National Competence Rules in the Application of Framework Decision 2008/909/JHA. The Case of Spain

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Abstract: *Framework Decision 2008/909/JHA leaves Member States free to designate the competent authorities for both the transmission and the execution of judicial decisions imposing custodial measures. This freedom of designation, which is a consequence of the procedural autonomy that informs EU law, leads to a wide variety of competence models among the Member States. This paper reflects on the limits to that state power of designation, basically related to the principles of equivalence and effectiveness, and then offers an overview of the different competence models existing in the Member States. Thereafter, the Spanish competence provisions are analysed, in order to determine the extent to which the election of the Spanish legislator contributes to the effective application of this instrument or, conversely, is an obstacle to its effectiveness. For that purpose, an in-depth analysis of the gaps and interpretive difficulties of the Spanish regulation is carried out. The difficulties presented by the Spanish rules in determining the competent authorities are, in most cases, a consequence of the fragmentation and inconsistency of the legislation, which ignores the interrelation between the different instruments of mutual recognition.*

Keywords: *Competence, judicial authority, prison administration, principle of effectiveness, transfer procedure.*

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1. *Introduction*

Procedural autonomy means that

> since the Union does not have procedural law […], it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights [...] derived from Union Law. [1]

Therefore, according to the aforementioned principle, Member States are free to implement and enforce the EU law in accordance with their own judicial system, their own institutional setting and through those judicial proceedings envisaged by their national legislation, provided that such autonomy does not undermine the principles of equivalence [2] and effectiveness, [3] which also inform EU law. [4]

> Where national authorities are responsible for implementing a Community regulation it must be recognised that in principle this implementation takes place with due respect for the forms and procedures of national law. [5]

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[1] K. Lenaerts, I. Maselis, K. Gutman & J.T Nowak (Eds), *EU Procedural Law*, Oxford European Union Law Library, New York, 2014, p. 108.

[2] The equivalence principle means that national rules regulating actions derived from EU law must not be less favourable than those established for the exercise of domestic law actions, thus ensuring identical protection for the rights arising in both areas. *Cf.* F. Moya Hurtado de Mendoza, ‘Efectividad del Derecho de la Unión Europea vs. principio constitucional de imperio de la ley’, *Revista de Derecho Político*, No. 99, 2017, p. 407.

[3] The principle of effectiveness means that national rules must not make it impossible or extremely difficult, in practice, to apply EU law. The ultimate purpose of this principle is to ensure the integrity, coherence and uniformity of the European legal system as a whole, as opposed to the possibility of national standards preventing the effective application of EU rights. *See* M. Accetto & S. Zleptnig, ‘The Principle of Effectiveness: Rethinking Its Role in Community Law’, *European Public Law*, Vol. 11, No. 3, 2005, p. 392.

[4] In this vein, the Court of Justice of the European Union (hereinafter, the ‘CJEU’) states that “in the absence of community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law (procedural autonomy), it being understood that such conditions cannot be less favourable than those related to similar actions of a domestic nature” (equivalence criterion) and that the conditions laid down by the domestic norms should not make it “impossible in practice to exercise the rights which the national courts are obliged to protect” (effectiveness criterion). *Cf.* Judgment of 16 December 1976 in *Case 33/76, Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, [1976] ECR 1989.

[5] Judgment of the CJEU of 11 February 1971 in *Case 39/70, Norddeutsches Vieh- und Fleischkontor GmbH v Hauptzollamt Hamburg-St. Annen*, [1971], para. 4.

Consequently, as observed by the European Commission,

> Member States are entitled to adopt rules of procedure of a formal nature which define, for example, the form of the request, the competent authority and other details which the Community provisions cannot regulate. [6]

The duty of Member States to implement and enforce EU law through their own legislative, judicial and administrative systems entails the obligation to designate the competent national authorities responsible for assuming such obligations. Accordingly, in relation to the instrument at issue, Article 2 of 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 (OJ L 327, 5.12.2008, pp. 27-46, hereinafter, the 'Framework Decision') provides that each Member State shall communicate to the General Secretariat of the Council the authority or authorities that are, in accordance with their national legislation, competent both for forwarding and recognising custodial sentences in cross-border transfer procedures.

Pursuant to the aforementioned provision, Spanish Law no. 23/2014 of 20 November, on mutual recognition of criminal decisions in the EU (hereinafter, 'LRM' by its Spanish acronym), has established a system of powers that largely corresponds to the current competence scheme laid down in the domestic Spanish legal system for the execution and supervision of prison sentences, which is based on the duality between sentencing courts, responsible for enforcing criminal judgments, and the prison supervisory judge, which have a residual competence in the criminal execution, consisting of supervising the execution of prison sentences. [7]

Such a scheme has the advantage of being consistent with the judicial competence rules provided by domestic law. However, it also has certain drawbacks as a result of the strong decentralisation that it implies between the different national judicial bodies. Excessive decentralisation in decision-making on the transfer procedure hinders the specialisation of the bodies involved, makes their actions more unpredictable and, above all, makes it difficult to standardize the procedures.

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[6] Observations submitted to the CJEU by the Commission of the European Communities in *Case 39/70, Norddeutsches Vieh- und Fleischkontor GmbH.*

[7] At the XIX meeting of Spanish prison supervision judges and magistrates, it was requested that such competence distribution model between sentencing courts and prison supervisory judges be respected in transposing Framework Decision 2008/909/JHA into domestic law. The conclusions of this meeting were retrieved on 26 September 2019 from www.derechopenitenciario.com/documents/criterios2010.pdf.

On the other hand, in choosing the competent authority in the LRM, the intervention of certain administrative entities closer to the executive branch, such as the Public Prosecutor's Office and, notably, the Prison Administration, is missing. However, these bodies are usually in a better position to detect potentially transmissible cases, to assess the appropriateness of issuing and recognising custodial sentences, as well as to detect problems arising from the existence of other pending proceedings or convictions handed down to the same person. [8]

First of all, we will analyse to what extent Member States face limits deriving from EU law in selecting their competence models to enforce the Framework Decision. Thereafter, a comparative note will be made to determine the competence rules envisaged by other Member States.

Secondly, in order to study the legislative treatment of the competence issue in Spanish law, firstly, Article 64 LMR, in which the issuing competent authorities are established, will be analysed. Finally, we will explore some problems arising in cases of interrelation between various instruments of mutual recognition, particularly when different judicial authorities are involved without adequate coordination between them. Subsequently, the intervention of the Ministry of Justice, the Public Prosecution and the Prison Administration in the transfer procedure will be examined.

The chapter will end with some proposals for improving the current Spanish competence system for the transfer of prisoners within the European Union.

2. *National Authorities Competent to Enforce Framework Decision 2008/909/JHA and Some Limits on the Freedom of Choice*

Contrary to what might be assumed at first glance, the discretion enjoyed by Member States in designating the competent authorities to enforce instruments of mutual recognition is not absolute, since the CJEU has stated that the notion of 'judicial authority' is an autonomous concept of EU law when it comes to some judicial cooperation procedures. [9] Moreover, the inherent limits

[8] In the second part of the chapter we will discuss the possible intervention by these public entities in the different phases of cross-border transfer procedures.

[9] The autonomous concept of 'judicial authority' has been developed by the jurisprudence of the CJEU in relation to Framework Decision 2002/584/JHA: Judgment of 29 June 2016, in *Case C-486/14*, *Piotr Kossowski* [2016]; Judgment of 10 November 2016, in *Case C-452/16 PPU*, *Krzystof Marek Poltorak* [2016]; Judgment of 10 November 2016, in *Case C-453/16 PPU*, *Halil Ibrahim Özçelik* [2016]; Judgment of 10 November 2016, in *Case C-477/16 PPU*, *Ruslanas Kovalkovas* [2016] and Judgment of 27 May 2019, in *Joined Cases C-508/18 and C-82/19 PPU* [2019]. In these latter cases, the CJEU states that "Although, in accordance with the principle of procedural

to the concept of procedural autonomy, namely the principles of equivalence and effectiveness, must also be taken into consideration.

Firstly, it is interesting to reflect on the appropriateness of expanding the case law on the autonomous concept of 'judicial authority', developed in relation to Article 6(1) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, pp. 1-20), to Article 2 of Framework Decision 2008/909/JHA on cross-border transfers. The CJEU, in the judgments in which it has been shaping that concept, is particularly concerned about the risks of the influence of the executive branch in the decision to issue a European Arrest Warrant (hereinafter, 'EAW'). Therefore, in accordance with its case law, independence is the defining feature in indicating which national authorities are included in the concept of 'judicial issuing authority' within the meaning of Article 6(1) of Framework Decision 2002/584/JHA and which ones are not. [10]

On the one hand, it seems clear that the risk of political influence might also arise in relation to cross-border transfers when the issuing authority is administrative in nature and, therefore, directly or indirectly dependent on the executive branch. This risk could advocate the convenience of extending this autonomous concept of 'judicial authority', put together for EAWs, to cross-border transfers. However, so far, the CJEU has limited the scope of application of this autonomous concept of EU law to the EAW. In addition, the European Court holds that "the term 'judicial authority', contained in Article 6(1) of the Framework Decision, requires, throughout the Union, an autonomous and uniform interpretation, which […] must take into account the terms of that

autonomy, the Member States may designate, in their national law, the 'judicial authority' with the competence to issue a European arrest warrant, the meaning and scope of that term cannot be left to the assessment of each Member State" (para. 48). "That term requires, throughout the European Union, an autonomous and uniform interpretation, which, in accordance with the settled case-law of the Court, must take into account the wording of Article 6(1) of Framework Decision 2002/584, its legislative scheme and the objective of that framework decision" (para. 49).

[10] *See* Judgment of 27 May 2019, in *Case C-509/18* in which is stated that "'issuing judicial authority', within the meaning of Article6(1) of Framework Decision 2002/584, must be interpreted as including the Prosecutor General of a Member State who, whilst institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and is independent from the executive". However, that term "must be interpreted as not including the public prosecutors' offices of a Member State which are responsible for the prosecution of criminal offences and are subordinate to a body of the executive of that Member State, such as a Minister for Justice, and may be subject, directly or indirectly, to directions or instructions in a specific case from that body in connection with the adoption of a decision to issue a European arrest warrant" (*Joined Cases C-508/18 and C-82/19 PPU*). Likewise, an organ of the executive, such as the Ministry of Justice of the Republic of Lithuania, must be excluded from being designated as an 'issuing judicial authority', within the meaning of the same Article 6(1) (*Case C-477/16 PPU*, *Ruslanas Kovalkovas*) as well as the police service, such as the *Rikspolisstyrelsen* (National Police Board, Sweden), which are within the province of the executive (*Case C-452/16 PPU*, *Krzystof Marek Poltorak*).

provision, its context and the objective of the Framework Decision”,[11] elements that are clearly not common to both instruments.

Leaving aside the differences in the legislative context and the purposes of both instruments, the literal argument cannot go unnoticed. Thus, the first reason supporting the non-extension of the autonomous concept of judicial authority to cross-border transfers is based on the lack of use of the term ‘judicial authority’ in the provisions of the Framework Decision, which always refer to the ‘competent authority’ without specifying its jurisdictional nature.[12] This different terminological use seems to be a deliberate decision by the European legislator, which may, precisely, seek to give access to other types of authorities, notably those that, in accordance with the internal legislation of the different Member States, have been granted functions related to compliance with prison sentences and, notably, powers to assign the prison centre of offenders, as well as to decide on transfers between national prisons.[13]

However, the fact that Member States are not limited by the aforementioned autonomous concept of judicial authority in determining the competent authorities to enforce the Framework Decision does not imply that they enjoy unlimited freedom to design their competency model. That decision is conditioned by the necessary respect for the principles of equivalence and effectiveness, requirements with which national law related to procedure must comply.[14]

The above limits essentially imply that the competency model chosen by each Member State should not make it impossible or excessively difficult to achieve the objective pursued by the Framework Decision, that is, to facilitate the social rehabilitation of offenders. Furthermore, the choice of the national competent authority must not discriminate community inmates against national inmates in terms of the possibilities of serving their jail sentence in a place where they have better prospects for rehabilitation and reintegration into society.

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[11] *See Cases C-452/16 PPU*, para. 32; *C-477/16 PPU*, para. 33; and *Joined Cases C-508/18 and C-82/19 PPU*, para. 49.

[12] The literal argument is also pointed out by K. Ambos, ‘Sobre las fiscalías alemanas como autoridad de emisión de la orden europea de detención y entrega. Comentario a las sentencias del Tribunal de Justicia de la Unión Europea (Gran Sala), en los asuntos acumulados C-5081/18 y C-82/19 PPU, y en el asunto C-509/18, de 27 de mayo de 2019’, *Revista española de derecho europeo*, No. 71, 2019, p. 15, when considering the extension of the autonomous concept of judicial authority to other instruments of mutual recognition.

[13] For example, in the case of Spain, this competence falls to the Prison Administration at national level, with little judicial intervention limited to deciding appeals that may be brought against administrative decisions made on internal transfers (Article 31 of Royal Decree No. 190/1996, of 9 February, and Article 79 of Organic Law No. 1/1978, of 26 September, General Prison Act, hereinafter ‘LOGP’ by its acronym in Spanish).

[14] Leanaert *et al.* 2014, p. 109.

Thus, considering those requirements – derived from the principles of equivalence and effectiveness – it should be noted that, for example, if, in a given Member State, the Prison Administration is the authority that is in the best position to evaluate the offender's prospects of social rehabilitation and the one with the best means to carry out this assessment, that Prison Service, should intervene in the management of prisoner transfers also at the European level.

Of course, the legitimacy of this administrative body to take action is not incompatible with a final decision made by a judicial authority after hearing the offender and with an adequate judicial recourse system. This judicial control would serve to prevent abuses or deviations of executive power, when, for example, the transfer was based on different purposes or purposes even contrary to improving the offender's prospects of social rehabilitation. In addition, judicial intervention grants a greater degree of reliability of the decision for the purpose of being recognised in the executing State. On the other hand, the intervention of the Prison Administration would lead, in a case like the one described, to greater effectiveness of the social rehabilitation purpose and, therefore, would contribute to achieving the aim of the Framework Decision.

Through consultation of the European Judicial Atlas, [15] as well as the information published by the General Secretariat of the Council based upon information provided by the different Member States, [16] it can be seen that the designation of the competent authorities for both issuing and recognising and enforcing custodial sentences or measures involving a loss of liberty differs greatly from one Member State to another. [17]

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[15] Retrieved on 26 October 2019 from www.ejn-crimjust.europa.eu/ejn/AtlasChooseMeasure/EN/0/354. The ATLAS responds to the need for more practical information on the national procedure of other states to enhance cooperation. According to the European Organization of Prison and Correctional Services (2013), 'Expert Group on Framework Decision 909', Working Group Report, p. 13, retrieved on 25 September 2019 from www.europris.org/file/report-europris-expert-group-on-framework-decision-909/?download=1, "there is a widespread variety in some elements of the legal implementation, organisation and practical application (…). These variations include, inter alia, the variation in the type of competent authority competent in the whole process (…) and the fact that some Member States have not appointed a central authority (…) so that the issuing Member State has to identify the proper competent authority", which is greatly facilitated with the ATLAS.

[16] Retrieved on 24 October 2019 from www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/1897.

[17] According to I. Durnescu, 'Obstacles and Solutions in the implementation of the FD 2008/909/JHA. STEPS2 Resettlement: Support for Transfer of European Prison Sentences towards Resettlement', 2016, p. 11, retrieved on 22 September 2019 from www.google.com/search?client=firefox-b-d&q=Obstacles+and+Solutions+in+the+implementation+of+the+FD+2008%2F909%2FJHA, one of the practical obstacles of this instrument is due to the large number of competent authorities. In this sense, it can be predicted that the wide variety of situations regarding the competent authority between the Member States will lead to different practices and a low level of predictability, above all in areas of the law amenable to interpretation.

While several States continue to grant powers to the Ministry of Justice, others indicate certain administrative authorities linked to the Prison Administration as being competent. There are also those who choose to designate the Public Prosecutor's Office as the competent body, along with another group of countries which, like Spain, with a greater or lesser degree of decentralisation, resort to attributing competence to one or more judicial bodies.

Accordingly, it is clear that many Member States still have a central authority in charge of issuing and receiving the certificate and the rest of the documentation required for the transfer, as in the case of, amongst others, Estonia, Hungary, Italy, England, Wales, Latvia, the Netherlands and Romania, where the authority in charge of issuing and receiving the case file is the Ministry of Justice, although the decision is made by judges or prosecutors' officers.

To our mind, the option of designating a central governmental authority, while undoubtedly facilitating the determination of the foreign competent authority and speeding up communications, distorts, to a certain extent, what should be direct communication between the judicial authorities, as required by Article 5(1) of the Framework Decision. [18] This intervention by the Ministry of Justice constitutes a clear footprint of the outdated model of intergovernmental cooperation. In this regard, it should be noted that one of the features of the principle of mutual recognition is, precisely, this direct communication between the members of the judiciary, without intermediation by the executive authority, which is, to some degree, altered by the leading role of the Ministry of Justice as intermediary, even though it does not hold the power to make the final decision. [19]

Other States have opted to designate the Crown Prosecution Service as the central authority competent to recognise and execute this instrument, as in the case of Belgium, Denmark, Luxembourg, Malta and Portugal. In turn, another group of countries, aware of the advantages of having a centralised decision-

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[18] Contrary to Article 7 of Framework Decision 2002/584/JHA, which provides for the designation of central authorities, Article 5(1) of Framework Decision 2008/909/JHA clearly states that "The judgment or a certified copy of it, together with the certificate, shall be forwarded, by the competent authority of the issuing State directly to the competent authority of the executing State". It also adds that "All official communications shall also be made directly between the said competent authorities".

[19] "Mutual recognition is understood as procedure(s) of national authorities avoiding central national authorities when a Member State of the EU recognises criminal decisions of another Member State(s) without cumbersome formalities giving them status of domestic decisions". *Cf.* L. Klimek, *Mutual recognition in European decisions in European Criminal Law*, Springer, Bratislava, 2017, p. 6. For its part, the preamble of the LRM provides that the new model of judicial cooperation, based on the principle of mutual recognition, entails, among other things, a radical change in relations between the Member States of the EU, replacing communications between central or governmental authorities with direct communication between the judicial authorities.

making authority, have designated certain services or offices responsible for the administration and management of prisons as the competent bodies. These include Finland, with its Central Administrative Office of the Criminal Sanctions Agency, along with Sweden, Scotland and Northern Ireland, which designate their respective Prison Services as the competent authorities.

Lastly, there is another set of Member States in which the authorities designated as competent to recognise and enforce custodial sentences imposed abroad are territorially decentralised, determined on the basis of the prisoner's domicile or residence in the executing State. This group includes Austria, France, Croatia, Cyprus, the Czech Republic, Germany and Slovenia. It also includes Romania and Italy where, in the former case, if the prisoner does not have a domicile in Romania, the Bucharest Court of Appeal will have jurisdiction, while in Italy, if there is a lack of information about the prisoner's domicile or residence, the Court of Appeal in Rome will have jurisdiction.

The response time and the sense of decisions, as well as the speed of prior consultations between the authorities of the different Member States involved in the transfer or the internally developed procedures for assessing the merit of the transfer in terms of the prisoner's social rehabilitation vary significantly from one Member State to another, which may, to some extent, be affected by the type of competent authority. Thus, for example, as Sanz Álvarez points out, there are States, like the Netherlands, which reply quickly, as they have a special service within the Ministry of Justice, while others take longer to reply and make decisions on procedures. [20]

It may be assumed that, in general, the centralisation of the authorities would lead to greater specialisation and, therefore, to quicker and more efficient management of these procedures. However, it appears difficult to identify a general criterion to this effect, since the territorial extension of the State in question, its jurisdictional organisation or the excessive workloads existing in the different jurisdictional and/or administrative services involved are just some of the factors that could influence the determination of the optimal competence model for processing cross-border transfer procedures.

However, with regard to the Spanish system, which will be analysed in some detail below, it can be stated that the strong level of decentralisation in the determination of the authorities competent to handle this issue, together with the lack of authority of the Public Prosecutor's Office and the Prison Administra-

[20] A.C. Sanz Álvarez, 'La Orden Europea de Detención y Entrega y la DM 909/2008 de 27 de noviembre de 2008 relativa a la aplicación del reconocimiento mutuo de sentencias en materia penal por las que se imponen penas u otras medidas privativas de libertad a efectos de su ejecución en la Unión Europea', in AA.VV., *Jornadas sobre la Orden Europea de Detención y Entrega*, Centro de Estudios Judiciales, Madrid, 2017, pp. 37-38.

tion to propose or request the start of the transfer procedure, result in a competence system that, in addition to being excessively complex and plagued with interpretive questions, is not effective in practice.

3. *The Spanish Case*

3.1. *Authorities Competent to Decide on the Transmission and Recognition of Custodial Sentences or Measures Involving Deprivation of Liberty*

3.1.1. *Spain as Issuing State*

As regulated by Article 64(1) LRM, in order to determine the competent body for the transmission of a decision imposing custodial sentences or measures, two cases should be differentiated. On the one hand, the case in which an offender has already begun to serve his or her sentence and is, therefore, imprisoned and, on the other hand, the case in which s/he has not begun to serve his or her sentence.

In the first case, that is, when the offender is already imprisoned, regardless of whether s/he is serving the sentence that is intended to be forwarded or a different one, the competent authority for forwarding the judgment will be the prison supervision judge in charge of the prison in which the offender is held or, where appropriate, the central prison supervision judge, if any of the penalties were imposed by the National High Court.

With regard to the competence of prison supervision judges, one question arises concerning the determination of territorial competence, which the LRM does not resolve. If the offender is transferred to another national prison during the transfer procedure, it is not clear which judge will be territorially competent. Unlike what is provided by the legal regulation of other mutual recognition instruments, which establish the general procedural rule of *perpetuatio iurisdictionis* [21] – according to which any changes that occur, once the procedure has been initiated, in terms of the domicile of the parties or the situation of the subject of the procedure, will not modify the jurisdiction or competence –,

[21] For instance, the legislation on orders freezing property or evidence states that any change of the location of the object to be frozen will not imply any loss of competence of the investigating judge or the Prosecutor who had agreed to the recognition and enforcement of the resolution transmitted to Spain (Article 144(2) II LRM). Likewise, the law regarding the mutual recognition of confiscation orders contains a similar rule (Article 158(2) II LRM). In addition, with regard to resolutions imposing financial penalties, it is also stated that the change of the offender's residence, registered office, real estate or sources of income will not imply an unexpected loss of jurisdiction of the judge initially competent (Article 174(2) LRM).

nothing is said about this issue in the Section related to the transmission of custodial sentences or measures involving deprivation of liberty.

Despite the aforementioned legal loophole, according to Sanz Álvarez, the principles of procedural economy, legal certainty and public order infer that it would be worth applying the general rule of *perpetuatio iurisdictionis* also in the case of the instrument in question, so that any change of prison, if the transfer procedure has already begun, would not modify the competent judicial body.

The same conclusion would be reached by applying the rules on *lis pendens* and *res judicata*. In this regard, de Marcos Madruga[22] points out that, if the inmate is transferred from one prison to another and reiterates his or her transfer request before the new prison supervision judge competent to supervise the execution of his/her sentence, this judge shall respect the decision made by his or her predecessor due to the force of *res judicata* of judicial decisions,[23] while, if a transfer request is pending before another court, a new procedure could not be initiated by virtue of the effects of *lis pendens.*

As noted at the beginning of this section, there is a second rule of competence, less frequently used in practice.[24] This rule states that if the transfer procedure begins when the custodial sentence has not yet started to be served, and the offender is therefore free, the competent authority to decide on the transmission will be the sentencing court and, more specifically, the judicial body that handed down the first-instance ruling (Article 64(1) LRM).

The aforementioned competence rule means that virtually any Spanish judge or court may be competent to issue this instrument. Thus, taking into account the combination of the different competence criteria (seriousness of the offence, nature of the crime and some special competence rules *ratione*

[22] F. de Marcos Madruga, 'La transmisión de sentencias en materia penal por las que se imponen penas privativas de libertad. España como Estado de transmisión: regulación y examen de problemáticas surgidas en la práctica', paper presented in a course on Framework Decision 2008/909/JHA and its transposition in Spain held on 20 and 21 May 2019, 2019, p. 13. Retrieved on 15 October 2019 from www.cej-mjusticia.es/cej_dode/flash/ebook/assets/img/cejponencia1560180533759/cejponencia 1560180533759.pdf.

[23] Contrary to this interpretation, it is argued that the nature of the executive procedure leads to the fact that, if the transmission request is rejected by the competent authority, the request could be raised again, invoking any change in circumstance. *See* M. Fernández Prado, 'Cuestiones prácticas relativas al reconocimiento de resoluciones que imponen penas o medidas privativas de libertad', in C. Arangüena Fanego, M. de Hoyos Sancho & C. Rodríguez-Medel Nieto (Eds), *Reconocimiento mutuo de resoluciones renales en la Unión Europea*, Aranzadi, Navarra, 2015, p. 134.

[24] In this sense, it must be borne in mind that the offender's request to be transferred should not be a cause for suspension of his or her imprisonment and, once the entry into prison occurs, the competence shall correspond automatically to the prison supervision judge. Consequently, the competence of the sentencing court will be practically reduced to those cases where the offender is not in Spain, but in the executing State. *See* Fernández Prado 2015, p. 133.

personae for certain public positions) any of the following judicial bodies could be competent to decide the case in the first-instance and, therefore, to forward the final judgment to another Member State: Criminal Courts, Provincial High Courts, Central Criminal Courts and even the regional Superior Courts and the Supreme Court for certain offenders (*e.g.* those entitled to parliamentary immunity).

The first problematic issue raised by the aforementioned competence rule derives from the strong level of decentralisation of the authorities competent to decide on the issuance and forwarding of this instrument.[25] The implication of numerous and diverse judicial bodies increases the lack of homogeneity of their decisions, above all when considering that the judicial authorities are sovereign in the interpretation of the laws, and it is not possible to impose upon them binding guides or protocols on how to apply legal rules, as their independence would be undermined.

Moreover, this second rule of competence also presents certain gaps. For example, it does not resolve the competence issue if there are several custodial sentences involving the same individual, when none of them have started to be served. In such a case, the law does not indicate which of the different sentencing courts would be competent in the transfer procedure. The competence may be held by the last sentencing court,[26] the first[27] or the one that handed down the highest penalty.[28] What seems clear is that, regardless of which of them is competent to decide on the transfer, communication and coordination between them is essential . However, such coordination is not expressly envisaged by the current legislation, which is aggravated by the lack of existence of

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[25] According to M. de Hoyos Sancho, 'El reconocimiento mutuo de resoluciones por las que se impone una pena o medida privativa de libertad: análisis normativo', in C. Arangüena Fanego; M. de Hoyos Sancho & C. Rodríguez-Medel Nieto (Eds), *Reconocimiento mutuo de resoluciones penales en la Unión Europea*, Aranzadi, Navarra, 2015, p. 113, it is a fully decentralised competence model.

[26] This is the solution proposed by the Office for International Relations of the Spanish General Council of the Judiciary, expressed in the *Guide on the recognition to judgments imposing custodial sentences or measures involving deprivation of liberty*, published on 27 February 2015, p. 4; Fernández Prado 2015, p. 133, also attributes the jurisdiction to the last sentencing court, responsible for the accumulation of sentences.

[27] Organic Law No. 5/2000 of 12 January, on criminal juvenile justice (hereinafter, 'LORPM' by its acronym in Spanish) establishes the opposite rule: the first one that handed down the sentence is responsible for the execution (Article 12(1)).

[28] In this regard, the Additional Provision 5th of the Organic Law No. 6/1985 of 1 July, of the Judiciary (hereinafter, 'LOPJ' by its acronym in Spanish), states that, in order to decide on appeals against decisions of prison supervision judges, the sentencing court will be competent and, in the event that the offender is serving several sentences, the jurisdiction shall correspond to the court that imposed the most severe penalty, while if several courts imposed the same penalty, the jurisdiction shall correspond to the one that handed down the last sentence.

a register recording the different European orders issued or recognised in relation to a given individual, together with the absence of a register of non-final convictions.

The legislation on the issuing competent authorities also includes a confusing Article 65(2) LRM, which seems to contain a clause extending the jurisdiction of prison supervision judges. This provision indicates that, when the offender is still free, the resolution ordering the transfer to another Member State can be transmitted, either directly by the sentencing body or via the prison supervision judge.

A joint interpretation of Articles 64 and 65(2) LRM leads to the conclusion that the scope of competence of the prison supervision judge is not limited only to cases where the prisoner is already serving the sentence, but is also extended to those cases where the penalty has not yet started to be served, whenever the sentencing judge, once the judgment become final, decides to transmit the file via the prison supervision judge.

In our opinion, the main problem posed by Article 65(2) LRM, aside from its difficulty of interpretation, lies in the fact that it seems to leave the determination of judicial competence to the sentencing court. This way of determining jurisdiction clashes with the nature of criminal competence rules, which are mandatory (Article 8 Spanish Criminal Procedure Act), and constitute authentic procedural prerequisites. This is the reason why those acts, made by or before a court without objective or functional competence, are null and void (Article 238(1) LOPJ). Moreover, the legal determination of the competent authority is part of the basic content of the fundamental right to the ordinary judge predetermined by law, which, in turn, is crucial to ensuring the independence and impartiality of the judiciary.

Accordingly, in order to avoid inadmissible discretion in determining the competent authority introduced by the literalness of Article 65(2) LRM, De Marcos Madruga[29] makes a systematic interpretation of the rule, according to which the transfer decision will be issued by the prison supervision judge or by the sentencing judge, depending on whether or not it is considered necessary to adopt precautionary measures against the sentenced person, as Article 72 LRM designates the prison supervision judge as the body exclusively competent to request such precautionary measures.[30] In this way, paraphrasing the aforementioned author, it would not be the mere discretion of the sentencing

[29] De Marcos Madruga 2019, p. 11.

[30] According to this interpretation, the prison supervision judge would be competent to forward the judgment when the offender is in the executing State and the adoption of a personal precautionary measure must be requested to ensure that they remain in that territory. Conversely, when the adoption of precautionary measures is not necessary, the sentencing court itself shall be competent to forward the custodial sentence directly to the competent authority of the executing State.

judge that would entitle the prison supervision judge to act, but the need to guarantee the offender's presence in the executing State through the request for precautionary measures.

In addition, Article 65(2) LRM presents another interpretative problem, since it does not determine which prison supervision judge would be territorially competent, in the event that the sentencing court decided to defer the transfer procedure to it, without the offender yet being deprived of liberty and, therefore, without having a specific prison centre as a reference. In this case, the preliminary draft of the LRM provided that the prison supervision judge corresponding to the judicial district of the sentencing court would be competent. However, in the current legal order, as there is no such provision, the question of territorial competence remains unanswered. Two alternative options are available here: the prison supervision judge of the prisoner's domicile provided that such information is available,[31] or the prison supervision judge of the judicial district of the sentencing body, as envisaged by the aforementioned draft.

Another difficulty that arises due to the jurisdictional duality existing between the sentencing court and the prison supervision judge occurs when, once the custodial sentence has started to be served, the offender escapes and is found in the executing State. In this case, the most appropriate solution would be to attribute the competence to the sentencing body, despite the sentence having already started, given that the offender, not being in prison, would no longer be under the jurisdiction of any prison supervision judge.[32] However, Spanish law also fails to clarify this point.

Finally, for the forwarding of the judgment imposed in accordance with Organic Law No. 5/2000 of 12 January, on criminal juvenile justice, specifically for custodial measures for minors, juvenile courts are competent for issuing this instrument regardless of whether or not the measure has begun to be fulfilled. This competence rule is consistent with the centralisation of competences in the juvenile courts both for the prosecution of minors (Article 2 LORPM) and for the execution and supervision of custodial measures imposed upon them (Article 44 LORPM).

The only doubt that may arise in the latter case refers to the event in which

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[31] For some scholars, the judge of the offender's domicile would be competent by analogy with other cases in which there is no imprisonment, such as in the supervision of the enforcement of sentences involving community services or post-penitentiary probation measures. *Cf.* de Marcos Madruga 2019, pp. 10-11.

[32] The following scholars argue in the same vein, Fernández Prado 2015, p. 133; A.M. González Álvarez & J. Nistal Burón, 'El reconocimiento mutuo de resoluciones penales en la Unión Europea. El cumplimiento en España de penas privativas de libertad impuestas en otros Estados Miembros de la Unión Europea', *La Ley Penal: Revista de Derecho Penal, Procesal y Penitenciario*, No. 114, 2015, p. 8; de Marcos Madruga 2019, p. 11.

the minor, upon reaching adult age, is transferred to a prison centre (Article 14 LORPM). However, in accordance with the LRM, it can be assumed that, even when the juvenile court has lost jurisdiction regarding the execution and supervision of the measure in Spain, it will retain the competence to forward the judgment to another Member State. [33]

On the other hand, although the LRM does not expressly state as such, it seems logical that, in terrorist offences or in crimes committed abroad by minors, the competent body is the Central Juvenile Court, which ordinarily deals with prosecuting such offences when they are committed by under-age offenders and also executes any measures imposed (Article 2(4) LORPM). Once again, the legislative omissions denote a certain lack of care in determining the competent authorities for the transfer procedure, forcing the interpreter to seek systematic solutions, with the risk that the lack of a clear legal basis for such attribution of judicial competence may lead to the emergence of conflicts of jurisdiction, [34] to conflicting decisions being made or even to the annulment of proceedings held before an non-competent court (Article 238(1) LOPJ).

3.1.2. *Spain as Executing State*

As provided by Article 64(2) LRM, the authority competent to recognise a foreign custodial sentence is the Central Criminal Court, while the authority competent to supervise the execution of the sentence is the central prison supervision judge. However, when the conviction refers to a custodial measure imposed upon a minor, the Central Juvenile Court is competent both for the recognition and for the execution and supervision of the measure.

When comparing the rules determining the issuing competent authorities with those identifying the executing competent authorities, it can be seen that the executing authorities are much more centralised, being concentrated on the Central Courts, which belong to the National High Court, a judicial body located in the city of Madrid, having jurisdiction over the whole Spanish territory, without being territorially decentralised. [35]

Centralisation can contribute to homogeneity in recognition decisions. It must be borne in mind that recognition decisions, although they may apparently seem highly regulated, include an important component of discretionary assessment, as social rehabilitation is undefined legal concept and the non-con-

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[33] De Marcos Madruga 2019, p. 11.

[34] Fernández Prado 2015, p.133.

[35] According to Fernández Prado 2015, p.141, the Spanish legislator has opted, in this case, for a centralised competence model.

tribution to social rehabilitation is provided as a ground for refusing the transfer request.[36]

On the other hand, centralisation can facilitate the determination of the Spanish competent body by the issuing state. In any case, it may not be easy for the foreign authority to determine the competent authority to which the certificate must be forwarded, along with the custodial sentence. Therefore, if the certificate is received by an non-competent judicial body, the latter will be obliged to send it to the competent judicial authority, informing the prosecutor and the foreign issuing authority (Article 5(5) of the Framework Decision and Article 16(2) LRM).

4. *Interrelations of Transfers with Other Mutual Recognition Instruments and Need for Coordination between Judicial Authorities*

The interrelationships between the different mutual recognition instruments are plentiful and very significant. However, the fact that the Spanish regulation of these instruments occurs unsystematically and in a fragmentary way, through the transposition of successive relevant acts, may cause the overall vision to be blurred and may lead to underestimating the need to establish coordination mechanisms between them. However, if the aim is to create a genuine area of freedom, security and justice throughout the EU territory, the panoply of instruments of mutual recognition must be seen as a comprehensive set.

It is important to consider, for example, the partial overlap between cross-border transfers pursuant to Framework Decision 2008/909/JHA and the European Arrest Warrant, regulated in Framework Decision 2002/584/JHA.[37] Similarly, there is a clear complementary relationship between the transfer of prisoners and the instrument regulated in Framework Decision 2008/947/JHA

[36] As held by the experts group in European Organization of Prison and Correctional Services, 'Expert Group on Framework Decision 909', *Working Group Report*, 2013, pp. 7, 10-11, retrieved on 24 September 2019 from www.europris.org/file/report-europris-expert-group-on-framework-decision-909/?download=1, there are no common criteria or procedures for assessing the contribution of a transfer to the offender's social rehabilitation. At the same time, the Framework Decision also fails to offer clear guidance on how to interpret 'the living place' of a person, which is, therefore, determined differently depending on the interpretation of the Member State concerned.

[37] According to the European Organization of Prison and Correctional Services 2013, p. 13, "The participating experts concluded that the link between the EAW and the Framework Decision can give rise to problems, due to the fact that both systems are not fully compatible and that differences in national legislation could hinder the effectiveness of its combined application. The experts point to the importance of involving and informing the prisoner in this regard". An in-depth study on the overlapping between cross-border transfers and the EAW can be found in Rosanò's chapter of this book (*Framework Decision 2008/909/JHA in Context: Interplay with the European Arrest Warrant and (EU) Extradition Law*, pp. 79-95).

of 27November 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 (OJ L 337, 16.12.2008, pp. 102-122, hereinafter, the 'FD 2008/947/JHA'). [38]

A relevant case of connection between the instrument analysed here and the EAW occurs when Spain denies the detention and surrender of a Spanish national for the purpose of executing a prison sentence in another Member State, in which case, as prescribed by law, the penalty imposed by the foreign authority must be served in Spain (Article 48(2) b) LRM). [39] This provision establishes that, once the EAW has been refused by the Central Investigating Court, the executing competent authority for cross-border transfers, that is, the Central Criminal Court, shall apply the specific provisions for regulating the recognition in Spain of custodial sentences or measures involving deprivation of liberty in order to prevent the impunity of the offender (Article 91 LRM).

In the aforementioned case, beyond the material obstacles that may exist to the forwarding of the custodial judgment due to the different requirements of both instruments (for example, their partially different purposes and aims, the divergent requirements for issuing and executing both instruments, the different approach to the sentenced person's consent, the different penalty thresholds and so on), there is a problem of coordination between the judicial authorities involved.

According to Article 91 LRM, the authority entitled to request the forwarding of the judgment involving custodial penalties to Spain is the Central Criminal Court. However, the authority in charge of deciding on the denial of the EAW is the Central Investigating Court, which is the authority ordinarily competent for recognising and executing this instrument (Article 35(2) LRM). It seems clear that, in a case such as this, the communication between the Central Investigating Court which denies the surrender of the offender and the Central Criminal Court, competent to request the transmission of the custodial

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[38] This complementary link is clearly set out in European Commission, *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)57 final, 2014, retrieved on 9 August 2019 from htpp://eur-lex.europa.eu/procedure/EN/1041647**,** according to which these Framework Decisions must be seen as a package of coherent and complementary legislation addressing the issue of detention of EU citizens in other Member States.

[39] The described case is based on Article 25 of the Framework Decision, which envisages a link to the EAW. This provision, in conjunction with Articles 4(6) and 5(3) of the EAW Act, allows a Member State to refuse to surrender its nationals or residents or persons staying in its territory provided that such State undertakes to enforce the prison sentence in accordance with the Framework Decision.

sentence to Spain as a direct consequence of that refusal, is essential. However, Spanish law gives no direction in this regard.[40]

Hence, it is rightly stated that the different competent authorities designated in the LRM for the issuance, recognition and execution of each instrument, and even in relation to the same instrument, without identifying a central registration system for the different European orders,[41] or the need for communication between the different authorities involved, requires a voluntary and spontaneous coordination task that does not always work as desired.[42]

Likewise, coordination between the authorities responsible for recognising and executing an EAW and the authorities responsible for transmitting a custodial sentence is required in cases where, pending a sentence of imprisonment imposed in Spain, the offender is claimed, through an EAW, by the State of nationality or residence, either for the exercise of criminal actions or for the enforcement of a final sentence. In such a case, the Central Investigating Court that receives the EAW, instead of denying the surrender of the arrested person or suspending it until the complete execution of the sentence in Spain, may choose to promote the forwarding of the Spanish judgment to the issuing State of the EAW where the offender has certain family, social or professional ties. However, since the Central Investigating Court is not competent for initiating the transfer procedure, or entitled to forward the judgment, it must act through the proper authorities, either via informal communication with the Spanish issuing authority (prison supervision judge or sentencing court, depending on whether or not the offender is in prison), or by suggesting this to the foreign executing state, which is entitled to request the transmission of the custodial sentence imposed in Spain.[43]

Another interesting case of connection between different instruments of mutual recognition arises when a custodial sentence is to be transmitted along with a probation measure which must be served after the deprivation of liberty. Thus, when issuing or recognising a custodial sentence, the competent authorities must also communicate and coordinate with those other judicial au-

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[40] According to González Álvarez & Nistal Burón 2015, p. 8, footnote 22, despite the legislative silence, once the EAW is denied, the file must be transmitted to the Central Investigating Judge competent to initiate the transfer procedure.

[41] In view of the interconnection that, in practice, exists between the various instruments of mutual recognition, it would be very useful to create a European registry of probation orders, custodial sentences, and supervision measures as an alternative to provisional detention and protection orders similar to the Schengen Information System essential for the proper functioning of the EAW. *Cf.* C. Rodríguez-Medel Nieto, 'Cuestiones prácticas relativas al reconocimiento de resoluciones de libertad vigilada', in C. Arangüena Fanego, M. de Hoyos Sancho & C. Rodríguez-Medel Nieto (Eds), *Reconocimiento mutuo de resoluciones penales en la Unión Europea*, Aranzadi, Navarra, 2015, pp. 181-182.

[42] Sanz Álvarez 2017, p. 12.

[43] Sanz Álvarez 2017, p. 8.

thorities competent to issue or recognise the probation measures envisaged by Framework Decision 2008/947/JHA.[44]

According to Article 66(2) LRM, the concurrence of the custodial sentence with other financial penalties or confiscation orders pending execution will not prevent the transfer.[45] From this legal provision it can be inferred, conversely, that when penalties or measures pending execution are non-pecuniary, for instance, in the case of post-penitentiary probation measures consisting of the prohibition of approaching the victim for a certain period of time once the prison sentence has been served,[46] the impossibility of transmitting this latter measure may become an obstacle to the transmission of the prison sentence, preventing the offender's transfer to a prison in the country of his/her nationality or residence.

In the described case, the various interests at stake must be assessed – essentially the social rehabilitation of the offender and the safety of the victim – in order to decide which instrument or combination of instruments of mutual recognition should be applied. When both penalties – the custodial sentence and the measure restrictive of other rights – have been adopted in the same procedure and by the same judge, the assessment is possible. However, problems arise when sentences of different nature are imposed on the same individual in different proceedings held before different courts. In this case, as a result of the lack of coordination between the judicial authorities competent to issue the various mutual recognition instruments, together with the absence of a register of non-final convictions,[47] the prisoner may be improperly trans-

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[44] Rodríguez-Medel Nieto 2015, p. 189.

[45] According to B. Mapelli Caffarena & M.I. González Cano, *El traslado de personas condenadas entre países*, McGraw Hill, Madrid, 2001, p. 89, the refusal of the transfer to ensure compliance with a fine or other financial penalties, frustrating the purpose of social rehabilitation, would be contrary to the principle of proportionality.

[46] According to de Marcos Madruga 2019, p. 16, the post-penitentiary probation measure is not transferable under Framework Decision 2008/947/JHA, since it is characterised by the absence of concreteness until a few months before the termination of the custodial sentence (Article 106(2) of the Spanish Penal Code), whereas, according to the aforementioned Framework Decision and the LRM, what is transmitted are concrete measures of probation. In this context, it should be considered that instruments that have been developed through regulations without direct effect on the national legal systems of the Member States, such as Framework Decisions or Directives, have often not been transposed with sufficient faithfulness or correspondence, which causes difficulties in practical application when creating non-homogeneous systems or referring to non-comparable measures. In this regard, in relation to Framework Decision 2008/947/JHA, the determination of the contents of its objective scope is not seen homogenously in the different Member States. In relation to the Spanish legislation, this controversy has been addressed in P. Faraldo-Cabana, '¿Cuáles son las resoluciones de "libertad vigilada" a efectos del reconocimiento mutuo? Sobre las dificultades de trasposición de la Decisión Marco 2008/947/JAI al derecho español', *Revista de Derecho Comunitario Europeo*, Year 23, No. 63, 2019, pp. 575-597.

[47] Although the LRM states that, before deciding on the transmission of a custodial sentence, the competent judicial authority must check that there are no other non-final convictions pending against the offender (Article 66(3)), the truth is that such verification, which is carried out by consulting the

ferred, thereby frustrating the execution and effective enforcement of those other penalties or measures not transferrable to the executing State and undermining the national jurisdiction.[48]

5. *Involvement of Other Spanish Authorities in the Transfer Procedure*

5.1. *The Intervention of the Ministry of Justice*

In accordance with the spirit of European acts implementing the principle of mutual recognition, aimed at eliminating the decision-making power of the executive branch, the Spanish legal system has chosen to establish a purely jurisdictional procedure for cross-border transfers within the EU territory. Consequently, all communications that occur within the transfer procedure will be established directly between the competent authorities involved, thus respecting the mandate of Article 5(1) of the Framework Decision.

Despite this, according to Article 6 LRM, the Spanish Ministry of Justice will be the central authority in charge of assisting judicial authorities competent to issue and execute the various instruments of mutual recognition on criminal matters. This provision does not seem to make much sense in a fully jurisdictional procedure. Moreover, such characterisation does not correspond to the function effectively performed by this executive body, which is limited to developing a task of mere receipt and centralisation of certain documentation.

To facilitate this documentary undertaking entrusted to the Ministry of Justice, the judicial authorities are mandated to forward to the Ministry the certificates issued or recognised by the Spanish courts (Article 6 LRM). This provision is supplemented by that contained in Article 64(3) LRM, inserted in Section III LRM, specifically devoted to the forwarding of custodial sentences or measures involving deprivation of liberty, which establishes the mandate to forward to the Ministry the certificates issued or recognised by Spanish courts within three days from the issuance or recognition of the corresponding instrument.[49]

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system of administrative registers to support the Administration of Justice, is not always possible. This is because, according to Article 2(3) b) of Royal Decree No. 95/2009 of 6 February, which regulates this registration system, the register only reflects non-final judgments when, in the procedure, protective or precautionary measures have been taken.

[48] De Marcos Madruga 2019, pp. 14-15, points out that, in this case, it will be necessary to enforce, prior to the transfer, those penalties or measures not subject to transmission, since a conflict would otherwise arise with the judicial authority competent to execute the non-transferable measure, which would be entitled to oppose an act, such as the transfer, rendering its pronouncement ineffective.

[49] According to the Office for International Relations of the Spanish General Council of the

This documentary receipt assignment entrusted to the Ministry of Justice could be useful for statistical purposes. However, in practice, there are two main problems affecting the reliability of this source of information. The first reason concerns judges' systematic failure to send the files. Secondly, the type of documents that must be sent do not provide information on requests denied by the Spanish courts, on the results of transfer requests issued by Spanish judges, on the ongoing procedures or on their duration, amongst other details that are extremely relevant for evaluating the effectiveness of the instrument at issue.

5.2. *The Intervention of the Public Prosecution Service*

The Public Prosecutor intervenes at various times in the procedure for both the issuance and execution of this mutual recognition instrument, as will be detailed below. However, when the Spanish legal order is carefully analysed, it can be seen that the Public Prosecutor's intervention is reduced, in most cases, to challenging those court decisions forwarded to it and to issuing its technical opinion at the request of the judge when the file is sent to it by the competent judicial authority.

Faced with this reactive position of the Public Prosecutor, it seems possible, and very convenient, for reasons that will be explained later, for this body to adopt a more active role in the initiation and management of transfer procedures. This change in the prosecutor's role would allow, among other things, greater possibilities of specialisation due to the broader powers of self-organisation of prosecutors, compared to the legal predetermination of judges in the assignment of cases.

Although the current Spanish legal regulation does not assign a leading role to the Prosecutor's Office in cross-border transfer procedures, the fact is that, sometimes by express legal provision, sometimes through a systematic interpretation of the law, there are various procedural acts in which the intervention of the Prosecutor's Office appears to be necessary or, at least, convenient.

Firstly, when Spain is the executing state, it is stated that the Public Prosecutor, together with the competent judicial authority and the offender, is entitled to request the forwarding to Spain of the custodial sentence handed down in another Member State (Article 79 LRM). In addition, when the initiative originates from the judicial authority or the sentenced individual, the competent judicial body shall decide on the recognition or refusal of the transfer only after hearing the Public Prosecutor's opinion (Article 79 LRM).

Judiciary, expressed in the *Guide on the recognition to judgments imposing custodial sentences or measures involving deprivation of liberty*, published on 27 February 2015, although the law does not state it, together with the copy of the certificate, judgments should also be forwarded and, where appropriate, the resolution of accumulation of judgments on which the certificate is based.

Likewise, the Public Prosecutor's opinion must be heard in relation to the possibilities of reintegrating the offender into society, not only, as established by law, when the foreign issuing authority consults the executing authority requesting information in this regard (Article 78(2) LRM), but also when, in the absence of prior consultations, the executing authority receives the judgment and the certificate, and decides to issue an opinion on the possible contribution of the transfer to the offender's social rehabilitation (Article 78(3) LRM). In this regard, it is important to point out that the primary objective of the Framework Decision is to enhance the offender's prospects of social rehabilitation but, nonetheless, the Framework Decision does not provide any criteria or procedures for assessing the compliance with this aim. Therefore, the assessment procedure depends on each Member State and the effectiveness of such evaluation depends on the effort and resources that each Member State decides to invest in it.

On the other hand, as provided in Article 22(2) LRM, the judicial decision regarding the recognition or denial of this instrument must be forwarded without delay, not only to the sentenced person, but also to the Public Prosecutor, which will be entitled to challenge the judicial decision. In this way, the Prosecutor develops one of its essential functions, consisting of supervising the judicial action, ensuring that it is exercised in accordance with the applicable law.

The Public Prosecutor also intervenes in taking precautionary measures that must be imposed on the offender found in the Spanish territory in order to prevent his or her escape. In this regard, even if the issuing authority has not requested the adoption of precautionary measures restricting the offender's freedom, the Public Prosecutor may do so when deemed necessary (Article 87(1) LRM). Moreover, even if the request for personal precautionary measures originates from the foreign issuing authority, the Public Prosecutor must be heard before taking the measure, as that is the procedure provided in the Spanish Criminal Procedure Act to which the LRM refers.

Thus far, the intervention of the Prosecutor's Office when Spain is the executing State has been addressed. Its intervention in the cross-border transfer procedure when Spain is the issuing State will now be discussed.

The initial point of interest is that the Public Prosecutor is not entitled to request the inception of the transfer procedure when Spain is the issuing State, as the judicial authorities, both issuing and executing, are the only ones entitled to do so, either acting *ex officio* or at the request of the sentenced individual (Article 65 LRM).

The Public Prosecutor's Office also appears to be somewhat forgotten with regard to the notification of the resolution by which the competent Spanish judicial authority decides to forward the judgment. The law is concerned with guaranteeing the communication of this decision to the offender, whether s/he

is in Spain or in the executing State, to allow him/her to challenge such a crucial pronouncement (Articles 70 and 13 LRM). However, surprisingly, it does not require it to be notified to the Prosecutor, which would prevent this public body from challenging such a judicial decision that may even have been taken *ex officio* and against the opinion of the offender.[50]

In our opinion, despite the legal loophole, the judicial decision to forward the judgment must be notified to the Public Prosecutor[51] in order to allow prosecutors to check its legality and, notably, its adequacy in terms of the aim of social rehabilitation which justifies the transfer, challenging the decision through the resources system when appropriate. Moreover, I also believe that it would be convenient to give the Prosecutor a hearing prior to the adoption of the judicial decision,[52] so as to consider its technical opinion in issuing this instrument. In this way, the Prosecutor's Office could give its opinion, amongst other things, on the compliance of the judicial decision with the legal requirements for issuing this instrument, on the existence of other pending cases in Spain, on the advisability of conducting prior consultations with the executing authority, on the offender's prospects of social rehabilitation, on the need to request the adoption of personal precautionary measures involving deprivation of liberty from the executing state or, where appropriate, on the possibility of issuing alternative or complementary instruments of mutual recognition, such as EAW or probation measures.

Although the decision-making power in relation to the issuance, recognition and execution of this instrument is attributed to the judiciary, which can be seen as positive in guaranteeing the independence of the decision, the intervention of the Prosecutor's Office in this procedure would certainly be useful. Beyond the work carried out by the Public Prosecutor, in controlling the legality of the judicial action, especially through filing resources, its intervention in these procedures would be convenient for various reasons, such as its greater flexibility in terms of self-organisation, which implies greater possibilities of specialisation, and the principles of unity and hierarchical dependence which inform its performance in accordance with its organic statute and its constitutional set-up.

Thus, primarily, it is worth mentioning the possibility for the State Attorney General's Office to issue instructions establishing the priority criteria for deciding between the various mutual recognition instruments applicable to a

[50] On the possibilities of appealing this crucial decision, see Montaldo's chapter of this same book (*Framework Decision 2008/909/JHA and Fundamental Rights Concerns: In Search of Appropriate Remedies,* pp. 37-60, p. 56)

[51] In the same vein, V.J. González Mota, 'Resolución por la que se impone una pena o medida privativa de libertad', p. 6, 2015, retrieved on 23 September 2019 from https://es.scribd.com/document/370353522/Ponencia-Sr-Gonzalez-Mota.

[52] Fernández Prado 2015, p. 137.

given case,[53] as well as to establish a unique procedure for assessing the offender's prospects of social rehabilitation. These unitary criteria would be difficult to impose on members of the judiciary, on the one hand, due to the high degree of decentralisation in the assignment of responsibilities between the various judicial competent bodies and, above all, due to the independence that governs their actions, which prohibits the imposition upon them of binding instructions on the interpretation of laws.

Secondly, it is important to note that the possibilities of specialisation of the Prosecutor's Office are much broader, whereas the principle according to which a judicial body must be pre-determined by the law does not allow matters to be deferred to those courts having more experience in international judicial cooperation issues and in mutual recognition procedures. At this point, it must be borne in mind that, in such a specific, complex and evolving matter, specialisation undoubtedly provides a huge advantage for improving the efficiency and effectiveness of these proceedings.

5.3. *The Intervention of the Prison Administration*

Finally, we must mention the role that should be played by the Prison Administration in cross-border transfer procedures of offenders, despite the fact that the LMR, surprisingly, does not refer to it at all. Here, it should be noted that prison treatment consists, precisely, of the set of activities aimed directly at achieving the re-education and social rehabilitation of prisoners (Article 59 LOGP) and that qualified teams of specialists working within the Prison Administration are responsible for its design, implementation and monitoring (Articles 69 and 70 LOGP).

Therefore, these professionals, who are responsible for carrying out a personalised assessment of the prisoner's re-socialisation needs, as well as for designing his or her treatment plan are, undoubtedly, those who are in the best position to detect cases susceptible to transfer, at least if it is seriously accepted that the purpose of the transfer procedure is the prisoner's social rehabilitation.[54] In fact, at national level, the Prison Administration is responsible for assigning inmates to a specific prison, as well as for deciding upon transfers between national prisons. In order to do so, comprehensive and integrating concepts of prison treatment must be borne in mind, taking into due consideration

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[53] According to Sanz Álvarez, 2017, p. 16, the Prosecutor is in the best position to assess all the concurrent circumstances and to propose the most appropriate measure in each case, as evidenced in some real cases that the author reflects in her article.

[54] The Netherlands, for instance, makes use of probation officers. These volunteers visit prisoners abroad, provide support and begin the process by assessing the prisoners. Their information is then used to assess whether rehabilitation in the Netherlands or another country is appropriate. *See* European Organization of Prison and Correctional Services 2013, p. 7.

the social, family, economic or other ties held by the inmate in a given territory. In spite of this, according to the LRM, professionals from the Prison Administration are not even entitled to request the inception of cross border procedures.

In addition to the role that the Prison Administration would naturally be called upon to play in identifying sentences susceptible to transfer, as it is the Administration that is best informed of the social rehabilitation needs of its inmates, it should also be responsible for informing potentially transferable prisoners of the relevant information on the transfer procedure and its consequences, as it is the public authority closest to the prisoner. [55] In this regard, according to Recommendation (2012) 12 of the Committee of Ministers to States concerning foreign prisoners, as soon as possible after entering the prison, the foreign prisoner should be informed, in a language s/he understands, verbally and in writing, of the possibilities of being transferred. [56]

However, despite the aforementioned recommendation and the absolute alignment of purposes that exists, at least in theory, between prison treatment and transfer procedures, according to a study published in 2017, in which 83 foreign prisoners were interviewed in different Spanish prisons, only 61.4 percent of them knew about the possibility of being transferred, of which only half had received relevant information from the prison staff. [57] This clearly reveals, on one hand, the lack of adequate information protocols for foreign prisoners, and, on the other, the lack of attention given by the Prison Administration to this type of procedures. [58]

Some of the conclusions of the above recalled study, based on the suggestions put forward by the interviewed prisoners, refer specifically to the need for the prison authorities to provide prisoners with clear, understandable and

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[55] It is noteworthy that there is no penitentiary rule in Spanish legislation that expressly obliges the Prison Administration to inform foreign prisoners of the transfer possibilities, the procedure for requesting it and its consequences.

[56] Provision 15(3) of the Recommendation CM/Rec(2012)12 of the Committee of Ministers to member States concerning foreign prisoners (adopted by the Committee of Ministers on 10 October 2012 at the 1152nd meeting of the Ministers' Deputies).

[57] I. Durnescu, E. Montero Pérez de Tudela & L. Ravagnani, 'Prisoner transfer and the importance of the 'release effect'', *Criminology & Criminal Justice*, Vol. 17, No. 4, 2017, p. 459.

[58] It is discouraging to note how little progress has been made in this matter compared to the situation prior to the approval and implementation of the Framework Decision. Thus, in a study published in 2001, the neglect of penitentiary issues in the treaties and conventions on cross-border prison transfers, despite having a profound impact on this area, was harshly criticised. Specifically, criticism was aimed at the lack of a clear legislative mandate to inform the offender about the centre to which he/she is to be sent as a result of the transfer, about the prison system, prison labour opportunities or exit permits, among other relevant elements to allow the prisoner to make a free and informed decision. *Cf.* Mapelli Caffarena & González Cano 2001, p. 111. Therefore, it cannot be said, in Spain at least, that this situation has improved with the implementation of the Framework Decision.

accessible information, about the conditions and regime applied in the destination prison (in Romania, in the studied case), as well as the duration of the procedure and its purpose, among other things, enabling the prisoners to make a free and informed decision on the transfer. [59]

6. *Concluding Remarks*

The principle of mutual recognition of judicial decisions tends to minimise the decision-making power of the executive branch, giving prominence to the judiciary. However, when the CJEU case law on the autonomous concept of 'judicial authority' is analysed together with the wording of the Framework Decision, it is doubtful that such a term is transferable to cross-border transfer procedures. In this sense, it can be said that Union law does not require the judicial intervention to decide on cross-border transfers, as the decision-making power can be attributed to the prosecutor or even to the Prison Administration, provided that such a decision can subsequently be challenged before a judicial body.

In the case of Spain, the trend to eliminate the decision-making power of the executive branch has been taken to its most extreme consequences, opting for a purely jurisdictional cross-border transfer procedure, in which the intervention of other public authorities is reduced to a minimum or even sometimes completely excluded.

Problems arise when the absolute exclusion of certain administrative authorities and, notably, of the Prison Administration, from certain activities, such as the identification of potential transmissible cases or the assessment of the convenience of the transfer request from the perspective of social rehabilitation, erodes the principle of equivalence and effectiveness of Union law, as a consequence of the inadequate institutional context.

In Spain, by constitutional mandate, the jurisdictional function consists not only of judging, but also of enforcing judgments. Therefore, in accordance with this constitutional framework, an independent judicial authority must authorise the transfer outside the national territory, at least if it is considered to entail a surrender of national jurisdiction. However, to guarantee the effectiveness of the Framework Decision, the Prison Administration should be entitled to take the initiative, since it is the authority which ordinarily performs the activities and makes the decisions on the re-education and social rehabilitation of the sentenced individuals.

On the other hand, the distribution of authority between the Spanish judicial bodies established in the LRM is not straightforward. The competency

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[59] Durnescu, Montero Pérez de Tudela & Ravagnani 2017, p. 463.

system suffers from a strong degree of decentralisation, especially when Spain is the issuing State, which may hinder not only the existence of homogenous and predictable criteria for actions and decisions, but also the coordination between the different judicial authorities involved in the processing of one or more of these instruments.

The lack of coordination that may arise as a result of the decentralisation of authority is accentuated by the absence of regulated communication between the judicial bodies asked to apply the various instruments of mutual recognition, as well as by the lack of intervention by other, non-judicial authorities, notably the Public Prosecutor's Office and the Prison Administration. In addition, the problems of this lack of coordination are aggravated by the incomprehensible non-existence of a register in which the different European orders, issued and received, are centralised in relation to a given individual.

Faced with this scenario, the best remedy for enhancing the Spanish system seems to be greater cooperation and better inter-institutional communication between the competent judicial authorities, the Public Prosecutor's Office and the Prison Administration, which could enhance the use of this instrument, helping to improve the efficiency of the procedures and the effectiveness of the instrument, as a mechanism aimed at improving the social rehabilitation of EU prisoners. In this regard, it would be ideal for the Public Prosecutor's Office, whose actions are governed by principles of unity and hierarchical dependence, to have unitary criteria for applying this instrument, both for identifying potentially transferable cases, and also for providing the relevant information on the transfer procedure to its potential beneficiaries throughout the offender's different procedural and prison phases.

The sentencing judge, when sentencing the offender, may state his or her opinion for or against the transfer, ideally after a hearing with the prosecutor. Once the inmates have entered prison, the Prison Administration, through bodies specialising in prison classification and treatment, should apply specific protocols to identify and evaluate cases with potentially transferable sentences, and provide information pamphlets, in a language understandable to the prisoners, about the possibility, procedure and consequences of a transfer, so that inmates can make a free and informed decision on the matter.

All these adjustments would be possible without undermining the principle of mutual recognition, which leads to independent and impartial judicial authorities ultimately controlling whether or not the issuance and recognition of the instrument at hand was decided in light of the specific purposes for which it is intended and which justify its existence, preventing undue deviations of power.