E-manual for implementing

FD 947/2008 & FD 829/2009

PONT PROBATION OBSERVATORY

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Partners

University of Bucharest, Romania (Coordinator)
Universidad Loyola Andalucía, Spain
Bremen Ministry of Justice and Constitution, Germany
University of Latvia, Latvia
Confederation of European Probation (CEP)

Authors

Ioan Durnescu

Esther Montero Perez de Tudela

Gabriel Oancea

Rhianon Williams

Carmen Garcia

Simone Mattfeldt

Helmut Schwiers

Liga Rasnaca

Anvars Zavackis

Content

Executive summary

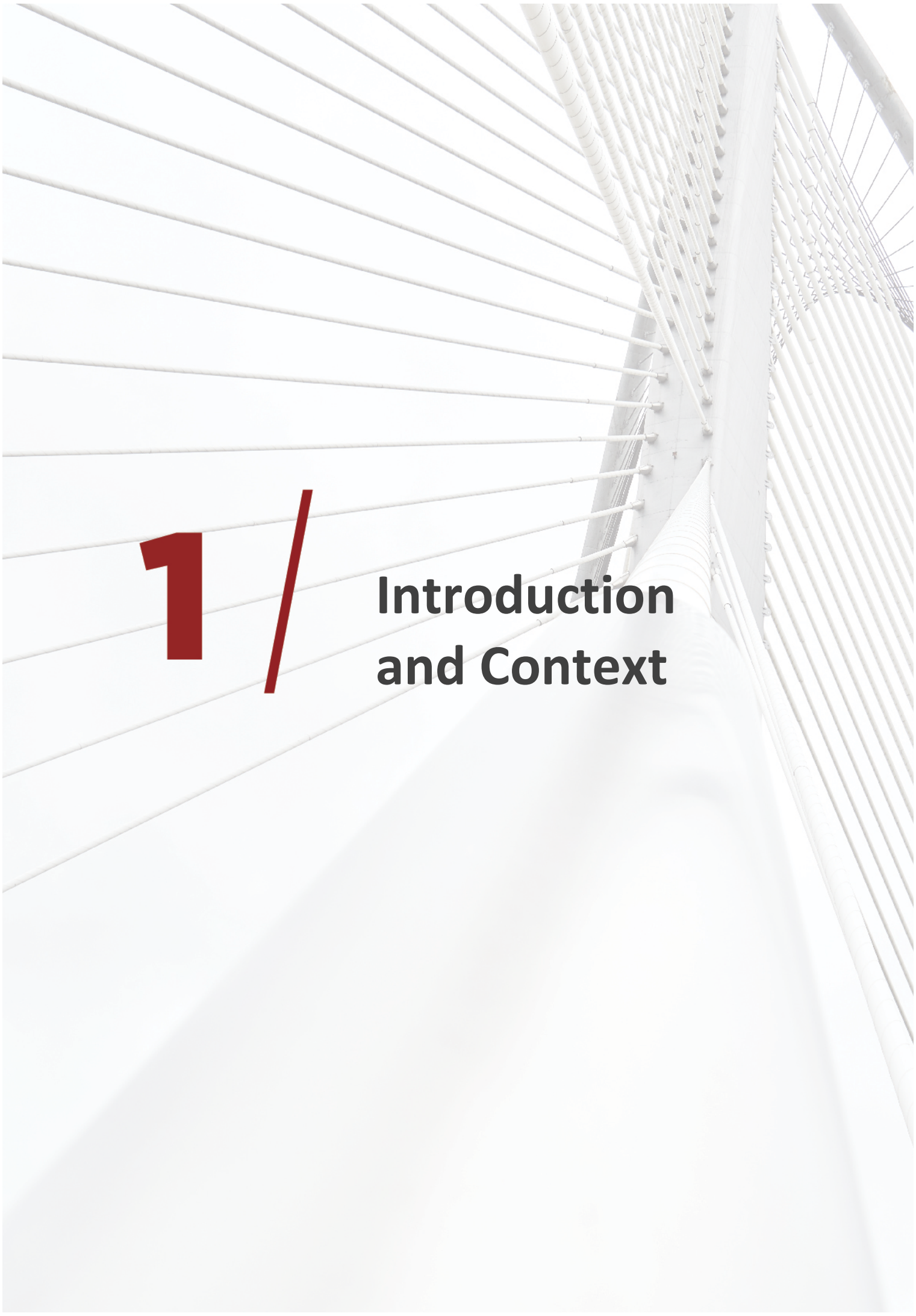
For many years the proportion of foreign prisoners in the EU prisons have been significantly high. Countries like Austria or Luxembourg registered high percentages of foreign prisoners of up to 70%. Some of these foreign prisoners were EU nationals, mostly from the new democracies.
In many cases, the foreigner's over-representation in the European prison systems was attributed to the lack of alternatives to pre-trial detention or alternatives to detention for this group. In spite the former Council of Europe initiatives, the judiciary still has not experienced much cooperation among each other in European Union in the field of criminal justice.
Against this backdrop, the European Council has adopted several framework decisions aiming at improving the mutual trust and cooperation among the EU Member States in the field of justice and home affairs. Two of these framework decisions were Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition of probation decisions and alternative sanctions (Probation and Alternative Sanctions) and Council Framework Decision 2009/829/JHA on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (European Supervision Order).

In order to support an effective use of these two framework decisions, the European Commission has decided to co-finance the project **Probation Observatory. Training and Network** (PONT) – Grant no. 807026 – coordinated by the University of Bucharest in partnership with University Loyola Andalucía, Ministry of Justice Bremen/Germany, University of Latvia and the Confederation of European Probation (CEP).
The main activities of this project are: to conduct a thorough literature review, to run a training gap analysis, to elaborate an e-manual and deliver training to competent authorities from 10 European jurisdictions. Beyond these practical objectives, the project aims at creating a sustainable network of competent authorities in European Union able and willing to support each other.

This e-manual is, therefore, a part of the PONT project and aims at facilitating the cooperation and mutual trust between the competent authorities in the EU Member States. Therefore, the main beneficiaries of this manual are the competent authorities for the two framework decisions: FD 2008/947 and FD 2009/829. As probation counsellors are contributing in the judicial procedures and in the implementation of the measures provided by these two FDs, probation staff is also part of the beneficiary's group. Lawyers and offenders themselves may be interested in this manual as it provides concrete and practical guidelines of the procedure and possibilities.

This e-manual comprises three main parts: a theoretical one – where the Framework Decisions 829/2009 and 947/2008 are described in detail; a normative one – where the sanctioning systems and other measures are described in the four jurisdictions involved directly in the project (Germany, Latvia, Romania and Spain) and the final part – where the main difficulties identified are explored and clarified (e.g. how to fill out the certificate, how to identify the competent authority in the executing State, how to deal with mental health obligations etc.).
The e-manual has also four useful annexes that can support an effective practice – a decision-making flowchart, a certificate checklist, a list with the relevant case law to date and some vignettes that can be used during the training.

The project team is fully committed to the believe that cooperation between Member States will improve once the judiciary will know each other better, will understand each other's systems and exchange best practices. As the Spanish poet Antonio Machado conjured: 'Traveller, there is no road: the road is made as you go'.



1/ Introduction and Context

1. Introduction and Context

For many years the proportion of foreign prisoners in EU prisons has been significant. Countries like Austria or Luxembourg registered record percentages of foreign prisoners of up to 70% in 2008 (see SPACE I, Council of Europe). Some of these foreign prisoners were EU nationals, mostly from the new democracies.

Various studies and evaluations[1] have reported the lack of alternatives to pre-trial and prison sanctions as one of the main causes of this over-representation of foreign prisoners in EU prisons. The fear of not turning up for trial has also been identified as another cause of the overuse of custodial sanctions and measures. Indeed, not having a fixed address and solid links with the country of sentencing has made the courts reluctant to use community sanctions and measures at all.

Against this backdrop, the EU has acted to ensure that non-residents are not treated differently from the residents, by adopting three complementary Framework Decisions:

- Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty (Transfer of Prisoners)
- Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition of probation decisions and alternative sanctions (Probation and Alternative Sanctions)
- Council Framework Decision 2009/829/JHA on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (European Supervision Order).

The deadline for their implementation was set in December 2011 and December 2012. To support this process, the European Commission funded several projects that identified the obstacles and difficulties in the transposition and the use of these

[1] See for instance 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. **Available at: https://publications.europa.eu/en/publication-detail/-/publication/712944e1-8f12-11e3-b19c-01aa75ed71a1 ;** or the Panel discussions of the 51st Plenary Meeting of the European Judicial Network, Vienna, 22-23 November 2018.

Framework Decisions (FDs)[2] or started to develop training programs for the competent authorities[3]. However, to the date there is no training manual that covers in a comprehensive manner the training needs of the competent authorities and probation staff while implementing the FDs.

To close this gap, the European Commission has funded a new project – **Probation Observatory: Network and Training** (PONT) – aimed at enhancing mutual trust and the use of the FDs 947/2008 and 829/2009 by conducting a thorough literature review, running a training needs analysis, developing an e-manual for training and delivering training to at least 60 participants from 12 different jurisdictions[4].
This e-manual is therefore based on the completed literature review and training needs analysis, which can be found on the PONT project website.

The manual is structured in three main parts: a theoretical one – where the Framework Decisions 829/2009 and 947/2008 are described in detail; a normative one – where the sanctioning systems and other measures are described in the four jurisdictions involved directly in the project (Germany, Latvia, Romania and Spain) and the final part – where the main difficulties identified are explored and clarified (e.g. how to fill out the certificate, how to identify the competent authority in the executing State, how to deal with mental health obligations etc.).
The e-manual has also four useful annexes that can support an effective practice – a decision-making flowchart, a certificate checklist, a list with the relevant case law to date and some vignettes that can be used during the training.

The e-manual is designed to serve the training needs of competent authorities and probation staff but it can be also useful for lawyers and offenders themselves. Therefore, it is a tool to enhance practice rather than advance knowledge or research.

[2] Projects such as: 'THE FUTURE OF MUTUAL TRUST AND DE PREVENTION OF ILL TREATEMENT. JUDICIAL COOPERATION AND THE ENGAGEMENT OF NATIONAL PREVENTIVE MECHANISMS', 2015-2017, coordinated by the Academy of European Law (ERA); 'ISTEP project – IMPLEMENTATION SUPPORT FOR THE TRANSFER OF EUROPEAN PROBATION SENTENCES', 2011-13, coordinated by National Offender Management Office (NOMS); 'PROBATION MEASURES AND ALTERNATIVE SANCTIONS IN THE EU',2009, coordinated by the Belgium Ministry of Justice; '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.

[3] Projects such as: 'DERAD', coordinated by the Italian Ministry of Justice, 2017-18; 'SOCIAL REINTEGRATION OF SENTENCED PERSONS: A COMPREHENSIVE EUROPEAN APPROACH', 2013, coordinated by the Institute of Magistracy, Romania; 'DUAL TRAINING PROGRAMME FOR JUDGES ON CRIMINAL MATTERS AND LEGAL LANGUAGE' (2012), coordinated by the Court of Appeal of Mons (Belgium) or 'EUROPEAN JUDICIAL TRAINING: LOT 1 – STUDY ON BEST PRACTICES IN TRAINING JUDGES AND PROSECUTORS', coordinated by the European Judicial Training Network (EJTN).

[4] For more information about the PONT project, please visit: www.probation.observatory.eu

2 / Framework decisions and mutual recognition

2. Framework decisions and mutual recognition

Although it appears new, the principle of mutual recognition has a long history in Europe. Mutual recognition was first developed by the Court of Justice of the European Union in the case of Cassis de Dijon (1979-case 120/78) which stated that a product lawfully produced and marketed in one Member State must be accepted in the other (Klimek, 2017). As it can be noted, the first use of the mutual recognition principle took place to complete the single market and facilitate the free movement of goods and services.

In the criminal justice sphere, the principle of mutual recognition was introduced in the Amsterdam Treaty as a main tool for 'police and judicial cooperation in the criminal matters'. Later on, it was further developed in the Lisbon Treaty and it is nowadays recognized as one of the main elements of judicial cooperation:
'judicial co-operation in criminal matters in the Union shall be based on the principle of mutual recognition of judgements and judicial decisions and shall include approximation of the laws and regulations of the Member States ...'[5].

In brief, mutual recognition is understood as the free circulation of judicial decisions across the entire EU, by giving judicial decisions effect outside the State in which they were adopted. In practice, a national authority can, under certain conditions, recognize a judicial decision from another Member State without cumbersome formalities giving it the status of a domestic decision (Klimek, 2017; Montero Pérez de Tudela, 2020).
It is usually accepted that 'mutual' means 'between the Member States of EU' and 'recognition' is understood as accepting a foreign decision from another Member State as a national one (Klimek, 2017: 6).

The Amsterdam Treaty (1997) and, later on, the Treaty of Nice (2006) created a legal order binding upon the Member States based on the framework decisions[6]. This legal instrument - created especially for criminal law - was always adopted by unanimity by the Member States. The framework decisions are mandatory for the

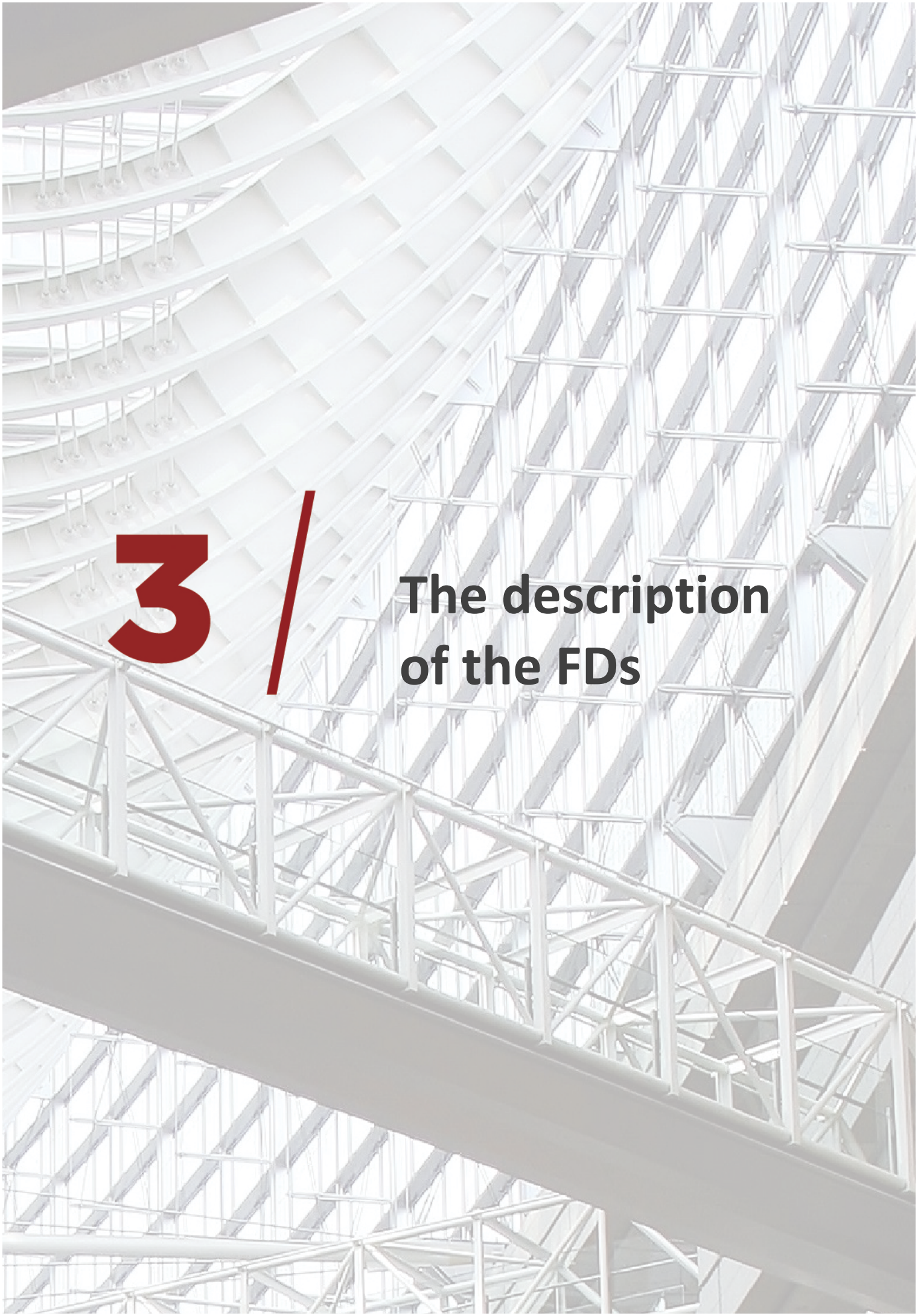
[5] Art. 82(1) of the Treaty on the functioning of the European Union as amended by the Treaty of Lisbon.
[6] Based on the art. 31 and 34(2)(b) of the Amsterdam Treaty.

Member States in terms of results to be achieved but leave the national authorities the choice of form and method. Therefore, in order for a framework decision to be implemented it needs to be transposed into national legislation. In conclusion, only Member States which transposed the framework decision will be able to recognize and enforce judicial decisions emanating from other Member States. This rule should be read with some degree of caution since in the *Pupino* case the Court of Justice of EU ruled that the Member States have to interpret national legislation in conformity to the framework decision[7].

The framework decisions were legal instruments adopted under the Amsterdam Treaty (2002-2009). Under the Lisbon Treaty they have been replaced by directives since 2010. As a development from the pre-Lisbon era, since December 2014, there has been an enforcement mechanism in place, whereby the European Commission and the Member States are entitled to launch infringement proceedings before the Court of Justice of the European Union against those Member States which have not implemented, or not correctly implemented, the European Union law.

Klimek, L. (2017). *Mutual Recognition of Judicial Decisions in European Criminal Law*. Cham, DEU: Springer.
Montero Perez de Tudela, E. (2020). Transferring Alternatives to Pre-trial Detention in the European Union context. Can European Agreements Be Trusted? *Victims and Offenders.* 15(6): 705-719

[7] Judgment of the Court of Justice of the European Communities of 16th June 2005-case C-105/03-Criminal proceedings against Maria Pupino.



3 The description of the FDs

3. The description of the FDs

3.1. *Council Framework Decision 2008/947/JHA*

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

In order to facilitate the reading, we will present each FD as questions and answers (Q&A). Most of these questions were selected based on the training needs expressed by the competent authorities involved in out survey.

Is it possible to implement the principle of mutual recognition in the context of probation measures?

It is. There are several types of probation measures and alternative sanctions which are common among the Member States and which all Member States are in principle willing to supervise: suspended sentences, conditional sentences, alternative sanctions and decisions on conditional release.

Which are the probation measures and alternative sanctions that are, in principle, obligatory to supervise?

They include, *inter alia*, orders relating to treatment (such as an obligation to stop the consumption of alcohol), residence (such as an obligation to change residence for reasons of domestic violence), education and training (such as an obligation to follow a 'safe-driving course'), leisure activities (such as an obligation to cease playing or attending a certain sport) and limitations on or modalities of carrying out a professional activity (such as an obligation to seek a professional activity in a different working environment; this obligation does not include the supervision of compliance

with any professional disqualifications imposed on the person as part of the sanction).

Where appropriate, electronic monitoring could be used with a view to supervising probation measures or alternative sanctions, in accordance with national law and procedures. If the Member State is willing to supervise other probation decisions and alternative sanctions than the ones explicitly mentioned in art. 4, it had to notify the General Secretariat of the Council.

What´s the purpose of the FD?

There are several objectives (article 1)

- Rehabilitation, to enhance the prospects of the sentenced person's being reintegrated into society, by enabling that person to preserve family, linguistic, cultural and other ties, but also to improve monitoring of compliance with probation measures and alternative sanctions, with a view to preventing recidivism, thus paying due regard to the protection of victims and the general public.
- To improve the protection of victims and of the general public.
- To facilitate the application of suitable probation measures and alternative sanctions in case of offenders who do not live in the State of conviction.

Where to be forwarded? (article 5)

To the Member State where the person is lawfully and ordinarily residing, if they return or want to return.

To other Member State upon request or consent of the Member State.

According to this FD, a Member State, other than the Member State in which the person concerned has been sentenced, recognizes judgments and, where applicable, 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, unless otherwise provided for in this Framework Decision.

Which are the areas of application of this FD? (article 4)

This Framework Decision shall apply only to: (a) the recognition of judgments and, where applicable, probation decisions; (b) the transfer of

responsibility for the supervision of probation measures and alternative sanctions; (c) all other decisions related to those under (a) and (b).

This means that this Framework Decision shall apply to the following probation measures or alternative sanctions:

a) an obligation for the sentenced person to inform a specific authority of any change of residence or working place;
b) an obligation not to enter certain localities, places or defined areas in the issuing or executing State;
c) an obligation containing limitations on leaving the territory of the executing State;
d) instructions relating to behaviour, residence, education and training, leisure activities, or containing limitations on or modalities of carrying out a professional activity;
e) an obligation to report at specified times to a specific authority;
f) an obligation to avoid contact with specific persons;
g) an obligation to avoid contact with specific objects, which have been used or are likely to be used by the sentenced person with a view to committing a criminal offence;
h) an obligation to compensate financially for the prejudice caused by the offence and/or an obligation to provide proof of compliance with such an obligation;
i) an obligation to carry out community service;
j) an obligation to cooperate with a probation officer or with a representative of a social service having responsibilities in respect of sentenced persons;
k) an obligation to undergo therapeutic treatment or treatment for addiction.

Each Member State shall notify the General Secretariat of the Council, when implementing this Framework Decision, stating which probation measures and alternative sanctions, apart from those referred to in paragraph 1, it is prepared to supervise. The General Secretariat of the Council shall make the information received available to all Member States and to the Commission[8].

[8] This information is available here: https://www.ejn-crimjust.europa.eu/ejnupload/Practical_info/Probation/ImplemantionProbationNov16.PDF

Which are the competent authorities in this procedure? (article 3)

It depends on each Member State, under its national law, and shall inform the General Secretariat of the Council in the situation where that Member State is the issuing State or the executing State.

It is also possible for states to designate non-judicial authorities, provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures.

What is the time limit established? (article 14)

The competent authority of the executing State shall decide as soon as possible, and within 60 days of receipt of the judgment. When in exceptional circumstances it is not possible for the competent authority of the executing State to comply with this 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.

Reflection point

In practice, the communication process described above does not work as smoothly as it could. It may be helpful for the competent authorities to show a more open attitude towards communicating with each other.

What is the governing law? (article 13)

The supervision of probation measures and alternative sanctions shall be governed by the law of the executing State.

What was the deadline for implementation?

6th December 2011.

Which countries have implemented this Framework Decision?

All EU member states except Ireland which is in the process of transposition.

3.2. Council Framework Decision 2009/829/JHA

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.

This Framework Decision should make it possible that supervision measures imposed in one Member State (issuing State) on the person concerned is monitored in another member State (the executing State), while ensuring the due course of justice and, in particular, that the person concerned will be available to stand trial.

Which are the objectives of this FD? (article 2)

(a) to ensure the due course of justice and, in particular, that the person concerned will be available to stand trial;
(b) to promote, where appropriate, the use, in the course of criminal proceedings, of non-custodial measures for persons who are not resident in the Member State where the proceedings are taking place;
(c) to improve the protection of victims and of the general public.
(d) equal treatment to non residents

Where should it be forwarded to? (article 9)

To the Member State where the person is lawfully and ordinarily residing, after being informed and giving her/his consent.
To other Member State but only with the consent of it.

What type of supervision measures may be transferred? (article 8)

This Framework Decision shall apply to the following supervision measures: ***(obligatory)***

a) an obligation for the person to inform the competent authority in the executing State of any change of residence, in particular for the

purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings;
b) an obligation not to enter certain localities, places or defined areas in the issuing or executing State;
c) an obligation to remain at a specified place, where applicable during specified times;
d) an obligation containing limitations on leaving the territory of the executing State;
e) an obligation to report at specified times to a specific authority;
f) an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed.

Apart from that, each Member State shall notify the General Secretariat of the Council, when transposing this Framework Decision or at a later stage, which supervision measures, it is prepared to monitor, such as: *(not obligatory)*

a) an obligation not to engage in specified activities in relation with the offence(s) allegedly committed, which may include involvement in a specified profession or field of employment;
b) an obligation not to drive a vehicle;
c) an obligation to deposit a certain sum of money or to give another type of guarantee, which may either be provided through a specified number of instalments or entirely at once;
d) an obligation to undergo therapeutic treatment or treatment for addiction;
e) an obligation to avoid contact with specific objects in relation with the offence(s) allegedly committed.

Which are the competent authorities in this procedure? (article 6)

It depends on each Member State, under its national law, and shall inform the General Secretariat of the Council in the situation where that Member State is the issuing State or the executing State. It is also possible for states to designate non-judicial authorities, provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures.

Which are the criteria relating to the Member State to which the decision on supervision measures may be forwarded? (article 9)

a) A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is

lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State.

b) The competent authority in the issuing State may, upon request of the person, forward the decision on supervision measures to the competent authority of a Member State other than the Member State in which the person is lawfully and ordinarily residing, on condition that the latter authority has consented to such forwarding.

Which State is competent over the monitoring of the supervision measures? (article 11)

As long as the competent authority of the executing State has not recognised the decision on supervision measures forwarded to it and has not informed the competent authority of the issuing State of such recognition, the competent authority of the issuing State shall remain competent in relation to the monitoring of the supervision measures imposed.

What is the time limit established? (article 12)

The competent authority in the executing State shall, as soon as possible, but within 20 working days of the receipt of the decision, has to decide whether to recognize and monitor or to refuse recognition.

What is the governing law? (article 16)

The monitoring of supervision measures shall be governed by the law of the executing State.

What was the deadline for implementation?

1st December 2012.

Which countries have implemented this Framework Decision?

All EU Member States, except Ireland and Greece.

4 The procedure in practice

4. The procedure in practice

4.1. Probation and alternative sanctions - FD 2008/947

Initiation of the procedure: "sine qua non" conditions

As seen, the FD 2008/947 is applicable to the recognition of judgments and probation decisions, and also to the transfer of responsibility for the supervision of probation measures and alternative sanctions. In order to start the procedure of transfer according to the FD 2008/947, a final decision or order of a court of the issuing State is necessary, establishing that a natural person has committed a criminal offence and imposing one of the above-mentioned measures or sanctions.

On the other hand, the consent of the sentenced person is implicitly required. The competent authority of the issuing State may forward a judgment and/or probation decision to the competent authority of the Member State in which the sentenced person is lawfully and ordinarily residing (or, upon request of the sentenced person, to a competent authority of a Member State other than the 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.

Practical tip

Therefore, the sentenced person must agree with the transfers of the measure. Actually, in most of the cases, it will be the sentenced person who will initiate the procedure. As the consent procedure is not very clear, it could be useful for the competent authorities to develop a form where the sentenced person should express his/her consent for the transfer. The existence of such a document would reduce delays significantly.

The procedure for forwarding a judgment and/or a probation decision

When the competent authority of the issuing State forwards a judgment or a probation decision to another Member State, it shall ensure that it is accompanied by a certificate (set out in Annex I of the FD 947 and explained in one of the next sections). The certificate shall be translated into the official language or one of the official languages of the executing State[9].

Practical tip

Based on the past practice, it seems that sometimes the poor quality of the certificate or the lack of details cause important delays. Therefore, more attention should be awarded to the quality of the Certificate (see also the section dedicated to the certificate and also the Checklist at the end of this manual).

The judgment and/or the probation decision, together with the certificate, shall be forwarded by the competent authority of the issuing State directly to the competent authority of the executing State by any means which leaves a written record allowing the executing State to establish their authenticity.
The original of the judgment and/or the probation decision, or certified copies thereof, as well as the original of the certificate, shall be sent to the competent authority of the executing State if it so requires. All official communications shall also be made directly between the competent authorities.

The certificate shall be signed and its content certified as accurate by the competent authority of the issuing State.

Apart from the measures and sanctions referred to in Article 4 (above mentioned), the certificate can include other probation measures and alternative sanctions that the executing State notified the General Secretariat of the Council of which the Member State is prepared to supervise.

[9] Any Member State may, on adoption of this Framework Decision or later, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the institutions of the European Union (https://www.consilium.europa.eu/en/general-secretariat/).

Practical tip

As a good practice, probation services from the issuing State could forward to the probation services of the executing State additional documents that would facilitate social reintegration (e.g. pre-sentence report, risk assessment, psychiatric report etc.). The same practice can be used for competent authorities in countries where probation services are not involved in the implementation of this procedure. For more on this subject, please see the section dedicated to the certificate.

Competent authorities of the executing State

The competent authority of the issuing State shall forward the judgment or probation decision, together with the certificate, only to one executing State at any one time.

If the competent authority of the executing State is not known to the competent authority of the issuing State, the latter shall make all necessary inquiries, including via European Judicial Network (EJN) created by Council Joint Action 98/428/JHA, in order to obtain the information from the executing State[10].

When an authority of the executing State which receives a judgment and/or probation decision, together with the certificate, has no competence to recognise it and take the necessary measures for the supervision of the probation measure or alternative sanction, it shall, ex officio, forward it to the competent authority and shall without delay inform the competent authority of the issuing State accordingly by any means which leaves a written record.

Consultations between competent authorities

Where and whenever it is felt appropriate, competent authorities of the issuing and executing State **may consult each other with a view to facilitating the smooth and efficient application** of this Framework Decision.

[10] Official Website of the EJN: https://www.ejn-crimjust.europa.eu/ejn/Ejn_Home/EN

Practical tip

Therefore, when appropriate, consultations are strongly recommended in order to assess the real reintegration options of the sentenced person, especially when the probation decisions or alternative sanctions imposed imply the need of permanent address, submission to compulsory treatment etc.

Time limit

The competent authority of the executing State shall decide as soon as possible, but no later than 60 days of receipt of the judgment and / or the probation decision, together with the certificate, whether or not to recognise it and assume responsibility for supervising the probation measures or alternative sanctions. It shall immediately inform the competent authority of the issuing State of its decision, by any means which leaves a written record.

Consequences for the issuing State

Once the competent authority of the executing State has recognised the judgment and/or probation decision forwarded to it and has informed the competent authority of the issuing State of such recognition, this last shall no longer have competence in relation to the supervision of the probation measures or alternative sanctions imposed.

Only in some cases referred into the art. 7.2 the competence shall revert to the issuing State. Thus, the competence shall revert to the issuing State as soon as the competent authority of the issuing State notifies withdrawal of the certificate to the competent authority of the executing State; when a Member State has declared that as an executing State it will refuse to assume the responsibility of the supervision of a judgement and/or probation measure: (a) in cases relating to an alternative sanction, where the judgment does not contain a custodial sentence or measure involving deprivation of liberty to be enforced in case of non-compliance with the obligations or instructions concerned; (b) in cases relating to a conditional sentence; (c) in cases where the judgment relates to acts which do not constitute an offence under the law of the executing State, whatever its constituent elements or however it is described. Finally, when the jurisdiction of the executing State ends due to absconding, ending of the lawful and ordinary residence in the executing State or new criminal proceedings against the person concerned taking place in the issuing State. Consequently, the supervision and application of probation measures and alternative sanctions shall be governed by the law of the executing State. In general, the competent

authority of the executing State shall have jurisdiction to take all subsequent decisions relating to a suspended sentence, conditional release, conditional sentence and alternative sanction, in particular in case of non-compliance with a probation measure or alternative sanction or if the sentenced person commits a new criminal offence.

Only if the competent authority of the issuing State has jurisdiction for the subsequent decisions (once transferred the judgement or the probation decision), shall the competent authority of the executing State immediately notify the issuing State the eventual revocation, conversion in custodial sentence or other essential circumstance related to the probation measure or alternative sanction.

Decisions of the executing State. Recognition, adaptation and double criminality

The competent authority of the executing State shall recognise the judgment and / or the probation decision and shall without delay take all necessary measures for the supervision of the probation measures or alternative sanctions, unless it decides to invoke one of the grounds for refusing recognition. Certainly, art. 11 of the FD 947 regulates 11 grounds for refusal, any of them mandatory, but discretionary: the competent authority of the executing State may refuse to recognise the judgment or / the probation decision and to assume responsibility for supervising probation measures or alternative sanctions if:

- in a case when the judgment relates to acts which would not constitute an offence under the law of the executing State and the principle exempting the need of verification of the double criminality of the act does not function[11].
- the enforcement of the sentence is statute-barred according to the law of the executing State and relates to an act which falls within its competence according to that law.
- there is immunity under the law of the executing State, which makes it impossible to supervise probation measures or alternative sanctions,
- under the law of the executing State, the sentenced person cannot, owing to his or her age, be held criminally liable for the acts in respect of which the judgment was issued,

[11] However, in relation to taxes or duties, customs and exchange, execution of the judgment or the probation decision may not be refused on the grounds that the law of the executing State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes or duties, customs and exchange regulations as the law of the issuing State.

Practical tip

The age of criminal responsibility varies from state to state. When not sure, a consultation can be performed to the executing State before forwarding a judgment and / or a probation decision.

- the certificate is incomplete or manifestly does not correspond to the judgment or to the probation decision and has not been completed or corrected within a reasonable period set by the competent authority of the executing State,

- the criteria for forwarding a judgment and / or a probation decision (art. 5.1 and 5.2 FD 947) are not met or the measure / decision subject of transfer has not been notified by the executing State to the General Secretariat of the Council, as probation measures and alternative sanctions accepted to be supervised,

- recognition of the judgment and assumption of responsibility for supervising probation measures or alternative sanctions would be contrary to the principle of ne bis in idem,

- the judgment was rendered in absentia, unless the certificate states that the person was summoned personally or informed via a representative competent according to the national law of the issuing State of the time and place of the proceedings which resulted in the judgment being rendered in absentia, or that the person has indicated to a competent authority that he or she does not contest the case (see the sections dedicated to difficulties for a broader discussion on the subject),

- the judgment or, where applicable, the probation decision provides for medical/therapeutic treatment which, notwithstanding the eventual adaptation, the executing State is unable to supervise in view of its legal or health-care system,

- the probation measure or alternative sanction is of less than six months' duration,

- or the judgment relates to criminal offences which under the law of the executing State are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory[12].

Practical tip

In these cases, before deciding not to recognize the judgment or the probation decision, the competent authority of the executing State shall communicate, by appropriate means, with the competent authority of the issuing State and shall, as necessary, ask it to supply all additional information required without delay.

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 (see the section dedicated to sentence adaptation for more).

For the offences referred to into art. 20 of the FD 2008/947 a verification of the double criminality of the act would not be necessary. However, some States reserved the right to check for double criminality.

According to the art. 10 FD 2008/947, the following offences, 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, and as they are defined by the law of the issuing State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to recognition of the judgment and, where applicable, the probation decision and to supervision of probation measures and alternative sanctions: participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the

[12] Any decision in relation to offences committed partly within the territory of the executing State, or in a place equivalent to its territory, shall be taken by the competent authority of the executing State only in exceptional circumstances and on a case-by case basis, having regard to the specific circumstances of the case, and in particular to whether a major or essential part of the conduct in question has taken place in the issuing State.

meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests[13], laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships and sabotage.

Practical tip

In case of control of double criminality, it is important to take into account the ECJ preliminary ruling in the Grundza case (C-289/15) where the Court stated that: 'Whether the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority on the issuing State, would also, per se, be *subject to a criminal penalty in the executing State if they were present in that State.'*

Information

The competent authority of the executing State shall without delay inform the competent authority of the issuing State of all decisions on the modification or revocation of the probation measure or alternative sanction, enforcement of a custodial sentence or measure involving deprivation of liberty - because of non-compliance with a probation measure or alternative sanction - and the eventual lapsing of the probation measure or alternative sanction.

And, in all cases, the competent authority of the executing State shall inform the competent authority of the issuing State of the transmission of the judgment and / or probation decision to the competent authority responsible for its recognition, the fact that it is in practice impossible to supervise the

[13] Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33019

probation measures or alternative sanctions, the final decision to recognise the judgment and/or the probation decision, as well as any decision not to recognise the judgment or the probation decision, any decision to adapt the probation measures or alternative sanctions and any decision on amnesty or pardon which leads to not supervising the probation measures or alternative sanctions.

Annex 1 of this e-manual illustrates with some flow charts the process map of how Germany, Latvia, Romania and Spain deal with the transfer under FD 2008/947. These are only examples of how the decision-making takes place in some jurisdictions. It is possible that other jurisdictions apply different internal procedures.

Important: Note that amnesty or pardon may be granted by the issuing State and also by the executing State.

4.2. European Supervision Order (ESO) – FD 2009/829

Initiation of the procedure: "sine qua non" conditions

As seen, the FD 2009/829 lays down rules according to which one Member State recognizes a decision on supervision measures issued in another Member State as an alternative to provisional detention, monitors the supervision measures imposed on a natural person and surrenders the person concerned to the issuing State in case of breach of these measures. Therefore, a decision on supervision measures issued by a competent authority is required.

The consent of the sentenced person will be always required. A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State. Also, upon request of the sentenced person, the competent authority of the Issuing State may forward the decision on supervision measures to the competent authority of a Member State other than the Member State in which the person is lawfully and ordinarily residing, on condition that the latter authority has consented to such forwarding.

Practical tip

Therefore, the sentenced person must agree with the transfers of the measure. Actually, in most of the cases, it will be the sentenced person who will initiate the procedure. However, there should be a document that explicitly collects the consent of the person.

The procedure for forwarding a judgment and/or a probation decision

When the competent authority of the issuing State forwards a decision on supervision measures to another Member State, it shall ensure that it is accompanied by a certificate (set out in Annex I of the FD 829). The certificate shall be translated into the official language or one of the official languages of the executing State[14].

The decision on supervision measures or a certified copy of it, together with the certificate, shall be forwarded by the competent authority in the issuing State directly to the competent authority in the executing State by any means which leaves a written record under conditions allowing the executing State to establish their authenticity.

The original of the decision on supervision measures, or a certified copy of it, and the original of the certificate, shall be sent to the executing State if it so requires. All official communications shall also be made directly between the competent authorities.

The certificate shall be signed, and its content certified as accurate, by the competent authority in the issuing State, and it shall include one or some of the supervision measures referred to in Article 8 FD 2009/829.

The competent authority in the issuing State shall specify, where applicable, the length of time to which the decision on supervision measures applies and whether a renewal of this decision is possible; and, on an indicative basis, the provisional length of time for which the monitoring of the supervision measures is likely to be needed, taking into account all the circumstances of the case that are known when the decision on supervision measures is forwarded.

[14] Any Member State may state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the institutions of the European Union.

Competent authorities of the executing State

The competent authority of the issuing State shall forward the decision imposing a supervision measure together with the certificate, only to one executing State at any one time.

The FD 829 also calls for one central competent authority (no more than one) which should facilitate the transmission and reception of decisions on supervision measures, together with the certificates. As a consequence, all communications, consultations, exchanges of information, enquiries and notifications between competent authorities may be dealt with, where appropriate, with the assistance of the central authority(ies) of the Member State concerned.

If the competent authority of the executing State is not known to the competent authority of the issuing State, the latter shall make all necessary inquiries, including via the contact points of the EJN, in order to obtain the information from the executing State.

When an authority of the executing State which receives a decision on supervision measures together with a certificate has no competence to recognize that decision, this authority shall, ex officio, forward the decision together with the certificate to the competent authority.

Consultations between competent authorities

To the extent possible, the competent authorities of the issuing State and of the executing State shall consult each other: during the preparation, or, at least, before forwarding a decision on supervision measures together with the certificate; to facilitate the smooth and efficient monitoring of the supervision measures; where the person has committed a serious breach of the supervision measures imposed.

The competent authority in the issuing State shall take due account of any indications communicated by the competent authority of the executing State on the risk that the person concerned might pose to victims and to the general public.

Also, the competent authorities of the issuing and executing State shall exchange all useful information, including: information allowing verification of the identity and place of residence of the person concerned and relevant information extracted from criminal records in accordance with applicable legislative instruments.

Consultations are also contemplated in the case the competence for monitoring the supervision measures reverts back from the competent authority of the executing State to the issuing State, in order to avoid any discontinuance in the monitoring of the supervision measures.

Time limit

The competent authority in the executing State shall adopt a decision about the eventual recognition of the decision sent within 20 working days of receipt of the decision on supervision measures and certificate, and, without delay, take all necessary measures for monitoring the supervision measures, unless it decides to invoke one of the grounds for non-recognition referred to in Article 15.

If a legal remedy has been introduced against the decision receipted, the time limit for recognition of the decision on supervision measures shall be extended by another 20 working days.

In case of exceptional circumstances preventing the competent authority of the executing State complying with the time limits, it shall immediately inform the competent authority of the issuing State in order to explain the reasons for the delay and to indicate how long it expects to take to issue a final decision.

If the certificate is incomplete or obviously does not correspond to the decision on supervision measures, the competent authority may postpone the decision on recognition until such reasonable time limit set for the certificate to be completed or corrected.

Consequences and obligations for the issuing State

As long as the competent authority of the executing State has not recognized the decision on supervision measures forwarded to it and has not informed the competent authority of the issuing State of such recognition, the competent authority of the issuing State shall remain competent in relation to the monitoring of the supervision measures imposed. Once recognition has taken place, the supervision of the measures forwarded shall be governed by the law of the executing State.

Even once the decision on supervision measures has been recognised by the competent authority of the executing State, when the time period of supervision expired, and if 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. The competent authority in the issuing State shall indicate the period of time for which such an extension is likely to be needed.

The competent authority of the issuing State shall have jurisdiction to take all subsequent decisions relating to a decision on supervision measures. Such subsequent decisions include notably: renewal, review and withdrawal of the decision on supervision measures; modification of the supervision measures; issuing an arrest warrant or any other enforceable judicial decision having the same effect. In these cases, the law applicable will be that of the issuing State. These subsequent decisions will be recognized - where required by its national law - for the competent authority of the executing State (without leading to a new examination of the grounds of non-recognition).

If competence for monitoring the supervision measures has been transferred to the competent authority of the executing State, such competence shall revert back to the competent authority of the issuing State: where the person concerned has established his/her lawful and ordinary residence in a State other than the executing State; as soon as the competent authority in the issuing State has notified withdrawal of the certificate to the competent authority of the executing State; where the competent authority in the issuing State has modified the supervision measures and the competent authority in the executing State has refused to monitor the modified super vision measures; when the period of time of supervision has elapsed; where the competent authority in the executing State has decided to stop monitoring the supervision measures and has informed the competent authority in the issuing State thereof (in application of Article 23).

Before the expiry of the period of the supervision of the measure, the competent authority in the issuing State shall specify, ex officio or at the request of the competent authority in the executing State, for which additional period, if any, it expects that the monitoring of the measures is still needed.

The competent authority in the issuing State shall immediately inform the competent authority in the executing State of any decision modifying the decision on supervision measures (renewal, review and withdrawal etc.) and of the fact that a legal remedy has been introduced against a decision on supervision measures.

Decisions and obligations of the executing State. Recognition, adaptation and double criminality

The competent authority of the executing State shall recognise the decision on supervision measures forwarded by the competent authority of the

issuing State, unless it decides to invoke one of the grounds for non-recognition referred to in Article 15 (all of them discretionary, the executing State may recognise the supervision measure even if one or more conditions for non-recognition are met). Only if the nature of the supervision measures is incompatible with the law of the executing State, the competent authority in that Member State may adapt them in line with the types of supervision measures which apply, under the law of the executing State, to equivalent offences.

The adapted supervision measure shall correspond as far as possible to that imposed in the issuing State. The adapted supervision measure shall not be more severe than the supervision measure which was originally imposed.

For the offences referred to into art. 14 of the FD 2009/829 verification of the double criminality of the act would not be necessary. This article reproduces the above mentioned art. 10 of the FD 2008/947, covering the same offenses exempted of verification of double criminality (*see above*).

Information

The authority in the executing State which has received a decision on supervision measures, which it has no competence to recognise, together with a certificate, shall inform the competent authority in the issuing State to which authority it has forwarded this decision, together with the certificate.

The competent authority in the executing State shall, without delay, inform the competent authority in the issuing State by any means which leaves a written record of any change of residence of the person concerned, of the maximum length of time during which the supervision measures can be monitored in the executing State or of the fact that it is in practice impossible to monitor the supervision measures - if the person cannot be found in the territory of the executing State - of the fact that a legal remedy has been introduced against a decision to recognise a decision on supervision measures, of the final decision to recognise the decision on supervision measures and take all necessary measures for the monitoring of the supervision measures, of any decision to adapt the supervision measures and of any decision not to recognise the decision on supervision measures in accordance with the above mentioned Art. 15 FD 2009/829.

The competent authority in the executing State shall immediately notify the competent authority in the issuing State of any breach of a supervision measure, and any other relevant finding, using the standard form set out in Annex II of the FD 2009/829.

Other decisions and obligations

In exercising the authority to take all subsequent decisions relating to a decision on supervision measures, the competent authority of the issuing State modifies the supervision measures, the competent authority in the executing State may either:

- adapt these modified measures in application of Article 13, in case the nature of the modified supervision measures is incompatible with the law of the executing State; or
- refuse to monitor the modified supervision measures if these measures do not fall within the types of supervision measures referred to in Article 8.

When the time period of supervision has expired, and the competent authority of the issuing State requests the extension of the monitoring of the supervision measures, the competent authority in the executing State shall decide on this request in accordance with its national law, indicating, where appropriate, the maximum duration of the extension.

If the competent authority of the issuing State has issued an arrest warrant or any other enforceable judicial decision having the same effect, the person shall be surrendered in accordance with the Framework Decision on the European Arrest Warrant (FD 2002/584/JHA)[15].

Finally, if the certificate relating to the decision on supervision measures has been withdrawn, the competent authority of the executing State shall end the measures ordered as soon as it has been duly notified by the competent authority of the issuing State.

At any time during the monitoring of the supervision measures, the competent authority in the executing State may invite the competent authority in the issuing State to provide information as to whether the monitoring of the measures is still needed in the circumstances of the particular case at hand. The competent authority in the issuing State shall, without delay, reply to such an invitation.

Unanswered notices

Where the competent authority in the executing State has transmitted several notices related to a breach or any other circumstance which can provoke a substantial modification of the supervision measure to the competent authority in the issuing State without answer, the competent authority in the executing State may invite the competent authority in the issuing State to take a decision. The issuing State should be given a reasonable time limit to do so. If the competent authority in the issuing State

[15] Available on: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32002F0584

does not act within the time limit indicated by the competent authority in the executing State, the latter authority may decide to stop monitoring the supervision measures. In such case, it shall inform the competent authority in the issuing State of its decision, and the competence for the monitoring of the supervision measures shall revert back to the competent authority in the issuing State.

Where the law of the executing State requires a periodic confirmation of the necessity to prolong the monitoring of the supervision measures, the competent authority in the executing State may request the competent authority in the issuing State to provide such confirmation, giving it a reasonable time limit to reply to such a request. In case the competent authority in the issuing State does not answer within the time limit specified, the competent authority in the executing State may send a new request to the competent authority in the issuing State, giving it a reasonable time limit to reply to such a request and indicating that it may decide to stop monitoring the supervision measures if no reply is received within that time limit. Where the competent authority in the executing State does not receive a reply to such a new request within the time limit set, it may decide to stop monitoring the supervision measures, informing the competent authority in the issuing State of its decision.

5 Alternative measures to pre-trial detention

5. Alternative measures to pre-trial detention

5.1. Germany

Pre-trial detention (in German *Untersuchungshaft*) may be proposed by the prosecutor, and the application drawn up by the prosecutor's office during a criminal investigation under German criminal legal procedure. The accused must be presented to a judge. The judge must then issue a warrant to order remand in custody. The order for pre-trial detention is governed by §§ 112 and subsequent of the Code of Criminal Procedure (in German Strafprozessordnung or *StPO*).

Pre-trial detention is designed to ensure criminal proceedings. Pre-trial detention may only be ordered against an accused person if the accused is under a reasonable suspicion of being charged with the offense.

In addition, pre-trial detention may be ordered if:

a) s/he is a flight risk (in German *Fluchtgefahr*),
b) there is danger of collusion (in German *Verdunkelungsgefahr*) or
c) there is risk of reoffending (in German *Widerholungsgefahr*). If the accused person is suspected of having committed a particularly serious offense, remand in custody may be ordered even without the above reasons. Particularly serious crimes include murder, manslaughter, particularly severe arson and the formation of a terrorist group.

The arrest warrant will be cancelled immediately if the prerequisites for pre-trial detention cease to exist.

Proportionality must be respected: the arrest warrant will also be set aside if it turns out that further pre-trial detention is disproportionate to the importance of the case and the expected sentence.

As a rule, pre-trial detention may not last longer than 6 months. It may only exceed this 6-month period if it is not yet possible to make a judgment, due

to the particular nature of the investigation or due to the specific nature of the investigation or another important reason.

Pre-trial detention for minors and adolescents is governed by Sections 72 and subsequent of the Juvenile Court Act (in German *Jugendgerichtsgesetz* or *JGG*). Pre-trial detention may only be imposed on minors and adolescents if their purpose is not fulfilled by a provisional order of education or other measures such as interim placement in a youth welfare home. If there are grounds for believing that the accused was legally incapacitated, or with reduced capacity at the time of committing the unlawful act, a judge may use an involuntary commitment order, and may order detention in a psychiatric hospital or a detention centre.

5.1.1. Alternatives to pre-trial detention (*Alternativen zur Untersuchungshaft)*

In order to avoid pre-trial detention, the court may impose various conditions on the accused, as alternatives to detention. The arrest warrant is then no longer effective.

The following alternative to detention measures fall within the remit of FD 2009/829 (with short-form German translations italicized in brackets):

a. The obligation to communicate to an authority any change of residence (*die Verpflichtung, einer bestimmten Behörde jeden Wohnsitzwechsel mitzuteilen*),

b. The obligation not to enter certain places, places or specified areas in the Federal Republic of Germany or in another Member State (*die Verpflichtung, bestimmte Orte, Plätze oder festgelegte Gebiete in der Bundesrepublik Deutschland oder in einem anderen Mitgliedstaat nicht zu betreten*),

c. The obligation to stay at a certain place, if any, at a specific time (*die Verpflichtung, sich gegebenenfalls zu einer bestimmten Zeit, an einem bestimmten Ort aufzuhalten*),

d. An obligation to restrict departure from the Federal Republic of Germany (*Verpflichtung, mit der das Verlassen der Bundesrepublik Deutschland eingeschränkt wird),*

e. The obligation to report to a judge, the prosecution authority or a specific department at specific times (*die Verpflichtung, sich zu bestimmten Zeiten bei einem Richter zu melden*),

f. The obligation to avoid contact with certain persons, such as co-accused persons, witnesses or experts (*die Verpflichtung, den Kontakt mit bestimmten Personen zu meiden)*

g. An obligation to abstain from certain activities connected with the alleged offense (*die Verpflichtung, sich bestimmten Aktivitäten zu enthalten*),

h. The obligation to deposit a certain amount of money or other security, either at fixed rates or as a lump sum; other securities may be stocks and bonds, items pledged for pawning or bail (*Bürgschaft)*

i. The obligation to avoid contact with certain items, such as computers or mobile phones, which are related to the alleged offense *(die Verpflichtung, den Kontakt mit bestimmten Gegenständen zu meiden*).

The judge can reinstate the arrest warrant and order remand in custody if:

a) the accused person grossly violates the duties or restrictions imposed upon him,
b) the accused person seeks to escape, fails to duly discharge himself without reasonable excuse, or otherwise shows the accused that the trust placed in him was not justified,
c) or new evidence or circumstances make the arrest necessary.

5.2. Latvia

Several measures are eligible under FD 2009/829 in Latvia. According to the Criminal Procedure Law (art.243)[16] the security measures (*lv. drošības līdzekļi*) available in Latvia are:

a) notification of the change of the place of residence;
b) reporting to the police authority at a specific time;
c) prohibition from approaching a specific person or location;
d) prohibition from a specific employment;
e) prohibition from departing from the State of Latvia;
f) residence in a specific place;
g) personal guarantee;
h) bail;
i) placement under police supervision;
j) house arrest;
k) arrest.

Apart from the final one, all of them can be subject to transfer under FD 2009/829.

[16] Criminal Procedure Law. Available in English on: https://likumi.lv/ta/en/en/id/107820-criminal-procedure-law

In order to ensure criminal proceedings, in Latvia there are also Procedural Compulsory Measures (art. 242, *lv. Procesuālie piespiedu līdzekļi*). The rights of a person may be restricted with the following procedural compulsory measures:

a) detention - for 48 hours without judicial decision, if the judge decided detention is necessary, detention could be applied for up to two months. If necessary, the court could prolong this in two month periods, following the previous decision;
b) placement in a medical institution for the performance of an expert-examination;
c) placement in a special location.

These measures against a suspect or accused person shall be chosen according the principles (art. 244):

a) that infringes upon the basic rights of person as little as possible and proportionate;
b) in selecting a security measure, the person directing the proceedings shall take into account the nature and harmfulness of a criminal offence, the character of the suspect or accused, his or her family situation, health, and other conditions.

Further down, we will refer in detail only to the provisions a, b, c, d, f, j, i, k that can be transferred under FD 2009/829. As mentioned, the measure (k) is arrest, but the others alternative measures can be transferred under FD 2009/829:

5.2.1 Notification of the change of place of residence (*art. 252, lv. Dzīvesvietas maiņas paziņošana)*

Notification of the change of place of residence obliges the suspect or accused to notify in writing the person directing the proceedings without delay, but not later than within one working day, regarding any change of their place of residence, and indicating their new residential address.

5.2.2 Reporting to the police authority at a specific time *(art. 252, lv. Pieteikšanās noteiktā laikā policijas iestādē)*

Reporting to the police authority at a specific time is a duty imposed to report to the respective police authority of his or her place of residence.

5.2.3 Prohibition from approaching a specific person or location *(art. 253, lv. Aizliegums tuvoties noteiktai personai vai vietai)*

This provision allows the person directing the proceedings to prevent the suspect or accused from approaching a specific person, from being located

closer than the distance referred to in the decision from the relevant person, from having physical or visual contact with such person, and using means of communication, or techniques for transferring information, in order to make contact with the specified person.

Similarly, the suspect or accused may be prevented from visiting a specified location, or being located closer than the distance referred to in the decision.

5.2.4 Prohibition from specific employment *(art. 254, lv. Noteiktas nodarbošanās aizliegums)*

This provision allows the person directing the proceedings to prevent the suspect or accused from performing a specific type of employment for a specified time, or from executing the duties of a specific employment position. A decision on the prohibition of specific employment shall be sent for execution to the employer of the suspect or accused, or to another relevant authority. It shall come into effect within three working days after the day of receipt thereof.

5.2.5 Residence in a specific place *(art. 256, lv. Uzturēšanās noteiktā vietā)*

Residence in a specific place is a written obligation of a suspect or accused to reside during the time indicated and at the place specified by the person directing the proceedings or not to leave the specifically indicated place of residence or temporary residence for longer than 24 hours without the permission of the person directing the proceedings, as well as to arrive without delay when summoned by the person directing the proceedings, or to fulfil other duties within the criminal procedure.

5.2.6 Placement under police supervision (art. 261, *lv. Nodošana policijas uzraudzībā)*

Placement under police supervision is the relocation and the restriction of the discretionary power of a suspect or accused with the provision that the relevant person shall not:

a) change his or her permanent or temporary place of residence without the permission of the person directing the proceedings;
b) visit the locations or institutions referred to in the decision;
c) meet with the persons referred to in the decision;

At the same time accused or suspected person has to:

a) be located in his or her place of residence during specific hours of the day;
b) present himself or herself not more than 3 times per week at the police institution according to the place of residence thereof.

Restrictions shall be determined taking into account the work or study conditions of a suspect or accused. The police performs control over the enforcement of restrictions, the police officer is allowed to enter his or her permanent or temporary place of residence (apartment, house).

5.2.7 House arrest (*art.* 282, *lv. Mājas arrests)*

House arrest is the deprivation of liberty of a person that may be applied with a decision of an investigating judge, or a court ruling to a suspect or accused before the final ruling in specific criminal proceedings has entered into effect. It may be used if there are grounds for the application of arrest, yet the holding under arrest of the person is not desirable or not possible due to special circumstances.

A person may be held under house arrest in their permanent place of residence, if the persons of legal age living with the suspect/ accused agree to such house arrest in the permanent place of residence. House arrest shall be applied, complaints regarding the application thereof shall be examined, and control over the application thereof shall be performed in accordance with the same procedures as arrest.

After assessment of the proposal of the investigator or public prosecutor and listening to the opinion of a person held under house arrest, the investigating judge or court shall take into account both the nature of the criminal offence and the reasons for application of a security measure and special circumstances why house arrest has been applied. S/he will then determine:

a) the address where a person shall reside during house arrest;
b) restrictions on meetings, except meetings with a defence counsel and persons living at the relevant address, and communication;
c) control of correspondence and conversations;
d) the necessity of guarding the particular address, as well as during movement of a person to where procedural actions are taking place.

Terms of arrest shall be applied to house arrest, and the time spent under house arrest shall be recognised as time spent under arrest, in accordance with The Criminal Law.

5.2.8 Duties of a suspect or accused *(art.67)*

From the moment when a person is notified that he or she has been placed under criminal suspicion, this person shall have the following duties:

a) to arrive for the proceedings in a specific time at the place indicated by an authorised official, if the invitation has been made in accordance with the procedures laid down in law;
b) to not delay and hinder the progress of criminal proceedings;

c) to comply with the provision of a security measure and the restrictions referred to in the law;
d) to permit that he or she be subjected to the study of an expert, and to submit samples for comparative study or to permit such samples to be obtained;
e) to comply with the specified procedures during the performance of procedural actions;
f) to indicate the fact that during the commitment of the criminal offence, such person was in another place (the alibi), or the conditions provided for in The Criminal Law that exclude criminal liability.

5.3. Romania

Preventive measures available in Romania, according to the Criminal Procedure Code are (art. 202):

a) taking in to custody (ro. reținerea);
b) judicial control (ro. controlul judiciar);
c) judicial control on bail (ro. controlul judiciar pe cauțiune);
d) house arrest (ro. arestul la domiciliu);
e) pre-trial detention (ro. arestul preventiv).

These measures may be taken against a suspect or accused person only if there is enough evidence leading to a reasonable suspicion that the person has committed an offence and such measure a is necessary in order to ensure a proper criminal investigation, to prevent him/her from escaping criminal investigation or trial or to prevent him/her from committing another crime.

When ordering these measures, the prosecutor, judge for rights and liberty, the judge for preliminary chamber and the court **must** take into account several procedural rights of the suspect or accused, such as: s/he has to be informed about the charges in a language that he understands, s/he has to be heard and is entitled to legal assistance (or legal aid, if he cannot cover the costs). The person may appeal these measures to a higher level within 48 hours (e.g. if the measure was imposed by the prosecutor, the person can appeal this decision to the judge for rights and liberties and so on).

Further down, we will refer in detail only to the provisions b, c and d that can be transferred under FD 2009/829.

Taking into custody may be ordered by the police or the prosecutor and only for 24 hours.

5.3.1. Judicial control

The prosecutor may order judicial control during the criminal investigation phase. The preliminary chamber judge or the court may order it during the preliminary chamber or trial phase.
While under judicial control, the person shall comply with the following ***obligations***:

a) to appear before the criminal investigation body, the Preliminary Chamber Judge or the court any time they are called;
b) to inform forthwith the judicial bodies having ordered the measure or with which their case is pending on any change of domicile;
c) to appear before the law enforcement body appointed to supervise them by the judicial bodies having ordered the measure, according to the supervision schedule prepared by the law enforcement body or whenever they are called.

Judicial bodies having ordered the measure may require that the defendant, during judicial control, comply with one or more of the following ***obligations***:

a) not to exceed a specific territorial boundary, set by the judicial bodies, without their prior approval;
b) not to travel to places set specifically by the judicial bodies or to travel only to places set by these;
c) to permanently wear an electronic surveillance device;
d) not to return to their family's dwelling, not to get close to the victim or the members of their family, to other participants in the committed offense, witnesses or experts or to other persons specified by the judicial bodies and not to communicate with these in any way, be it directly or indirectly;
e) not to practice a profession, craft or activity during the practice or performance of which they committed the act;
f) to periodically provide information their living means;
g) to subject themselves to medical examination, care or treatment, in particular for the purpose of detoxification;
h) not to take part in sports or cultural events or to other public gatherings;
i) not to drive specific vehicles established by the judicial bodies;
j) not to hold, use or carry weapons;
k) not to issue cheques.

The measure is ***ordered for 60 days*** and is revised periodically but not later than 60 days, without having a maximum.

In Romania, the police are entitled to supervise judicial control under the control of the judicial body that ordered it.

5.3.2. Judicial control on bail

The same judicial bodies that can impose judicial control may also order judicial control on bail. The value of the bail is at least 1,000 lei and is determined based on the seriousness of the accusation and the material situation of the suspect or accused.
This amount has to be deposed at the disposal of the judicial body and different property bonds, real estate or other goods can replace it.
While under judicial control on bail, the person has to comply with the obligations mentioned above for judicial control.

5.3.3. House arrest

Only the judge for rights and liberties, preliminary chamber judge and the court may order **house arrest**. When imposing this measure, the judiciary has to take into account, besides the threshold for the preventive measures, the age, family status and other personal circumstances of the person. If the person has no fixed address in Romania, this measure is highly unlikely to be ordered.

However, in exceptional cases when this measure is ordered, the person shall have to comply with the following ***obligations***:

a) to appear before criminal investigation bodies, the judge for rights and liberties, the preliminary chamber judge or the court whenever they are called;
b) not to communicate with the victim or with members of their family, with other participants in the commission of the offense, with witnesses or experts, as well as with other persons established by the judicial bodies.

During house arrest the person is not allowed to leave the premises except for appearing before the judicial body. In exceptional cases, the judicial body may allow the person to leave the premises for attending work, education or other similar activities, but only for a limited time.

The measure may be imposed for up to ***30 days*** but it is revised and may be prolonged every 30 days, if the reasons behind this decision continue to exist. There is no maximum time limit for this measure. The person may stay under house arrest until the end of his trial.

5.4. Spain

The alternatives to detention are regulated in Spain by the Criminal Procedural Act of 1882[17](CPA). According to Spanish Legislation (art. 528 CPA), provisional detention will only last for as long as the reasons for it

[17] Royal Decree of 14 September 1882 Approving The Criminal Procedure Act, amended several times; available in Spanish on: https://www.boe.es/buscar/pdf/1882/BOE-A-1882-6036-consolidado.pdf

subsist. The detainee or prisoner will be released at any stage of the case where they are found to be innocent. All authorities intervening in proceedings will be under the obligation to shorten arrest and provisional detention of those found innocent or accused as far as possible.

The CPA talks about measures of 'provisional release' as opposed to the provisional detention. Thus, several measures can be imposed as alternatives to pre-trial detention:

5.4.1. Bail (es. fianza)

Where provisional detention of the accused is not ordered, the judge or court will order whether or not the accused must post bail to continue in provisional release. If the judge or court orders bail, the same court order will set the type and amount that must be posted (art. 529 CPA).

In order to calculate the type and amount of bail, the nature of the crime and the social status and record of the accused will be taken into account, along with any other circumstance that may influence the greater or lesser interest of the accused in placing themselves out of the reach of the Judicial Authority (art. 531 CPA).

Imprisonment, provisional release and bail orders may be altered throughout the duration of the case. As a result, the accused may be imprisoned or released as many times as may be appropriate and bail may be changed as necessary to ensure the consequences of the trial.

Bail will be cancelled:

- when the guarantor requests it, submitting -at the same time- to the accused (before the judge),
- when the accused is put in prison,
- when a final dismissal order or final acquittal is passed or, if a conviction, the convicted person hands themselves over to serve the sentence and,
- due to the death of the accused while the case is pending.

5.4.2. Withdrawal of driving license (es. Retirada o privación del permiso de conducir)

Where the prosecution is referring to a person holding a driving licence for a crime committed as a result of their driving, if the accused must be released, the judges, at their discretion, may provisionally take their driving licence away, ordering that it is taken from them (art. 529 bis CPA).

5.4.3. Obligation to appear and retention of the passport (es. Obligación de comparecer y retención del pasaporte)

The accused who is given provisional release, with or without bail, will appear *apud acta*[18] on the days set out in the relevant court order and as many other times as they are called before the judge or court hearing the case. To ensure compliance with this obligation, the judge or court may order, retention of their passport (art. 530 CPA).

5.4.4. Restrictions measures as protection for victims (es. *Medidas cautelares de protección a la víctima*)

In specific serious offences (regulated in art. 57 of the Spanish Criminal Code; SCC), the judge or court may, with grounds and where this is strictly necessary to protect the victim, impose a ban on the accused residing in a specific place, area, municipality, province or local district, or Autonomous Region as a precaution (art. 544 bis CPA).

Under these same terms, as a precaution, a ban may be imposed on them going to specific places, areas, municipalities, provinces or other local districts, or Autonomous Regions, or from approaching or communicating with specific persons, to the degree deemed appropriate.

When ordering these measures, the accused's financial situation and health requirements, family situation and employment will be taken into account. Particular attention will be given to the continuity of the latter while the measure is in force and after it has ended.

In the event that the accused breaches the measure ordered by the judge or court, the latter will convene the appearance of the accused to order eventually the provisional detention, to implement a new protection order for victims of domestic violence (regulated in the art. 544 ter.) or another precautionary measure involving greater limitation on their personal liberty, for which the occurrence of the breach, the reasons for it, its severity and circumstances will be taken into account, without prejudice to the liabilities that may be incurred due to the breach.

[18] Appearance *apud acta* is the obligation imposed on a defendant who is on provisional release and that forces him or her to go to court on the days indicated, as well as how many times he or she is called before the judge or court that is handling the case.

5.4.5. Restrictions measures as a protection for underage victims

*(Child or minor victims) or **who are legally incapacitated** (es. Medidas cautelares de protección a la víctima menor de edad o con capacidad judicialmente modificada)*

In specific serious offences (regulated in the art. 57 of the SCC) the judge or court, where needed to protect a victim who is underage or who is legally incapacitated, as appropriate, will order, with grounds, one of the following measures (art. 544 CPA).:

a) Suspension of the parental authority of one of the parents. In this case, a regime for visits or communication may be set in the interest of the minor or person who is legally incapacitated and, as appropriate, the conditions and safeguards under which this must be carried out.
b) Suspension of wardship, guardianship, custody or fostering.
c) Establish a regime supervising exercise of parental authority, guardianship or any other type of custody or protective or support function for the minor or person who is legally incapacitated, without prejudice to the jurisdiction of the Public Prosecution Service and competent public bodies.
d) Suspension or amendment of the regime for visits or communication with any non-cohabitant or other family member which may be in force, where this is necessary to ensure protection of the minor or the person who is legally incapacitated.

As seen, the choice of alternative to the pre-trial detention or remand prison is not very broad in the Spanish legal system. Measures such as electronic monitoring or home detention are not considered as alternatives to detention.

Nevertheless, electronic monitoring is being used in Spain in the case of gender-based violence to control the alleged offender in order to avoid a breach of a restraining order. Thus, the Organic Law 1/2004 of 28 December on Comprehensive Protection Measures against Gender-based Violence[19] (art. 64.3), allowing judges and courts to use telemetrically controlled devices to monitor compliance with the restraining orders imposed as a precautionary measure in the procedures followed by gender violence[20].

[19] Available in Spanish on: https://www.boe.es/buscar/act.php?id=BOE-A-2004-21760

[20] Several explanations and protocols available, only in Spanish, on: http://www.violenciagenero.igualdad.mpr.gob.es/informacionUtil/recursos/dispositivosControlTelematico/home.htm

On the other hand, electronic monitoring can also be used during the execution of the custody sentence during leave from prison (for a specific kind of high risk offender) and as a modality of open regime (called "third degree with telemetric control"), resulting in some kind of conditional release (not considered legally as such, but in practice very similar) with electronic monitoring[21] (regulated in the Spanish Prison Rules, SPR).

Home detention, called 'permanent location', is a penalty in the Spanish legal system[22], for a light sentence of up to six months.

Therefore, even if the electronic monitoring and the home detention measures are not considered as alternatives to detention measures, the Spanish legal system could be in a position to implement then in the case of application of the FD 2009/829.

[21] Art. 86.4 of the SPR. Available in Spanish on: http://www.institucionpenitenciaria.es/web/export/sites/default/datos/descargables/legislacion/Reglamento_Penitenciari_texto_consolidado.pdf

[22] Art. 37 of the SCC. Available in Spanish on: https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444

6 / Probation decisions and alternative sanctions

6. Probation decisions and alternative sanctions

6.1. Germany

In Germany, the suspension of imprisonment for probation (in German, *Aussetzung der Freiheitsstrafe*) is a judicial measure of criminal law. The suspension of parole is regulated in Sections §§ 56 and subsequent of the German Criminal Code (in German *deutsches Strafgesetzbuch* or *StGB*).

The suspension of juvenile punishment for adolescents is regulated in Section §§ 21 and subsequent of the Juvenile Court Act (in German the *Jugendgerichtsgesetzes* or *JGG*).

There is also the possibility to postpone the execution of a prison sentence in accordance with Section § 35 of the Narcotics Act (in German the *Betäubungsmittelgesetz* or *BtMG*).

6.1.1. Suspension of Short Prison Sentence (Article 56 StGB)

(Die Strafaussetzung zur Bewährung gemäß § 56 StGB)

Imprisonment of up to two years may be suspended for probation. The decision as to whether imprisonment is suspended for probation falls to the competent court. The duration of the probationary period can be from two to five years. The suspension of short and medium term license for probation pursues the goal of promoting the rehabilitation and social re-inclusion of the convicted person.

The court with jurisdiction must draw up a social prognosis or legal prognosis as to whether the convicted person can no longer be expected to commit offenses without the execution of the imprisonment. With a positive social prognosis, the sentence of imprisonment can be suspended.

If the sentence of imprisonment is less than six months and the social prognosis is positive, the execution of the sentence should be avoided and the prison sentence should be suspended.

If the sentence of imprisonment is six months to one year, the suspension of imprisonment via positive social prognosis will depend on if there is a Legal System Defence plea. Legal System Defence (*Verteidigung der Rechtsordnung*) is a term used in German sentencing law and in the context of the imposition of short sentences and suspension on probation. The term describes the need to impose or enforce prison sentences in order to maintain trust in the rule of law or in the inviolability of the law.

In the case of imprisonment of more than twelve months up to two years, special circumstances must be present in addition to the positive social prognosis and the defence of the legal system. These special circumstances can be, for example, aspects of the reparation and restitution process.

6.1.2. BtMG Suspension of the remainder of the sentence with time-limited imprisonment (art 57 StGB) *(Aussetzung des Strafrestes bei zeitiger Freiheitsstrafe gemäß § 57 StGB)*

Convicted criminals can be released prematurely from prison in the event of a positive social prognosis. The suspension of the parole is regulated in art. 57 and subsequent of the StGB. The decision as to whether or not a convicted person will be released prematurely from the prison is made by the penal execution chamber (in German Strafvollstreckungskammer) of the competent district court (in German *Landgericht*).

The suspension of the sentence of imprisonment for probation aims to protect the convicted person from the possible consequences of a long imprisonment and to enable him or her to re-integrate into society.

6.1.3. Restitution of the prison sentence in accordance with art. 35 BtMG *(Zurückstellung der Freiheitsstrafe gemäß § 35 BtMG)*

If the social prognosis of a convicted person turns out to be negative due to his narcotic dependence, the court will give him the opportunity to seek appropriate drug treatment. The execution of the prison sentence is postponed.

Conditions and instructions during the probationary period

The convicted person is usually given conditions and instructions during his/her probationary period. However, with the conditions and instructions, no unreasonable demands should be made on the convicted person.

The court may grant the convicted person as a condition:

a) to notify the court immediately of the change of residence,
b) to submit to the supervision and management of a probation officer,
c) to make the best of the damage caused by the act;
d) pay a sum of money to a charitable institution or state fund,
e) and / or charitable work.

Instructions that the court imposes on sentencing may be:

a) to comply with orders relating to residence, education, work or leisure or in response to his economic circumstances,
b) to report to courts or other offices at certain times,
c) not to contact, interact, train/ work or host the injured person or certain persons or persons of a particular group that may give him the opportunity or incentive to commit further offenses;
d) to comply with maintenance support obligations, such as child or spousal support payments

For the period of probation, the convicted person may be assigned to a probation officer (in German *Bewährungshelfer/in*). Probation officers are socio-pedagogic staff who, in their work with the convicted persons, pursue the tasks of a double mandate and act as both helping and controlling tasks:

- Probation officers assist the convicted person in a caring and supportive manner. The convict should be empowered to lead a crime- and punishment-free life of social responsibility.
- At the same time, the probation officer monitors, on behalf of the competent court, whether the conditions and instructions are duly fulfilled. Periodic reports of compliance with the requirements and instructions are issued at intervals determined by the court. The probation officer or the probation officer can suggest to the court the changes of the conditions and instructions. The decision as to whether the conditions and instructions are changed will be made by the court.

6.1.4. Revocation of the probation license or alternative sanction (*Widerruf der Bewährung)*

If the convicted person violates the instructions and requirements in a severe or persistent manner, or if the convicted person commits new crimes during the probationary period, the parole may be revoked or the probation period extended and / or further conditions and instructions given.

6.1.5. Decree of imprisonment (*Erlass der Freiheitsstrafe)*

At the end of the probationary period, the probation will come to an end unless new offenses have occurred within the probationary period or the

imposed conditions and instructions have not been fulfilled. The competent court issues a corresponding decision on the imprisonment.

The following probation measures and alternative sanctions fall within the scope of FD 2008/947:

a) the obligation to inform an authority of any change of residence or change of employment;
b) the obligation not to enter certain places, places or specified areas in the other Member State or in the Federal Republic of Germany;
c) an obligation involving restrictions on leaving the territory of the Federal Republic of Germany,
d) an obligation relating to conduct, residence, education, training or leisure or which includes restrictions or modalities for the exercise of a professional activity;
e) the obligation to report to a specific authority at specific times,
f) the obligation to avoid contact with certain persons,
g) an obligation to avoid contact with certain items used or likely to be used by the sentenced person for committing an offense;
h) the obligation to make financial reparation for the damage caused by the offense;
i) the obligation to provide evidence that the obligation referred to in point (h) has been complied with;
j) an obligation to provide proof that the damage has been recovered financially;
k) the obligation to provide a charitable service (such as voluntary work),
l) the obligation to cooperate with a probation officer or a probation officer,
m) the obligation to undergo a cure associated with a physical intervention or a withdrawal treatment, provided that the sentenced person and, where applicable, their legal guardian and legal representative have given their consent,
n) the obligation to make every effort to repair the damage caused by the offense,
o) the obligation of a person who had not yet completed his 21st year at the time of the offense to personally apologize to the injured person,
p) the obligation to pay a sum of money in favour of a charitable organization, where appropriate for the crime and personality of the offender, or
q) other obligations designed to help the convicted person not to commit crimes or to govern the conduct of the convicted person who was under the age of twenty-one at the time of the offense, thereby promoting and securing their education should.

6.2. Latvia

According with the Criminal Law[23] (CL) of 1998 (art.36 CL) punishments in Latvia are divided into main punishments and additional punishments.

The main punishments are: a) deprivation of liberty; b) community service; or c) a fine. The law also mention that a custodial sentence may be imposed conditionally (suspended sentence).

In addition to a main punishment, the following additional punishments may be imposed:

a) confiscation of property;
b) deportation from the Republic of Latvia;
c) community service;
d) a fine;
e) restriction of rights; and
f) probationary supervision.

The alternative sanctions and probation decisions, that fall under the scope of the FD 2008/947 are:

6.2.1 Community Service *(art. 40, lv. Piespiedu darbs)*

The convicted person serves community service by doing work in the area of the place of residence, as specified by the community service implementation authority during free time outside regular employment or studies and without remuneration. Community service can be imposed as a basic punishment or additional punishment (supplementary sanction to deprivation of liberty, fine or suspended sentence). If person is sentenced with prison sentence, then community service should be served after his release from prison.

Community service as basic punishment can be imposed for a period of forty hours and up to two hundred and eighty hours. As an additional punishment, community service can be determined for a period of 40 hours and up to 100 hours. Community service is not applicable to persons disabled from working.

6.2.2 Suspended sentence *(art. 55, lv. Nosacīta notiesāšana)*

The Court may suspend a prison sentence and set a time of probation, if the following conditions are met:

a) the penalty imposed by court is a term of more than three months, but no more than five years of imprisonment;

[23] The Criminal Law is availible in English on: https://likumi.lv/ta/en/en/id/88966-the-criminal-law

b) the court, taking into account the nature of the committed criminal offence and the harm caused, the personality of the offender and other circumstances of the matter, becomes convinced that the offender, without serving the punishment, will not commit violations of the law in the future.

In the case, when suspension of prison sentence is applied, the court shall determine a period of probation, which ranges from 6 months up to 5 years. Supervision period may not be shorter than the applied period of deprivation of liberty.

In imposing a suspended sentence, additional punishments may be imposed, except additional punishment - probationary supervision. Additional punishment - probationary supervision - shall be executed only if the probationer fails to comply with the order and court decides to execute the main punishment (deprivation of liberty).

If a convicted person, upon whom a suspended sentence has been imposed, does not fulfil the obligations, the court, on the basis of a submission by the Probation Service, may take a decision to serve the punishment determined in the judgment for the convicted person, or to extend the period of probation up to 1 year. If the convicted person did not commit a new offense during the period of probation and did not fail to comply with the order, the penalty is deemed served.

6.2.3 Additional punishment "Probationary Supervision" *(art. 45[1], lv. Probācijas uzraudzība)*

Probationary supervision is an additional punishment set to ensure the supervision of the behaviour of a convicted person, encourage social reintegration of this person and prevent him or her from committing new criminal offences. In the case, when probationary supervision is imposed, the court shall determine a period of probation, which ranges from 1 year up to 3 years, or in some cases, regulated in the Special Part of Criminal Law, up to 5 years.

If probationary supervision is applied together with deprivation of liberty, execution thereof shall be commenced after serving of the main punishment, but if a fine or community service is imposed - from the moment when the judgement of conviction has entered into effect. In cases where a person is conditionally released from prison, the additional punishment - probationary supervision - will be started after the end of the probationary period of parole. The court also may reduce the period of probationary supervision, or revoke it, according to a submission by the Probation Service.

If a convicted person commits a new crime during the period of serving the additional punishment, the court shall substitute the additional unserved punishment period with deprivation of liberty and shall determine the final punishment. In the case, when probationer fails to comply with the obligations, the court, after receipt of a submission from the Probation Service, may substitute the additional unserved punishment term, counting two probationary supervision days as one day of deprivation of liberty.

6.2.4 Conditional release *(art. 61, lv. Nosacīta pirmstermiņa atbrīvošana no soda)*

The court can decide to conditionally release the sentenced person prior to completion of his or her prison sentence, if the following requirements are met:

a) the convicted person has reached a certain result of resocialisation;
b) the convicted person to the extent possible has voluntarily made compensation for the losses caused by his or her crime;
c) the convicted person has the possibilities to acquire means of subsistence in legal way after his or her release;
d) the convicted person has not had further institutional rule violations within a certain period of time specified by the Sentence Execution Code;
e) the convicted person is solving and is ready to continue to solve his or her psychological problems which have caused or may cause commitment of offence;
f) the convicted person has agreed to treatment for addiction/substance abuse, if he or she has committed the criminal offence due to addiction/substance abuse.

If the parolee commits a new crime during the probation period, the court shall revoke conditional release. In case the parolee does not fulfil the obligations, the court, based on a submission from the Probation Service, may take a decision to execute the part of unserved punishment.

The measures and obligations

According to the Sentence Execution Code[24], all convicted persons who have supervision period[25] shall to comply with the same supervision measures and obligations. During the supervision period, the sentenced person must comply with the following core measures and obligations:

[24] The Sentence Execution Code of Latvia is available in English on: https://likumi.lv/ta/en/en/id/90218-the-sentence-execution-code-of-latvia

[25] Conditionaly sentenced persons, persons sentenced with additional punishment "Probationary Supervision", conditionaly released persons (parolees).

a) fulfil the duties and lawful requirements determined by probation counsellor;
b) arrive at the Probation Service at the time determined by the probation counsellor;
c) notify their probation officer regarding his or her place of residence, workplace or study institution, as well as notify regarding changing thereof without delay;
d) request permission from the Probation Service to leave the place of residence for a time period exceeding 15 days;
e) submit information on fulfilment of the imposed obligations to the probation counsellor;
f) submit information on the means of subsistence of the convicted person to the probation counsellor.

Measures and obligations mentioned above are to be performed throughout the entire supervision period and cannot be revoked.

In addition to the obligations listed above, the Probation Service **may** require the probationer to perform one or more of the following additional obligations:

a) not leave the place of residence at a specific time of the day;
b) not be/visit specific public places established by the Probation Service;
c) not contact specific people established by the Probation Service;
d) not leave a specific administrative territory without the permission of the Probation Service;
e) not to use alcohol and other intoxicating substances;
f) get permission from the probation officer regarding daily movement routes;
g) participate in one or more probation programmes;
h) not own, carry or keep particular items established by the Probation Service;
i) not be in certain location, places or attend certain events established by the Probation Service;
j) attend medical treatment or counselling (such an obligation may be imposed if the convicted person agrees to pay the additional expenses related to such visits or it does not result in additional expenses for the convicted person);
k) perform the instructions of the Probation Service aimed at deriving legal subsistence means or resolving of practical matters.

During the probation period, the Probation Service can impose new additional obligations or to increase or decrease the existing obligations, if it is necessary for public safety and rehabilitation of the probationer.

6.3. Romania

Since 2000, community sanctions and measures are implemented in Romania by the National Probation Service. The Service works under the authority of the Ministry of Justice and has branches in every county of the country.

According to Romanian legislation (Criminal Code adopted by Law no. 286/2009), the following provisions fall under the scope of the FD 2008/947:

6.3.1. Deferred sentence *(art. 83-90, ro. Amanarea aplicarii pedepsei)*

The court can decide to postpone enforcement of a penalty and set a time of probation, if the following requirements are met:

a) The sentence, including for a situation of multiple offenses, is a fine or no more than two years of imprisonment
b) The defendant does not have any previous prison sentences
c) The defendant has consented to perform community service
d) Considering the person of the defendant, their conduct before committing the offense, efforts to remove or minimize the consequences of their offense, and their likelihood of rehabilitation, the Court appreciate that enforcing a penalty immediately is not necessary, but it is nevertheless mandatory to have their conduct supervised for a determined period.

Enforcing a sentence cannot be postponed if the penalty stipulated by law for the committed offense is higher than seven years of imprisonment or the person attempted to escape criminal investigation or trial.

The probation period is two years and the person on probation must comply with the probation measures and their obligations imposed by the court.

On probation period, the person **must** comply with the following probation measures:

a) report to the Probation Service on the dates set by the probation counsellor;
b) receive visits by the probation officer appointed to supervise them;
c) give notice of changing domicile and of any travel longer than 5 days, as well as of their return date;
d) give notice of changing jobs;
e) provide information and documents of a nature that will make it possible to check into their livelihood.

The Court **may** order a defendant to comply with one or several of the following obligations to:

a) take classes in school or for vocational training;
b) perform community service for a duration between 30 and 60 days (60-120 hours), in the conditions ordered by the Court, except for the case where their health precludes them from performing that service.
c) attend one or more social reintegration programs developed by the Probation Service or in cooperation with community institutions;
d) comply with medical treatment or care;
e) not communicate with the victim or the victim's family, with the persons together with whom they committed the offense or with other persons as established by the Court, or to not go near such persons;
f) not be in certain locations or attend certain sports events, cultural events or public gatherings established by the Court;
g) not drive certain vehicles established by the Court;
h) not own, use and carry any category of weapons;
i) not leave Romanian territory without securing agreement from the Court;
j) not take or exercise the position, profession, occupation or activity they used in the commission of the offense.

The probationer must pay their civil obligations as ordered in the court judgment, no later than 3 months before expiry of the probation period. In the case where, before expiry of the probation period, the supervised individual fails to pay their civil obligations as ordered by the Court, the Court shall revoke the postponement and rule to enforce the penalty except for the case where the individual can prove they had financial resources to comply.

If during the probation period, the probation counsellor considers that is necessary to be imposed new obligations or to increase or decrease the existing obligations, the Court shall order an amendment of the obligations accordingly, to provide increased chances for probationer's rehabilitation. If during the probation period, the individual, in bad faith, fails to comply with the probation measures or obligations ordered them, the Court shall revoke the postponement and rule to enforce the penalty.

6.3.2. Suspension of prison sentence under supervision *(art. 91-98, ro. Suspendarea exectarii pedepsei sub supraveghere)*

The court may suspend a prison sentence under supervision if the following conditions are met:

a) The penalty imposed, including in case of multiple offenses, is a term of no more than three years of imprisonment
b) The offender was not previously convicted to imprisonment for a term exceeding one year,

c) The offender agreed to perform community service
d) The court appreciated taking into account aspects as offender's person and conduct prior to the commission of the criminal offense, their efforts to eliminate or mitigate the consequences of criminal offense and their means of reformation, the penalty is sufficient without executing in prison, but is necessary to supervise their behaviour for a period of time.

It is mandatory for the court to explain the grounds of the sentence, as well as those that led to the suspension of the sentence enforcement. In addition, the court will warn the offender about the future conduct and the consequences they are exposed, if they continue to commit offenses or fail to comply with the supervision measures or fulfil their obligations during the probation term.

The term of suspension of a sentence under supervision shall be the convict's supervision period, which ranges from 2 to 4 years, but may not be shorter than the term of the sentence enforced.

During the supervision period, the sentenced person **shall** comply with the following supervision measures:

a) report to the Probation Service on the dates set by the probation counsellor;
b) receive visits by the probation counsellor appointed to supervise them;
c) give notice of changing domicile and of any travel longer than 5 days, as well as of their return date;
d) give notice of changing jobs;
e) provide information and documents of a nature that will make it possible to check into their livelihood.

The court orders the convicted to comply with one or several of the following obligations to:

a) take classes in school or a vocational training
b) attend one or more social reintegration programs operated by the Probation Service or in cooperation with community institutions
c) attend medical treatment or care
d) not leave Romanian territory without securing agreement from the court.

During the supervision period, the probationer shall perform community service for a period between 60 and 120 days (120-240 hours), under the terms set out by court, unless their health prevents them from performing such work.

The regulations from deferred sentence regarding payment of civil obligations, changing the framework of obligations imposed by the court in order to increase the chance of offender's rehabilitation and revoking the sentence if the offender fails to comply with measures or obligations are also applicable.

If the convicted person did not commit a new offense, discovered before the expiry of the supervision term, the revocation of suspension of the sentence enforcement under supervision was not ordered and no reason for rescission appeared, the penalty is deemed served.

6.3.3. Conditional release *(art. 99-106, ro. liberarea conditionta)*

The Romanian Criminal Code provides that if the remaining part of the prison sentence, upon conditional release, is 2 years or more, the sentenced person shall submit to probation supervision and, therefore, **comply** with the following supervision measures:

a) report to the Probation Service on the dates set by the latter;
b) receive visits by the probation officer appointed to supervise them;
c) give notice of changing domicile and of any travel longer than 5 days, as well as of their return date;
d) give notice of changing jobs;
e) provide information and documents of a nature that will make it possible to check into their livelihood.

In addition, the court **may** require the convicted person to perform one or more of the following obligations:

a) take classes in school or a vocational training
b) attend one or more social reintegration programs operated by the Probation Service or given in cooperation with community entities
c) not leave Romanian territory
d) not be in certain locations or attend certain sports events, cultural events or public gatherings established by the court
e) not communicate with the victim or the victim's family, with the persons together with whom they committed the offense or with other persons as established by the court, or to not go near such persons
f) not drive certain vehicles established by the court
g) not own, use and carry any category of weapons.

The supervision measures and the obligations provided in lit. a) and lit. b) shall be fulfilled as of the date of release, for a period equal to one-third of the supervision term, but no more than 2 years, and the obligations set out in

par. (2) lit. c) - g) are to be performed throughout the entire supervision period.

The regulations from deferred sentence regarding changing the framework of obligations imposed by the court in order to increase the chance of offender's rehabilitation and revoking the sentence if the offender fails to comply with measures or obligations are also applicable.

6.4. Spain

There are different kinds of alternative sanctions and measures in the Spanish legal system, belonging to different administrations. The most two relevant characteristics of the Spanish penitentiary system are:

- The control and supervision element are predominant in the majority of probation measures, taking into account the assistance and help-support role attributed to the probation officers in the EU context,

- And, an important group of alternative sanctions and probation measures are implemented by the General Deputy Direction of Open Regimen and Alternative Sanctions and Measures, belonging to the Penitentiary Administration, but others (as in the case of suspension of the sentence, or home detention) are under the competence of the law enforcement authorities. In Spain there is not a "Probation Agency" as understood in European terms.

In summary, in the Spanish system offenders can be sentenced directly to an alternative measure (e.g. to community work as a principal penalty assigned to an offence) or offenders can be sentenced to a custodial sentence which can be suspended from the beginning (total suspension of the enforcement of the sentences), or during the enforcement of the sentence (partial suspension of the sentences, known as the conditional release). In the case of total suspension of the custodial sentence, the suspension can be accompanied by control measures, which in many cases are supervised by the Penitentiary Administration.

Some alternative sanctions and measures can be identified as alternative sanctions or probation measures in the Spanish legal system:

6.4.1. Suspension of the sentence *(art. 80 SCC, sp. suspension de condena)*

According to the art. 80 SCC the judge (or court) can grant the suspension of the custody sentence not exceeding 2 years (even not exceeding 5 years in the case of drug addicts) when it was reasonable to expect that the execution of the sentence is not necessary to avoid the commission of new crimes (by

the sentenced person). This measure is under the condition of not committing new offences (in case of new offence the revocation of the suspension would take place). In addition, the judge (or court) may condition the suspension of the sentence to the fulfilment of the following prohibitions and duties (art. 83 SCC):

a) Prohibition of approaching the victim or those of relatives or other persons determined by the judge or Tribunal, their homes, their workplaces or other places usually frequented by them, or communicating with them by any means.
b) Prohibition of contact with certain persons or members of a particular group, if there are indications that allow a reasonable expectation that such subjects can provide the opportunity to commit new crimes or incite to.
c) To keep the place of residence in a particular place, forbidden to leave or temporarily absent without authorization of the court or tribunal place.
d) Prohibition to reside in a particular place or come to it, when they could find the opportunity or reason to commit new crimes.
e) To personally appear before the judge or court, police premises or in the Administration to be determined, to report his/her activities and justify them.
f) To participate in educational, occupational, cultural, education road programs, or in programs on sexual behaviour, defence of the environment, protection of animals, equal treatment and non-discrimination, or any other program of this nature.
g) To participate in addiction treatment programs for alcohol consumption, toxic drugs or narcotic substances, or programs focused on any other addictive behaviours.
h) Prohibition to drive motor vehicles that do not have technological devices that can determine or check the physical conditions of the driver's behaviour, when the subject has been convicted for a traffic offence and the measure is necessary to prevent possible new crimes being committed.
i) To comply with other duties which the judge or the court consider appropriate for the social rehabilitation of the offender, provided that they do not violate their personal dignity.

In the case of gender-based violence, the judge or the court will always impose prohibitions and duties stated in the 1st, 4th and 6th of the above conditions.

The prohibitions or duties from 1 to 4 are under the competence of the law enforcement authorities. Any possible breach or circumstances relevant for assessing the dangerousness of the offender and the possibility of committing new crimes, shall be immediately communicated to the public

prosecutor's office and to the judge or the court. The control of the fulfilment of the duties 6, 7 and 8 are under the competence of the Alternative Sanctions and Measures Management Service (belonging to the Penitentiary Administration). These services shall report to the judge or the court on compliance with a periodicity of at least quarterly, in the case of the rules 6th and 8th, and bi-annually in the case of the 7th and, in any case, to its conclusion.

Also (art. 84 SCC) the judge or the court can grant the suspension of the enforcement of the sentence dependent on the following conditions: compliance with the agreement reached by the parties through mediation, payment of the fine determined by the judge or the court and the performance of work for the benefit of the community (a community service).

6.4.2. Conditional release *(art. 90 SCC, sp. libertad condicional)*

Conditional release is regulated as a 'suspension of the execution of the sentence'. The general conditions for the conditional release are: to be classified in third penitentiary degree, to have served three quarters of the prison sentence and to exhibit good behaviour. It is necessary to have paid the civil liability or to sign a payment commitment in order to satisfy this responsibility. In case of very good behaviour (when the convict has developed continuously labour, cultural and occupational activities) conditional release can be given after the two thirds of the sentence has been served. After July 2015, the new regulation of this figure provides also for the possibility of getting the conditional release after served the half of the sentence in the case of being the first custody sentence if this is no longer than three years of imprisonment (and provided, of course, the sentenced person fulfils the others general conditions). The legislation provides also for special cases: old persons - persons older than 70 years - and convicts suffering from serious illness. In these cases, conditional release can be granted with fewer or without conditions.

The plan - treatment program or plan - to monitor conditional release will be enforced by the penitentiary social services and the Penitentiary Surveillance Judge (sp. *Juez de Vigilancia Penitenciaria*) as the competent authority to grant the conditional release. This authority can impose one or several 'rules of conduct' (sp. *reglas de conducta*). These rules of conduct are, on one side, the prohibitions and duties that can be imposed in the cases of total suspension of the sentence (above-mentioned), and on the other side, some of the rules referred in art 105 of the SCC which regulate the non-custodial security measures can be imposed: supervised freedom, family custody, deprivation of the right to possess and carry weapons and deprivation of the right to drive motor vehicles and motorcycles.

6.4.3. Security measures not involving deprivation of liberty *(art. 95 and 96 SCC, sp. Medidas de seguridad no privativas de libertad)*

The security measures regulated by the SPP (art. 95 and followings) can be custodial and non-custodial. The non-custodial measures are professional disqualification, expulsion from the country (for foreigners not legally residing in Spain), supervised freedom, family custody (which is the competence of the Penitentiary Surveillance Judge and who can request the collaboration of the Penitentiary Administration, through the penitentiary social departments), deprivation of the right to drive motor vehicles and mopeds and the deprivation of the right to possess and carry weapons (art. 96.3 SCC).

6.4.4. Supervised liberty *(art. 106 SCC, sp. Libertad vigilada)*

The supervised liberty is a non-custodial security measure which can be applicable instead of a custodial penalty (as an alternative to a prison sentence) for persons immune from prosecution (non-criminally responsible) or can be imposed after the implementation of a prison sentence, in case of some serious crimes. This measure consists in the submission of the convict to a judicial control through compliance of any or some of the measures referred to in the art. 106 SCC: the obligation to be always reachable by electronic devices that allow their permanent monitoring, obligation to appear periodically in place that set the judge or court, communicate immediately, within a maximum period and by the means indicated by the judge or court to the effect, each change of the place of residence or of the place or job, the prohibition of approaching the victim, or those of relatives or other persons determined by the judge, the prohibition of contact with the victim, or those of relatives or other persons determined by the judge, the prohibition of being in certain territories, places or establishments, the prohibition of residing in certain places, the prohibition of certain activities that may offer or provide the convict with the opportunity to commit criminal acts of a similar nature, the obligation to participate in educational, occupational, cultural programs of sex education or other similar, the obligation to follow external medical treatment or undergo a regular medical monitoring etc[26].

6.4.5. Open regimen or third degree *(art. 80 and following of SPR, sp. Régimen abierto o tercer grado)*

[26] Some measures are under the competence of the law enforcement authorities and other ones under the competence of the Penitentiary Administration, following a similar distribution that in the case of the suspension of the sentence (art. 83 SCC, above-mentioned).

The open regime is considered as a probation measure by a lot of authors in the literature. There are several modalities of open regimen, and some of them are very similar to the conditional release.
The Spanish Penitentiary legislation establishes a system divided in three 'degrees' or regimes: first degree – dedicated to the most dangerous offenders, is focused on security and restricted movement, second degree – open to the vast majority of prisoners, it is characterized by more freedom of movement inside the prison yard and the availability of many activities- and third degree – or open regime, which falls within the concept of "Probation", as it is understood in the rest of Europe-. Those classified in third degree are sent to the Social Insertion Centres (sp. *Centros de Inserción Social - CIS*), a kind of "open prison" where the convicted persons have a "normalized life". As a general rule, they should spend the night in the Centre, and they do work or training activities (among others) from the centre during the day. Inmates classified in third degree with electronic monitoring have a life regime similar to those conditionally released, coming to the CIS regularly (approximately every 15 days). In the same vein, it is possible to classify an inmate in third degree to be sent to an external therapeutic community, in order to follow a specific treatment program. In this case, the inmate lives in an external centre. The third degree or open regime is under the competence of the Penitentiary Administration.

6.4.6. Community work *(art. 49 SCC, sp. Trabajo en Beneficio de la Comunidad)*

According to the SCC (art. 49), when agreed to by the sentenced person, community service involves the performance of the activities of public utility without remuneration (community services may consist of repair of damage or support or assistance to victims but also may involve the participation of the sentenced person in workshops, or training or rehabilitation programs, including the driver education program, etc.). In Spain, the sentenced person can propose a concrete work placement as community service that will be assessed by the Penitentiary Administration and brought to the attention of penitentiary surveillance judge. This latter authorizes the community work plan, but the execution of this measure in under the competence of the Penitentiary Administration.

6.4.7. Permanent localization or 'Home detention' *(art. 37 SCC, sp. Localización Permanente)*

In Spain, permanent localization is considered a deprivation of liberty penalty, is a 'light penalty', defined as the obligation to remain at home or another location as designated by the judge or the court during the period established in the sentence. This penalty is not called in Spanish 'home detention' because can be implemented in other place different to the 'home. The permanent localization can last up to six months and in cases where the

permanent location is provided as the principal penalty, the judge may agree in their ruling that the penalty of permanent location should take place on Saturdays, Sundays and public holidays in the prison nearest to the domicile of the convict. Excluding this last case, this measure is under the competence of the law enforcement authorities and, normally, in practice, is implemented in the residence of the convict.

7 Obstacles and difficulties

7. Obstacles and difficulties

As mentioned in the introduction section, as part of the PONT Project, a survey for identifying the training gap around the use of Framework Decisions 829/2009 and 947/2008 was launched in April 2019. The questionnaire was placed on the EU Survey Platform and included 28 questions. Fourteen questions referred to the level of knowledge, the previous experience, and the difficulties around the implementation of mentioned FDs, both with the competent authority of the issuing State and the executing State. Competent authorities from all 27 EU Member States were invited to complete this online questionnaire. According to the survey results, the main obstacles identified were:

- finding the competent authority in the executing State,
- filling out the certificate
- adaptation of sentence
- dealing with the medical or therapeutical treatment
- conducting the ‚rehabilitation test'

In this section we will discuss all of these, each time trying to put forward some possible solutions. However, we would like to stress that these solutions need to be considered in the context of each case and not applied automatically to all cases.

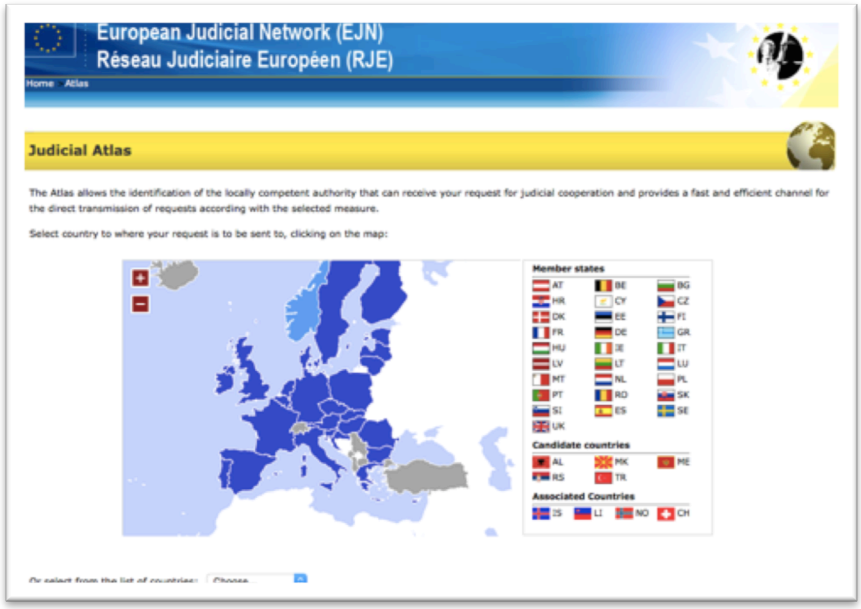
7.1. Finding the competent authorities in the Executing State

In order to find the competent authorities involved in the process, the best option is to use the European Judicial Network website (EJN) (https://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx). Certainly, some countries have developed their own tools, such as 'Prontuario'[27] in Spain.

Therefore, as explained, the most-used tool to find the competent authority in a Member State to send a certificate according to the FD 2008/947 or 2009/829, and any other legal cooperation instrument, is the web page created by the EJN, that establishes a network of all the national contact points, in order to facilitate the judicial cooperation in criminal matters. We are therefore beginning with detailed instructions on how to use this as the first stop: https://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx

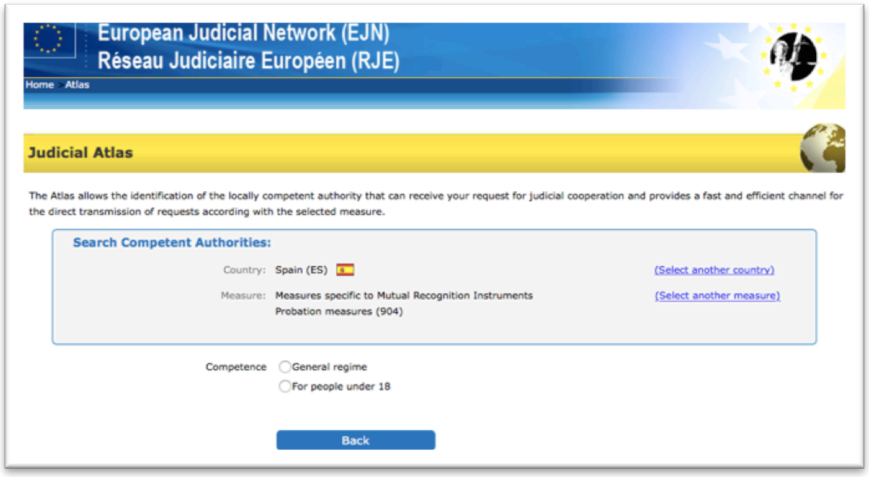
[27] This website requires access keys: http://www.prontuario.org/portal/site/prontuario

It is necessary to click on Atlas, that appears at the bottom of the page on the left-hand edge and allows the identification of the competent authority that can receive your request for judicial cooperation. Then, select the country you want to send your request to, clicking on the map:

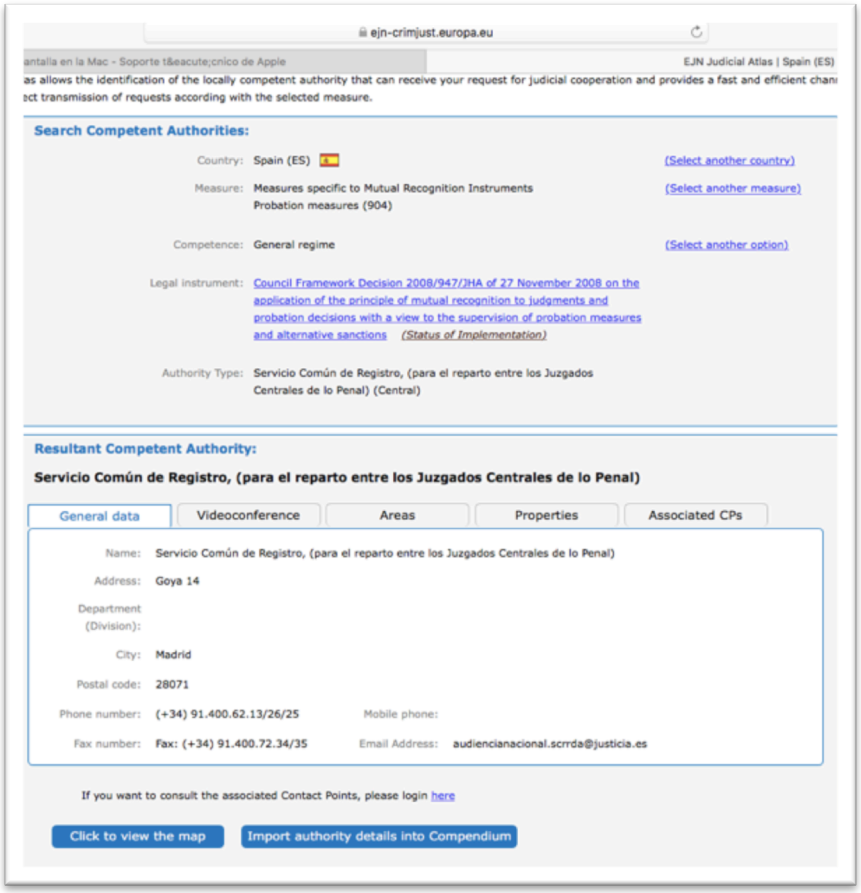


After selecting the country you need, for example Spain, all the measures available for this Member State for which you are seeking assistance will appear:

At this moment, you only have to select the appropriate measure:



You will have access to all the contact information about the authorities you need:



In the case of doubt, or if some information is not available, there is always the possibility to contact the 'Administrator'. Clicking a button available on the webpage, we can always 'contact EJN Secretariat', and filling out a short form.

Even if the competent authority that you have contacted for the purpose of transferring the certificate is not the right one in your case, that competent authority has the obligation to forward the certificate to the appropriate authority and inform you about this.

7.2. Filling out the certificate

In order to structure the information and facilitate the communication between the Member States, both framework decisions are making use of the certificates. In short, these certificates are pre-established forms that require the competent authority in the issuing State to provide structured information about the natural person subject to the supervision measure, probation decision or the judgment, the authorities involved from both issuing and executing State, the content of the supervision measure, probation decision or alternative sanction and so on. Previous training events and the training gap analysis suggest that some competent authorities find it difficult to fill out this document. This is the reason we have

included this section in the training manual. As each certificate has some particular sections, we will deal with each of them separately, focusing more on the parts that could be problematic for the competent authorities.

7.2.1. Filling out the certificate under the FD 947/2008

The certificate provided by art. 6 of the FD 947/2008 has eleven sections: a) information about the issuing and executing State; b) information about the court that issued the judgment; c) information about the authority that issued the probation decision; d) information about the competent authority for supervising the probation measure or the alternative sanction; e) information about the natural person in respect of whom the judgment or the probation decision has been issued; f) information regarding the executing Member State where the certificate is transferred; g) indications regarding the judgment or the probation decision; h) information regarding the status of the judgment; i) indications regarding the nature of the sentence imposed by the judgment or the probation decision; j) indications regarding the duration and the nature of the probation measures or alternative sanction(s); k) other relevant circumstances.

Most of these sections are quite detailed and the questions are straightforward. However, some sections give room for different interpretations and therefore may cause some anxiety. These sections seem to be:

- section f) information about the executing State where the certificate will be forwarded,
- section g) indications regarding the judgement or the probation decision,
- section h) information regarding the status of the judgment,
- section i) indications regarding the nature of the sentence impose by the judgment or the probation decision and
- section j) indications regarding the duration and nature of the probation measure(s) or alternative sanction(s).

Section f) information about the executing State where the certificate will be forwarded

This section covers the reasons the certificate is forwarded:

- the sentenced person has his/her lawful and ordinary residence in the executing State and has returned or wants to return to the that State;
- the sentenced person has moved or intends to move to the executing State for the following reasons:
  a) the sentenced person has been granted an employment contract in the executing State,

b) the sentenced person is a family member of a lawful and ordinary resident person of the executing state,
c) the sentenced person intends to follow a study or training in the executing State,
d) other reason (please specify).

At least three issues were raised by some competent authorities in relation to this section of the certificate: ***how to determine if a person is a lawful and ordinary resident of the executing State; how to forward the certificate to another State where the sentenced person is not a resident, how to prove that the sentenced person intends to return to the executing State***.

In most cases, the residency of the sentenced person is quite straightforward: it can be determined based on the address in the passport, or on the person's statement; it can be determined with the assistance of the authorities in the executing State etc. If unclear, the competent authority of the issuing State may contact the competent authority in the executing State asking for information about the residency of the sentenced person. The competent authority in the executing State can verify this information by asking for official data from the police or other authorities in charge with this type of data.

As there is no normative decision regarding the meaning of residency, the only guideline that can be used so far is the Court of Justice of the European Union (CJEU) judgement in the case of Kozlowski (case C-66/08, 2008)[28] concerning the European Arrest Warrant (EAW) where the CJEU acknowledged that the formal acquisition of residence rights pursuant to domestic law does not exhaust the scope of the notion of residence, which should also include substantial and stable de facto connection with the host State:

> *'overall assessment of various objective factors characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State'*

Although the judgment referred to the EAW the same approach should be followed in relation to other judicial cooperation mechanisms (for more, see Montaldo, 2019).

How to decide on the lawful and ordinary residence?

In case of unclear residence of the sentenced person, the lawful and ordinary residence can be decided after proper consultation between the competent authorities from both States – issuing and executing – and should take into

[28] The same interpretation can be found also in the Wolzenburg case (case C-123/08, 2009)

account not only the residence rights but also the substantial and stable connections in the host State (in terms of family, employment or education).

How to forward the certificate to a Member State that is not the one where the sentenced person is lawful and ordinary resident?

It is possible to forward the certificate to a Member State that is not the one where the person has the residence. In this case the following conditions need to be fulfilled:

a) the Member State to declare according to Art. 5(4) that is prepared to recognize probation decisions and alternative sanctions for sentenced person irrespective of whether the person has his/her domicile or permanent residence in the executing State. This information can be obtained from the European Judicial Network, via this link, under the column Country Notification: https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?l=EN&CategoryId=37

Example of the Austrian notification:
III. Article 5(4):
Austria declares that monitoring of supervision measures or alternative sanctions by the competent Austrian court can be approved irrespective of whether the sentenced person has their domicile or permanent residence in Austria, if because of specific circumstances ties exist between the sentenced person and Austria of such intensity that it can be assumed that monitoring in Austria will help facilitate the social rehabilitation and reintegration of the sentenced person.

b) The sentenced person to prove the ties with the executing State in terms of family relations, employment or education.

c) The sentence person to wish to return to that particular Member State.

d) Although it is not *expresis verbis* mentioned in the FD text, the intention of the sentenced person to return in the executing State should be gathered either before the competent authority of the issuing State or through a statement of the sentenced person. The way the intention of the sentenced person was gathered should be mentioned in the certificate under point k) Other circumstances relevant to the case.

Practical tip

As suggested by some competent authorities, it may be useful to use a form where the person's consent is collected in a direct and explicit manner.

Section g) indications regarding the judgement or the probation decision

This section is essential for the executing State competent authority to establish whether the offence(s) behind the judgment or the probation decision is also punishable in the executing State (special attention to drug related offences, motor offences and forest related offences). The Member States are encouraged to proceed with recognition and supervision without checking for double criminality for 32 categories of offences that are mentioned in the certificate. The main reason behind this option is that for most of these offences the EU adopted framework decisions for approximation and therefore there are in place already minimum rules concerning the constituent elements of crime and penalties[29].

However, the Member States may, by a declaration notified to the General Secretariat of the Council, declare that they will verify the double criminality for all offences, including these 32 categories of offences.

It is, therefore, important that the offence(s) that are the basis of the judgment or probation decision are very well described in terms of facts, description of the circumstances, time and place and also the nature of the involvement of the sentenced person.

Practical tip

In most cases, this information is available in the judgement or the probation decision text.

The nature and the legal classification of the offence(s) and also the statutory provisions on the bases of the judgement should be also mentioned.

[29] For terrorism, EU has adopted Framework decision 2002/475/JHA on combating terrorism as amended by the Framework Decision 2008/919/JHA.

Practical tip
Penal codes from the EU member states are usually available in different languages on the European Judicial Network website under the heading – **Info about national systems**.

Section h) indications regarding the status of the judgement

It is important to note that the FD 947/2008 and its certificate were amended by the Council **Framework Decision 2009/299/JHA** on amending different framework decisions among which FD 947/2008 thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absentia of the person concerned at the trial.
According to this amendment, in case the person did not appear in person at the trial resulting in the decision, at least one of the following conditions should be confirmed:

- the person was summoned in person on … (day/month/year) and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial;

or

- being aware of the scheduled trial the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

or

- the person was served with the decision on … (day/month/year) and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and

or

- the person expressly stated that he or she does not contest this decision,

or

- the person did not request a retrial or appeal within the applicable time frame

Practical tip
According to CJEU case C-270/17 PPU Tupikas, the concept of 'trial resulting in the decision' refers to the proceedings that the court made a final ruling on the guilt and imposed a penalty. This is the proceedings where the persons should be present or summoned in a rigorous way.

In case of trial in absentia, at least one of these boxes has to be ticked and details must be provided. If this is not the case, the forwarding of the certificate is not possible.

Reflection point
It is expected that this provision will create some difficulties for some Member States, which have a summary procedure for summoning the person. For example, some executing States might find that posting the summons on the front door of the court is not satisfactory notice.

In case 3.1b, 3.2 or 3.3 were ticked, the competent authority is expected to provide information on how the relevant conditions has been met.

Section i) indications regarding the nature of the sentence impose by the judgment or the probation decision

This section has two main parts: one regarding the nature of the sentence and one regarding the additional information.
In the first part, the competent authority is expected to tick the box that corresponds to the nature of the judgement or the probation decision. Here there are four options:

a) a suspended sentence
b) a conditional sentence
c) an alternative sanction
d) conditional release

Based on the existing limited practice, it seems that when transferring the alternative sanction some competent authorities experience some difficulties, especially when they are not regulated as such. For instance, in countries like Belgium or Spain it is possible for the judge to substitute one short prison sentence with electronic monitoring or community service. In case of revocation, it is clear what the prison sentence is that could be activated. In other countries, such as Romania or Germany, this possibility of substitution does not exist. Therefore, in case of revocation it is not clear what the options are.

In this case, it is advisable that the issuing State retains the competence in case of revocation.

The additional information is particularly important for deciding the length of supervision and also in determining the course of action in case of breach.
When deciding the length of supervision is important to pay close attention to the period of time spent in pre-trial detention. This is mainly because this period of time needs to be deducted from the whole prison term in case of conditional release.

In case of suspended sentence, conditional sentence and conditional release it is important to be clear that is the duration of the prison term that is suspended and what is the duration of the supervision (the period of suspension). This information is important in particular in case of breach.

The last item of this section deals with what is the deprivation of liberty to be served in case of revocation. There are countries where, in case of revocation, the whole initial prison sentence is activated while there are countries that take into account the time spent under suspended sentence. It is important to be as rigorous as possible with this information in order to assist the executing State to make the best decision in case of revocation.

Section j) Indications regarding the duration and nature of the probation measure(s) or alternative sanction(s)

In some countries, the period of supervision is not the same with the period of probation.

Example:
In Romania the unspent prison term can be three years, but the supervision of the measures can last only 1/3 of this term, therefore one year. In this case, the probation period is three years, but the effective supervision can last only one year.

Furthermore, some measures or obligations may be supervised for the whole probation period, while others have to be fulfilled within a certain period of time – usually in the first year of the supervision.

Example:
In Romania, the measures attached to conditional release shall be observed in the first 1/3 of the probation period. However, the judge may impose also some obligations – such as 'not to visit certain places' – that have to be observed for the whole probation period.

This information is very important for the executing State when recognizing the sentence in order to ensure that the adaptation – if any – will not result into worsening the situation of the person.

At point four, the competent authority is required to tick the probation measures or alternative sanctions which were imposed upon the person. These probation measures or alternative sanctions are the same as the ones provided at art. 4 of the FD, therefore are those measures or alternative sanctions that all Member States should be ready to supervise. Apart from them, each Member State may notify the General Secretariat of the Council that they are ready to supervise also other measures. In most cases, the added measures or alternative sanctions are related to electronic monitoring.

Practical tip
If the competent authority intends to transfer a probation measure or alternative sanction other than the ones explicitly mentioned at art. 4 of the FD, it is recommended that that they first check on the European Judicial Network website – under the Notification heading - whether the executing State is ready to supervise that particular measure or alternative sanction (https://www.ejn-crimjust.europa.eu/ejn/libcategories/EN/37/-1/-1/-1)

Due to the fact that some probation measures and alternative sanctions are described in different words in different countries, it is required at point 5 to provide

a detailed description of what the measures or the alternative sanctions mean in the issuing State. This description will help the executing State identify the closest measure or alternative sanction to the one imposed in the issuing State.

Practical tip

Recent jurisprudence showed that there are some misunderstandings around the obligation not to leave the territory of the executing State. In some countries this is interpreted as not to leave the territory of a certain localities. This might be seen as a more severe restriction than the one imposed initially by the issuing State and therefore should be avoided.

At point 6, the Certificate suggests that probation reports should be made available to the executing State. In particular, pre-sentence reports or initial assessments or supervision plans may be very useful for the probation agencies in the executing State, so as not to start the supervision work from scratch. The same applies to any psychiatric report or expertise on the mental health state of the sentenced person. In case these reports are available, the competent authority is asked to mention which language(s) these reports are accessible in.

7.2.2. Filling out the Certificate for the FD 829/2009

Similarly to the Certificate for the FD 947/2008, the Certificate for the FD 829/2009 has eight sections: a) issuing State, b) Authority which issued the decision on supervision measure, c) the Authority to be contacted if any additional information is needed, d) Information regarding the natural person in respect of whom the decision on supervision measures has been issued, e) Information regarding the Member State to which the decision on supervision measure, together with the certificate are being forwarded, f) Indications regarding the decision on supervision measures, g) Indications regarding the duration and nature of the supervision measure(s), h) Other circumstances relevant to the case, including specific reasons for the imposition of the supervision measure (s)(optional information).

As the jurisprudence in the application of FD 829/2009 is still limited, it is difficult to assert what are the difficulties in filling out this Certificate.
Most of the observations made in the previous section regarding the Certificate for the FD 947/2008 are also valid for the Certificate for FD 829/2009.

However, section g) Indications regarding the duration and nature of the supervision measure(s) may require special attention. If in the case of FD 947/2008 the general rule is that the executing State assumes the subsequent decisions, in the case of FD 829/2009 the subsequent decisions are made by the issuing State (e.g. renewal, revocation). The first part of this section helps the executing State anticipate the length of the supervision measure and whether it is possible to be renewed.
The rest of the section deals with the supervision measures that all Member States should be able to supervise and also with the ones that Member States declared are ready to take over.

7.3. Adaptation

As recognition of the wide variety of legal systems and institutions involved in the criminal justice systems across European Union, both framework decisions provide for the possibility for adapting the measure or the sanction.
However, the adaptation has to comply with some conditions:

- the result of the adaptation shall be as close as possible to the measure imposed in the issuing State,
- the adaptation shall not be more severe or longer than the supervision measure which was originally imposed.

Once the competent authority in the executing State has adapted the measure or the sanction, it has to inform the competent authority of the issuing State. If the competent authority of the issuing State does not agree with the adaptation, it may decide to withdraw the certificate provided that the supervision in the executing State has not begun yet. In such case, the competent authority in the issuing State has to inform the competent authority in the executing State as soon as possible but no later than 10 days from the receipt of the information.

Apart from these two conditions, each framework decision has some particular features regarding adaptation that we will explore in the following sub-sections.

7.3.1. Adaptation of the probation measure or alternative sanction

The probation measures and alternative sanctions can be adapted both for the nature and duration. If the nature or duration of the probation measure or alternative sanction in the executing State is not compatible to the one imposed by the issuing State, the competent authority of the executing State may adapt it in line with the national legislation to equivalent offences.

Example:
VA was conditionally released in Latvia with several obligations. One of them was to reside in a halfway house. VA expressed the desire to come back to Romania where his wife and children live. This obligation is not available by the Romanian legislation for conditionally released prisoners. As this measure was imposed by the court in Latvia due to the absence of a domicile in Latvia, the Romanian competent authority recognized all the other obligations except the residing in a halfway house. VA will live in the same house as his family.

The same applies also for the duration of the probation measure or the alternative sanction or probation period. If the duration exceeds the one in the executing State, the competent authority in the executing State may adapt the duration to the maximum provided by the national law.

Example:
According to the Latvian legislation, VA has to comply with six obligations for two years, as this is the time of the probation period in Latvia. According to the Romanian law, VA can be under conditional release for two years but has to comply with the obligations only for 1/3 of the probation period. Therefore, the competent authority in Romania recognized the conditional release for two years but accepted to supervise only for 7.2 months. As the competent authority of the issuing State agreed to that, this was the final probation period decided for VA.

7.3.2. Adaptation of the supervision measure

The supervision measure may be adapted only in its nature. If the nature of the supervision measure is incompatible with the law in the executing State, the competent authority in that State may adapt it in line with the national legislation for equivalent offence.

Example:
VA is a Romanian citizen who committed a car accident in Spain while being under the influence of alcohol. He wants to return Romania and

attend the trial from there. One of the measures imposed by the Spanish judge is withdrawal of the driving licence. This measure does not exist as such in the Romanian legislation. Therefore, the Romanian competent authority adapts it for judicial control with an extra obligation 'not to drive a vehicle' during this preventive measure.

As the duration and all the other subsequent decisions are made by the issuing State, there is no need to adapt them by the executing State.

7.4. Difficulties in relation to medical treatment

Among the various challenges faced by the implementation of the FDs 947/2008 and, more rarely, 829/2009, we find the implementation of the medical treatment, as an alternative, probation or supervision measure. Certainly, this issue is a case more often related to the implementation of the FD 947/2008 but nothing prevents that a medical treatment could be imposed as alternative to a pre-trial detention.

In fact, among the type of measures that can be imposed as probation measure (art. 4 FD 947/2008) or as supervision measure (art. 8 FD 829), it is enshrined the obligation to undergo therapeutic treatment or treatment for addiction (see above); nevertheless, in the FD 829/2009, as supervision measure, this measure of therapeutic treatment or treatment for addiction is regulated as "discretional": the acceptance of recognition of this measure is discretional for EU countries, since is not included in the set of measures to be recognized obligatory by Member States[30].

Indeed, as probation or alternative measure, in the scope of work of the FD 947/2008, the most of the EU Member states cover in their domestic legislations the "medical treatment" as a measure. Normally, this measure is contemplated in the legislations in relation to addiction treatments but the way to regulate this measure can vary greatly from one State to another.

Concretely, in the case of FD 947/2008 the impossibility to implement a medical treatment is considered a ground of refusal: the competent authority of the executing State may indeed refuse to recognize the judgment or the probation decision and take responsibility of the supervision if the judgment or probation measure orders medical treatment that the executing State cannot provide.

[30] According to the art. 8.2 of the FD 829 "each Member State shall notify the General Secretariat of the Council, when transposing this Framework Decision or at a later stage, which supervision measures, apart from those referred to in paragraph 1, it is prepared to monitor", and among these "discretional" measures is included the obligation to undergo therapeutic treatment or treatment for addiction.

Practical tip

The first step to forward a certificate that involves medical treatment measure is to consult the competent authority in the executing State (art. 15 FD 947/2008 and 22 FD 829/2009). It is recommended to verify whether this kind of measure is included in the executing State law, especially in the case of supervision measures -FD 829/2009 - and to check how it is regulated, in order to know beforehand whether the measure can be monitored by the executing Member State

In addition to the obstacles related to the existence or not of this measure in the executing State legislation and the terms under which is regulated, medical treatment has the difficulty that can involve a deprivation of liberty or to be a "pure" probation measure. In the 51st Plenary Meeting of EJN[31], a question related to the medical treatment as a custody or probation measure was asked to all the contact points of the member estates:

Example:

Y, who is a permanent resident of your Member State, has been sentenced to a custodial sentence of two years for drug trafficking by a court of Member State A. He is a drug addict and has primarily committed the crime to fund his addiction. According to the national law of Member State A, it is possible under those circumstances to suspend the execution of the sentence if Y agrees to subject himself to a health-related measure (drug rehabilitation). Y is examined by an expert who reaches the conclusion that it would be sufficient to i. treat Y as an out-patient / ii. hospitalize Y.

Y agrees to undergo this health-related measure. The court of Member State A suspends the sentence for a period of two years on the premise that Y takes part in the health-related measure suggested by the consulted expert. Member State A requests your Member State to enforce the measure. a. Upon request by Member State A, your Member State would enforce ad i. the treatment of Y as an out-patient / ad ii. the hospitalization of Y on the basis of:

[31] Largely explained in the PONT literature review: https://probationobservatory.eu/wp-content/uploads/2019/06/PONT-Literature-review-final-PDF-1.pdf (p. 11 and seq.)

- *FD 2008/947/JHA*
- *FD 2008/909/JHA*
- *Not enforced*

Most contact points of the Member states were able to reply to this question, and, in conclusion, the prevalent answer given by Member States was that if the convict enforces the medical treatment as an out- patient, most of the member states would use the FD 947/2008 (3/4 of the respondents), while, if the measure is enforced in a hospital - consequently with a kind of deprivation of liberty - less than half would enforce hospitalization under FD 947/2008 (only 3/10 would enforce it on the basis of FD 909).

According to this data, the majority of the Member States contact points saw both the medical treatment as an out-patient and the hospitalization as falling under the scope of FD 947/2008.

As seen, this is a complex issue and there is not universal right answer, but, when the medical treatment is enforced on an outpatient basis the tool to use is usually FD 947/2008. When the medical treatment is enforced into a hospital - involves hospitalization - some states consider using FD 947/2008, others FD 909/2008.

The contact points of some countries (as Denmark, Spain, Romania, Poland, Germany, Slovenia, Slovakia, Check Republic, Estonia or France) had an intermediate point of view (apparently more in line with the scope of application of the concerned FDs): the medical treatment enforced on an outpatient basis would fall within the scope of the FD 947/2008, while the hospitalization - as a measure involving deprivation of liberty - would fall within the scope of the FD 909/2008.

Among the different opinions related to this medical issue as a probation measure (outpatient basis measure) or as a measure involving deprivation of liberty (hospitalization) one of the question have kept our attention. A contact point form Italy explained that they could not enforce the hospitalization, but would apply FD 947/2008 for treatment as an out-patient, since in the case presented above the sentence is suspended, and therefore the enforcement would not be possible under FD 909/2008.

Certainly, the suspension of the sentence is normally considered a probation measure, but if the suspension involves the application of a custody measure -a measure encompassing a deprivation of liberty- we are not anymore face to a supervision measure or alternative-to-custody measure. This is rather a question of legal terminology than substance.

Practical dilemma

The same applies in case of electronic monitoring with extended curfew hours and other monitoring obligations.

In this case the distinction between deprivation of liberty and restriction of liberty is very important. In order to guide the decision making process on whether to use FD 947/2008 or FD 909/2008, the competent authority may use the case-law of ECJ – C-294/16 PPU JZ, that stipulates that detention is "covering not only imprisonment but also any measure or set of measures imposed on the person concerned which, on account of the type, duration, effects and manner of implementation of the measure(s) in question deprive the person concerned of his liberty in a way that is comparable to imprisonment."

So, different situations may occur in relation to the medical treatment and different solutions could be given on a case-by-case basis:

- The medical treatment can be outpatient or to involve the hospitalization of the sentenced person.
- The medical treatment can be a measure directly imposed by the judge of the Court (as a main penalty) - probation or custody sanction - or can be an alternative sanction, a measure substituting the main sanction (f- ex. a prison sentence).
- The medical treatment can be imposed as an obligation in the case of suspension of the sentence.
- The medical treatment - as outpatient measure or as a hospitalization measure - can be imposed as alternative to a pre-trail detention - alternative to remand prison -, but currently, it is the most unusual case.

All these options can receive different solutions, and all of them could be debatable, but according to the scope of application of the mentioned FDs, it looks to be clear than when a penalty or measure involves a deprivation of liberty the adequate tool to be used is the FD 909/2008[32]. In the cases when no deprivation of liberty measure is imposed, it would be then necessary to look if the measure is imposed as an alternative to a pre-trail detention, in which case it would be clear that the

[32] See explanatory statements nº 3 of the FD 947/2008.

applicable FD is the FD 829/2009, falling the rest of the cases into the scope of the FD 947/2008.

Reflection point

In accordance with the text of the FD 947/2008, FD 909/2008 should be used in case of custodial sentences or measures involving deprivation of liberty, and FD 947/2008 should be used for non-custodial sentence involving the supervision of probation measures or alternative sanctions. So, the deprivation of liberty should be the relevant point to take into account in order to decide correctly which tool to use. In defining detention, the case C-294/16 PPU-JZ may be helpful.

One contact point from the Netherlands mentioned specific problems with the medical treatment as executing state: in finding the right treatment or clinic, in not having the reports of experts and sometimes the person was already in a clinic before receiving the certificate. The same contact point revealed also problems as issuing state: necessary treatment cannot start because of delays in recognition.

Practical tip

*As issuing state, in case of medical treatment, reports of experts justifying the treatment can be sent together with the certificate. In the text of the certificate of the FD 947 (section *k*) are included “other circumstances relevant to the case”; among them, it is mentioned as optional information ”specific reasons for the imposition of the probation measure or alternative sanction”. This option is also available in the section *h* of the FD 829´ certificate.

*On the other hand, as executing state, if the reports of experts are considered important, they can be requested to the competent authority of the issuing state.

No unique solution can be given to the problems related to the needs of starting the medical treatment immediately or related to the eventual transfer of the person if the medical treatment has already started in the issuing state in order of ensuring the continuity in the treatment. An individual assessment of the concrete situation should be made in order to elucidate what is better for the person subject to the measure, in the light of the purpose of the social rehabilitation.

In addition, it is necessary to take into account that in some countries, medical treatment (drug addiction treatment, psychiatry treatment etc.) is free of charge, is a public service provided by the government; but some medical treatments can be private (not provided by the state or the community) and their costs fall on the user. In some cases, a specialized psychiatric facility may be necessary, and not all the countries can provide for this kind of treatment.

Practical tip

All these question should be treated in advance, in the previous consultations: it is recommended not only to ask for the existence of the medical treatment in the legislation of the executing State and the conditions under which it is regulated, but also about the kind of treatments - and clinics - available and the eventual costs (if it is a public service or should be paid by the sentence persons). This data should be provided to the person subject to the measure in order to take an informed decision.

Finally, even if considered a ground of refusal, if the executing State cannot provide a medical treatment imposed as a measure in the issuing State, either because is not regulated in its legislation or because is regulated in a different way, before of refusing the implementation of the measure it would be recommendable to propose another option.

According to the opinion given for some contact points in the EJN 51st Plenary meeting, because the sentences vary much between Member States, it is often not possible or practicable to carry out the measures. Therefore, the sentence has to be adapted in every case in both **nature and length**.

Practical tip

Adaptation is foreseen precisely for these cases in both FDs 947/2008 and FD 829/2009: when implementation of the medical treatment is no possible in the executing State - because this measure is not regulated in its legislation or it is but in another way - adaptation can be proposed by the competent authorities of the executing State; another kind of measure provided for under domestic legislation can be proposed (adaptation of the nature of the measure) or the same measure with another period of time (adaptation of the length of the measure). See the adaptation section of this e-manual for more information on the topic.

In summary, medical treatment as a probation measure, alternative sanction or supervision measure:

- In the most of the EU legal systems, medical treatment measures normally involve addiction treatment measures and psychiatric measures.
- It is not included in the obligatory measures to be monitored by member states in the FD 829/2009 -only in the FD 947/2008.
- The difficulties in its implementation can be considered a ground for refusal in the framework of the FD 947/2008.
- It is often regulated in different ways by each member states, therefore, previous consultations are highly recommended.
- Questions related to the cost, time and conditions of the medical treatment should be asked in consultation prior to filling out the form, to clarify theses aspects, to allow the person to take an informed decision and to save time (in order to avoid future obstacles or misunderstandings).
- Rather than refusing to implement a measure, it could be adapted. This would provide a solution in the case of incompatibility between the legislations of the issuing and executing state.
- Equivalence of the measures, expenditure of time and costs are the most important obstacles found in the transmission of a sentence or measure ordering a medical treatment.

7.5. Difficulties in relation to assessing the reintegration prospects

One of the aims of the FD 947/2008 is to 'enhance the prospects of the sentenced person's being reintegrated into society, by enabling that person to preserve family, linguistic, cultural and other ties, but also to improve monitoring of compliance with probation measures and alternative sanctions, with a view to preventing recidivism, thus paying due regard to the protection of victims and general public'. At article 1, the FD stresses again that the aim of the FD is to 'facilitate the social rehabilitation of sentenced persons …'

The same ideas are reiterated in recital 14 of the FD 947/2008 when describing the hypnotises of transferring the sentenced person to another Member State than that where the sentenced person is residing:

> ' … with the view to social rehabilitation, where the sentenced person, without losing his/her right of residence, intends to move to another Member State because he/she is granted an employment contract, if he/she is a family member of a lawful and ordinary resident person of that Member State, or if he/she intends to follow a study or training in that Member State, in accordance with the Community law.'

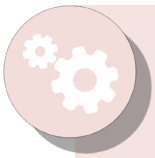
Based on these statements, it seems that the main dimensions of the concept social rehabilitation or social reintegration are:

- family ties,
- linguistic and cultural ties,
- residence rights,
- employment
- education and training
- compliance to the probation supervision.

However, the text of FD 947/2008 keeps the concept of social reintegration open by stressing that 'other ties' might be also important.

Based strictly on this text, when conducting the evaluation of a person's social reintegration prospects (the rehabilitation test), the competent authority could look their family ties (where are the closest family members living), employment prospects, education and training perspectives and residential rights. If these dimensions are better covered in the executing State than in the issuing State, the obvious conclusion is that the aims of the FD are better served in the executing State. However, this analysis should be conducted on a case-by-case bases, as circumstances are different from one case to another.

This point is illustrated in Annex 3 where different vignettes are presented.



Reflection point

According to some scholars, the way the FD text defines social reintegration or rehabilitation is highly imprecise and limited. According to De Wree et al (2009), the definition loses sight of the importance of the psychosocial dimensions of the rehabilitation process. McWilliams and Pease (1990) suggest that rehabilitation means restoration of the individual to their original rights ('rétablir dans ses droits'). Therefore, rehabilitation is not only about personal reform but also about how effective and quickly society restores the civic rights of that person. The desistance literature is replete with evidence that social bonds are not always supporting of desistance (Robinson, 2007). Take, for instance, a drug user may need to break the bonds and create new relationships that are more supporting of desistance. A thorough analysis of social reintegration prospects may take into account also these dimensions on a case-by-case bases.

8 References

8. References

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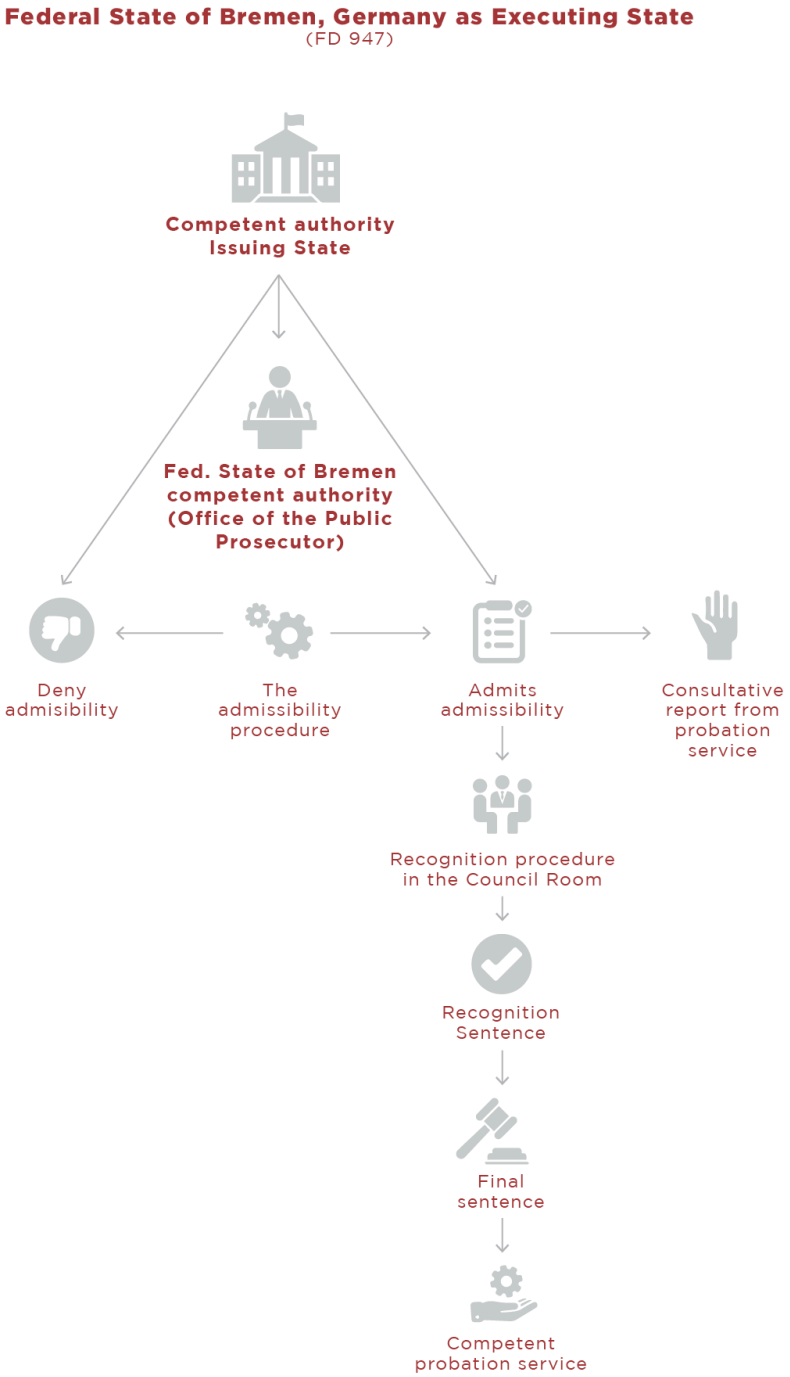
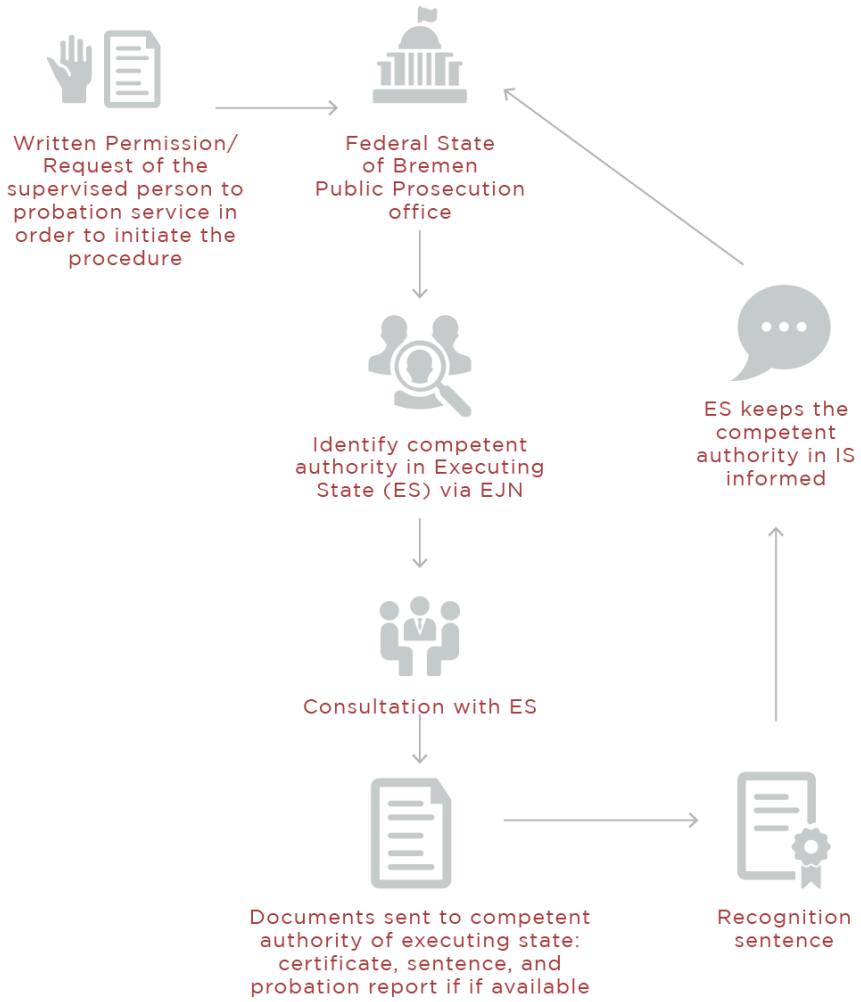
9 Annexes

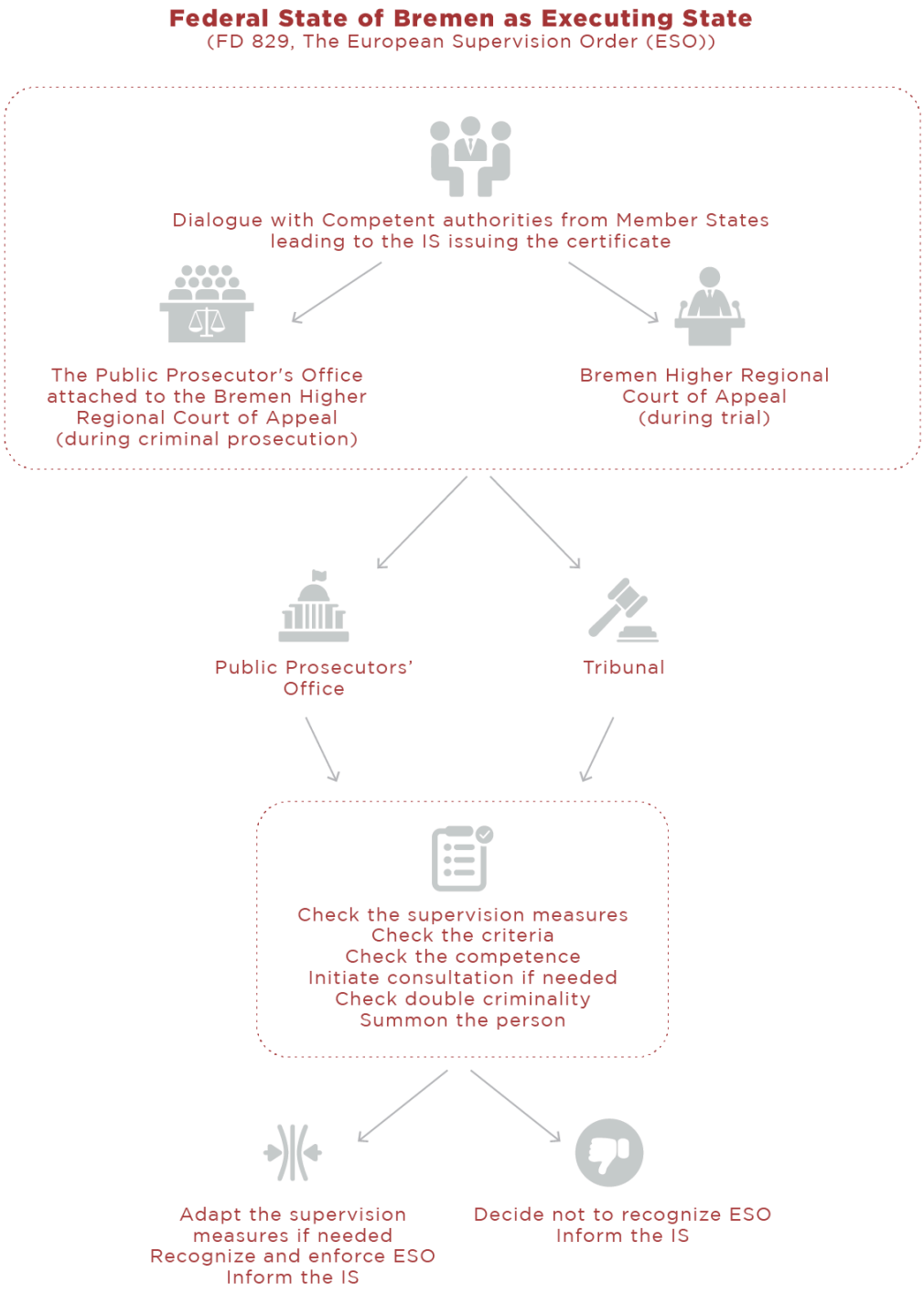
9. Annexes

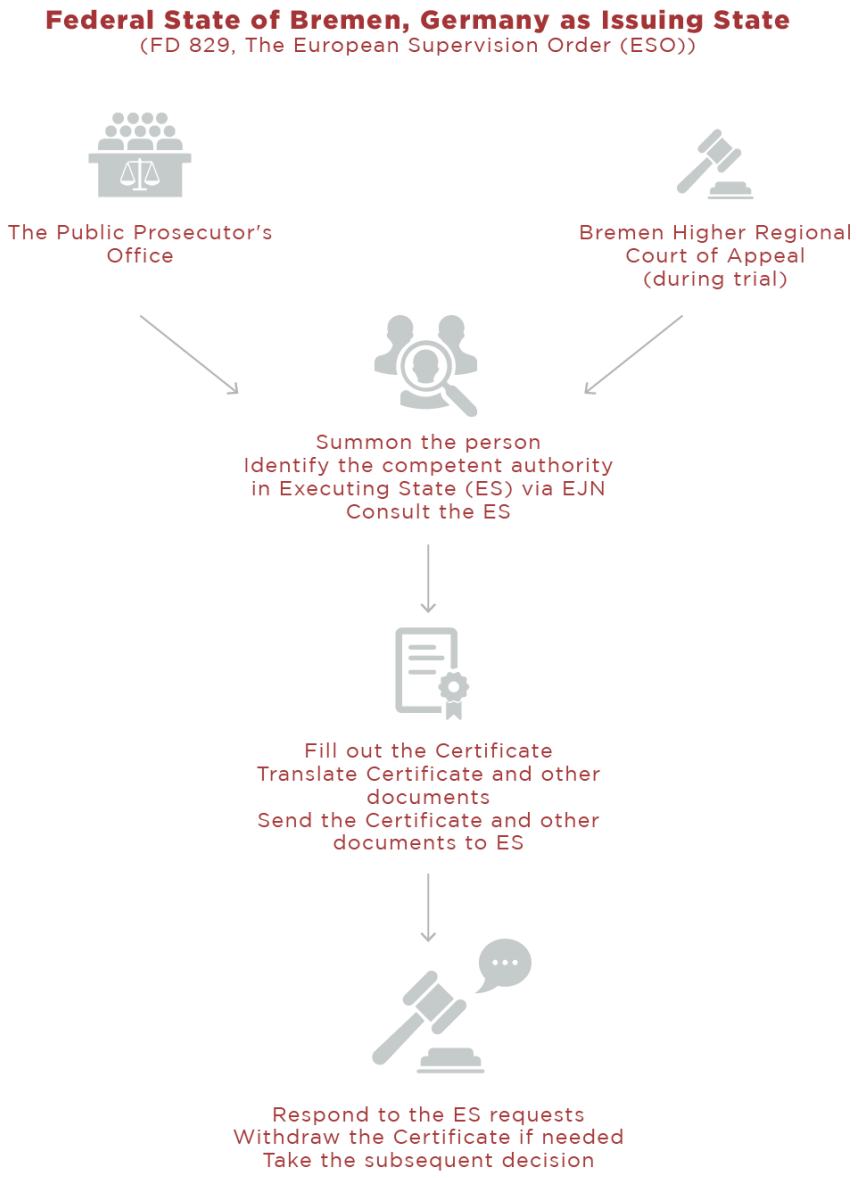
9.1. Annex 1 – Decision making flowcharts

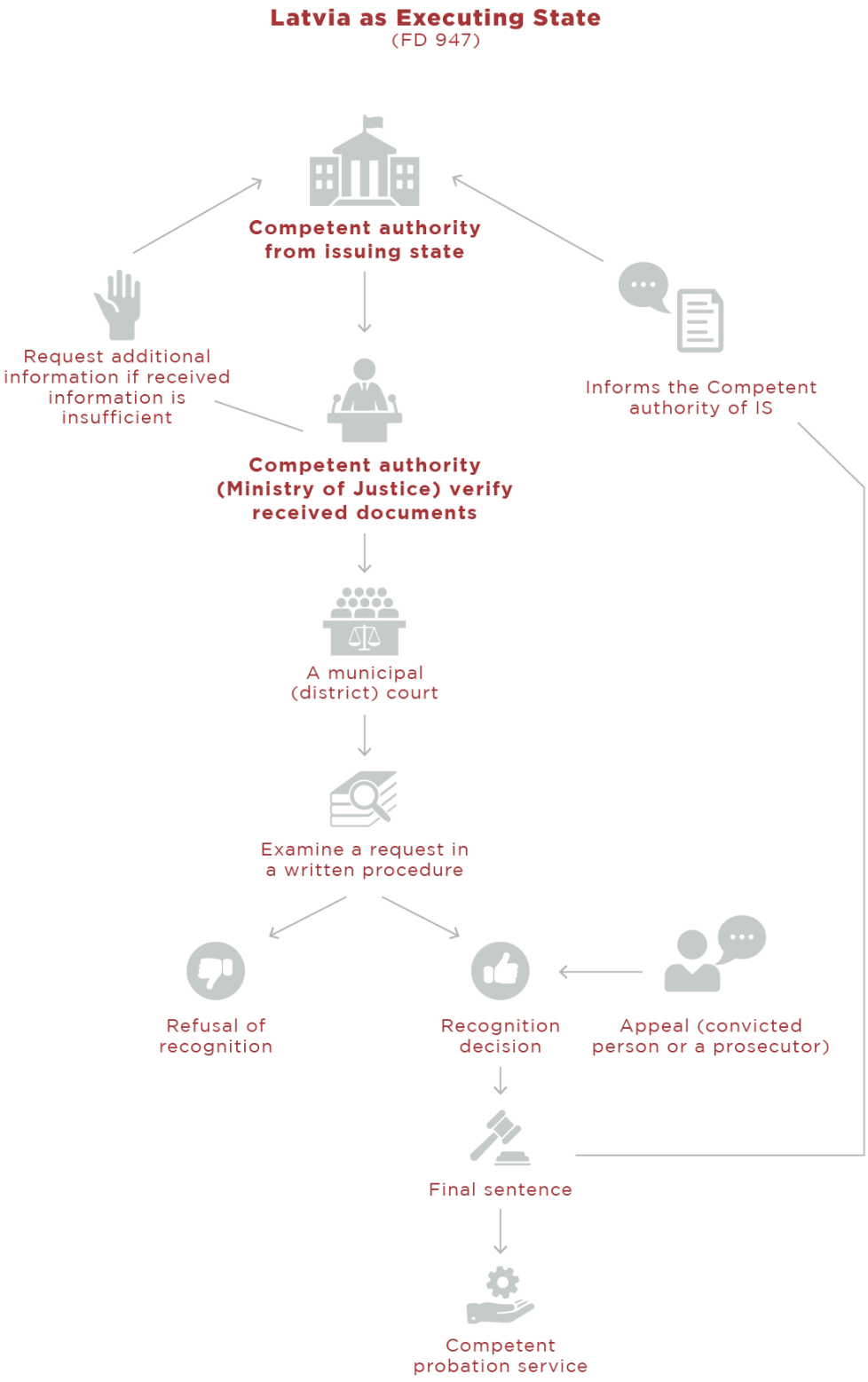


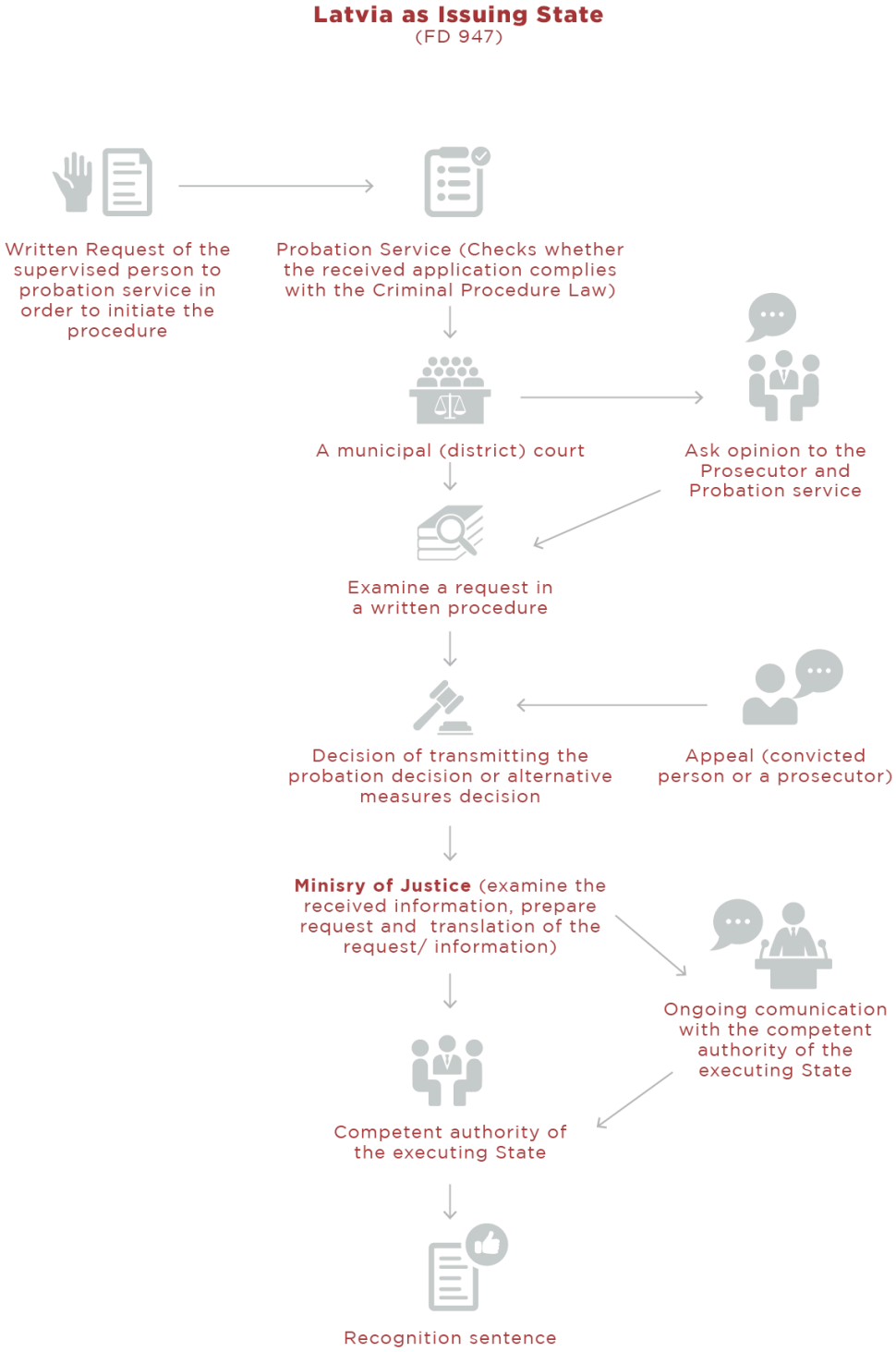
Federal State of Bremen, Germany as Issuing State
(FD 947)

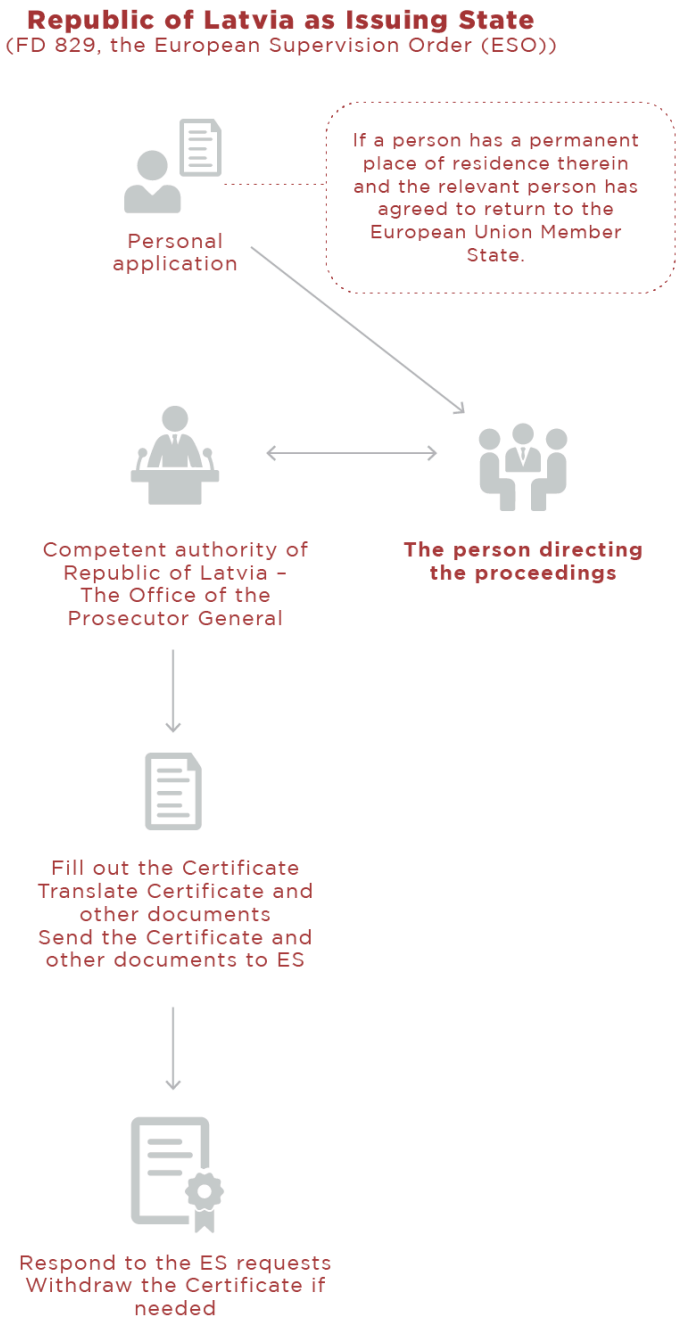



Federal State of Bremen as Executing State
(FD 829, The European Supervision Order (ESO))
Dialogue with Competent authorities from Member States leading to the IS issuing the certificate
The Public Prosecutor's Office attached to the Bremen Higher Regional Court of Appeal (during criminal prosecution)
Bremen Higher Regional Court of Appeal (during trial)
Public Prosecutors' Office
Tribunal
Check the supervision measures
Check the criteria
Check the competence
Initiate consultation if needed
Check double criminality
Summon the person
Adapt the supervision measures if needed
Recognize and enforce ESO
Inform the IS
Decide not to recognize ESO
Inform the IS


Federal State of Bremen, Germany as Issuing State
(FD 829, The European Supervision Order (ESO))
The Public Prosecutor's Office
Bremen Higher Regional Court of Appeal (during trial)
Summon the person
Identify the competent authority in Executing State (ES) via EJN
Consult the ES
Fill out the Certificate
Translate Certificate and other documents
Send the Certificate and other documents to ES
Respond to the ES requests
Withdraw the Certificate if needed
Take the subsequent decision


Latvia as Executing State
(FD 947)
Competent authority from issuing state
Request additional information if received information is insufficient
Informs the Competent authority of IS
Competent authority (Ministry of Justice) verify received documents
A municipal (district) court
Examine a request in a written procedure
Refusal of recognition
Recognition decision
Appeal (convicted person or a prosecutor)
Final sentence
Competent probation service

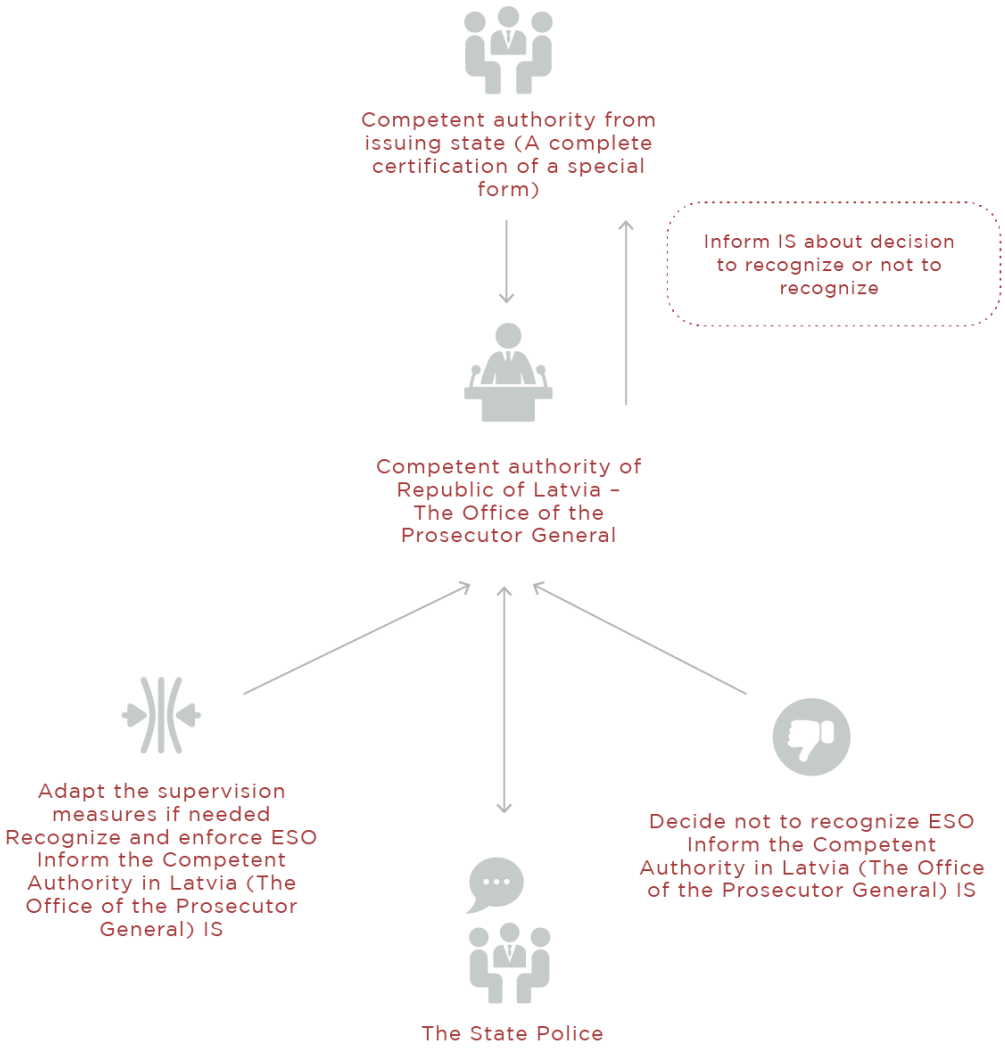

Latvia as Issuing State
(FD 947)
Written Request of the supervised person to probation service in order to initiate the procedure
Probation Service (Checks whether the received application complies with the Criminal Procedure Law)
A municipal (district) court
Ask opinion to the Prosecutor and Probation service
Examine a request in a written procedure
Decision of transmitting the probation decision or alternative measures decision
Appeal (convicted person or a prosecutor)
Minisry of Justice (examine the received information, prepare request and translation of the request/ information)
Ongoing comunication with the competent authority of the executing State
Competent authority of the executing State
Recognition sentence

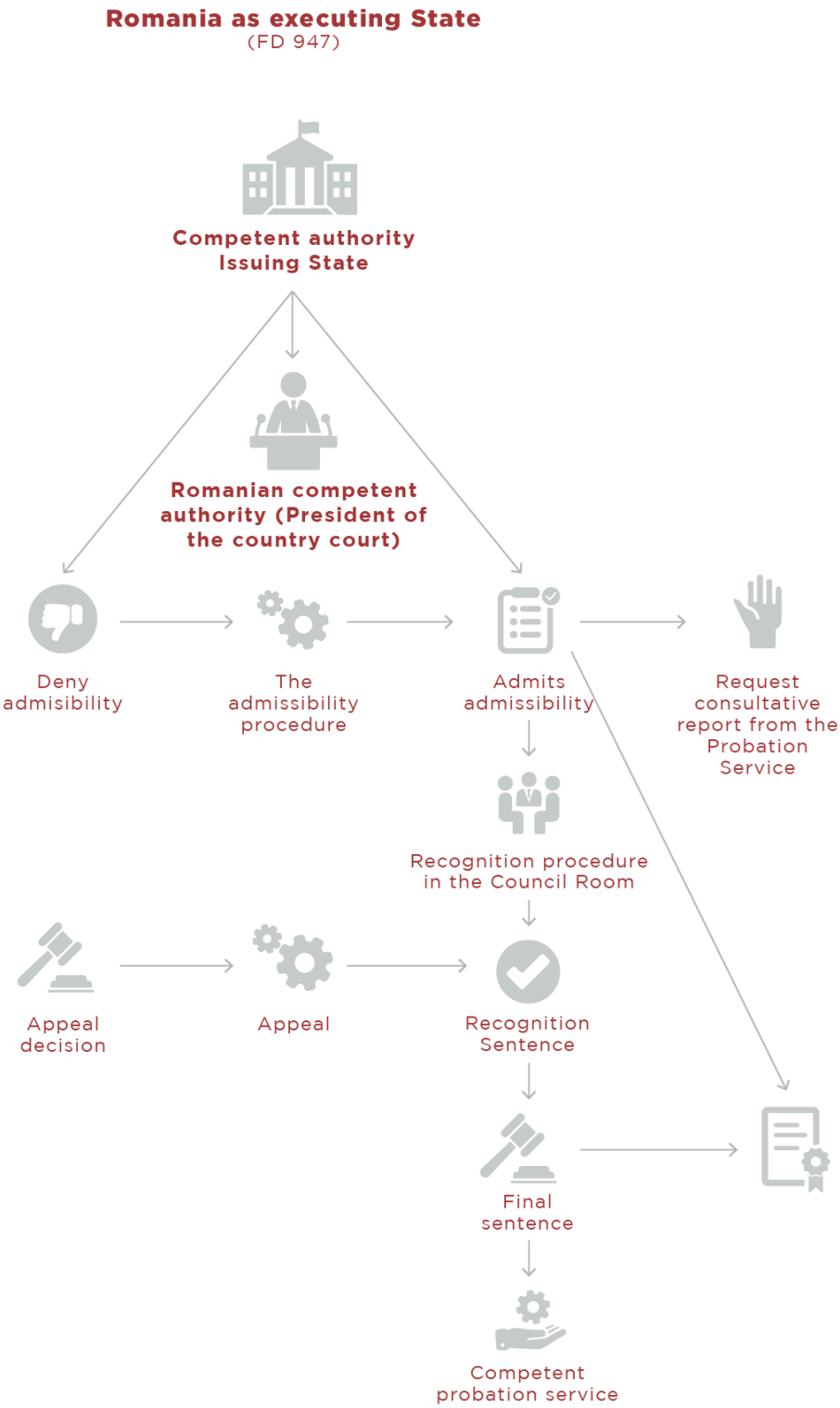

Republic of Latvia as Issuing State
(FD 829, the European Supervision Order (ESO))
If a person has a permanent place of residence therein and the relevant person has agreed to return to the European Union Member State.
Personal application
Competent authority of Republic of Latvia – The Office of the Prosecutor General
The person directing the proceedings
Fill out the Certificate
Translate Certificate and other documents
Send the Certificate and other documents to ES
Respond to the ES requests
Withdraw the Certificate if needed

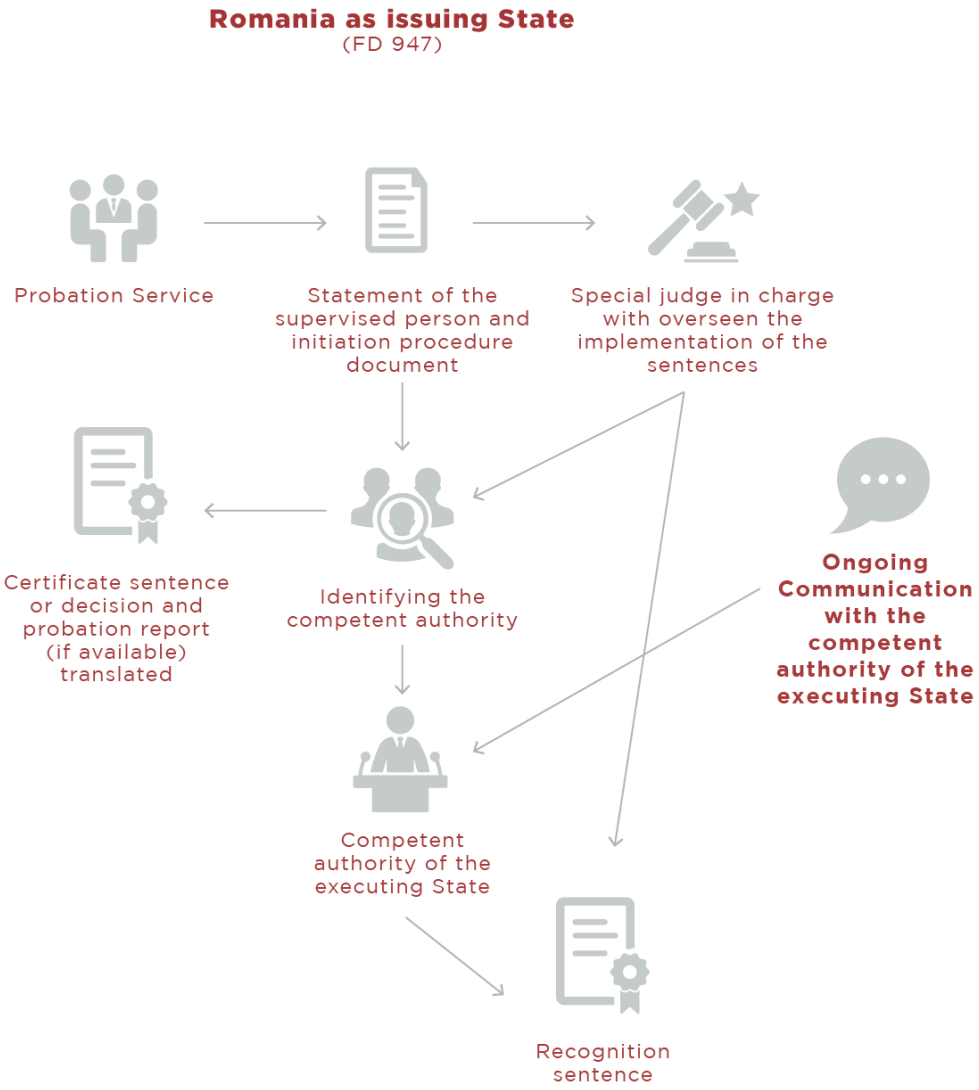
Council Framework Decision 2009/829/JHA on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (European Supervision Order)

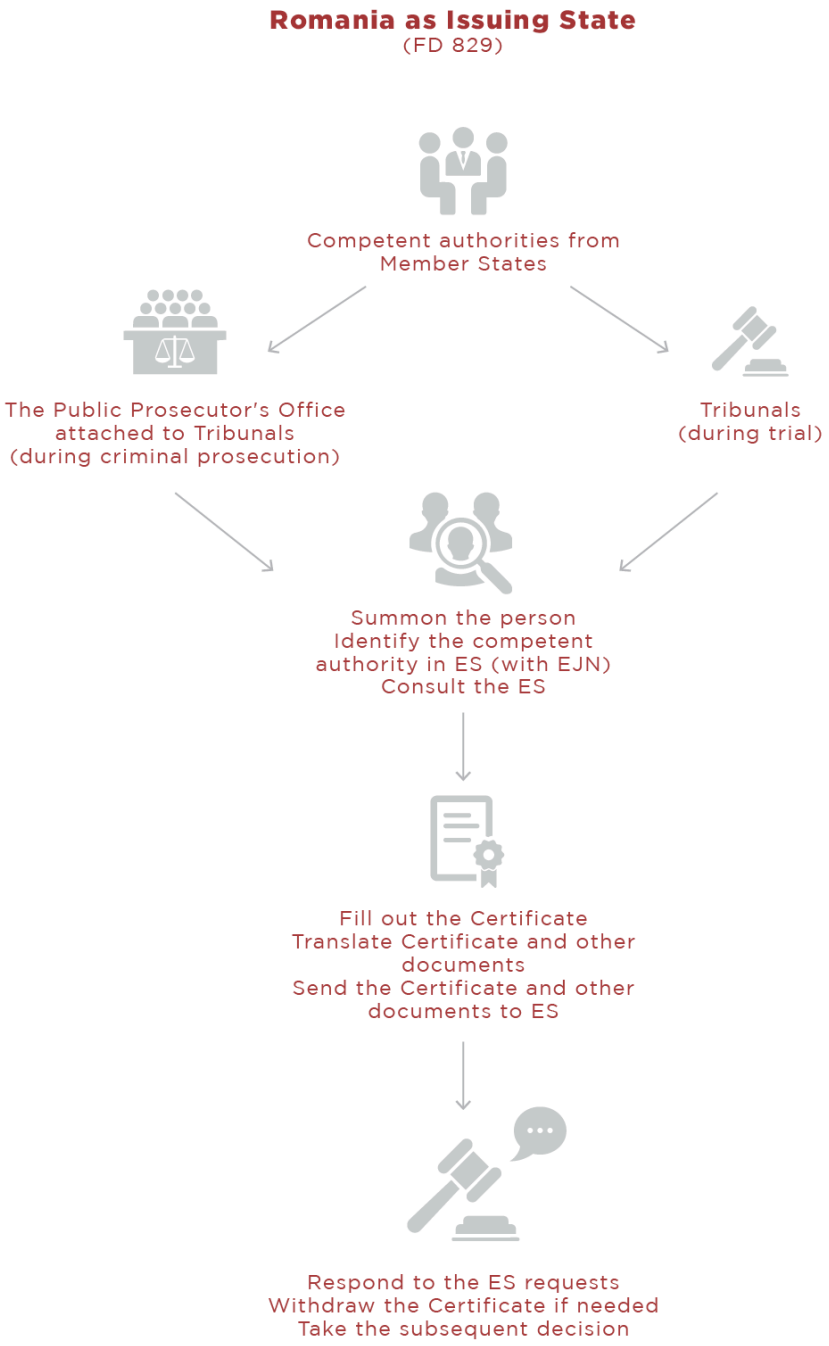
Latvia as executing state

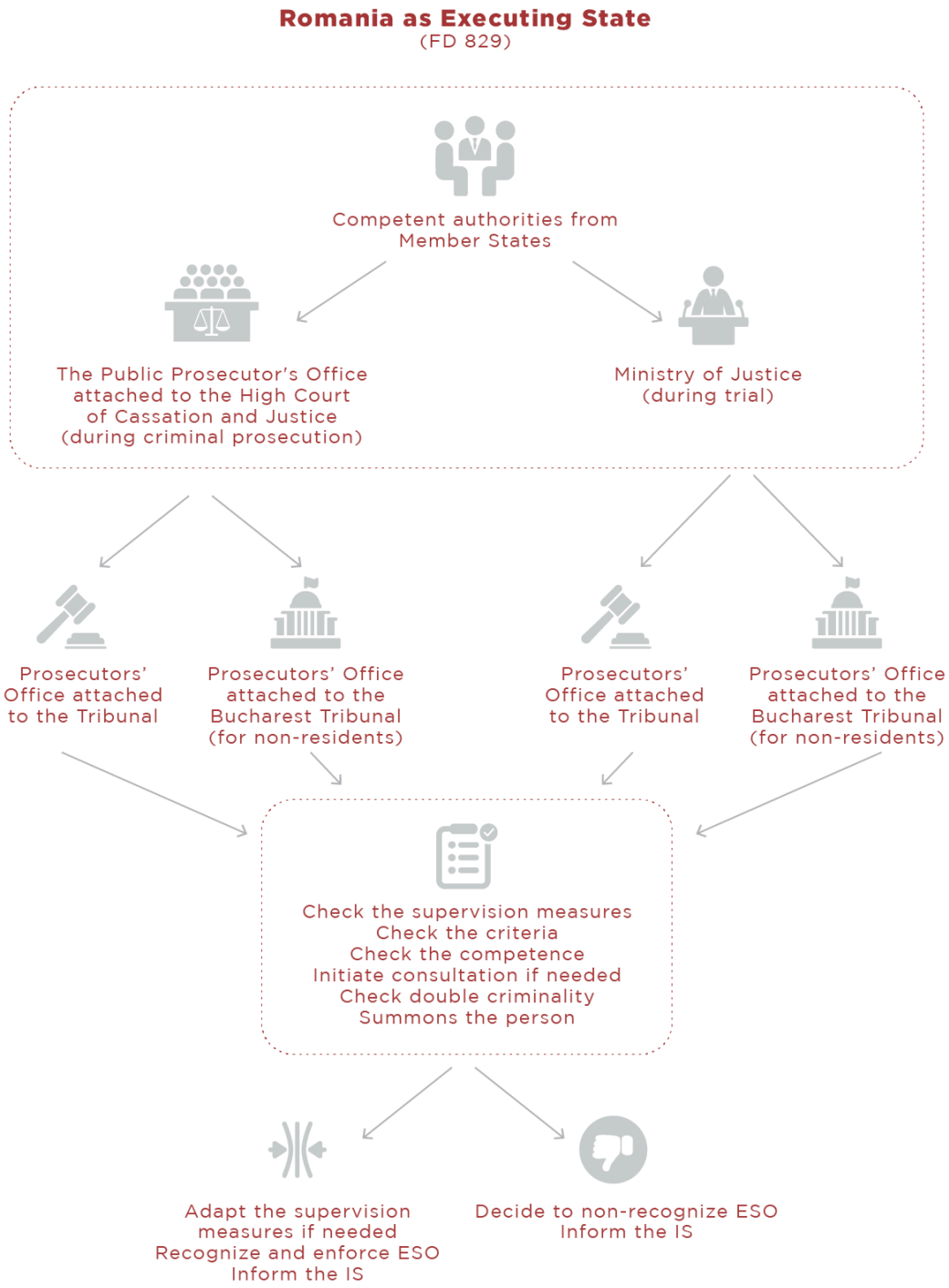
(FD 829, The European Supervision Order (ESO))

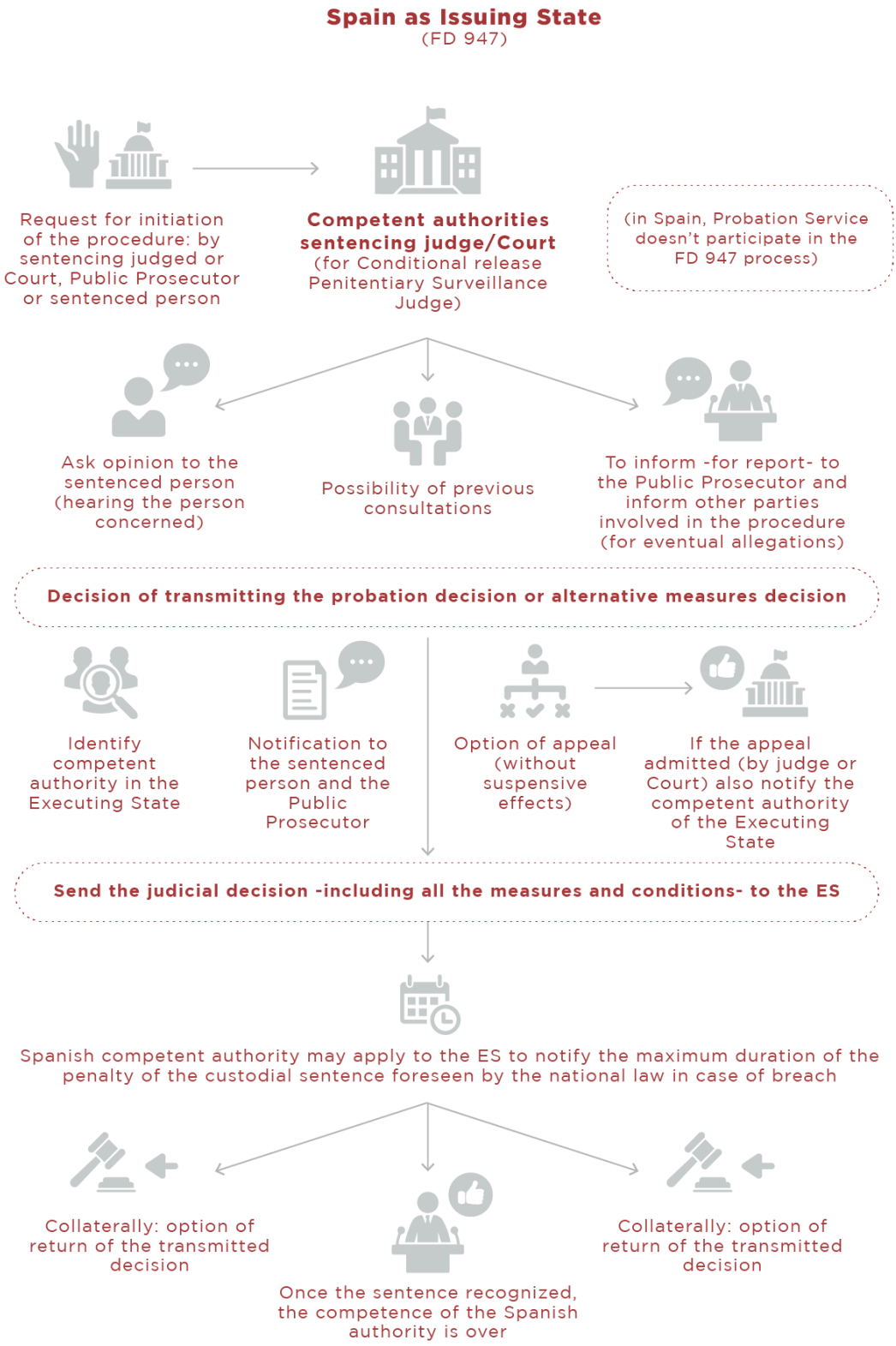


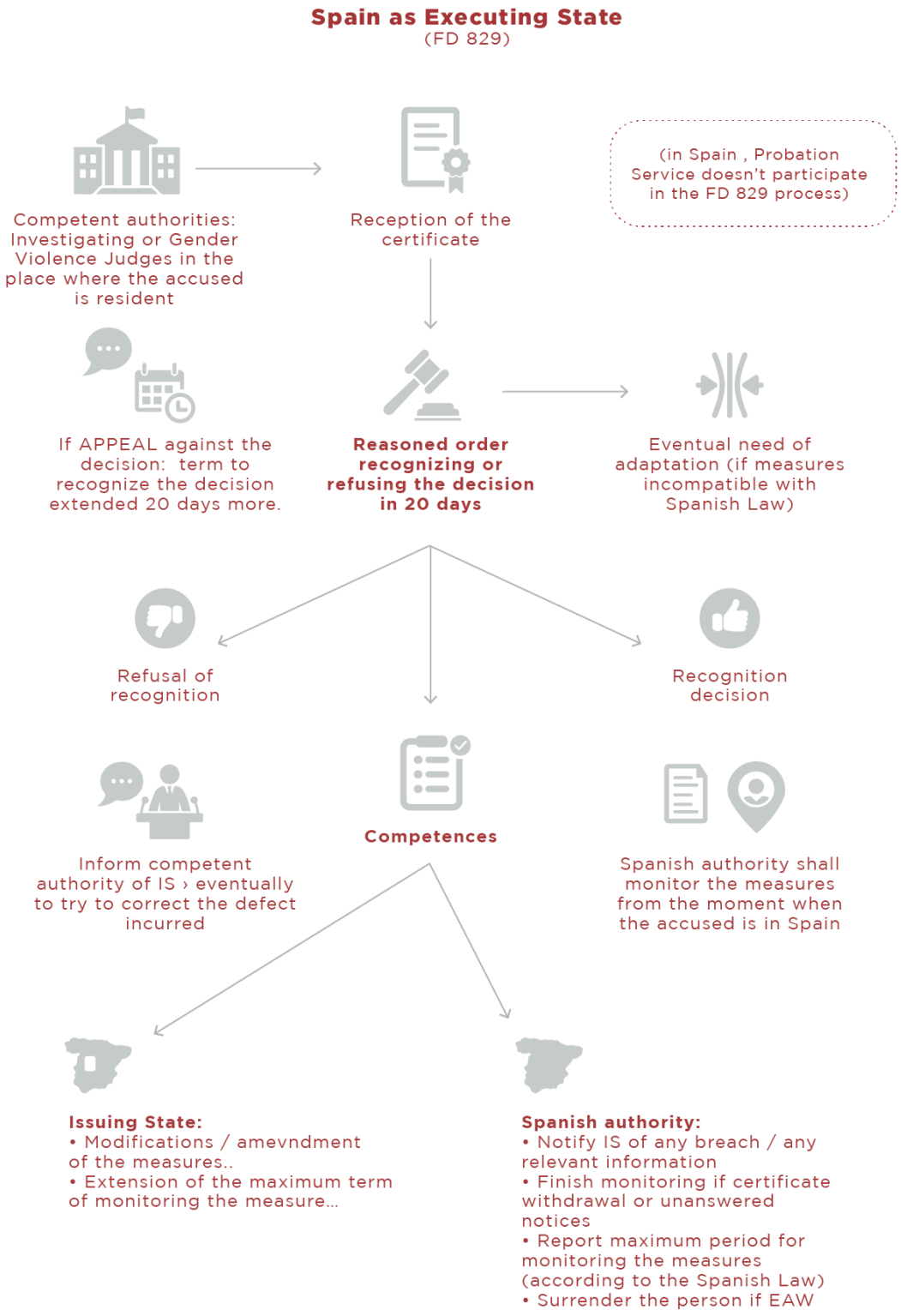

Romania as executing State
(FD 947)
Competent authority
Issuing State
Romanian competent
authority (President of
the country court)
Deny
admisibility
The
admissibility
procedure
Admits
admissibility
Request
consultative
report from the
Probation
Service
Recognition procedure
in the Council Room
Appeal
decision
Appeal
Recognition
Sentence
Final
sentence
Competent
probation service

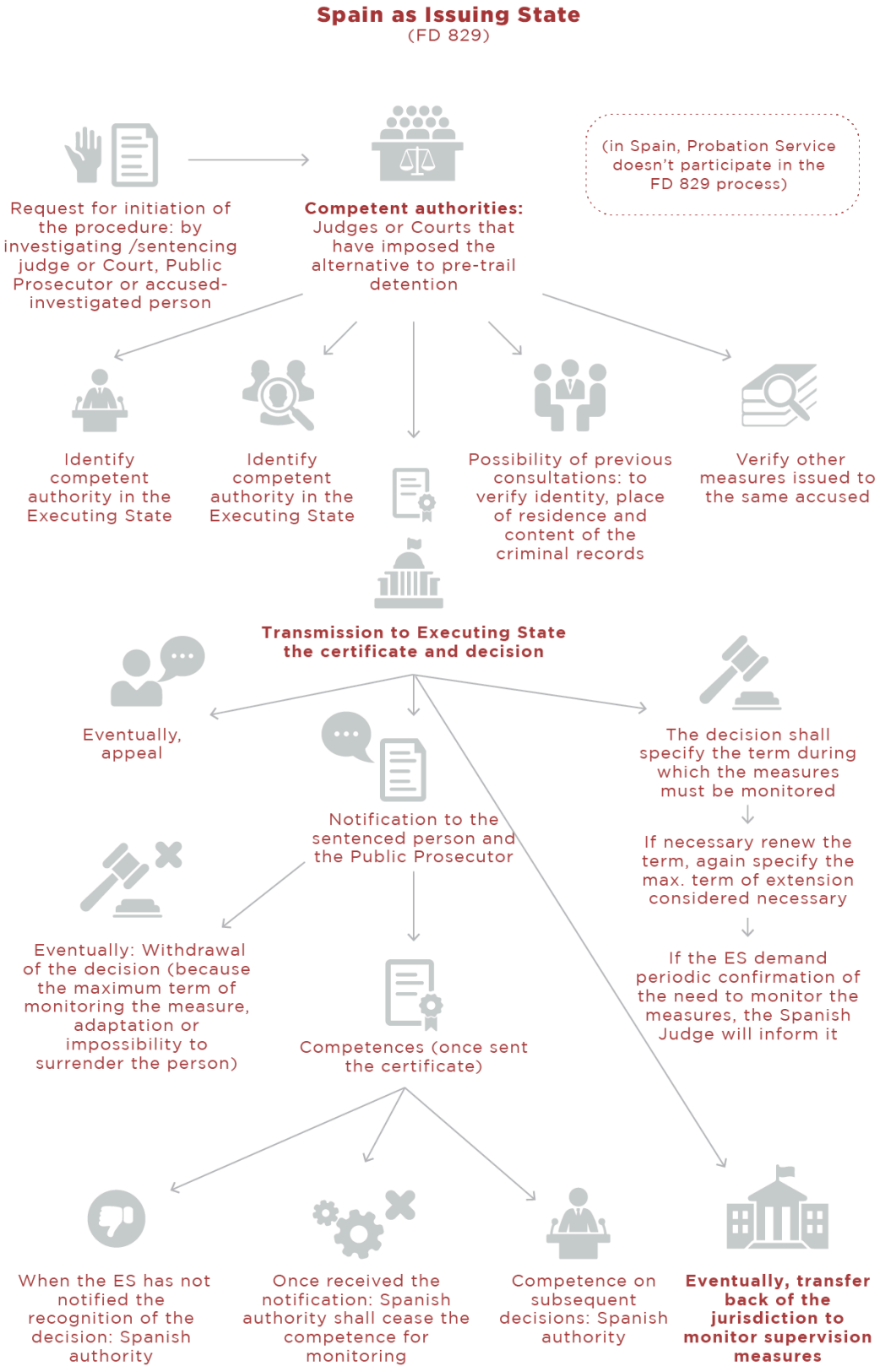

Romania as issuing State
(FD 947)
Probation Service
Statement of the supervised person and initiation procedure document
Special judge in charge with overseen the implementation of the sentences
Certificate sentence or decision and probation report (if available) translated
Identifying the competent authority
Ongoing Communication with the competent authority of the executing State
Competent authority of the executing State
Recognition sentence


Romania as Issuing State
(FD 829)
Competent authorities from Member States
The Public Prosecutor's Office attached to Tribunals (during criminal prosecution)
Tribunals (during trial)
Summon the person
Identify the competent authority in ES (with EJN)
Consult the ES
Fill out the Certificate
Translate Certificate and other documents
Send the Certificate and other documents to ES
Respond to the ES requests
Withdraw the Certificate if needed
Take the subsequent decision


Romania as Executing State
(FD 829)
Competent authorities from Member States
The Public Prosecutor's Office attached to the High Court of Cassation and Justice (during criminal prosecution)
Ministry of Justice (during trial)
Prosecutors' Office attached to the Tribunal
Prosecutors' Office attached to the Bucharest Tribunal (for non-residents)
Prosecutors' Office attached to the Tribunal
Prosecutors' Office attached to the Bucharest Tribunal (for non-residents)
Check the supervision measures
Check the criteria
Check the competence
Initiate consultation if needed
Check double criminality
Summons the person
Adapt the supervision measures if needed
Recognize and enforce ESO
Inform the IS
Decide to non-recognize ESO
Inform the IS


Spain as Issuing State
(FD 947)
Request for initiation of the procedure: by sentencing judged or Court, Public Prosecutor or sentenced person
Competent authorities sentencing judge/Court (for Conditional release Penitentiary Surveillance Judge)
(in Spain, Probation Service doesn't participate in the FD 947 process)
Ask opinion to the sentenced person (hearing the person concerned)
Possibility of previous consultations
To inform -for report- to the Public Prosecutor and inform other parties involved in the procedure (for eventual allegations)
Decision of transmitting the probation decision or alternative measures decision
Identify competent authority in the Executing State
Notification to the sentenced person and the Public Prosecutor
Option of appeal (without suspensive effects)
If the appeal admitted (by judge or Court) also notify the competent authority of the Executing State
Send the judicial decision -including all the measures and conditions- to the ES
Spanish competent authority may apply to the ES to notify the maximum duration of the penalty of the custodial sentence foreseen by the national law in case of breach
Collaterally: option of return of the transmitted decision
Once the sentence recognized, the competence of the Spanish authority is over
Collaterally: option of return of the transmitted decision


Spain as Executing State
(FD 829)
Competent authorities: Investigating or Gender Violence Judges in the place where the accused is resident
Reception of the certificate
(in Spain , Probation Service doesn't participate in the FD 829 process)
If APPEAL against the decision: term to recognize the decision extended 20 days more.
Reasoned order recognizing or refusing the decision in 20 days
Eventual need of adaptation (if measures incompatible with Spanish Law)
Refusal of recognition
Recognition decision
Competences
Inform competent authority of IS › eventually to try to correct the defect incurred
Spanish authority shall monitor the measures from the moment when the accused is in Spain
Issuing State:
• Modifications / amevndment of the measures..
• Extension of the maximum term of monitoring the measure...
Spanish authority:
• Notify IS of any breach / any relevant information
• Finish monitoring if certificate withdrawal or unanswered notices
• Report maximum period for monitoring the measures (according to the Spanish Law)
• Surrender the person if EAW


Spain as Issuing State
(FD 829)
Request for initiation of the procedure: by investigating /sentencing judge or Court, Public Prosecutor or accused-investigated person
Competent authorities: Judges or Courts that have imposed the alternative to pre-trail detention
(in Spain, Probation Service doesn't participate in the FD 829 process)
Identify competent authority in the Executing State
Identify competent authority in the Executing State
Possibility of previous consultations: to verify identity, place of residence and content of the criminal records
Verify other measures issued to the same accused
Transmission to Executing State the certificate and decision
Eventually, appeal
Notification to the sentenced person and the Public Prosecutor
The decision shall specify the term during which the measures must be monitored
If necessary renew the term, again specify the max. term of extension considered necessary
If the ES demand periodic confirmation of the need to monitor the measures, the Spanish Judge will inform it
Eventually: Withdrawal of the decision (because the maximum term of monitoring the measure, adaptation or impossibility to surrender the person)
Competences (once sent the certificate)
When the ES has not notified the recognition of the decision: Spanish authority
Once received the notification: Spanish authority shall cease the competence for monitoring
Competence on subsequent decisions: Spanish authority
Eventually, transfer back of the jurisdiction to monitor supervision measures

9.2. Annex 2 – Checklist for filling out the Certificate FD 947/2008

General:

- Is this certificate the latest form as amended by FD 299/2009?
- Will the certificate be forwarded by any means which leaves a written record? (regular post, email etc.)
- Will the certificate be accompanied by the translation of the judgment or the probation decision?
- Is the language used in the certificate accepted by the executing State? (see the declarations on the EJN website)
- Is the certificate signed by the competent authority in the issuing State?
- Is the certificate forwarded only to one competent authority of the executing State?
- Are all the sections completed? (from a.to k.)

Special attention to:

- Accuracy of the names and addresses (including tel. numbers)
- Accuracy of the data regarding the natural person (e.)
- Accuracy of the data regarding the executing State and reasons for forwarding (f.)
- Accuracy of the data regarding the judgment or probation decision (g.)
- Did you provide full description of the offence – the facts - if this is not among those 32 mentioned at point 2. or the executing State will check for double criminality?
- Did you provide the full description of how the person was summoned if not appeared in person in the final proceedings?
- Did you classify carefully the judgment or the probation decision as suspended sentence, conditional sentence, alternative sentence or conditional release? (i.)
- Did you provide clear instructions regarding the length of deprivation of liberty to be served upon revocation or breach?
- Did you provide accurate information about the duration and the nature of the probation measure or alternative sanction?
- Did you mention other relevant reports? (j.)

Final notes:

- Did you consult with the competent authority in the executing State regarding any unclear issues?
- Is the probation decision or the alternative sanction compatible with the system in the executing State?

9.3. Annex 3 – Relevant case-law

1. Case C-579/15 of the EUCJ – Openbaar Ministerie v. Daniel Adam Poplawski – on the optional nature of the grounds for refusal
(http://curia.europa.eu/juris/document/document.jsf?text=&docid=187867&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=147367)

2. Case C-294/16 PPU – JZ – JZ v. Prokuratura Rejonowa Lodz-Srodmiescie – on defining 'detention'
(http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&lgrec=ro&jge=&td=%3BALL&jur=C%2CT%2CF&num=C294%252F16&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=4734)

3. Case C-66/08 – Oberlandesgericht Stuttgart v. Szymon Koslowski – on the interpretation of the terms 'resident' and 'staying' in the executing State
(https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62008CA0066&from=EN)

4. Case C-123/08 – Dominic Wolzenburg – on the equal treatment of non-nationals unless objective and proportional justification. (https://duca-llm.ro/?p=84)

5. Case C-289/15 Grundza case – on the control of double criminality (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CC0289&from=EN)

6. Case C-270/17 PPU Tupikas – on the definition of 'trial resulting in the decision'
(http://curia.europa.eu/juris/liste.jsf?language=en&num=C-270/17%20PPU)

7. Joined cases C-404/15 and C-669/15 PPU Aranyosy and Caldararu – on the risk of inhuman and degrading treatment
(http://curia.europa.eu/juris/document/document.jsf?text=&docid=175547&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=25826)

8. Case C-216/19 PPU - High Court of Ireland v. LM - on the risk of the fundamental right to a fair trial
(http://curia.europa.eu/juris/document/document.jsf?text=&docid=204384&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=26139

9. Cases C-508/18 and C-82/19 PPU on the preliminary rulingon the request of the Supreme Court Ireland – deciding that: *'All subsequent decisions relating to a suspended sentence, a conditional sentence or an alternative sanction which result in the imposition of a custodial sentence or measure involving deprivation of liberty should be taken by a judicial authority.'*
*(*http://curia.europa.eu/juris/document/document.jsf?text=&docid=214466&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3695146*)*

9.4. Annex 4 – Vignettes

1. G.F. transferred from Portugal to Spain – 829/JHA

Case history

G.F. (female, 28 years old) is a Spanish citizen awaiting trial in detention in the island of Madeira since 24-03-2019. She is awaiting trial for aggravated drug trafficking – she is suspected of being a part of an international "network" that acquires cocaine in the Caribbean and introduces it to Europe using cruise ships. G.F. has her legal and usual residence in Spain and has no connection to Madeira or Portugal. She was pregnant and her partner lives in Spain.

G.F. requested preventive detention to be substituted by house arrest with EM. Court accepted this decision in 26-06-2019, attending to the pregnancy state, as long as she could execute the supervision measure in her home country.

Transfer procedure

The Madeira Court asked the Court in Spain (Oficina Decanato of A Coruna, *para su reparto a juzgados de instruccion*) for the recognition of the decision to apply an alternative sanction to detention in 16-07-2019. The certificate was accompanied by the court decision and a declaration of consent by G.F. The end of the measure was set for 24-09-2019.

In 16-08-2019 the Spanish court decided to recognize the sentence. This decision was sent on 19-08-2019 to Madeira court, first by e-mail and the originals by post. Decision was based on the fact that: 1) the request is under the Spanish mutual recognition law; 2) the requested measure also exists in the Spanish legislation; 3) the address were G.F. wants to live was confirmed by the Spanish police as her partner's; 4) G.F. gave consent.

The Spanish court agreed to accept the surveillance and supervision of G.F. at the requested address. However, since EM was not available, they decided on control by police officers with daily visits until 24-09-2019.

In 03-09-2019, the Madeira court ordered the Portuguese Prison and Probation service to coordinate with Spanish authorities in order to begin the execution of the measure in Spain. Spain was later requested to assess practical issues regarding documentation for traveling.

G.F. gave birth on 05-09-2019, still in the Portuguese prison. Preparations for her to leave with her baby are still ongoing.

Particular issues

The Portuguese Prison and Probation service are the central authority in this law in Portugal. Portugal's competent authorities were informed of the request, but we were not mentioned on the certificate sent to the Spanish authorities. As central authority, our role is ambiguous, particularly when no specific request is received.

Since EM was not available, due to lack of means, the decision was to use police surveillance with daily visits to control house arrest. This adaptation of the measure seems to have been decided without prior consultation of the Portuguese authorities, but we are unsure.

Conclusions

I successful case of mutual recognition. Delays are noted.

2. H.P. transferred from the Netherlands to Portugal - 947/JHA

Case history

H.P. (male, 41 years old) is a Portuguese citizen who was sentenced in 30-06-2017 by the Rotterdam court to 40 hours' community work suspended for 2-years probation with duty of submitting to drug rehabilitation treatment (20 days in prison in case of revocation) and paying a 500€ restitution to the victim, for a crime of assault.
When request for recognition is received, H.P. was already in Portugal.

Transfer procedure

In 28.11.2017 the request for recognition was sent from the Dutch authorities to Portugal, first by email and later by post. The certificate was sent accompanied by the sentence, both in Portuguese language. They also sent a report from the Dutch probation service.

The Portuguese prosecutor office requested the recognition by the Portuguese competent court in 30.11.2017. They stated that H.P. was living in Portugal and that the execution of the sentence in Portugal could contribute to his social reintegration. Besides, nothing on the Dutch decision was contrary to the Portuguese legislation, the sentence was also enforced by Portuguese law. So all conditions for transference were met.

The decision to recognise was decided by the competent court in 01-03-2018.

Particular issues

On the certificate, the contact of the Dutch probation was included in case further information needed to be collected for the supervision.
Double incrimination was confirmed by the Portuguese public prosecutor office.
Sentence adaptation resulted in a crime of qualified assault with 20 days of imprisonment substituted by 40 hours community service and 28 days of imprisonment suspended for 2 years with probation subject to rehabilitation treatment. Small adaptations were required.

In the recognition decision, the Portuguese court cites FD 2008/909/JHA instead of 947/JHA (note: they were transposed in the same Portuguese law).

Conclusions

More or less 4 months till recognition.
Good sharing of information from the Dutch probation service.
Confusion with FD/909/JHA.

3. J.T. transferred from France to Portugal

Case history

J.T. (male, 46 years old) was born in France and has dual nationality (Portuguese and French). He was sentenced in 20-10-2013 for rape, by the DOUAI court, to 7 years in prison, with posterior socio-judicial support for 3 years, with the advertence to serve 2 years in case of non-compliance to duties orders imposed.

Conditional release was decided in 13-05-2016 and duties were set by the ARRAS court: 1) therapeutic treatment; 2) establish residence; 3) maintain work, study or training; 4) reparation of damage, by paying the restitution request by the victim; 5) not to contact the victim in any way; 6) not to enter the Roubaix municipality; 7) not to own or transport weapons. He was released in 25-03-2017, for 3 years.

J.T. was born and always lived in France, but he was expelled from French territory and moved to Portugal to a family house. His family remains in France.

Transfer procedure

The French authorities requested mutual recognition for the conditional release to the Portuguese competent authority in unknown date. The certificate was sent accompanied by the sentence, both in Portuguese language.

The court concluded that the supervision of the duties applied by the issuing authority could contribute to his social reintegration and that due to the expelling order it would not be possible for the issuing country to supervise them. They concluded that all dispositions of FD 2008/909/JAI were met.

The decision to recognise was final in 11-03-2019. The probation service was asked to execute the measure in 04-04-2019.

Particular issues

Double incrimination was not necessary because the rape crime is included in the list of crimes mentioned by the Portuguese law that do not need such verification, as long as they are also criminalized and sentenced with prison over a minimum of 3 years by the issuing country.

The court said no consent was necessary and justifies this option with an art. 6, nº2 b) from FD 2008/909/JAI and an article of the Portuguese law that refers to the transposition of this FD. He was already expelled from France and living in Portugal.

The decision included the possibility of serving 2 years in case of non-compliance with duties. The court states that this could be an impediment to the recognition, but they concluded that the recognition request did not include this part – only the socio-legal support – so the recognition went forward.

Although the court concluded that the recognition was good for social reintegration, J.T. only came to Portugal due to the expelling order and because he has a family house here. All his family lives in France and he has no support or employment prospects in Portugal. He as always lived in France, although he was not allowed to live there anymore due to expelling decision.

No information regarding the individual characteristics or others was sent to the Portuguese probation service and they felt it would have been useful. J.T. has since proven to be a very aggressive man and is missing his appointments currently.

Conclusions

The court repeatedly cites FD 2008/909/JAI instead of 947/JAI (they were transposed in the same Portuguese law).

The recognition is finalized less than 1 year before the end of the conditional release.

Case were the recognition of sentencing was put forward to an expelling order. Resulted that the parolee had not support in Portugal.

There was no information provided or communication with the French prison/probation service.

4. R.R. transferred from Germany to Hungary

Case history

R. R. (*) was 28 years old at the time of the trial. He is a German citizen and single. He has a child of two years old, but has no contact with the child. The child lives with the child's mother.

R. R. has a professional qualification as a carpenter. During the probationary period in Germany, he was unable to find a job. R. R. therefore lived on social benefits. He did not have a permanent home, instead living with various friends.

R. R. was convicted and sentenced in the autumn of 2012 by a district court for joint illicit cultivation of narcotics. He received a prison term of 10 months, which was suspended. After expiry of the probationary period, this suspended prison sentence was lifted in the autumn of 2015.

R. R. was again convicted and sentenced. A district court sentenced R. R. in the spring of 2018 for theft with weapons in accordance with § 242 Paragraph 1, 244 Paragraph 1 No. 1 a Penal Code (StGB) and attempted coercion in accordance with § 240 paragraph 1, 2, 3 StGB and criminal defamation § 185 StGB. He received a total custodial sentence of eight months.

The court considered R. R.'s prospect for social reintegration positively, and the prison sentence was therefore again suspended according to § 56 StGB. The probationary period was set at 3 years.
At that time of suspension, the court granted the convicted person the following conditions and instructions:

a) He must conduct himself without criminal incident throughout the probationary period.
b) He is placed under the supervision and direction of a probation officer. He must keep close contact with the probation officer during the probationary period. He must comply with the appointments at the probation officer's instructions as instructed.
c) He must take a permanent residence. Each change of residence is to be reported immediately to his probation officer and to the court.

Transfer procedure

After the trial, R. R. immediately contacted his probation officer. He kept reliably to the dates he had agreed with his probation officer. The other

requirements and instructions imposed on him by the court were also met by R. R.

After two months of probation R. R. decided to move to Spain. He had lived and worked temporarily in Spain a few years earlier.

R. R. immediately informed his probation officer and the court about his move plans to Spain. The competent court decided to wait for two months. Their aim during this two month period was to be sure that R. R. would actually stay permanently in Spain.

R. R. rented an apartment in Spain and worked there in the tourism industry. After six weeks, he lost his job and returned to Germany. During his stay in Spain, he regularly informed his probation officer and the court by telephone about his life situation and the actual whereabouts.

Back in Germany, he again applied for social benefits as his main source of income.

A little later he met his partner, who comes from Hungary. Together they decided to relocate their centre of life to Hungary.

The probation officer was under the impression that the move abroad to Hungary this time would be of longer duration. Through written report, the probation officer informed the competent court that R. R. had reliably adhered to the appointments with the probation officer. New crimes have not been disclosed. The move to Hungary has developed along these lines. After the transfer of R. R. to Hungary, the German probation officer proposed that the condition of the convicted person to submit to the supervision and direction of a probation officer be set aside. After detailed examination, the court followed this suggestion and lifted this condition. The other conditions were not changed.

Conclusion

High mobility and instability can be difficult in case of transfer.

5. U.U. transferred from Germany to Spain

U. U. was 60 years old at the time of his trial. He had trained as a machinist, and had graduated in 1979 with a degree in electrical engineering. U. U. was employed by a large company in Germany until 2009. He finished his employment with his employer in 2009.

Case history

At the time of the trial U. U. was planning to move to Spain. He had had no previous criminal conviction.

Following the issue of an arrest warrant, U. U. was held on remand for six months until the spring of 2009. The arrest warrant was set on 10.03.2009 under conditions beyond execution.

U. U. was granted the following conditions:

a) He must immediately inform the court in writing of any change of residence or residence.
b) He has to report twice a week to the local police station.
c) He must go immediately to outpatient therapeutic treatment.
d) He may not contact the injured party.

In the autumn of 2012, U. U. was convicted of serious sexual abuse of children in connection with sexual abuse of wards, as well as of attempted incitement to a crime (namely, taking part in a serious child sexual abuse ring) in two cases and for distribution as well as possession of child pornographic works sentenced to a total of 2 years' imprisonment.

The regulations applied were: § 174 (1) No. 1 StGB a.F., § 176 a (1) No. 1 StGB a.F., § 30 (1) StGB i.V.m. Section 176a (2) (1) of the Criminal Code, Section 184b (1) (2), (4) (2) StGB a.F., Articles 21,52,53,56

The court certified U. U. had a positive social prognosis. The prison sentence was therefore suspended in accordance with Section 56 (2) of the Criminal Code. The probationary period was set at 3 years.

The court justified the special circumstances justifying the suspension of probation as follows: The court expects that the conviction alone will be sufficient and serves as a warning to prevent U. U. from committing further crimes. It was the first criminal conviction of U. U. U. U. has voluntarily embarked on therapeutic treatment, had confessed and had paid compensation to the victims to the amount of 5000 €.

The probationary period was set at three years. U. U. the following conditions and instructions were imposed:

a) The accused is placed under the supervision and guidance of a probation officer.
b) During the probationary period, he must notify the court and the probation officer immediately in writing of any change of residence.
c) He must continue the outpatient psychotherapy with the therapist for a period of 2 years with at least 12 therapy sessions per year. He must not terminate the treatment on his own initiative or against the

advice of doctors and therapists. A therapeutic certificate must be submitted after one year to the Bremen probation who would forward to the court.

d) He must strictly avoid contact with the injured party.

Transfer procedure

After the main hearing, U. U. immediately contacted his probation officer. He informed him that he was living permanently in Spain. However, he stated his intent to travel monthly for the therapy sessions and for appointments with his probation officer to Germany.

The probation officer immediately informed the court that, in these circumstances, the statutory control mandate could not be fulfilled. Contact was not regular enough, and the precise life and environment of U. U. could not be verified by a permanent residential in Spain.

The court did not agree with this view. In their view, it would be sufficient if U. U. regularly came to Germany to take his appointments with the therapist and the probation officer.

In the summer of 2013, the lawyer of U. U. informed the probation officer about a second arrest, that his client was in custody in Spain for distribution as well as possession of child pornographic writings. The lawyer then informed the Bremen probation officer then informed the court about the detention of U. U. in Spain.

Towards the end of 2013 U. U. again contacted his probation officer and informed him that the arrest warrant had been suspended. He was ordered to appear twice a month at a police station in Spain.

Since then, U. U. has returned regularly to Germany to fulfil his requirements for probation. The therapy sessions he took regularly according to the specifications again are as specified in his conditions. U. U. reliably upheld his agreed appointments with his probation officer

a. The German prosecutor's office requested the documents about the new criminal proceedings in Spain. Towards the end of 2014, a hearing was held before the German court responsible for the probation. The documents from Spain were discussed at the hearing.

The probation service was able to report at the hearing and afterwards in the context of a report that the social prognosis of U. U. This was found to be unfavourable, with the possible of reoffending more likely than at the first conviction. Therapeutic processing of criminal offenses is not possible in Germany if U. U. retains his residence in Spain.

The court could not follow this argument. U. U. was ordered to continue the therapy sessions with his therapist until the end of the probation period.

Conclusion

The probationary period has expired, but the sentence could not yet be issued. The outcome of the criminal proceedings in Spain should initially be awaited. The probation officer has ceased his work on probation.

6. A.R. transferred from Spain to Romania

Case history

A. R. (43 years old) is an Italian citizen sentenced in Catalonia for drug trafficking to 6 years and one day imprisonment. He is married to Romanian women and has two daughters who have Romanian citizenship.
In June 2016 he was conditionally released with a probation period up until September 2018 and some obligations:

- to cooperate with a probation service,
- to visit the probation service every 15 days,
- not to leave the Romanian territory (not to enter the Spanish territory), to inform the probation service about the employment and domicile.

The transfer procedure

The Braila Tribunal (Romania) was asked on the 1st of July 2016 to recognize the decision and supervise the conditional release for A. R. The certificate was accompanied by the court decision. On the 4th of July 2016 the Romanian court asked for more information regarding the consent of the person. The response arrived on the 11.07.2016 in the Romanian language.

After analyzing all the elements of the file, the court decided to admit in principle the request and set 19.07.2016 as the first court appearance. The court also summoned the sentenced person and the probation service. The court also asked for a report from the probation service regarding the compatibility between the obligations imposed by the Spanish authorities and the Romanian legislation.

The procedure:

- the court checked for double criminality principle (drug trafficking is also punishable with imprisonment in Romania);
- the probation measures have a correspondent in the Romanian legislation;

- R intends to return to Romania where he has family. He is not a Romanian citizen and has no resident permit to reside in Romania but he is a member of family for a Romanian citizen and is the father of two Romanian citizens;
- The court could not identify any reason for refusing the recognition
- Evaluate that the reintegration prospects are higher in Romania due to his family relations.

The decision – to recognize the decision and empower Probation service Galati to supervise A. R until 16th of September 2019 with the following obligations:

- to visit the probation service every 15 days,
- to allow probation counsellors to visit his premises,
- to announce any journey outside the domicile for more than 5 days,
- to announce any change in the employment status,
- to announce the income sources,
- not to leave the Romanian territory.

Particular issues

The sentenced person should be present in trial or send a lawyer. Consent seems to be crucial.

The probation service from Romania was asked to submit a report regarding the possibility for the obligations to be carried out in Romania.

This is a case involving an Italian citizen sentenced in Spain and transferred to Romania.

The Romanian court added more measures after the adaptation. They are compulsory for any case under conditional release. They come as a pack (art. 101 alin. 1 CP). Based on the Spanish decision, the Romanian court set the frequency of the visits to 15 days.

To the basic measures, the court added also the obligation of not to leave the Romanian territory – from the Spanish decision.

Conclusions

No evidence of agreement with the Spanish competent authority regarding the final outcome of the sentence adaptation.

Interesting how the Spanish court imposed an obligation – not to leave the Romanian territory – to an Italian. This obligation is monitored by the Romanian Border Police who will not take orders from a Spanish court

7. *Transferring four suspects in Germany and Poland from Spain using FD 2009/829/JHA*

Case history

The Spanish judicial authority were investigating a group accused of organized crime. The group was formed by twenty people from different nationalities (mainly from UE state members: Germany and Poland). The criminal organization grows marihuana in industrial warehouses and sells it through Europe by trucks and in Barcelona by one illegal marihuana smokers club**.** The members of the organization had been arrested. After being under pre-trial detention during 2018, some of the accused ones were released under alternative measures as **the prohibition to leave the country and the obligation to report at specified times to a specific authority (court appearances)**. These measures were also applied to some of the foreign offenders.

The transfer procedure

The judge ordered the provisionally release of the eight accused persons and imposed upon them the following measures: the **obligation to inform the competent authority** in the executing State **of any change of residence; the obligation to remain at a specified place (their home cities) during and specified times (until the trial)** and **the obligation to report at specified times (twice a month) to a judicial authority.**

The transfer procedure under FD 2009/829 has started on 18th January 2019 at the initiative of the investigation judge in Spain who informed the accused persons from Germany and Poland about the legal possibility of carrying out alternative measures to provisional detention in their countries based on the Framework Decision 2009/829/JHA. Four of them, accepted (agreed) to this procedure. The accused were required to provide evidence on their domicile.

At the end of March 2019, by resolution of 25th March 2019, the transfer of the supervision measure was decided by the Spanish competent authority. By mistake, the competent authorities sent the judicial decision instead of the certificate to the competent authority in Germany and Poland.
As the Spanish authorities have not received any reaction from the competent authorities in the executing States, they agreed, as a temporary procedure, that the accused persons from Poland and Germany to appear in front of the Spanish Consulate in their countries every 15 days.

In April 2020, the certificates together with the other documents were sent to the competent authorities in the executing States. The procedure is still ongoing.

Particular issues

Under the Spanish law the alternative measures to the provisional detention have no time limit, they can last until the trial. The Spanish authorities expressed the wish to know about the time limits for the supervision measures in the executing states.

The Spanish authorities do not know in-depth the FD 2009/829 procedure and they commit a mistake not sending the certificate, but the judicial resolution.

The competent authorities of the executing states took almost one year for responding.

It was easier for the Spanish authorities to use their own 'own national resources' (the appearance before the Spanish Consulate in Germany and Poland). If this 'informal' procedure was not possible, the accused persons from Germany and Poland would spend one year and half in pretrial detention.

Conclusions

The short time limits provided by the FD 2009/829 are quite tights and some competent authorities might use some extra training on the FD procedure.
More information about the legislative resources in the executing State could also help the issuing State make a better and faster decision.

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