

of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law and replacing Council Framework Decision 2000/383/JHA, *O.J. L* 151, 21.5.2014, 1–8.

13 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud affecting the financial interests of the Union by means of criminal law, *O.J. L* 198, 28.7.2017, 29–41.

14 European Parliament resolution of 31 January 2019 on the Annual Report 2017 on the protection of the European Union's financial interests – fight against fraud (2018/2152(INI)).

15 See press release “EU Budget: €181 million to strengthen the fight against fraud affecting de EU Budget”, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_3967](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3967), accessed 2 November 2019.

16 Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, *O.J. L* 123, 10.5.2019, 18–29.

17 M.A. Pérez Marín, “La estructura orgánica de la Unión Europea en la lucha contra el fraude y contra la delincuencia organizada transnacional: presente y futuro”, (2017) 5 *Revista Internacional Consinter de Direito*, 15–17 <<https://revistaconsinter.com/es/revistas/ano-iii-numero-v/>> accessed 10 December 2019. See by the same author, *La lucha contra la criminalidad en la Unión Europea: el camino hacia una jurisdicción penal común*, Atelier, Barcelona, 2013.

18 On this same matter, see P. Csonka, A. Juszczak, E. Sason, “The establishment of the European Public Prosecutor's Office: The Road from

Vision to Reality”, (2017) *eu crim*, 125–135; L. Kuhl, “The European Public Prosecutor's Office – More Effective, Equivalent and Independent Criminal Prosecution against Fraud?”, (2017) *eu crim*, 135–143.

19 Cf. note (10).

20 Art. 3(2) lit. a) and b) of Directive 2017/1371 defines the criminal offences of fraud affecting the Union's financial interests in respect of non-procurement-related and procurement-related expenditure. Art. 3(2) lit. d) of the Directive defines the criminal conduct of fraud affecting the Union's financial interests in respect of revenue arising from VAT own resources. However, the harmonisation of this VAT fraud by the Directive only applies to serious offences. Art. 2(2) of the Directive defines as “serious offence” the necessity that intentional acts or omissions are connected with the territory of two or more Member States of the Union and involve a total damage of at least € 10.000.000. Art. 22(1) of the EPPO Regulation established corresponding restrictions on the competence of the EPPO to prosecute these VAT offences.

21 OLAF is indispensable to protect the EU budget and to prevent fraud affecting the financial interests. See “Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee of the regions and the court of auditors – Commission Anti-Fraud Strategy: enhanced action to protect the EU budget”, 29.4.2019, COM(2019) 196 final.

22 Eurojust and Europol can also be considered “criminal bodies” of the EU, however they still have only cooperation and coordination tasks in the area of criminal law.

## Mutual Recognition of Judgements in Criminal Matters Involving Deprivation of Liberty in Spain

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**Council Framework Decision 2008/909/JHA of 27 November 2008 “on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union” was implemented in Spain by the introduction of new rules into the Mutual Recognition Act. Achieving social rehabilitation is the core objective of the Framework Decision. This has also practical consequences for the implementation of this instrument, for example requiring ties on the part of the sentenced person with the executing State. Some of the most controversial procedural issues in Spain are analysed in this article, including the consent of the sentenced person and the grounds for the adaptation of the sentence by the executing State under Spanish law.**

### I. Legal Framework in Spain

The 1999 European Council meeting in Tampere was the starting point for the approval of a significant number of European regulations dealing with mutual recognition in criminal matters during the first decade of the new millennium. These regulations led to a change in the legislative techniques of European instruments in Spain. Previously, each mutual recognition instrument was implemented by means of an individual transposition act. After 2014, all European instruments were

included in a new statute, which aims to integrate the legislation of the different EU instruments on mutual recognition into a single act (called Mutual Recognition Act). This technique aims to guarantee better transposition and greater clarity, as claimed by the Spanish legislator in the preamble to the Mutual Recognition Act.<sup>1</sup> From 2014 onwards, every EU mutual recognition instrument has been transposed by an amendment to the Mutual Recognition Act. Every instrument is regulated in one of the titles of the Act, and three chapters can be found under each title: the first chapter regulates general provisions,

the second one the rules to be followed when Spain is the issuing State, and the third establishes the regulation to be applied when Spain is the executing State. For some instruments, there is a fourth chapter that includes additional dispositions.

Spain missed the transposition deadline for Framework Decision 2008/909/JHA, which was to have been implemented by December 2011; the implementation law was finally approved in 2014. Arts. 63 to 92 of the Mutual Recognition Act provide for the recognition and execution of criminal judgements involving deprivation of liberty. The present article assesses whether the Spanish legislator achieved the main purposes of this European instrument; it will also outline where – in my opinion – the Spanish legislator has not succeeded in properly reflecting the Framework Decision. The main features of the regulation on the mutual recognition of judgements imposing deprivation of liberty according to the Spanish Mutual Recognition Act will be explained.

## II. Links of the Sentenced Person with the Executing Member State

Framework Decision 2008/909/JHA pursues the social rehabilitation of the sentenced person. Both the Framework Decision and the Spanish Mutual Recognition Act do not define the meaning of “social rehabilitation;” therefore, it is up to the judge to decide whether the circumstances that enable the rehabilitation are met in each individual case. In my opinion, however, the Spanish law has failed to accurately reflect the connection between achieving social rehabilitation and linking the sentenced person with the executing State, i.e., Spain, which will be further elaborated in this section.

Recital 9 of the Framework Decision provides a number of guidelines that may be helpful for the authority issuing a request for the transfer of a sentenced person. In this context, social rehabilitation is easier to accomplish if the sentenced person has some links with the State in which the sentence is to be served. Recital 9 establishes that the competent authority of the issuing State has to take into account the place of residence of the sentenced person’s family, together with any linguistic, cultural, social, and economic links to the executing State. The mere place of residence of the sentenced person is not included among the criteria that the issuing authority must consider. Likewise, Art. 4 of Framework Decision 2008/909/JHA – establishing the criteria for forwarding a judgement and a certificate to another Member State – refers to the Member State “of nationality of the sentenced person in where she or he lives” as the most suitable criterion. But the proper meaning of the expression “Member State [...] where she or he lives” can be found in Recital 17, which establishes that “this indi-

icates the place to which that person is attached based on habitual residence and on elements such as social or professional ties.” Recital 9 was probably inspired by the ECJ’s judgment of 17 July 2008, Case C-66/08, *Szymon Kozłowski*,<sup>2</sup> in which the Court established a person’s connection with the executing State within the context of the Framework Decision on the European Arrest Warrant.<sup>3</sup> The aim of the European legislator was presumably to avoid situations, in which the mere fact of “staying” in one country is considered a stronger link rather than the sentenced person’s culture, profession, or family relations.

The meaning of the wordings “Member State where the sentenced person lives” or “where the person stays” used in Framework Decision 2008/909/JHA is not as precise as “the place of residence.” Since these former notions are undefined legal concepts, it is at the judge’s discretion to decide whether cultural, professional, and family links – which are not always readily apparent – are given in each case. This decision involves both the issuing State (which decides whether it endorses the transfer) and the executing State (which takes a decision on the acceptance of the petition of the issuing State). From the perspective of the issuing State, the significant role of prison officers and social workers should also be taken into account in its consideration, because they are required to know well the circumstances and possible benefits for the rehabilitation of the inmate. In fact, Spanish statistics show that the number of petitions for transfer varies considerably from one prison to another, depending on the initiative of prison officers.<sup>4</sup>

Given the aforementioned framework of Union law, the Spanish Mutual Recognition Act did not always take into account these nuances in meaning in the words “Member State where a person lives.” Only Art. 67 of the Act, which regulates the exceptions for the necessary consent of the sentenced person, refers to economic, professional, or family links with the executing State.<sup>5</sup> Hence, this rule imparts the proper meaning of “place of residence” or “place where the person lives” precisely in the same sense given by Framework Decision 2008/909/JHA. Unfortunately, most of the articles of the Mutual Recognition Act are not as accurate as Art. 67. As an example of this inappropriate transposition, Art. 68, which regulates the consultation about the transmission of a certificate, merely establishes that the consultation will be sent to the State where the sentenced person lives, regardless of whether his or her roots are in any other Member State. This is the case as well of Art. 71, which stipulates the criteria for forwarding a certificate: the provision only refers to the Member State of “usual residence.” And another unfortunate example can be found in Art. 91, which transposes the content of Art. 25 of Framework Decision 2008/909/JHA, referring to the enforcement of a

criminal sentence as a consequence of refusing an EAW on the basis of Arts. 4(6) and 5(3) of the Framework Decision on the European Arrest Warrant; Art. 91 does not even include “residents” but instead refers to the nationality of the sentenced person.<sup>6</sup> Of course, in this case and despite its wording, Art. 91 must be interpreted in conformity with Art. 25 of Framework Decision 2008/909/JHA in connection with Arts. 4(3) and 5(3) of Framework Decision 2002/584/JHA on the European Arrest Warrant; this means that, if the European Arrest Warrant is refused, a sentenced person who has links with Spain (even though he or she is a national of another Member State, or lives or has his/her residence in another Member State), shall serve the sentence of imprisonment in Spain in order to avoid impunity.<sup>7</sup>

### III. Spain as Issuing State: Requirements of the Judgement Forwarded from Spain

Arts. 66 to 76 of the Mutual Recognition Act regulate the situation when Spain is the issuing State. The provisions, *inter alia*, deal with the consent of the sentenced person, his/her transfer, and the procedural requirements to be met by the competent Spanish court. The opinion of the sentenced person is a particularly sensitive issue, since it is mandatory to request it (not to be confused with the consent of the sentenced person). Spain also included a provision on the absence of pending criminal proceedings that does not belong to the Framework Decision 2008/909/JHA. These two issues will be analysed in more detail in the following.

#### 1. The sentenced person’s consent to the transfer

Art. 66 of the Mutual Recognition Act contains the criteria for forwarding a criminal judgement from Spain, whose issuing authority is the Prison Supervision Court (or Juvenile Court in case of convicted minors).<sup>8</sup> The essential element of Art. 66 is regulation of the sentenced person’s consent to the transfer.<sup>9</sup> The sentenced person must give his/her consent with legal assistance and with the services of an interpreter (if the person does not understand Spanish). In practice, it seems advisable that the sentenced person become acquainted with the circumstances of the enforcement in the executing State so that he/she can take an informed decision, although neither Framework Decision 2008/909/JHA nor the Mutual Recognition Act require provision of this information.<sup>10</sup>

Nonetheless, the provision leads to several legal questions. *Fernández Prado* concludes that consent cannot be withdrawn, but he makes an exception for cases in which a change in circumstances may justify a new decision.<sup>11</sup> Apparently,

however, the consent of the sentenced person to the transfer is the general rule. *De Hoyos* points out that Art. 67 of the Mutual Recognition Act transposing Art. 6(2) Framework Decision 2008/909/JHA includes many common exceptions to the consent, which implies that the rule specifying mandatory consent on the part of the sentenced person can be easily undermined.<sup>12</sup> It must, however, be taken into account that Art. 67(3) of the Mutual Recognition Act establishes the right of the sentenced person to state his or her opinion about the transfer, either orally or in writing (in accordance with Art. 6(3) of Framework Decision 2008/909/JHA). Even when the consent of the sentenced person is not required, the opinion of the sentenced person may be decisive, since it can provide valuable information for assessing the achievement of the purpose of social rehabilitation.<sup>13</sup> Reception of the sentenced person’s statement by the judicial authority is mandatory, and the Spanish court must strictly observe legal requirements in order to guarantee that the sentenced person’s opinion has been duly obtained (i.e., on an informed basis; if necessary, with the support of an interpreter, etc.).

#### 2. Absence of pending criminal proceedings

The Spanish issuing authority (usually the Prison Supervision Court) has to make sure that there is not another criminal conviction under appeal against the same person before any other criminal court. The court can obtain this information by means of the SIRAJ (a register for the support of the administration of justice). *Ruiz Yamuza* points out that this requirement is not found in Framework Decision 2008/909/JHA, but was added by the Spanish legislator.<sup>14</sup> This provision also triggers some legal questions. Some authors argue, for instance, that this rule includes not only conviction judgements under appeal but also pending proceedings, since the purpose of the provision, on the one hand, is to enable the defendant to attend the court hearings in pending criminal proceedings. On the other, its purpose is to reach a level of certainty about convictions against one person, given that – since the competence for all the pending convictions lies with one single court (the one that first received the petition about the transfer of the sentence) – contradictory decisions on the transfer can be avoided.<sup>15</sup>

### IV. Spain as Executing State: Consequences of Application of the Spanish Law to the Enforcement and Adaptation of the Sentence

International law on the transfer of sentenced persons regularly provides two systems if it comes to the enforcement of a sentence handed down abroad in the requested state: either the requested state (in terms of Union law: the executing State)

continues the enforcement as it was established in the sentence handed down in the requesting state (namely the issuing State) or it adapts the sentence as if the sentence had been delivered under the national law of the requested state. Framework Decision 2008/909/JHA has, as a rule, chosen the first option.<sup>16</sup> However, a sentence to deprivation of liberty may require some adjustments, since the law governing its enforcement is that of the executing State. The Framework Decision allows adaptation in two scenarios, i.e., either if the sentence is incompatible with the law of the executing State in terms of its duration (Art. 8(2)) or if the sentence is incompatible with the law of the executing State in terms of its nature (Art. 8(3)). Spain implemented these provisions in Art. 83 of the Mutual Recognition Act.

In the first scenario, the Spanish executing authority is allowed to adapt the sentence if the duration of deprivation of liberty exceeds the maximum established under the Spanish Criminal Code. According to Art. 83(1) of the Mutual Recognition Act, the judge may alter the conviction to the maximum for the same type of crime in these cases. The second scenario for adaptation of the sentence – the incompatibility of the punishment included in the criminal sentence in terms of its nature – allows the Spanish court to adapt the sentence by taking into account the crime committed. When applying the 1983 Council of Europe Convention on the Transfer of Sentenced Persons, the Spanish Supreme Court warned about the risk of broad interpretation of these two exceptions, as it could change the current system (continuing the enforcement) and open the door for a change in the content of the criminal judgement in practice.<sup>17</sup> The same statement can be applied towards correct interpretation of the Mutual Recognition Act as far as the EU scheme is concerned.

Other problems concerning a possible change in the content of the sentence may arise under Spanish law regarding the application of the General Prison Act, even when the sentence has not been adapted. According to the Spanish regulation on criminal enforcement, each case of a person sent to prison is analysed by a committee and, as a consequence, each inmate is classified according to a three-degree system, the first degree being for the most dangerous inmates. Convicted persons who are classified as third-degree inmates are closest to their release, so that they may enjoy longer leaves and the possibility of an earlier release (not only according to the conviction of the sentence but also to their behaviour in prison). As a consequence of the decision of the committee, a sentenced person transferred to Spain for the enforcement of a foreign criminal sentence, may enjoy an open prison regime from the very outset considering the Spanish prison system of degrees.<sup>18</sup> Although this release is not the result of a legal adaptation of the sentence by the executing authority, it can be described as

a *de facto* adaptation, since there is actually a change in the enforcement of the sentence pursuant to the Spanish criminal enforcement legislation.<sup>19</sup>

The Spanish enforcement law in criminal matters may also hinder the correct application of Art. 17(2) of Framework Decision 2008/909/JHA. The problem lies in the various jurisdictional competences and is as follows: The competent authority for the execution of transfer requests in Spain is the Central Examining Magistrate's Court located in Madrid. It is responsible for the execution of sentences for the entire national territory. According to Art. 17(2) of Framework Decision 2008/909/JHA, the competent authority of the executing State may be requested to inform the issuing State about the possible provisions on early or conditional release. Depending on the answer given, the issuing State is allowed to accept these provisions or withdraw the certificate. This provision was transposed to Art. 78 of the Mutual Recognition Act with a similar wording. As mentioned above, however, criminal enforcement is entrusted to the Prison Supervision Courts.<sup>20</sup> At the moment at which the executing decision is taken by the Central Examining Magistrate's Court, the judge may not yet be aware of the prison regime that is to be applied to the sentenced person in a Spanish prison. This means that the judge at the Central Examining Magistrate's Court might not know about the possibility of an early release, because this decision is taken under the jurisdiction of the Prison Supervision Court. Therefore, at this juncture, the Central Examining Magistrate's Court cannot provide any accurate information to the issuing State in accordance with Framework Decision 2008/909/JHA. In my opinion, in order to avoid this paradoxical situation, the Spanish Central Examining Magistrate's Courts should inform the issuing State about the possible consequences of application of the General Prison Act (see above).

## V. Conclusions

Transposition of EU criminal law instruments is usually done quite literally in Spain, which avoids misinterpretations. Nevertheless, the Spanish legislator has not always achieved a successful transposition of Framework Decision 2008/909/JHA on EU mutual recognition of prison sentences and prisoner transfers. Regarding the regulation of this mutual recognition scheme, there are mismatches between the wording of the Framework Decision and the Mutual Recognition Act that transposes Union law in Spain. This particularly concerns the links of the sentenced person with the executing State. Framework Decision 2008/909/JHA stresses the importance of taking into account various criteria when linking the sentenced person with the executing State, e.g., family, work, or linguistic ties (among others), considering that the place where



the person lives is the place where he/she has these roots. The Spanish Mutual Recognition Act does not specify all these circumstances, since most of its provisions merely refer to the place of residence. Therefore, there are several conceivable issues where interpretation of the Spanish regulation in conformity with European legislation is necessary.

Interestingly, the Mutual Recognition Act adds a requirement that it is not found in Framework Decision 2008/909/JHA. Whenever Spain is the issuing State, the court must inform itself about any other criminal proceedings in which a judgement of conviction is under appeal against the person to be transferred. The scope of this rule is debated in literature, however, since it intends to avoid contradictions about different convictions concerning the same person.

If we look at Spain as executing State, some problems may arise as a consequence of the peculiarities of Spanish penitentiary law. A committee analyses the circumstances of the convicted person at the moment he/she enters prison, and the decision of this committee may lead to the application of an open prison regime. This may result in a *de facto* adaptation of the foreign sentence. In addition, this scheme may lead to another problem: when the issuing State asks for information about the possibilities of an early or conditional release, it is impossible for the Spanish competent court, which decides on this request, to know the decision that will be taken by the committee. In practice, the court can only inform the issuing State of the possible consequences of the application of Spanish penitentiary law.

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1 Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea (BOE A-2014-12029).

2 See 2.3.2 of the Handbook on the transfer of sentenced persons and custodial sentences in the European Union, *O.J. C* 403, 29.11.2019, 2 (p. 12).

3 Para. 54 of the judgment states: “it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of his presence and the family and economic connections which that person has with the executing Member State”. In the case, Poland had issued an EAW against Polish national Mr Kozłowski, who “lived predominantly in Germany” at the moment of his arrest and one year prior. He occasionally had some jobs in Germany, but he had no family in the country and barely spoke German; on the other hand, he had grown up in Poland and worked there until two years before moving to Germany. Mr Kozłowski did not consent to his surrender to Poland. The ECJ upheld the arguments of the referring German court with the aforementioned argumentation.

4 F.-G. Ruiz Yamuza, “Comentario del primer supuesto práctico de transmisión de una sentencia condenatoria por un tribunal español, en aplicación de la Ley 23/2014, en relación con la Decisión Marco 2008/909/JAI sobre reconocimiento mutuo de sentencias que imponen penas u otras medidas privativas de libertad”, (2015) *Revista General de Derecho Europeo*, 13, 25.

5 See Art. 6 of Framework Decision 2008/909 for the system when the consent of the sentenced person is not required.

6 M. Fernández Prado submits that the Spanish legislator forgot to include the residence of the sentenced person in Art. 91; in strict terms, this omission would also affect the proper meaning of the State of residence or State where the sentenced person lives. See M. Fernández Prado, “Cuestiones prácticas relativas al reconocimiento de resoluciones que imponen penas o medidas privativas de libertad”, in: C. Arangüena Fanego (coord.), *Reconocimiento mutuo de resoluciones penales en la Unión Europea*, Aranzadi, Cizur Menor, 2015, p. 131.

7 Spanish legal scholars recognize the lack of clarity of the Spanish text and agree in the need to interpret the Mutual Recognition Act in conformity with Framework Decision 2008/909/JHA. See M. De Hoyos Sancho, “El reconocimiento mutuo de resoluciones por las que se impone una pena o medida privativa de libertad: análisis normativo”, in: C. Arangüena Fanego (coord.) *Reconocimiento mutuo de resoluciones penales en la Unión Europea*, Aranzadi, Cizur Menor, 2015, p. 109; J. Nistal Burón, “La «adaptación» de una condena para su cumplimiento en España cuando ha sido impuesta

por un tribunal extranjero. Criterio del Tribunal Supremo y su encaje dentro del nuevo marco legal europeo”, (2019) *Revista de Derecho Migratorio y Extranjería*, 11; and F.-G. Ruiz Yamuza, “Comentario ...” *op. cit.* (n. 4), p. 13.

8 The competence of the Prison Supervision Courts relates to all matters of imprisonment. This competence is also justified in cases of international transfer, because any petition for transfer will not suspend imprisonment once the sentence has been delivered and the defendant convicted to deprivation of liberty. There is at least one Prison Supervision Court in each province and their competences (according to Art. 94 of the Organic Law on the judiciary) are “matters concerning the enforcement of terms of imprisonment and security measures, the issue and enforcement of instruments for the mutual recognition of criminal rulings within the European Union that are assigned to them by law, judicial review of the disciplinary power of prison authorities and the protection of the rights and benefits of prison inmates.”

9 Art. 66 implements Art. 6 together with Art. 4(1) of Framework Decision 2008/909/JHA.

10 M. De Hoyos Sancho, *op. cit.* (n. 7), p. 116.

11 M. Fernández Prado, *op. cit.* (n. 6), p. 135.

12 M. De Hoyos Sancho, *op. cit.* (n. 7), p. 116.

13 F.-G. Ruiz Yamuza (*op. cit.* (n. 4), p. 17) gives the example of a sentenced person who apparently has family links in the executing State but is nevertheless in a relationship in the issuing State or in a third State. Or perhaps there is an upcoming move on the part of his family that may change the State where he has family links in the short term.

14 F.-G. Ruiz Yamuza, *op. cit.* (n. 4), p. 33.

15 M. Fernández Prado, *op. cit.* (n. 6), p. 133.

16 J. Nistal Burón, *op. cit.* (n. 7), p. 3.

17 STS 820/2013, 17 October 2013.

18 J. Nistal Burón, *op. cit.* (n. 7), p. 10.

19 J. Nistal Burón, *op. cit.* (n. 7), p. 11.

20 See *supra* n. 8.

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