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Exploratory study on possible lisbonisation of ex-third pillar acquis in the area of criminal matters

Executive summary

ICF S.A



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Study on possible lisbonisation of ex-third pillar acquis in the area of mutual recognition in criminal matters

Executive summary

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1. Objective and scope of the study

The main objective of this study is to provide an analysis, including case-law, of current legal issues and practices in mutual recognition of criminal decisions and cross-border cooperation in criminal matters based on seven Framework Decisions (FDs), and of the feasibility for possible action at European Union (EU) level.

The study was carried out in three successive phases, with one cross-cutting activity.

- **Inception phase:** This included a kick-off meeting, scoping interviews and exchanges with the Directorate-General for Justice and Consumers (DG JUST) to refine the methodological tools guiding the different study tasks.
- **Part A – Assessment of transposition and implementation of the seven FDs covered by this study for 27 Member States.** One national expert in each Member State developed a country fiche reporting on the state of transposition of each FD, resulting in 189 country fiches.
- **Part B – Possibilities for EU action, with special focus on legislation, lisbonisation** – drawing on the conclusions of Part A, and supplemented by additional desk research, the study team developed possible measures for future EU action to improve the implementation of each FD.
- **Cross-cutting consultation:** Online surveys and interviews were carried out at national level in the Member States during the development of Part A, and two workshops during the preparation of Part B.

2. Mutual recognition and process of lisbonisation

EU cooperation in criminal matters, including the seven FDs, is based on the principle of mutual recognition of judicial decisions. First appearing in the Tampere Conclusions (1999), this principle requires EU Member States to recognise judgments and execute requests for judicial cooperation adopted by competent authorities in other Member States without further formalities. The Treaty of Lisbon (2007) reflects as part of EU primary law that 'the Union shall endeavour to ensure a high level of security (...) through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws', (Article 67(3) Treaty on the Functioning of the European Union (TFEU)). Harmonisation is limited and may only take place 'to the extent necessary to facilitate mutual recognition of judgments and police and judicial cooperation with a cross-border dimension [...] establish minimum rules' (Article 82(2) TFEU).

The Court of Justice of the European Union (CJEU) has assessed how this principle applies in respect of the seven FDs considered here, for example the balance between mutual recognition and the underlying assumption of equivalent treatment with protection of fundamental rights (Case C-396/11 *Radu*)¹, or the relationship between EU law based on mutual recognition with national constitutional protections (Case C-399/11 *Melloni*)². In Opinion 2/13³, on the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the CJEU affirmed the principles underpinning mutual recognition, stating that the legal structure of the EU is based on the premise of common values, implying a mutual trust that these values will be recognised and respected. These selected cases reflect the balance between EU instruments applying procedures based on mutual recognition and the diversity of Member States' criminal law systems.

The Lisbon Treaty brought changes to the EU legal structure and the legal standing of the FDs. Protocol 36 of the Lisbon Treaty provides that the legal effects of all acts adopted under the Treaty on European Union (TEU) before the Lisbon Treaty came into force are preserved until those acts are repealed, annulled, or amended. The so-called lisbonisation of FDs can therefore be defined as the process of recasting former third-pillar instruments as ordinary EU

¹ Opinion of Advocate General Sharpston of 18 October 2012, Case C-396/11 *Radu*, ECLI:EU:C:2012:648.

² Judgment of the Court (Grand Chamber) of 26 February 2013, *Stefano Melloni v Ministero Fiscale*, C-399/11, ECLI:EU:C:2013:107.

³ Opinion of the Court (Full Court) of 18 December 2014. Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and TFEU Treaties, Case Opinion 2/13. ECLI:EU:C:2014:2454.

legal instruments. Of the 34 FDs adopted in police and judicial cooperation in criminal justice matters, 15 remain in force, including the seven discussed here. While the EU institutions have been invited⁴ to lisbonise these instruments, significant challenges remain, including strong Member State interest in retaining sovereignty over criminal matters and limitations to the mutual trust between Member States, primarily based on concerns about threats to fundamental rights.

⁴ Declaration 50 of the Treaty of Lisbon and the 2010 Stockholm Programme.

3. Assessment of transposition and implementation of seven instruments of the ex-third pillar (Part A)

This part of the study summarises the situation for each FD in the Member States.

3.1. FD European Arrest Warrant (FD EAW)⁵

FD EAW provides a framework for issuing and recognising EAWs. It is applied frequently and successfully, with more than 13,000 EAWs issued each year between 2018 and 2022.⁶ According to Member State stakeholders, FD EAW is widely used and considered to function effectively and well in practice. However, recurring issues include transposition, practical application, and lack of clarity or legal gaps. The most common challenges are transposition and application of grounds for refusal, and application of time limits for the EAW procedure. Key issues also arose in relation to fundamental rights safeguards. These elements form part of the European Commission's lengthy infringement procedure, which seeks to remedy ambiguities in national legal transpositions. Application of FD EAW has given rise to a substantial corpus of CJEU case-law, with over 100 cases providing substantive clarifications that must be taken into account by practitioners when applying FD EAW.

All Member States have transposed FD EAW in a manner that generally reflects its structure and objectives. Provisions on surrender procedures, time limits, and refusal grounds are widely implemented, but conformity varies: optional refusal grounds, such as territoriality or ongoing proceedings, are often made mandatory, diverging from the FD. Rules on consent to surrender, guarantees for nationals, and subsequent extradition are frequently incomplete or absent, and references to fundamental rights and proportionality are inconsistent. The double-criminality exemption list is usually included, but its interpretation differs between countries. Time limits are typically transposed, although some Member States allow extensions beyond those in the FD. Overall, FD EAW's core framework is maintained, albeit with several articles only partially transposed.

⁵ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584>.

⁶ European Commission, Statistics on the practical operation of the European arrest warrant – 2022, SWD(2024) 137 final.

3.2. FD Transfer of Prisoners (FD TOP)⁷

FD TOP applies the principle of mutual recognition to criminal judgments involving custodial sentences or liberty deprivation for enforcement in the EU, and facilitates recognition and enforcement of sentences to promote the social rehabilitation of the convicted person. Use of FD TOP varies, with some Member States applying it frequently and others only seldom. Observers identified specific limitations to the instruments, including a need to better account for consent of the person concerned and for social rehabilitation. Some academic commenters argue that in practice, FD TOP is used to support Member States' interest in regulating prison populations more so than to secure better social rehabilitation for the person concerned.⁸

Member State transposition of FD TOP varies considerably. Most have adopted the provisions on recognition of judgments and enforcement of custodial sentences that form the backbone of the FD. However, other key elements, such as criteria for forwarding judgments, consultation obligations between Member States, and procedures for adapting sentences, are often transposed incorrectly. In several jurisdictions, optional grounds for refusal have been transposed as mandatory, limiting judicial discretion. Requirements for obtaining consent from the sentenced person and considering their social rehabilitation prospects are present in some national laws but absent in others. Notification duties, including informing the issuing Member State of enforcement decisions, are frequently incompletely transposed or lack clear timelines. Adaptation of sentences to fit national law is generally provided for, but approaches differ: some Member States make adaptation mandatory, while others treat it as discretionary. Similarly, standard forms and procedural time limits are not uniformly transposed. Overall, while FD TOP's essential structure is reflected in national legislation, detailed provisions on cooperation and procedural guarantees are often missing or incompletely transposed.

⁷ 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0909>

⁸ De Wree, E., Vander Beken, T. and Vermeulen, G., 'The transfer of sentenced persons in Europe: Much ado about reintegration', *Punishment & Society*, Vol. 11, Issue 1, 2009, pp. 111-128, <https://doi.org/10.1177/1462474508098135>; Mitsilegas, V., *EU Criminal Law* (1st ed.), Hart Publishing, 2022.

3.3. FD Probation and Alternative Sanctions (FD PAS)⁹

FD PAS enables Member States to recognise probation measures and alternative sanctions imposed elsewhere in the EU, with the aim of reducing foreign detention, supporting public interest, and promoting reintegration. Its central objective is to improve social rehabilitation by allowing individuals to serve sentences where they have family and social ties, preventing unnecessary imprisonment of those eligible for probation. Non-resident EU citizens are particularly vulnerable, as concerns about absconding may lead to detention, even when non-custodial measures would normally apply. Despite its potential, FD PAS is used infrequently due to low awareness, procedural complexity, and significant differences in national probation systems.

Transposition of FD PAS varies widely. Most Member States include provisions on recognising and supervising probation measures and alternative sanctions, covering common obligations such as reporting, movement restrictions, and rehabilitation activities. However, rules on forwarding judgments, determining suitability, and specifying required documentation are often incomplete. Adaptation of measures is generally transposed, though approaches differ, with making it mandatory and others discretionary. Optional refusal grounds are frequently mandatory. Deadlines, communication duties, and use of standard forms are inconsistently addressed. Definitions of key terms, including 'probation measure', are sometimes missing or diverge from the FD TOP terminology. Overall, national laws reflect the FD's framework but lack uniformity in operational detail.

3.4. FD Supervision (FD ESO)¹⁰

FD ESO provides for the recognition of supervision measures as an alternative to pre-trial detention for individuals residing in one Member State but prosecuted in another, aiming to reduce excessive pre-trial detention through non-custodial options. It is rarely used in practice. Key obstacles include diverging national systems, low awareness, and procedures that are too complex and slow for ongoing criminal proceedings. It has also been criticised for insufficient victim involvement, despite victim protection being one of its stated objectives. Although

⁹ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0947>

¹⁰ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009F0829>.

FD ESO could mitigate overreliance on pre-trial detention, its limited and cumbersome framework has led to very low uptake.

Transposition is often incomplete. Most Member States have implemented basic provisions on recognising and supervising pre-trial measures, such as reporting duties or movement restrictions. However, rules on forwarding decisions, recognition procedures, and competence for subsequent decisions (e.g. extensions) are frequently missing or incorrectly transposed. Optional refusal grounds are often made mandatory, and definitions (e.g. habitual residence) are inconsistently implemented. While adaptation of supervision measures is generally transposed, levels of discretion vary significantly. Communication obligations, including notifications and consultations, are only partially reflected in many national systems. As a result, although the FD's core framework appears in national law, essential procedural detail remains fragmented.

3.5. FD Previous Convictions¹¹

FD Previous Convictions requires Member States, under the principle of equivalence, to give convictions from other EU countries the same legal effect as domestic ones. While the effects remain a matter for national discretion, they must mirror those applied to national judgments. Its application relies on the European Criminal Records Information System (ECRIS)¹², which links national criminal records systems and enables the exchange of information for criminal proceedings, including identifying recidivism or habitual offending.

Transposition of FD Previous Convictions is partial. Most Member States require consideration of previous EU convictions, but alignment with the FD varies. Many have not correctly transposed the FD's definition of 'conviction', creating uncertainty in interpretation. Rules on how foreign convictions affect sentencing or procedural decisions are often incomplete, and some Member States add conditions to the new offence (e.g. dual criminality, relevance). Although obligations to exchange information on convictions are generally transposed, their scope and detail differ. Overall, the FD's objectives appear in national legislation, but key definitions and procedural rules are frequently missing or only partially implemented.

¹¹ Council Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, [EUR-Lex - 72008F0675GBR_224278 - EN - EUR-Lex](#).

¹² Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, OJ L 93, 7.4.2009, pp. 33; replaced by Directive (EU) 2019/884 of the European Parliament and of the Council of 17 April 2019 amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third-country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA PE/87/2018/REV/1 OJ L 151, p. 143.

3.6. FD Conflicts of Jurisdiction¹³

FD Conflicts of Jurisdiction was adopted to prevent jurisdictional conflicts between Member States,

While intended to safeguard the *ne bis in idem* principle, implementation of FD Conflicts of Jurisdiction varies considerably. Experts point to the lack of binding criteria for choosing the best jurisdiction, weak enforcement mechanisms, and limited fundamental rights safeguards. It only mandates a consultation procedure to prevent jurisdictional conflicts and does not regulate their resolution or provide for transfer of proceedings once a preferred jurisdiction is agreed. The European Commission has sought to address this gap through Regulation (EU) 2024/3011 on the transfer of proceedings (Transfer of Proceedings Regulation), but its practical impact will only become clear after implementation.

FD Conflicts of Jurisdiction has been transposed in most Member States, often incompletely. Basic duties, such as cooperating when parallel proceedings arise, are generally implemented, but requirements to identify competent authorities, proactively contact other Member States, and establish structured mechanisms for detecting conflict are frequently partial or absent. As a result, while the core principles of the FD are transposed, detailed cooperation obligations remain inconsistently reflected in national law.

3.7. FD Financial Penalties¹⁴

FD Financial Penalties extends mutual recognition to financial sanctions imposed for criminal offences by judicial or administrative authorities, for the latter under strict conditions (so-called semi-criminal offences), enabling their enforcement in other Member States. It covers all offences carrying financial penalties and removes the double criminality check for 39 categories, including traffic offences.

Approximately 90% of the decisions issued in cross-border cases under FD Financial Penalties are linked to road traffic offences¹⁵. However, the proportion of financial penalties successfully enforced varies from 0% to 1%¹⁶. Directive

¹³ Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009F0948>.

¹⁴ Council Framework Decision 2009/948/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005F0214>.

¹⁵ ECORYS, Grimaldi Studio Legale, Wavestone and COWI, *Impact assessment support study for the revision of Directive (EU) 2015/413 facilitating cross-border exchange of information on road-safety-related traffic offences: Final report*, 2023.

¹⁶ European Commission, *Report from the Commission to the European Parliament and the Council on the application of Directive (EU) 2015/413 facilitating cross-border exchange of information on road-safety-related traffic offences*, COM(2016) 744 final, p. 7.

2015/413 on the cross-border exchange of information on road safety-related traffic offences (CBE Directive)¹⁷ is particularly relevant for road traffic fines, providing the framework for their investigation, while the FD relates to the execution of fines. The 2023 revision of the CBE Directive introduced strengthened mechanisms for mutual assistance for the identification of the offender, communication between authorities, and fundamental rights safeguards for the person concerned. It also established an enforcement mechanism based on mutual recognition for administrative fines linked to road safety-related offences. While FD Financial Penalties applies to criminal and semi-criminal offences, it has resulted in cases on fundamental rights issues coming before the CJEU, and poses difficulties for legal practitioners.

The FD is largely transposed, with most Member States recognising and enforcing financial sanctions issued by foreign judicial authorities. Key elements such as the definition of financial penalties and the duty to execute other Member States' decisions are generally included. However, optional refusal grounds (e.g. territoriality, double criminality) are often made mandatory. Rules on transmitting decisions, translation, and inter-authority communication are unevenly implemented. Although national laws broadly mirror the FD's structure, variations in refusal grounds and procedural requirements lead to significant inconsistencies in transposition.

¹⁷ Directive (EU) 2015/413 of the European Parliament and of the Council of 11 March 2015 facilitating cross-border exchange of information on road-safety-related traffic offences Text with EEA relevance, available at: <https://eur-lex.europa.eu/eli/dir/2015/413/oj/eng>

4. Possibilities for EU action (Part B)

This section presents suggestions for each FD, with the four detention-related instruments grouped together.

4.1. Possible policy options (POs) for detention-related FDs

Given the high level of interaction between the detention-related instruments, common POs are presented for FD EAW, FD TOP, FD PAS, and FD ESO). The following POs are suggested for further analysis:

- **PO 1.A – Comprehensive guidelines to accompany digitalisation:** Address ongoing practical challenges through optimised digitalisation.
- **PO 1.B – Existing training opportunities supplemented and centralised through a dedicated practitioner’s hub:** Expand, supplement, and organise training opportunities through a practitioners’ forum, improving access to resources and enabling/fostering direct communication and exchange.
- **PO 1.C – Targeted financial and/or resource support to Member States extended:** Resource support to address specific resource and capacity limitations in respect of digitalisation tools and knowledge, as well as specific financial limitations that inhibit Member States from improving detention conditions.
- **PO 1.D – Consultation role of Eurojust extended:** Expand the existing role of Eurojust to provide consultations and written opinions to resolve disagreements in applying the FDs.
- **PO 2.A – New horizontal legislation on cross-cutting topics:** Targeted legislation addressing major cross-cutting challenges, such as the need to account for fundamental rights of accused persons.
- **PO 2.B – Legislation partially lisbonising FDs relating to detention:** New legislation action for the FDs that would address limited articles within each, amending the most problematic provisions while expressly leaving the majority of each instrument unchanged.

- **PO 3.A – Legislation comprehensively lisbonising FDs relating to detention:** Legislation specific to each FD systemically amending and updating the instrument.
- **PO 3.B – Legislation recasting all FDs relating to detention into a single act:** A new legislative act to comprehensively regulate the issue of detention, from arrest and surrender, to transfer, pre-trial detention and alternatives, to non-custodial alternatives to detention

4.2. Possible POs for FD Previous Convictions

The following initiatives could be considered to improve implementation of FD Previous Convictions:

- **PO 1 – Complete and correct transposition by all Member States:** Encourage Member States to voluntarily incorporate the entirety of the FD, facilitated by expert workshops, training for professionals, guidelines and handbooks, and a European Commission recommendation highlighting common gaps in transposition and/or launching infringement proceedings for non-compliance.
- **PO 2 – Targeted assistance for adopting digital tools:** Address the weaknesses resulting from low usage of ECRIS by some Member States by modernising and standardising databases, financial support for improving technical capacities, and more training on digital tools.

4.3. Possible POs for FD Conflicts of Jurisdiction

The following initiatives could be considered to improve implementation of FD Conflicts of Jurisdiction:

- **PO 1 – Complete and correct transposition by all Member States:** Encourage Member States to voluntarily incorporate the FD in full, facilitated by expert workshops, training for professionals, guidelines and handbooks, and a European Commission recommendation highlighting common gaps in transposition and/or launching infringement proceedings for non-compliance.
- **PO 2 – Legislative measures:** adoption of binding measures, including three alternative sub-options:
 - **Sub-option 2.A– Restructuring Eurojust guidelines on jurisdiction and exploring transforming existing soft-law measures into hard law:** The Eurojust guidelines on jurisdiction could be updated to downplay problematic factors and could possibly be transformed into a hard law instrument if that were deemed useful.

- **Sub-option 2.B – Extending the mediation role of Eurojust:** Allow Eurojust to explicitly act as a mediator by issuing either non-binding reasoned opinions or binding decisions subject to limited judicial review.
- **Sub-option 2.C – Territoriality of the offence as the primary or sole criterion for resolving conflicts of jurisdiction:** New legislation prescribing the principle of territoriality of the offence as the key criterion for jurisdiction. In the event of a multi-territorial offence, Member States would agree jurisdiction based on a pre-established list of factors.

4.4. Possible POs for FD Financial Penalties

The following initiatives could be considered to improve implementation of FD Financial Penalties.

- **PO 1.A – Support for complete transposition:** Encourage Member States to voluntarily incorporate the FD in full, facilitated by expert workshops, training for professionals, guidelines, and/or launching infringement proceedings for non-compliance.
- **PO 1.B – Practitioner’s handbook:** Practical guidance on issuing and executing financial penalties, including CJEU case-law, and integrated with digital tools.
- **PO 1.C – Digitalisation and mandatory forms:** Build on ongoing EU digitalisation of justice to improve communication between authorities in the issuing State and the executing State, and make the use of the five standardised forms¹⁸ mandatory.
- **PO 2.A – Legislative measure – Partial lisbonisation of key problems:** Amend the FD by introducing new grounds for refusal based on infringements of fundamental rights, setting time limits, and making standardised forms mandatory.
- **PO 2.B – Legislative measure – legislation on road traffic offences:** Adopt a *lex specialis* instrument on cross-border enforcement of fines for road safety-related offences and introduce measures to cover the entire procedure from the identification of the offender thorough mutual assistance in assisting the issuance and execution of fines, mirroring and complementing the rules of the revised CBE Directive.

¹⁸ Council doc 9610/17, Explanatory memorandum to the five standardised forms for FD 2005/214/JHA. Available at <https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?id=25>

- **PO 2.C – Legislative measure – Full lisbonisation:** Replaces the FD with a directive or regulation incorporating comprehensive mutual assistance and enforcement rules, aligned with digitalisation.

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