



Literature review on  
the Council Framework  
Decision 2008/947/JHA of  
27 November 2008 and  
the Council Framework  
Decision 2009/829/JHA of  
23 October 2009



PROBATION OBSERVATORY



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## Prologue

This report, which addresses a literature review above the Council Framework Decision (FD) 2008/947/JHA and Council Framework Decision (FD) 2009/829/JHA, forms part of the *Probation Observatory. Training and Network (PONT)* project.

This European project is funded by the Directorate General of Justice<sup>1</sup>, coordinated by the University of Bucharest (coordinated by Ioan Durnescu) and implemented in partnership with University Loyola Andalucía, University of Latvia, Bremen Ministry of Justice and Constitution and the Confederation of European Probation (CEP).

The main objectives of this project are to offer training to the competent authorities on the two FDs and to create a sustainable network of experts in this field<sup>2</sup>.

To this end, the project team has produced this report to conduct a literature review on the above-mentioned FDs, covering academic papers, grey literature and previous training content. This review has focused on collecting interesting data and information related to the implementation of the mentioned FDs (947 and 829) in order to highlight the most important learning points. From here, *PONT* will develop an e-manual on good practices and to develop a training package, our project goals. Therefore, articles, books, project reports and other kind of documentation have been taken into account, paying special attention to the training materials developed in prior projects or reports coming from international entities (organisations and EU institutions) related to the practical implementation of the FDs 947 and 829.

The University Loyola Andalucía team is the coordinator and producer of this report.

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<sup>2</sup> For further information, please visit: <http://probationobservatory.eu/>

# 1. Introduction

The European Union (EU) constitutes an area of freedom, security and justice. The freedom of mobility has led to an increase of movement of EU citizens between countries, usually bringing lots of benefits, but also having some undesirable consequences: many people commit crimes far away from their 'home countries' and are sentenced in foreign countries. This in turn becomes an obstacle for the post-sentence social reintegration and rehabilitation of the offenders.

In 1999, *"the Tampere European Council decided that judicial cooperation in criminal matters between the Member States should be based on the principle of mutual recognition of decisions in criminal matters"* (Nauta, van Aalst & Özgül, 2018, p. 3). The main idea was that mutual recognition would provide a faster and more efficient formula of cooperation than traditional legal instruments. This principle of mutual recognition means that Member States must recognize and enforce a legal decision taken in another Member State as if that decision had been taken by its own national authorities (Marguery, 2017, p.5).

Several Framework Decisions (FDs) have further developed the principle of mutual recognition of decisions in criminal matters, establishing some procedures to be transposed into domestic law by the EU Member States. Certainly, these FDs only establish general guidelines, without prescribing the concrete means by which expected results must be achieved. Thus, the FDs stipulate a flexible mechanism to improve legal cooperation in criminal matters.

Among those Framework Decisions developing the principle of mutual recognition in criminal matters and focused on the recognition of penal decisions concerning accused, suspect or convicted persons could be highlighted:

- Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (FD 909).
- Council Framework Decision 2008/947/JHA of 27 November 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 (FD 947).
- Council Framework Decision 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 (European Supervision Order, FD 829).

This report will focus on the two last FDs, with the aim of conducting a literature review to collect all relative information and the ultimate goal of developing a training package for competent authorities. Therefore, articles and academic papers, books, grey

literature (project reports and training materials), papers related to the training on the issue and any other documentation (legal documents, guides to implement these FDs performed by the Institutes of Magistracy and similar documents) have all been taken into account.

## 2. Framework Decisions in brief

### 2.1. Council Framework Decision 2008/947/JHA and Council Framework Decision 2009/829/JHA in brief

These Framework Decisions are based on principle of Mutual Recognition. Briefly explained, mutual trust raises mutual confidence among Member States with respect to procedural rights in national criminal procedures. This principle of mutual recognition was mentioned for the first time in the Tampere Council in 1999 and was posteriorly regulated in the Lisbon Treaty (2007).

The background for FD 947 lies in the Council of Europe Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (1964), which aimed to provide mutual assistance in the social rehabilitation of offenders (this Convention was only ratified by 20 European Member States). FD 947 goes further, and extends the scope to the mutual recognition of suspended sentences, conditional sentences, alternative sanctions and decisions on conditional release. This means that probation measures and alternative sanctions are covered by this FD. This instrument implies the imposture of the application of the principle of mutual recognition of judgments and probation decisions in the supervision of probation measures and alternative sanctions in a Member State other than that in which the probation measure or the alternative sanction.

In the same vein, FD 829 - 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 - allows the accused in a criminal procedure resident of one Member State, but subjected to alternative preventive measures (non-custodial) emanating from the competent authorities of a different Member State, to implement those measures in his country of residence.

These FDs share some common characteristics. Both FDs establish a similar procedural system of certificates and direct contact among competent authorities. Both FDs introduce the obligation to accept a transfer of the resolution, unless grounds for refusal can be applied, but there is no obligation to transfer a probation or alternative measure or sanction for the issuing State (this is, the accused or the sentenced person does not have the right to the transfer). There is no need to check the double criminality for a list of 32 offences. The process can be launched at the request of the individual concerned or one of the Member States involved. Both FDs establish strict time limits, but only in the executing State. Adaptation of the sentence will be only possible if the nature or duration of the sentence is incompatible with national law and an assessment of the social rehabilitation of the concerned person should always be implemented.

However, these two instruments also present some divergences. In addition to being focused on different measures at different moments of the criminal procedure, other differences can be summarized in the following figure:

Table n 1. FD 947 and 829 Comparative Overview

	FD 947/2008 on alternative to detention and probation decision	FD 829/2009 on alternatives to provisional detention
<b>General target group</b>	Offenders that being sentenced with an alternative to detention or probation measure want to go back to their countries (consent)	Suspected offenders that want to go back to their country under an alternative to provisional detention (consent)
<b>Aim</b>	Enhance social rehabilitation by preserving offender's ties.	Protection of the victim and general public. Enhancing the right to liberty and the presumption of innocence
<b>Deadline of implementation</b>	6 <sup>th</sup> December 2011	1 <sup>st</sup> December 2012
<b>Countries that have implemented</b>	all EU member states countries except UK. Ireland (in progress)	All EU member states countries except: Ireland, Cyprus and ?
<b>Documentation</b>	Certificate + sentence (Adaptation – nature and duration)	Certificate + Decision on the supervision measure (Adaptation – nature and duration)
<b>Grounds of non recognition</b>	Certificate incomplete Art. 11	Certificate incomplete Art. 15

Source: presentation of Gerry McNally, President of the CEP, 6th October 2017, at the 20th Annual Conference of the Association for Criminal Justice Research and Development, “*The Brexit Impact on Criminal Justice Co-operation in Ireland*”, available on: [https://www.acjrd.ie/files/WS\\_3\\_-\\_Gerry\\_McNally.pdf](https://www.acjrd.ie/files/WS_3_-_Gerry_McNally.pdf)

As we are going to see below, the level of implementation of these FDs is today quite similar, but there are still some differences with regard to their level of use.

## 2.2. State of Implementation of the FD 947 and FD 829

The principle of mutual recognition requires a reciprocal transposition and cannot work if the instruments are not implemented in the two Member States concerned in a process of mutual recognition of penal judgments; it is necessary that all Member States do properly apply the EU legal instruments for Judicial Cooperation.

Concerning FD 947, once adopted by the Council of the European Union, it was published in the *Official Journal of the European Union*, and came into force on that day (16<sup>th</sup> December 2008). According to Art. 25 of this FD, all Member States should take the necessary measures to comply with the provisions of this Framework Decision by 6<sup>th</sup> December 2011. This meant that all EU States had just under three years to take all the necessary measures to implement the FD and transpose it into their national laws. Only two Member States met this deadline.

Concerning the FD 829, it was adopted in October 2009 and published 11 November of that year in the *Official Journal of the European Union*, coming into force on the 20th day following its publication. According to Art. 27 of this document, all Member States had to take the necessary measures to comply with the provisions of the Framework Decision by 1<sup>st</sup> December 2012. Only four Member States met this deadline.

According to the Report conducted by the European Commission to the European Parliament and the Council on 5th February 2014, concerning the implementation by the Member States of the FDs 909, 947 and 829, many Member States had not yet complied with their obligation to transpose the Framework Decisions, and Member States had little practical experience in the application of the FDs. At the time of writing, the Commission had received limited indicative information on the practical application of the Framework Decisions: The Transfer of Prisoners measure had already been used, whereas no transfers had yet taken place under Probation and Alternative Sanctions and European Supervision Order. With specific reference to non-custodial sentences and measures, Member States had to provide for at least the probation measures and alternative sanctions as mentioned in Article 4(1) of the FD 947 and had to provide at least for the six mandatory measures as mentioned in Article 8(1) of the FD 829. A preliminary assessment of the legislation showed that some Member States had not implemented all mandatory measures. Some Member States had not implemented all grounds for refusal as indicated in the Framework Decisions, adding additional grounds or implementing them as mandatory. Other Member States did not make provision in their implementing legislation for a maximum time limit for court's decisions in appeal procedures on transfers. In conclusion, the level of implementation of the FDs 909, 947 and 829 was far from satisfactory, and sometimes the transposition was partial and incomplete.

On 4<sup>th</sup> November 2016, the General Secretariat of the Council of the European Union (to delegations) released a report on the implementation of FD 947 showing an increase in the number of transpositions: according to the information received by the General Secretariat at that time, 19 Member States (BE, BG, CZ, DE, DK, ES, HR, CY, LT, LV, HU, NL, AT, PL, RO, SI, SK, SE, FI) had implemented the Framework Decision in their national legal framework.

According to data provided by the European Judicial Network<sup>3</sup>, almost all the EU Member States have now transposed the FD 947 and FD 829. Only Ireland remains to transpose, where the process of transposition is “ongoing”.

Nonetheless, the fact of being transposed into the national legislation does not automatically indicate that these FDs are actually being used correctly in practice. According to the questionnaire performed by the European Judicial Network for the 51st Plenary Meeting of this Network (on 22 - 23 November 2018 in Vienna), about the Application of European Legal Instruments Based on Mutual Recognition in Criminal Matters, FDs 947 and 829 are underused: To the question “*how often have you been concerned with the application of the FD 2008/947/JHA as contact point or in any other*

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<sup>3</sup> Consult the web-link: [https://www.ejn-crimjust.europa.eu/ejn/EJN\\_Library\\_StatusOfImpByCat.aspx?CategoryId=37](https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=37)

*function since its implementation*” 97 Member States contact points (or competent or involved authorities in the application of this FD) were able to reply and over 3/5 of them had never been concerned with the application of this FD, nearly 1/3 were rarely consulted and less than 1/10 were consulted more often. The situation in relation to the FD 829 is still worst: the vast majority (nearly 7/8) of the 96 contact points answered that they had not at all been concerned with the FD 2009/829/JHA; only 1/8 of the contact points had rarely dealt with this FD.

Member States contact points exposed various obstacles which prevent their use these FDs. Among others, these were: a lack of information and knowledge about these instruments among practitioners; the fact that the procedure is too complicated or provides a big administrative burden; the disparity of measures in different Member States; the difficulties in getting the required consent of the suspect; the costs, or the question of the proportionality –since the cases concerned by the FD 947 and/or 829 often concern minor offences.

Data provided by the CEP throughout the expert meeting about how these FDs performed in 2017 and 2018<sup>4</sup> confirmed these conclusions, with special emphasis on the lack of knowledge of these FDs by the competent authorities (judicial authorities and probation officers) and clients, and the lack of training for the professionals involved in the application of these instruments, specially concerning the FD 829.

In conclusion, at formal level, nowadays both FDs are incorporated in domestic legislation of most Member States (all except one), but they are - particularly FD 829 - underused.

### 3. Methodology

The literature review was coordinated by Universidad Loyola Andalucía, but all *PONT* partners conducted a literature research in their own language and covering the jurisdictions under their competence.

Each partner worked usually narrowly within set jurisdictions, each taking charge of geographically closer jurisdictions, as detailed:

Universidad Loyola Andalucía	Spain, France, Portugal and Italy
Bremen Ministry of Justice	Germany, Belgium and The Netherlands
University of Latvia	Latvia, Estonia and Lithuania
University of Bucharest	Romania

The literature review focused on detecting:

- Obstacles and difficulties in procedural implementation of FDs 947 and 829
- Good practices
- Challenging / complex issues related to the implementation of FDs 947 and 829
- Training materials or tools that can be used in an e-manual.
- Practical and critical cases related to the implementation of these FDs.

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<sup>4</sup> Available on: <https://www.cep-probation.org/presentations-and-materials-of-the-4th-framework-decisions-expert-meeting-now-available/>

Therefore, this review includes academic papers that deal with these two topics in Europe, especially in the 12 Member States covered by the project, dealing with mutual trust among EU member states, published after 2008, describing good / bad practices on this topic, papers or website posts that describe previous projects dealing with these topics (so-called grey literature) and training materials produced in other projects or by national authorities.

The documents have been classified in five groups: academic articles, books (including book chapters), prior projects (dealing with theses FDs, directly or indirectly), other materials (research report, reports coming from or to some institutions or organizations, speeches, etc.) and relevant legal documents and legislations.

Description of the procedure:

A list of keywords was developed, covering practical issues related to the literature review and distributed among the PONT partners. Selected keywords were:

FD 2008/947 on alternative to detention and probation decisions.

FD 2009/829 on alternative to provisional detention.

Framework Decision 2008/2009.

Framework Decision 2009/829.

Transfer Cross-border cooperation.

Principle on mutual recognition.

Mutual recognition of judgments and probation decisions.

These keywords were translated into the languages of the involved jurisdictions (see table above). Different databases were studied in depth (such as Google Scholar, SAGE, ProQuest, ISI Thomson, Francis and Taylor etc). In addition to these databases, partners also searched professional and official websites for papers which comply with the above search criteria (e.g. University, Ministries, research institutes, European Commission etc.).

Two tools have been developed to analyse the information in a systematic way, to be used by all the partners and professionals involved in this literature review. For articles, books and other documents a template with the following fields was generated to highlight the relevant information for the PONT project (Annex 1):

-Author, year, country,

-Research or Program / Project design (research question, sampling, instruments, target group etc.)

-Abstract

- Conclusion(s) of the paper/program /projects

-Learning points that we can use when designing the e-manual and the training materials. Concretely: obstacles, difficulties and good practices, some relevant data to identify the training needs.

A separate template was developed to report information on Projects (Annex 2), to extract the relevant information of the previous research project in a homogenous way, following the next classification of the fields:

- Title of the project and coordinator
- Summary
- Website
- Short presentation of the relevant outcomes
- Comments on how this could be used in PONT project

All papers were analysed and selected according to PONT project goals. Only the most interesting and adequate to the project aims were chosen.

Guides and handbooks of national institutes of magistracy (including guides and directories of ministries of Justice and other legal institutions), dealing with the two selected FDs, were also consulted. Direct contact with previous projects on this area and with the EU Commission have also been carried out.

## 4. Results of the consulted bibliography

### 4.1. General overview

This section includes the bibliographic review results of a sample of papers (13), books (6), research projects (15) other materials (10) and a special mention to the training materials (9). In particular, the main aspects of each work are summarized (objectives and conclusions).

### 4.2. Outcomes

#### 4.2.1. Papers

**Paper 1. EU constitutional limits to the Europeanization of punishment: A case study on offenders' rehabilitation.**

**Wieczorek, I. (2019).**

This article contributes to the debate on the functions and limits of cross-border punishment. It uses two existing Framework Decisions as case studies, namely on Transfer of Prisoners (2008/ 909) and on Transfer of Probationers (2008/947). These texts include promoting the rehabilitative function of punishment in cross-border cases among their objectives. However, they have been criticized for not being fit for their purpose and being just an instrument for 'covert' deportation of foreign offenders. This article argues that European Union norms on punishment should be assessed considering the broader EU constitutional law framework, which requires EU norms not to compress disproportionately national regulatory autonomy (Article 5 Treaty on European Union). Against this background, it submits that some of the features of these Framework Decisions open to criticism are not a neglect of the core objective of offenders' rehabilitation but, in fact, the result of a legitimate balance with the interest of national regulatory autonomy. In broader terms, this illustrates that the Europeanization of criminal justice can help to ensure the certainty of punishment in transnational cases.

Yet, due to some institutional limits, it can also compromise the effective achievement of all its functions.

Concretely, some deficiencies of FDs 909 and 947 are identified in this article, such as not being adequately designed to achieve the offender's rehabilitation due to several reasons. Among these reflections are: these FDs do not envisage as mandatory the consultations with the executing State, do not establish a system which provides for enough information to the offender, do not establish a procedure to adequately collect the consent of the offender, do not take the right moment into account a 'right moment' for the process of transfer of the penal resolution or give too much discretion to the issuing State to send the certificate.

**Paper 2: The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?**  
**Martufi, A (2019).**

This article analyses the case law of European Court of Human Rights and the Court of Justice of the European Union about rehabilitation. It argues that the Europeanization of criminal justice is generally contributing to a reconceptualization of the aim of punishment and has relevant implications for each national criminal justice system and its actors. Finally, the article underscores the differences in approaches to rehabilitation between the two Courts, trying to assess their potential impact on national law and their significance in the broader context of European penal policy.

It is interesting to see how there is not yet a consensus about the concept of rehabilitation whilst it is the main purpose of some of the international cooperation instruments, such as those analysed in this project.

**Paper 3: RAPPORT – Evaluation Law on Mutual Recognition and Enforcement of Custodial and Suspended Sanctions.**  
**Nauta, O. / Van Aalst, M. / Özgül, P. (2018).**

As we know, based on the principle of mutual recognition of decisions in criminal matters, Framework Decisions 2008/909/JHA and 2008/947/JHA completed the EU legislation on the transfer of enforcement of criminal penalties. On 1 November 2012, both Framework Decisions were transposed into national law as the Law on Mutual Recognition and Enforcement of Custodial and Suspended Sanctions (in Dutch: the Wets). From that date, the Wets regulates the enforcement in the Netherlands of criminal sentences from EU Member States which, like the Netherlands, have implemented both Framework Decisions in their national legislation. On behalf of the Scientific Research and Documentation Centre (in Dutch: WODC), DSP-groep conducted an evaluation about the implementation of this Law. The purpose of the investigation is to provide insight into the application of the Wets in practice: how many Wets cases have been dealt with since this law came into force, with what outcome, and what are the characteristics of these cases. Also, to know how the procedure of application of the Wets and how this is experienced by the organisations involved.

In order to respond to the problem as defined, for suspended and alternative sanctions, case studies were carried out at the International Legal Aid Centre (in Dutch: IRC) in Noord-Holland. In addition, some details of the Wets cases have been requested from the National Office of the Public Prosecution Service (Fact Factory). After completion of the quantitative study, discussions took place with the main stakeholders of the Wets procedure. A total of 18 respondents were interviewed. Some parties provided written input. The focus of the research was on the Netherlands: we looked at the way in which Dutch litigants deal with Wets cases and what concerns they see.

#### Conclusions:

-Compared to custodial sanctions, the number of certificates received for the transfer of conditional and alternative sanctions is limited. Most cases come from Belgium, followed by Germany. The majority of the cases lead to an actual transfer.

- In approximately 60% of the incoming Wets cases, the convicted persons have Dutch nationality (followed by convicts of Belgian, Moroccan and Polish origin). A quarter were found to be drug-related. Approximately half of the incoming cases relate to the special conditions, 1/4 concerns community service or job sentences. Men are strongly overrepresented. The average age is about 40. In 2016, 65% of cases with received certificate led to transfer of the judgment. In 2017, this percentage was 74%.

-The decision on the recognition or transmission of 'probation' judgments to another Member State, lies with the Public Prosecution Service. On behalf of the Public Prosecution Service, the IRC Noord-Holland in Haarlem is the competent authority (one competent authority for the whole of the Netherlands).

-The process of receiving the certificate, assessing and transferring conditional and alternative sanctions is very similar to that of custodial sanctions, but shorter: the start of the process usually begins with the receipt of the certificate and the (translated) judgment by the central authority (no prior consultation phase).

-The first step is to check whether there are grounds for refusal, to check whether the convict has ties to the Netherlands. If no legal grounds for refusal is found, the central authority usually consults with the Foreign Affairs Office of the Parole Board on the possibilities of transfer of sanctions or supervision. During these consultations, it will be determined in what way the conditions from the judgment may be fulfilled. Regularly, the central authority also coordinates directly with the competent authority abroad, in order to identify which adjustments to sanctions the issuing country will to agree to. As soon as the Dutch recognition decision has been accepted by the competent authority of the issuing state, the sentence can be implemented in the Netherlands. The local public prosecutor is requested to execute the transferred sanction in the same way as a Dutch sanction. The convicted person is expected to come to the Netherlands himself, but usually already resides in the Netherlands.

-There is an essential distinction between incoming Wets cases that relate to community service and those in which special conditions and/or conditions for early release have been imposed: Community Service and job sentences can easily be entered into the GPS (the central system in which the primary registration of the Wets case takes place) by the central authority. The situation is entirely different if the sanction only concerns special conditions: these cannot be introduced in GPS, and this is a difficult and sensitive process.

-The work processes are largely in line with the prescribed regulations, but it takes a long time and the system leads to errors on a regular basis.

-The number of outgoing requests is, due to the automatic selection in GPS, in fact higher than the number of incoming requests: 136 in 2016 and 101 in 2017. The majority of the cases are transferred to Belgium, followed by Germany. In almost half of the outgoing the person concerned has Dutch nationality. In a third of the cases, they have Belgian nationality, and Polish nationality accounts for around 10% of cases. In about one third of the cases, the conviction is drug-related, followed by conviction for abuse and acts of violence in a public place. A large majority of the outgoing cases consist of community service or job sentences. Cases mainly concern male individuals between 35 and 37 years.

-Conditional and alternative sanctions eligible for transfer are systematically selected and placed in the central authority's working stock: the central authority assesses the content of the cases in the working stock and determines whether they are actually eligible for transfer. If this is the case, the necessary documents (certificate and the judgment) are requested from the local public prosecutor's office. In practice, the central authority must send many reminders. In some cases, the delay makes the case no longer eligible for transfer.

-When the judgment and certificate are received, the central authority reviews again. After that, it should be established if there are any ties to the Netherlands. In practice, the actual address may differ from the address registered in GPS.

-If the documents are in order, the next step is to determine the competent authority in the executing state: in the case of countries already contacted is easy but for other countries, finding the right names and addresses may take a lot of time and effort. The period within which a member state submits a recognition decision also varies from one country to another.

-The work processes are largely as prescribed, because of the documentation and the ignorance of the process of some users...and lack of appropriate infrastructure.

#### **Paper 4. La libertad condicional de los penados extranjeros. El cumplimiento en su país de residencia cuando ha sido concedida en España.**

*Nistal Burón, J. (2018).*

The suspension of the sentence for conditional release granted to foreign prisoners in Spain, for fulfillment in their country of residence – this being a different country from the one where the conviction takes place - requires certain conditions. This applies both to processing and follow-up and control, and has a different regulation depending on whether the foreigner is from the EU –Law 23/2014, 20 November– or from another non-EU Member State –Penitentiary Rules Art. 197–. In this paper, the aim is to study the differences between the two regulations, in order to determine their consequences and effects.

Conclusions:

In Spain, there are two kind of conditional release in the original country (residence, nationality or origin country). With the transposition of the FD 947 into domestic law (through the Law 23/2014, which incorporates into national legislation several FDs and EU Directives, among them the FD 947), we have two different procedures to approve a

conditional release abroad for a foreigner, depending on the nationality: one procedure for European citizens (regulated in the title IV of the Law 23/2014, which is that established in the FD 947) and another for foreigners belonging to a 3<sup>rd</sup> country.

Concerning the procedure resulting from the transposition of FD 947 -for the conditional release of communitarian citizens in another EU member state - normally, the competent authority will be the Surveillance Penitentiary Judge. The process is often initiated by the inmate, and in any case, with his consent. A legal resolution of a “supervised freedom” is necessary –a legal resolution of conditional release in this case- and that the offender does not have his current legal residence in Spain. Is also possible to enjoy conditional release in a country where the offender has not the normal residence (the domicile) but it would be so necessary to have also the consent of the Executing State.

Normally the follow-up and the monitoring of conditional release control measures will fall under the competency of the Executing State.

**Paper 5. Prospects and problems for European legal cooperation concerning prisoners.**  
*Conway, G. (2018).*

With the development of European Union (EU) competence in criminal law from the Treaty of Maastricht 1992 onwards, now both the Council of Europe and the EU have adopted legal instruments in this sphere. This paper analyses the scope and rationale of transnational European cooperation relating to prisoners. It first outlines Council of Europe instruments, including the relevance of the European Convention of Human Rights, conventions specifically on prisoners, and soft law. It then examines the more recent EU instruments, following which the relevance of constitutional principles and the prospects and potential difficulties of European cooperation are analysed. It concludes that cooperation can best succeed through a specification of minimum standards and greater coordination between Council of Europe and EU action, along with greater recognition of its specifically penal context.

Conclusions:

The legal framework of cooperation between States in Europe in matters relating to prison law, understood here to include probation, is relatively complex due to the existence of two parallel avenues of cooperation: the Council of Europe and the European Union (EU). The present study focuses on European developments. This article first outlines and compares the legal instruments of the Council of Europe and EU, noting the overlap and differences between them, from a juridical perspective. The second part of the paper adopts a normative approach, examining the relevance of ‘constitutional’ principles in the criminal sphere, where normative concerns are prominent because the punitive power of the State is engaged.

Concerning FD 947, The author makes an interesting comparison between the *Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders 1964* and the FD 947: “The principle of mutual recognition was developed by the European Court of Justice (ECJ), in the *Cassis de Dijon* case in the context of free movement goods in the common market (now internal market) (Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* (*‘Cassis de Dijon’*) [1979] ECR

*649, the facts of which concerned labelling an alcoholic drink), as an alternative to harmonisation for the achievement of increased integration. With the development of EU competence in criminal matters, mutual recognition has been used in this context also, given its greater sensitivity to Member State traditions and differences and, thus, sovereignty.*

EU Framework Decision 2008/947 is broadly similar to the 1964 Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders. Recital 4 of the Framework Decision observes that it provides for a more effective instrument because it is based on the principle of mutual recognition and all Member States participate, whereas only 12 had ratified the Convention. However, although the term ‘mutual recognition’ is not used in the 1964 Convention, it is based on the same principle or concept. The value added, therefore, of the EU instrument is essentially to achieve adherence of all the EU Member States (although this will obviously not extend to States that are in the Council of Europe, but are not in the EU).<sup>19</sup> Recital 9 and Article 1 identify the purpose of mutual recognition in the Framework Decision as to enhance the prospect of the sentenced person’s being reintegrated into society. Recital 19 sets out the typical approach to derogations of EU, that the grounds of refusal should only be applied exceptionally. This is a point of difference also with typical international law such as the 1964 Convention, where derogations are more broadly applied. Article 4 of the Framework Decision sets out a broad list of probation measures or alternative sanctions to which it applies, which is more detailed than the equivalent definition in Article 2 of the 1964 Convention (which refers generically to probation without sentence and suspended sentences). As with the 1964 Convention, the executing State is, under Article 5 of the Framework Decision, a Member State in which the sentenced person is lawfully and ordinarily residing, in cases where the sentenced person has returned or wants to return to that State. The EU Framework Decision’s narrower list of exceptions in Article 11 leaves out the generic reference to the fundamental interests or legal requirements of the executing State and the political offence exception in the Convention. In addition, as generally with EU instruments in this area, double criminality is dropped for 32 offences listed in Article 10 (see further below for a comparison of the derogations in the 1983 Convention, the comparison with EU instruments in this respect is largely the same for both Council of Europe conventions”).

The author highlights as Problems of European cooperation (as problematic aspects of the current legal framework):

- Undue complexity through overlap and unnecessary differentiation of legal forms
- Under-specification and the division of labour between the legislature and the judiciary
- Mis-translation of market model

In the sphere of criminal law and enforcement, it is perhaps best, from a legal point of view, to discuss cooperation rather than the more loaded term of integration. Integration witnessed in the common market (now termed ‘internal market’) context of the EU runs a risk of an erosion of national constitutional concerns and a sidelining of specifically penal justification. In contrast, ‘cooperation’, though more modest in its ambition, will allow for incremental change in a way that will not undermine the legitimacy of reforms through sidelining national constitutional traditions. This analysis has certain implications for the respective roles of the EU and of the Council of Europe. First, a more systematic

approach to the relationship between the two bodies would enhance the transparency of the legal framework. The Council of Europe has the advantage of a much broader geographical reach, as well as a tradition of adopting minimum agreed standards. It is thus well suited to the initiation and careful development of cooperation in a sphere traditionally sensitive from a State sovereignty perspective. Rather than adopting overlapping measures, the EU could focus on how it can add to the Council of Europe framework through either strengthening enforcement or adopting specific, additional measures. Finally, the EU must also avoid an overly simple assimilation of legal instruments in the area of prison law to a market model. Thus, the 'free movement of prisoners', in the sense of a system of transfer from jurisdiction to another to serve a sentence that is as easy as possible may not fully reflect the specific concerns of penal policy of both retribution and rehabilitation.

**Paper 6. Framework decisions 2008/947 and 2009/829: state of play and challenges.**  
**Durnescu, I. (2017).**

This paper aims at comparing and contrasting Framework Decisions 2008/947 and 2009/829 and critically discusses the main difficulties in implementing them in practice. Issues like the existence of multiple competent authorities, lack of awareness among judiciary and para-judiciary staff, lack of 'parenthood' and the ambivalent definition of consent are only a few such obstacles that define the current stage of development.

The article ends on a positive note with some concrete suggestions for enhancing the use of these framework decisions.

**Paper 7. European Supervision Order – Is it the Ballast for Law Enforcement or the Way out of the Deadlock?**  
**Jurka, R. (2017).**

This article analyses the conception of the European Supervision Order (ESO) as well as some theoretical and practical problems arising in the process of implementation and effectiveness of the ESO. The authors, being guided by the currently existing legal provisions, legislative ideas and jurisprudence of the European Court of Human Rights (ECHR), formulate the question whether the ESO is an operating mechanism of international cooperation in criminal proceedings or just a nice idea on paper.

The attention is hereby drawn to the fact that this segment still remains at the search-discovery-search stage. In the absence of European Union level regulation criteria which must be taken into account by the issuing State when considering the person's or his/her defender's application to issue the ESO, current affairs force us to acknowledge that there is a slim opportunity for Member States to misuse their right and not to issue the ESO, even in justified cases. Finally, it is hereby emphasized that significant aspects related to the realization of the person's right to defence and appeal against the decisions, made by the issuing and executing States are still not covered by FD 829. The article calls into question whether it is appropriate to make the issuing state responsible for compensation of costs.

A relatively short time has passed since his legislation has been transposed into the national law of Member States; therefore, the ESO topic remains relevant and new in terms of scientific research; the future prospects of application of this legal mechanism are of interest. The authors are not inclined to submit final answers at this stage of the ESO existence, but they suggest some possible ways for the solution of problematic issues.

Conclusions:

1. The ESO was adopted as a legal instrument to solve the issue of keeping foreigners under detention and the tendencies of national courts implementing supervision measures to create unequal conditions for foreigners, as compared to residents of that state.

2. ESO solved the problem that the different alternatives to pre-trial detention and other pre-trial supervision measures, which prior to ESO could not be transposed or transferred across borders as States do not recognize foreign judicial decisions in these matters.

3. The ESO could be defined as European Union enforceable decision made by the competent authority of the issuing State under the national law during criminal proceedings, according to which one or several supervision measures not associated with deprivation of freedom, as an alternative of detention, are imposed on a natural person, i.e. a non-permanent resident, who is suspected of having committed the criminal offence, which is addressed to the executing Member State, in which that person resides.

4. The ESO is an innovative and advanced measure which, when applied, allows for a reduction of custody, better ensures the principle of the presumption of innocence, the right to liberty, helps the person suspected of criminal offences, and allows the accused to preserve their family ties, workplace and income. However, non-legal reasons related to a large workload of the law enforcement institutions, a lack of initiative for new working methods and political mutual disagreements can lead to the sluggish application of the European judicial supervision order. States' discretion in the application of the European judicial supervision order would be hardly restricted due to States' sovereignty and the territorial principle of the international criminal law.

5. The procedural guarantees to be harmonized between Member States at the EU level must be secured for persons, also including the unanimous criteria which must be taken into account by the competent authorities of the issuing State when solving the issue on issuance of the ESO. These criteria could be similar to those used in the issuing of extradition detention at the national level and a person's social relations are being assessed. The absence of similar criteria may lead to the circumstance that the ESO in certain Member States may remain just a nice idea on paper.

6. The ESO legal regulation raises the importance of cooperation between states, of the principles of the presumption of innocence, recognition of the measures of procedural coercion and volunteering. Insufficient cooperation between States can become an obstacle to achieving the objectives of criminal proceedings.

7. Member States, without any reason not considering the application of the ESO in the criminal case, would violate the Convention, as the ESO encourages the application of supervision measures that are alternative to detention, whereas the responsible consideration of the measures of procedural coercive in each case serving as an alternative to detention is the duty of States, which is clarified in the ECHR jurisprudence.

8. The issues of defence, which also are not regulated by certain Member States in their national law, remain not covered by the Framework Decision. It is to be considered whether the state attorney must be guaranteed for persons in the ESO sanctioning process. In the absence of any minimal criteria, which must be taken into account by courts when solving the issue of the ESO, it is difficult for a person to defend his or her rights. The outstanding issue of whether a person must hire two lawyers to adapt and extend suspension measure under the ESO to deal with two different national legal bases is transmitted to the competence of the executing State, unlike all the other actions on sanctioning the supervision measure, as well as how the organizational issues must be settled, remains unsolved. Also the issues around appeal, on the consequences of appeal for execution of the decision, on adaptation of the supervision measure etc. remain undiscussed in the Framework Decision.

9. The FD does not completely regulate the issue on compensation of the costs; thus, this issue is left to be decided by Member States. It is supposed that the issue on transportation of suspects and accused persons as well as of the costs related to it, must not be a mere issue of the issuing State's budget; the costs must be recovered from the transported suspects and accused persons; the financial relief or compensation mechanisms must be foreseen for indigent persons.

**Paper 8. Judicial Cooperation, transfer of prisoners and offenders' rehabilitation: no fairy-tale bliss. Comment on Ognyanov.**  
*Montaldo, S. (2017).*

This *Insight* analyses the first preliminary ruling (Court of Justice, judgment of 8 November 2016, case C-554/14, *Ognyanov* [GC]) concerning a provision of the Council Framework Decision 2008/909/JHA on the cross-border transfer of prisoners in the EU. The Court of Justice clarifies the notion of enforcement of the sentence, for the purposes of the horizontal division of competences between the issuing State and executing authority. In this context, despite the quasi-automatic nature of judicial cooperation mechanisms, a prominent role is given to the issuing authority. In particular, the issuing State is entitled to assess unilaterally the prisoner's chances of social rehabilitation abroad. It is contended that this prudent approach, albeit reasonably inspired by the well-established principle of territoriality of criminal law, is capable of undermining the effectiveness of the Council Framework Decision 2008/909. This approach also blocks a gradual emergence of a common European approach to offenders' social rehabilitation, which is a key objective of judicial cooperation in criminal matters. A common attitude towards crime prevention through offenders' rehabilitation could be the feeding ground favoring future evolution of cooperation in criminal matters, besides the current overarching focus on *ex post* crime repression.

Conclusions:

Only the FM 2008/947/JHA is mentioned in two footnotes, the article develops FM 2008/909/JHA in depth. It is indicated that FM 2008/947/JHA is complementary to other instruments, such as 2008/909/ JHA and that these types of FM have been developed in recent years.

**Paper 9. Carceri e stranieri. Foreigners and prisons.**

***Romano, C.A. (2014).***

The issue of foreign national prisoners needs to be considered in a national and supranational perspective because of its importance, related to different topics connected to the respect of the rights of the foreign inmate. Among these, we have to keep in special consideration the exposure to discrimination, the lack of access to justice (due inter alia to the language barrier), the relational isolation, the difficult reintegration and the impact of the status of illegal immigrant.

Facing such a view, it's easy to understand the central importance of all the international instruments for the protection of foreign prisoners, especially of the European framework decisions, since these have unfortunately not been fully applied in each Member State. Their particular importance is due to the fact that, if correctly implemented, they can have a strong impact on different phenomena, such as the discrimination of the foreign prisoners and their effective reintegration, thanks to the mutual recognition of criminal decisions and the possibility to transfer persons deprived of liberty. However, different kinds of reasons may hinder the full application of these framework decisions. So, on the one hand effort is required from each Member State to enforce the implementation, yet on the other hand, national governments should consider how to identify privileged interlocutors for the approval of convention that can allow the transfer of stakeholders.

**Paper 10. Nuevos instrumentos para el cumplimiento transnacional de las medidas cautelares alternativas a la prisión provisional en la unión europea.**

***Recio Juarez, M. (2014).***

The aim of this work is to make a brief assessment of the transposition into Spanish Internal Law of Council Framework Decision 2009/829/JAI 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. This Council Framework Decision was transposed into Spanish Internal Law by Act 23/2014, of 20 November on mutual recognition of judicial decisions in criminal matters in the European Union. It is a highly important measure to prevent provisional detention from becoming the most frequent resource to guarantee the attendance of an accused that resides in another Member State of the European Union different from the one where the penal proceedings are taking place. This implies an unquestionable advance in the development of judicial cooperation in criminal matters, part of the area of freedom, security and justice.

Conclusion:

It is a descriptive article, but explains very well the adaptation of the FD 829 to the Spanish Legal System.

**Paper 11. “Do as I say, not as I do. The application of mutual recognition and mutual trust”.**

*Spreeuw, M. (2013).*

This paper focuses on the principles of mutual recognition and mutual trust in the area of justice and home affairs, with which the current Member States are supposed to comply and which are so vigorously applied in the Western Balkans. Specifically, the objective of this paper is to analyse the difficulties that the current Member States encounter in the application of the principles of mutual recognition and mutual trust, and the related issue of the Western Balkans depending on compliance with these principles for their future membership. The growing importance of these principles both for the Member States and the candidate and potential candidate countries will be discussed, since the pre-accession framework is a very powerful tool to export these values and principles to the Western Balkans. In addition, the paper argues that on the one hand the EU is aware that the current Member States do not comply with these values and principles and the tools available to force the Member States to comply are very weak. On the other hand, the Western Balkan countries are not allowed one step further towards membership if they do not comply with these values and principles. This illustrates that the EU has double standards in the application of its values and principles. FD 2008/947/JAI and FD 2009/829/JHA are only mentioned as mechanism of mutual recognition in page 5.

**Conclusions:**

Since the entry into force of the Treaty of Amsterdam, the principles of mutual recognition and mutual trust have become crucial tools to realise the objective of the Union as an ‘area of freedom, security and justice’. This later obtained an even more prominent position in the Treaty of Lisbon. Together with the growing importance of the development of the Union as an ‘area of freedom, security and justice’, regional cooperation in the Western Balkans in the Justice and Home Affairs Council (JHA) area has become a key priority in pre-accession policy. With the incentive of future membership, the pre-accession framework is a very powerful mechanism to export the values and principles of the EU, including mutual trust and mutual recognition in the field of JHA. Furthermore, the enforcement machinery available to force the current Member States to comply with the principle of mutual trust and mutual recognition is relatively weak, while the pre-accession conditionality mechanisms are very strong. This illustrates that there are double standards in the EU regarding the expectations and requirements in the pre-accession policy for the Western Balkans and the compliance and enforcement of the common values and principles with regard to current Member States in the JHA area. Nonetheless, it is understandable that the EU is very strict towards the Western Balkans regarding fulfilment of requirements in the JHA area, since noncompliance undermines the entire system based on mutual trust, which is a prerequisite for the development of the Union as an area of freedom, security and justice.

**Paper 12. The European Protection Order: No Time to Waste or a Waste of Time?**

*Van der Aa, S./ Ouwerkerk, J. (2011).*

The article discusses the content of the European Protection Order (EPO) to protect from repeated victimization focus on victims that show an additional need for protection against recidivism: such as victims of stalking or domestic violence. In order to protect victims from repeat offences by the same offender, criminal protection orders have been created, in addition to regular penalty the judicial authorities can also hand down pre-trial protection measures, or a victim can turn to a civil court to ask for a civil protection order and EPO. After a discussion of the content, procedures of the EPO and the objections that have been raised against the proposal by several Member States' representatives, this article aims to assess whether the EPO would actually increase the safety of crime victims or whether it is merely symbolic legislation. The article concludes with an answer to the question of whether there is no time to waste in adopting and implementing the EPO or whether the EPO itself is merely a waste of time. In its current form and in this current state of play, the EPO appears to the authors to be a waste of time.

**Paper 13. Transfer of Probation Supervision between Member States: An EU Initiative.**  
*O'Donovan, D. (2009).*

At the end of last year, a new mechanism was initiated within the EU which will come into effect in December 2011 across all Member States. Orders for probation supervision will then be able to be transferred to another Member State for implementation. The principal features of this legal instrument are outlined, with some comments on the wider context and on how probation agencies should approach the issue.

Principal features of this FD:

-*Objective and scope:* Article 1 states clearly that the FD 'aims at facilitating the social rehabilitation of sentenced persons.... There are therefore two elements: the recognition of the judgment and the implementation of the supervision ordered. Only for natural persons.

- *Categories of supervision:* The FD encompasses 4 types of judgment giving rise to supervision (defined in the text):

- Suspended sentence.
- Conditional sentence.
- Alternative sanction.
- Conditional release.

In additions, article 4 of the FD lists eleven different requirements of probation measures - *Initiating the process:* For the purposes of the FD, each Member State is required to designate one or more competent authorities to forward or receive judgments, decide on recognition and so on. The competent authorities in each Member State are notified to the General Secretariat of the Council, which circulates the information to all Member States. The judgment and certificate are then forwarded by the authority in the issuing State (normally a Member State in which the sentenced person is lawfully and ordinarily residing, but there are other options).

-*Grounds for defining recognition and supervision:* Article 8 is very clear: the competent

authority in the executing State “shall recognise the judgment”, and “shall without delay take all necessary measures for the supervision of the probation measures or alternative sanctions” unless there are grounds for refusal as set out in Article 11 of the FD.

Under Article 10, the requirement of ‘double criminality’ must also be satisfied. There is an agreed list of 32 offences that in this and other FDs are recognised as sufficiently serious in all countries. This issue is particularly relevant for probation supervision, which may well be ordered for minor or less heinous instances of a serious offence category. Where there are difficulties with the certificate, or practical issues arise, the competent authority in the executing State may postpone the decision and request additional information/clarification, but the decision of recognition should be taken within 60 days of receipt of the documentation. If it is not possible, the “authority in the executing State must inform the issuing State of the reasons for the delay and the estimated time needed for the decision” (Art 12).

*-Adapting the judgment to the law of the executing State*

If the nature or duration of the probation measures is “incompatible” with the law of the executing State, the competent authority may adapt them (but it should correspond as far as possible to what was imposed in the issuing State and never to be more severe or longer). The issuing State must be told of the adaptation and, if it does not agree with the proposal, it may withdraw the certificate “provided that supervision in the executing State has not begun”.

*-Follow-through of supervision*

Supervision “shall be governed by the law of the executing State” (Art13). Executing State decides about modification of the obligations or instructions, revocation of suspension of the sentence, or of conditional release, and imposition of a custodial sentence (however, an executing Member State may therefore declare that it will not accept responsibility for revocation or imposition of a custodial sentence, in which case jurisdiction in these situations is transferred back to the competent authority in the issuing State).

*-Exchange of information:* there are specific obligations on the executing State to inform the issuing State of decisions on modifications, revocations, etc., and vice versa. The issuing State must inform the executing State of any findings that are likely to result in revocation etc. and indeed of ‘any circumstances or findings which could entail such a decision’. Art. 16

*-End of jurisdiction of the executing State:* the competent authority in the executing State may transfer jurisdiction back to the issuing State if the sentenced person absconds. Where new criminal proceedings are commenced in the issuing State, after supervision has begun in the executing State, then the issuing State may ask for jurisdiction to be returned and the executing State may, or may not, comply with this request.

The wider context:

This FD aptly illustrates the difference between, on one hand, non-obligatory Council of Europe Conventions and, on the other, FDs promulgated within the EU that are then compulsory for Member States to implement. On 30 November 1964, the Council of Europe issued a Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders. Only eight countries subsequently signed and ratified. In contrast, this FD is mandatory on all 27 EU Member States (and replaces the corresponding provisions of the 1964 Council of Europe Convention).

The following specific implications hold for probation internationally:

With this FD an alternative emerges: imposing a non-custodial order with conditions, to be implemented in the offender's home State. There is a danger that this disposal would be utilised when appraisal would suggest that there are no significant underlying criminogenic or social issues to be addressed and that supervision is not really needed for what would be termed a low-risk offender.

It constitutes a challenge to probation organisations to be familiar with the national legal provisions that will ensue and to operate them as professionally as possible. Hence the importance of risk assessment, of programmes that work in dealing with the criminogenic factors identified, and ensuring that offenders who blithely ignore the requirements are dealt with accordingly.

For example, the only reference to probation reports is at the end of the certificate, which merely requests that a box be ticked if such reports are available. In practice, the language in which such reports are written should be indicated, with a footnote that the issuing State is not obliged to provide translation of these reports.

Lack of information: Information such as the type of accommodation that the offender has in the executing State, his or her employment or training prospects, and so on are examples of some of the information needed. Ideally, a home circumstances appraisal should be prepared and considered before the decision is taken to recognise the judgment, but the tight time-line (60 days) will militate against that in most cases... It may well be, therefore, that a full assessment of social functioning and attitudes to crime should be the first order of business once supervision commences.

The use of the term "alternative sanctions" in the FD is unfortunate: that means the sanction is the second option and that custody is the principal and preferable punishment. Electronic monitoring is often used in Europe as an enforcement of bail measure or as an added requirement for early release from custody. Although it is not legislated for in the FD text. It could be argued that this FD too closely parallels the FD on the execution of custodial sentences. Many provisions are very similar. A minority of countries, indeed, do not have a probation service as such. Transferring prisoners in custody essentially means changing from one cell to another, while for probation, transfer to another jurisdiction involves having to deal with issues such as accommodation, employment, family and interpersonal relationships, and appropriate leisure pursuits.

Conclusion:

This FD presents both a challenge and an opportunity to probation agencies across Europe. The challenge is to make transnational supervision effective. The opportunity is to make probation a valued option for offenders throughout all Member States. As the name implies, we now have a framework, a basic structure on which each legislature in the EU must build the sinews of how the FD will work in its jurisdiction. It is to be hoped that the professional probation bodies will bring their experience and expertise in the field of supervision to the task of formulating the provisions and protocols necessary for the implementation of the FD.

#### 4.2.2. Books

##### **Book 1. Mutual Trust under Pressure, the Transferring of Sentenced Personnas in the EU. Transfer of judgments of Conviction in the European Union and the Respect for Individual's Fundamental Rights.**

***Marguery, T. (2018).***

This book is the final report of a research project funded by European Commission to Utrecht University in order to analyse how mutual recognition in criminal matters interferes with the rights of the individual concerned. The study is limited to the FD on the European Arrest Warrant (FD EAW), the FD on Transfer of Prisoners (FD 2008/909) and the FD on judgments and probation decisions (FD2008/947). With regards to the rights of individuals, this research particularly focuses on the Charter of Fundamental Rights of the European Union (CFR), Directive 2012/13/EU on the right of information in criminal proceedings, Directive 2013/48/EU on the right to Access to a lawyer in criminal proceedings and Directive 2010/64/EU on the right to interpretation and translation.

The study aims to improve judicial cooperation and to exchange best practices with full respect for citizens' fundamental rights. One of the most important aspects of this research is that it combines a legal analysis of the legislation with an empirical study. In the context of transnational transfer of persons several specific rights may cause problems and create tensions between the obligation for a judicial authority to execute a foreign decision and its obligation to respect fundamental rights. In particular, this study focuses on the protection against torture and degrading treatment, the right to a fair trial and the right to private and family life.

The main research question of the project is "in the post-trial context, how do fundamental-rights concerns affect mutual recognition and mutual trust in EU criminal law? The legal analysis was complemented by qualitative, empirical research (interviews) and quantitative data (statistics) in the five Member States participating in the project with regard to the EU instruments subject to this study.

Results are organised in VI parts and 2 Annexes about statistics. Part I is an introductory part; part II and III are legislative reviews in EU Framework in criminal matters and protection of human rights; part IV is integrated by the national reports (Italy, the Netherlands, Poland, Romania, Sweden); part V is a comparative analysis and VI conclusions and recommendations.

Two main trends can be identified, about functioning of FD 2008/947/JHA, in the five analysed countries:

1. There are clearly distinguishable differences among countries regard to the procedure to execute and issue a judgment:
  - a. First, there are three different ways to designate the competent authorities. Some countries provide for a limited role for judges, since the Public Prosecutor's Office (NL) or the Prison and Probation Service (SE) are the competent authorities with regard to the issuing and execution of a judgment.

- b. On the other hand, two Member States (PL, RO) rely on the courts to issue and execute the judgments. One of the countries (IT) has adopted a mixed formula, whereby public prosecutors are competent to forward a judgment immediately after it has been handed down, whereas the courts decide on its execution when receiving it.
2. Other differences exist as regards the time limit to make a decision when the countries are requested to execute a judgment. Whereas some respect the 60-days' time limit established in the FD (NL, RO), other countries (PL, IT) has divided into two periods of 30 days each, to allow the possibility for an appeal within the timeframe provided by the FD.  
Four of the studied countries (PL, SE, RO, IT) allow for the possibility to appeal against the decision to issue and/or execute a judgment.

**Book 2. Mutual Recognition of Judicial Decisions in European Criminal Law**  
*Klimek, L. (2017).*

This book is a review of legislation among EU members and about the level of harmonization on FD 2008/947/JHA. The objective of this work is to assess the level of mutual recognition of judicial decision in criminal matters in the area of judicial co-operation in criminal matters in the European Union. Many questions stem from this. This monograph focuses on the most crucial issues, namely: assessment of historical development of mutual recognition in EU criminal law, its legal basis at the European Union level and its key features; assessment of mutual recognition legislative measures at the European Union level and relevant case-law; assessment of concrete mutual recognition measures at the European Union level; assessment of the impact of mutual recognition on procedural safeguards and rights of persons concerned; and assessment of implementation and application of mutual recognition. However, the monograph includes also aspects of the Council of Europe. Without Council of Europe issues and comparison(s) it would not be comprehensive. Therefore, it includes extra issues focusing on the Council of Europe in individual chapters.

The hypothesis of this monograph to verify is the fact that in spite of mutual recognition in criminal matters has been constantly referred to as cornerstone of judicial co-operation in criminal matters in the European Union, it is not perfect.

This book refers criminal procedures and cooperation in criminal matters in general in point 1.2 (The EU Policy in the III Pillar and Harmonization and Approximation of Criminal Law 9). Specifically refers legal basis, procedures, implementation and evaluation about FD 2008/947/JHA in Chapter 7 (Mutual Recognition of Probation Measures), and about FD 2009/829/JHA in Chapter 10 (European Supervision Order in Pre-Trial).

The EU introduced framework decisions for purposes other than the approximation of substantive criminal law. These purposes include the adoption of common regulations concerning exchange of information, criminal procedure and, most notably, the implementation of the principle of mutual recognition (Bernardi, 2007, 720). Today, this

second group of framework decisions outnumbers the one approximating substantive criminal law.

The level of implementation of the Framework Decision 2008/947/JHA on mutual recognition of probation measures and alternative sanctions is far from satisfactory. Its partial and incomplete transposition hampers the application of the principle of mutual recognition.

A question which begs consideration is whether the application of the principle of mutual recognition on probation measures and alternative sanctions, introduced by the Framework Decision 2008/947/JHA on mutual recognition of probation measures and alternative sanctions, is useful.

The Framework Decision aims at facilitating the social rehabilitation of sentenced persons, improving the protection of victims and of the general public, and facilitating the application of suitable probation measures and alternative sanctions, in case of offenders who do not live in the State of conviction. With a view to achieving these objectives, the Framework Decision lays down rules according to which a Member State of the EU, other than the Member State in which the person concerned has been sentenced, recognises judgments and probation decisions and supervises probation measures imposed on the basis of a judgment, or alternative sanctions contained in such a judgment, and takes all other decisions relating to that judgment.

The Framework Decision relates to the post-trial stage. It shall apply only to the recognition of judgments and probation decisions, the transfer of responsibility for the supervision of probation measures and alternative sanctions, and all other related decisions, as described and provided for in the Framework Decision.

As regards types of probation measures and alternative sanctions, the Framework Decision shall apply to the following probation measures or alternative sanctions:

- an obligation for the sentenced person to inform a specific authority of any change of residence or working place,
- an obligation not to enter certain localities, places or defined areas in the issuing or executing State.

Related to proceedings, when a judicial authority of a Member State of the EU requests to execute the probation measure or alternative sanction, its decision must be first recognised. The Treaty on the Functioning of the European Union stipulates that judicial co-operation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions. This provision is the first basis for the recognition of probation measures and alternative sanctions. Further, the Framework Decision stipulates that the competent authority of the executing State shall recognise the judgment and, where applicable, the probation decision and shall without delay take all necessary measures for the supervision of the probation measures or alternative sanctions). The competent authority shall adopt the decision on recognition of probation measure or alternative sanction. The competent authority of the executing State shall decide as soon as possible, and within 60 days of receipt of the judgment and the probation decision, together with the certificate, whether or not to recognise the judgment and the probation decision and assume responsibility for supervising the

probation measures or alternative sanctions. It shall immediately inform the competent authority of the issuing State.

When in exceptional circumstances it is not possible for the competent authority of the executing State to comply with that time limit, it shall immediately inform the competent authority of the issuing State by any means, giving the reasons for the delay and indicating the estimated time needed for the final decision to be taken. In special cases the Framework Decision allows optional adaptation of the probation measures or alternative sanctions. If the nature or duration of the relevant probation measure or alternative sanction, or the duration of the probation period, are incompatible with the law of the executing State, the competent authority of that State may adapt them in line with the nature and duration of the probation measures and alternative sanctions, or duration of the probation period, which apply, under the law of the executing State, to equivalent offences.

The adapted probation measure, alternative sanction or duration of the probation period shall correspond as far as possible to that imposed in the issuing State.

While the system established by the Framework Decision is based on the principle of mutual recognition, that recognition does not mean that there is an absolute obligation to execute the probation measure or alternative sanction which has been transmitted. The Framework Decision includes optional grounds for non-recognition and non-supervision the decision. Thus, the competent authorities of the executing State are in principle obliged to act, unless they decide to invoke one of the grounds for non-recognition or non-supervision of the decision provided for in the Framework Decision. To conclude, authors consider that the level of implementation of the Framework Decision is far from satisfactory. The partial and incomplete transposition of framework decisions hampers the application of the principle of mutual recognition in the area of criminal justice. Proper implementation of the Framework Decision would 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. The method of implementation of the Framework Decision does not vary considerably. In principle, two methods can be observed:

1. first, adoption of an amendment to supplement and 'update' earlier existing legislation in the area of procedural criminal law, and
2. second, adoption of an entirely new legislation.

As regards the application of the principle of mutual recognition on probation measures and alternative sanctions introduced by the Framework Decision, it is useful. However, its correct application would imply that probation measures and alternatives to imprisonment would be available in all legal systems across the EU.

### **Book 3. Legitimacy and Trust in Criminal Law, Policy and Justice: Norms, Procedures, Outcomes.**

*Persák, N. (2016).*

The 'legitimacy crisis' of the state, legal institutions, and in particular in the criminal justice system, has become a much-observed phenomenon that is said to be plaguing

several European democracies. Trust in advanced industrial democracies has similarly been reported to be in decline since the 1960s (Putnam 1995, Dalton 2005), with recent declines aggravated by the effects of the global financial crisis. The connection between the two notions is not accidental: when people lose trust in the state, government, legal institutions or the rule of law, they tend to perceive the last as less legitimate.

Trust in law, in the legal system and authorities behind it, is important in several ways. Law participates in the creation of normative culture, which is considered given and stable and is thus contributing to the balance of the social system. If law or the legal system are perceived as not functioning properly, this not only causes significant imbalances within the social system but also destabilises the normative culture by shaking the public belief in its stability and immutability.

This may trigger great distress among the public and become a source of fears and insecurities, which can in turn fuel various negative social phenomena, such as crime and xenophobia. The lack of trust can create a breeding ground for populist and extremist movements and invite the criminalisation of 'the other', the antisocial, marginal or migrant. Lack of trust, fears and insecurities may also further decrease the public trust in the legal system and stimulate disrespect towards authorities. The non-functioning or malfunctioning of the legal system thereby impinges on trust in the 'order of things' and on the trust in those who were entrusted with maintaining this order.

From the viewpoint of society (and democracy, in particular), at least minimal trust in political institutions is required to enable their functioning. Even though no government enjoys – and perhaps even ought to – enjoy the absolute trust of its citizens, it must enjoy at least a minimum of public confidence in order to operate effectively.

To sum, in order to counter the member states discriminatory use of pre-trial custodial measures against non-nationals or non-residents (non-custodial measures awaiting trial are likely to be granted predominantly to own nationals and residents), the EU has adopted FD 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, allowing member states that envisage issuing an EAW for prosecution purposes to not immediately do so. Instead they may order the home member state, in which the person they want for trial has his residence and/or and is willing to return to, to take a non-custodial supervision measure, with just-in-time delivery for the trial through an EAW (thereby avoiding unnecessary pre-trial detention in the issuing member state). Has this worsened extradition-linked pre-trial detention problems or rather dramatically improved them? That is the final question of the book.

#### **Book 4. Criminal Law and Policy in the European Union** *Miettinen, S. (2013)*

This book takes stock of the development of EU criminal law from the establishment of the European Community to the first European Union criminal law directives passed after the Lisbon Treaty. The work considers criminal offences established at EU level, the

effects of EU law on national criminalisation, the emerging body of EU criminal procedural law, and the increasing recognition of defence rights as EU rights. Limits to the legal effects of EU-level rules require them to be examined in the light of Member State practice. Implementing measures are not always appropriate, and may balance interests under national law, the rights of criminal defendants, and the need for EU-wide approximation. The proliferation of EU criminal law has led to an explicit, albeit underdeveloped, EU criminal policy.

This book will be of particular interest to students and scholars of EU Law and Criminal Law.

The book points out two main conclusions:

- The European supervision order facilitates the mutual recognition of decisions on criminal sanctions which do not involve a total deprivation of liberty, but which may instead impose alternative sanctions or parole conditions following release from a custodial sentence Council (2009/829/JHA of 23 October 2009) Framework Decision.
- in absentia trials are addressed, and this very recently with an amendment of existing instruments rather than a comprehensive horizontal solution (2008/947/JH).

### **Book 5. Probation Measures and Alternative Sanctions in the European Union**

*Flore, D./ Bosly, S.7 Honhon, A./ Maggio, J. (2012)*

This book is the final Report of a European Research project launched in 2009 by the Federal Public Service Justice (Belgian Ministry of Justice) and co-financed by the European Commission (partners: France, Germany, Hungary, Luxembourg, Slovakia, Spain, United Kingdom and CEP).

The core activities of this project were:

- The development of a questionnaire which has been distributed by the General Secretariat of Council of the European Union on 14 April 2009.
- The organization of a seminar on 8 and 9 July 2010 in Durbuy (Belgium) concerning the legislative and practical implementation of the Probation Framework Decision with a view to improving mutual knowledge of national probation measures as well as identifying legal and practical difficulties with regard to the implementation.
- The dissemination of the gathered information through this book in addition to a website established for this project ([www.euprobationproject.eu](http://www.euprobationproject.eu))

This book is a result of a Belgian Presidency of EU in 2009. They decided to prioritize the follow-up of the implementation of mutual recognition instruments and proposed a specific methodology consisting of a set of practical measures to be taken at European Union level.

The project was focused on the Probation Framework Decision, which has been adopted in 2008 and needs to be implemented into national laws by 6 December 2011. Implementation of this instrument is directly linked to the priorities set out in the Stockholm Programme which expressly points out the importance of increased attention in the coming years.

The book is structured around three main themes:

1. National probation systems. This part contains the replies from the MS to the first part of the questionnaire. A summary of the answers is contained.
2. Seminar on the legislative and practical aspects of implementation. It includes the conclusions of this seminar and the results of the workshops.
3. Specifics recommendations in relation to the implementation of the Probation Framework Decision and its follow-up from the project team as well as from an independent and scientific point of view.

In conclusion, authors consider that it is essential to encourage the MS to pursue and expedite the implementation work by effectively bringing together the legislative and practical levels.

After the seminar developed by the project, all participants found that implementation process can really benefit from continued dialogue and Exchange of best practices, which may in turn avoid divergent interpretations between MS, which are detrimental to the uniform application of the Probation Framework Decision thorough the EU.

After a workshop comprised of representatives of Member States about the legislative and practical implementation of the Framework Decision 947, in the background there is always the question of the disparities between the systems of the Member States:

- How can practitioners become familiar with and understand the various systems of the Member States and with what tools?
- How can we take responsibility for a person sentenced to a measure that MS do not recognize under their national legislation?
- How can we ensure the transfer of a measure with the obligations under certain legislations or requiring the consent of the party concerned (obligation to undergo therapeutic treatment). The idea of voluntary work seems to prevail on this point and recourse to the national legislation of the MS where sentence is to be carried out.

An effective implementation of this instrument (FD 2008/947/JHA) entails the setting up of concrete tolls allowing an efficient exchange of information regarding national systems as well as direct and regular contacts between the authorities involved. Indeed, MS generally agree on the fact that many problems in the application of the FD could be avoided through regular contacts and adequate exchanges of information between competent authorities of the issuing and executing States.

This is with particular reference to recommendations set up the following measures:

- National fact sheets, handbooks, best practices and training sessions available to the authorities concerned with a view to allowing access to the information on the national probation systems;
- Networks and fora for discussions in order to share experience as well as to promote consultation and direct contacts between executing and issuing authorities.

**Book 6. Organized Crime Legislation in the European Union: Harmonization and Approximation of Criminal Law, National Legislations and the EU Framework Decision on the Fight Against Organized Crime**

*Calderoni F. (2010)*

This book assesses the level of harmonization and approximation of organized crime legislation among European Union Member States (EU Member States).

Firstly, it defines the concepts of harmonization and approximation and clarifies their relationship. It also argues the evolution of the EU policy of harmonization and approximation in the sector of Justice and Home Affairs. Finally, it points out the lack of scientific research assessing harmonization and approximation of organized crime legislation among EU Member States.

The book refers criminal procedures and cooperation in criminal matters in general in point 1.2 (The EU Policy in the III Pillar and Harmonization and Approximation of Criminal Law 9)

The EU introduced framework decisions for purposes other than the approximation of substantive criminal law. These purposes include the adoption of common regulations concerning exchange of information, criminal procedure and, most notably, the implementation of the principle of mutual recognition (Bernardi 2007, 720). Today, this second group of framework decisions outnumbers the one approximating substantive criminal law.

This book provides a first cross-national analysis of organized crime legislation among EU Member States. It is an exploratory attempt to assess the level of harmonization and approximation among different legal systems. Definitely, this book does not pretend to exhaust the topic. It is possible to identify some opportunities for further research in the field of harmonization and approximation of organized crime legislation.

First, the same assessment could be repeated after the implementation of the Framework Decision (2008/841/JHA) into national legislations. According to Article 10 of the Framework Decision (2008/841/JHA), Member States shall implement the Framework Decision (2008/841/JHA) before 11 May 2010. The national measures shall be transmitted to the Council Secretariat and to the Commission. The repetition of the assessment could verify whether any modification in the level of harmonization has happened and the level of approximation to the EU standards has improved. The results of this second assessment would provide interesting information on the evolution of the process of harmonization and on the impact of the Framework Decision(2008/841/JHA) on the level of approximation among EU Member States' organized crime legislation.

Second, the geographic scope of the assessment could be extended beyond the borders of the EU, including non-EU European Countries (e.g. Norway, Switzerland, Croatia, Ukraine, Turkey and Russia) and other countries such as the USA and Canada and Latin American countries. This operation would allow to verify whether EU countries are more harmonized among them than non-EU countries. Indeed, this could provide additional information on the impact of EU policies in the field.

Third, the most relevant and complex development may be the study the actual implementation of organized crime legislation. In this perspective, statistical data on the use and application of the criminal organization offences (COOs) could be collected. Moreover, information could be gathered concerning the actual application of the

studied legislation (case studies, interviews with prosecutors and law enforcement agencies). Finally, information on penalties and punishment could be collected. This operation could provide additional valuable information on the concept of organized crime and its differential application among EU Member States.

#### *4.2.3. Prior Projects*

There is a significant number of projects dealing with the object of this research, both in a direct or indirect way. The most outstanding results in order of importance are:

a.- Dealing with a similar object and purpose to the PONT project:

- THE FUTURE OF MUTUAL TRUST AND DE PREVENTION OF ILL TREATMENT. JUDICIAL COOPERATION AND THE ENGAGEMENT OF NATIONAL PREVENTIVE MECHANISMS, 2015-2017, coordinated by the Academy of European Law (ERA). This project aimed to increase awareness of the judiciary of National Preventive Mechanisms and the relevance of the latter in the implementation of the EAW and common rules on detention. It centred around the Framework Decision on the European Arrest Warrant, (FD EAW), Framework Decision 909 on the Transfer of Prisoners, Framework Decision 829 on the European Supervision Order (FD ESO) and Framework Decision 947 on Probation and Alternative Sanctions. <https://bim.lbg.ac.at/en/publikation/prevention-ill-treatment-context-eu-criminal-cooperation-and-role-npms>
- ISTEP project – IMPLEMENTATION SUPPORT FOR THE TRANSFER OF EUROPEAN PROBATION SENTENCES, 2011-2013, was coordinated by National Offender Management Office (NOMS). Its object was to support the implementation of 2008/947/JHA through identification of the obstacles and challenges to implementation, designing of tools and techniques to overcome. <https://www.probationtransfers.eu>
- DOMICE (Developing Offender Management in Corrections in Europe), coordinated by NOMS, 2010-2011, focused on understanding, comparing and contrasting the variations of how case management is organized and conducted within the prison system with accused and convicted criminals in different European countries. The goals of the project included: To promote the reputation of case management as an essential component of the 'support mix'. To enable different countries to learn from each other, improve the effectiveness and effectiveness of their own programs, to build understanding on Framework Decision 947 on EU-wide monitoring of probation requirements at international level for how to deal with offenders in different countries. The project was very successful as it succeeded in getting 40 legal systems from 34 countries across Europe to work together.
- PROBATION MEASURES AND ALTERNATIVE SANCTIONS IN THE EU, 2009, coordinated by the Belgium Ministry of Justice, aimed at facilitating the effective implementation of the FD 947 by networking legislative experts and practitioner, identifying the main difficulties linked to the implementation of this instrument and disseminating information on national probation in systems. It carried out the development of a questionnaire to obtain the most exhaustive replies and

information from MS (in Dec 2010), organization of a seminar (July 2010) on FD 947 and dissemination of the gathered information.  
<https://www.euprobationproject.eu/index.php>

b.-Focused on the implementation of the Framework Decisions:

- BEYOND SURRENDER, 2016, coordinated by Fair Trials, Belgium. EU-wide project looking at the use of the EAW and its impact on the life of extradited people and their families. <https://www.fairtrials.org/publication/beyond-surrender>
- IMPROVING THE TRANSFER OF PERSONS PURSUANT TO MUTUAL RECOGNITION OF JUDICIAL DECISION IN CRIMINAL MATTERS AND THE CITIZENS' FUNDAMENTAL RIGHTS PROTECTION', 2016, coordinated by Utrecht University. The main objective of the project is to assess whether current Union legal instruments based on mutual recognition in criminal matters adequately protect fundamental rights. The focus is placed in particular on the protection against torture and degrading treatment, the right to a fair trial and the right to private and family life.
- INTERNATIONAL COOPERATION TO SUPPORT THE IMPLEMENTATION OF THE FD 947/2008/JAI, 2011, coordinated by the Ministry of Justice, Romania. The aim of the project was to analyse the cooperation between Ireland and Romania regarding the implementation of FD 947. The project also facilitated the development of Drink Driving program for offenders.

c.- Dealing with the development of Training Programs:

- DERAD, coordinated by the Italian Ministry of Justice, 2017-2018. The project developed a training platform that helps practitioners to use rule of law in combating radicalization. <https://www.agenformedia.com/international-projects/derad>
- SOCIAL REINTEGRATION OF SENTENCED PERSONS: A COMPREHENSIVE EUROPEAN APPROACH, 2013, coordinated by the Institute of Magistracy, Romania. The aim of the project was to train competent authorities in different member states for implementing FDs 947 and 909.
- ENHANCING EUROPEAN JUDICIAL COOPERATION, coordinated by The Prosecutor's Office to the High Court of Cassation and Justice, Romania, 2013, in order to improve general aspects of the judicial cooperation among Spain, Sweden, Germany and Romania.
- DUAL TRAINING PROGRAMME FOR JUDGES ON CRIMINAL MATTERS AND LEGAL LANGUAGE, 2012, coordinated by the Court of Appeal of Mons (Belgium). The aim of the project was to prepare judges from the two countries to cooperate better in implementing FD 947/2008 and FD 909/2008.
- EUROPEAN JUDICIAL TRAINING: "LOT 1 – STUDY ON BEST PRACTICES IN TRAINING JUDGES AND PROSECUTORS", coordinated by the European Judicial Training Network (EJTN). <http://ec.europa.eu/esf/BlobServlet?docId=13949&langId=en>

d.- Addressing the general existing framework:

- DETOUR - TOWARDS PRE-TRIAL DETENTION AS ULTIMA RATIO, 2016-2017, This project aims at exploring and analysing pre-trial detention practice and especially different ways of reducing the use of pre-trial detention in seven European jurisdictions (Austria, Germany, Romania, Belgium, Lithuania, Ireland and the Netherlands). <http://www.irks.at/detour/>
- LIMITS OF MUTUAL RECOGNITION, it seeks to reach conclusions about mutual recognition as a general principle of law in Union law. Its perspective is to research the horizontal and vertical dimension of regulation and enforcement. The research is 'bottom-up': it seeks to answer general questions by looking at specific several topics in the area of the internal market and the Area of Freedom, Security and Justice. <http://reinforce.rebo.uu.nl/bouwsteenprojecten/wederzijdse-erkenning-en-wederzijds-vertouwen/>
- STEPS2 RESETTLEMENT: SUPPORT FOR TRANSFER OF EUROPEAN PRISON SENTENCES TOWARDS RESETTLEMENT, 2014 – 2016, coordinated by the National Offender Management Service (NOMS). aimed to support the effective delivery of Framework Decision (FD) 2008/909/JHA (transfer of prisoners) by investigating and analysing the legal and practical obstacles that may hinder its implementation and execution in all Member States (MS). The project assisted in working towards the goal of common European standards of working effectively with offenders. <http://steps2.euopris.org/en/home/>

#### 4.2.4. Other material

##### 1. Vienna Report ANNEX to the PANEL DISCUSSIONS of the 51st Plenary Meeting of the European Judicial Network on 22 - 23 November 2018 in Vienna *European Judicial Network (2018).*

To prepare de panel discussion for the 51<sup>st</sup> Plenary Meeting of EJM, several questions related to the FD 909, 947 and 829 have been asked to the competent authorities of all Member States. Some of them can be useful for a training package.

##### 2. Improving conditions related to detention. The role of the ECHR, the Strasbourg court and national courts. *Meysman, M. (2016) ERA.*

Council Framework Decisions 2009/829/JHA, 2008/909/JHA and 2008/947/JHA and their implementation: state of play and overcoming legal and practical problems (26.2.2016, Strasbourg). Institut für International Research on Criminal Policy.

Council Framework Decisions 2009/829/JHA, 2008/909/JHA and 2008/947/JHA and their implementation: state of play and overcoming legal and practical problems.

##### 3. Speech to to the Bundestag, Rechte von Beschuldigten besser stärken - Rede zu Protokoll. *Wawzyniak (2015).*

Wawzyniak welcomes any extension of the possibility to avoid detention. Yet, raises the point that FD 829 cannot solve the problem that very different entry thresholds for pre-trial detention exist in the Member States, and that some Member States below the detention threshold can impose freedom-limiting surveillance measures, which may result in conditions in the executing State suspected of having a crime below the threshold of detention. In the event of a breach of obligations, she continues further consequence would demand that the executing State would have to surrender the accused in the event of the issuing of an arrest warrant in the issuing State. So, for example if an individual were in Germany, the detention threshold must be reached in order to put the warrant under conditions beyond enforcement. In other countries (England and Wales, Poland a substitution model (Substitutionsmodell) exists, a graduated model whereby measures of restraint can be imposed to safeguard the process, even below the pre-trial detention threshold. Politically and on a legislative basis she considers this is a serious problem. It is true that Article 21 (3) RP (Art. 21 Abs. 3 RB EuÜA) provides that the obligation for the defendant to be returned by the Member States in the event of minor deprivations which are subject to a maximum of 12 months' imprisonment is mandatory. Germany has so far made no use of the arrangement. But this was a prerequisite for Die Linke to approve the bill (they did).

In addition, Die Linke/ Wawzyniak flag that there remains the problem that the Framework Decision provides, in principle, an obligation for the executing State to recognize supervisory measures which can only be rejected by the executing State in limited cases (Article 15 RPA). This in turn leads - as in the case of the European arrest warrant, etc. - to Germany enforcing measures even for acts that are not sanctioned under German law and so are not punishable. This is constitutionally very precarious, even though this specific framework decision is a relief (monitoring measures as a more lenient means of pre-trial detention).

#### **4. 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 *European Commission (2014)***

Once expired the transposition deadlines of the FD 909, 947 and 829, the European Commission implement an analyse about the implementation of these three FDs. The purpose of the report is, 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 2014; secondly, to provide a preliminary evaluation of the national transposition laws already received by the Commission. Some conclusions can be highlighted:

- The sentenced person should play an active role – he/she has to be informed about the procedure and the consequences, should have the opportunity to be heard and even to consent for 947 – implicit consent if he/she has returned to the executing state.
- The sentences should be adapted but only to a certain extent.
- Care should be exercised with the subsequent decisions. States should consult each other more often regarding the internal regulations – especially regarding the conditional release.

-There is an obligation to accept a transfer – except the limitative cases when it can be refused.

-It is necessary to fulfill the deadlines – including the appeal timeframes but should not go over the deadlines of the FD.

-Some countries did not transpose art. 21 of 829 that allows EAW even when the possible sentence is shorter than 12 months if the person does not comply with the ESO.

#### **5. Should be Framework Decisions related to Detention Issues. Will the work effectively to enhance cooperation within the EU? Strasbourg, France.**

*Beneder, J (2013)*

Analysis of the relations related to detention: EU legislation in the field of detention; state of Play implementation FD; general characteristics of the FDs; legal and practical obstacles; possible solutions.

#### **6. Aktuelle probleme bei der vollstreckung des europäischen haftbefehls/ Current problems related to the enforcement of the European Arrest Warrant 2013, Report on Conference in Budapest.**

*Mohácsi, B (2013).*

Barbara MOHÁCSI also discusses FD 829 as it relates to the implementation of the European Arrest Warrant. She covers grounds for refusal to execute and the differences between the legislations of the Member States, if any, and that fundamental rights are duly protected, however, the precise content and scope of the grounds for refusal have not been clarified yet. The difficulties of implementation and interpretation related to the grounds for refusal to execute the European Arrest Warrant are particularly significant, because the too broad or disputable interpretation of facultative or mandatory grounds for refusal may hinder and jeopardize the very purpose of the European Arrest Warrant. Although the European Court of Justice has determined the framework for interpreting the grounds for refusal to execute the European Arrest Warrant, numerous questions remain open, which need to be answered as specific cases shall arise in the future.

#### **7. Politique pénale et d'exécution des peines: Aperçu & développement. Criminal policy and the execution of sentences: Overview and developments.**

*DeClerck, S (2010).*

DeClerck's review is of newly implemented legislative tools which the Belgian Ministry of Justice has started to use in the 5 years prior to publication (De Clerck, 2010). Across the whole 64-page document, these regulations cover victims' rights, new legal phenomena in Belgian society and alternative measures and sanctions. This latter section is the only part relevant to our research question, so that the following conclusions:

The author notes that the internationalization of society Developments in sentencing and sentencing occur to a significant extent in a (territorial) context wider. Criminal policy and the enforcement of sentences become a political criminal justice system and the enforcement of the European dimension, which must also be implemented in our own

national legislation. The author goes on to note that the legislation is an incentive for the elaboration of a set of sanctions and a transparent sentencing policy. What, he asks does the future of law look like? The relationship between execution of sentence and sentencing has weakened over the years. Justice must question this point. An intense movement has seized the prison sector during the past decade, one which has had little regard for the connection with the sentencing. The link between public action and the treatment of offenses by the public prosecutor, the sentencing by the judge and the execution of the sentence, he notes, deserves more attention.

It is interesting for our research to take into account the following conclusions:

-The transfer of probation would function better if public prosecution, the judge and the criminal sanctions agencies in each EUMS communicated more effectively.

-FDs 826 and 947 give us two precise opportunities: Each EUMS can now enlarge and implement more effective sanctions in a more transparent way. Each country could also use these FDs to strengthen the links between sentence and execution of sentence which have been allowed to deteriorate over the years.

#### **8. *Limits of Mutual Recognition in Criminal Matters.* Lund (Sweden). Master thesis Krönmarl, R. (2010)**

Principle of mutual recognition as the cornerstone of criminal law cooperation within the European Union.

The main justification of mutual recognition in criminal matters has been mutual trust. Mutual recognition applies at all stages of the criminal proceeding and thus mixes different criminal justice systems in unforeseen combinations. The fragmentation of national criminal systems works poorly alongside the holistic approach of the ECtHR, i.e. the Court always looks at the proceeding as a whole to decide whether it amounts to a fair trial.

#### **9. Meijer Committee. Standing Committee of Experts on International Migration, Refugee and Criminal Law. *"Gaps and inconsistencies in Legal protection in EU Criminal Law"*.**

The current body of EU criminal law offers inconsistent and incomplete legal protection to European citizens. Shortcomings are found in the procedural safeguards in instruments of mutual recognition, the proposal on a European Public Prosecutor's Office and the criteria used to decide on criminalization of conduct at the EU level. In light of an expert meeting held at the European Parliament in January 2015, the Meijers Committee publishes three short notes on gaps and inconsistencies in the legal protection offered by EU criminal law. This first note concerns the need to reform existing mutual recognition instruments that overlap but also contradict each other and to strengthen judicial review. It is recommended that the following inconsistencies should be dealt with:

- Inconsistencies in overlapping mutual recognition instruments, and
- Inconsistencies regarding the exercise of procedural rights in practice.

## 10. “The future of Mutual Trust and de Prevention of Ill Treatment. Judicial Cooperation and the Engagement of National Preventive Mechanisms”.

*Tomkin, J., Zach, G., Crittin, T., Birk, M. Ludwing Boltzmann Institute Human Rights and ERA- Academy of European Law.*

Over the last decade, criminal justice has increasingly played a significant role in the operation of the EU. To this end, and with a view to guaranteeing an area of freedom, security and justice within its territory, the EU has established systems of cooperation between Member States, as well as common minimum standards. In order to ensure the effectiveness of national criminal laws despite the removal of internal borders, a number of EU legal instruments were introduced to foster cooperation in criminal matters. This Study centres around the Framework Decision on the European Arrest Warrant (FD EAW), and three of the key Framework Decisions on detention, namely the Framework Decision 909 on the Transfer of Prisoners, (FD TOP) Framework Decision 829 on the European Supervision Order (FD ESO) and Framework Decision 947 on Probation and Alternative Sanctions (FD PAS). Mutual recognition is essential for effective cross-border cooperation and the practical implementation of EU instruments. It is based on a principle of mutual trust – an understanding that each Member State can and should trust that all the other Member States respect fundamental rights standards, as is a prerequisite to membership of the EU.

### *4.2.5. Special Mention to the training material*

Different kind of training materials have been identified throughout the literature review, but most of them deals with the FDs in a descriptive way and others cannot be easily accessible, since the instructions or guidelines for Member States Judiciaries developed by the different Ministries of Justice are normally of restricted access for users.

According to the data provided by the CEP, throughout the expert meetings on this area (specially the information obtained by the Framework Decisions Expert Meeting which took place on September 2018<sup>5</sup>), only some countries provide for training to their competent authorities. Croatia, Germany and Netherlands seem to give training about both FD 947 and 829, while some countries like France, provide for training only on FD 947. In Finland, there are some trainings about FD 829. Italy is planning a training for judges and prosecutors on this area and Ireland is still working on the transposition into their domestic law of the FDs. The other countries, apparently, do not have specific training on the FDs.

Countries like Spain, implement concrete refreshing courses for judges and prosecutors focused on these topics –normally dealing with the subject in a descriptive way- making the presentations available to the public<sup>6</sup>; the General Council of Judicial Power has also developed some “guides” explaining the process to use the FDs according to the transposition law, but it is just a description of the process only available for judges (only accessible through intranet).

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<sup>5</sup> See: <https://www.cep-probation.org/presentations-and-materials-of-the-4th-framework-decisions-expert-meeting-now-available/>

<sup>6</sup> See, for example, for prosecutors: <https://bit.ly/2WNvZGb>

Some states, like Netherlands, provide for brochures or pamphlets containing the most important or useful information for potential offenders or users interested in the application of the FDs processes<sup>7</sup>.

The information provided by some organizations and international institutions is also relevant. Thus, the CEP has some presentations and “brochures” available for the public<sup>8</sup> and ERA (the Academy of European Law) provide for training at this respect -being necessary to have a subscription- except for some presentations open access<sup>9</sup>.

The most relevant information related to the training on the FDs have been found in the context of the result of international projects. Important training materials can be extracted from the analyzed projects (for more information about the projects, see above):

1. DERAD (2017-2018) has developed an excellent training platform: <https://www.traininghermes.eu>
2. “The future of Mutual Trust and the Prevention of Ill Treatment. Judicial Cooperation and the Engagement of National Preventive Mechanisms”, 2015-2017: [https://bim.lbg.ac.at/sites/files/bim/anhang/publikationen/final\\_version\\_the\\_future\\_of\\_mutual\\_trust\\_and\\_the\\_prevention\\_of\\_ill-treatment\\_1.pdf](https://bim.lbg.ac.at/sites/files/bim/anhang/publikationen/final_version_the_future_of_mutual_trust_and_the_prevention_of_ill-treatment_1.pdf)
3. Project about “Social reintegration of sentenced persons: a comprehensive European approach” (2014): [https://www.kssip.gov.pl/sites/default/files/handbokk\\_social\\_reintegration.pdf](https://www.kssip.gov.pl/sites/default/files/handbokk_social_reintegration.pdf)
4. Project about “Enhancing European judicial cooperation”, JUST/2013/JPEN/AG/4475: develops a Handbook on judicial cooperation in criminal matters. Comparative approach of the judicial instruments used by Germany, Romania, Spain and Sweden.
5. STEPS2 Resettlement: Support for Transfer of European Prison Sentences towards Resettlement (2014 – 2016), develops a Handbook for offenders and leaflets. A training package developed and guidelines on consideration for victims can be found on: <http://steps2.euopris.org/en/home/>

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<sup>7</sup> See Netherlands wets : [https://www.dji.nl/binaries/fact-sheet-for-foreign-prisoners-in-the-netherlands-\(from-an-eu-country\)\\_tcm41-120875.pdf](https://www.dji.nl/binaries/fact-sheet-for-foreign-prisoners-in-the-netherlands-(from-an-eu-country)_tcm41-120875.pdf) and Netherlands wots: [https://www.dji.nl/binaries/information-sheet-for-foreign-prisoners-in-the-netherlands\\_tcm41-120866.pdf](https://www.dji.nl/binaries/information-sheet-for-foreign-prisoners-in-the-netherlands_tcm41-120866.pdf)

<sup>8</sup> See for example the CEP brochures: <https://www.cep-probation.org/wp-content/uploads/2018/10/Flyer-FD-final-1.pdf> and <https://www.cep-probation.org/wp-content/uploads/2018/10/FD-guideline-final.1.pdf>

<sup>9</sup> See: [https://www.era-comm.eu/detention/2014\\_2015/pdf/Beneder\\_PPP.pdf](https://www.era-comm.eu/detention/2014_2015/pdf/Beneder_PPP.pdf)

6. ISTEP project, on the “Implementation Support for the Transfer of European Probation Sentences” (2011-2013). Develops a European Implementation Handbook and useful Newsletters: <https://www.probationtransfers.eu>
7. Dual training Programmed for judges on criminal matters and legal language’ (2012). Reference to these materials could be made in order to enhance language competences: <http://www.curteadeapelcraiova.eu/judicial-intercultural-communication-in-family-mediation/dual-training-programme-for-judges-on-criminal-matters-and-legal-language-2> , <http://www.curteadeapelcraiova.eu/wp-content/uploads/2012/04/english.pdf>, and <http://www.curteadeapelcraiova.eu/wp-content/uploads/2012/04/french.pdf>
8. Probation measures and alternative sanctions in the EU, 2009. Provide for some interesting presentations related to the implementation of the FD (legal and practice issues):
  - Presentation: “Aspects pratiques de l’implémentation” shows some interesting drawbacks about the use of the Electroning Monitoring.
  - Presentation of Workshop I y II - Legislative Implementation: some interesting points about the legal aspect can be found here (<https://www.euprobationproject.eu/images/workshop2.pdf>)
  - For practical issues, interesting information in the workshops III and IV of the seminars of July 2010 (<https://www.euprobationproject.eu/project.php?sp=2> )
9. Project European Judicial Training: “Lot 1 – Study on best practices in training judges and prosecutors”, provide for some training for judges and law users: <http://ec.europa.eu/esf/BlobServlet?docId=13949&langId=en>

A lot of documents have not been taken into account due to its little extension, the fact that they deal with the FDs in a descriptive perspective and the language (for example, the guidelines for the use of the FDs made in Sweden are only available in Swedish, and they constitute just a descriptive explanation about the FDs).

More information at this respect will be provided in the next step of the PONT project, when developing the training manual. A database with all the information concerning the training materials on FDs 947 and 829 at European level will be developed.

## 5. Obstacles in the implementation of the FDs and learning points: key points for the training package

According to the bibliographical research, certain obstacles seem to be more relevant in the implementation of the FDs here analysed. Some obstacles are common to both FDs, while others have been identified only in relation to one of the FDs.

## 5.1. Common obstacles to both FD

### 5.1.1. Theoretical, terminological or ideological issues

A. The lack of mutual trust between Member States.

- In relation to the protection of fundamental rights in the EU. According to the analysed prior projects Judges in some Member States refuse to execute a surrender due to the risk of exposing an individual to cruel, inhuman or degrading treatment (ill-treatment) upon return, in violation of the principle of non-refoulement prescribed by Article 3 of the European Convention on Human Rights (ECHR) and Article 4 of the Charter of Fundamental Rights of the EU (CFREU).
- Lack of trust in supervision by another MS and risk of flight.

B. The terminological problems. According with some authors (see e.g. O'Donovan, 2009) the use of the term 'alternative sanctions' in the FD is unfortunate and can be misunderstood or leave aside other measures not imposed as alternatives to a prison sentence but encompassing a supervised freedom –probation measure.

C. Ambiguity regarding the correct identification of the place where the condemned can be considered "lawfully and ordinarily resident" or in another State "that consented to such forwarding", since it does not clearly determine for how long a subject must have resided in a place to be considered legally or habitually resident, does not specify what happens in the case of multiple residence or of absolute absence of residence.

D. The meaning of the consent. Consent has been debated, since it is not clear if this is related to consent to moving from one country to another, or consent of the measure that is imposed (or its adaptation).

### 5.1.2. Legislative obstacles

A. Discretionary power to send a certificate for the Issuing State. To implement a sentence or a supervision order in the own country is not a right for the offender or suspected person, but a decision to be taken without conditions by the competent authority of the issuing State.

B. No time limit to send a certificate for the issuing State. Although FDs 947 and 829 establish strict time limits to implement the recognition and enforcement process one the certificate sent to the Executing State, there is a lack of time limits for the procedures in the Issuing States.

C. The lack a specific obligation for the Issuing State to inform the Executing State regarding the prisoner's behaviour and progress.

D. The absence of the obligation for the Issuing State to inform prisoners about the implementation conditions of the measures (probation measures or alternative sanctions, or supervision measures) in the Executing State.

E. The possibility of overlapping mutual recognition instruments. There are cases where a judge can impose certain restrictions or prohibitions on a convicted person covered by several recognition instruments, for example, Framework Decision 2008/947/JHA and Directive 2011/99/EU may apply simultaneously (this is the case when a judge imposes an obligation on an offender to avoid contact with his victim, or the prohibition on entering certain areas).

F. The possibility of incompatibility of mutual recognition instruments. There are cases where a judge can impose certain restrictions or prohibitions (for example, European Protection Order of a victim living in the same place of residence of the offender/accused) which prevents or makes it difficult to transfer the suspected, accused or sentenced person to his / her Member States to implement the alternative measure to detention or probation measure or sanction.

G. There are important differences between available measures across Member States, which have different range of “alternative or probation measures and sanctions” and “alternative to detention measures”. There are also important differences in relation to the nature and duration of the available measures in the Member States:

- A preliminary assessment of the legislations shows that some Member States have not implemented all mandatory measures. With respect to non-custodial sentences (FD 947), Member States have to provide for at least the probation measures and alternative sanctions mentioned in Article 4(1) of this FD. 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). Some Member States have not implemented all mandatory measures and only allows for the transfer of some probation / supervision measures. This gives rise to one of the most complicated problems: how to take responsibility for a person sentenced to a measure that a Member State do not recognize under their national legislation.
- On the other hand, there are some measures whose supervision can be optionally assumed by the States. So that they can only be transmitted to those EU Member States that have also assumed their supervision by notification to the General Secretariat of the Council of the European Union. Thus, it will be necessary to verify in each case if those countries have assumed their supervision or not.
- The systems of application of sentences and of precautionary measures still differ strongly between States in terms of maximum and minimum duration of penalties combinable. While the principle is the no adaptation of the sentence, the differences in relation to the duration of the penalties force, in several cases, the adaptation of the sentence in each Member State. This provokes huge differences in the enforcement of the sentences (in terms of punitivity) depending on the executing state, being therefore more ‘profitable’ (cost-effective) for the offender to implement the sentence in another Member State.

H. Different regulations about the consent of the offender. The systems of application of sentences and of precautionary measures still differ strongly between States in terms of concrete applicative or role modalities consent of the interested people (this last point must be taken into account regarding several factors: consent to the application of an alternative measure instead of the detention, consent to be transferred to another State and consent to fulfil the modalities of execution of the penalty provided by the State other than the sentence).

I. Incorrect transposition of the grounds for refusal. Some Member States added new grounds for refusal and other Member States transposed them as mandatories.

J. The age of offending -of criminal responsibility- differs from a jurisdiction to another. Some young people would be very much affected by the FD as social rehabilitation is paramount and they are likely to have family and support networks in their home countries. For some jurisdictions it's even possible to find specific ages for different sanctions, adding an additional extra to the sending of the penal decision and the eventual adaptation of the measure / sanction.

K. Electronic monitoring is often used in Europe as an enforcement of bail measure, alternative to the pre-trial detention or as an added requirement for early release from custody. It is not comprehensively legislated for in the FDs text.

L. The lack of a properly regulation of the procedures of appeal. It must be said that, when solving the issues of the European supervision order (or European Probation Order), and its transmission for execution, it would be appropriate to foresee the procedures of appeal against the decisions of the issuing State and the executing State in order to ensure the imperatives of legal clarity and legal certainty arising from the rule of law.

### *5.1.3. Prior obstacles: knowledge and motivation*

Before commencing a thorough analysis of obstacles and difficulties, we can highlight the presence of three general obstacles in the implementation of these FD.

A. The lack of awareness of the FDs. According to several prior research projects and the data collected from the CEP and the EJM, both the competent authorities and the probation services have a limited, sometimes restricted, knowledge of the existence of the FDs and their procedural application. Also, there is a lack of awareness of the FDs among the other parties involved in the process: accused or sentenced persons and Lawyers.

B. It has become clear that there is a huge lack of training concerning the FDs, for both competent authorities and the implementation authorities (among them, probation services).

C. There is also a lack of incentive to use these FD, concerning FD 947, among other reasons, because the kind of sentence covered by this FD (probation measures and alternative sanction) have sometime (often) short duration, involving a lot of work for

'little profit'. On the other hand, the use of the FD 829 may involve some risks and difficulties to ensure the return of the accused being 'easier' and 'safer' for the prosecutors to have the accused in custody or at least within their territory during pre-trial investigation.

#### *5.1.4. Practical obstacles*

A. Identify the competent authorities. One of the most important difficulties derives from the identification of the competent authorities involved in the transfer procedures: the Ministry of Justice is not assumed to take care of the mutual recognition instrument implementation in every MS (it could be the courts or the prosecutors to do it and, again it could also be an administrative procedure e non-jurisdictional). Subsequent convictions in the executing State could then generate incompatibility profiles between the application of an alternative measure assigned by State that has applied the sanction and the disposition of one custodial measure by the executing State.

B. Absence of known contact points. Related to the identification of the competent authorities, the dispersion of the competent authorities and the absence of a central authority managing the mutual recognition instrument, make more difficult to know to who address a request related to the FDs. In most of the countries there is not a central contact point –general or central information desk- and the staff movement between positions and roles in the organizations make very difficult to have the contact details updated.

C. Subsequent decision concerning recognition: competence problems. With reference to FD 947, the executing State may make a declaration of not assumption of responsibility, e.g. on the imposition of a custodial sentence, while concerning the FD 829, the power to take subsequent decisions will remain in the hands of the issuing State. These situations provoke important problems of competence among the different competent authorities of the Member States involved in the mutual recognition procedure. It is

D. Limiting trials held in absentia: Concerns about the fairness of trials conducted in absentia led to the passage of Framework Decision 2009/299/JHA which inserted new common provisions concerning proceedings which had been conducted without the presence of the defendant into existing instruments on surrender, confiscation, the recognition of penalties, judgments and non-custodial measures. (2008/947/JH) (Miettinen, 2013: 196).

E. Access to legal aid. These FDs involve proceedings taking place in the territory of two Member States and consequently subject to two different legal systems, leading to different kind of difficulties:

- The need (or not) of a legal aid or lawyer. In some jurisdictions, some legal procedures require a lawyer. The need of lawyer can also be subject to the intention of appeal: if the offender or suspect does not agree with the final decision and wants to appeal, the assistance of a lawyer will probably be required.

- Free legal aid for indigent. In case the offender or suspected does not have financial resources, the procedure to have free legal aid and the requirement to have access to this aid can be different in each jurisdiction.
- The whole procedure of recognition and enforcement of a measure covered by the studied FDs takes place in two different jurisdictions, entailing the need of two lawyers or one knowing the legal procedure in both legal systems involved.

F. Huge level of bureaucracy. The significant volume of documentation required during the course of the application of the FD: It was identified that in excess of 50 pages was accumulated including skeleton arguments, draft order, references and the information required by the Spanish authorities. A more consistent implementation across the EU of ESO is needed to better safeguard the presumption of innocence and the right to liberty

G. The lack of a system or clear procedural path: hundred hours of work per order. Furthermore, the lack of a clear procedure and the resulting delays in each part of the procedure mean individuals spend a considerable amount of time in pre-trial detention.

H. Linguistics issues: translation of documents. According to the FDs, certificates always need to be translated, and sometime also the judgment. Nothing is regulated about other documents.

- So, the first question before us is in which language the certificate has to be translated into (since the certificate shall be translated into the official language or one of the official languages of the executing State, but any Member State may state -in a declaration deposited with the General Secretariat of the Council- that it will accept a translation other official languages of the institutions of the European Union).
- Secondly, in addition to the certificate, sometimes the translation of the judgment is required by a competent authority in some Member States.
- Thirdly, it is debatable if it is possible to ask for the translation of other documents considered relevant for the competent authorities (pre-trial report, probation report, medical reports etc.).
- On the other hand, the translation of the document can take a lot of time, slowing down the procedure and provoking delays.

I. Non-compliance with the time limits. For internal and external reasons, the processing times are not always met, and the periods of time are sometimes disproportionately long (sometime Executing State can take too much time in answering, sometime the issuing State take too much time in sending the certificate –because of the bureaucracy, the translation issues, etc.) (see, among others, Oberon Nauta, Marga van Aalst & Perihan Özgül, 2018).

J. Capacity issues: lack of staff. In several Member State the FDs have been incorporated into domestic legislation, introducing new procedures and generating new documentation without accompanying these measures with an increase in staff (Oberon Nauta, Marga van Aalst & Perihan Özgül, 2018).

K. The lack of appropriated information and communication network and software. In addition to the lack of training and the eventual need of adaptation of the measures or sanctions, among others, the lack of new infrastructures and IT systems can also lead to practical errors related to the calculation of the early release, starting date, the failure to administratively close completed sentences so that an individual is wrongly called back for execution of the sentence, incomplete and/or incorrect entries in the Judicial Documentation, or a probation execution order while at that time the case is already being transferred abroad.

- There is not centralized information system in all Member States.
- There is not a centralized information system among Member States (at European level).

L. Problems related to the determination sentencing equivalence and the eventual adaptation of the sentence. As seen, there are important differences between the available measures across Member States, which have different range of “alternative or probation measures and sanctions” and different system of “alternative to detention measures”. The differences in relation to the nature and duration require the adaptation of the measure in some situations. These divergences provoke disparities and inequalities in the implementation of the measure subjects to the studied FDs and provoke important problems with conversion and determining sentencing equivalence.

M. The need to check the double criminality for the offences concerned by the FDs 947 and 829. Since pre-trial detention is often reserved for serious crime, the alternative to detention are more often used in cases of non-serious crime, some of them not included in the list of offenses which do not need check of double criminality. Similar situation happens with the “probation measures”, in some jurisdiction reserved for minor offenses requiring the checking of double criminality.

N. Lack of information on the situation of the accused or sentenced person in the executing State. According to the data collected, it would be necessary to know, for example, the type of accommodation that the suspected / offender has in the executing State, his or her employment or training prospects, etc. A *home circumstances appraisal* should be prepared and considered before the decision is taken to recognize the judgment, but the tight time-line is short. A full assessment of social functioning and attitudes to crime should be the first order of business once supervision commences.

O. Lack of clear way to measure the social relations of the person in the executing State. Related to the last obstacle, the problem is not only the collection of the data, but its evaluation. A question arises in relation to the social links: how to assess the social relations of that person in the executing State according to the objective data submitted by the person, his or her personality and criminal experience. The person's marital status, constant place of residence, labour relations, health condition, previous convictions,

possessed assets and the other circumstances could be taken into account in the executing State. The absence of similar criteria among competent authorities of the Member States can lead to implementations problems and divergences among the Member States practice.

P. Difficulties in getting the required consent of the accused / sentenced person. In addition to the difficulties about the different regulations about the consent, the literature review reveals as a practical obstacle to get the required consent of the accused or sentenced person; some national laws provide for consensual ways for ending proceedings without trial at reduced cost, moving away would be deemed a breach and require resentencing.

## 5.2. Obstacles related to the implementation of the FD 947

Some of the obstacles and difficulties identified in the implementation of the studied FDs lend special significance in relation to the FD 947. Others effect only this FD.

### 5.2.1. Theoretical, terminological or ideological issues

A. The term “therapeutic treatment” (see f. ex. Art. 4 FD 947) is quite wide and it is regulated as grounds for refusal. A Member State may refuse to recognize a judgment or probation decision providing for medical/therapeutic treatment which the executing State cannot supervise in respect of such persons under its national law. A “therapeutic treatment” can be largely understood and encompasses most of drug treatments, therefore a risk to broaden the options for refusal.

B. The term “mentally ill” is quite wide and it is regulated as grounds for refusal. As in the last case, a Member State may refuse to recognize a judgment or probation decision, if the judgment concerned was issued against a person who has not been found guilty, such as in the case of a mentally ill person. This greatly increases the options for refusal.

### 5.2.2. Legislative obstacles

A. No detailed regulation is covered by the FD in relation to some specific treatment programs (as medical treatment programs or treatments of mental ill offenders) which can generate specific problems.

B. No specific procedure is regulated by the FD in relation to the treatment of some sensitive information, especially related to medical issues.

C. The regulation of the ground for refusal do not take into account the often-short duration of some Probation measures. The art. 11 of the FD 947 consider a ground for refusing recognition and supervision if the probation measure or alternative sanction is of less than six months’ duration. In several Member States probation measures and alternative sanctions tend to be short, therefore in many situations the executing State can refuse the recognition of a sentence.

### *5.2.3. Practical obstacles*

A. Concerning the subsequent decision to the recognition, the FD 947 poses a specific problem, since the executing State may make a declaration of not assumption of responsibility. This adds an extra-complication: to check the declarations of the countries to know their position on subsequent decisions and whether they would intend to make use of the possibilities.

B. The Identification of the competent authorities become especially complicated in the case of FD 947, which involves the participation of the Probation Services in many countries, even the participation of other institutions (in the case of specific treatment programs).

C. Current lack of knowledge and awareness amongst probation staff regarding FD 947. In many countries, the probation staff that deal with offenders on a day to day basis are not at all aware of the possibilities of using 947 to transfer an individual and thus the principle of 947 is undermined. In some system, the Probation System is not involved in the procedure.

D. Language issues. The “probation terminology” can be some time confuse and complex. The term “suspended sentence” in some member states, as Latvia or Estonia, is literally translated as “conditional sentence”, which is a different type of sentence.

E. The “lack of adaptation” of some probation measures or alternative sanctions. Specifically, it is difficult for the implementation of the FD 947 to implement special sanctions such as medical treatments, especially when does not exist in the executing State similar sanctions.

F. The use of the Pre-sentence Report (PSR). The use of the pre-sentence report is something common among Probation systems. The FD does not say anything about this point except that the report should be sent with the certificate, but without specifying when, at what stage of the procedure, by whom and, without any mention of the need for translation (what content it must have and so on). Language is only mentioned regarding the certificate, but nothing is established about the PSR. On the other hand, the diversity of probation system and difference among Member States mean that the PSRs normally have different content and structure, so difficult to harmonize. The only reference to probation reports is at the end of the certificate, which merely requests that a box be ticked if such reports are available. The language in which such reports are written should be indicated, but with a footnote that the issuing State is not obliged to provide translation of these reports.

G. Translations issues. Some of the probation / alternative sanction and measure consist of the implementation of a treatment programs. No only nothing is envisaged in the FD about the translation of the PSR, but if a programme is established as a sanction or as a part of a probation measure the question of the need of translation arise in this context.

H. Issues related to the treatment programs. Some difficulties can be found at this respect.

- Formal issues. Some questions such as when the treatment should start or how to implement the calculation of the program-days, or therapy-days (a six-month therapy can have different quantity of session, or a therapy of 20 session can have different duration in terms of months).
- Substantive problems. Some problems about the quality and the kind of treatment can be discussed at this respect.
- Cost and implementation problems. In some countries, some kind of treatments have to be played by the patient, even to find the good treatment or the place to receive it (treatment centre, hospital...) may fall under the competence of the individual.
- Sensitive information related to some kind of specific treatment programs. Special information is necessary to implement some specific programs related to medical treatment or mentally ill offenders.
- Problems related to some kind of specific treatment.

I. The absence of double criminality for minor offences. The list of offences listed in the article 10 of the FD 947 do not need a check of double criminality if they are punishable in the issuing State by a custodial sentence or a measure involving deprivation of liberty for a maximum period of at least three years. Often, the offences receiving a probation measure or alternative sanction tend to be short sentences.

J. Absence of “Probation Systems” in some Jurisdictions. A minority of countries do not have a probation service as such.

#### *5.2.4. Risks identified*

According to the data collected, the main risk identified is the increase of number of transfers without taking into account the correct reason: to improve the social reinsertion. Starting from the idea that Member States desire to transfer as many offenders as possible to reduce the cost of probation, it was raised as a risk the possibility of, in order to increase the numbers of transfers, ignore or neglect the main goal of this FD: to aid the social rehabilitation of the individual.

Seen the data provided by the CEP and the EJM this risk does not seem to be realistic (the FDs are underused).

### **5.3. Obstacles related to the implementation of the FD 829**

Some of the obstacles and difficulties identified in the implementation of the studied FDs lend special significance in relation to the FD 829. Other ones affect only to this FD.

### *5.3.1. Legislative obstacles*

A. The lack of alternative to detention in national legislation. In a lot of systems there are not a large range of alternatives to pre-trial detention.

B. The unlimited discretion to refuse applying the ESO for the issuing State. It is believed that the issuing State's unlimited discretion to refuse applying the ESO is one of the most problematic aspects, which can lead to the non-application of the FD 829 or to its unreasonably unequal, discriminatory application, for e.g., against the persons, whose social status is high and they have the possibility to make use of the services rendered by lawyers of the highest professional level.

C. Legal regulation is inconsistent and has many gaps. As the issuing State has jurisdiction to take all subsequent decisions relating to a decision on supervision measures, there are a lot of gaps in the regulation made by the FD 829. Concretely the regulation of the extension of the supervision measure by the Issuing State is inconsistent:

- Where the time period has expired, and the supervision measures are still needed, the competent authority in the issuing State may request the competent authority in the executing State to extend the monitoring of the supervision measures, in view of the circumstances of the case (..). If the issuing State can impose the supervision measure and transmit it for execution to the executing State, and if the issuing State can review, annul, change and so on the supervision measure, it remains unclear why it cannot extend it, whereas the latter is transferred to the competence of the executing State.

D. Nothing is regulated about the cost related to the eventual transfers, caused by the pre-trial investigation, implanted during the supervision, which can cause practical problems (see below).

### *5.3.2. Practical obstacles*

A. The overuse of the pre-trial detention to the detriment of the use of ESO. The underuse of alternative to detention has consequently an impact on the underuse of the ESO. By the way, it has been revealed by judges the concern that they might face when admitting people on bail as opposed to where pre-trial detention measures are applied. Judges have experienced pressure exerted by the media and members of the public in cases where pre-trial detention is not used.

B. Concerning the subsequent decision to the recognition, the fact that in the case of the FD 829 the competence is under the issuing State can cause huge difficulties and needs of fluid communication (not always possible) to implement the supervision.

C. Time limit of the alternative measures to detention. In almost of the system the measures implemented as alternative to the pretrial detention has a limit, taking into account the presumption of innocence, and these limits can suppose a problem to adapt the alternative measure to the national legislation in the executing state.

D. The lack of a system or clear procedural path –what increases the amount of work- and the excess of bureaucracy reaches a wider significance in relation to the FD 829, seen while the transfer the accused can suffer pre-trial detention in the issuing State. The resulting delays in obtaining an order can mean that the individual spent a considerable amount of time in pre-trial detention. A more consistent implementation across the EU of ESO is needed to better safeguard the presumption of innocence and the right to liberty.

E. The lack of knowledge of the social situation and the real social links of the accused in the issuing state, play an important role taking into account the risk of scape.

F. Overlapping with other measures. Specifically related to FD 829, the ESO was revealed as an obstacle for the implementation of FD 947: it may be possible that the ESO may be able to capture some cases -restrictions on contact, for example- which are covered as a part of a sentence under the FD 947.

G. Political barriers. The probability that the mutual relations between two Member States are tense can influence the non-application ESO, considering that the competence about subsequent decision one the decision recognized, belong to the issuing state in the case of the FD 829.

H. The issue of the costs. It must be assumed that, when transporting a person from the issuing State to the executing State, the costs are incurred by the issuing State; thus, the issuing State must cover these costs. But using FD 829 it can happen that a person should be transported from the executing State to the issuing State and back due to the pre-trial investigation actions of the issuing State or court sittings. We can assume that costs are also incurred in the issuing State, which made the decisions, because of which that person must be transported, but can be debatable.

- It is inconsistent that we seek to save state budget funds, which would be allocated for persons in custody. However, the transportation of suspects and accused persons, including the costs, which accrue to their safekeeping, would also affect the state budget.
- The authors think that Member States can also attribute such costs to the costs of proceedings in the national legal acts and recover them from a person, who caused them: however, it would be complicated for certain indigent citizens and such situation is incompatible with the principle of equality, the rule of law aspiration; thus, it would be progressive to foresee the financial relief or compensation mechanisms for indigent persons.

### *5.3.3. Risks identified*

According to some authors there is a perceived danger that the option of using FD 829 (the ESO) would be utilized when appraisal would suggest that there are no significant underlying criminogenic or social issues to be addressed and that supervision is not really needed for what would be termed a low-risk offender.

Having seen the data provided by the CEP and the EJM this risk does not seem to be realistic (the FDs are underused).

## 6. Solutions

### 6.1. Common solutions to both FD

#### *6.1.1 To improve the knowledge and awareness about the FD 947 and 829*

It is clear there is a significant lack of awareness of - and motivation to use - FDs. Not only among competent authorities but among law users and potential offenders-users.

#### *6.1.2 To promote the training at national and international level*

To develop training packages for competent authorities (from judiciary and for Probation systems), but also for law users (especially for lawyers). In a lot of cases, the role of the lawyer is crucial to promote the use of the FDs.

#### *6.1.3. To facilitate the contact between competent authorities*

A. Encouraging consistent contact between the competent authorities of each country to build the foundations for co-operation between all member states and encouraging mutual trust and understanding. Many problems in the application of the FDs could be avoided through the setting up of concrete tools allowing an efficient exchange of information regarding national systems as well as direct and regular contacts between the authorities involved:

- Handbooks, best practices and training available to the authorities concerned with a view to allowing access to the information held on national probation systems;
- Networks and fora for discussions in order to share experience as well as to promote consultation and direct contacts between executing and issuing authorities.

B. To specify the information that the General Secretariat of the Council should make circulating among MS. (The competent authorities in each Member State are notified to the General Secretariat of the Council, which circulates the information to all Member States).

C. Certificates – Certificates need to be clear and concise and include all the relevant information for the executing state to be able to determine whether the individual can be transferred and to be able to allocate the most effective services to him/her.

#### *6.1.4. To provide clearer information about how to implement them*

A. Clear factsheets. Information on the types of Probation measures and alternative sanctions in every member state as well as information on their declarations and their competent authorities must be available and correct to facilitate effective transfers.

B. Website – clear and complete, in order to facilitate the access to practical and necessary requirements to implement the FD:

- o Information on each member state: contact details for their competent authorities, information on community sanctions and specifics such as declarations on community sanctions.
- o Information about national fact sheets about legislation and practical implementation of the FD.

#### *6.1.5. To give specific practical training for probation workers*

Staff training - In the practical implementation of the FD.

## 6.2. Solutions related to the implementation of the FD 947

A. Cooperation and Mutual Trust. Many informal transfers have been underway for some time due to informal agreements and a mutual trust between certain member states. The FD is not designed to undermine this mutual trust but to encourage countries to work together and where required, compromise over changes of sanctions and types of sentences to ensure that the social rehabilitation of the individual is at the forefront of all transfer decisions.

B. Further clarity on the FD. An opportunity for all member states to air their concerns and inform the EC of areas of the FD that they either do not understand, causes confusions or is posing too great a challenge to implement into their law.

C. Formal agreement on costs. A formal agreement on who bears the cost should be considered. It is widely viewed that many individuals due for transfer will not be in a position to pay for the transfer and therefore should this prevent them from transferring?

D.- To facilitate the assistance of a lawyer: Because protection is not uniform, a person who is subject to a transfer may will find him/herself in a situation where he/she will not enjoy legal assistance. It is indeed true that the threshold of protection granted by Article 6 ECHR and Articles 47 and 48 CFR does not cover post-trial situations and, consequently does not guarantee the assistance of a lawyer at this state. Nevertheless, it might be relevant to consider going beyond the current boundaries of these provisions and think of making the assistance of a lawyer in transfer proceedings a justifiable right throughout

the EU. In this regard, respect for the standards provided in Directive 2013/48 could be advisable for the MS.

E.- Strengthening the exchange of information between defence lawyers. Firstly, several multilingual templates establishing a list of information which is necessary for smooth cooperation between foreign counterparts could improve the system of the transfer of sentenced persons. Recourse to existing cooperation platform such as Eurojust and the European Judicial Network should be enhanced. Here also the role of the lawyer should be stressed. Moreover, the study shows that the place of the individual in transfer proceedings is not uniform and could be improved or could at least be more closely monitored by EC. Secondly, a lack of information exists concerning the detainees who are subjects to mutual recognition as such. The language barrier is obviously a problem that still occurs even if important improvements have recently been made. Measures that would develop EU mechanism in order to ensure good translation in transnational proceedings may also be welcome. It should also be stressed that if a good translation of the penal dossier is essential for the judicial authorities that have to take a decision to recognize and enforce a foreign request, it is also essential for the individual who is subject to the mutual recognition measure. Although the Directive 2013/48 does not formally apply to post-trial issues concerning the right to legal counsel, a recommendation addressed to the MS recalling the importance of legal assistance also at this stage of the proceedings might be advisable.

### 6.3. Solutions related to the implementation of the FD 829

A. To increase the awareness of the European Arrest Warrant and its potential among the judiciary.

B. Further clarity on the FD.

C. To provide more information concerning how other jurisdictions implement different supervisory measures. The variety of supervisory measures contributes to the lack of confidence that the monitoring will be effective, and absconding will be unlikely. In this context, some judges would rather apply financial surety or speed up the trial and impose a quick sentence.

D. To take measures to facilitate the implementation of this procedure not only in easy cases but also in more complex cases that require long investigative activities.

E. To make available information on how each jurisdiction constructs and implements the supervision measures: Platforms like the European Judicial Network website should make this information accessible and must regularly be updated.

F. To increase research on the implementation of the ESO and to spread the results of this research to practitioners, in order to boost their confidence in cross-border co-operation.

G. To improve the knowledge of the defence lawyers to request ESOs and to convince judges that with regard to proportionality it is indispensable to apply this measure in suitable cases.

## 7. Recommendations

### 7.1. At European level

1. To develop information campaigns about the FDs.
2. To develop training packages –practical- about the FDs
3. To develop networks and forum for discussions.
4. To improve information and follow-up of the implementation thoroughly. relevant tools and regularly updated.
5. Statistics, reliable and comparable between MS.

### 7.2. At national level

6. General recommendations: National coordination between competent authorities involved in the implementation of FD and pay particular attention to the relationship with other mutual recognition instruments (e.g. EAW, transfer of custodial sentence).
7. Practical recommendations:
  - a. Development of expertise and guidance for practitioners
  - b. National trainings in the execution and supervision of probation measures and alternative sanctions.
  - c. Bilateral contacts and preliminary consultation
  - d. Collection of data at EU level

### 7.3. At academic level

1. To define clearly the concept of Social rehabilitation goal established by the FD 2008/947: competent authorities of the issuing State are invited to take into account elements such as the person's attachment to the executing State and whether he/she considers it to be the place of his/her family, linguistic, cultural, social or economic and other links. In addition, MS can take international standards into account such as the United Nations Standard Minimum Rules for the Treatment of Prisoners ([http://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E\\_ebook.pdf](http://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf)). These standards established by Rule 59 or 4.2 could improve the position of the individual and in particular his/her chance of social rehabilitation.
2. The sentencing and implementation of probation measures under the Probation Framework Decision shall aim at the social rehabilitation and social inclusion of offenders. Authorities and practitioners should be guided by the council of Europe's (2010) 1 Probation Rules.
3. The implementation of probation measures shall be in full accordance with European human rights standards.
4. An issuing state cannot order an executing state to implement a probation measure in a particular way. It should not refuse to transfer an offender to an

- executing state because it believes that the implementation is not sufficiently punitive.
5. There is a duty on the issuing state to ensure that Art. 3 ECHR rights will not be breached by the executing state: the issuing state should decline to transfer an offender if it has information that the implementation by the executing state may breach the human rights of the offender concerned.
  6. The implementation of the probation measure by the executing state shall not increase the burdens or restrictions of rights imposed by the judicial decision in the issuing state.
  7. The determination of how such particularities might be regarded in different states and under European law will be the subject of ongoing dialogue and exchange between MS.
  8. The diversity of approaches to supporting sentencing decision-making used by different probation agencies should not hamper the transfer of decisions between MS. Where the law or practice of an executing state requires additional information, probation agencies in that state should gather it.
  9. Requirement of consent to specific probation measures should not hamper transfer between MS.
  10. Consent is not justification for practices which are considered as inhuman or degrading treatment.
  11. The mere fact of an offender travelling to another state cannot be regarded as “informed consent” in itself.
  12. Age ranges to which particular CSM apply: for juveniles such transfers shall be based on the best interests of the juvenile offender.
  13. Mentally ill offenders: possible financial implications for the offender of transfer of treatment conditions should be made available to any offenders.
  14. Electronic monitoring: pay attention in FD 2008/209/JHA on custodial sentences and FD 2009/829/JHA on supervision measures.
  15. Information on range of CSM, and patterns of enforcement should be available to all MS.
  16. Likely partner MS: MS should regularly gather data on the nationalities of those subject to pre-trial or pre-sentence inquire and to CSM, in order to be better placed to assess the likely level of demand for transfers.
  17. Anticipated issues in relation to inward and outward transfers.
  18. The need for evaluation and research.
  19. Administrative arrangements: each MS should create a national office or point of contact so as to efficiently and effectively manage initial discussions about potential transfers and to coordinate the information collection and monitoring required.

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## 9. Annex

### Annex 1 Form for the literature review

Author, year, country	
Research or Program / Project design (research question, sampling, instruments, target group etc.)	
Abstract	
Conclusion(s) of the paper/program /projects	
Learning points that we can use when designing the e-manual and the training materials. Concretely: obstacles, difficulties and good practices, some relevant data to identify the training needs.	

### Annex II Form / Table with previous projects dealing with FD 947 / 829

Nº	Title of the project	Coordinator	Summary	Website	Short presentation of the training materials	Comments on how can be used in PONT