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Other instruments: personal interim measures, the enforcement of prison sentences and probation measures

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1. The instruments of mutual recognition.

1.1 The Tampere, the Hague and Stockholm programmes.

The mutual recognition of judicial decisions and the harmonisation of the legislation of the Member States has been furthered with the adoption of two programme instruments: the European councils held in Tampere in October 1999 and the Hague in March 2004.

In particular, the Hague Programme has contributed to the progressive creation of a common legal framework in the sphere of justice and home affairs and attain the integration of this policy into the Union's other policy areas.

From the point of view of criminal policies, the objectives sought are the improvement of the common capacity of the Union and its Member States to safeguard fundamental rights, minimum procedural safeguards and access to justice to facilitate protection to those who need it in accordance with the Geneva Convention on refugees and other international treaties; the regulation of migratory flows; the control of the external borders of the Union; the fight against cross-border organised crime; the suppression of the threat of terrorism; the development of the potential of Europol and Eurojust and forging ahead in the mutual recognition of decisions and judicial acts. Moreover, the Council document promotes full respect of the fundamental rights guaranteed in the European Convention for the Protection of Human Rights and the Charter of Fundamental Rights.

The results obtained can be found throughout the guidelines on mutual recognition and in the harmonisation of the provisions of material criminal law and procedural law.

From the specific perspective of the approximation of procedural provisions, it is worth highlighting the Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings[1], and of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of the proceeds of crime[2].

[1] In *OJ* no. L 13 of 20/01/2004.

From the specific point of view of the mutual recognition of judicial decisions, the most important measure is the Framework Decision on the European arrest warrant[3] which, albeit with some difficulty, has been accepted by all Member States.

Council Framework Decision no. 2003/577/JHA, of 22 July 2003, on the enforcement in the European Union of orders freezing property or evidence and Council Framework Decision 2005/214/JHA, of 24 February 2005, on the application of the principal of mutual recognition to financial penalties are also particularly relevant.

The Council has also addressed the problem of riches accumulated from illegal sources, in Framework Decision 2005/212/JHA, of 24 February 2005, on the Confiscation of Crime-Related Proceeds, Instrumentalities and Property and with Framework Decision 2006/783/JHA, of 6 October 2006, on the application of the principle of mutual recognition to confiscation orders [4].

Thus, the regulatory impulse of the Council continued to manifest itself in the form of the adoption of the Framework Decision on the exchange of information extracted from criminal records between Member States (2005/0267(CNS))[5].

Meanwhile, the system known as the European register of criminal records has recently been completed with Framework Decision 2009/315/JHA dated 26 February 2009, on the organisation and content of the exchange of information extracted from the criminal record between Member States and Decision 2009/316/JHA of 6 April 2009, on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, mentioned earlier.

Moreover, the interventions in relation to organised crime, xenophobia and terrorism have acquired special importance in the context of the harmonisation: Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime; Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia; Framework Decision 2008/919/JHA which amends the Framework Decision on combating terrorism.

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[2] In *OJ* no. L 82 of 22/03/2004.
[3] In *OJ* no. L 182 of 5/07/2001.
[4] Official Journal of the European Union, L 328 of 24/11/2006.
[5] Both framework decisions are published in the Official Journal of the European Union of 7 April 2009.

In relation to the balance between the requirements of cooperation and the protection of rights, we must not forget Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the sphere of police and judicial cooperation in criminal matters[6].

Nevertheless, the greater insistence of the European Council has manifested itself in a series of framework decisions aimed at extending and consolidating the system of mutual recognition of judicial decisions.

From this point of view, the following framework decisions have recently been passed:

- Decision 2008/978/JHA of 18 December 2008, on the European evidence warrant[7];

- 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 [8];

- 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 [9].

We should also highlight the vital importance of the recent 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, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial[10].

However, in the face of such significant regulatory production, we can see, nevertheless, from the point of view of the practical application of the principle of mutual recognition, that the process of implementation of European regulatory instruments in the legal systems of the Member States is extremely slow, both due to technical and political reasons.

Therefore, while it is true that the model of mutual recognition is destined to replace –with time- the regulatory corpus contained in the multilateral conventions on extradition

[6] Official Journal of the European Union, L 350 of 30 December 2008, page 60.
[7] Official Journal of the European Union, L 350 of 30 December 2008, page 72.
[8] Official Journal of the European Union, L 327 of 5 December 2008, page 27.
[9] Official Journal of the European Union, L 337 of 16 December 2008, page 102.
[10] Official Journal of the European Union, of 27 March 2009.

and judicial assistance in criminal matters, the extent of the results obtained over fifty years, which is testimony to the complexity of European criminal policy, should not mean that we forget the limits of the process underway.

In reality, while until now it has not been possible for Member States to be called to answer before the Court of Justice of the European Communities in the event of a failure to comply with their obligations to implement the framework decisions in their respective national legal systems, it is also necessary to highlight that the unanimity required for the adoption of acts under the Third Pillar means that the decision-making process becomes quite cumbersome[11].

The subsequent development of the action of the European Union in the field of mutual recognition is also reflected in the programme lines of the 2009-2014 five-year period, established pursuant to the Stockholm Programme[12], the content of which highlighted the stages of the net operational programme of the European institutions in their task of constructing the common area of freedom, security and justice.

In this regard, the European Council reiterated its "*determination to continue the development of an area of freedom, security and justice, serving and protecting EU citizens and those living in this area [...] to effectively meet the new challenges, taking full advantage of the opportunities presented by the Lisbon Treaty*."

In particular, the political priorities that are directly or indirectly relevant in relation to mutual recognition of judicial decisions are specified in the following points, all of which are closely interrelated: the European citizenship and fundamental rights; the achievement of a Europe of law and justice; internal security.

The document highlights that the real application of the principles established in the Charter of Fundamental Rights and the European Convention on Human Rights is a fundamental requirement for developing European citizenship.

The rights and duties of this citizenship can only be understood in the context of a common judicial space, governed by the principles of law and justice, the pillars of

[11] For a critical reconstruction of the application of the principle of mutual recognition, see: Lorenzo Salazar, "La lotta alla criminalità nell'Unione: passi in avanti verso uno spazio giudiziario comune prima e dopo la Costituzione per l'Europa ed il Programma dell'Aia", in *Cassazione Penale*, November 2004.

[12] EU Council Document 17024/09, Brussels, 2 December 2009. On the origins of the programme it reminds us that the Commission sent the European Council, as the institution responsible for the definition of the Union's strategies, communication [COM(2009) 262] *An area of freedom, security and justice serving the citizen*, in which it set out possible priorities for the 2010-2014 period. To be precise, the main lines of this communication were the following: 1) Promoting citizens' rights; 2) Making life easier; 3) Protecting citizens; 4) Promoting a more integrated society for the citizen.

which are the harmonisation of rules, the mutual recognition of judicial decisions, the training of jurists and professionals in the sector, and access to justice.

The complement to this structure is an effective internal security strategy, characterised by the development of judicial cooperation in criminal matters and that makes it possible to combat organised crime and terrorism properly.

The European Council invited the Commission to present an action plan, which was to be adopted by June 2010 at the latest, with an intermediate review before the end of the month of June 2012.

To that end, and in accordance with the programme indicated by the Council, last April the Commission adopted the Action Plan to implement the Stockholm Programme[13], which, among other things, establishes, in relation to the European space of justice, additional measures designed to promote the harmonisation of the rules and achieve the mutual recognition of judicial decisions[14].

Specifically, the Commission stated its intention to promote legislative proposals designed to establish common procedural foundations, especially in relation to obtaining evidence and the exchange of information between judicial and police authorities[15].

Essentially, in order for the principle of mutual recognition to function effectively, future measures designed to strengthen mutual trust are envisaged, such as those to develop a series of common minimum standards in civil and criminal law or those others that aim to create a European prosecutor's office.

[13] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens, Action Plan Implementing the Stockholm Programme [COM(2010) 171 final – not published in the Official Journal].

[14] In this regard, the philosophical foundations of the Commission in relation to the European criminal space is clearly set out in the following statements in the Communication: "*Criminal law is a relatively novel area of EU action for which the Treaty of Lisbon sets a clear legal framework. A criminal justice strategy, fully respecting subsidiarity and coherence, should guide the EU's policy for the approximation of substantive and procedural criminal law. It should be pursued in close cooperation with European Parliament, national parliaments and the Council and acknowledge that focus will remain primarily on mutual recognition and the harmonisation of offences and sanctions will be pursued for selected cases*."

[15] Once again, it is worth quoting the clarificatory words of the Commission: "*The administration of justice must not be impeded by unjustifiable differences between the Member States' judicial systems: criminals should not be able to avoid prosecution and prison by crossing borders and exploiting differences between national legal systems. A solid common European procedural base is needed. A new and comprehensive system for obtaining evidence in cross-border cases*

1.2 The instruments of mutual recognition: integrated cooperation

Keeping in mind the indisputable fact that the increase in judicial cooperation and the mutual recognition of judicial decisions is based essentially on the high degree of reciprocal trust in the legal systems of the Member States of the Union, it is important to point out that the development and extension of said element is not only derived from the regulatory measures that we have just mentioned and directly characterised by their objectives of harmonisation and integration between the different legislative apparatus of the Member States.

The trust in the efficiency, legality and democratic nature of the systems is a complex phenomenon, the development of which is also the result of the day-to-day collaboration of Member States' institutions in the bodies of the Union, the implementation of all the conventions and legislative instruments that make the application of the common area of freedom, security and justice possible. Moreover, it is important to highlight the activity performed by certain agencies, specifically created for the purposes of coordinating with the institutions of each of the Member States operating in specific sectors of justice and home affairs.

These measures can be included in a category defined as "integrated cooperation"[16].

In this field, the implementation of the Convention on mutual assistance in criminal matters between the Member States of the European Union adopted on 29 May 2000[17] and the subsequent protocol, signed on 16 October 2001[18], have acquired particular relevance, specifically designed, as they are, to guarantee effective judicial assistance even in relation to the exchange of information on accounts and banking transactions and monitoring the same.

In fact, this convention introduced a series of innovations that have helped give a new impulse to cooperation between Member States, particularly in the context of

and better exchange of information between Member States' authorities on offences committed are essential tools to developing a functioning area of freedom, security and justice."

[16] The definition is from Lorenzo Salazar, "La lotta alla criminalità nell'Unione: passi in avanti verso uno spazio giudiziario comune prima e dopo la Costituzione per l'Europa ed il Programma dell'Aia", in *Cassazione Penale*, November 2004.

[17] *OJEC no*. C 197 of 12/07/2000, page 1.

[18] *OJEC no.* C 326 of 12/11/2001.

investigations into organised crime and, indirectly, to the increase in reciprocal trust between the national institutions involved that are committed to this fight.

Remember the introduction of the general principle according to which, in procedures of mutual assistance between Member States, the request should be made in line with the manner, method and terms "expressly" set out by the requesting state instead of following the rule set out in the legislation of the requested state.

"Controlled deliveries" have also been of particular operational importance as well as the covert operations of undercover agents and the creation of "joint investigation teams".

From another point of view, the reciprocal trust between the Member States has found vital vehicles in the intergovernmental cooperation bodies such as Eurojust and Europol.

In particular, Eurojust, created as a kind of "Agency" of the Union, has contributed to the resolution of the difficulties arising in processing requests for judicial cooperation, even via the consolidated practice of holding coordination meetings between the competent investigating authorities at their offices or in the states in question.

From this perspective, the Union has seen another positive development in the creation of "contact networks" between the institutions that act in certain relevant areas in the field of justice and security.

Think of the European Judicial Network, created in 1998 and with a generalist vocation in criminal matters, as well as the creation of "national correspondents", both in the police and judicial spheres, with a view to intensifying and facilitating cooperation with Europol and Eurojust, respectively.[19]

In this regard, it has been pointed out that the action of the European Union aimed at stepping up integrated cooperation has represented a further step forward with the adoption of three important decisions: Decision 2009/426/JHA, of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [20]; the Decision of 6

[19] Decision of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in, in *OJEC* no. L 16 of 22 January 2003.

[20] OJ L 138/14 of 4 June 2009,.

April 2009 creating the European Police Office (Europol)[21]; Decision 2008/976/JHA of 16 December 2008, on the European Judicial Network[22].

Finally, even though they are not structures dedicated directly to the development of judicial cooperation, we must highlight the importance of institutions such as the Network of Presidents of Supreme Courts, that of Public Prosecutors, the European judicial training network or the Network of self-governing bodies of the judiciary. These are indeed fundamental institutions for the development of dialogue between institutions that, within each national system, play a vital role in the growing affirmation of reciprocal trust.

The Stockholm Programme and the subsequent regulatory actions of the Community institutions intend to strengthen the integrated cooperation network, in particular by means of the creation of the much sought-after European Prosecutor's Office, with the power to investigate and bring criminal actions.[23]

1.3 Regulatory instruments: reference to earlier sections of the course

We have already said that the application of the principle of mutual recognition is centred on the instrument of framework decisions and, mainly, on the Framework Decision on the European arrest warrant: the only regulatory instrument in the sphere of freedom, security and justice that has been fully executed in the legal systems of all the Member States.

Other regulatory instruments of the Union already in force – and undoubtedly destined to play a key role in the development of the reciprocal accreditation of jurisdictional decisions– are the ones mentioned earlier in the context of financial penalties, securing evidence, judicial confiscation and obtaining evidence in the progress of investigations.

[21] OJ , L 121/37 s, of 15 May 2009.
[22] OJ, L 348/130 s, of 24 December 2008.
[23] "*The Commission will prepare the establishment of a European Public Prosecutor's Office from Eurojust, with the responsibility to investigate, prosecute and bring to judgement offences against the Union's financial interests. In doing so, the Commission will further reflect on the cooperation with all the actors involved, including the European Anti-Fraud Office (OLAF)*." Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens, Action Plan Implementing the Stockholm Programme [COM(2010) 171 final –not published in the Official Journal.

These measures are dealt with specifically in other sections of the course to which we refer you.[24]

Meanwhile, we will now go on to specifically analyse three of the regulatory instruments that are already in force: the Framework Decision on the application of the principle of mutual recognition to decisions on supervision measures not involving the deprivation of liberty; the Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty; the Framework Decision 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.

2. The recognition of non-custodial pre-trial supervision measures

3.1 The action of the Commission: the Green Paper and the proposal for the European supervision order

One of the points of action of the European Council of Tampere, subsequently developed in the Programme of measures designed to implement the principle of mutual recognition of criminal judgments of November 2001, is the introduction of mutual recognition of the decisions that refer to non-custodial pre-trial supervision measures adopted by the judicial authorities of the Member States.

The aim is to increase, via the instrument of mutual recognition, the adoption of supervision measures other than provisional detention, thus reducing the number of non-resident detainees awaiting trial in the European Union.

Indeed, it has been observed that the consideration of the risk of escape often leads to provisional detention measures being adopted in the case of non-resident suspects,

[24] Module IV: units 10, 11 and 12.

while residents are more likely to be subject to non-custodial pre-trial supervision measures.

Meanwhile, the creation of a European decision on the implementation of non-custodial pre-trial supervision measures should favour the application of alternative sanctions for non-residents.

Moreover, the indirect effects of the introduction of said instrument would be both the strengthening of the right to freedom and the presumption of innocence in the common European area of freedom, security and justice as well as the reduction of the risk of different treatment of non-resident accused persons.

With a view to promoting the legislative initiative on this matter, the Commission published the Green Paper on mutual recognition of non-custodial pre-trial supervision measures[25]

Indeed, the Green Paper is a Commission document that serves as a basis for a debate that makes it possible to prepare the proposal of a new legislative instrument: a Green Paper on the mutual recognition of judicial decisions on non-custodial pre-trial supervision measures. A working document from the Commission's service, attached to the Green Paper, contains a full analysis of the legal framework in that area at the time, and illustrates the approach taken by the Commission in preparing the document.

As a result, via this Green Paper, the Commission laid the foundations for the introduction of a new instrument that makes the mutual recognition of non-custodial pre-trial supervision measures possible, with a view to promoting the replacement of provisional detention with a non-custodial supervision measure, the enforcement of which will correspond to the Member State in which the suspect is ordinarily resident.

In this way, the suspect in question will be subject to a supervision measure in his/her usual environment until the trial takes place in the other Member State.

An action in this sphere logically belongs to the programme of measures designed to put into practice the principle of mutual recognition of decisions in criminal matters, approved in November 2000, whose principles are illustrated in the working document of the services of the Commission.

The idea underlying this new instrument is the replacement of provisional detention by a kind of non-custodial supervision measure, as well as the transfer of said measure to the Member State in which the suspect is ordinarily resident. In this way, the person

[25] COM (2004) 562, not published in the Official Journal

can be subject to a pre-trial measure in his/her habitual environment, until the time of the trial in the competent Member State.

In order to guarantee the effectiveness of the instrument, the Green Paper envisages, as a last resort, the inclusion of a coercive mechanism that makes it possible to send uncooperative suspects to the state where the trial is to be held.

As a conclusion to said process of consultation and study, in 2006 the Commission presented a proposal for a Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union[26], designed to allow the mutual recognition of supervision measures.

In view of the lack of harmony between the different systems of control measures in force in the legal systems of the different Member States, the authority issuing the proposal has allowed for the risk that it may treat non-resident suspects resident in the state where the trial is to take place differently to those who are not.

Basically, the Commission has made safeguarding the rights of the individual the main element of its legislative initiative in relation to the European supervision order in the context of pre-trial procedures applied between Member States of the European Union and has started work on the basis of one of the main objectives explicitly contemplated in the Tampere Programme of 2000[27], together with the objective of achieving effective judicial cooperation.

Therefore, the aim is the rationalisation of the system, so that the citizens of the Union who are resident in another Member State can return to their country and comply with the supervision measures there awaiting the trial, instead of remaining in the pointless situation of provisional detention in the state where the offence was allegedly committed.

Meanwhile, the indirect aim sought by the initiative is the promotion of the adoption of measures that are less stringent than provisional detention and the regulation of the justice procedures in such a way as to guarantee the appearance of the person in question before the judge in the Member State that issued the European supervision order.

[26] COM (2006) 468, not published in the Official Journal
[27] This is the Programme of measures designed to implement the principle of the mutual recognition of decisions in criminal matters (the Programme for mutual recognition) of November 2000 (measure number 10).

The European supervision order may be issued in relation to a suspect in criminal proceedings who is not resident in the Member State in whose territory the order was issued.

The competent authority for issuing the decision will be the court, the judge, the examining magistrate or public prosecutor who is competent, in accordance with national law, to issue a European supervision order, while the executing authority will be the corresponding judicial authority competent by virtue of national law for executing the European supervision order.

It is necessary to specify that the issue of a European supervision order is structured as an option that is available to the suspect, the application of which depends on the discretional assessment of the judicial authority overseeing the trial. Therefore, according to the actual text of the proposal, the suspect, even though he/she may apply for a European supervision order to be issued, does not have a right to it from a legal point of view.

The proposal takes into account the relevant differences between the legislations of the Member States in relation to the regulation of supervision measures.

Indeed, there is no specific minimum threshold for the sentence in question, with a view to identifying the offences for which a European supervision order can be issued; instead it states that the decision may be issued provided it is possible, under the national law of the issuing state, to keep an accused person detained, regardless of whether the thresholds envisaged differ from one Member State to the next.

It is also important to indicate that, according to the structure of the Commission's proposal, the European supervision order can be issued both as an alternative to provisional detention and in cases where offences for which coercive measures other than provisional detention apply and, as such, even when the minimum sentence is lower than that envisaged for provisional detention.

In fact, it envisages, as *extrema ratio*, that those suspects who do not wish to collaborate in the execution of the measure be transferred obligatorily to the Member State where the trial is to be held, within a term of three days since their arrest.

However, before a decision can be adopted in this regard, the suspect will be entitled to be heard by the issuing authority, possibly even via telephone.

As for the content of the obligations that may be imposed in a European supervision order, the proposed Framework Decision covers the protection of the three "classic" requirements for pre-trial measures that generally allow the application of provisional detention in national law: the danger of the sources of evidence being altered, the danger of a repeat of the offence and the risk of escape.

The corresponding obligations that may be imposed in order to guarantee compliance with said requirements correspond, in maximum terms, to the recommendations of the Council of Europe on provisional detention (for example, the prohibition on leaving national territory, the obligation to appear before the judicial police, curfew and house arrest) and they are all optional. The only exceptions refer to: 1) the obligation of the suspect to be available to appear in court (nevertheless, in the case the legislation of the issuing state allows trials *in absentia*, the accused person may be exempt from the obligation to appear in the court); 2) the obligation not to hinder the normal operation of justice or not to commit criminal activities.

The responsibility for supervising the suspect falls on the Member State where he/she is usually resident, whose authorities have the duty to report any violation to the issuing judicial authority. In such cases, the issuing authority will have the option to decide that the suspect be detained and, if necessary, request that he/she be transferred to the issuing state.

Even in such cases, before the issue of the restrictive order, the accused person will be entitled to be heard by the issuing authority, taking advantage of videoconference if necessary.

As in the other regulatory instruments in force, designed to achieve the mutual recognition of judicial decisions, the proposed Framework Decision we are looking at here establishes the obligation for the state in which the suspect is ordinarily resident to comply with a European supervision order issued by the state in which the trial should be held. The requested state may refuse execution if said execution may entail a violation of the *ne bis in idem* principle, or if one of the following grounds exists: a) if the suspect cannot, due to his/her age, be considered criminally responsible for the acts on which the European supervision order is based; b) if an immunity or privilege under the law of the executing state prevents the execution of the European supervision order; c)

if the offence for which the European supervision order was issued is the object of amnesty in the state in which execution was requested, in the case that the latter, under criminal law, were competent for prosecuting the offence.

Finally, from the point of view of the future mutual recognition of the effects of final decisions in criminal matters, the proposal envisages that if a person to whom a European supervision order refers is a citizen or resident of the executing Member State, the execution could be subject to the condition that said person, after having been tried, be transferred to the executing Member State in order to serve the provisional detention or other sentence imposed by the issuing Member State.

2.2. The Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition of decisions on supervision measures as an alternative to provisional detention.

The process of drafting the legislation, guided by the Commission by means of the adoption of the Green Paper on the mutual recognition of supervision measures not involving a deprivation of liberty, followed by the proposal for a Framework Decision on the European supervision order, has lead to the adoption of a Framework Decision 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.[28]

The Council, on the basis of the elements proposed by the Green Paper on the mutual recognition of supervision measures not involving a deprivation of liberty and the Proposal for a Framework Decision on the European supervision order, has essentially accepted the principle of recognition by Member States of supervision measures other than provisional detention.

As a result, the Framework Decision analysed here and that assumes the key aspects of the structure of the Commission's proposal, indirectly seeks to attain the objective of promoting the adoption of measures that are not as harsh as provisional detention and

[28] 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, in OJ L 294 dated 11.11.2009 p. 20.

regulating the justice procedures in such a way that the appearance of the person in question before the judge of the Member State that issued the European supervision order is guaranteed.[29]

Meanwhile, it is worth highlighting the general aim of improving the security of citizens.

Following essentially the same layout approved with positive results in the European arrest warrant, the Framework Decision establishes that the decision leading to the application of a supervision measure not involving deprivation of liberty can be sent to the competent authority of the Member State in which the person in question is lawfully and ordinarily resident.

As is logical, the basic premise for doing so is so that the person in question, after being informed of the measures in question, consents to return to the country in which he is lawfully or ordinarily resident.

Moreover, with the dual objectives of facilitating execution of alternative measures to detention and safeguarding the requirements of the person to whom the trial refers, it is envisaged that the interested party may request for the transfer of the decision on supervision measures to the competent authority of a different Member State to the one in which he/she is lawfully and ordinarily resident, if said authority gives its consent in advance.

The decision on supervision measures that is sent to another Member State will be accompanied by a certificate which states the address at which the person in question will reside in the executing state, as well as all the relevant information that may facilitate the monitoring of the supervision measures in the executing state.

Here the aim is to prevent, in cases where the persons subject to pre-trial measures are citizens resident in other states of the European Union, the judicial authorities from deciding to impose the measure of detention just because they consider that the fact their residence is abroad increases the risk of escape, thus leading to discrimination between those citizens who are resident in the countries of the authority in charge of the trial and the rest of EU citizens.

[29] In relation to the Framework Decision discussed here, see Ariano Maffeo, “La decisione quadro n. 2009/829/GAI: il principio del mutuo riconoscimento applicato alle decisioni sulle misure alternative alla detenzione cautelare”, in Diritto Comunitario e degli scambi internazionali, 2010, vol. 49, p. 113; Coral Aranguena Fanego, “De "la Orden europea de vigilancia" al reconocimiento mutuo de resoluciones judiciales sobre medidas sustitutivas de la prisión provisional: primera aproximación a la Decisión marco 2009/829/JAI del Consejo”, in Espacio Europeo de libertad, seguridad y justicia últimos avances en cooperación judicial penal/ Coral Aranguena Fanego (dir.), 2010, ISBN 978-84-9898-212-1, p. 223-266

On the basis of the Framework Decision, the requesting judicial authority may apply one of the alternative measures to detention to the suspect resident in another EU Member State and choose from among those envisaged it is legal system.

Once the restrictive decision is adopted, the certificate must be completed in accordance with the form annexed to the Framework Decision and sent to the competent judicial authority of the Member State in which the suspect is lawfully and ordinarily resident for execution.

Then, the country receiving the decision will execute it within a term of twenty days as of the receipt of the complaint.

Nevertheless, in the event that the pre-trial measures adopted by the issuing country are incompatible with the legal system of the Member State being asked to execute the decision, the receiving country will not be obliged to comply with the content of the decision and will instead have the option of adapting the provisions of the same in order to make them compatible with its legal system.

In that case, the Framework Decision introduces a highly appropriate flexibility mechanism: the requested state may adapt the measure of the requesting authority and establish the adoption of any of the supervision measures not involving the deprivation of liberty that are envisaged in its legal system for offences equivalent to the one for which the process began. The only limit in this regard is that it will not be possible to apply harsher measures.

From this perspective, it is important to highlight that said adaptation instrument represents a genuine new development, given that, in order to achieve the fundamental objective of facilitating the adoption and subsequent application of a supervision measure not involving a deprivation of liberty, also in the case where the object of the decision is ordinarily resident abroad, the judicial authority of the requested state (responsible for overseeing the executing of the measure) can modify the essential content of the decision issued by the judicial authority of a foreign country. All of this is for the purpose of ensuring that a supervision measure not involving a deprivation of liberty can be executed, even if, in order to do so, it is necessary to moderate the requirements for protection of society sought by the decision in accordance with the

fundamental rights of the person subject to the measure on the basis of the legal tradition of the country obliged to execute it.

In any event, the Framework Decision distinguishes two categories of supervision measures not involving a deprivation of liberty: on the one hand, those that are always applied, in one way or another, by the Framework Decision and that cover a set of measures that have some effect on the freedom of movement or relation of the person on whom they are imposed[30]; on the other hand, there are those that the Member State is prepared to supervise, with an express communication sent to the General Secretariat of the Council and which are characterised by the imposition or prohibition of certain conduct.[31]

Having said that, it is important to highlight the fact that the Framework Decision in question (like all those that configure the system of mutual recognition of judicial decisions) clearly establishes a mechanism for mutual recognition that will under no circumstances harm the fundamental rights protected by Article 6 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union.

It expressly establishes that nothing in the Framework Decision should be interpreted as prohibiting refusal to recognise a decision on supervision measures if there are objective indications that it was imposed to punish a person because of his or her sex, race, religion, ethnic origin, nationality, language, political convictions or sexual orientation or that this person might be disadvantaged for one of these reasons.

When a decision on supervision measures with alternatives to detention in prison is recognised, it will be the requested country that will execute the supervision measure ordered and assume the corresponding supervision activity.

Meanwhile, with a view to duly executing the decision, as well as optimising supervision, periodic consultation between the central authorities of the two interested countries is envisaged.

[30] The measures are the following: (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.. (Article 8, section 1, of the Framework Decision).

[31] The measures are the following: (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.. (Article 8, section 2, of the Framework Decision).

From another perspective, in order to guarantee the participation of the supervised person in the context of the trial to be held in the issuing country, a compulsory surrender procedure is activated, similar to the one envisaged in the European arrest warrant[32].

Another interesting element is the elimination of the dual criminality system, in line with the model already envisaged in the case of the European arrest warrant.

As a result, for offences entailing a deprivation of liberty of no less than three years, the executing state may not condition recognition of the measure on the dual criminality test.

Nevertheless, the possibility does exist for the supervision measures not involving a deprivation of liberty to be refused in the event it is confirmed that the certificate that should accompany the order to be executed is missing, or if it is incomplete, or in the event the order clashes with the principle of *ne bis in idem*. Other cases in which it is possible to refuse execution are the time-barring of the offence, in accordance with the legislation of the requested state, the existence of immunity or the absence of criminal liability on grounds of age[33].

Moreover, in order to speed-up procedures and reduce costs, the possibility is envisaged to take recourse to the videoconference system both at the examination state and at the oral hearing.

[32] It states: "In case the person concerned does not return to the issuing State voluntarily, he or she may be surrendered to the issuing State in accordance with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States".

[33] 1. The competent authority in the executing State may refuse to recognise the decision on supervision measures if: (a) the certificate referred to in Article 10 is incomplete or obviously does not correspond to the decision on supervision measures and is not completed or corrected within a reasonable period set by the competent authority in the executing State; (b) the criteria laid down in Article 9(1), 9(2) or 10(4) are not met; (c) recognition of the decision on supervision measures would contravene the ne bis in idem principle; (d) the decision on supervision measures relates, in the cases referred to in Article 14(3) and, where the executing State has made a declaration under Article 14(4), in the cases referred to in Article 14(1), to an act which would not constitute an offence under the law of the executing State; in tax, customs and currency matters, however, execution of the decision may not be refused on the grounds that the law of the executing State does not prescribe any taxes of the same kind or does not contain any tax, customs or currency provisions of the same kind as the law of the issuing State; (e) the criminal prosecution is statute-barred under the law of the executing State and relates to an act which falls within the competence of the executing State under its national law; (f) there is immunity under the law of the executing State, which makes it impossible to monitor supervision measures; (g) under the law of the executing State, the person cannot, because of his age, be held criminally responsible for the act on which the decision on supervision measures is based; (h) it would, in case of breach of the supervision measures, have to refuse to surrender the person concerned in accordance with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [6] (hereinafter referred to as the "Framework Decision on the European Arrest Warrant"). (Article 15 of the Framework Decision)

The Member States are urged to accept the measures contemplated in the Framework Decision by 1 December 2012 at the latest.

3. The execution of custodial sentences

3.1 The Strasbourg Convention and the Commission Green Paper

As we highlighted earlier, the European Union has set itself the objective of offering its citizens a high level of protection inside the area of freedom, security and justice (Article 29 of the Treaty on European Union).

From this point of view, the full materialisation of the mutual recognition of judicial decisions entails both the application of the instruments for harmonising the national rules in relation to criminal punishment, and the enforcement of modern mechanisms for the recognition of final decisions issuing custodial sentences.

But in reality, it is not possible to speak of a single legal space (which makes the realisation of the values of freedom, security and justice difficult) unless there is a basically homogenous implementation of criminal legislation and the possibility exists to execute sentences involving a deprivation of liberty imposed by the judicial authorities of the Member States in a uniform manner.

Faced with this reality, the only regulatory instrument that existed was that governing the transfer of persons sentenced to deprivation of liberty, also applicable to the Member States of the Union, set out in the provisions of the Council of Europe Convention signed in Strasbourg on 21 March 1983 and based exclusively on a consensus regime, as a sentenced person could only be transferred to another country with his/her consent and if both interested states agreed[34].

[34] By virtue of Article 3 of the Convention, a sentenced person may be transferred under this Convention only on the following conditions: 1. if that person is a national of the administering State; 2. if the judgment is final; 3. if, at the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence to serve or if the sentence is indeterminate; 4. if the transfer is consented to by the sentenced person or, where in view of his age or his physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative; 5. if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory; and 6. if the sentencing and administering States agree to the transfer.
Therefore, in addition to the agreement of the sentenced person, it is essential that the two states also agree, who, in any event, are subject to some specific obligations, by virtue of the provisions of Article 4: f the sentenced person has expressed an interest to the sentencing State in being transferred under this Convention, that State shall so inform the administering State as soon as practicable after the judgment becomes final; If the sentenced person has expressed his

All the Member States of the European Union have signed and ratified the Convention, although only 11 of them have signed the additional protocol of 1987[35]. The main aim of the Convention is the social reinsertion of persons sentenced to measures involving a deprivation of liberty; in the case of a foreigner who is deprived of his/her liberty due to an offence, he/she can serve out the sentence in his/her state of origin. The reasons for this Convention are of a humanitarian nature, as it is based on the idea that communication difficulties related to linguistic, social and cultural barriers, as well as the absence of contact with one's family, can have drastic effects on the conduct of foreigners who find themselves in prison and hinder, or indeed prevent, their reinsertion into society.

In this context, 11 Member States of the Union signed an Agreement on 25 May 1987 regarding the application among the Member States of the European Communities of the Council of Europe Convention of 1983.

It is an agreement that complements the provisions of the Council of Europe Convention mentioned above (Article 1)[36].

As a result, the Commission is well aware of the limits of this regime based on the Convention, which is based more on the requirement of humanising fulfilment of the sentence than on strengthening the legal bases of the area of freedom, security and justice, and in 2004 it published the Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union[37].

This is a weighty document which contemplates not only sanctions involving a deprivation of liberty, but also specifically sets out to identify obstacles to the application of the principle of mutual recognition, which, according to the conclusions of

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interest to the administering State, the sentencing State shall, on request, communicate to the State the information referred to in paragraph 3 above.

[35] On 18 December 1997 the Council of Europe approved an additional protocol to the Convention on the transfer of sentenced persons that entered into force on 1 June 2000 and was ratified by 16 Member States of the Council of Europe. The protocol completes the 1983 Convention on the Transfer of Sentenced Persons and establishes the rules that are applicable to the transfer of the fulfilment of sentences, both in the case the sentenced persons have fled the sentencing state in order to return to the state of which they are nationals, and in the case of persons in relation to whom an expulsion or deportation order has been issued.

[36] For the purpose of applying Article 3(1) (a) of the Convention on Transfer, each Member State shall regard as its own nationals the nationals of another Member State whose transfer is deemed to be appropriate and in the interest of the persons concerned, taking into account their habitual and lawful residence in its territory. (art. 2). Declarations made pursuant to the Convention on Transfer shall not apply with respect to the Member States that are party to this Agreement. In its relations with Member States that are party to this Agreement, each Member State may make, renew or alter any declaration provided for by the Convention on Transfer (art. 3).

the Tampere European Council, was to become the "cornerstone" of the functioning of the Union in the area of justice and make it generally easier for one Member State to enforce penalties issued in others[38].

3.2 Mutual recognition of judgments in criminal matters which impose sentences or other measures involving the deprivation of liberty

Along the same lines as the Commission Green Paper, the Council adopted Framework decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty.

However, one quickly notices that this decision is a partial response to the requests made in the Commission Green Paper, as it fails to deal with the complex and delicate matter of the approximation of Member States' criminal justice apparatus, instead merely addressing the enforcement of custodial sentences, applying the principle of mutual recognition to convictions that impose such penalties or, in any event, measures involving a deprivation of liberty.

Nevertheless, despite everything, this is a particularly significant decision, as its execution would make it possible to realise the principle of mutual trust in the decisions of the courts of the Member States[39].

Indeed, the principles of the Framework Decision intend to make custodial sentences handed down by a court of one Member State potentially effective throughout the territory of the Union, thus achieving the free movement of sentenced persons within the European space of justice.

Hence, this represents surpassing the system of agreements designed in the Strasbourg Convention which does not envisage, as a principle, any obligation to

[37] Commission Green Paper, *Approximation, mutual recognition and enforcement of criminal sanctions in the European Union*, COM (2004) 334, 30 April 2004.
[38] It is interesting to take into account that the Green Paper expressly states that "the approximation of rules of criminal law concerning penalties and their enforcement also helps to secure acceptance of the mutual recognition of judgments, since it enhances mutual trust".
[39] Italy was the first Member State to accept the Framework Decision in Legislative Decree no. 161, of 7 September 2010, "Provisions for adapting Framework Decision 2008/909/JHA on the mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of its execution in the EU into national law".

accept sentenced persons with a view to service of a sentence or another measure involving a deprivation of liberty (whereas 4), while transfer in order to continue with fulfilment of the sentences is only envisaged if the destination is the state of nationality of the sentenced person and if he/she and the states involved give their consent.

In relation to the above, Framework Decision 2008/909/JHA defines the principle of mutual recognition of judicial decisions in the context of the execution of judgments in criminal matters, contemplated in Article 82 of the Treaty on the functioning of the European Union, in the event that citizens of the Union are the object of a judgment in criminal matters and are sentenced to imprisonment or another custodial sentence in another Member State.

In fact, the first whereas of the Framework Decision mentions the conclusions adopted by the Tampere European Council on 29 November 2000, highlighting both the need to introduce said mechanisms and the need to apply the principle of the transfer of sentenced persons to persons resident in the Member States.

Having said that, it is worth mentioning that the preamble of the decision sets out the principles that inspired it and the objectives of the European legislature, with significant reference to the architecture of the European constitutional system which, as we have seen in the foregoing paragraphs, is solidly built on the fulfilment and protection of the fundamental rights derived from the shared constitutional traditions of the Member States and the European Convention on Human Rights, according to the interpretation of the European Court of Human Rights.

These inspiring principles are clearly taken from the text of the fifth whereas of the framework decision, which expressly states that "*procedural rights in criminal proceedings are a crucial element for ensuring mutual confidence among the Member States in judicial cooperation*".

And it is precisely the mutual trust in the corresponding procedural systems that is identified as a crucial element for allowing a Member State to enforce a criminal judgment in its territory when it was rendered by a judge in another Member State of the Union which establishes a criminal conviction that, one way or the other, entails a custodial sentence.

Obviously, what maintains this trust is the "*need to provide the sentenced person with adequate safeguards*", as well as full respect of the principles of equality, impartiality and proportionality[40].

Only under such conditions may custodial sentences or measures involving deprivation of liberty be enforced.

And even where the sentenced person has not participated in the proceedings, mutual recognition is possible "*by requiring in all cases his or her consent to the forwarding of a judgment to another Member State for the purpose of its recognition and enforcement of the sentence imposed*"[41].

Meanwhile, it is important to highlight that the Framework Decision mentioned above contains an express reference not only to fundamental rights and the principles recognised in Article 6 of the Treaty on European Union, but also to the Charter of fundamental rights of the European Union, with special reference to the provisions regarding justice, contained in chapter VI, thus anticipating the effects granted to said charter of rights in the Treaty of Lisbon[42].

Moreover, it is also worth recalling that, among the principles inspiring the enforcement of a sentence in a different state to the one in which it was rendered, is the possibility of the social rehabilitation of the sentenced person. The state issuing the decision is also asked to monitor fulfilment and "*take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State*".

Meanwhile, it is significant that it is precisely the objective of the social rehabilitation of the sentenced person that Article 3 of the Framework Decision considers the main aim of the decision.

From an operational perspective, it is clarified that the mechanism of mutual recognition assumes that the sentenced person is in the territory of the issuing state or that of the executing state and has given his/her consent to the transfer of the sentence to the executing state, pursuant to the legislation of the issuing state.

In the same way as with the other mechanisms of mutual recognition of judicial decisions, the recognition of judgments and the enforcement of sentences is carried

[40] Expressly mentioned in whereas six.
[41] See whereas 5.
[42] See whereas 13.

out by means of the transfer of the judgment and an attached certificate to the executing state, drafted using the standard model annexed to the framework decision.

Moreover, with the same technique used by the other measures for mutual recognition, the requirement of dual criminality as grounds for refusal of execution is excluded, establishing that the executing state may not refuse to recognise the judgment or enforce the sentence imposed in the event that the crimes for which the sentence was issued are punished in the issuing state with a measure involving deprivation of liberty or custodial sentence of no less than three years and are included on the list of serious crimes indicated in Article 7 of the framework decision.

As for the identification of the executing state, the measure refers to the Member State of nationality in which the sentenced person lives, to the Member State of which he/she is a national that, even if it is not where the sentenced person lives, is the Member State to which he/she will be deported once released due to an expulsion or transfer order included in the judgment and also refers to any other Member State whose competent authorities consent to the transfer of the judgment and the certificate.

The peculiarity of the mechanism of mutual recognition of judgments involving deprivation of liberty, in relation to other similar systems (for example, the European arrest warrant), is that the initiative does not necessarily have to come from the issuing state.

In fact, the executing state may ask the issuing state, on its own initiative, to transfer the judgment together with the certificate; and the sentenced person himself/herself may ask the competent authorities in both states to take the necessary steps to enforce the judgment in a country other than the issuing state.

Nevertheless, the procedure retains a certain respect for the national sovereignty of the state that has rendered the judgment, given that said state has no legal obligation to transfer the judgment and the certificate.[43]

Article 5 of the Framework Decision sets out the procedures for the transfer of the judgment and certificate, while Article 6, after affirming the need for the consent of the sentenced person, envisages some significant exceptions to the need for the consent of the sentenced person, stating that said declaration of his/her wishes is not necessary when the request for transmission of the judgment is addressed to the Member State of nationality in which the sentenced person lives; to the Member State

[43] See Article 4.5.

to which the sentenced person will be deported once he or she is released on the basis of an expulsion or transfer order included in the judgment; to the Member State to which the sentenced person has fled or returned prior to the criminal proceedings pending against him/her in the issuing State or following the conviction in that issuing State.

Having said that, the only reasons for refusing recognition and enforcement are specifically listed in Article 9 and consist of the failure to transmit or incomplete transmission of the certificate that, pursuant to Article 4, must accompany the judgment being transmitted; the incorrect identification of the executing state, with the criteria set forth in Article 4(1) not being met; in the event enforcement of the sentence would be contrary to the principle of *ne bis in idem*; in the event of a lack of dual criminality in the case of crimes not included in the list in Article 7.1; in the event the sentence is statute-barred; in the event there is immunity which makes it impossible to enforce the sentence; in the event the sentence is imposed on a minor who, on the basis of the legislation of the executing state, cannot be held liable; in the event that less than six months of the sentence remain to be served; in the event of a judgment rendered *in absentia,* unless the requirements set out in letter (i) have been fulfilled; in the event there is a lack of consensus regarding the person concerned being prosecuted, sentenced or otherwise deprived of his or her liberty for an offence other than the one that led to the request for transmission; if the sentence imposed includes a measure of psychiatric or health care or another measure involving deprivation of liberty, which cannot be executed by the executing State in accordance with its legal or health care system; if 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.

As for the methods of recognition, it is indicated that the position *in favour of* the transmission is contained in the provisions that allow the adaptation of the length of the penalty to the characteristics of the legislation of the Member State (Article 8), as well as partial recognition and enforcement.

Finally, the Framework Decision establishes the cases of provisional arrest, in the event the sentenced person is in the executing state, as well as the methods for transferring sentenced persons.

3.3 Scope of application and purpose of the mutual recognition of judgments involving the deprivation of liberty. Relationship with the European arrest warrant

The considerations set out in the foregoing paragraph allow us to understand the importance of the mutual recognition of judicial decisions that impose custodial sentences or other measures involving a deprivation of liberty for the construction of the European space of justice.

This importance is also understood if we take into account the scope of this new instrument of cooperation, established with clarity in Article 26 of Framework Decision 2008/909/JHA, which replaces —as of 5 December 2011— the corresponding provisions of the following conventions, applicable in relations between the Member States of the EU:

a) the Convention on the Transfer of Sentenced Persons, of 21 March 1983, and its additional protocol, of 18 December 1997;

b) the European Convention on the International Validity of Criminal Judgments, of 28 May 1970;

c) title III, chapter 5, of the Convention, of 19 June 1990, implementing the Schengen Agreement, of 14 June 1985, on the gradual abolition of checks at common borders;

d) the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences, of 13 November 1991.

From another point of view, it is clear that the system of mutual recognition of judgments imposing custodial sentences must necessarily be integrated into the system of surrender of the European arrest warrant, with specific reference to the possibility of surrendering persons who must serve a custodial sentence imposed by a final judgment.

As a result, the system of coordination introduced by Framework Decision 2008/909/JHA is very appropriate.

In particular, we will cite the provisions of whereas 12 and, especially, Article 25, which refer expressly to the possibility of the sentences linked to a European arrest warrant and which derive from the general rules of allocation being served, by virtue of which "*Without prejudice to Framework Decision 2002/584/JHA, provisions of this Framework Decision shall apply, mutatis mutandis to the extent they are compatible with provisions under that Framework Decision, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that Framework Decision, or where, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned*".

3.4. The coordination of the principles introduced by Framework Decision 2009/299/JHA in relation to the procedural rights of persons

Framework Decision 2009/299/JHA has been introduced recently with the aim of enhancing the procedural rights of persons, as well as promoting the mutual recognition of decisions rendered in the absence of the person concerned at the trial. This Framework Decision also represents a significant amendment of Framework Decisions 2002/584/JHA, of 13 June 2002, on the European arrest warrant and surrender procedures between Member States; Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties; Framework Decision 2006/783/JHA, on the application of the principle of mutual recognition to confiscation orders; Framework Decision 2008/909/JHA, on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty and Framework Decision 2008/947/JHA, 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 this regard, it is worth specifying that the different modalities of the system of mutual recognition of judicial decisions within the European Union envisage a series of

exceptions, specifically in the Framework Decisions on the execution of judicial decisions mentioned above.

In particular, these Framework Decisions — and, in particular, the one regarding the application of mutual recognition to judgments imposing custodial sentences— establish that one of the grounds for refusal of recognition is related to judgments rendered in absentia.

This ground for refusing recognition represents the obligation to offer guarantees of a new trial, in accordance with the requirements established in the executing Member State; in this regard, it requests an assessment to ascertain whether the safeguards supplied by the authority in the issuing state are sufficient to guarantee that the person to be surrendered or transferred will have the possibility of a new trial in the issuing state and that he/she may be present at the trial.

This is a system that, despite the fact that it respects individual guarantees in theory, does not make it possible to foresee, with a reasonable degree of certainty, in which cases the requested state may refuse execution. This has a negative effect on the operation of justice and the protection of the fundamental rights of citizens, which are exposed to the discretionality of the state being asked to execute the judgment or surrender.

As such, recent Framework Decision 2009/299/JHA intends to propose a clear, coherent approach to the question of the recognition of decisions rendered *in absentia* and allows the authority asked to execute the judgment involving a custodial sentence (or surrender, in the case of a European arrest warrant) to execute the judgment even if the accused person is not present at the trial, although it must respect the accused person's right to a defence.

Meanwhile, the aim of the Framework Decision analysed here is not to regulate the procedural forms, methods and requirements used to apply said Decision; these aspects are regulated by the internal legislation of the Member States.

In reality, the purpose of the Framework Decision is to duly guarantee the right to a new trial, which must be characterised by three elements: 1) the accused person will be entitled to be heard; 2) the arguments presented will be re-examined, and 3) the trial may lead to a decision that is contrary to the initial one.

In accordance with this philosophy, Framework Decision 2009/299/JHA introduces an exception to the ground for refusing recognition consisting of the existence of a right to

a new trial within a defined minimum term in the four Framework Decisions mentioned above. Specifically, in the case of the Framework Decision regarding the European arrest warrant, this right to a new trial may be granted before the European arrest warrant is issued (or after surrender), while in the case of the Framework Decision regarding the recognition of judgments imposing custodial sentences and that of the other two Framework Decisions cited, the right to a new trial must be established (although not exercised) before the application for execution of the judgment is sent to the other Member State.

4. Mutual recognition of judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions

4.1. The European space of justice and the judgments that establish probation measures and alternative sanctions

As explained earlier, the aim of making an area of freedom, security and justice a reality presupposes that the Member States of the Union must share the same concept of freedom, security and justice, as well as the idea of developing it in a legislative framework based on the principles of freedom, democracy, respect for human rights and fundamental freedoms and the essential principles of the rule of law.

In this context, what is needed is the full application of the principle of mutual recognition of judicial decisions in order to attain the fundamental aim of guaranteeing the security of citizens, their fundamental rights and a high degree of certainty in the legal situations within the Union[44].

Therefore, in this context we cannot overlook the need to complete the framework of the mutual recognition of judicial decisions. In this regard, instruments have been introduced that make it possible to apply that principle also in the case of judgments that impose probation decisions or alternative sanctions.

Indeed, this can be seen in the aim of guaranteeing the free movement of sentenced persons in order to ensure better social reinsertion, maintaining their social, cultural, family and linguistic links.

Meanwhile, the mutual recognition of these judgments and, as a result, the certainty that the supervision measures imposed by a suspended sentence will be enforced throughout the Union, will also guarantee the fulfilment of the society's need for security, while at the same time ensuring a better protection of victims.

Indeed, in the programme of measures of 29 November 2000, adopted in order to favour the application of the principle of mutual recognition in criminal matters, the Council declared itself in favour of cooperation in the field of suspended sentences and probation.

Meanwhile, the importance of judicial cooperation in the execution of suspended sentences with probation had already been highlighted by the Council of Europe, when on 30 November 1964 the process for the signing of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders was opened, entering into force on 22 August 1975.

The aim of this Convention was to allow sentenced persons to leave the territory of the country in which the judgment imposing a suspended sentence was handed down and establish their residence in another state party to the Convention, with appropriate supervision on the part of the competent authorities.

The basic principles of this Convention determined that the parties had to undertake to collaborate in order to achieve the reinsertion of persons sentenced abroad in order to facilitate their good behaviour and re-adaptation to life in society.

The Convention also indicated the conditions under which the requested state should execute the suspended sentence handed down in the other state party.

However, the Convention proved to be ineffective, both due to the significant number of cases in which the requested state could refuse execution of the judgment and because only twelve EU states had completed the ratification procedures and had done so with numerous reservations.

[44] See the conclusions of the European Council o f Tampere, of 15 and 16 October, confirmed in the Hague Programme, of 4 and 5 November 2004, on enhancing freedom, security and justice in the European Union.

As a result, in Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty, the Union set the aim of achieving effective cooperation between the Member States even in the case that criminal proceedings were brought against a person who was finally granted a suspended sentence or alternative sanction in a state.

4.2. The structure and aims of Framework Decision 2008/947/JHA, of 27 November 2008.

The aims described in the foregoing paragraph inspired the adoption 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[45], aimed precisely at extending the range of possibilities for the social reinsertion of the sentenced person, prevent him/her from committing new crimes and protecting the victims[46].

Basically, the Framework Decision we are discussing here extends the principle of mutual recognition of judicial decisions to the execution of sentences not involving custodial sentences on the one hand and, on the other, establishes the rules that each Member State had to follow in order to supervise the probation measures and alternative sanctions handed down by the other Member State.

From another point of view, it encourages the Member states to cooperate to a greater degree, to document the assumption of supervision of measures and sanctions in their own national registries and to protect personal data.

The mutual recognition mechanism established in the Framework Decision applies to judgments handed down due to the commission of an offence that impose a custodial sentence for several charges that is suspended or alternative sanctions. On the other hand, no mention is made of the execution of custodial sentences or measures that

[45] OJ L 337 of 16.12.2008, p.102. 102
[46] Among the most recent observations on the Framework Decision, see Andrés Palomo del Arco, "Reconocimiento y ejecución de sentencias penales dictadas en otro Estado europeo", Revista Jurídica de Castilla y León, no. 21, May 2010, p. 175 *et seq*.

restrict freedom or recognition and execution of financial penalties and confiscation orders, elements that are contemplated in specific Framework decisions.

The requirement for a Member State of the Union to request that another Member State recognise a decision is that the sentenced person have a lawful and ordinary residence in the requested state and have returned to said state or wish to return to it. Moreover, it is also possible to send the request to a different state, provided that the authority of the same so authorises.

The Framework Decision contains a series of specific alternative sanctions, prohibitions and obligations that the sentenced person must observe and the Member state will execute:

- an obligation for the sentenced person to inform a specific authority of any change of residence or working place;
- an obligation not to enter certain localities, places or defined areas in the issuing or executing State;
- an obligation containing limitations on leaving the territory of the executing State
- instructions relating to behaviour, residence, education and training, etc.;
- an obligation to report at specified times to a specific authority;
- an obligation to avoid contact with specific objects or persons;
- an obligation to compensate financially for the prejudice caused by the offence;
- an obligation to carry out community service;
- an obligation to cooperate with a probation officer or with a representative of a social service having responsibilities in respect of sentenced persons;
- an obligation to undergo therapeutic treatment or treatment for addiction.

Meanwhile, in view of the variety of alternative sanctions and the obligations in relation to supervision introduced in the Member States, it is highlighted that this list is not exhaustive; each Member State will notify the Secretariat General of the Council in relation to any other measures and sanctions it is prepared to supervise.

In any event, Member States may refuse to recognise a judgment or supervise a probation measure or alternative sanction if they are discriminatory.

It also establishes that the Framework Decision's position in favour of respect for the application of mutual recognition to judgments in criminal matters— and, in particular,

those that impose suspended sentences or alternative sanctions— is derived from the provision that authorises Member States, after informing the Council and the Commission, to conclude or continue applying conventions or agreements insofar as they facilitate the supervision of probation measures and alternative sanctions, and they duly inform the Council and the Commission.

As we have already highlighted, the structure of the mechanism of mutual recognition of judgments and supervision measures is similar to the one adopted via other Framework Decisions that deal with other kinds of judicial decisions in criminal matters, such as custodial sentences.

Indeed, in such cases it is also envisaged that the mechanism will function by means of the direct relationship between the competent central authorities for the activities related to this Framework Decision, constituted in each Member State by means of a decision notified to the Secretariat General of the Council.

With a view to considering the specificities of the legal systems of each Member State, a central authority is established that can also be a non-judicial authority, even when it is necessary that said authority have equivalent powers to those of a judicial authority, pursuant to the national legislation. However, if a decision that revokes the suspension of the conditional sentence or imposes a custodial sentence comes from an authority other than the jurisdictional body, it is necessary that said resolution be appellable before a jurisdictional body or a court. The Council will communicate the information to the Commission and the Member States.

The subsequent phases of the process highlight the mechanism envisaged in relation to the European arrest warrant or for the execution of custodial sentences: the central authority of the requesting state will send the decision to the corresponding authority of the requested state, which will include the certificate containing the essential elements of the decision, together with the form annexed to the Framework Decision.

The European legislature has taken into account the wide range of alternative sanctions and supervision measures that exist in the legal systems of each Member State and, as such, as in the case of the Framework Decision on custodial sentences, has subsequently stated its position in favour of mutual recognition and established that, if the nature or duration of the probation measures or alternative sanctions are not in line with the legislation of the executing state, the basis of the decision to be

executed may be altered by adapting the measures envisaged to other equivalent ones that exist in the internal legal system.

However, such measures will correspond to the extent possible to those imposed in the issuing state and under no circumstances will the nature or duration of the same be more severe or longer than those imposed in the state of origin.

The authority of the executing state will recognise the judgment —or the decision imposing probation— and take all necessary steps to supervise the measures and alternative sanctions without delay, unless it decides to refuse recognition and supervision.

In this regard, the executing state may refuse to recognise a judgment or probation measure or to supervise a measure if:

- the certificate is incomplete or manifestly does not correspond to the judgment or to the probation decision;
- the criteria for transfer of the judgment or probation measure are not met;
- recognition and supervision would be contrary to the principle of *ne bis in idem*;
- the judgment relates to acts which would not constitute an offence under the law of the executing state, unless it refers to in relation to taxes or duties, customs and exchange
- the enforcement of the sentence is statute-barred according to the law of the executing State;
- there is immunity under the law of the executing State, which makes supervision impossible;
- 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;
- the judgment was rendered *in absentia*, unless the person was summoned personally or informed via a competent representative, or that the person has indicated to a competent authority that he or she does not contest the case;
- the judgment or probation decision provides for medical/therapeutic treatment which the executing State is unable to supervise;
- the probation measure or alternative sanction is of less than six months' duration;

• the offences, under the law of the executing State, were committed within its territory.

Also in this case, the Framework Decision's vocation to apply mutual recognition to the fullest extent possible can be seen from the principle, mentioned earlier, of dual criminality for a broad range of offences. In particular, offences punishable in the issuing state with a custodial sentence of a maximum of three years do not require the dual criminality test. The offences in question are the following: participation in a criminal organisation, terrorism, trafficking in human beings, child pornography, illicit trade in human organs and tissue, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, nuclear or radioactive materials, corruption, fraud, computer-related crime, racism and xenophobia, environmental crime, kidnapping, infringement of intellectual or industrial property rights, rape, etc.

However, for other offences, the executing state may condition its recognition of the judgment and the probation decision, as well as the supervision of the measures and sanctions, on fulfilment of the requirement that the judgment refer to acts that also constitute an offence under its domestic legislation.

Within a term of sixty days as of receipt of the judgment or the probation measure and the certificate, the executing state will notify the issuing state in writing whether it recognises the judgment or probation measures and agrees to assume responsibility for supervising execution. Finally, both the issuing state and the executing state may grant an amnesty. In the event the executing state does so, it will inform the issuing state in writing.

The expenses resulting from the application of the Framework Decision will be borne by the executing state, with the exception of those originating the territory of the issuing state.

The executing state, in addition to other obligations consisting of supervision and the application of the supervisory measures, will comply with a series of obligations in relation to communication.

In particular, the issuing state will receive information in writing on any modification of the probation measures or alternative sanctions or of the revocation of the suspension of the execution of the judgment or the probation decision that entails the execution of

a custodial sentence or deprivation of liberty in the event a probation measure or alternative sanction is not observed.

Moreover, there is an information obligation both in the case the executing state is unable to supervise the probation measures or alternative sanctions, if the sentenced person does not reside it is territory, and in the case the executing state transfers the judgment or probation decision and certificate to an authority responsible for recognition and supervision of the same.

Meanwhile, if the issuing state assumes subsequent decisions, the executing state will supply it with any information required for the suspension of the execution of the judgment or the revocation of the decision on conditional release, a conditional sentence or a measure involving deprivation of liberty.

Moreover, the issuing state is obliged to supply the executing state with any information on decisions regarding the revocation of the suspension of the execution of the judgment or the revocation of the decision on conditional release, the execution or imposition of a conditional sentence or a measure involving deprivation of liberty and the expiry of a probation measure or alternative sanction.

The competence of the executing state is clearly not maintained if the sentenced person flees or ceases to have a lawful and ordinary residence in the executing state, in view of which, as there are no longer reasons for the territorial link, the competent authority of the executing state may transfer the competence to the central authority of the issuing state. Moreover, a similar transfer is envisaged in the case the issuing state is bringing further criminal proceedings against the person in question.

This Framework Decision replaces the corresponding provisions of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders of the Council of Europe, between the Member States of the European Union.

The term for adapting the national legal systems to the provisions of the Framework Decision expires on 6 December 2011.

4.3 The relationship with other European Conventions.

With regard to the effect that the Framework Decision discussed here has on the rest of the European Conventions, it is worth highlighting that the decision expressly envisages that the Framework Decision will replace the corresponding provisions of the

Council of Europe Convention of 30 November 1964, European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.

In each case, we are reminded that the Framework Decision establishes a minimum standard of judicial cooperation and mutual recognition of judicial decisions, which contemplates the possibility for the conclusion of bilateral or multilateral agreements, or for others to be in force at the time of publication of the Framework Decision or those entered into subsequently aimed at furthering the aims of the Framework Decision, as mentioned above.

Having said that, it is worth pointing out that those Member States who want the pre-existing bilateral agreements to continue to be valid are obliged to notify the Council and the Commission of the validity of the same no later than 6 March 2009.

Only Denmark, Finland and Sweden have exercised this right. The three countries decided to maintain the cooperation agreement between Nordic states, which establishes a more effective degree of judicial cooperation in the sphere specifically regulated by the Framework Decision.

5. The prospects for mutual recognition of judicial decisions in criminal matters in light of the Treaty of Lisbon

The Treaty of Lisbon introduced a profound reform of the institutional organisation of the European Union, developing the work begun under the treaties establishing the European Community and the Treaty on European Union.

In particular, the preamble is significant in that it solemnly states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

Moreover, it proclaims pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

In addition, the Treaty expressly mentions the Charter of fundamental rights signed in Nice, which hitherto had no legal value.

It is precisely in relation to the protection of fundamental rights where the treaty introduces important innovations, clearly designed to be introduced in the criminal justice systems of the Member States.

In particular, Article I-9 of the Treaty contains the guarantee of the fundamental rights of the EU treaty, referring to the European Convention on the Protection of Human Rights and Fundamental Freedoms, as well as the Member States' shared constitutional traditions.

Meanwhile, said provision establishes the premises for the formal accession of the Union to the ECHR, with important possible consequences for the external control of the conformity of the Union to the standards of the Convention, assigned to the European Court of Human Rights.

Therefore, the fundamental rights proclaimed by the Convention officially form part of the Union's primary law, due to their status as general principles.

In this way, among other things, the constitutional basis for the construction of a core of shared values between the Member States of the European Union is established, which can represent the primary structure of a European criminal system centred precisely on the respect for fundamental rights.

And in fact, one of the areas that is most affected by the innovations introduced by the Treaty is justice and home affairs, characterised above all by the abolition of the Third Pillar and the almost total generalisation of the community method.

At present, the provisions regarding said area are grouped together in a single chapter (part III, title III, chapter IV).

The Treaty contains a general definition of the area of freedom, security and justice stating that "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers" (Articles I-42 and III-257 of the Treaty).

Article I-42 differentiates between the sectors of action of the Union in the area, i.e., the legislative sector and operational cooperation (the latter being a specific characteristic particular to JHA).

The fundamental principles around which the future European space of justice will be built are in Article III-257: subsidiarity and respect for traditions and the different legal systems; solidarity in relation to the common policy on asylum, immigration and external borders, mutual recognition of judicial decisions in criminal and civil matters.

If we limit our analysis to the innovations affecting judicial cooperation and the mutual recognition of judicial decisions, we should point out that, due to the abolition of the Third Pillar, all the acts that are particular to that sector (common positions, decisions, framework decisions, conventions) have been replaced by laws and framework laws adopted by the ordinary legislative procedure (common legislative powers of the Parliament and the Council of Ministers and control by the Court of Justice).

In relation to judicial cooperation in criminal matters and criminal justice, the constitutional project envisages a qualified majority in most cases; however, due to the opposition of some important Member States, the mechanism known as the "emergency brake" was introduced. According to this clause, in the event a Member State considers the draft bill or framework law affects fundamental aspects of its national legal system in relation to criminal justice, it may call on the European Council to terminate the ordinary legislative procedure.

At this point discussions begin that must conclude within four months, at which time the European Council can choose between sending the project to the Council and starting the ordinary procedure over again or to the group of Member States that presented the project, so that they present a new one. If, after four months of inactivity of the European Council regarding the initial project or twelve months of discussions in the Council on the new project, the law or framework law has still not been passed, one third of the Member States may set enhanced cooperation in motion.

The right of legislative initiative in this field is shared by the Commission and the Member States, although the convention introduces a quorum for the presentation of an initiative (a quarter of Member States, i.e., 7 countries in a Union of twenty-five or twenty-seven).

The Treaty grants the Tampere programme constitutional status, establishing that the principle of mutual recognition is the cornerstone of judicial cooperation in criminal matters, thus contributing to improve reciprocal trust between the competent authorities of the Member States (as envisaged in Article I-42 of the constitutional Treaty).

Cooperation also includes the approximation of legislations, thanks to the approval of minimum standards in the following spheres:

In criminal procedure, Article III-270 of the Treaty identifies three spheres of intervention: mutual admissibility of evidence (although the harmonisation or assessment of evidence is not envisaged); the rights of individuals in criminal procedure; the rights of victims of crime.

In any event, the approximation of the criminal legislation should only take place insofar as it is necessary and taking into account the differences between the legal traditions and systems of the Member States.

It is important to point out that the Treaty envisages that the Member States will maintain or increase the levels of protection of individual rights.

In this regard, it will be necessary to verify whether said solution is appropriate for securing an effective level of protection of fundamental rights, above all taking into account the fact that precisely the principle of mutual recognition has attracted significant criticism from the perspective of fair trials and guaranteeing fundamental rights[47].

In the field of material criminal law, Article III-271 sows the seeds of a European criminal code, establishing that the Union may define criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension in ten areas: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment and computer crime.

Moreover, from the point of view of material criminal law, it must be pointed out that the Council can unanimously adopt minimum rules regarding the elements that comprise criminal offences and the applicable sanctions in the event the approximation of legal systems becomes indispensable for guaranteeing the effective application of the policy of the Union in an area that is already the object of harmonisation measures.

In any event, it should be clarified that the elements we have just cited are not exhaustive and the Council of Ministers can extend them, by unanimity and after receiving approval from the European Parliament.

[47] For a recent acknowledgement of the criticisms levelled at the mechanisms for application of the principle of mutual recognition, see S. Lavenex, "Mutual recognition and the monopoly of force: limits of the single market analogy", in 14 *Journal of European Public Policy* (2007) 762

From the point of view of the adoption of a common policy in criminal matters, it is important to underline that Article III-272 envisages the possibility of adopting promoting and supporting measures, although the greatest innovation is the one introduced in Article III-273, which extends and better defines the operational powers of Eurojust.

In fact, while the EU Treaty in force at present envisages that Eurojust can ask a Member State to begin an investigation, albeit on a non-binding basis, the Treaty of Lisbon envisages the possibility for Eurojust to directly begin criminal investigations; propose that national authorities bring criminal actions; coordinate investigations and actions carried out by the competent authorities.

In order to provide balance and greater definition to the new powers, it is established that Eurojust's actions must be in line with respect for the Charter of fundamental rights and its activities will be subject to the jurisdictional supervision of the Court of Justice.

This essentially lays the foundations for the creation of a genuine European public prosecutor's office; a body which, according to the provisions of Article III-274 of the Treaty, may be created with a unanimous decision of the Council, following approval from the European Parliament.

It is true that the scope of action of said entity is in any event limited to crimes that harm the Union's financial interests, although it must be said that the Treaty envisages that the European Council, always with a unanimous vote and the approval of the Parliament and the Commission, may extend the powers of the public prosecutor's office to the fight against serious organised crime with a cross-border dimension.

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