



## Trust & Action Project

### Probation Framework Decision (FD 2008/947/JHA)\*

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## 1. Introduction

Framework Decision (FD) 2008/947/JHA<sup>1</sup> on probation measures and alternative sanctions "*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*" belongs to the spectrum of EU judicial cooperation instruments in criminal matters<sup>2</sup>, laying down the principle of mutual recognition of EU judicial decisions across the [Member States](#)<sup>3</sup>.

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<sup>1</sup> Official Journal of the European Union, L-337, 16 December 2008, p. 102–122

<sup>2</sup> [Judicial cooperation in criminal matters](#). European Parliament. Retrieved 16 November 2020

<sup>3</sup> [EU Member countries in brief](#). European Union. Retrieved 16 November 2020

This mechanism permits a criminal sentence issued in a Member State imposing deprivation of liberty but not amounting to detention (said to be executed *extra muros*)<sup>4</sup> to be enforced and supervised abroad, by the authority of another Member State of the European Union (EU). In order to provide the most favourable conditions for the social rehabilitation of the defendant, he is, in principle, allowed to serve the sentence in the Member State in which he has close ties.

The peculiarity of the instrument lies in the extension of the principle of mutual recognition of final judicial decisions across the EU to: custodial sentences granting [conditional release](#) (Article 2(1)), [suspended sentences](#) (Article 2(2)), [conditional sentences](#) (Article 2(3)), [alternative sanctions](#) (Article 2(4)) and [probation](#) decisions (Article 2(5)).

This Framework Decision entails one of the corollaries to the system established by the [EAW](#) (FD 2002/584/JHA<sup>5</sup>) and the “Transfer of Prisoners Directive” (FD 2008/909/JHA)<sup>6</sup>.

The Framework Decision entered into force in 2011, substituting the 1964 Council of Europe *Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders* between Member States and it is transposed in all Member States<sup>7</sup>.

## 2. Objectives

The main aim of this Framework Decision is to create an effective instrument to foster the application of the principle of mutual recognition to those final sentences which, rather than imposing detention, apply alternative sanctions or probation measures, in order to execute and supervise those measures in the territory of another Member State.

Firstly, the Framework Decision aims to foster the rehabilitation of the defendant by imposing an alternative measure, allowing him to carry out the conviction in the Member State of residence<sup>8</sup> or at least in the location of his centre of gravity<sup>9</sup>.

The objective is to maximise the individual's chances of social reintegration, by preserving his “family, linguistic and cultural ties”<sup>10</sup>. Similarly, rehabilitation aims to combat recidivism<sup>11</sup>, to allow the sentence to be applied within the community, and to increase the chances of re-socialisation.

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<sup>4</sup> Neveu, Suliane. (2013) “Probation Measures and Alternative Sanctions in Europe: from the 1964 Convention to the 2008 Framework Decision”. In *New Journal of European Criminal Law* 4(1-2), p. 142.

<sup>5</sup> Official Journal of the European Union, L-190, 18 July 2002, p. 1–20

<sup>6</sup> Official Journal of the European Union, L-327, 5 December 2008, p. 27–46

<sup>7</sup> [Status of implementation](#) of the FD 2008/947/JHA. European Judicial Network. Retrieved 3 December 2020

<sup>8</sup> Framework Decision 2008/947, Art. 5(1)

<sup>9</sup> Framework Decision 2008/947, Recital 8

<sup>10</sup> Montaldo p. 946

<sup>11</sup> Neveu, p. 136

Secondly, it attempts to avoid different treatment between Member State nationals and foreign citizens. The latter are usually granted alternatives to detention less frequently due to the fear that they will return to their country of residence, compromising the execution of the sanction. Due to the rationale of the Framework Decision, States should be encouraged to provide foreigners with alternative sanctions and early release rather than forcing them to serve their full punishment in prison, facilitating the defendant's rehabilitation<sup>12</sup>.

Thirdly, the Framework Decision attempts to protect the general public and the victims<sup>13</sup>, as the alternative measures are aimed at preventing reoffending and thus promoting public safety. This is combined with restorative justice aimed at repairing the harm caused by the offence, considering the position of the victims<sup>14</sup>.

### 3. Background

In 1957 the [Committee of Ministers](#) of the [Council of Europe](#) decided to establish the so-called *European Committee on Crime Problems*, with the main task of preparing an action plan in the field of judicial cooperation in order to prevent crime and facilitate cooperation in mutual assistance for treatment of offenders. The Committee met multiple times between 1958 and 1963 and drew up a preliminary draft convention<sup>15</sup>.

As a result, the first European measure on the supervision of offenders was established: *The Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders*. It was open to signature by States part of the Council of Europe since 30 November 1964<sup>16</sup>. Resolutions and Recommendations were adopted in 1965 to safeguard procedures on probation, alternative measures and supervision<sup>17</sup>; the main purpose of this framework was social rehabilitation.

Along the same lines, the [European Convention on the International Validity of Criminal Judgments](#) (1970), the [Convention on the Transfer of Sentenced Persons](#) (1983) and Recommendation no. R 92(16)<sup>18</sup> established European and international standards on the handling and transfer of prisoners, focusing more on individualisation and on the consent of the defendant, which was initially not required in the 1964 Convention<sup>19</sup>.

When the European Council met in Tampere (1999) to establish the priorities of EU justice and home affairs ([JHA](#)) policies, the principle of mutual cooperation in judicial cooperation

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<sup>12</sup> Id, p. 152

<sup>13</sup> Framework Decision 2008/947, Recital 8

<sup>14</sup> Draft Council Conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice. Council of the European Union, p. 2

<sup>15</sup> “[Explanatory Report to the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders](#)”. Council of Europe. Retrieved 15 November 2020, p. 2

<sup>16</sup> “[Details of Treaty No.051](#)”. Council of Europe. Retrieved 15 November 2020

<sup>17</sup> Neveu, p. 135

<sup>18</sup> “[Recommendation No. R \(92\) 16 of the Committee of Ministers to Member States on the European rules on Community sanctions and measures](#)”. Committee of Ministers. Retrieved 15 November 2020

<sup>19</sup> Neveu, p. 140

became the basis for collaboration between the Member States in criminal matters<sup>20</sup>; the EU needed new legal instruments to protect the general public and to achieve coordination in the mutual recognition of judgments, in order to create the idea of equivalency of decisions in criminal matters across all EU Member States<sup>21</sup>. After the creation of the [European Arrest Warrant](#) mechanism - the most important instrument implementing the principle of mutual recognition in criminal matters - other Framework Decisions creating common grounds for judicial recognition were adopted, such as Framework Decision 2005/214/JHA<sup>22</sup> on financial penalties and Framework Decision 2006/783/JHA<sup>23</sup> on confiscation orders.

Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions, also known as the ‘Probation Framework Decision’, was drafted in 2008 along with Framework Decision 2008/909/JHA, at the initiative of Austria, Finland and Sweden<sup>24</sup>. The Probation Framework Decision was designed to form a system of recognition of probation decisions and alternative sanctions, and to establish the consequent transfer of persons from the Member State that delivered the judgment, known as the issuing State<sup>25</sup>, to another one, namely the executing State, where he would be supervised<sup>26</sup>, on the basis of his social, family and professional ties.

#### **4. Scope of Application: Probation Measures and Alternative Sanctions**

Framework Decision 2008/947/JHA establishes a list of probation measures and alternative sanctions that are ‘*in principle obligatory to supervise*’ by executing States<sup>27</sup>. This list is outlined in Article 4, and includes the following eleven measures and 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;

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<sup>20</sup>Id. p. 141

<sup>21</sup>Ibidem

<sup>22</sup> Official Journal of the European Union, L-76, 22 March 2005, p. 16–30

<sup>23</sup> Official Journal of the European Union, L-328, 24 November 2006, p. 59–78

<sup>24</sup> Hofman, Robin; Hans, Nelen. (2020). “Cross-border cooperation in the execution of sentences between the Netherlands, Germany and Belgium: an empirical and comparative legal study on the implementation of EU framework decisions 2008/909/JHA and 2008/947/JHA”. In *Crime, Law and Social Change* 74, pages 381-404, p. 386

<sup>25</sup> Framework Decision 2008/947, Article 2(8)

<sup>26</sup> Framework Decision 2008/947, Article 2(9)

<sup>27</sup> Framework Decision 2008/947, Recital 10

- (h) an obligation to compensate financially 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 the sentenced person;
- (k) an obligation to undergo therapy or addiction treatment.

In addition to these measures and sanctions, the [Court of Justice of the European Union \(CJEU\)](#), asked by a national court to interpret the Framework Decision through the [preliminary ruling mechanism](#) under Article 267 TFEU, expanded the list of obligatory probation measures to be supervised by the executing States by including custodial sentences whose execution is suspended, subject to the sole obligation not to commit another criminal offence<sup>28</sup>. According to the Court's ruling, although the obligation not to commit a criminal offence is not expressly mentioned in the above list of measures, it must be regarded as being linked to and forming part of the wider category of 'instructions relating to behaviour' established by Article 4(1)(d) of the Framework Decision<sup>29</sup>.

In addition to the measures and sanctions indicated in the list, Member States **may** undertake to supervise additional types of probation measures and/or alternative sanctions (Art. 4(2)). To date, only Denmark, Germany and the Netherlands have notified their will to supervise additional probation measures and alternative sanctions. More specifically, Denmark is willing to monitor the sentenced person's place of residence, Germany may supervise 'certain other constraints which satisfactorily make amends for wrongs committed' and instructions to limit and prevent a specific lifestyle of the sentenced person, and, lastly, the Netherlands is willing to supervise measures involving electronic devices<sup>30</sup>.

## 5. Procedure

Articles 3 and 5 to 12 of Framework Decision 2008/947 establish the procedural aspects concerning the issuance and recognition of judgments.

### 5.1 Competent Judicial Authorities

Framework Decision 2008/947 leaves a large amount of discretionary power to the Member States for designating the competent authorities to act and take decisions on the issuance and execution of probation measures/alternative sanctions (Art. 3 (1)). Contrary to other Framework Decisions regarding judicial cooperation matters, such as, for instance, the EAW Framework Decision, Member States can designate even non-judicial authorities as the competent authorities, *'provided that such authorities have competence for taking decisions*

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<sup>28</sup> Court of Justice of the European Union, 26 March 2020, no. C-2/19, *A.P.*

<sup>29</sup> Case *A.P.*, para. 41 to 45

<sup>30</sup> Notifications sent by the Member States to the Eurojust Judicial Network. Available at: <<https://www.ejn-crimjust.europa.eu/ejnupload/StatusImp/PracticalInfoProbation.en20.pdf>>

*of a similar nature under their national law and procedures*' (Art. 3(2)), and, in set cases, that the defendant has the right to appeal the decision before a court (Art. 3(3)).

## 5.2 Commencement of the Procedure in the Issuing State

Articles 5 and 6 relate to the commencement of the procedure: the competent authority of the issuing State **may** forward a judgment imposing a probation decision or an alternative sanction, accompanied by a standard form certificate<sup>31</sup>, to:

- The state in which the sentenced person is '**lawfully and ordinarily residing**<sup>32</sup>, in cases where the sentenced person has returned or wants to return to that State' (Art. 5(1)).
- Upon request of the sentenced person, to 'a Member State other than the Member State in which the sentenced person is lawfully and ordinarily residing, on condition that this latter authority has consented to such forwarding' (Art. 5(2)).

In the former case, the role given to the will of the sentenced person is reduced<sup>33</sup>. Although the wording '*where the sentenced person ... wants to return*' implies a verification of his will, there are no specific provisions regulating the collection of the person's consent and his right to be heard<sup>34</sup>. Moreover, the defendant has no right of initiative<sup>35</sup>. However, in the latter case, the defendant has a real right of initiative, although this is subject to the subsequent consent of the executing State.

## 5.3 Procedure in the Executing State

Once the competent authority from the executing State receives the judgment and the duly completed certificate, it must promptly take all necessary measures to supervise the probation measures or alternative sanctions (Art. 8). The executing State **may** only refuse to recognise and supervise the measures according to the optional grounds for refusal enshrined in Article 11 (**see section 5.3.2**).

The probation measures or alternative sanction imposed by the issuing State's judgment, if incompatible with the law of the executing State, can be adapted both in terms of nature and/or duration with the latter's national legal order (Art. 9(1)). However, the adapted measure must not be more severe or longer than the original measure imposed (Art. 9(3)).

### 5.3.1 Double Criminality

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<sup>31</sup> Annex I to Framework Decision 2008/947.

<sup>32</sup> Regarding the concept of residence, see the interpretations of the European Court of Justice in case C-66/08 *Kozłowski*, and in case C-123/08 *Wolzenburg*.

<sup>33</sup> Neveu, p.145

<sup>34</sup> Montaldo, p.947

<sup>35</sup> Neveu, p. 145

Double criminality, or dual criminality, is a common principle of international extradition law. It requires the alleged crime or criminal act for which extradition is being demanded to constitute a crime under the law of both the requesting and the requested State<sup>36</sup>.

In EU judicial cooperation in criminal matters<sup>37</sup>, the double criminality check is abolished in relation to a list of serious offences when they are punishable in the issuing state with a maximum period of at least three years (in other words, the minimum punishment available is three years). Accordingly, Framework Decision 2008/947 lists in Article 10 a series of 31 offences which do not require verification of the double criminality of the act and, more specifically:

- 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 meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests
- 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,

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<sup>36</sup> Stein, Torsten. (2019), 'Extradition', in *Max Planck Encyclopedia of International Law*

<sup>37</sup> For instance, see Framework Decision 2002/584/JHA on European Arrest Warrant, Framework Decision 2008/909/JHA on the transfer of prisoners, Framework Decision 2009/829/JHA on supervision measures as an alternative to provisional detention



- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

For offences other than those listed above, the executing State **may** require a double criminality check to be carried out in order to recognise the issuing State's judgment and to enforce the supervision of the probation decision or alternative sanction (Art. 10(3)). Although the wording of the Framework Decision suggests that this step is optional, Member States routinely resort to the double criminality check for offences not included in the list.

### 5.3.2 Optional Grounds for Refusal

In Article 11(1), the Framework Decision includes a list of eleven **optional** grounds through which the executing State authority **may** refuse to recognise the foreign judgment:

- the certificate sent is incomplete or 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 are not met;
- recognising the judgment and assuming responsibility for supervising probation measures or alternative sanctions would be contrary to the principle of *ne bis in idem*;
- in the case referred to in Article 10(3) and, where the executing State has made a declaration under Article 10(4), in the case referred to in Article 10(1), the judgment relates to acts which would not constitute an offence under the law of the executing State (lack of double criminality);
- 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;
- the law of the executing State grants immunity and it is therefore impossible to supervise the probation measures or alternative sanctions;
- the person is not old enough to be criminally liable according to the law of the executing State;
- the trial was conducted *in absentia* (see section 5.3.3);
- the judgment or the probation decision requires medical/therapeutic treatment which the executing State is unable to supervise in view of its legal or healthcare system;
- the probation measure or alternative sanction will last for less than six months; or
- the criminal offence described in the judgment was committed wholly or for a major or essential part in the territory of the executing State.

Before deciding to refuse the request for cooperation, the competent authorities of the executing state **must**, *inter alia*, communicate and cooperate with the issuing State with a view to finding a solution (see Article 11 paragraphs 2 to 4).



### 5.3.3 Trials *in absentia*

In 2009, the [Council of Ministers of the EU](#) amended the grounds for refusal related to trials *in absentia* enshrined in the Framework Decisions for judicial cooperation in criminal matters<sup>38</sup>. The amendment was mainly aimed at enhancing and fostering the effectiveness of these Framework Decisions by narrowing down the grounds for non-recognition of decisions rendered following a trial at which the defendant did not appear. Consequently, point (h) of Article 11(1) of the Framework Decision was modified as follows:

- (h) according to the certificate sent, the person did not appear in person at the trial that resulted in the decision, unless the certificate states that the person, in accordance with further procedural requirements defined in the national law of the issuing State:
- (i) in due time: either received personally information on the scheduled trial, or by other means actually received information in a way that establishes unequivocally that he/she was aware of the scheduled trial, and was informed that a decision may be taken against him/her if he/she did not appear for the trial;
- or
- (ii) was aware of the scheduled trial and gave a mandate to a legal counsellor to represent him/her at the trial who actually defended him/her;
- or
- (iii) after the decision, was expressly informed of the possibility of appealing it, by participating in person, so to have the merits of the case re-examined and the original judgment reversed, but he/she did not expressly contest the decision or did not request a retrial or appeal.

## 6. Time Limit

The procedure in the executing State must be dealt with rapidly. As a general rule, the competent executing authority has 60 days to recognise or refuse to recognise the judgment (Art. 12(1)); if it is not possible to respect the original deadline, the issuing authority must be informed immediately (Art. 12 (2)).

## 7. Jurisdiction and Subsequent Decisions

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<sup>38</sup> Official Journal of the European Union, L-81, 27 March 2009: Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA

An important feature of this Framework Decision is the issue of governing law. This means establishing which national law applies to the case once the sentenced person is under the control of the executing State, which of the two Member States involved should take further decisions concerning the case, the conditions involved and the respective obligations of the two competent authorities. A series of provisions contained in the Framework Decision deals precisely with these matters.

## **7.1 Governing Law**

Once the supervision and application of probation measures and alternative sanctions take place, the applicable law becomes that of the executing state (Art. 13(1)).

## **7.2 Subsequent Decisions**

As a general rule, the competent authority of the executing State is responsible for adopting further decisions on the suspension of the sentence, conditional release or sentence and alternative sanctions. This may occur particularly when the sentenced person violates any condition of the measure or sanction imposed on him or if he commits another criminal offence (Art. 14(1)). The decisions that may be taken by the executing authority concern, in particular:

- Modification of duties or orders of the measure or sanction, or modification of the temporal extension of the probation period (Art. 14(1)(a));
- Annulment of the suspension of execution of the judgment or revocation of the decision on conditional release (Art. 14(1)(b)); and
- Imposition of a custodial sentence or any other measure that deprives the person of his liberty (Art. 14(1)(c)).

The law applicable in these circumstances is the one of the executing State (Art. 14(2)).

As an exception to this provision, Member States can notify, at any time, the [General Secretariat of the Council](#) (Art. 14(6)) that they will not take responsibility in the latter two cases mentioned above or under other circumstances, such as:

- If the judgment imposing the alternative sanction does not state that if the person violates the established obligations or instructions, he will be subject to a measure depriving him of his liberty (Art. 14(3)(a));
- If a conditional sentence is at stake in the case (Art. 14(3)(b));
- If the judgment refers to acts that are not considered an offence in the executing State (Art. 14(3)(c)).

When the executing State opts for this possibility, if the person does not comply with the measure or sanction imposed and the competent authorities in that State decide that subsequent decisions must be taken, the jurisdiction is transferred back to the issuing State (Art. 14(4)). However, the executing State remains responsible for recognising the judgment

and taking adequate measures to supervise the probation measure or alternative sanction (Art. 14(5)).

A document prepared by the General Secretariat of the Council in early 2020 with data received from 21 Member States provides information on those that have decided to refuse jurisdiction and responsibility for further decisions. Despite having decided to implement it in different cases, the Member States that opted for this possibility are: Czech Republic, Denmark, Germany, Croatia, Cyprus, Netherlands, Austria, Poland, Romania, Slovenia, Finland and Sweden<sup>39</sup>.

### **7.3 End of Jurisdiction of the Executing State**

The jurisdiction of the executing State concerning supervision and further decisions may terminate and be transferred back to the issuing State in two cases. Firstly, if it is no longer possible to locate the sentenced person or if he can no longer lawfully remain in the executing State (Art. 20(1)). Secondly, if a new criminal trial begins in the issuing State against the person and the issuing State requests the return of its jurisdiction (Art. 20(2)).

Even if the issuing State regains jurisdiction, it must consider for how long and to what extent the person has already complied with the measure or sanction in the executing State, along with the decisions adopted by the authorities in that State (Art. 20(3)).

## **8. Informative Duties of the Competent Authorities**

### **8.1 Obligations when the Executing State has Jurisdiction for Subsequent Decisions**

When the executing State maintains jurisdiction for subsequent decisions, its competent authority has two main informative duties.

Firstly, it must communicate in writing to the issuing State any specific decisions that are taken, such as changes to the probation measure or alternative sanction, annulment of the suspension of execution of the judgment or of the decision on conditional release, implementation of sentences or measures that deprive the person of his liberty if he failed to comply with the measure or sanction imposed, and termination of the measure or sanction (Art. 16(1)). In this regard, the authorities of the issuing State must promptly send to the executing State any information that could give rise to the adoption of one of these decisions (Art. 16(3)).

Secondly, if asked by the issuing authorities and after the relevant documentation has been received, the executing State must confirm the maximum duration of deprivation of liberty that applies according to its domestic law if the person fails to comply with the measure or sanction (Art. 16(2)).

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<sup>39</sup> [“Implementation of 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”](#). General Secretariat of the Council. Retrieved 15 November 2020

## **8.2 Obligations when the Issuing State has Jurisdiction for Subsequent Decisions**

If the executing State is not responsible for the subsequent decisions, its obligations are slightly different, but it still has a duty to communicate some information to the issuing State, such as findings that could result in the termination of the suspension of execution of the judgment or of the decision on conditional release, or in the enforcement of measures that limit the person's liberty, and any other information that could be relevant for the issuing authorities to be able to take further decisions (Art. 17(1)).

In addition, if the executing State has not recognised the judgment but has accepted supervision, it is under an obligation to report any violation of the probation measure or alternative sanction (Art. 17(2)).

Finally, the informative duties of the issuing State concern the following decisions: annulment of the suspension of execution of the judgment or revocation of the decision on conditional release, adoption of measures restricting the person's liberty, and termination of the measure or sanction (Art. 17(5)).

## **8.3 Obligations of the Competent Authorities in any case**

Regardless of this difference concerning any further decisions, the competent authority in the executing State is obliged to inform the issuing State promptly in writing:

- When the judgment and the relevant documentation is sent to the authority that is in charge of its recognition and for adopting the necessary measures to ensure supervision (Art. 18(1));
- If it is impossible to supervise the person as he cannot be found in the executing State and the executing State is thus relieved of its supervision duties (Art. 18(2));
- When a final decision to recognise the judgment and the probation decision is adopted, and when the executing State assumes responsibility for supervision (Art. 18(3));
- If the judgment and the probation decision are not recognised, together with the reason for this decision (Art. 18(4));
- When decisions concerning the adaptation of the probation measure or alternative sanction are taken (Art. 18(5));
- When decisions on amnesty or pardon are taken, together with the reason for this decision (Art. 18(6)).

## **9. Controversies**

Since its creation in 2008, the Framework Decision has presented some critical issues regarding its direct application between European Member States.

The *legal fragmentation* created by the different criminal law systems of the States slows down the cooperative processes, constituting, *de facto*, the lack of application of the Framework Decision. For example, community services are not in place in Austria, Cyprus,

Malta, Spain, Italy and Sweden; only 12 States include sanitary treatments; only 11 States provide training or educational courses; and only 9 States envisage measures of direct compensation to the victim as an alternative to detention<sup>40</sup>. The differences between probation systems can lead to differences in enforcement methods in the executing States. In addition, the presence of the adaptation clause, on one hand, can be seen as a remedy for the lack of harmonisation of national laws; on the other hand, this solution affects the principle of mutual recognition. In this sense, the lack of uniformity between Member States regarding measures alternative to detention can be considered a crucial issue to be solved in order to guarantee full application of Framework Decision 2008/947. For instance, the [European Commission](#), in its 2014 report<sup>41</sup>, emphasised the fact that, after its entry into force, not a single transfer was carried out using this Framework Decision, due to the lack of harmonisation on measures alternative to detention between the Member States<sup>42</sup>.

Another core criticality is the absence of a proper right of initiative of the convicted person; in this sense, the convicted person's consent is only taken into account when the executing State is different from the State of residence. According to Article 5(2) of the Framework Decision, the transfer occurs following a request by the individual but the issuing Member State has no obligation to accept the convicted person's request. In the absence of an explicit request by the individual, according to Article 5(1), the transfer may take place to the State where the sentenced person is lawfully residing and to which he, consequently, wishes to return; for this reason, his consent is taken for granted. The sentenced person, however, does not have the right to be informed of the adaptation of the sentence or to revoke the consent if he considers the decision taken by the two States involved to be unfair<sup>43</sup>.

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<sup>40</sup> Rosanò, Alessandro. (2019). "Tristes, solitarias y finales: la Convención de Estrasburgo del 1964 e la decisión marco 2008/947/GAI sulla sorveglianza all'estero delle misure di sospensione condizionale e delle sanzioni sostitutive". In *Freedom, Security and Justice: European Legal Studies* 3, pages 139-159, p. 155

<sup>41</sup> Rosanò, p.154

<sup>42</sup> Rosanò, p. 155

<sup>43</sup> Faraldo-Cabana, Patricia. (2019). "One step forward, two steps back? Social rehabilitation of foreign offenders under Framework Decision 2008/909/JHA and 2008/947/JHA". In *New Journal of European Criminal Law* 10(2), pages 151-167, p. 165