have full jurisdiction, including preliminary rulings on the interpretation of legislation, in the area of police cooperation and judicial cooperation in criminal matters. The Commission as well as Member States will be entitled to launch infringement proceedings against those Member States that have not implemented or not correctly implemented EU law.

These new opportunities will be particularly relevant for the most important pieces of legislation predating the Lisbon Treaty in the area of criminal justice, to which the Commission considers the three Framework Decisions belong.

6. CONCLUSION

While recognising the efforts made by some Member States to date, the level of implementation of these three important pieces of legislation is far from satisfactory.

The objective of developing an area of freedom, security and justice for all EU citizens as laid down in Article 3 of the Treaty on European Union cannot be achieved if Member States do not properly implement the instruments they all agreed upon.

The partial and incomplete transposition of the Framework Decisions hampers the application of the principle of mutual recognition in the area of criminal justice. It moreover breaches the legitimate expectations of EU citizens as they lose a precious tool to reduce the negative impact on their lives if they are suspected or accused in another Member State, in particular those citizens who are subject to a European arrest warrant in the pre-trial stage. At the same time the objective of the Framework Decisions to ensure that justice is served while enhancing the social rehabilitation of the suspected or accused person cannot be achieved.

Finally, late implementation is to be regretted as the Framework Decisions have the potential to lead to a reduction in prison sentences imposed by judges to non-residents. This could not only reduce prison overcrowding and thereby improve detention conditions, but also – as a consequence – allow for considerable savings for the budgets spent by Member States on prisons.

Keeping in mind the power of the Commission to start infringement proceedings as of 1 December 2014, it is of utmost importance for all Member States to consider this Report and to provide all further relevant information to the Commission, in order to fulfil their obligations under the Treaty. In addition, the Commission encourages those Member States that have signalled that they are preparing relevant legislation to enact and give notification of these national measures as soon as possible. The Commission urges all those Member States that have not yet done so to take swift measures to implement these Framework Decisions to the fullest extent. Furthermore, it invites those that have transposed it incorrectly to review and align their national implementation legislation with the provisions of the Framework Decisions.