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The Transfer of Offenders between European Countries and
Remission of Sentences: A Comment on the Grand Chamber
of the Court of Justice of the European Union's Judgment in
Criminal Proceedings against Atanas Ognyanov of
8 November 2016

Dealing with Article 17 of Council Framework Decision
2008/909/JHA

Abstract

Article 17 of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, Council Framework Decision 2008/909/JHA, provides for the manner in which the transferred prisoner's sentence has to be served. In case C-554/14 (Criminal Proceedings against Atanas Ognyanov) of 8 November 2016, the Grand Chamber of the Court of Justice of the European Union, for the first time, interpreted Article 17 of Council Framework Decision 2008/909/JHA and held, *inter alia*, that although the sentence of the transferred offender has to be governed by the laws of the executing state, the laws of the executing state do not apply to the part of the sentence that the offender served in the issuing state before the transfer. The Court also held that although the Framework Decision does not have direct effect in EU member states, courts in countries where the Framework Decision has not yet been transposed must interpret their offender transfer legislation to comply with the Framework Decision. The purpose of this article is to highlight the Grand Chamber's judgment and call upon EU member states to ensure that before an offender is transferred to serve his sentence in another country, he/she is informed fully of the legal consequences of the transfer.

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1. Introduction

In its report to the European Parliament and to the Council, the EU Commission stated that '[e]ach year tens of thousands of EU citizens are prosecuted for alleged crimes or convicted in another Member State of the European Union.'¹ The 2014 Council of Europe *Annual Penal Statistics SPACE (I) Prison Populations Survey* report (published in December 2015) shows that there are thousands of foreign inmates in prisons in different European countries.² The Survey report states that '[t]he median proportion of foreign inmates was 13.3% of the total prison population. The average value being of 21.7%. Yet, there are very big differences between countries, from 0.7% in Poland to 96.4% in Monaco.³ This shows that the need for the transfer of some of these offenders to their countries of nationality or habitual residence cannot be overemphasised. The transfer of offenders between European countries is governed by multilateral and bilateral agreements or instruments. The multilateral instruments are the Convention on the Transfer of Sentenced Persons⁴ and its Additional Protocol⁵ and the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (CFD 2008/909/JHA).⁶ Referring to the relevant instruments that preceded CFD 2008/909/JHA⁷, the Advocate General stated that '[t]he operation of ...[the] rule[s] under Framework Decision 2008/909 should not produce less developed or more cumbersome interactions between the Member States, compared to the previous less integrated system based on the aforementioned international law in-

- 1 Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention /COM/2014/057 final, para 2. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1486800481840&uri=CELEX:52014DC0057>.
- 2 Council of Europe Annual Penal Statistics SPACE(I) Prison Populations Survey(2014), 23 December 2015, PC-CP(2015) 7 pp. 70 – 71 (Table 4). Available at http://wp.unil.ch/space/files/2016/05/SPACE-I-2014-Report_final.1.pdf.
- 3 Council of Europe Annual Penal Statistics SPACE(I) Prison Populations Survey(2014), 23 December 2015, PC-CP(2015) 7 p. 2 (point 7). Available at http://wp.unil.ch/space/files/2016/05/SPACE-I-2014-Report_final.1.pdf.
- 4 Convention on the Transfer of Sentenced Persons, ETS No.112.
- 5 Additional Protocol to the Convention on the Transfer of Sentenced Persons, ETS No.167.
- 6 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, Official Journal of the European Union L 327/27, 5.12.2008.
- 7 Grundza, Case C 289/15, Opinion of Advocate General Bobek, delivered on 28 July 2016 para 39. These instruments were 'the Convention on the Transfer of Sentenced Persons, the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences, and the European Convention on the International Validity of Criminal Judgments.'

struments.⁸ Some European countries have also signed bilateral agreements on the transfer of sentenced persons.⁹ One of the important issues in the transfer of offenders between countries is the duration of the sentence that a transferred offender will serve after the transfer. Of great importance to the issue of this duration is the question of the remission of the sentence of the transferred offender. Article 17 of CFD 2008/909/JHA deals with the issue of remission. It provides that:

1. The enforcement of a sentence shall be governed by the law of the executing State. The authorities of the executing State alone shall, subject to paragraphs 2 and 3, be competent to decide on the procedures for enforcement and to determine all the measures relating thereto, including the grounds for early or conditional release. 2. The competent authority of the executing State shall deduct the full period of deprivation of liberty already served in connection with the sentence in respect of which the judgment was issued from the total duration of the deprivation of liberty to be served. 3. The competent authority of the executing State shall, upon request, inform the competent authority of the issuing State of the applicable provisions on possible early or conditional release. The issuing State may agree to the application of such provisions or it may withdraw the certificate. 4. Member States may provide that any decision on early or conditional release may take account of those provisions of national law, indicated by the issuing State, under which the person is entitled to early or conditional release at a specified point in time.

Article 17 is one of the ‘Articles that form the core part of the Framework’ Decision.¹⁰ In case C-554/14 (Criminal Proceedings against Atanas Ognyanov),¹¹ the Court of Justice of the European Union (CJEU), for the first time interpreted Article 17 of CFD 2008/909/JHA. The purposes of this article are to highlight the Grand Chamber’s judgment, argue that practice from some European countries show that the Court’s conclusion was justified and call upon EU member states to ensure that before an offender is transferred to serve his sentence in another country, he is informed fully of the legal consequences of the transfer. The author also highlights recommendations from the European Commission on some of the measures that states could adopt to give effect to their obligations in CFD 2008/909/JHA. Before discussing how the

8 Grundza, Case C 289/15, Opinion of Advocate General Bobek, delivered on 28 July 2016 para 40.

9 See generally, Jamil Ddamulira Mujuzi, ‘The Transfer of Sentenced Persons between European Countries and the Protection of the Right to Family Life: A Comment on *Serce v Romania*’ (2016) 6(3) *European Criminal Law Review* 307 – 319, at 309.

10 Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention /COM/2014/057 final, para 4. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=148680048184&uri=CELEX:52014DC0057>.

11 Criminal proceedings against Atanas Ognyanov, Case C 554/14, Judgment of the Court (Grand Chamber), delivered on 8 November 2016, ECLI:EU:C:2016:835.

CJEU interpreted Article 17 of CFD 2008/909/JHA, it is important to highlight the significance of this instrument.

2. *Council Framework Decision 2008/909/JHA: its purpose, state of transposition and emerging jurisprudence*

In this part of the article, the author deals with three separate but related issues on CFD 2008/909/JHA: the purpose of CFD 2008/909/JHA; the state of its transposition in different European countries and the legal consequences for that transposition; and jurisprudence emanating from the CJEU dealing with different aspects of the CFD 2008/909/JHA. Article 3(1) of CFD 2008/909/JHA outlines the purpose of this Framework Decision. It states that '[t]he purpose of this Framework Decision is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence.' Commenting on the purpose of CFD 2008/909/JHA, the Advocate General of the CJEU stated that: 'Council Framework Decision 2008/909/JHA...establishes a system the purpose of which is to make it easier to enforce a sentence in a Member State other than the State which gave the criminal judgment with a view to improving the social rehabilitation of the sentenced person.'¹² In *Criminal proceedings against Gerrit van Vemde (Request for a preliminary ruling from the Rechtbank Amsterdam)*,¹³ the CJEU referred to Article 3(1) of the CFD 2008/909/JHA and held that the 'framework decision is intended to lay down rules enabling a Member State, with a view to facilitating the social rehabilitation of the sentenced person, to recognise a judgment and enforce the sentence.'¹⁴ The Advocate General stated that:

[T]he principal objective of the Framework Decision is to further the social rehabilitation of persons who have been sentenced to imprisonment by enabling individuals who have been deprived of their liberty as a result of a criminal conviction to serve their sentence, or the remainder of it, within their own social environment. That is clearly expressed in recital 9 and Article 3(1) of the Framework Decision. This means that all measures concerning how the sentence is to be enforced and organised must be tailored to the individual by the judicial authorities, in such a way as to further the social inclusion or social rehabilitation of the sentenced person, while at the same

12 João Pedro Lopes Da Silva Jorge, Case C 42/11, Opinion of Advocate General Mengozzi, delivered on 20 March 2012 para 9. See also para 24.

13 Criminal proceedings against Gerrit van Vemde, Request for a preliminary ruling from the Rechtbank Amsterdam, Case C-582/15, Judgment of the Court (Fifth Chamber) of 25 January 2017.

14 Criminal proceedings against Gerrit van Vemde, Request for a preliminary ruling from the Rechtbank Amsterdam, Case C-582/15, Judgment of the Court (Fifth Chamber) of 25 January 2017 para 24.

time respecting the interests of society and the rights of victims and the aim of preventing repeat offending.¹⁵

The purpose of CFD 2008/909/JHA has been highlighted by the CJEU in other decisions.¹⁶ The Framework decision only comes into play once a person has been sentenced by the issuing state. As the Advocate General stated that:

[T]he objective pursued by Framework Decision 2008/909 is to facilitate the social reintegration of sentenced persons by making it possible for them to serve their sentences in another Member State. This means that the objective is the transfer of already sentenced persons and their social reintegration. It is most definitely not to start challenging final decisions or conducting anew criminal trials in the executing Member State. It is not without reason that the cooperation established by Framework Decision 2008/909 may be triggered only once the trial has been conducted and the final judgment has been given in the issuing State.¹⁷

The Advocate General stated that CFD 2008/909/JHA is a very important instrument in the field of international co-operation in criminal matters between European countries because it 'has replaced several international law instruments with the aim of increasing the level cooperation between Member States.'¹⁸ It is, therefore, clear that at the centre of CFD 2008/909/JHA is the rehabilitation of the transferred offender. This is an issue which has been underlined by the Advocate General¹⁹ and the EU Commission which 'emphasise[d] that the aim of Framework Decision 2008/909/JHA is to enhance the possibility of social rehabilitation by allowing the sentenced person to return to his home country to be close to his family.'²⁰ Apart from emphasising the rehabilitation of the sentenced person, the Framework Decision also refers to the need to ensure that sentenced persons are integrated in society.²¹

- 15 Criminal proceedings against Gerrit van Vemde, Request for a preliminary ruling from the Rechtbank Amsterdam, Case C-582/15, Opinion of Advocate General Bot delivered on 12 October 2016 paras 47 – 48.
- 16 Dominic Wolzenburg, Reference for a preliminary ruling: Rechtbank Amsterdam – Netherlands, Case C-123/08, Judgment of the Court (Grand Chamber) of 6 October 2009, ECLI:EU:C:2009:616 para 14.
- 17 Grundza, Case C 289/15, Opinion of Advocate General Bobek, delivered on 28 July 2016 paras 66 – 67. Emphasis in the original.
- 18 Grundza, Case C 289/15, Opinion of Advocate General Bobek, delivered on 28 July 2016 para 38.
- 19 João Pedro Lopes Da Silva Jorge, Case C 42/11, Opinion of Advocate General Mengozzi, delivered on 20 March 2012 para 37.
- 20 Answer given by Mrs Reding on behalf of the Commission, 26 February 2013, Written questions by Members of the European Parliament and their answers given by a European Union institution, OJ C 340E, 21.11.2013, p. 1–629. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1486800481840&uri=CELEX:C2013/340E/01>.
- 21 Article 4(4) provides that 'During such consultation [to decide whether or not to transfer the sentenced offender], the competent authority of the executing State may present the competent authority of the issuing State with a reasoned opinion, that enforcement of the sentence in the executing State would not serve the purpose of facilitating the social rehabilitation and successful reintegration of the sentenced person into society.' See also Dominic Wolzenburg,

On the issue of the transposition, many EU countries have transposed CFD 2008/909/JHA into their domestic law. These countries include Denmark, Finland, Italy, Luxemburg, the United Kingdom, Austria, Belgium, Czech Republic, France, Hungary, Latvia, Malta, Netherlands, Poland, Romania, Slovenia, and Slovakia.²² This means that some EU member states still have to transpose the Framework Decision into their national law.

Jurisprudence has started to emerge from the CJEU on some of the provisions of CFD 2008/909/JHA dealing with issues such as the condition of double criminality,²³ the Framework Decision's legal status,²⁴ the relationship between the Framework Decision and the execution of European arrest warrants,²⁵ the question of the offender's consent before the transfer,²⁶ the fact that the Framework Decision does not govern the recognition of foreign criminal judgments,²⁷ the correct interpretation of the word 'judgment' as used in the Framework Decision,²⁸ and that 'a systemic deficiency of detention conditions...would also constitute grounds for non-transfer under Framework Decision 2008/909.'²⁹ In case C-554/14 (Criminal Proceedings against Atanas Ognyanov) the CJEU for the first time interpreted Article 17 of the Framework Decision. Below I discuss the facts and holding in this case.

Reference for a preliminary ruling: Rechtbank Amsterdam – Netherlands, Opinion of Mr Advocate General Bot delivered on 24 March 2009, Case C-123/08, ECLI:EU:C:2009:183 para 107.

- 22 Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention /COM/2014/057 final, para 3. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=148680048184&uri=CELEX:52014DC0057..>
- 23 Grundza, Case C 289/15, Opinion of Advocate General Bobek, delivered on 28 July 2016. See also Criminal proceedings against Jozef Grundza, Case C-289/15, Judgment of the Court (Fifth Chamber) of 11 January 2017.
- 24 Zoran Spasic, Case C 129/14 PPU, View of Advocate General Jääskinen, delivered on 2 May 2014 para 51, where it is stated that Framework Decision 2008/909/JHA is an instrument of 'secondary law.'
- 25 Pál Aranyosi and Robert Căldăraru, Cases C 404/15 and C 659/15 PPU, Opinion Of Advocate General Bot, delivered on 3 March 2016 para 61.
- 26 Zoran Spasic, Request for a preliminary ruling from the Oberlandesgericht Nürnberg, Case C-129/14 PPU, Judgment of the Court (Grand Chamber), 27 May 2014, ECLI:EU:C:2014:586 para 70.
- 27 Criminal proceedings against István Balogh, Case C 25/15, Opinion Of Advocate General Bot, delivered on 20 January 2016 para 41.
- 28 Criminal proceedings against Gerrit van Vemde, Request for a preliminary ruling from the Rechtbank Amsterdam, Case C-582/15, Judgment of the Court (Fifth Chamber) of 25 January 2017.
- 29 Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, Opinion of Advocate General Bot delivered on 3 March 2016, ECLI:EU:C:2016:140, para 128.

ARTICLES

3. Facts and holding in case C-554/14 (Criminal Proceedings against Atanas Ognyanov)

This was a request for a preliminary ruling concerning ‘the interpretation of Article 17(1) and (2) of Council Framework Decision 2008/909/JHA...’³⁰ The request was ‘made in proceedings relating to the recognition of a judgment in a criminal case and the enforcement, in Bulgaria, of a custodial sentence imposed on Mr Atanas Ognyanov by a Danish court.’³¹ On 28 November 2012, the Danish Court sentenced Mr Ognyanov to fifteen years’ imprisonment for murder and aggravated robbery.³² He had been awaiting trial from 10 January to 28 November 2012 when the sentence was imposed.³³ He served part of this sentence, approximately 10 months, in a Danish prison.³⁴ For these 10 months, he worked for approximately seven months.³⁵ The Danish authorities informed the Bulgarian authorities that Mr Ognyanov was to be transferred from Denmark to serve his sentence in Bulgaria on the basis of CFD 2008/909/JHA.³⁶ This was the case although the ‘Framework Decision 2008/909 had not yet been transposed into Bulgarian law.’³⁷ The Danish authorities sent to the Bulgaria authorities:

*... a request for information concerning the sentence that the latter anticipated being able to enforce and the rules applicable in Bulgaria on early release. Further, the Danish authorities expressly stated that Danish legislation did not permit any reduction in a custodial sentence on the ground that work was carried in the course of the enforcement of that sentence.*³⁸

The Bulgarian law that governs the enforcement of the sentence of the transferred offender is Article 457(4) to (6) of the Bulgarian Code of Criminal Procedure.³⁹ On 12

30 Criminal proceedings against Atanas Ognyanov, Case C 554/14, Judgment of the Court (Grand Chamber), delivered on 8 November 2016, ECLI:EU:C:2016:835 para 1.

31 Ibid, para 2.

32 Ibid, para 18.

33 Ibid, para 19.

34 Ibid, para 20.

35 Ibid, para 21.

36 Ibid, para 22.

37 Ibid, para 12.

38 Ibid, para 22.

39 Ibid, para 14. This article provided that ‘4. Where the maximum term of imprisonment provided for under the law of the Republic of Bulgaria for the offence committed is less than the term imposed in the judgment, the court shall reduce the sentence imposed to that term. Where the law of the Republic of Bulgaria does not provide for a custodial sentence for the offence committed, it shall determine a punishment that corresponds as far as possible to that imposed in the judgment. 5. The period of remand in custody pending trial and any part of the sentence already served in the issuing State shall be deducted and, in the event that the convictions are different, taken into account for the purposes of determining the term of imprisonment. 6. Additional punishments imposed in the judgment shall be enforced if they are provided for in the corresponding provisions of the legislation of the Republic of Bulgaria and have not been enforced in the issuing State.’

November 2013, the Bulgarian Supreme Court of Appeal held that Article 457(5) of the Bulgarian Code of Criminal Procedure read together with Article 41(3) of the Criminal Code:

must be interpreted as meaning that work that is in the general interest, undertaken in the issuing State by a Bulgarian national convicted of an offence who is transferred, must be taken into account by the competent authorities of the executing State for the purposes of reducing the length of the sentence, in that two days of work are to be treated as equivalent to three days of deprivation of liberty, unless the issuing State had already made a corresponding reduction in that sentence.⁴⁰

In its request to the CJEU for a preliminary ruling, the referring court informed the EU court that it was 'bound by the' Bulgarian Supreme Court of Appeal's interpretative judgement.⁴¹ The referring court also stated 'that neither the legislation nor that interpretative judgment identify any obligation to inform the issuing State or to obtain its observations and its consent to the application of such a reduction in the sentence by the competent Bulgarian authorities.'⁴² The referring court informed the CJEU that if it follows the Supreme Court's interpretative judgment and take into account the period that the offender worked in the Danish prison before the transfer, this would result in the offender being released earlier and that 'Framework Decision 2008/909 makes no provision for such a reduction in sentence.'⁴³

The referring court gave detailed reasons as to why it was of the view that 'Bulgarian law does not comply with the relevant provisions of Framework Decision 2008/909.'⁴⁴

It is against that background that the Bulgarian court referred questions to the CJEU.⁴⁵ The CJEU held that:

[W]hile Article 17(1) provides that 'the enforcement of a sentence shall be governed by the law of the executing State', it does not however clarify...whether that means the enforcement of the sentence from the moment the judgment is delivered in the issuing State or merely from the moment the person concerned is transferred to the executing State.⁴⁶

The Court added that:

Article 17(2) of Framework Decision 2008/909... provides that 'the competent authority of the executing State shall deduct the full period of deprivation of liberty already served in connection with the sentence in respect of which the judgment was issued from the total duration of the deprivation of liberty to be served'. That provision, which starts from the premise that a sentenced person is liable to serve part of

⁴⁰ Ibid, para 15.

⁴¹ Ibid, para 16.

⁴² Ibid, para 17.

⁴³ Ibid, para 24.

⁴⁴ Ibid, paras 26 – 28.

⁴⁵ Ibid, para 29.

⁴⁶ Ibid, para 32.

his sentence in the issuing State before his transfer, does not answer the question whether the executing State can apply a reduction in the sentence which takes account of work carried out by the sentenced person during his period of imprisonment in the issuing State.⁴⁷

The Court held that the background to Article 17 of the Framework Decision must be taken into consideration when interpreting it.⁴⁸ The Court went ahead to assess Article 17 in the light of other Articles of the Framework Decision⁴⁹ and held that ‘Article 17 of Framework Decision 2008/909...establishes the general rules applicable to the enforcement of the sentence once the sentenced person has been transferred to the competent authority of the executing State.’⁵⁰ It then held that:

Article 17 of Framework Decision 2008/909 must be interpreted as meaning that only the law of the issuing State is applicable, not least on the question of any grant of a reduction in sentence, to the part of the sentence served by the person concerned on the territory of that State until his transfer to the executing State. The law of the executing State can apply only to the part of the sentence that remains to be served by that person, after that transfer, on the territory of the executing State.⁵¹

The Court added that this conclusion was also supported by the template certificate which is annexed to the Framework Decision.⁵² The Court held further that:

[B]efore the recognition of the judgment passing sentence by the executing State and the transfer of the sentenced person to the executing State, it falls to the issuing State to determine the reductions in sentence that pertain to the period of detention served on its territory. The issuing State alone is competent to grant a reduction in sentence for work carried out before the transfer and, where appropriate, to inform the executing State of that reduction...Consequently, the executing State cannot, retroactively, substitute its law on the enforcement of sentences and, in particular, its rules on reductions in sentence, for the law of the issuing State with respect to that part of the sentence which has already been served by the person concerned on the territory of the issuing State.⁵³

The Court added that:

[I]t is clear from the documents submitted to the Court that, when Mr Ognyanov was transferred to the competent Bulgarian authorities, the Danish authorities expressly stated that Danish legislation did not permit any reduction in a custodial sentence on the ground that work was carried out by the sentenced person during the period of his detention. Consequently, an authority in the executing State that is com-

⁴⁷ Ibid, para 33.

⁴⁸ Ibid, para 34.

⁴⁹ Ibid, paras 35 – 38.

⁵⁰ Ibid, para 39.

⁵¹ Ibid, para 40.

⁵² Ibid, paras 41 – 43.

⁵³ Ibid, para 44.

petent with respect to matters concerning enforcement of the sentence, such as the referring court, cannot grant a reduction in sentence that relates to the part of the sentence that has already been served by the sentenced person on the territory of the issuing State, when no such reduction in sentence was granted by the authorities of the issuing State, in accordance with their national law.⁵⁴

The Court highlighted the fact that '[a]n interpretation to the contrary would be likely...to undermine the objectives pursued by Framework Decision 2008/909, those objectives including respect for the principle of mutual recognition, which constitutes... the "cornerstone" of judicial cooperation in criminal matters within the European Union...'⁵⁵ The Court observed that:

Yet were it to occur that a national court of the executing State granted, in accordance with its national law, after it had recognised the judgment passing sentence delivered by a court of the issuing State and after the sentenced person had been transferred to the authorities of the executing State, a reduction in sentence that related to the part of the sentence served by that person on the territory of the issuing State, although no such reduction in sentence was granted by the competent authorities of the issuing State, on the basis of its national law, that would jeopardise the special mutual confidence of Member States in their respective legal systems. In such a situation, the national court of the executing State would then be applying, retroactively, its national law to the part of the sentence served on territory subject to the jurisdiction of the court of the issuing State. The former court would thus be re-examining the period of detention served on the territory of the issuing State, which would be in breach of the principle of mutual recognition.⁵⁶

The Court concluded that:

Article 17(1) and (2) of Framework Decision 2008/909 must be interpreted as precluding a national rule being interpreted in such a way that it permits the executing State to grant to the sentenced person a reduction in sentence by reason of work that he carried out during the period of his detention in the issuing State, although no such reduction in sentence was granted by the competent authorities of the issuing State, in accordance with the law of the issuing State.⁵⁷

The Court made it clear that national law had to be interpreted in line with EU law and that the Bulgarian lower court should not apply the Supreme Court of Appeal's decision which was contrary to the Framework Decision.⁵⁸

⁵⁴ Ibid, para 45.

⁵⁵ Ibid, para 46.

⁵⁶ Ibid, paras 48 – 49.

⁵⁷ Ibid, para 50.

⁵⁸ Ibid, paras 54 – 71.

4. Comment on the judgment

This judgement raises very important issues when it comes to the application of CFD 2008/909/JHA in EU member states. The first issue relates to the Court's approach in arriving at the conclusion it reached. After highlighting the purpose of CFD 2008/909/JHA, the Court emphasised the fact that interpreting Article 17 as permitting the applicability of the enforcement state's law to the part of the sentence served in the sentencing state would defeat the objective of CFD 2008/909/JHA. In the author's opinion, the practice on the transfer of offenders between some European countries, although not referred to by the Court, supports the Court's reasoning to the effect that reducing the sentence of a transferred offender in circumstances which the transferring state considers questionable could deter some countries from transferring offenders to specific countries and consequently defeat the objective of prisoner transfer agreements or arrangements. For example, case law from the European Court of Human Rights shows that Germany refused to transfer offenders to the Netherlands where they would have served a shorter sentence after the transfer than the one they would have served in Germany had they not been transferred.⁵⁹

Another issue relates to the transposition of the Framework Decision in domestic law. The facts of this judgment show that at the time the offender was transferred, Bulgaria had not yet transposed the Framework Decision into domestic law. This was the case although the deadline to do that had passed. In fact, the offender was transferred on the basis of the Convention on the Transfer of the Sentenced Persons as opposed to CFD 2008/909/JHA. As the Advocate General stated in his Opinion:

38...[C]ontrary to what is suggested in the order for reference, the transfer of the sentenced person was carried out not on the basis of the provisions of the Framework Decision, but on the basis of the provisions of the Convention on transfers. 39. That is expressly stated in the request for Mr Ognyanov's transfer which the Danish Ministry of Justice made on 26 March 2013 and from all the subsequent related correspondence contained in the national case file. 40. The Danish judicial authorities clearly referred to the provisions of the Convention on transfers, since the Framework Decision had not been transposed by the Republic of Bulgaria.⁶⁰

Whether or not the Framework Decision has been transposed in domestic law has implications on the issue of the transfer of offenders. The EU Commission has pointed out that:

Framework Decisions have to be implemented by Member States as is the case with any other element of the EU acquis. By their nature, Framework Decisions are binding upon the Member States as to the result to be achieved, but it is a matter for the

59 *Buijen v Germany* (Application no. 27804/05) (1 April 2010); *Smith v Germany* (Application no. 27801/05) (1 April 2010).

60 Criminal proceedings against Atanas Ognyanov, Case C 554/14, Opinion of Advocate General Bot delivered on 3 May 2016 para 38 – 40.

national authorities to choose the form and method of implementation. Framework Decisions do not entail direct effect. However, the principle of conforming interpretation is binding in relation to Framework Decisions adopted in the context of Title VI of the former Treaty on European Union. The non-implementation of the Framework Decisions by some Member States is very problematic since those Member States who have properly implemented the Framework Decisions cannot benefit from their co-operation provisions in their relations with those Member States who did not implement them in time. Indeed, the principle of mutual recognition, which is the cornerstone of the judicial area of justice, requires a reciprocal transposition; it cannot work if instruments are not implemented correctly in the two Member States concerned. As a consequence, when cooperating with a Member State who did not implement in time, even those Member States who did so will have to continue to apply the corresponding conventions of the Council of Europe when transferring EU prisoners or sentences to other Member States.⁶¹

The fact that some states have not transposed the Framework Decision in their domestic law means that they do not comply with their obligation under Article 17(3) of the Framework Decision to inform the authorities in the issuing state 'of the applicable provisions on possible early or conditional release. The issuing State may agree to the application of such provisions or it may withdraw the certificate.' As the EU Commission recommended, '[i]t is therefore important that Member States have properly implemented this duty [under Article 17] to provide this information upon request before transfer and execution of the sentence, which is not the case in some Member States' implementing legislation.'⁶²

The CJEU's holding that even if the Framework Decision has not been transposed in domestic law, courts in the executing state have a duty to interpret domestic law to comply with the EU law, could put the transferred offender to a disadvantage. This is because he might consent to the transfer without being aware of the fact that the domestic law, which is more generous than the Framework Decision when it comes to early release, would have to be interpreted to comply with the strict regime in the Framework Decision resulting in him spending more time in prison than he thought

- 61 Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention /COM/2014/057 final, para 3. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=148680048184&uri=CELEX:52014DC0057>.
- 62 Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention /COM/2014/057 final, para 4.3. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1486800481840&uri=CELEX:52014DC0057>.

he would. This is one of the questions that the CJEU dealt with in the *Criminal Proceedings against Atanas Ognyanov*. The question was ‘whether EU law must be interpreted as precluding a national court from applying a national rule...even though that rule is in breach of Article 17(1) and (2) of Framework Decision 2008/909, on the ground that the national rule is more lenient than that provision of EU law.’⁶³ Although the facts of the judgment are clear that the Danish authorities informed the Bulgarian authorities that work the offender had done in the Danish prison was not to be considered as a factor in reducing his sentence, the judgment is silent on whether the offender was informed of this fact before he consented to the transfer. It has to be recalled that the Grand Chamber of the CJEU in the case of *Zoran Spasic (Request for a preliminary ruling from the Oberlandesgericht Nürnberg)*⁶⁴ emphasised the relationship between the offender’s consent to the transfer and his rehabilitation when it held that:

*[A]lthough Framework Decision 2008/909 envisages the execution of a custodial sentence in a Member State other than that in which the court which imposed the sentence is located, it must be pointed out that, under Article 4 thereof, that option arises only where the sentenced person has consented and the sentencing State has satisfied itself that the execution of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person.*⁶⁵

The offender’s consent is also required under Article 7(1) of the Convention on the Transfer of Sentenced Persons which provides that ‘[t]he sentencing State shall ensure that the person required to give consent to the transfer...does so voluntarily and with full knowledge of the legal consequences thereof.’ In this case it is not clear whether Mr Ognyanov was informed that after his transfer, the work he had performed in the Danish prison will not be considered as a factor in reducing his sentence. This means that whether the transfer is done either under the Framework Decision or the Convention on the Transfer of Sentenced Persons, the offenders should be informed fully of the legal consequences of their transfer, otherwise they might end up feeling prejudiced and as a result approach courts for a remedy. This judgment also shows that there is a need for officials in both sentencing and enforcement states to have detailed discussions of the laws that would regulate the offender’s sentence after the transfer to as to prevent any misunderstands that might result after the transfer.

63 Criminal proceedings against Atanas Ognyanov, Case C 554/14, Judgment of the Court (Grand Chamber), delivered on 8 November 2016, ECLI:EU:C:2016:835 para 54.

64 *Zoran Spasic, Request for a preliminary ruling from the Oberlandesgericht Nürnberg*, Case C-129/14 PPU, Judgment of the Court (Grand Chamber), 27 May 2014, ECLI:EU:C:2014:586.

65 Ibid, para 70.

5. Conclusion

Jurisprudence has started to emerge from the CJEU on CFD 2008/909/JHA. Practice from the EU Commission also shows the steps which have been taken or which still have to be taken by Member States to implement this Framework Decision. The CJEU has made it clear that although the Framework Decision ‘has no direct effect’,⁶⁶ EU Member States cannot run away from the fact that ‘[i]t is...settled case-law that although framework decisions may not entail direct effect...their binding character nevertheless places on national authorities, and in particular on national courts, an obligation to interpret national law in conformity with EU law...’⁶⁷ The implication for this on the sentence of the transferred offender is that, as we have seen in the case of Mr Ognyanov, the Framework Decision has to take precedence over domestic law even if domestic law is more lenient towards the offender when it comes to the issue of determining his remission. This is because of the very important principle of mutual recognition. As the Advocate General has stated, ‘mutual recognition under Framework Decision 2008/909 is supposed to transcend, in general, the particularism of Member State interests.’⁶⁸ This fact has also been highlighted by the CJEU in Criminal proceedings against Jozef Grundza.⁶⁹

It is therefore important that the relevant authorities in both the issuing and the executing states bring this fact to the attention of every offender who is to be transferred so that he or she is aware of how his sentence is going to be administered after the transfer and decides how to conduct himself or herself while serving a prison sentence. As some judges of the Grand Chamber of the European Court of Human Rights observed, though in a different context, ‘[i]t is the case that persons convicted of criminal offences and sentenced to imprisonment will take the sentence and the relevant remission or parole scheme together at the outset of their sentence, in the sense of making calculations as to whether, how and when they are likely to be released from prison and of planning their conduct in prison accordingly. In ordinary language, they will

66 Criminal proceedings against Atanas Ognyanov, Case C 554/14, Judgment of the Court (Grand Chamber), delivered on 8 November 2016, ECLI:EU:C:2016:835 para 56.

67 Ibid, para 58.

68 Grundza, Case C 289/15, Opinion of Advocate General Bobek, delivered on 28 July 2016 para 75.

69 Criminal proceedings against Jozef Grundza, Case C-289/15, Judgment of the Court (Fifth Chamber) of 11 January 2017, paras 41 – 42, where the Court states that ‘Framework Decision 2008/909 is based primarily on the principle of mutual recognition, which constitutes, as stated in recital 1 of the decision, read in the light of Article 82(1) TFEU, the ‘cornerstone’ of judicial cooperation in criminal matters within the European Union, which, according to recital 5 of the decision, is founded on a special mutual confidence of the Member States in their respective legal systems ...The principle of mutual recognition means, in accordance with Article 8(1) of Framework Decision 2008/909, that, in principle, the competent authority of the executing State is to recognise a judgment which has been forwarded to it and forthwith take all the necessary measures for the enforcement of the sentence.’.

take the sentence imposed and the possibilities and modalities of remission, parole or early release as a “packet”.⁷⁰

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70 Del Río Prada v Spain, (Application no. 42750/09) 21 October 2013 (Joint Partly Dissenting Opinion of Judges Mahoney and Vehabović).