

# The Transfer of Prisoners in the European Union

Challenges and Prospects in the Implementation  
of Framework Decision 2008/909/JHA

*Editor*

STEFANO MONTALDO



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***Introduction.***  
***The Repers Project, Framework Decision***  
***2008/909/JHA and the Cross-Border Transfer***  
***of Prisoners in the EU***

Stefano Montaldo

This book is one of the outcomes of the RePers - Mutual Trust and Social Rehabilitation in Practice research project, co-funded by the European Union Justice Programme 2014-2020. The project was led by the Law Department of the University of Turin and involved a set of academic, institutional and civil society organisations, namely the University of A Coruña, the Italian Ministry of Justice, the Italian association Amapola - Progetti per la sicurezza delle persone e delle comunità, the think-tank Romanian Centre for European Policies, and the Romanian association Liderjust.

The collection contains original contributions regarding Framework Decision (hereinafter ‘the Framework Decision’) 2008/909/JHA on the cross-border transfer of prisoners in the EU, with a specific focus on its implementation and application in Italy, Romania and Spain, the three Member States covered by the project.

The Framework Decision in question applies 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 another Member State.<sup>1</sup>

The judicial cooperation mechanism established by this act aims to identify the most appropriate place for serving a sentence, with a view to maximising the chances of the convict’s social rehabilitation. As such, it allows the prisoner to be transferred to the Member State in which his or her (societal, family, work, cultural, ...) centre of gravity is located, in order to facilitate his or her social reinsertion in a post-release era and avoid recidivism.

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<sup>1</sup> Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

Building on the premise of mutual trust between domestic judicial authorities, this Framework Decision replaces the intergovernmental footprint of pre-existing conventions and obliterates the role of the political branch. As is the case for other EU judicial cooperation instruments, this advanced mechanism is centred on horizontal cross-border judicial dialogue between the issuing and executing authority. More specifically, the authorities identified as competent by the issuing (i.e. sentencing) State adopt a decision on transfer and forward it to those of the executing Member State. The latter may be the convict's State of nationality, the Member State to which he or she will be deported or any other Member State, but in this case the relevant authorities must express their consent to the forwarding.

The procedure is, in itself, simple and rapid, as it keeps the formalities to a minimum and sets clear deadlines.<sup>2</sup> The issuing State transmits a certificate, the template of which is attached to the Framework Decision. This document contains all relevant information, ranging from the identity of the person concerned to the facts of the case, their legal qualification and the sentence imposed. In addition, the judgment is attached to the certificate.<sup>3</sup> On this basis, the authority of the executing State is, in principle, expected to recognise the foreign judgment and order its enforcement, making any adaptation with regard to the duration or nature of the sentence, so long as it is actually compatible with national law.<sup>4</sup>

The Framework Decision reiterates two major recurring features in this domain of EU law: the abolition of the double criminality check in relation to a list of serious offences<sup>5</sup> and the provision of an exhaustive list of optional grounds for denying recognition.<sup>6</sup>

The role of the sentenced person is also a distinctive aspect. In fact, whereas his or her consent is, in principle, a mandatory condition for the transfer, this requirement is lifted in three situations. Crucially, these are by far the most recur-

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<sup>2</sup> Except in the case of postponement, recognition should occur as soon as possible and, in any case, within ninety days from receipt of the judgment and the certificate (Art. 12 (1) and (2)). Recognition may be postponed if the certificate is incomplete or does not correspond to the judgment (Art. 11).

<sup>3</sup> The certificate must be translated into the official language or one of the official languages of the executing State.

<sup>4</sup> In any case, the adapted sentence cannot aggravate the sentence passed in the issuing State (Art. 8). In addition, partial recognition and execution are allowed (Art. 10).

<sup>5</sup> Art. 7(1)(2) Framework Decision 2008/909/JHA, which reflects corresponding provisions included in most of the EU secondary acts in this domain.

<sup>6</sup> Art. 9 Framework Decision 2008/909/JHA. Art. 10 also allows for partial recognition and execution. In addition, Art. 11 provides for postponement of execution if the certificate is incomplete or does not correspond to the judgment. Another key departure from the previous intergovernmental regime is the provision of strict deadlines for handling the procedure and issuing a final decision: *see* Art. 12(1)(2) and 15(1).

ring cases of cross-border transfers: consent is not required when the judgment is forwarded to the Member State of nationality in which the prisoner lives or to which he or she will be deported, or the Member State to which he or she has fled or returned before the conclusion of the proceedings or following the conviction in the issuing State. However, the sentenced person has the right to express his or her opinion on the transfer, which must be taken into account by the authority of the sentencing State when deciding whether or not to issue a transfer request.

More than ten years after its adoption, this instrument is increasing in importance in the scenario of the European judicial space, albeit that its practical application by the national judicial authorities is still not entirely satisfactory.<sup>7</sup> The unexplored potential of transfer procedures has led to a very limited body of EU and national case law and has further fuelled the silence of legal scholars. As a consequence, most of the significant theoretical knots in this Framework Decision are still to be undone.

This is due to several converging factors, which are addressed from different perspectives in this book.

Firstly, the implementation of the Framework Decision was belated in many Member States, most of which failed to comply with the transposition deadline of December 2011.

Secondly, the wording of this act represents the result of three years of heated negotiations within the Council. The imminent entry into force of the Lisbon Treaty was actually the most effective impetus towards achieving an agreement, under pressure of the planned eradication of the third pillar, along with the intergovernmental nature of its legal sources.<sup>8</sup> This final hastiness led to inevitable compromises affecting the internal coherence and conceptual accuracy of the act.<sup>9</sup> For example, the Framework Decision provides no guidance on the scope of the notion of offenders' rehabilitation, the elusiveness of which blurs the purpose and content of the cooperation duties incumbent upon the issuing and executing Member States.

Thirdly, although apparently confined to an advanced and specialised segment of criminal (procedural) law, the Framework Decision reveals crucial con-

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<sup>7</sup> European Union Agency for Fundamental Rights, 'Criminal Detention and Alternatives: Fundamental Rights Aspects in EU Cross-Border Transfers' (2016), also available online at <https://fra.europa.eu/en/publication/2016/criminal-detention-and-alternatives-fundamental-rights-aspects-eu-cross-border> (accessed 5 March 2019).

<sup>8</sup> V. Mitsilegas, 'The Third Wave of Third Pillar Law', *European Law Review*, Vol. 34, No. 4, 2009, pp. 523-60.

<sup>9</sup> A. Martufi, 'Assessing the Resilience of 'Social Rehabilitation' as a Rationale for Transfer: A Commentary on the Aims of Framework Decision 2008/909/JHA', *New Journal of European Criminal Law*, Vol. 9, No. 1, 2018, pp. 49-51.

nections with other key aspects of EU law, such as the protection of fundamental rights, the limits of Union competences, the freedom of movement of EU citizens and the European Union migration policy. This inherent systemic complexity poses significant legal and political challenges. From the latter point of view, for instance, a closer look at the preparatory works to the Framework Decision and at the practice of some Member States<sup>10</sup> reveals that this act is not immune from *de facto* managerial uses, as it adds a new instrument to the national authorities' toolbox of forms of control over – and removal of – undesired EU citizens.

Fourthly, Framework Decision 2008/909/JHA covers the criminal execution phase, which is one of the most delicate fields in judicial cooperation procedures. This domain is still now perceived as a secret garden of the Member States, where the process of Europeanisation of penal justice comes up against a solid barrier, delimiting exclusive national competences. The limited room for EU intervention entails the absence of harmonisation measures and a subsequent high degree of fragmentation of domestic legal orders. The wide variety of penitentiary benefits, alternatives to detention and related measures, pursuing the goal of enhancing the inmate's chances of successful re-socialisation after conviction, is an illustrative example, which goes straight to the core of the scope and rationale of transfer procedures.<sup>11</sup>

The outlined combination of elusive notions of EU law, opposing teleological priorities and legal fragmentation represents a favourable breeding ground for the many facets of the dark side of mutual trust: mutual distrust, mutual mistrust, or even just a lack of confidence in the feasibility and usefulness of judicial cooperation procedures. It follows that, at this stage, several substantive and procedural hurdles block the full effectiveness of this Framework Decision, from both the quantitative (number of transfers) and qualitative (genuine attempt to pursue social rehabilitation goals) perspectives.

In this scenario, the varied practice of the national judicial and governmental authorities is clearly a key factor, as it can amplify or neutralise the above described concerns. In fact, beyond mere effectiveness-oriented arguments, a closer look at how cross-border transfers work at domestic level provides illustrative insights into how judicial cooperation mechanisms are perceived by the authorities concerned and into the degree of consistency between expected EU patterns and law in action within the national realm.

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<sup>10</sup> S. Neveu, *Le transfert de l'exécution des peines alternatives et restrictives de liberté en droit européen. A la recherche d'un équilibre entre intérêts individuels et collectifs*, Anthemis, Limal, 2016, p. 440.

<sup>11</sup> See the analysis of the legislation of the Member States annexed to G. Vermeulen, *et al.*, *Cross-border Execution of Judgments Involving Deprivation of Liberty in the EU. Overcoming Legal and Practical Problems through Flanking Measures*, Maklu, Anvers, 2011, pp. 236-54.

In this context, Italy, Romania and Spain represent promising test-beds for assessing the advances and shortcomings of cross-border transfer procedures, on two main grounds. Firstly, Italy and Spain are among the countries with the highest rate of Romanian prisoners in Europe. To a lesser extent, this also applies to Italian and Spanish prisoners in Spain and Italy, respectively. This basically entails remarkable (quantitative) opportunities for resorting to transfer mechanisms and ensuing enhanced institutional efforts to cope with this phenomenon. Secondly, these Member States share the common problem of prison overcrowding, albeit at differing degrees of intensity. Deficiencies concerning detention conditions have triggered diversified formal and informal reactions, which, in one way or another, influence the scope of cross-border transfers. In Italy, the *Torreggiani* pilot judgment,<sup>12</sup> in which the Strasbourg Court urged Italy to take action to solve this structural criticism, led the Ministry of Justice to encourage the judicial authorities to use Framework Decision 2008/909/JHA as a means for deflating prison overcrowding. Conversely, Romania has enacted new legislation allowing for a reduction in sentence for each detention period suffered in inhumane or degrading conditions. For its part, Spain reveals a generalised preference for deportation measures, which to some extent erode the domain of cross-border transfers.

The book addresses the main legal challenges raised by Framework Decision 2008/909/JHA in general and as reflected in the Italian, Romanian and Spanish experiences. As such, on the one hand, the analysis is closely connected to the experience of these Member States and is not intended to provide an all-encompassing study of domestic trends, implementation strategies and practices regarding cross-border transfers. On the other hand, these case studies provide added value to the analysis, as, in all chapters, the theoretical approach is combined with a detailed study on how the cross-border transfer procedure is actually dealt with by the judicial authorities.

This mutually beneficial combination is particularly evident in Ana Neira-Pena's chapter, which focuses on the identification and designation of the issuing and executing domestic authorities. The author offers an overview of the different competence models existing in Member States and critically addresses the leeway left to Member States in this regard. With this aim, she provides an in-depth analysis of the advances and shortcomings of the Spanish model, which she criticises for being fragmented and inconsistent.

The following chapter frames Framework Decision 2008/909/JHA within the general quest for enhanced fundamental rights protection in the implementation of EU judicial cooperation instruments in criminal matters. I present the case law developed by the Court of Justice in relation to the EAW and discusses

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<sup>12</sup> *Torreggiani and Others v Italy*, App. No. 43517/09 *et al.* (ECHR, 8 January 2013).

its relevance to cross-border transfer procedures. I contend that the peculiarities of Framework Decision 2008/909/JHA make it difficult to extend the Court findings to the subject matter under consideration, especially in relation to the denial of execution of a cooperation request in the event of a serious risk of violation of a right. This entails an urgent need for effective judicial remedies both in the issuing and executing States, to avoid abusive transfers and challenge any undue rejection of a prisoner's request to be transferred abroad.

Patricia Faraldo-Cabana's contribution builds on these premises and discusses the more specific aspect of the prisoner's rights in the event of a forced transfer. The rationale behind the Framework Decision is that allowing prisoners to serve their sentence close to home is a significant instrument in improving their chances of social rehabilitation. Framework Decision 2008/909/JHA removes the previous veto right of the sentenced persons in the 1983 Council of Europe Convention. This change has a significant impact on the position of the sentenced person and questions the coherence between the transfer of non-consenting prisoners and the rehabilitation perspective, given that social rehabilitation intrinsically requires the cooperation of the person involved. The author contends that the abolition of the prisoner's right to veto makes the European instrument appear more concerned with the needs of the issuing states than with those of the affected individuals.

The following two chapters make a step forward and focus on the interplay of the Framework Decision in question with other parallel instruments of EU law. Alessandro Rosanò discusses the coordination of Framework Decision 2008/909/JHA with the EAW Framework Decision and another two complementary instruments, namely Framework Decision 2008/947/JHA and Framework Decision 2009/829/JHA. Although apparently clear-cut, the interconnections between these instruments can be difficult to manage in practice, for instance due to their diverging objectives and the possible evolution *in itinere* of a case, which could trigger a parallel shift of legal regime. José Angel Brandariz addresses the much debated role of Framework Decision 2008/909/JHA in the wider set of measures stemming from EU law, allowing for an undesired EU citizen to be returned his or her home country. To do so, the author provides an overview of the main domestic approaches to the deportation of aliens within the Union. He then discusses if and to what extent the momentum recently gained by the deportation of EU nationals has contributed to hampering the expected consolidation of an Framework Decision 2008/909/JHA-based prisoner transfer system.

The final two chapters distil some of the outcomes of the RePers project activities concerning the Italian, Romanian and Spanish legal orders. The first focuses on the implementation of Framework Decision 2008/909/JHA in these Member States, covering both formal transposition measures and the ensuing

practices. The chapter also provides relevant statistics and discusses domestic institutional arrangements for dealing with cross-border transfer procedures. The final chapter puts forward some recommendations and proposals with a view to improving the application of Framework Decision 2008/909/JHA in the three Member States concerned and – hopefully – beyond. The analysis addresses a limited set of issues that have proven to be particularly sensitive for the judicial authorities of the countries concerned, such as the identification of potential transferees, the burden of proof regarding the prisoner's centre of gravity, the appropriate filling out of the certificate, the translation of the sentence, and the coordination with the EAW.

The RePers project activities were oriented towards fostering the improvement of transfer procedures both in terms of their effectiveness and their compliance with fundamental rights standards and social rehabilitation goals. From a methodological point of view, the activities combined a varied set of approaches. Following a preliminary desk review phase of existing studies and literature, each unit distributed an online survey. The survey was sent to selected categories of recipients, namely members of the judiciary and public prosecution offices, ministerial officers, prison administration staff, lawyers and academics. About one hundred replies were collected from the three Member States involved. The survey results provided a general picture of the degree of knowledge and awareness of the main features of the Framework Decision, and illustrated reactions on personal perceptions and views as to the main hurdles to the implementation of this act.

The interim outcomes of this activity were then used to hold *ad hoc* interviews with key stakeholders from the national judiciary and the Ministries of Justice, with a view to investigating further some of the issues broadly raised by the participants in the survey. This activity was supported by quantitative research on the overall number of transfers involving Italy, Romania and Spain in their capacity as issuing or executing States. Official statistics were collected and analysed, thanks to the invaluable cooperation of the Ministries of Justice of the Member States concerned.

The third step of the research entailed both qualitative research of the data collected and a more in-depth analysis of specific files. In particular, the Romanian Ministry of Justice granted access to specific landmark cases, which are illustrative of the main trends in Romanian practice. The Italian Ministry of Justice, which is party to the project consortium, authorised the research unit of the University of Turin and Amapola to analyse the documentation concerning pending and concluded transfer procedures. About 400 files were considered, covering most of the transfers processed in 2016 and 2017 and in the first-half of 2018 by the competent ministerial department. Whilst performing this analysis, specific attention was paid to a series of key factors,



namely: the actual role of social rehabilitation concerns, the prisoners' consent/opinion and the way it is expressed and collected, exchanges of information between the issuing and executing authorities, the role of the lawyer (if any), the length of the transfer procedure and its link with the sentence remaining to be served, the outcome of the transfer procedure.

This remarkable body of information fuelled the fourth and final phase of the research. The consortium conducted a series of mutual learning meetings involving selected experts and practitioners from Italy, Romania and Spain. Initially, these meetings were aimed at allowing the national authorities to share their concerns and views on the shortcomings of cross-border transfers. At a later stage, they became fruitful for an in-depth discussion on possible shared best practices and solutions to common problems, which could also be beneficial for other Member States in the long run.

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

Ana Neira-Pena

**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.*

SUMMARY: 1. Introduction. – 2. National Authorities Competent to Enforce Framework Decision 2008/909/JHA and Some Limits on the Freedom of Choice. – 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. – 3.1.2. Spain as Executing State. – 4. Interrelations of Transfers with Other Mutual Recognition Instruments and Need for Coordination between Judicial Authorities. – 5. Involvement of Other Spanish Authorities in the Transfer Procedure. – 5.1. The Intervention of the Ministry of Justice. – 5.2. The Intervention of the Public Prosecution Service. – 5.3. The Intervention of the Prison Administration. – 6. Concluding Remarks.

## 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.<sup>1</sup>

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<sup>2</sup> and effectiveness,<sup>3</sup> which also inform EU law.<sup>4</sup>

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.<sup>5</sup>

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

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

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

<sup>7</sup>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/documentos/criterios2010.pdf](http://www.derechopenitenciario.com/documentos/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.<sup>8</sup>

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.<sup>9</sup> Moreover, the inherent limits

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<sup>8</sup> 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.

<sup>9</sup> 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, Krzysztof 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.<sup>10</sup>

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

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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).

<sup>10</sup> See Judgment of 27 May 2019, in *Case C-509/18* in which is stated that “‘issuing judicial authority’, within the meaning of Article 6(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, Krzysztof Marek Poltorak*).

provision, its context and the objective of the Framework Decision”,<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup>

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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<sup>11</sup> 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.

<sup>12</sup> 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-508/18 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.

<sup>13</sup> 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).

<sup>14</sup> 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,<sup>15</sup> as well as the information published by the General Secretariat of the Council based upon information provided by the different Member States,<sup>16</sup> 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.<sup>17</sup>

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<sup>15</sup> Retrieved on 26 October 2019 from [www.ejn-crimjust.europa.eu/ejn/AtlasChooseMeasure/EN/0/354](http://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](http://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.

<sup>16</sup> Retrieved on 24 October 2019 from [www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/1897](http://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/1897).

<sup>17</sup> According to I. Dumescu, ‘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](http://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.<sup>18</sup> This intervention by the Ministry of Justice constitutes a clear footprint of the outdated model of inter-governmental 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.<sup>19</sup>

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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<sup>18</sup> 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".

<sup>19</sup> "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.<sup>20</sup>

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-

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<sup>20</sup> 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*<sup>21</sup> – 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 –,

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<sup>21</sup> 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<sup>22</sup> 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,<sup>23</sup> 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.<sup>24</sup> 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*

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<sup>22</sup> 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/cejponencia1560180533759.pdf](http://www.cej-mjusticia.es/cej_dode/flash/ebook/assets/img/cejponencia1560180533759/cejponencia1560180533759.pdf).

<sup>23</sup> 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.

<sup>24</sup> 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.<sup>25</sup> 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,<sup>26</sup> the first<sup>27</sup> or the one that handed down the highest penalty.<sup>28</sup> 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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<sup>25</sup> 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.

<sup>26</sup> 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.

<sup>27</sup> 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)).

<sup>28</sup> In this regard, the Additional Provision 5<sup>th</sup> 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<sup>29</sup> 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.<sup>30</sup> In this way, paraphrasing the aforementioned author, it would not be the mere discretion of the sentencing

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<sup>29</sup> De Marcos Madruga 2019, p. 11.

<sup>30</sup> 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,<sup>31</sup> 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.<sup>32</sup> 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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<sup>31</sup> 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.

<sup>32</sup> 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.<sup>33</sup>

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,<sup>34</sup> to conflicting decisions being made or even to the annulment of proceedings held before a 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.<sup>35</sup>

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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<sup>33</sup> De Marcos Madruga 2019, p. 11.

<sup>34</sup> Fernández Prado 2015, p.133.

<sup>35</sup> 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.<sup>36</sup>

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 a 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.<sup>37</sup> Similarly, there is a clear complementary relationship between the transfer of prisoners and the instrument regulated in Framework Decision 2008/947/JHA

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<sup>36</sup> 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](http://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.

<sup>37</sup> 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 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 (OJ L 337, 16.12.2008, pp. 102-122, hereinafter, the 'FD 2008/947/JHA').<sup>38</sup>

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).<sup>39</sup> 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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<sup>38</sup> 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 <http://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.

<sup>39</sup> 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.<sup>40</sup>

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,<sup>41</sup> or the need for communication between the different authorities involved, requires a voluntary and spontaneous coordination task that does not always work as desired.<sup>42</sup>

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.<sup>43</sup>

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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<sup>40</sup> 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.

<sup>41</sup> 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.

<sup>42</sup> Sanz Álvarez 2017, p. 12.

<sup>43</sup> Sanz Álvarez 2017, p. 8.

thorities competent to issue or recognise the probation measures envisaged by Framework Decision 2008/947/JHA.<sup>44</sup>

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.<sup>45</sup> 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,<sup>46</sup> 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,<sup>47</sup> the prisoner may be improperly trans-

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<sup>44</sup> Rodríguez-Medel Nieto 2015, p. 189.

<sup>45</sup> 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.

<sup>46</sup> 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 homogeneously 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.

<sup>47</sup> 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.<sup>48</sup>

## **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.<sup>49</sup>

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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.

<sup>48</sup>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.

<sup>49</sup>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).

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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.<sup>50</sup>

In our opinion, despite the legal loophole, the judicial decision to forward the judgment must be notified to the Public Prosecutor<sup>51</sup> 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,<sup>52</sup> 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

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<sup>50</sup> 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)

<sup>51</sup> 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>.

<sup>52</sup> Fernández Prado 2015, p. 137.



given case,<sup>53</sup> 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.<sup>54</sup> 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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<sup>53</sup> 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.

<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup>

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.<sup>57</sup> 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.<sup>58</sup>

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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<sup>55</sup> 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.

<sup>56</sup> 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 1152<sup>nd</sup> meeting of the Ministers' Deputies).

<sup>57</sup> 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.

<sup>58</sup> 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.<sup>59</sup>

## 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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<sup>59</sup> 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.



# ***Framework Decision 2008/909/JHA and Fundamental Rights Concerns: In Search of Appropriate Remedies***

Stefano Montaldo

**Abstract:** *The chapter focuses on the main fundamental rights challenges posed by Framework Decision 2008/909/JHA. It discusses how fundamental rights concerns have been addressed by the EU legislature and the CJEU thus far, and then applies this approach to the system of cross-border transfers. The analysis firstly addresses the normative and judicial remedies available to resist a forced transfer or challenge the issuing authority's decision to reject the prisoner's request for a transfer. Secondly, the chapter considers whether the risk of facing inhumane or degrading treatment in consequence of a transfer may result in a limit to this judicial cooperation mechanism, also in light of the CJEU case law concerning the European Arrest Warrant.*

**Keywords:** *Mutual recognition, cross-border transfers, family life, detention conditions, remedies.*

SUMMARY: 1. Introduction. – 2. Mutual Trust between Effectiveness and Fundamental Rights Protection: The Normative Approach ... – 3. ... And the Case Law of the Court of Justice. – 4. The Case of Cross-Border Transfers of Prisoners: Social Rehabilitation and Human Rights Challenges. – 5. Resisting Mutual Recognition: Remedies against Transfers Resulting in Violations of Fundamental Rights. – 5.1. The Normative Layer: Preventing Illegitimate Transfers through the Judicial Cooperation Mechanism Designed by Framework Decision 2008/909/JHA. – 5.2. Judicial Remedies, between National Procedural Autonomy and the Role of the Court of Justice. – 6. Concluding Remarks.

## ***1. Introduction***

Since the late 1990s, the principles of mutual trust and mutual recognition have acquired increasing importance in the EU legal order and have ultimately become the ‘cornerstone of judicial cooperation’ across the Union. Accordingly, the Treaty on the European Union (hereinafter, the ‘TEU’) acknowledges the key role of these principles in both civil and criminal matters and leaves

their specific legal regime to an ever expanding and far-reaching body of EU secondary legislation.

As is known, mutual trust and mutual recognition develop traditional mutual legal assistance mechanisms towards advanced and purely technical cooperation procedures, which increase the role of the political branch and task the national judicial authorities with recognising and enforcing foreign decisions. The golden rule ‘recognise and execute’ seeks to facilitate judicial cooperation despite and beyond normative differences at domestic level. In fact, the application of a given domestic rule must be accepted even if the legal framework of the executing Member State would have led to a different (procedural or substantive) outcome. More importantly, mutual trust presumes that the foreign judicial decision to be recognised complies with fundamental rights standards, as the legal order from which it stems does.

However, the Court of Justice of the European Union (hereinafter, the ‘CJEU’) has clarified that this presumption is not absolute, but can be rebutted on a case-by-case basis, in the event of exceptional situations resulting in (the risk of) plain violations of fundamental rights standards. In fact, individual guarantees point out the path to be taken by a judicial cooperation procedure, but can also amount to binding a judicial authority to reject a request for cooperation, since their paramount role is to restrict the exercise of public coercive powers. In this respect, as the practice of the last decade shows, the clash between the effectiveness of EU law and the need to model the European judicial space on respect for the rights of the individual is a recurring concern, cross-sectional to all national judicial decisions covered by EU rules implementing the principle of mutual recognition.

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’) is not immune from this scenario, although, surprisingly enough, the fundamental rights challenges it poses have generally been neglected so far, particularly in comparison with the extensive studies on the European Arrest Warrant (hereinafter, ‘EAW’). Still, the forced cross-border transfer of a prisoner involves delicate assessments of the inmate’s family ties and of the situation he or she is likely to face in the executing State, thereby requiring the judicial authorities involved to take these aspects seriously.

Building on this background, this chapter aims to address the outlined structural effectiveness/fundamental rights dilemma in relation to cross-border transfers of prisoners within the European Union.

Section 2 considers this topic from a normative perspective, analysing how

the EU legislature usually addresses this dilemma by way of secondary legislation concerning the application of the mutual recognition principle to judicial decisions in criminal matters. The chapter then discusses the contribution of the CJEU in striking a balance between effective cooperation mechanisms and appropriate protection of fundamental rights. The chapter provides an outline of the recent and developing case law, mostly focusing on landmark cases concerning the EAW system.

Sections 4 and 5 apply this background to cross-border transfers of prisoners under the Framework Decision. In particular, the former addresses the normative scenario, by pointing out the main fundamental rights challenges posed by this judicial cooperation mechanism, in light of the rehabilitation goal it pursues. It is argued that, even though the prisoner's social rehabilitation cannot be considered to be a fundamental right as such, this elusive notion is an umbrella concept encompassing the right to family life, the prohibition on inhumane and degrading treatment, and the right to liberty. The fifth section discusses whether or not the Framework Decision and the case law of the CJEU establish an adequate set of normative and judicial tools and remedies to prevent or resist an illegitimate forced transfer. As confirmed by current domestic practices on cross-border transfers, the analysis stresses that the peculiar design of this judicial cooperation mechanism risks endorsing a gap in protection, particularly in terms of available effective judicial remedies. Moreover, it is argued that the Framework Decision offers leeway to the issuing judicial authority as regards the decision to commence the cross-border transfer procedure, without counterbalancing this discretionary power through appropriate remedies.<sup>1</sup>

## ***2. Mutual Trust between Effectiveness and Fundamental Rights Protection: The Normative Approach ...***

The EU legislature has only partially taken responsibility for the dilemma between effectiveness and limits to judicial cooperation mechanisms. In order to facilitate and accelerate judicial cooperation, all Directives and Framework Decisions implementing the principle of mutual recognition list the grounds

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<sup>1</sup> Of course, this does not mean that all domestic authorities necessarily abuse their powers. On this aspect see I. Wiczorek, 'EU Constitutional Limits to the Europeanization of Punishment: A Case Study on Offenders' Rehabilitation', *Maastricht Journal of European and Comparative Law*, Vol. 25, Issue 6, 2018, p. 655. Still, the law is a powerful means for safeguarding those in need of protection and the availability of remedies to address any illegitimate uses of coercive powers is a key aspect in this regard. Some of the best practices identified in the framework of the RePers project are presented in the last chapter of this collection.



for refusing enforcement of a foreign judicial decision. Such limits to cooperation mechanisms are usually optional,<sup>2</sup> whereas only 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) also envisages compulsory ones.<sup>3</sup>

The CJEU has provided some general guidelines on the actual scope of these exceptions to the almost absolute duty of recognition. Firstly, it took the stance that they should be interpreted narrowly and in compliance with the general principles of EU law.<sup>4</sup> Secondly, it clarified that the national legislature is entitled to restrict the scope of application of the optional grounds for refusal in the implementing laws, thereby further curtailing the limits to cooperation.<sup>5</sup> Lastly, and most importantly, the Court underlined that the predetermined lists of grounds for refusal are exhaustive. This implies that Member States are prevented from identifying new limits to mutual recognition when implementing EU law. Moreover, the national judicial authorities are not entitled to reject a cooperation request on the basis of either an extensive interpretation of existing exceptions or of an entirely new one, since this departure from the centrally-steered EU pattern would hamper judicial cooperation and foster mutual distrust.<sup>6</sup>

The *ope legis* predetermination of the grounds for refusal has sparked heated debates between practitioners and scholars.<sup>7</sup> As is widely acknowledged, this approach is understandable, as it secures coherence throughout the EU and avoids the risk of a rush to unilateral and uncoordinated initiatives at domestic level, which would affect the European judicial space. Nonetheless, some authors point out that, despite preserving the effectiveness of judicial cooperation procedures and enhancing legal certainty, this normative choice deprives the system of flexibility, as it prevents national judicial authorities from considering different expectations of protection.<sup>8</sup> More specifically, the question

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<sup>2</sup> The Court clarified that the optional nature of these clauses does refer to the implementation of EU law and therefore does not allow national legislators to decide whether or not to transpose them. It is up to the executing judicial authority to decide on their application. Judgment of 21 October 2010 in *Case C-306/09, B.*, [2010] ECLI:EU:C:2010:626, para. 52.

<sup>3</sup> Article 3 of Framework Decision 2002/584/JHA.

<sup>4</sup> Judgment of 5 September 2012 in *Case C-42/11, Lopes da Silva Jorge*, [2012] ECLI:EU:C:2012:517.

<sup>5</sup> Judgment of 6 October 2009 in *Case C-123/08, Dominic Wolzenburg*, [2009] ECLI:EU:C:2009:616.

<sup>6</sup> Judgment of 26 February 2013 in *Case C-399/11, Stefano Melloni c. Ministero Fiscal*, [2013] ECLI:EU:C:2013:107, para. 44.

<sup>7</sup> In general, see M. Möstl, 'Preconditions and limits of mutual recognition', *Common Market Law Review*, Vol. 47, Issue 2, 2010, p. 405; S. Montaldo, *I limiti della cooperazione in materia penale nell'Unione europea*, Editoriale Scientifica, Napoli, 2015, pp. 334-429.

<sup>8</sup> On the shift of approach from overreliance on mutual trust to the increasing role of the effectiveness

arises as to whether the exhaustive lists of grounds for refusal fit the purpose of appropriately protecting individual rights.

An overview of the relevant EU legislation demonstrates that most of relevant EU secondary acts do not envisage a general limit to mutual recognition on fundamental rights grounds. Existing provisions touch upon certain selected procedural guarantees and individual rights, such as the right to take part in criminal proceedings or the right to family life, but do not address this topic from an overall perspective. Instead, the opening articles of the Framework Decisions and Directives on mutual recognition usually state that “the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union” cannot be affected. This recurring clause merely reflects the inherent hierarchy of the sources of EU law. The Court of Justice has consistently contended that judicial cooperation mechanisms must not result in a violation of the Charter of Fundamental Rights of the European Union, but no clear consequences have ever been attached to the fundamental rights clause under consideration.

The absence of a specific and binding fundamental rights ground for refusal has led some commentators to consider that, at least in the context of the EAW, “hardly any fundamental guarantees of the accused person are ensured”.<sup>9</sup> This critical remark perhaps overestimates the legal concept at issue, but highlights a traditional gap in European secondary law in this domain.<sup>10</sup>

The crucial point is that, regardless of the wording of EU secondary law, EU institutions are subject to review regarding their conformity with Treaties and general principles of law, just like Member States when they implement the law of the Union.<sup>11</sup> However, resolving the clash between the quest for effectiveness and human rights protection cannot be left to uncoordinated and, in all likelihood, extremely diversified solutions developed by national judicial

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paradigm, E. Herlin-Karnell, ‘From Mutual Trust to Full Effectiveness of EU law: The Years of the European Arrest Warrant’, *European Law Review*, 2013, Vol. 38, Issue 1, p. 79.

<sup>9</sup>N.M. Schallmoser, ‘The European Arrest Warrant and Fundamental Rights’, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 22, Issue 2, 2014, p. 135.

<sup>10</sup>None of the acts adopted in this domain qualifies the protection of fundamental rights as a reason for rejecting a request for cooperation, with the exceptions of Article 11 of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014, pp. 1-36), and Article 19, let. h) of Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders (OJ L 303, 28.11.2018, pp. 1-38).

<sup>11</sup>Judgment of 3 May 2007 in *Case C-303/05, Advocaten voor de Wereld*, [2007] ECLI:EU:C:2007:261, para. 45. On the post-Lisbon approach of the Court, see K. Lenaerts & J.A. Gutiérrez Fons, ‘The European Court of Justice and Fundamental Rights in the Field of Criminal Law’, in V. Mitsilegas, M. Bergström & T. Konstadinides (Eds), *Research Handbook on EU Criminal Law*, Edward Elgar Publishing, Cheltenham, 2016, p. 15.

authorities. Therefore, the Court of Justice has been called upon to provide common interpretative guidance, with a view to striking a clearer balance between these opposing driving forces.

### 3. ... And the Case Law of the Court of Justice

The CJEU has contributed to bridging the gap of fundamental rights protection in a series of preliminary rulings on the EAW system. Admittedly, due to the varied peculiarities of the judicial decisions covered by EU rules implementing the principle of mutual recognition, such case law cannot be uncritically replicated for any branch of judicial cooperation in criminal matters in its entirety. Nonetheless, the success of the EAW – and the ensuing significant body of jurisprudence, by now much more considerable and meaningful compared to any other mutual recognition instrument – has triggered interpretative solutions and clarifications worthy of attention in any branch of judicial cooperation in criminal matters. This section provides an essential overview of some key stages of the evolution of the Court's approach, to pave the way for a closer analysis of the case of cross-border transfers.

At the outset of a developing line of cases on Framework Decision 2002/584/JHA, the CJEU clearly considered the effective conduct of judicial cooperation mechanisms to be the overarching priority of its legal reasoning.<sup>12</sup> In *Melloni*, it emphasised that the exhaustive nature of the list of grounds for refusal prevents States from opposing judicial cooperation by invoking higher standards of protection of an individual right than the levels set by the Charter.<sup>13</sup> In such cases, more extensive protection equates to an undue restriction of the primacy of EU law and the functioning of judicial cooperation. In addition, in *Radu*, the Court contended that the executing judicial authorities could not refuse to give effect to an EAW on grounds that the requested person had not been heard before that EAW was issued. A similar situation does not feature among the grounds for non-execution and cannot be derived from the wording of Articles 47 and 48 of the Charter.<sup>14</sup> On the other hand, an obligation for judicial authorities to hear the requested person before an EAW was issued would “inevitably lead to the failure of the very system of surrender”.<sup>15</sup> This would undermine the “certain element of surprise” of the procedure, which is essential for

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<sup>12</sup> S. Rodin, ‘Useful Effect of the Framework Decision on the European Arrest Warrant’, *Il Diritto dell’Unione europea*, Vol. 32, Issue 1, 2016, p. 1.

<sup>13</sup> *Case C-399/11, Stefano Melloni c. Ministero Fiscal*, para. 103.

<sup>14</sup> Judgment of 29 January 2013 in *case C-396/11, Ciprian Vasile Radu*, [2013] ECLI:EU:C:2013:39.

<sup>15</sup> *Case C-396/11, Ciprian Vasile Radu*, para. 39.

stopping the person concerned from taking flight, as a side effect of the freedom of movement.<sup>16</sup>

Legal scholars have critically appraised this approach. The Court has been considered evidently less concerned with protecting the fundamental rights of individuals granted by primary law than with safeguarding the intention of governments, when they passed the secondary legislation.<sup>17</sup> Moreover, undisputed reliance on effectiveness would hamper more strategic objectives, such as strengthening the chances of the offenders' future rehabilitation, as an integral part of human dignity.<sup>18</sup> Other scholars have highlighted a lack of institutional empathy on the part of the Court of Justice.<sup>19</sup>

This scenario began to change in the aftermath of the *NS* case,<sup>20</sup> where the Court underlined that EU law precludes the application of a conclusive presumption that the Member State responsible for an asylum application complies with fundamental rights. Even though the (then) Council Regulation (EC) no. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50, 25.2.2003, pp. 1-10) established automatic criteria for determining the Member State responsible for an asylum application, the Court rejected the idea of an entirely blind application of such requirements. In fact, the duty to interpret secondary law in light of the Charter binds the national authorities to perform a preliminary check on whether the Member State of destination ensures an appropriate level of protection of fundamental rights. Consequently, an asylum seeker cannot be transferred to the formally competent Member State if systemic deficiencies affecting the management of the asylum procedure and reception conditions amount to substantial grounds for believing that the person involved would face a real risk of being subjected to inhumane or degrading treatment.<sup>21</sup>

By analogy, questions arose as to whether or not and to what extent the

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<sup>16</sup> Judgment of 27 May 2014 in *Case C-129/14 PPU, Zoran Spasic*, [2014] ECLI:EU:C:2014:586, para. 63-65.

<sup>17</sup> L. Besselink, 'The parameters of constitutional conflict after Melloni', *European Law Review*, Vol. 39, Issue 4, 2014, p. 551.

<sup>18</sup> P. Mengozzi, 'La cooperazione giudiziaria europea e il principio fondamentale di tutela della dignità umana', *Studi sull'integrazione europea*, Vol. 9, Issue 2, 2014, p. 225.

<sup>19</sup> P. Martín Rodríguez, 'Crónica de una muerte anunciada: comentario a la sentencia del Tribunal de Justicia (Gran Sala), de 26 de febrero dl 2013, Stefano Melloni', *Revista general de derecho europeo*, Vol. 30, 2013, p. 34.

<sup>20</sup> Judgment of 21 December 2011 in *Joined Cases C-411/10 and C-493/10, NS*, [2011], ECLI:EU:C:2011:865.

<sup>21</sup> *Joined Cases C-411/10 and C-493/10*, para. 94-100.

Charter imposes similar obligations in the field of judicial cooperation, where mutual recognition of the foreign decision would lead to a manifest breach of fundamental rights.

The Court was soon challenged with these concerns in *Lanigan*,<sup>22</sup> a case concerning the failure on the part of an Irish executing authority to respect the time limits for the adoption of a decision on the execution of an EAW (Article 17 of Framework Decision 2002/584/JHA). The referring Court asked whether such a situation could prevent the holding of the requested person in custody and eventually neutralise the duty to execute the EAW, by virtue of the right to liberty (Article 6 of the Charter). The Court considered that keeping a suspect in custody is precluded only insofar as the duration of the procedure is excessive in relation to the characteristics of the case and the procedure itself has been carried out in a sufficiently diligent manner. However, the duty to enforce the foreign judicial decision persists.<sup>23</sup> If the national authority decides to bring the requested person's custody to an end, it is consequently required to attach any measures it deems necessary to the provisional release so as to prevent him from absconding and to ensure that the material conditions for his effective surrender remain fulfilled for as long as no final decision on the execution has been taken.<sup>24</sup> The Court's findings set a clear dividing line: fundamental rights significantly influence the management of the procedure in the executing Member State, but they do not mark a plain departure from the golden rule 'recognise and execute', leading to a mere postponement of enforcement of a cooperation request.

In developing these premises, the Court made a step forward in its seminal judgments *Aranyosi and Căldăraru* and *Celmer*.<sup>25</sup> The first case dealt with the EAW system and the risk for the requested person of facing inhumane or degrading detention treatment in a detention facility in the issuing State. The Court followed on opinion 2/13 and *NS*,<sup>26</sup> to confirm that mutual trust does not mean blind trust,<sup>27</sup> as the duty to recognise and execute a

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<sup>22</sup> Judgment of 16 July 2015 in *Case C-237/15 PPU, Lanigan*, [2015] ECLI:EU:C:2015:474.

<sup>23</sup> *Case C-237/15 PPU, Lanigan*, para. 37 and 40.

<sup>24</sup> *Case C-237/15 PPU, Lanigan*, para. 59 and 63.

<sup>25</sup> Judgment of 5 April 2016 in *Joined Cases C-404/15 and C-659/15 PPU, Pál Aranyosi and Robert Căldăraru*, [2016] ECLI:EU:C:2016:198; judgment of 25 July 2018 in *Case C-216/18 PPU, LM (deficiencies in the system of justice)*, also known as *Celmer*, [2018] ECLI:EU:C:2018:586.

<sup>26</sup> *Opinion 2/13* of 18 December 2014, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454, para. 191; *Joined Cases C-411/10 and C-493/10, NS*, para. 78-80 and para. 94.

<sup>27</sup> K. Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet Not Blind) Trust', *Common Market Law Review*, Vol. 54, Issue 4, 2017, p. 805.

foreign judgment cannot always justify the overruling of fundamental rights.<sup>28</sup> More precisely,<sup>29</sup> the executing judicial authorities must take into due consideration the presence of reliable and up to date evidence demonstrating a structural deficiency of the penitentiary system in the issuing State, amounting to a widespread and real risk of violation of the prohibition on inhumane and degrading treatment enshrined in Article 4 of the Charter. If such a systemic flaw is detected, the executing judicial authority must make a second, more specific and individual assessment, as it has a duty to verify whether the person concerned would personally face such a risk of violation upon surrender to the requesting State. If so, the authority involved should request reassurances on the compatibility of the penitentiary regime and of the personal situation to be faced by the person concerned, in the event of surrender, with fundamental rights standards. In fact, the Court stressed that priority should be given to the remedies provided by the EAW system itself. Namely, the possibility of prior consultations between the judicial authorities involved (Article 15(2) and (3) of Framework Decision 2002/584/JHA) is a preliminary way of seeking a solution to secure both the enforcement of the foreign decision and the rights of the person concerned. In any event, should the reassurances be inadequate and/or body of information collected be conclusive regarding the serious and actual risks for the person involved, the executing judicial authority is compelled to postpone the surrender. As a last resort, if the situation ultimately does not improve and no alternatives are found, the execution of the EAW must be abandoned.<sup>30</sup>

In its subsequent case law, the Court of Justice further clarified the scope of this individual assessment.<sup>31</sup> Firstly, if a systemic deficiency exists, the mere availability of a judicial remedy for challenging the detention conditions does not rule out the real risk of inhumane and degrading treatment.<sup>32</sup> Second-

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<sup>28</sup> S. Montaldo, 'On a Collision Course! Mutual Recognition, Mutual Trust and the Protection of Fundamental Rights in the Recent Case Law of the Court of Justice', *European Papers*, Vol. 1, Issue 3, 2016, p. 984.

<sup>29</sup> The test is explained in *Joined Cases C-404/15 and C-659/15 PPU, Pál Aranyosi and Robert Căldăraru*, para. 88-104.

<sup>30</sup> For a commentary on the test and on its possible developments *see, inter alia*, S. Gáspár-Szilágyi, 'Joined Cases Aranyosi and Căldăraru. Converging Human Rights Standards, Mutual Trust and New Grounds for Postponing a European Arrest Warrant', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 24, Issue 2, 2016, p. 197.

<sup>31</sup> Judgment of 25 July 2018, in *Case C-220/18 PPU, ML (detention conditions in Hungary)*, [2018] ECLI:EU:C:2018:589.

<sup>32</sup> *Ibidem*, para. 74 and 75. This has been more recently confirmed by judgment of 15 October 2019, in *Case C-128/18, Dorobantu*, [2019] ECLI:EU:C:2019:857, para. 81. The same applies in case of adoption in the issuing Member State of measures, such as the establishment of an ombudsman

ly, the executing judicial authority is required to assess only the detention conditions in prisons in which, according to the available information, it is likely that that person will be detained, including on a temporary or transitional basis.<sup>33</sup> Moreover, this evaluation must be confined to the actual and precise detention conditions which are relevant for determining a breach of the Charter in the specific case at issue, for instance, in view of the inmate's physical and mental condition.<sup>34</sup>

Elaborating on this background, the *Celmer* case offered the Court of Justice the opportunity to expand the scope of this two-layered test to the (serious risk of a) plain violation of a pillar of the rule of law, namely the independence and impartiality of the judiciary in the issuing Member State, ultimately affecting the right to a fair trial enshrined in Article 47(2) of the Charter. On that occasion, the Court was confronted with the recent reforms of the Polish judiciary and reiterated *mutatis mutandis* the subsequent and intertwined phases of this assessment. Firstly, as far as the identification of a systemic deficiency is concerned, it acknowledged that the executing authority can be satisfied with the issue of a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TFEU, detecting a real risk of breach of the right to a fair trial, on account of structural or generalised flaws with regard to the independence of the judiciary. Secondly, it stated that the executing authority must determine, specifically and precisely, whether the situation of the person concerned, the nature of the offence for which he or she is being prosecuted, and the factual context that forms the basis of the EAW converge to demonstrate that there are substantial grounds for believing that he or she will run the outlined serious risk.

While further clarifications are likely to be provided by the Court – for instance in relation to the possibility of extending the *Aranyosi and Căldăraru* test to other violations involving non-absolute fundamental rights – this developing case law has shed some light on possibly resolving the dilemma on effectiveness/fundamental rights protection. For the purposes of this chapter, the crucial point is whether the stance taken by the CJEU could contribute to some extent to addressing the fundamental rights challenges posed by the Framework Decision.

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system or establishment of courts of enforcement of penalties, which are intended to reinforce the monitoring of detention conditions in that Member State.

<sup>33</sup> *Case C-220/18 PPU, ML (detention conditions in Hungary)*, para. 84-87.

<sup>34</sup> *Ibidem*, para. 94. See also *Case C-128/18, Dorobantu*, where the Court has clarified that, in the absence of common EU standards on dignified detention, the minimum requirements laid down by the European Court of Human Rights under Art. 3 of the Convention should be considered.

#### **4. The Case of Cross-Border Transfers of Prisoners: Social Rehabilitation and Human Rights Challenges**

From a normative perspective, Framework Decision 2008/909/JHA does not differ from the scenario outlined above. In fact, it reiterates most of the optional grounds for refusal envisaged in other Directives and Framework Decisions and makes some general references to the obligation to protect fundamental rights, whereas the violation of the Charter does not formally amount to preventing mutual recognition of a foreign sentence. In particular, Article 3(4) reiterates the generic and introductory human rights clause which can be found in all EU secondary law instruments implementing the principle of mutual trust in criminal matters. In particular, this paragraph states that the Framework Decision “shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU”. The Preamble of the Framework Decision complements this provision. Recital 13 confirms that cross-border transfers must comply with the Charter, and more specifically with its Chapter VI. In addition, Recitals 5 and 14 refer to procedural guarantees and due process rights, as key components of the principle of mutual confidence between national judicial authorities, whereas Recital 15 states that the Framework Decision should affect the right of EU citizens to move freely in the European territory. The second part of Recital 13 clarifies that the Framework Decision should be interpreted as allowing

refusal to execute a decision when there are objective reasons to believe that the sentence was imposed for the purpose of punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person’s position may be prejudiced on any one of those grounds.

Lastly, compared to Framework Decision 2002/584/JHA, Framework Decision 2008/909/JHA does not provide any clear remedy in the event of exceptional situations affecting the person concerned. For instance, Article 23(4) of Framework Decision 2002/584/JHA allows for the postponement of surrender “for serious humanitarian reasons”, particularly where there are substantial grounds for believing that it would clearly endanger the requested person’s life or health. Moreover, the Preamble, at Recital 10, emphasises that the whole mechanism of the EAW may be (exceptionally) suspended only in the event of a serious and persistent breach of the founding European values and principles set out in Article 2 TEU, determined by the Council pursuant to Article 7(2) TEU.<sup>35</sup>

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<sup>35</sup> This limit to judicial cooperation is in any case dependent upon the outcomes of the political



Still, the act under consideration encroaches upon the key provisions of the Charter, and the increasing number of cross-border transfers requires further reflection on compliance with fundamental rights standards.

From this point of view, it must be borne in mind that the system established by the Framework Decision is intended to enhance the social rehabilitation opportunities of the prisoners concerned (Article 3(1)). In an EU-wide judicial space where people move freely, prisoner transfers contribute to preventing loopholes stemming from the territoriality of criminal law and its enforcement. In fact, the identification of the family/social/cultural centre of gravity of a given offender and the possibility of allocating enforcement accordingly, in principle, provides increased opportunities for choosing the best place for serving a deprivation of liberty, with a view to enhancing the post-release reinsertion into society and preventing reoffending. Admittedly, a closer look at the practice of the Member States reveals a divide between the law on paper and domestic approaches in this domain. An increasing body of scholarly analyses highlights that Member States are often more concerned with disposing of undesired EU citizens rather than pursuing the primary goal of this judicial cooperation mechanism.<sup>36</sup> The alternative drivers to cross-border transfers range from deflating prison overcrowding to minimising the budgetary burden of prison systems to general public order concerns, but in the end they all elude *de facto* the rationale of the Framework Decision.

The Court of Justice has not yet had the opportunity of taking a clear stance on this trend. In a handful of cases regarding other judicial cooperation instruments, free movement of persons, EU citizenship and extradition law, the CJEU has acknowledged that the offender's rehabilitation "in the State in which [the person is or] has become genuinely integrated is not only in his interest but also in that of the European Union in general".<sup>37</sup> However, this EU-wide interest needs to be balanced with competing policy objectives, and the consequences of a frustration of the rehabilitation goal are still unclear from an EU law perspective. At the same time, the stance taken by the Court infers that social rehabilitation as such, for the purposes of the European legal order,

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remedy under Article 7 TEU, whose effectiveness is a matter of debate, in light of the recent practice of EU institutions.

<sup>36</sup> See, for instance, V. Mitsilegas, 'The Third Wave of Third Pillar Law', *European Law Review*, Vol. 34, Issue 3, 2009, p. 523, and A. Martufi, 'Assessing the Resilience of 'Social Rehabilitation' as a Rationale for Transfer: A Commentary on the Aims of Framework Decision 2008/909/JHA', *New Journal of European Criminal Law*, Vol. 9, Issue 1, 2018, p. 49.

<sup>37</sup> *Inter alia*, Judgment of 17 April 2018 in *Joined Cases C-316/16 and C-424/16, IB and Vomero*, [2018] ECLI:EU:C:2018:256, para. 75, judgment of 23 November 2010 in *Case C-145/09, Panagiotis Tsakouridis*, [2010] ECLI:EU:C:2010:708, para. 50. Also S. Montaldo, 'Offenders' Rehabilitation: Towards a New Paradigm for European Criminal Law', *European Criminal Law Review*, Vol. 8, Issue 2, 2018, p. 223.

does not amount to an autonomous fundamental right deserving protection in court. Consequently, two key points arise in relation to cross-border transfers, namely which rights are actually at stake and which normative and judicial remedies could achieve the aim of the Framework Decision and the individual guarantees underpinning it.

These questions are actually in line with the case law of the European Court of Human Rights (hereinafter, the ‘ECtHR’), which rejects the idea of a fundamental right to be – or not to be – transferred. The Strasbourg Court has consistently contended that a forced transfer serving other purposes than social rehabilitation does not amount *per se* to a violation of the Convention.<sup>38</sup> Instead, the main concern is whether a violation of a fundamental right occurs during the transfer or as a result of it. In fact, the ECtHR describes social rehabilitation as an ongoing progression from the early days of the sentence to the preparation for release or, in general, to life after punishment.<sup>39</sup> As such, the Strasbourg Court conceptualises offenders’ rehabilitation as an obligation of means incumbent upon the national authorities. The latter have the duty to take all reasonable measures to enhance an inmate’s re-socialisation path. Still, the ECtHR has consistently held that this obligation “is to be interpreted in such a way as not to impose an excessive burden on national authorities” and that the domestic authorities enjoy significant discretion as to the actual choice of such means.<sup>40</sup>

Therefore, social rehabilitation calls for an appropriate normative, administrative and judicial environment, especially in a cross-border scenario, but, according to its interpretation by the ECtHR, it does not seem to be, as such, a conclusive argument for placing constraints on mutual recognition.

At the same time, social rehabilitation is an umbrella concept, which implies codified fundamental rights. Besides the procedural guarantees inherent to the enforcement of a sentence in the framework of the criminal execution phase, the right to family life, the ban on inhumane and degrading treatment, and the right to liberty play a prominent role in this domain.<sup>41</sup> These rights are enshrined both in the Charter and in the ECHR. Moreover, they all meet the conditions for being considered equivalent for the purposes of Article 52(3) of the Charter itself. This means that, in principle, the case law of the ECtHR is of particular

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<sup>38</sup> C. Grabenwater, *The European Convention for the Protection of Human Rights and Fundamental Freedoms: A Commentary*, Hart Publishing, Oxford, 2014, p. 60, and case law referred to therein.

<sup>39</sup> *Dickson v. United Kingdom*, ECHR (2007), ECLI:CE:ECHR:2007:1204JUD004436204.

<sup>40</sup> *Murray v. The Netherlands*, ECHR (2016), ECLI:CE:ECHR:2016:0426JUD001051110.

<sup>41</sup> A. Martufi, ‘The Paths of Offender Rehabilitation and the European Dimension of Punishment: New Challenges for an Old Ideal?’, *Maastricht Journal of European and Comparative Law*, Vol. 25, Issue 6, 2018, p. 1; L. Mancano, ‘Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law’, *Common Market Law Review*, Vol. 56, Issue 1, 2019, p. 61.

significance in defining the scope of the relevant provisions of the Charter, which must be interpreted in a manner consistent with the Convention.

In this respect, regardless of the conceptual essence of the notion of offenders' rehabilitation, the analysis of the practice developed during the RePers project demonstrates that the formal link established by the Framework Decision between this concept and prisoner transfers often conceals the managerial ambitions of Member States on intra-EU mobility for hidden public order and budgetary purposes. The absence of effective limits within the Framework Decision on the risk of abusive practices calls for more stringent remedies against the (risk of) a violation of prisoners' rights, and, in particular, of the provisions of the Charter contributing to defining the scope of the notion of offenders' social rehabilitation. The next section discusses the tools and remedies available to the judicial authorities involved and the person concerned for avoiding or tackling cross-border transfers resulting in a (risk of) violation of these rights.

## ***5. Resisting Mutual Recognition: Remedies against Transfers Resulting in Violations of Fundamental Rights***

### ***5.1. The Normative Layer: Preventing Illegitimate Transfers through the Judicial Cooperation Mechanism Designed by Framework Decision 2008/909/JHA***

The horizontal cooperation mechanism designed by the Framework Decision maximises the role of the judicial authorities involved, whereas it restricts the prisoner's intervention to a minimum, basically through the possibility of providing a personal opinion and, in limited cases, of conditioning the transfer upon his or her consent. Accordingly, the only tools for avoiding an undue transfer before a decision on recognition is taken refer to the bilateral relationship between the judicial authorities involved.

Article 4(2) of the Framework Decision clarifies that the issuing authority is entitled to forward a certificate and the related judgment only insofar as it "is satisfied that the enforcement of the sentence by the executing Member State would serve the purpose of facilitating the social rehabilitation of the sentenced person". Appropriate preliminary consultations between the competent domestic authorities should take place for this purpose. Furthermore, from the other side of the cooperation mechanisms, Article 4(4) allows the executing judicial authority to provide the issuing one with a "reasoned opinion" pointing out that enforcement in the Member State of destination would not facilitate the successful reintegration of the sentenced person into society.

Therefore, the Framework Decision, in principle, urges the Member States to adopt appropriate measures to form the basis on which their national judicial authorities will decide on the forwarding of a transfer request. However, it does not provide any additional guidance on the precise scope and significance of the rationale underpinning the judicial cooperation mechanism at stake, thereby leaving leeway for transposition and judicial practices at national level. Some useful hints can be taken from Recital 9, which indicates a non-binding list of possible criteria to be considered by the competent authorities, namely “the person’s attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State”. More substantial reference points could also be derived from the case law of the ECtHR and of the Court of Justice concerning the rights covered by the umbrella concept of social rehabilitation, namely the right to family life, the right to liberty, and the ban on inhumane and degrading treatment, briefly recalled in the previous paragraph. In fact, the content – and the ensuing need for protection – of these rights offer to the issuing authority a reliable parameter through which the preliminary assessment urged by Article 4(2) could be legitimised.

With regard to the right to family life, as confirmed by the relevant literature and the RePers project activities,<sup>42</sup> family links, in practice, feature highly among the drivers for a cross-border transfer. Even though no conclusive presumptions can be upheld, the existence of personal connections – even informal, such as a non-registered partnership – in the executing State and, conversely, the absence of such a familial environment in the issuing State are generally considered a sound justification for a forced removal. Accordingly, the ECtHR has repeatedly underlined the importance of preserving contacts with the outside world and family ties for the purposes of the prisoner’s engagement in an empowerment process in view of his or her release.<sup>43</sup> Nonetheless, a closer look at the practice of the judicial authorities reveals that the analysis of this aspect is quite poor, both in terms of the collection of appropriate evidence and of the assessment of the overall situation of the prisoner involved.

It should also be considered that the CJEU has interpreted the right to family life narrowly in other areas of judicial cooperation in criminal matters. Again, the case of the EAW system is particularly illustrative. Article 4(6) of

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<sup>42</sup> See the national reports included in T. Marguery, *Mutual Trust Under Pressure, the Transferring of Sentenced Persons in the EU: Transfer of Judgments of Conviction in the European Union and the Respect for Individual’s Fundamental Rights*, Wolf Legal Publishers, Tilburg, 2018.

<sup>43</sup> *Dickson v. United Kingdom*, ECHR (2007).

Framework Decision 2002/584/JHA envisages an optional ground for refusal of surrender “where the requested person is staying in, or is a national or a resident of the executing Member State”. Consistent case law of the Court of Justice upholds that this statement aims to safeguard the requested person’s societal environment, which any execution of an EAW would be likely to disrupt. The rationale is that the person concerned could have settled in the executing Member State, where he or she might work on a stable basis and might have established a solid network of personal relations, including family links. On the one hand, the Court has accepted that this environment facilitates rehabilitation from an individual perspective and also contributes to preventing reoffending, to the benefit of the hosting society as a whole. On the other hand, however, the CJEU itself has interpreted this provision narrowly, thereby further favouring mutual recognition and the principle of effectiveness in comparison to the right to family life. The *Wolzenburg* case is particularly insightful in this regard, as, on that occasion, a Dutch law conditioning the possibility of invoking Article 4(6) of Framework Decision 2002/584/JHA on a prior and continuous period of presence in the territory of the host Member State of no less than 5 years was deemed to introduce a proportionate limit to the right at issue, due to the need to enhance the advanced system of surrender established by the EAW.<sup>44</sup>

Detention conditions – in particular those to which the prisoner will be subject in the Member State of destination – pose further challenges to the achievement of the purpose of Framework Decision 2008/909/JHA. Again, the law on paper and the law in action do not entirely tally. In principle, appropriate treatment in prison, covering both adequate detention conditions and the possibility of engaging in a varied set of rehabilitation activities and programmes, is considered a key component of the gradual preparation for post-release return to society. Poor – where not degrading – detention conditions raise particular criticisms in a cross-border scenario. Firstly, the prisoner usually has very limited information on the treatment he or she will receive in the executing State. Secondly, he or she might be forced to interrupt an ongoing rehabilitation programme in the issuing State abruptly, having no access to equivalent or appropriate measures after the transfer has been performed. Nonetheless, a prisoner could be willing to face such a scenario, if – for instance – he or she may benefit from a reduced sentence pursuant to the law of the executing Member State. The same applies to the choice between detention conditions and proximity to family.

In this context, additional concerns derive from the right to liberty, under Article 6 of the Charter, in relation to which the case law of the ECtHR and of

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<sup>44</sup> *Case C-123/08, Dominic Wolzenburg*.

the CJEU converge to identify emerging protection requirements. The ECtHR has developed a test to verify whether domestic law and practices in the field of extradition and pre-removal detention lead to an arbitrary restriction of this right.<sup>45</sup> Some elements of this test are particularly significant for cross-border transfers pursuant to the Framework Decision and can be further developed in light of the recent case law of the Court of Justice.<sup>46</sup> More specifically, the ECtHR attaches importance to the appropriateness of the locations and material conditions of detention. In *Al Chodor*,<sup>47</sup> a recent case concerning the deprivation of liberty of asylum seekers, the Court of Justice complemented this approach, by pointing out that the protection against arbitrary restrictions of personal liberty also requires the detention to be based on a clear, predictable and accessible legal basis. Even before considering the material detention conditions, both the grounds and the procedures for deprivation of liberty should therefore be accessible and foreseeable, to avoid undue departures from Article 6 of the Charter. To provide an example, *Al Chodor* referred to domestic laws allowing for varied forms of detention of asylum seekers on generic grounds, such as the undetermined risk of absconding. Article 6 of the Charter requires this risk to be further clarified and defined through norms of general application outlining the criteria for believing that the person involved is likely to abscond. Otherwise, the relevant national law would blur the boundaries of a legitimate and proportionate deprivation of liberty, eventually offering leeway to the competent authorities for broadening the scope of their coercive powers.

This case law reinforces the importance of detention conditions – and of the related legal frameworks and institutional practices – in the framework of cross-border transfers of prisoners across the EU. In the execution State, a prisoner could face a twofold scenario: material detention conditions failing to reach appropriate legal standards established by national law, or national rules either failing to define – entirely or partially – such standards or being too vague to meet the necessary requirements of accessibility and foreseeability.

It follows that the assessment made by the issuing authority pursuant to Article 4(2) of Framework Decision 2008/909/JHA should encompass all relevant circumstances regarding the prison treatment the sentenced person will receive, ranging from – in particular – the availability of rehabilitation

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<sup>45</sup> Grabenwarter 2014, p. 60, and case law referred to therein.

<sup>46</sup> According to the ECtHR, lawful detention must be carried out in good faith, be enforced in appropriate places of detention and conditions, connected to specific grounds for detention, and be of a reasonable duration in relation to the aim it pursues. See L. Mancano, 'The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters', *Cambridge Yearbook of European Law*, Vol. 18, 2016, p. 215.

<sup>47</sup> Judgment of 15 March 2017 in *Case C-528/15, Salah Al Chodor and Others*, ECLI:EU:C:2017:213.

programmes and of adequate contacts with family members, to the material conditions of detention in light of the situation of the person concerned (mental and physical health, age, etc.). For this purpose, the issuing authority is entitled – and in principle should be expected – to solicit information from the executing one. Should the latter fail to provide appropriate indications on the post-transfer situation of the transferee – including updated information on personal ties, the facility to which he or she will be sent, the rehabilitation programmes available therein, and the material detention conditions – the issuing authority should carefully consider prioritising the protection of the individual and the *intentio legis*.

Nonetheless, as the research conducted in the framework of the RePers project demonstrates, the judicial authorities face many difficulties in seriously addressing these preliminary assessments, due to workload and the lack of time and resources, to such an extent that on many occasions not a single piece of information is requested and subsequently made available. Often, in the three Member States involved in the project, requests for transfers are issued regardless of the absence of any indications as to the post-transfer regime to be faced by the person concerned. This unsatisfactory approach to the elusive notion of offenders' rehabilitation and to its assessment by the judicial authorities blurs the scope and content of the cooperation duties incumbent upon the issuing and executing Member States, as well as the purpose they should primarily pursue.<sup>48</sup> Even though they are crucial to the whole mechanism, the actual effectiveness of these preliminary instruments is highly questionable. Firstly, they rely entirely upon the (unilateral and generally very poor) commitment of the judicial authorities involved to prioritising social rehabilitation purposes. Secondly, the prisoner has very limited opportunities to contact the competent authorities, to support his or her position. Thirdly, as will be discussed in the next section, there are loopholes in effectively challenging a failure to perform the preliminary assessment pursuant to Article 4(2) before a domestic court, as it is just an interim stage of a more complex procedure, the formal outcome of which is the decision on recognition and execution issued abroad by the judicial authority of the executing Member State.

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<sup>48</sup>Moreover, as discussed elsewhere, the clear dividing line between the complementary enforcement phases in the issuing and executing Member States – established by the Framework Decision and confirmed by the Court of Justice – further endangers the rationale of the transfer mechanism, as it disrupts ongoing rehabilitation programmes in which the prisoner might be involved in the issuing State. See S. Montaldo, 'Judicial Cooperation, Transfer of Prisoners and Offenders' Rehabilitation: No Fairy-Tale Bliss. Comment on Ognyanov', *European Papers*, Vol. 2, Issue 2, 2017, p. 709.

## 5.2. *Judicial Remedies, between National Procedural Autonomy and the Role of the Court of Justice*

In comparison to other judicial cooperation mechanisms, the way in which the Framework Decision implements the principle of mutual recognition is characterised by distinctive structural features. These differences are particularly striking in relation to the EAW, where the executing authority is expected to surrender the person concerned. In fact, the scope of the Framework Decision necessarily reverses the roles of the issuing and executing States: it is for the former to transfer the prisoner to the executing State, where he or she will serve the sentence. The Framework Decision connects the notion of executing authority to the material enforcement of the sentence abroad.

This paradigm shift has remarkable implications in terms of remedies to possible violations of fundamental rights and ensuing limits to the principle of mutual recognition.

A preliminary aspect must be highlighted in this respect. The Framework Decision provides no judicial remedies for resisting a forced transfer. More specifically, it does not introduce minimum common rules concerning the general features of an individual complaint against the cross-border enforcement of a sentence. Still, it might be the case that the recognition of a foreign decision results in a (risk of) violation of one of the rights outlined in the previous section, or that it does not serve the purpose of facilitating the prisoner's social rehabilitation. The absence of clear indications from the EU legislature is understandable, since it stems from both the vertical division of competence between the EU and the Member States and the principle of national procedural autonomy. Moreover, the Framework Decision covers a branch of criminal law in which the fragmentation of national legal orders reaches its peak, since *ius puniendi* – and the actual exercise of it – have always been considered a key component of core sovereign powers. In addition, as the Framework Decision is a former Third Pillar instrument entrusted solely to the decision-making power of the Council, one could hardly have expected more intrusive decisions to the detriment of the domestic reserved domains.

In this context, the structure of the cooperation mechanism at stake makes it rather difficult for the prisoner concerned to challenge a forced cross-border transfer. In fact, the decision on recognition and execution is entrusted to the State of destination, whereas the inmate is usually held in a prison facility in the issuing State. That decision formally closes the horizontal cooperation procedure and affects the prisoner's situation and legal regime. Therefore, an effective judicial complaint against a transfer should, in principle, challenge that domestic judicial decision, as occurs in relation to the EAW. However, in the latter case, the requested person is in the executing State and is necessarily assisted by a lawyer therein. This does not happen in cross-border transfers,



where, in most cases, the geographic divide and the ongoing detention of the person concerned converge and affect the possibility of resisting the decision on recognition easily and effectively.

Additional concerns stem from the opposite side of the horizontal cooperation procedure. In fact, the Framework Decision does not impose specific formalities for a transfer request submitted by the issuing authority. Therefore, it is the responsibility of the national legal orders and practices to better clarify this aspect of the procedure, which – nevertheless – has remarkable substantial implications on the person involved. The same applies to decisions denying a request for a transfer submitted by a prisoner. It follows that the transfer request (or the decision to reject a transfer) may take many different shapes and is in most cases issued by a public prosecutor without the intermediation or any sort of prior exequatur of a domestic court. The question, then, is whether the prisoner can challenge an intermediate judicial act barring or initiating a more complex cross-border procedure, which is closed by a final decision on recognition and enforcement issued in another Member State by the executing authority. Evidently, the question is particularly compelling in the event of *ex officio* requests issued in spite of the prisoner's dissent or rejected notwithstanding his or her consent to the transfer. Moreover, as discussed in the previous sections, the analysis of the practice shows that the preliminary check under Article 4(2) of the Framework Decision on whether the transfer would actually contribute to enhancing the prisoner's social rehabilitation often proves to be materially very difficult to implement for the authority involved. However, the broad discretion with which the issuing authorities are endowed is not apparently counterbalanced by clear remedies. The absence of indications in the Framework Decision and the aforementioned principle of procedural autonomy lead to the allocation of this aspect to the specific features of the domestic systems of judicial remedies and maximises the risk of loopholes. In fact, domestic legislations provide an extremely varied panorama. For instance, Spanish Law no. 23/2014 of 20 November, on mutual recognition of criminal decisions in the EU expressly envisages a judicial remedy against any decision to forward a request for cooperation to the judicial authorities of another Member State (Article 13). In other countries, such as Italy, The Netherlands and France, no such provisions are found. The possibility of challenging the request made by the public prosecutor is a disputed and – still not settled – practice, which can raise concerns as to the actual availability of this remedy.

Another key question is whether the case law developed by the Court of Justice (mainly) in the framework of the EAW can be extended to this separate area of judicial cooperation in criminal matters. In principle, as far as the interpretation of the grounds for refusal listed in EU legislation is concerned, there is no reason why a different regime should be reserved to cross-border transfers.

The answer is much more complex in relation to the *Aranyosi and Căldăraru* test, which covers all cases in which an exceptional situation may result in a serious and actual risk of violation of fundamental rights not envisaged in the list of pre-determined grounds for refusal.<sup>49</sup> In principle, the aforementioned twofold test could hardly be reiterated as such in cross-border transfers, since it would require the executing judicial authority to refuse recognition on the grounds of a negative self-assessment of the standards of protection of core fundamental rights in its own Member State. Even if a judicial authority were willing to perform such a self-assessment, the test would in any event be entirely modified: it would be confined to the realm of the executing State and no cross-border exchange of information and provision of assurances would logically apply. Crucially, we would then be dealing with a profoundly different test, the rationale of which would not be the establishment of exceptional limits to mutual trust and mutual recognition between the Member States but, rather, the empowerment of the domestic constitutional system for ensuring the compatibility of the national legal order with the standards set by the Charter. There would also be inevitable constitutional implications at domestic level, in terms of checks and balances between the judiciary and the executive and legislative branches of a Member State.<sup>50</sup>

In a nutshell, the *Aranyosi and Căldăraru* test – or what remains of it – would in any event forcefully undergo a genetic paradigm shift. It would be transformed from a horizontal inter-State dynamic of mutual warning on the protection of fundamental rights<sup>51</sup> to a purely domestic and unilateral scrutiny of the suitability of the national legal framework to respect this qualified EU *acquis* and the primacy and effectiveness of Union law. Nonetheless, from a

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<sup>49</sup> This is a cross-sectional issue which also applies to other judicial cooperation instruments, in particular those which are described as being complementary to Framework Decision 2008/909/JHA, namely Framework Decisions 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 (OJ L 337, 16.12.2008, pp. 102-122) and 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 (OJ L 294, 11.11.2009, pp. 20-40). Some authors have already ruled out this possibility, but alternative tools - if not alternative approaches to the same test - should be sought, for the sake of the coherence of the judicial cooperation system within the EU. See T. Marguery, 'La confiance mutuelle sous pression dans le cadre du transfert des personnes condamnées au sein de l'Union européenne', *Eucrim*, Vol. 13, Issue 4, 2018, p. 185.

<sup>50</sup> From this point of view, it would be quite difficult to perform this check, as the executing judicial authority would have to acknowledge the existence of widespread challenges to fundamental rights within its own jurisdiction. Even though this would be precisely the role that one would expect an independent judicial scrutiny to play over public authorities, it must not be taken for granted that any judicial authority would be concretely willing and fully equipped to take on such a responsibility.

<sup>51</sup> I. Canor, 'My brother's keeper? Horizontal Solange: An Ever Closer Distrust Among the Peoples of Europe', *Common Market Law Review*, Vol. 50, Issue 2, 2013, p. 383.

substantive point of view, the judicial authority in the Member State of transfer could not obliterate the duty to protect fundamental rights when implementing EU law, set forth by Article 51(1) of the Charter and reiterated in the fundamental rights clause of Article 3(4) of Framework Decision 2008/909/JHA, which the Court of Justice used as a legal basis in Framework Decision 2002/584/JHA to establish the *Aranyosi and Căldăraru* test.

From this point of view, the Strasbourg case law and the evidentiary threshold proposed by the Court of Justice in its case law could be reliable reference points for this self-assessment, also because any diverging and stricter constitutional requirement would have to be considered through the lens of the *Melloni* doctrine.<sup>52</sup> This would also be in line with the urgent need for EU-wide coherence of the general approach to the limits on cross-border judicial cooperation mechanisms, irrespective of the solutions developed on an individual basis.

At the same time, from a political point of view, this assessment appears to be hardly conceivable, as the executing judicial authority would have to acknowledge the existence of widespread challenges to fundamental rights within its own jurisdiction. Firstly, even though this would be precisely the role that one would expect to be played by an independent judicial scrutiny over the risk of abuses on the part of the public authorities, it must not be taken for granted that any judicial authority would be concretely willing and fully equipped to take on such a responsibility. Secondly, this check would be likely to facilitate the lodging of (several) successful applications to the ECtHR against the Member State concerned.<sup>53</sup> These concerns could partially be overcome by resorting to the preliminary ruling procedure, as a way of *de facto* self-limiting the duty of mutual recognition through interpretative guidance centrally steered from Luxembourg. Again, however, the empowerment of Article 267 of the Treaty on the Functioning of the European Union as a tool for handling serious human rights concerns in the executing State reiterates the thorny issue of political feasibility outlined above. It should not be ruled out that the domestic judicial authorities might be prevented from referring to the CJEU, especially in those Member States where threats to the independence of the judiciary are fuelling the crisis of the rule of law. These hurdles might not affect all the Member States, but would still generate loopholes in the European system of protection of fundamental rights.

Be that as it may, any elaboration on the *Aranyosi and Căldăraru* test would have to address a third and final concern. It might be the case that a prisoner

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<sup>52</sup> *Case C-399/11, Stefano Melloni v. Ministerio Fiscal*.

<sup>53</sup> A. Rosanò, 'Clash of Titans: The Fight Against Impunity vs Social Rehabilitation and the Protection of Fundamental Rights in the Framework of the Transfer of Prisoners in the EU', in S. Montaldo & L. Marin (Eds), *The Fight Against Impunity in EU Law*, Hart Publishing, Oxford, forthcoming (May 2020).

faces the threat of unlawful detention conditions – either poor material standards or vague/absent legal standards resulting in arbitrary detention – which does not reach the threshold of the exceptional circumstances rebutting the presumption of mutual trust and allowing for a deviation from the duty of recognising and enforcing a foreign judicial decision, in light of the current developments of CJEU case law. The CJEU, in *LM*, although referring to exceptional situations justifying a fundamental rights limit to mutual recognition, contended that the availability of a remedy for challenging detention conditions does not suffice to rule out the risk of inhumane and degrading treatment. In fact, the crucial point is that no judicial cooperation mechanism should lead to a manifest violation of a fundamental right, *a fortiori* in the event of ones that cannot be derogated, as is the case for Article 4 of the Charter. This is even more compelling for cross-border transfers, which are inherently connected to the enforcement of sentences and custodial measures. However, neither the Framework Decision nor the Court of Justice have developed clear alternatives to existing remedies and tests, such that criticism has been raised with regard to a gap in protection within the mechanism of cross-border transfers and in the EU system of protection of fundamental rights as a whole.<sup>54</sup>

## 6. Concluding Remarks

Framework Decision 2008/909/JHA is not immune from the recurring dilemma of effectiveness versus fundamental rights protection, which characterises judicial cooperation mechanisms. On the one hand, this instrument facilitates the enforcement of a sentence or a custodial measure abroad, by minimising the formalities and providing for an expedited and purely judicial procedure. On the other hand, it raises several fundamental rights challenges, which are at the core of the rehabilitation goal pursued by this instrument. While cross-border transfers should be used to facilitate social reinsertion in a post-release era, thereby also preventing recidivism, the current practice reveals recurring attempts to use this judicial cooperation tool to dispose of undesired EU citizens or to deflate national prison systems and to lower budgetary burdens accordingly.

This trend is likely to result in illegitimate forced transfers that could undermine prisoners' rights, such as the right to family life, the right to liberty, and the prohibition on inhumane and degrading treatment. The Framework Decision maximises the role of the judicial authorities involved, which are both expected to perform a preliminary check on the implications of a cross-border transfer on

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<sup>54</sup> Cf. Mancano 2019, p. 82.

the sentenced person. In principle, if these assessments reveal that the removal would not be beneficial to the inmate's progression towards social rehabilitation, the judicial cooperation mechanism should be set aside.

In this context, as is the case for any judicial cooperation instrument involving the exercise of public coercive powers, the set of remedies for resisting a forced transfer are revealed to be a much-needed pillar of the mechanism at issue. However, the current state of the art regarding available judicial remedies for fundamental rights violations resulting from forced cross-border transfers is a matter of concern. Generally speaking, the Framework Decision does not adopt minimum common standards in its domain. Judicial protection at domestic level broadly depends on national criminal procedural law and appears to be undermined by the lack of remedies in the issuing State and the need to challenge the decision on recognition from abroad. Moreover, even from the perspective of the executing State, the recent advances made by the Court of Justice fall short of securing appropriate protection, even in the case of exceptional situations stemming from systemic deficiencies. The *Aranyosi and Căldăraru* test does not apply, as such, to Framework Decision 2008/909/JHA transfers, and a specific test not yet been developed in relation to the risk of transferring prisoners to a facility where detention conditions are poor.

Two factors emerge from this context. Firstly, the magnitude of the competent judicial authorities' role and tasks is further amplified, since the presence of loopholes in the system of judicial remedies calls for appropriate *ex ante* safeguards with a view to preventing the risk of fundamental rights violations. Secondly, in a sort of inextricable circle, it highlights the need to strengthen the web of judicial protection pursuant to national law, as well as the need for clearer interpretative guidance from the CJEU.

# ***Transferring Non-Consenting Prisoners***

Patricia Faraldo-Cabana

**Abstract:** *Offenders' rehabilitation is the declared objective of the transfer of foreign prisoners to their country of nationality, origin or permanent residence. The rationale behind this is that allowing prisoners to serve their sentence close to home can be a significant instrument in improving their chances of social rehabilitation. In Framework Decision 2008/909/JHA, the previous right of veto held by sentenced persons in the 1983 Council of Europe Convention when they are transferred to their country of nationality or residence was abolished. This change has a major negative impact on the position of the sentenced person. It also raises questions as to the coherence between the transfer of non-consenting prisoners and the rehabilitation perspective, given that social rehabilitation intrinsically requires the cooperation of the person involved. By discussing the compatibility, the reader is given a deeper and contextualised insight into the fact that not every policy measure actually serves the purpose for which it was intended. In fact, the abolition of the prisoner's right of veto makes the European instrument appear more concerned with the needs of the issuing states than with those of the affected individuals.*

**Keywords:** *Transfer of prisoners, social rehabilitation, Framework Decision 2008/909/JHA, offender's consent, mutual recognition.*

SUMMARY: 1. Introduction. – 2. The Grounds for Abolishing the Requirement of Consent. – 3. The Rehabilitation Perspective. – 4. Social Rehabilitation through Non-Consented Transfers? – 5. Concluding Remarks.

## **1. Introduction**

The explanatory reports, preambles and contents of the instruments and agreements adopted in Europe since the 1960s that allowed foreign offenders to be transferred to their country of nationality, origin or permanent residence have consistently referred to their rehabilitation as an important objective of such transfers.<sup>1</sup> It is commonly accepted that, on the whole, enforc-

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<sup>1</sup> See Preamble and Article 1 of the European Convention on the Supervision of Conditionally

ing a prison sentence in surroundings familiar to the prisoner is more likely to facilitate his or her social rehabilitation. Therefore, social ties, particularly employment and family relations, should be given sufficient attention during and after punishment.<sup>2</sup> It is also widely assumed that a transfer to the home country is in a foreign prisoner's interest as the problems offenders experience in prison are generally exacerbated when they are foreign, even though the principle of non-discrimination is a basic principle in penitentiary law. Difficulties in communication due to language barriers, lack of information about the legal system, alienation from local culture and customs, and the absence of contacts with relatives may have detrimental effects on foreign prisoners, making it likelier that they will relapse into crime.<sup>3</sup> In many cases, they are not offered the range of penitentiary and post-release treatments and welfare-oriented services that may otherwise be an integral part of imprisonment.<sup>4</sup> As a

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Sentenced or Conditionally Released Offenders (Strasbourg, 30 November 1964); Explanatory Report and Preamble to the European Convention on the International Validity of Criminal Judgments (The Hague, 28 May 1970, hereinafter the '1970 Validity Convention'); Explanatory Report and Preamble to the Convention on the Transfer of Sentenced Persons (Strasbourg, 21 March 1983, hereinafter the '1983 Council of Europe Convention'); Explanatory Report and text of the UN Model Agreement on the Transfer of Foreign Prisoners, adopted by the Seventh Crime Congress (Milan, 16 August-6 September 1985) and endorsed by the General Assembly in resolution 40/32; Article 2 of the Agreement on the Application between the Member States of the European Communities of the Council of Europe Convention on the Transfer of Sentenced Persons (25 May 1987), etc. In general, recommendations of the Council of Europe on the matter always mention the importance of the social rehabilitation of sentenced persons and to that end the transfer of such persons to the country of their own society. See Preamble of Recommendation R (92) 18, concerning the practical application of the Convention on the Transfer of Prisoners (adopted by the Committee of Ministers on 19 October 1992).

<sup>2</sup>F. McNeill, 'A desistance paradigm for offender management', *Criminology and Criminal Justice*, Vol. 6, No. 1, 2006, pp. 39-62.

<sup>3</sup>See A. Tarzi & J. Hedges, *A Prison Within a Prison*, Inner London Probation Service, London, 1990; P. Green, *Drug Couriers*, Howard League for Penal Reform, London, 1991; A. Tarzi. & J. Hedges, *A Prison Within a Prison - Two Years On: An Overview*, Inner London Probation Service, London, 1993; R. Ellis, *Asylum-Seekers and Immigration Act Prisoners - The Practice of Detention*, Prison Reform Trust, London, 1998; P. Green, *Drugs, Trafficking and Criminal Policy - the Scapegoat Policy*, Waterside Press, Winchester, 1998; C. Pourgourides, S.P. Sashidharan & P.J. Bracken, *A Second Exile: the Mental Health Implications of Detention of Asylum Seekers in the UK*, North Birmingham Mental Health Trust, Birmingham, 1996; H.S. Bhui, *Going the distance: Developing effective policy and practice with foreign national prisoners*, Prison Reform Trust, London, 2004; H.S. Bhui, 'Foreign National Prisoners: Issues and Debates', in H.S. Bhui (Ed), *Race and Criminal Justice*, Sage, London, 2009, pp. 154-169; M. Knapen, 'Implementation of Framework Decisions on the Enforcement of Foreign Criminal Judgments: (How) Can the Aim of Resocialisation be Achieved?', in M. Groenhuijsen, T. Kooijmans & T. de Roos (Eds), *Fervet Opus. Liber Amicorum Anton van Kalmthout*, Maklu, Apeldoorn-Antwerp-Portland, 2010, pp. 118-120; T. Ugelvik, 'The Incarceration of Foreigners in European Prisons', in S. Pickering & J. Ham (Eds), *The Routledge Handbook on Crime and International Migration*, Routledge, London and New York, 2014, pp. 107-120.

<sup>4</sup>See T. Ugelvik, 'Seeing Like a Welfare State: Immigration Control, Statecraft, and a Prison with Double

consequence, foreign prisoners are often not able to exercise their formally equal rights.<sup>5</sup> It seems reasonable to conclude that a transfer to their home country would reduce the harm caused by their deprivation of liberty and promote social rehabilitation. This policy is also rooted in humanitarian considerations.<sup>6</sup>

The *ad hoc* legal instrument for the transfer of prisoners across the European Union is 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'). Its declared purpose is also to facilitate the social rehabilitation of the sentenced person (Article 3(1)). Again, the driving rationale behind this declaration is that allowing foreign prisoners to serve their sentence close to home improves their chances of social rehabilitation, since its objective is to transfer them to the society to which they will return after punishment.

Under the provisions of the Framework Decision, the consent of the sentenced person to the transfer will not be required when the transfer takes place to further the social rehabilitation of the person involved (Article 6). In particular, the consent of the sentenced person is not required when: (1) the person is a national of the executing state and also lives there; (2) the person is to be deported to the executing state on completing their sentence; and (3) the person has fled or otherwise returned there in response to the criminal proceedings. His or her opinion will be obtained when deciding the issue of forwarding the judgment together with the certificate, but it can be dismissed if the is-

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Vision', in K.F. Aas & M. Bosworth (Eds), *The Borders of Punishment. Migration, Citizenship, and Social Exclusion*, Oxford University Press, Oxford, 2013, p. 183.

<sup>5</sup> A.M. van Kalmthout, F. Hofstee-van der Meulen & F. Dünkel, *Foreigners in European prisons*, Wolf Legal Publishers, Nijmegen, 2007, p. 17.

<sup>6</sup> M. Plachta, *Transfer of Prisoners under International Instruments and Domestic Legislation*, MPICC, Freiburg, 1993, pp. 150, 153, 158-159, 166-167 and 206, 'Human Rights Aspects of the Prisoner Transfer in a Comparative Perspective', *Louisiana Law Review*, Vol. 53, No. 4, 1993, pp. 1043-1089, and 'Prisoner Transfer within the European Union: the European Enforcement Order and Beyond', in N. Keijzer & E. van Sliedregt (Eds), *The European Arrest Warrant in Practice*, T.M.C. Asser, The Hague, 2009, p. 360; A.M.M. Orie, 'Problems with the effective use of prisoner transfer treaties', in R. Atkins (Ed), *The alleged transnational offender*, Martinus Nijhoff Publishers, The Hague, 1993, pp. 59-67; D. van Zyl Smit, 'International imprisonment', *International and Comparative Law Quarterly*, Vol. 55, Issue 2, 2005, p. 364; E. De Wree, T. Vander Beken & G. Vermeulen, 'The transfer of sentenced persons in Europe', *Punishment and Society*, Vol. 11, No. 1, 2009, p. 117; Knapen 2010, pp. 118-121; D. van Zyl Smit & R. Spencer, 'The European dimension to the release of sentenced prisoners', in N. Padfield (Ed), *Release from prison*, Willan, Cullompton, 2010, p. 36; R. Mulgrew, 'The International Movement of Prisoners', *Criminal Law Forum*, Vol. 22, No. 1, 2011, pp. 111 and 139-140.



suings state has satisfied itself that such a transfer furthers the social rehabilitation of the prisoner involved. No position is taken on if and how the issuing state must assess this. More importantly, the Framework Decision does not provide the sentenced person whose consent is unnecessary with a remedy against the decision to forward the judgment.

Compared with the previous situation under the 1983 Council of Europe Convention, this is quite a novelty,<sup>7</sup> even more relevant because the Framework Decision has a significant negative impact on the position of the sentenced person. The change merits a more detailed explanation than has been given so far, because it raises questions with respect to the coherence between the transfer of non-consenting prisoners and the rehabilitation perspective,<sup>8</sup> given that social rehabilitation intrinsically requires the cooperation of the person involved. Therefore, transferring a prisoner without his or her consent could be counter-productive in terms of rehabilitation. Does the decision-making process in the Framework Decision fit the purpose of increasing the prospects of the prisoner's rehabilitation? Is abolishing the requirement of consent consistent with the central position awarded to furthering social rehabilitation? Does it highlight a shift towards an instrumentalisation of the transfer of prisoners to deal with unwanted foreign prisoners who the issuing states want to remove from their territory? Answering these questions requires an analysis that combines three aspects, namely 1) the grounds for abolishing the requirement of consent; 2) the rehabilitation perspective; and 3) the compatibility between transferring non-consenting prisoners and the declared purpose of their transfer being that of social rehabilitation. The following sections will introduce these topics.

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<sup>7</sup> As such, it has been stressed in all related official documents. See the report from the Commission to the European Parliament and the Council on the implementation by the Member States of 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 of 5.2.2014, 12, p. 7, where reference is made to the member states' declarations. It has also been underlined in literature. See Knapen 2010, p. 113; W. de Bondt & A. Suominen, 'State Responsibility When Transferring Non-consenting Prisoners to Further their Social Rehabilitation – Lessons Learnt from Asylum Case Law', *European Criminal Law Review*, Vol. 5, No. 3, 2015, p. 347.

<sup>8</sup> See Knapen 2010, pp. 118 and 123; G. Vermeulen *et al.*, *Material detention conditions, execution of custodial sentences and prisoner transfer in the EU member states*, Maklu, Antwerp, 2011, p. 15; G. Conway, 'Prospects and Problems for European Legal Cooperation Concerning Prisoners', *European Journal of Probation*, Vol. 10, No. 2, 2018, p. 154; A. Martufi, 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA', *New Journal of European Criminal Law*, Vol. 9, No. 1, 2018, pp. 43-61.

## 2. The Grounds for Abolishing the Requirement of Consent

None of the multilateral agreements on the enforcement of foreign penal judgments in the nineteenth century has ever mentioned the offender's consent, with only a minority sector in literature defending that transfer without consent by stating that it could be counterproductive to the declared purpose of rehabilitation.<sup>9</sup> From the 1960s onwards, when the tendency towards transferring foreign prisoners to their home countries strengthened and widened, this position was still very common in international instruments.<sup>10</sup> In the vast majority of multilateral conventions and uniform legislation adopted at that time, the consent of the sentenced person was not required in order to proceed with such a transfer. Nevertheless, the works in international congresses during the second half of the twentieth century reflected a slow but unstoppable change of opinion in the matter. While the Ninth International Congress on Penal Law (The Hague, 1964) only criticised the offender's restricted role in the context of extradition,<sup>11</sup> two decades later, the Thirteenth Congress (Cairo, 1984) emphasised that as long as the offender is imprisoned in the sentencing state, the transfer should only be authorised with his or her consent.<sup>12</sup> This consensus began to accelerate in the 1980s. For example, the Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders (Caracas, 1980) allowed the transfer to take place "either with the prisoner's consent or in his interest",<sup>13</sup> whereas the Model Agreement on the Transfer of Foreign Prisoners adopted just five years later at the Seventh Congress already considered the prisoner's consent indispensable to any transfer (Milan, 1985). As a consequence of this change of mind, the Riyadh Arab Agreement on Judicial Cooperation (Riyadh, 6 April

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<sup>9</sup> See, for example, E. Brusa, 'Report', in AA.VV., *Actes du Congrès pénitentiaire international de Rome, novembre 1885. Publiés par les soins du Comité exécutif. Tome premier*, Mantellate, Rome, 1887, p. 467, and H. Lammasch, *Auslieferungspflicht und Asylrecht*, Duncker & Humblot, Leipzig, 1887, p. 823.

<sup>10</sup> See, for example, the Treaty of Co-operation between Denmark, Finland, Iceland, Norway and Sweden (Helsinki, 23 March 1962), the Law on Cooperation with Finland, Iceland, Norway and Sweden Relating to Enforcement of Penal Sentences (3 May 1963), the Treaty between Belgium, the Netherlands and Luxembourg on the Enforcement of Judgments in Criminal Matters (26 September 1968, which never came into force), the 1970 Validity Convention or the Convention on the Transfer of Persons Sentenced to Imprisonment to Their Home Countries to Serve Their Sentence (19 May 1978).

<sup>11</sup> Resolution III.B of Section 4 adopted at the IX AIDP Congress, retrieved on 15 September 2019 from <http://www.penal.org/en/resolutions-aidp-iapl-congresses>, p. 301.

<sup>12</sup> Resolution 11 of Section 4 adopted at the XIII AIDP Congress, retrieved on 15 September 2019 from <http://www.penal.org/en/resolutions-aidp-iapl-congresses>, p. 349.

<sup>13</sup> Retrieved on 20 September 2019 from <https://www.unodc.org/congress/en/previous/previous-06.html>, resolution 13(1).

1983), the Commonwealth Scheme for the Transfer of Convicted Offenders of 1986 and the 1983 Council of Europe Convention introduced the requirement of the offender's consent.

In the 1983 Council of Europe Convention, the consent requirement was explicitly rooted in the understanding that transferring a prisoner without his or her consent would be counter-productive in terms of rehabilitation, which it declared to be its primary purpose (according to para. 23 of the Explanatory Report, although just in passing). Even so, it was still difficult to speak of a wide acknowledgement of the offender's consent as an integral part of the transfer of prisoners in international multilateral instruments of transfer.<sup>14</sup> In fact, many possible exceptions to the rule of consent were considered reasonable:<sup>15</sup> That the offender's veto might be detrimental to the public interest involved in this international instrument, for example, in cases where it would inevitably lead to impunity;<sup>16</sup> and that consent might be considered unnecessary where the offender is only a visitor who has been in the country for a very short time, with no ties to it, or where a deportation order has been made against the prisoner, so that he or she will be compulsorily returned to the executing country at the end of the sentence. In fact, the most influencing entry point of a new state of opinion was the increase in migration flows from the mid-1980s, with a large percentage of migrants coming from former Eastern bloc states and underdeveloped African, American and Asian countries. In such an international and European context in which it was increasingly common for many foreign prisoners to have no links with the country in which they were sentenced, being compulsorily removed at the end of their sentence, it was only natural that prisoner transfer agreements moved away from the idea that prisoners should consent to the transfer and therefore have the power to exercise an effective veto over the procedure.

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<sup>14</sup> The requirement of consent was severely criticised from the perspective that it was not only a strange body in the legal system governing international legal assistance, but also undesirable from a practical viewpoint and detrimental to the whole prisoner transfer scheme. This reasoning was widespread in German literature. See T. Vogler, 'Zur Rechtshilfe durch Vollstreckung ausländischer Strafurteile', in T. Vogler (Ed), *Festschrift für H.-H. Jescheck zum 70. Geburtstag. Band II*, Duncker & Humblot, Berlin, 1985, p. 1383; F.-Ch. Schroeder, 'Übertragung der Strafvollstreckung', *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 98, No. 2, 1986, p. 460; E. Müller-Rappard, 'The Transfer of Sentenced Persons – Comments on the Relevant Council of Europe Legal Instrument', *Pace International Law Review*, Vol. 3, No. 1, 1991, pp. 160-161.

<sup>15</sup> Plachta 1993, pp. 358-362.

<sup>16</sup> For example, the 1990 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, established that the transfer of enforcement of a penalty involving deprivation of liberty would not require the consent of the sentenced person whenever this person has avoided the enforcement by escaping to his or her own country (Article 69).

Consequently, the requirement of consent in the 1983 Council of Europe Convention was significantly diluted by the Additional Protocol to the Convention on the Transfer of Sentenced Persons (18 December 1997), which signalled a turning point. It allowed for non-consented transfers in particular circumstances. In order to prevent convicted persons who have fled to their state of nationality evading justice due to the prohibition on the extradition of nationals in some domestic legal systems, the Additional Protocol allows these persons to be tried in the administering state without their consent (Article 2). Moreover, acknowledging that the Convention operated on the basis of a three-fold consent – *i.e.* the sentencing state, the administering state and the sentenced person –, the Committee considered that the Convention could operate on the basis of a twofold consent – namely, the consent of both the sentencing state and the administering state – where the person concerned as a consequence of the sentence passed is subject to deportation or expulsion from the sentencing state (Article 3(1)). The need for the offender’s consent was substituted by the offender’s right to be heard by the administering state before the decision on transfer was taken and the requirement of an agreement between both states involved to dispense with the consent of the sentenced person (Article 3(2)). This exception was considered reasonable in terms of rehabilitation as it related to circumstances in which the offender could not start a new life in the sentencing state after punishment.<sup>17</sup> However, the Additional Protocol recognised that there was a significant difference between transferring a sentence to the state to which a prisoner has fled for enforcement purposes, and the involuntary transfer of a prisoner to another state to serve his or her sentence. It therefore enabled the contracting states to opt out of the latter mechanism (Article 3(6)). Non-consented transfers under the Additional Protocol would have to comply with the requirements of Protocol No. 7 to the European Convention on Human Rights (according to para. 30 of the Explanatory Report to the Additional Protocol), which means that prisoners must be given an opportunity to submit reasons against their transfer and to have their cases reviewed with the benefit of representation.

The Framework Decision follows the path of the Additional Protocol and takes the exclusion of the requirement of consent further, while at the same time imposing a duty on the executing state to take charge of sentenced persons.<sup>18</sup> In addition, in much the same way as in the Additional Protocol, the

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<sup>17</sup> See De Wree, Vander Beken & Vermeulen 2009, p. 119. Expressing some doubts, Conway 2018, p. 145. For critical considerations on this aspect, see V. Mitsilegas, ‘The third wave of third pillar law: which direction for EU criminal justice?’, *European Law Review*, Vol. 34, No. 4, 2009, p. 541 *et seq.*

<sup>18</sup> This compulsory system was also included in the proposed 2017 Second Additional Protocol to the 1983 Council of Europe Convention (Article 2.1), not currently in force.

consent of sentenced persons is not required when they flee or stand to be deported or expelled, but it is also not required when they are to be returned to a state party of which they are nationals and in which they live. The change is not limited to Europe in terms of its influence or effect. The Framework Decision states that existing and future bilateral and multilateral agreements entered into by EU member states may only be relied upon insofar as they allow the objectives of the EU Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for enforcing sentences (Article 26). Although it is unclear how this provision will be interpreted in practice, it is implied that it requires the EU member states to pursue ‘no consent’ transfer mechanisms in their agreements with non-EU States.<sup>19</sup> At national level, some countries are increasingly seeking to negotiate bilateral agreements that enable transfers without the offender’s consent.<sup>20</sup> The explicit purpose of this policy is to reduce significantly the foreign prisoner population and thus the burden on the national prison system.<sup>21</sup> Is it possible to pursue this purpose while at the same time furthering the rehabilitation of the transferred foreign offenders? To answer this question, we must first explain how social rehabilitation is to be seen in the context of the Framework Decision.

### 3. *The Rehabilitation Perspective*

‘Social rehabilitation’ is the term historically used in international transfer conventions and now in the Framework Decision. This concept is perceived in various ways in different European countries. Furthermore, it is not defined at European level, with only its contours having gradually been defined in the case law of the European Court of Human Rights.<sup>22</sup> It is clear that a uniformly interpreted, European-wide notion of social rehabilitation could only contribute to a more widespread achievement of the EU objective to become an area

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<sup>19</sup> Cf. Mulgrew 2011, p. 114.

<sup>20</sup> See, for example, the UK and Rwandan Agreement on the Transfer of Sentenced Persons (Kigali, 11 February 2010), para. 9. This agreement also introduces a new condition for transfer, not contained in the UK’s previous bilateral prison transfer agreements, namely the sentenced person must be subject to an order for deportation or removal from the sentencing state.

<sup>21</sup> For the UK, see Hansard Debates HC col 410W, 1 March 2011, parliamentary answer of the Secretary of State for Justice.

<sup>22</sup> S. Meijer, ‘Rehabilitation as a Positive Obligation’, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 25, No. 2, 2017, p. 146. For a definition of rehabilitation according to the sources of international and EU law, see S. Montaldo, ‘Offenders’ Rehabilitation: Towards a New Paradigm for EU Criminal Law?’, *European Criminal Law Review*, Vol. 8, No. 2, 2018, pp. 223-243.

of freedom, security and justice. As we will see, providing such an interpretation may prove challenging, given the great diversity of legal and penological traditions.<sup>23</sup>

In EU law, the meaning of social rehabilitation corresponds today more closely to ‘reintegration’, seen as the offender’s re-entry into society following imprisonment, than to the classical understanding of ‘rehabilitation’ as a process of internal change.<sup>24</sup> Recital 9 of the Preamble to the Framework Decision offers some guidance on which aspects need to be considered, even though it does not explicate the concept:

the competent authority of the issuing State should take into account such elements as, for example, the person’s attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State.

This understanding is coherent with both Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe to member states on the European Prison Rules<sup>25</sup> and the United Nations Standard Minimum Rules for the Treatment of Prisoners (hereinafter, the ‘Mandela Rules’),<sup>26</sup> according to which prisoners should be allocated “to the extent possible, to prisons close to their homes or their places of social rehabilitation” (Rule 17(1) of the European Prison Rules and Rule 59 of the Mandela Rules), and allowed “to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons” (Rule 24(1) both of the European Prison Rules and of the Mandela Rules). Case law of the European Court of Human Rights repeatedly stresses that states’ authorities should assist prisoners in maintaining effective contact with close family members as an im-

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<sup>23</sup> See Knapen 2010, p. 123, and A. Martufi, ‘The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?’, *Maastricht Journal of European and Comparative Law*, Vol. 25, No. 6, 2018, p. 673.

<sup>24</sup> De Wree, Vander Beken & Vermeulen 2009, p. 112; Meijer 2017, pp. 160-161. In the European instruments, ‘rehabilitation’ is an all-encompassing term, often used interchangeably with ‘reintegration’. We will do the same, although we are aware that there are differences between the two.

<sup>25</sup> Adopted by the Committee of Ministers of the Council of Europe on 11 January 2006 at the 952<sup>nd</sup> meeting of the Ministers’ Deputies. The emphasis placed on managing detention “so as to facilitate the reintegration into free society of persons who have been deprived of their liberty” (Rule 6) has strongly influenced the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>26</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, and revised by the United Nations General Assembly on 17 December 2015 after a five-year process.

portant means to facilitate re-entry after release.<sup>27</sup> According to this understanding, pursuing social rehabilitation with regard to the transfer of foreign prisoners means that such transfers should help to establish or restore offenders' societal and family bonds in their home country, which improve the likelihood of successful re-entry.<sup>28</sup>

However, social rehabilitation also refers to assisting with the moral, vocational and educational development of the imprisoned individual via working practices and educational, cultural and recreational activities. It includes addressing the special needs of offenders with programmes covering a range of problems, such as substance addiction, mental or psychological conditions, anger and aggression, amongst others, which may lead to re-offending behaviour. In this sense, the Mandela Rules mention that prisoners should be offered education, vocational training and work, as well as other forms of assistance that are appropriate and available, including those of a remedial, moral, spiritual, social and health and sports-based nature (Rule 4(2)). The European Prison Rules also pay attention to social work, medical and psychological care and education of sentenced prisoners (Rules 103 to 106). Similarly, Recommendation Rec(2000)22 of the Committee of Ministers of the Council of Europe to member states on improving the implementation of the European rules on community sanctions and measures highlights that special attention should be given to basic skills (e.g. basic literacy and numeracy, general problem solving, dealing with personal and family relationships, pro-social behaviour), educational or employment situation, possible addiction to drugs, alcohol, medication and community-oriented adjustment when designing programmes and interventions in the context of community sanctions and measures. The idea that providing prisoners with a real opportunity for rehabilitation requires them to be allowed to engage in work or education is also present in the case law of the European Court of Human Rights, which consistently demands that contacts with the outside world be supported by a comprehensive set of pro-

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<sup>27</sup> Cases *Messina v. Italy* (no. 2), Judgment of the Court (Second Section) of 28 September 2000, para. 61-62; *Lavents v. Latvia*, Judgment of the Court (First Section) of 28 November 2002, para. 139.

<sup>28</sup> D. MacKenzie, 'The impact of formal and informal social controls on the criminal activities of probationers', *Journal of Research in Crime and Delinquency*, Vol. 39, No. 3, 2002, pp. 243-376; S. De Li & D. Layton MacKenzie, 'The gendered effects of adult social bonds on the criminal activities of probationers', *Criminal Justice Review*, Vol. 28, No. 2, 2003, pp. 278-298; J. Hepburn & M. Griffin, 'The effect of social bonds on successful adjustment to probation: An event history analysis', *Criminal Justice Review*, Vol. 29, No. 1, 2004, pp. 46-75; van Zyl Smit 2005; M. Maguire & P. Raynor, 'How the resettlement of prisoners promotes desistance from crime: Or does it?', *Criminology and Criminal Justice*, Vol. 6, No. 1, 2006, pp. 19-38; De Wree, Vander Beken & Vermeulen 2009, p. 122. Explaining that family background and social capital in the home state may better serve relapse into crime than rehabilitation, which calls for a case-by-case analysis instead of generalisation, see I. Wieczorek, 'EU constitutional limits to the Europeanization of punishment: A case study on offenders' rehabilitation', *Maastricht Journal of European and Comparative Law*, Vol. 25, No. 6, 2018, p. 659.

grammes aimed positively at rehabilitating the offender.<sup>29</sup> It appears, however, that this criterion has not been considered in the Framework Decision, even though literature consistently underlines its importance,<sup>30</sup> maintaining that the transfer should improve foreign prisoners' access to treatment and assistance,<sup>31</sup> particularly if there are language barriers<sup>32</sup> or major cultural differences.<sup>33</sup> The Framework Decision simply assumes that possibilities of training, education and work are usually greater in the prisoner's own country.

A similar situation occurs with post-release services and supervision. Following their release, offenders face a range of social, economic and personal challenges that may become obstacles to a crime-free lifestyle, such as securing suitable accommodation with very limited means, surviving financially with little or no savings until they begin to earn wages and access services and support for their specific needs. Research on the variables that influence successful reintegration has revealed the interdependence of employment, housing, addiction treatment and social network support.<sup>34</sup> In the absence of material, psychological and social support during this transitional period, many offenders are likely to become trapped in a vicious cycle of release and re-arrest. The Mandela Rules contain a strong reminder that "the duty of society does not end with a prisoner's release" (Rule 90) and emphasise the need for efficient aftercare to be delivered by both governmental and non-governmental entities (Rule 108). The European Prison Rules also recommend close cooperation between prison authorities, services, and agencies that supervise and assist released prisoners to enable them to re-establish themselves in the com-

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<sup>29</sup> Cases *James, Wells and Lee v. United Kingdom*, Judgment of the Court (Four Section) of 8 September 2012, para. 218; *Khoroshenko v. Russia*, Judgment of the Grand Chamber of 30 June 2015, para. 122 and 144; and *Harakchiev and Tolumov v. Bulgaria*, Judgment of the Court (Four Chamber) of 8 July 2014, para. 265.

<sup>30</sup> E. Rotman, 'Beyond punishment', in A. Duff & D. Garland (Eds), *A Reader on Punishment*, Oxford, Oxford University Press, 1994, pp. 281-305; G. Robinson, 'Late-modern rehabilitation: The evolution of a penal strategy', *Punishment and Society*, Vol. 10, No. 4, 2008, pp. 429-445; R. Canton, *Why punish? An Introduction to the Philosophy of Punishment*, Palgrave MacMillan, London, 2018.

<sup>31</sup> See van Kalmthout, Hofstee-van der Meulen & Dünkel 2007; De Wree, Vander Beken & Vermeulen 2009, pp. 121-122.

<sup>32</sup> See Bhui 2004, p. 10; Ugelvik 2014, pp. 114-115.

<sup>33</sup> De Wree, Vander Beken & Vermeulen 2009, p. 122.

<sup>34</sup> See D. Banks & D.C. Gottfredson, 'The Effects of Drug Treatment and Supervision on Time to Rearrest among Drug Treatment Court Participants', *Journal of Drug Issues*, Vol. 33, No. 2, 2003, pp. 385-412; C.A. Visher, L. Winterfield & M.B. Coggeshall, 'Ex-offender Employment Programs and Recidivism: A Meta-analysis', *Journal of Experimental Criminology*, Vol. 1, No. 3, 2005, pp. 295-315; S.J. Bahr *et al.*, 'Successful reentry: what differentiates successful and unsuccessful parolees?', *International Journal of Offender Therapy and Comparative Criminology*, Vol. 54, No. 5, 2010, pp. 667-692.



munity (Rule 107(4)). In this sense, the issuing state might have better structures and resources to finance post-release services. However, again, this criterion has not been considered in the Framework Decision, which does not even mention post-sentencing alternatives for assisting offenders in their reintegration into society.

In summary, it is commonly accepted that using a rehabilitation perspective implies that the prisoners' societal and family bonds must be established, maintained or restored in order to increase their chances of reintegration, but also that prison-based treatment and assistance and post-release services provided to former prisoners are considered important to diminish the risk of recidivism. "The chosen interventions when focusing on rehabilitation are, therefore, treatment, assistance and the stimulation of societal bonds".<sup>35</sup> However, the Framework Decision only focuses on facilitating the social circumstances required for the full re-entry of sentenced persons into the community to which they belong. It fails to guarantee offenders' access to prison-based rehabilitation programmes and re-entry assistance. It also fails to consider that reintegration not only concerns societal and family ties, but also employment, education, mental healthcare, drug abuse treatment, and so on.

Last but not least, the Framework Decision does not take into account that the offenders' active and meaningful engagement with the requirements of an order and its prescribed purposes is the more direct link between effective enforcement, long-term compliance and reduced recidivism.<sup>36</sup> Given that social rehabilitation intrinsically requires the cooperation of the person involved, whenever a transfer is decided upon without the offender's consent, even to the country of origin, nationality or residence, there are reasons to doubt that the chances of rehabilitation can really be enhanced.<sup>37</sup> After all, although the

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<sup>35</sup>De Wree, Vander Beken & Vermeulen 2009, p. 115. See another conceptualisation of rehabilitation, from the perspective that a sentence served in the community against which the offence was committed is more rehabilitative, in Conway 2018, p. 154.

<sup>36</sup>T.R. Tyler, 'Procedural justice, legitimacy, and the effective rule of law', in M. Tonry (Ed), *Crime and justice. A review of research. Volume 30*, University of Chicago Press, Chicago, pp. 431-505; F. McNeill & G. Robinson, 'Liquid legitimacy and community sanctions', in A. Crawford & A. Hucklesby (Eds), *Legitimacy and Compliance in Criminal Justice*, Routledge, London, 2013, pp. 116-137; T. McCulloch, 'Beyond compliance: Participation, co-production and change in justice sanctions', *European Journal of Probation*, Vol. 7, No. 1, 2015, pp. 40-57.

<sup>37</sup>De Wree, Vander Beken & Vermeulen 2009, pp. 118 and 124; Mitsilegas 2009, p. 541; Knapen 2010, p. 123; G. Vermeulen *et al.*, *Cross-border execution of judgments involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures*, Maklu, Antwerp-Apeldoorn-Portland, 2011, p. 15; G. Vermeulen, 'Material Detention Conditions and Cross-border Execution of Custodial Sentences in the EU', in European Commission, *Framework Decisions on the Transfer of Prisoners and on Probation, Abstracts*, European Commission, 2012, pp. 111-112; L. Mancano, 'The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters', *Cambridge Yearbook of European Legal Studies*, Vol. 18, 2016, pp. 231-232; Martufi 2018a, p. 43.

expression of consent should not be overvalued, it is usually “taken to be an indication of a willingness to comply and indeed to cooperate actively”.<sup>38</sup> A lack of consent may create frustration and disappointment within offenders, which may in turn negatively reflect in their behaviour. This is particularly true in the context of supervisory measures applied to community sanctions, probation, parole, conditional release and suspended sentences, as some degree of co-operation on the part of the offender is essential to their meaningfulness and effectiveness. Is it possible to further social rehabilitation whilst imposing a transfer upon a non-consenting offender? Or are there other aims at stake?

#### **4. Social Rehabilitation through Non-Consented Transfers?**

As seen in the previous section, the Framework Decision uses a very limited notion of rehabilitation as the goal of transferring foreign prisoners, strictly related to the maintenance of societal and family bonds to facilitate re-entry into the society to which they belong. Even within this strict concept, “the evidence for this is not clear”.<sup>39</sup> In fact, the Framework Decision gives the impression that the focus has shifted from the perspective of offenders’ rehabilitation to that of the issuing states wanting to remove foreigners from their prisons.<sup>40</sup> They needed an instrument that was not rigid, slow and bureaucratic in its practical application, unlike the previous 1983 Council of Europe Convention.<sup>41</sup> Therefore, the Framework Decision “provides for a faster and more streamlined procedure than the Council of Europe instruments”.<sup>42</sup> The Framework Decision is based on the principle of mutual trust, founded on the presumption that member states respect fundamental rights throughout the Union.<sup>43</sup> Such a presumption calls for a high degree of automaticity, which, in

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<sup>38</sup> Canton 2018, p. 220.

<sup>39</sup> Conway 2018, p. 154.

<sup>40</sup> See G. Vermeulen, ‘Mutual instrumentalization of criminal and migration law from an EU perspective’, *European Journal of Migration and Law*, Vol. 9, No. 3, 2007, p. 353; De Wree, Vander Beken & Vermeulen 2009, p. 117; Mitsilegas 2009, p. 541 *et seq.*; Knapen 2010, p. 122; V. Mitsilegas, *EU after Lisbon. Rights, Trust and the Transformation of Justice in Europe*, Hart, Oxford and Portland, Oregon, 2016, p. 222; S. Neveu, *Le transfert de l’exécution des peines privatives et restrictives de liberté en droit européen. À la recherche d’un équilibre entre intérêts individuels et collectifs*, Anthemis, Limal, 2016, p. 440.

<sup>41</sup> J.C. Froment, ‘Les avatars de la Convention sur le transfèrement des détenus en Europe’, in J. Céré (Ed), *Panorama européen de la prison*, L’Harmattan, Paris, 2002, pp. 131-132.

<sup>42</sup> European Agency for Fundamental Rights, *Criminal detention and alternatives: fundamental rights in EU cross-border transfers*, Publications Office of the European Union, Luxembourg, 2016, p. 28.

<sup>43</sup> This presumption has been highly contested over recent years. See V. Mitsilegas, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State

turn, grants discretion to the issuing state when deciding on the transfer and the dispensation of the offender's consent in some cases, as well as narrows the grounds upon which the executing state may decline to enforce a sentence.

Of course, one could say that dispensing with the offender's consent may merely be related to the fact that the greater the similarity between the criminal systems, traditions and policies of the concerned states, the less reason there may be to afford the sentenced person an enforceable right to challenge a decision to transfer him or her.<sup>44</sup> The offender's veto might be considered detrimental to the interests of the EU and, perhaps more importantly, those of the issuing states. The EU's interests can be encapsulated in the need to enhance the effectiveness of the activity of law enforcement agencies and judicial authorities across Europe to compensate the absence of a genuine European area of criminal law, as both substantive and procedural criminal law largely remains national, and to reduce the risk of impunity that may result as a consequence of the increased mobility of EU citizens across borders.<sup>45</sup> The interests of the issuing states are centred around reducing prison costs and protecting victims and the general public.<sup>46</sup> The problem is that these interests are not seen as something that can be achieved *through* rehabilitation – which reduces prison costs and protects victims and the public by reducing reoffending – but as distinct objectives that may be contradictory with the social rehabilitation of offenders.<sup>47</sup>

From the viewpoint of social rehabilitation, the prisoner's consent before a transfer can take place is a positive requirement. We should not forget that the underlying but central thrust of the transfer of prisoners is a humanitarian attempt to assist them in readapting to society. Individuals are the primary beneficiaries – not states. The fact that the repatriation of sentenced persons may

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Cooperation to the Slow Emergence of the Individual', *Yearbook of European Law*, Vol. 31, Issue 1, 2012, pp. 319-372; T.P. Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions', *Maastricht Journal of European and Comparative Law*, Vol. 25, No. 6, 2019; and the case law of the Court of Justice of the European Union, especially on the European Arrest Warrant Framework Decision (*see* Montaldo's chapter in this book).

<sup>44</sup> The increased automaticity of the transfer procedure is "premised on the presumption that fundamental rights are respected fully across the European Union", according to Mitsilegas 2016, p. 126. It is also associated with international comity to non-inquiry, since legality and legitimacy are presupposed to exist *ipso iure* and are thereby removed from judicial testing.

<sup>45</sup> *See* van Zyl Smit & Spencer 2010, pp. 36-37; Martufi 2018a, p. 48.

<sup>46</sup> The Framework Decision does not mention the purpose of protecting the victims and the general public, but other mutual recognition instruments contain explicit reference to it. *See* Recital 24 of 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 (OJ L 337, 16.12.2008, pp. 102-122).

<sup>47</sup> *See* Vermeulen 2007, p. 353.

be in the best interests not only of them but also of the states concerned should not lead to a different prioritisation of interests. Whenever these interests collide, offenders' rehabilitation should come first. This does not happen in the Framework Decision. The procedure has been designed to serve the interests of the issuing state rather than those of the individuals affected by the transfer,<sup>48</sup> or even those of the executing state. It is up to the issuing state to decide whether the transfer is in the best interest of the sentenced person. In addition, the executing state has to recognise and enforce the judgment if the sentencing state forwards it – except when there are formal grounds for refusal (Article 9), and the consent of the home country can be dispensed with in cases of enforcement of a sentence imposed on a national residing in the state of nationality or awaiting expulsion or deportation towards it. The fact that the transfer may take place, *inter alia*, when the executing state is that in which the sentenced person lives (Article 6(2)) is based upon the presumption that social rehabilitation will be more successful in the executing state. Within the EU, however, which is based on the principle of free movement of persons, it is perfectly conceivable that an offender will want to return to a foreign society because he or she wants to settle there with a view to work, a relationship, etc.,<sup>49</sup> as the offender has lived there for most of his or her life, or simply because his or her family is entitled to remain there. For this reason, it is reasonable to listen to the sentenced person. A transfer without the offender's consent may violate Article 8 of the European Convention on Human Rights (hereinafter, the 'European Convention'), which protects the right to private and family life. Certainly, such interference with family life may be justified if the decision is made in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others (Article 8(2) of the European Convention). Nevertheless, states should consider a large number of factors already outlined by the European Court: the nature and seriousness of the offence committed by the prisoner; the length of time the prisoner has spent in the country; the prisoner's conduct in prison; the nationalities and situation of the prisoner's family; the length of any marriage and whether it has produced children, and if so, their ages; whether the couple lead a real and genuine family life; and the difficulties a spouse

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<sup>48</sup>This can be seen not only in the regulation of consent. For example, the system's cost-effectiveness is an important factor. The transfer of a prisoner is costly, and the considerable expenses incurred by the states concerned must therefore be proportionate to the purpose to be achieved, which excludes recourse to a transfer where the person concerned only has a short sentence to serve, even if this could further his or her social rehabilitation.

<sup>49</sup>Knapen 2010, p. 117.

would face in the prisoner's country of origin.<sup>50</sup> The Framework Decision does not guarantee that all these aspects will be considered by the issuing and the executing state when making their decision.

Furthermore, prison conditions may pose a challenge to the possibilities of social rehabilitation.<sup>51</sup> The lack of rehabilitative prospects due to deficiencies in detention conditions should constitute grounds for non-transfer under the Framework Decision,<sup>52</sup> which includes general respect of the fundamental rights clause (Article 3(4)). It does not. The problem here is that the issuing state may not be interested in undertaking such a 'specific and precise' analysis as required by the Court of Justice of the European Union in the context of the European Arrest Warrant,<sup>53</sup> particularly if it has problems with prison overcrowding or is concerned with financial costs linked to maintaining foreign citizens in prison. The Framework Decision does not impose this check, clearly relying on the assessment made by the issuing state. Perhaps considering that the executing state would not want to address the inadequate conditions of its prison system, the intervention of the executing state in this assessment is not required, as there is no need for an exchange of information between judicial authorities, even though the possibility of pre-transfer consultations provides some room for an informal exchange of views on this aspect. Nevertheless, the prominent role given to the issuing state can not only constitute a threat to mutual trust,<sup>54</sup> but also nurtures the fear that the transfer can be easily used as a political instrument to expel undesired aliens from the country, already clearly perceptible in the literature.<sup>55</sup>

Finally, where consent is not a requirement, the protection of the human rights of persons who may be transferred against their will becomes particularly important. The Framework Decision does not consider that the chances of

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<sup>50</sup> See *Boultif v. Switzerland* App. No. 54273/00 (2 August 2001), para. 48, and *Amrollahi v. Denmark* App. No. 56811/00 (11 July 2002), para. 35.

<sup>51</sup> See Vermeulen *et al.* 2011, p. 15; Martufi 2018a, p. 43; M. Pleić, 'Challenges in cross-border transfer of prisoners: EU framework and Croatian perspective', in D. Duić & T. Petrašević (Eds), *EU Law in Context – Adjustment to Membership and Challenges of the Enlargement*, University Josip Juraj Strossmayer, Osijek, 2018, p. 381; Marguery 2019, pp. 714-715.

<sup>52</sup> De Wree, Vander Beken & Vermeulen 2009, p. 119. At least, whenever detention conditions are so appalling that they result in inhuman and degrading treatment, prohibited by Article 4 of the European Convention.

<sup>53</sup> Judgment of 5 April 2016 in *Joined Cases C-404/15 and C-659/15 PPU, Pál Aranyosi and Robert Căldăraru*, [2018] ECLI:EU:C:2016:198.

<sup>54</sup> As underlined by S. Montaldo, 'Judicial Cooperation, Transfer of Prisoners and Offenders' Rehabilitation: No Fairy-tale Bliss. Comment on Ognyanov', *European Papers*, Vol. 2, Issue 2, 2017, p. 718.

<sup>55</sup> See Vermeulen 2007, p. 353; De Wree, Vander Beken & Vermeulen 2009, p. 117; Knapen, 2010, pp. 122-123; Mulgrew 2011, p. 141; Mitsilegas 2016, p. 222; Neveu 2016, p. 440; Pleić 2018, pp. 380-381; Marguery 2019, p. 716.

social rehabilitation in the state to which the prisoner is transferred may not be as good as those in the issuing state. Certainly, the judicial cooperation mechanism should not be initiated if the offender's prospects of social rehabilitation are better in the issuing state. A transfer should be promoted only if the issuing state is satisfied that enforcing the sentence in the executing state will enhance the offender's chances of social rehabilitation.<sup>56</sup> However, prisoners whose consent is not necessary do not have the opportunity to file a complaint in this regard, given that the Framework Decision does not envisage a right to appeal the forwarding decision in the issuing state, which not all member states grant.<sup>57</sup> Even if they had such a right, prisoners may not challenge a decision to transfer them to a member state with poorer detention conditions if they perceive that the transfer could contribute to the reduction of the time spent behind bars.<sup>58</sup> Moreover, the case law of the European Court of Human Rights has ruled out that offenders should enjoy a right to be transferred for rehabilitation purposes, or even a right not to be transferred.<sup>59</sup>

## 5. Concluding Remarks

By abolishing the offender's right to veto, the EU expects to maximise the offenders' chances of social rehabilitation while ensuring the cross-border enforcement of custodial sentences and measures involving deprivation of liberty. However, as De Wree *et al.* have correctly pointed out,<sup>60</sup>

[t]he fact that consent is considered to be an obstacle may indicate that offenders do not feel that transfer is of benefit to their reintegration, or that it is in any way a favour.

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<sup>56</sup> See Montaldo 2017, p. 716.

<sup>57</sup> European Agency for Fundamental Rights 2016, p. 96.

<sup>58</sup> See 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, pp. 462 ff.

<sup>59</sup> J.D. Mujuzi, 'Legal Pluralism and the convention on the transfer of sentenced person in practice: Highlighting the jurisprudence of the European Court of Human Rights on the transfer of sentenced persons within and to Europe', *The Journal of Legal Pluralism and Unofficial Law*, Vol. 47, No. 2, 2015, p. 324; Martufi 2018a, p. 43. For critical considerations regarding the compatibility of this opinion with the priority attributed in some national constitutions, such as that of Spain, to the aim of offenders' social rehabilitation, see, for instance, M. Baras González, 'La necesaria autorización judicial para el traslado de personas físicas condenadas a penas de prisión entre estados miembros de la Unión Europea', *Revista de derecho UNED*, Vol. 9, 2011, pp. 40-41.

<sup>60</sup> De Wree, Vander Beken & Vermeulen 2009, p. 124.

Further research should be conducted to find out why foreign offenders object to transfers. This was not the aim of our analysis. Our intention was instead to evaluate critically the intended main goal of the Framework Decision and its compatibility with the abolition of consent. It becomes clear from this analysis that the abolition of consent is not completely in line with improving offenders' rehabilitation prospects, nor with the primarily humanitarian – not administrative – aim that should be pursued by the European instrument. Moreover, there is potential for other traditional criminal justice concerns (apart from the social rehabilitation of offenders) to be displaced. In fact, the possibility of transferring non-consenting prisoners is just one of the many loopholes that exist,<sup>61</sup> making it obvious that the EU transfer system is no longer viewed primarily as a legal tool for returning to their home country citizens imprisoned abroad in order to improve their possibilities of rehabilitation, but as an efficient means for removing undesired foreign prisoners from expensive and sometimes overcrowded national prisons.

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<sup>61</sup> There are others. For example, Article 4(1) of the Framework Decision allows the transfer between member states other than the home member state in particular circumstances, which seem to bear no relation to rehabilitation. *See* Conway 2018, p. 154. Article 9(1) k) includes a new optional ground for refusal in cases where the sentence imposes a measure of psychiatric or health care or another involving deprivation of liberty which cannot be executed by the executing state under its legal or healthcare system, which demonstrates that concerns by member states with regard to the potential burdens that mutual recognition in the field would entail for their criminal justice systems prevail over rehabilitation. *Cf.* Mitsilegas 2009, p. 543.

# ***Framework Decision 2008/909/JHA in Context: Interplay with the European Arrest Warrant and (EU) Extradition Law***

Alessandro Rosanò

**Abstract:** *This Chapter analyses the relationship between Framework Decision 2008/909/JHA and other instruments allowing the transfer of sentenced persons in the EU and outside the EU. First, the Chapter focuses on the scope of application of Framework Decision 2008/909/JHA and Framework Decision 2002/584/JHA on the European Arrest Warrant in order to identify and to solve some coordination issues deriving from the overlap between these two acts. In this regard, an analysis of the Italian and Spanish transposing legislation and the case law of the Italian Supreme Court of Cassation is provided. Secondly, the Chapter provides an overview of a recently developed case law (Petruhhin, Peter Schotthöfer & Florian Steiner, Piscioti) concerning the protection of fundamental rights belonging to persons that should be or have been transferred towards third countries. Then, it takes into consideration a very recent judgement (Raugevicius) where the Court held that where an extradition request has been made by a third country for the purpose of enforcing a custodial sentence, the requested Member State is required to ensure that an EU citizen permanently residing in its territory, receives the same treatment as that accorded to its own nationals in relation to extradition. Finally, it is highlighted the role that social rehabilitation played in leading to the solution of both the coordination issues regarding Framework Decision 2008/909/JHA and Framework Decision 2002/584/JHA and the problems related to the transfer of sentenced persons outside the European Union. In this regard, it is argued that social rehabilitation should be finally acknowledged as a general principle of European Union law.*

**Key words:** *European Arrest Warrant, coordination issues, Petruhhin, Raugevicius, social rehabilitation*

SUMMARY: 1. Introduction. – 2. The Relationship between the Framework Decision on the Transfer of Sentenced Persons and the Framework Decision on the EAW in Light of Italian and Spanish Law. – 3. An Overview on the Case Law of the CJEU in the Field of Extradition Law. – 4. *Raugevicius*. – 5. Concluding Remarks.



## 1. Introduction

A problem that may arise when interpreting Framework Decision (FD) 2008/909/JHA concerns its relationships with other law sources. In fact, several sources of international law seem to overlap in the field of transfers of sentenced persons. As clarified under Article 26(1), from 5 December 2011 and as far as the relationships between the Member States are concerned, FD 2008/909/JHA replaces the 1983 European Convention on the Transfer of Sentenced Persons and its 1997 Additional Protocol,<sup>1</sup> the 1970 European Convention on the International Validity of Criminal Judgments,<sup>2</sup> Title III, Chapter 5, of the 1990 Convention implementing the Schengen Agreement,<sup>3</sup> and the 1991 Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences.<sup>4</sup> Subsequent paragraphs 2 and 3 add that the Member States may choose to apply bilateral or multilateral agreements or arrangements in force after 27 November 2008 and to conclude bilateral or multilateral agreements or arrangements after 5 December 2008. The only limit to this choice is that those agreements and arrangements must allow the objectives and the provisions of the FD to be extended or enlarged and to help to simplify or facilitate further the procedures for the enforcement of sentences.

Another significant issue concerns the material scope of FD 2008/909/JHA, as determined in light of the material scope of two other acts adopted in the context of the former third pillar,<sup>5</sup> namely FD 2008/947/JHA on the mutual recognition of judgments and probation decisions<sup>6</sup> and FD 2009/829/JHA on

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<sup>1</sup> European Convention on the Transfer of Sentenced Persons, Strasbourg, 21 March 1983, and Addition Protocol to the Convention on the Transfer of Sentenced Persons, Strasbourg, 18 December 1997, both stipulated in the framework of the Council of Europe. For a comment, see E. Muller-Rappard, 'The Transfer of Sentenced Persons - Comments on the Relevant Council of Europe Legal Instruments', *Pace Yearbook of International Law*, Vol. 3, No. 1, 1991, pp. 155-166 and J. Ddamulira Mujuzi, 'Legal pluralism and the convention on the transfer of sentenced persons in practice: highlighting the jurisprudence of the European Court of Human Rights on the transfer of sentenced persons within and to Europe', *The Journal of Legal Pluralism and Unofficial Law*, Vol. 47, No. 2, 2015, pp. 324-346.

<sup>2</sup> European Convention on the International Validity of Criminal Judgments, The Hague, 28 May 1970, stipulated in the framework of the Council of Europe.

<sup>3</sup> Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ 2000 L 239/19.

<sup>4</sup> Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences, Brussels, 13 November 1991.

<sup>5</sup> See V. Mitsilegas, 'The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?', *European Law Review*, Vol. 34, No. 4, 2009, pp. 523-560.

<sup>6</sup> Council FD 2008/947/JHA, OJ 2008 L 337/102. See H. Kuczyńska, 'Mutual Recognition of Judicial Decisions in Criminal Matters with Regard to Probation Measures and Alternative Sanctions' 2009

the European Supervision Order.<sup>7</sup> It is no surprise that the European Commission defined those three instruments, considered as a whole, as ‘a package of coherent and complementary legislation that addresses the issue of detention of EU citizens in other Member States and has the potential to lead to a reduction in pre-trial detention or to facilitate social rehabilitation of prisoners in a cross border context’.<sup>8</sup> While FD 2008/909/JHA concerns detention measures, FD 2008/947/JHA applies to alternative sanctions, such as those imposing obligations or prohibitions to carry out certain activities, to enter certain places or to meet with certain persons.<sup>9</sup> Instead, FD 2009/829/JHA concerns the surveillance of persons under trial; therefore, it applies to a stage prior to the execution of a judicial decision.

Furthermore, an issue can be identified regarding FD 2002/584/JHA on the European Arrest Warrant (EAW).<sup>10</sup> In fact, an EAW may be issued to obtain the surrender of a person for the purpose not only of prosecuting him/her, but also for executing a sanction or a measure determining the deprivation of personal liberty (EAW *in executivis*). Thus, in this latter case, the scope of application of the FD on the transfer of prisoners and that of the FD on the EAW overlap.

Finally, extradition requests of EU citizens submitted by third States for the purpose of executing a custodial sentence must also be taken into account.<sup>11</sup> Obviously, FD 2008/909/JHA does not apply to those States; therefore, any solutions provided by international agreements concluded with them should be considered. The 1983 European Convention on the Transfer of Sentenced Persons may play a role in this regard. However, in light of recent rulings of the Court of Justice of the European Union (CJEU), consideration must be given

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*Eucrim*, pp. 43-48 and S. Neveu, ‘Probation Measures and Alternative Sanctions in Europe: From the 1964 Convention to the 2008 Framework Decision’, *New Journal of European Criminal Law*, Vol. 4, No. 1-2, 2013, pp. 134-153.

<sup>7</sup> Council FD 2009/829/JHA, OJ 2009 L 294/20. See I. Dumescu, ‘Framework Decisions 2008/947 and 2009/829: state of play and challenges’, *ERA Forum*, Vol. 18, No. 3, 2017, pp. 355-363.

<sup>8</sup> 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, 5 February 2014, p. 4.

<sup>9</sup> However, it may be that an alternative sanction is applied to the sentenced person after he/she has been convicted (for instance, as a consequence of his/her good behaviour). In that event, if a procedure based on Framework Decision 2008/909/JHA has already begun, the certificate should be withdrawn and a new procedure based on Framework Decision 2008/947/JHA should be started.

<sup>10</sup> Council FD 2002/584/JHA, OJ 2002 L 190/1.

<sup>11</sup> On the EU extradition law, in addition to the texts recalled *infra*, see M. Mackarel, S. Nash, ‘Extradition and the European Union’, *The International and Comparative Law Quarterly*, Vol. 46, No. 4, 1997, pp. 948-957.

to the conditions that must be met in order for an extra-EU transfer to take place validly and if a “European” solution, as an alternative to that transfer, may be found.

Thus, elaborating on this background, the purpose of this chapter is to explore the issues concerning the relationship between the FD on the transfer of prisoners and, respectively, the FD on the EAW and EU extradition law. In terms of the former, the relevant provisions of the two FDs are taken into account, with a focus on the Italian and Spanish transposing legislation and the case law of the Italian Supreme Court of Cassation (paragraph 2). As regards the latter, the case law of the CJEU in the field of extradition law (paragraph 3) and, in particular, the *Raugevicius* case concerning the transfer of a European citizen to a third State for the execution of a custodial sentence (paragraph 4) are considered. The concluding paragraph highlights the importance of the function of offenders’ social rehabilitation in solving the aforementioned overlaps and the role that it may play in the future, if it were recognised as a general principle of EU law.

## ***2. The Relationship between the Framework Decision on the Transfer of Sentenced Persons and the Framework Decision on the EAW in Light of Italian and Spanish Law***

Pursuant to Article 1(1) and Article 2(1) of FD 2002/584/JHA, an EAW is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order. It may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or by a detention order for a maximum period of at least twelve months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

Therefore, an EAW may be issued both before the beginning of criminal proceedings and once a decision has been passed, in order to facilitate the execution of a custodial sentence or a measure determining the deprivation of personal liberty (EAW *in executivis*). This raises an issue as both the FD on the transfer of sentenced persons and the FD on the EAW make it possible to achieve the same outcome: that is, to ensure that a subject is transferred from one Member State to another in order to be punished.

The need to coordinate the two FDs is confirmed by what is stated by Article 25 of FD 2008/909/JHA. Pursuant to that Article, “without prejudice to Framework Decision 2002/584/JHA, provisions of this Framework Decision shall apply, *mutatis mutandis*, to the extent they are compatible with provi-

sions under that Framework Decision, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that Framework Decision, or where, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned”.<sup>12</sup>

While Article 5(3) of the FD on the EAW relates to the guarantees to be given by the issuing Member State in particular cases, Article 4(6) concerns a ground for optional non-execution. For the purpose of this chapter, only the latter provision is relevant, as it states that “the executing judicial authority may refuse to execute the European arrest warrant if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law”.<sup>13</sup>

This provision was transposed into the Italian legal system by Article 18(1)(r) of Law 69/2005.<sup>14</sup> Pursuant to that Law, the Court of Appeal competent to rule on the execution of the EAW may refuse its execution if the EAW was issued for the purpose of executing a custodial sentence or a measure determining deprivation of personal liberty and the requested person is an Italian citizen. However, the Court of Appeal must rule that the sanction be applied in Italy, in a manner which is consistent with national law.

In this regard, Article 24(1) of legislative decree 161/2010<sup>15</sup> should be con-

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<sup>12</sup> See also the Preamble at no. 12.

<sup>13</sup> In this regard, a recent ruling of the Court of Justice of the European Union may be taken into account to clarify the meaning of this provision. In the Judgment of 29 June 2017 in *Case 579/15, Popławski*, para. 21-22, the Court held that where a Member State chose to transpose Article 4(6) into its domestic law, the executing judicial authority must take into account the objective of the ground for optional non-execution set out in that provision, which concerns the possibility of increasing the requested person’s chances of social rehabilitation when the sentence imposed on him/her expires. Therefore, the application of that ground for optional non-execution must be preceded by an assessment regarding the execution of the sentence in the executing Member State. This line of reasoning was later confirmed in Judgment of 13 December 2018 in *Case 514/17, Sut*, para. 35, where the Court held that “any refusal to execute a European arrest warrant presupposes an actual undertaking on the part of the executing Member State to enforce the custodial sentence imposed on the requested person.”

<sup>14</sup> See Law 22 April 2005, No. 69, “Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d’arresto europeo e alle procedure di consegna tra Stati membri”, published in the Italian Official Journal of 29 April 2005, No. 98. For a comment, see G. De Amicis, ‘La legge sul mandato europeo d’arresto tra inadeguatezze attuative e incertezze applicative’, *Cassazione penale*, Vol. 45, No. 6, 2005, pp. 1813-1823.

<sup>15</sup> See Legislative Decree 7 September 2010, No. 161, “Disposizioni per conformare il diritto interno alla Decisione quadro 2008/909/GAI relativa all’applicazione del principio del reciproco riconoscimento alle sentenze penali che irrogano pene detentive o misure privative della libertà personale, ai

sidered, under which the provisions of the decree apply also to the execution of a custodial sentence or a measure implying deprivation of personal liberty in the case considered under Article 18(1)(r) of Law 69/2005.

Thus, it can be stated that FD 2008/909/JHA and the transposing legislation have sought to guarantee coordination between the two instruments of judicial cooperation in criminal matters. As far as this issue is concerned, the case law of the Italian Supreme Court of Cassation may be taken into consideration. In fact, over the last few years, the relationship between the two FDs and the two procedures has been a key issue in some cases regarding Article 24(1) of Legislative Decree 161/2010.

According to the Court, the FD on the transfer of sentenced persons aims to integrate the EAW surrender system with specific reference to cases of delivery *in executivis*. In light of Article 25 of the FD, in the event that an Italian citizen must be handed over to another Member State for the execution of a sentence or a measure involving deprivation of liberty, the Court of Appeal is entitled to refuse the surrender provided that the sentence or measure is applied in Italy. For this reason, the procedure for recognising the decision passed by the foreign judicial authority according to the provisions of Legislative Decree 161/2010 is necessary.<sup>16</sup>

Summarising the Supreme Court's reasoning, the transfer of sentenced persons and the EAW are alternative forms of recognition and execution of a judicial decision, characterised by the same rehabilitative purpose, and partly regulated by the same regulatory framework, but originating from a different act of procedural impulse which determines a different channelling and an autonomous progression of the two procedures.<sup>17</sup>

An approach similar to the Italian one has been followed under Spanish law.

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fini della loro esecuzione nell'Unione europea", published in the Italian Official Journal of 1 October 2010, No. 230. For a comment, see V. Ferraris, 'L'implementazione del d.lgs. 161/2010 sul reciproco riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento', *La legislazione penale*, 5 April 2019, <http://www.lalegislationepenale.eu/limplementazione-del-d-lgs-161-2010-sul-reciproco-riconoscimento-delle-sentenze-di-condanna-a-pena-detentiva-un-caso-di-doppio-fallimento-valeria-ferraris/>.

<sup>16</sup> *Ex multis*, Court of Cassation, judgment of 27 May 2014, No. 21912, judgment of 10 November 2016, No. 48046 and judgment of 9 August 2018, No. 38592.

<sup>17</sup> Court of Cassation, judgment of 14 May 2014, No. 20527. The fact that the application of Article 25 of FD 2008/909/JHA may prove difficult is confirmed by Article 29(4), pursuant to which "a Member State which has experienced repeated difficulties in the application of Article 25 of this FD, which have not been solved through bilateral consultations, shall inform the Council and the Commission of its difficulties. The Commission shall, on the basis of this information and any other information available to it, establish a report, accompanied by any initiatives it may deem appropriate, with a view to resolving these difficulties." Under the subsequent paragraph 5, Article 25 might be replaced by more specific provisions, should the Council deem it necessary on the basis of a report presented by the Commission.

Under Article 48(2)(b) of Spanish Law 23/2014,<sup>18</sup> the executing judicial authority may deny the execution of an EAW when the EAW has been issued for the purpose of executing a custodial sentence or a measure determining the deprivation of liberty, if the sentenced person is a Spanish national, unless he/she agrees to serve the sentence or the measure in the issuing Member State. Otherwise, he/she will serve the sanction in Spain. In the event of non-execution of an EAW, the Central Criminal Court shall refer to the national provisions on the transfer of sentenced persons, to avoid impunity on the part of the convict.

Another overlapping issue concerns those situations where the sentenced person has fled the State in which he/she was convicted, finding shelter in the territory of a State where the sanction might be executed following a transfer. The authorities of the sentencing State may resort to an EAW in order to obtain his/her surrender or they might decide to proceed according to FD 2008/909/JHA. This choice requires a careful assessment regarding the place of execution of the sentence and the chances of social rehabilitation in that location. A negative evaluation regarding the State in which the convict has found shelter should lead to the issuance of an EAW, while a positive one should convince the authorities of the sentencing State to opt for a transfer under FD 2008/909/JHA. Despite this, the main issue does not concern the choice of the EAW over the transfer of sentenced persons or vice versa, but the need to avoid the duplication of procedures, involving a waste of time and resources. In this regard, one may consider the case of a person surrendered by one Member State to another after an EAW has been issued, asking to be transferred back to the Member State in which he/she was located due to the particular relationships held by him/her with that Member State.<sup>19</sup>

### ***3. An Overview on the Case Law of the CJEU in the Field of Extradition Law***

It is clear that FD 2008/909/JHA does not apply to those States that are not Members of the European Union. This raises the issue of what regulatory framework should be used for relationships between a Member State and a third State. Furthermore, it may be possible for a Member State to decide not

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<sup>18</sup> Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea, in BOE núm. 282, de 21 de noviembre de 2014, 95437-95593.

<sup>19</sup> See in this regard, Commission Notice - Handbook on how to issue and execute a European arrest warrant, OJ 2017 C 335/1, para. 2.5.2., where the Commission stated that “in certain situations, instead of issuing an EAW for surrender of the person to serve the sentence in the Member State where the sentence was handed down, Framework Decision 2008/909/JHA could be used to execute the sentence in the place where the convicted person resides and might have better chances of rehabilitation.”

to execute a transfer request of a sentenced person presented by the authorities of a third State on the ground that that person has some significant ties to the former State, meaning on the ground that his/her chances of social rehabilitation are higher in the Member State. These problems were addressed by the CJEU in a recent judgment, *Raugevicius*; thus, the purpose of this second part of the chapter is to illustrate the solutions identified by the Court in this case. However, before considering the Court's decisions, it is worth considering the interpretative path followed by the CJEU in other relevant precedents.

As these cases concerned the EAW, it could be helpful to remember a couple of details regarding this instrument of judicial cooperation. The introduction of the EAW through FD 2002/584/JHA represented an innovation from many points of view. Firstly, it overcame the previous model of cooperation, based on extradition agreements.<sup>20</sup> This model, intergovernmental in nature, is based on the role played by national governments in handing over a subject who should have been tried or punished for a crime committed in another State. Due to this, a wide margin of political discretion could be exercised by the authorities of the requested State, should they decide not to comply with the extradition request.

Secondly, the mechanism established through the EAW predetermines exhaustively the grounds for refusing the execution of the EAW, the assessment of which is left to the judicial authorities of the executing Member State.<sup>21</sup>

Thirdly, the EAW makes it possible to surrender citizens of the executing Member State and thereby overcomes the ban on extradition of own nationals, well-rooted in domestic legislations. At the same time, the EAW endows the competent authorities of that State with the power to subordinate the surrender to the condition that the citizen, after being heard, is returned to the executing Member State in order to serve in that location the custodial sentence or the measure determining the deprivation of liberty in the issuing Member State (Article 5(3) of FD 2002/584/JHA). This exception applies not only to citizens, but also to individuals residing in the executing Member State, in line with the non-discrimination principle.<sup>22</sup>

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<sup>20</sup> For an introduction, see E. Guild, L. Marin (Eds), *Still not Resolved? Constitutional Issues of the European Arrest Warrant*, Wolf Legal Publishers, Nijmegen, 2009, N. Keijzer, E. van Sliedregt (Eds), *The European Arrest Warrant in Practice*, Asser Press, The Hague, 2009, M. Fichera, *The implementation of the European Arrest Warrant in the European Union: law, policy and practice*, Intersentia, Cambridge, 2011 and L. Klimek, *European Arrest Warrant*, Springer, Berlin, 2015.

<sup>21</sup> See, generally, L. Bachmaier, 'Mutual Recognition Instruments and the Role of the CJEU: The Grounds for Non-Execution', *New Journal of European Criminal Law*, Vol. 6, No. 4, 2015, pp. 505-526.

<sup>22</sup> On the choice not to extradite one State's own nationals, see Z. Deen-Racsomány, 'The Decline of the Nationality Exception in European Extradition?', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 13, No. 3, 2005, pp. 317-364.

In this regard, a problem has arisen in the case law of the CJEU, regarding extradition requests made by third States to EU Member States regarding individuals who are not citizens of the requested States, but are still European citizens. This raises a number of issues concerning the protection that may be provided to such individuals.<sup>23</sup>

In *Petruhhin*, the Court dealt with the case of an Estonian citizen who had been arrested in Latvia, in relation to whom an extradition request had been made by the Russian Federation for offences concerning illicit drug trafficking. On the basis of a judicial assistance agreement concluded between the Baltic Republics, the Estonian citizen claimed that he enjoyed the same rights as a Latvian citizen and that, therefore, he should not have been extradited. The Latvian authorities claimed that this limitation only operated in favour of national citizens. Some preliminary questions were raised in order to establish whether extradition could take place and what relevance could be given in this regard to the protection of fundamental rights guaranteed by the EU.

For the first time, the CJEU recognised that national extradition rules which introduce a difference in treatment between nationals and citizens of other EU Member States constitute a restriction of the freedom of movement referred to under Article 21 of the Treaty on the Functioning of the European Union (TFEU). However, this restriction may be justified in the event that it is based on objective considerations and is proportionate to the objective pursued, as in the case of the fight against impunity.<sup>24</sup>

This would make it possible to hand the individual over to the requesting State. Nevertheless, according to the Court, it must be verified whether there is an alternative measure, which may prove to be less harmful to the exercise of the rights conferred under Article 21 TFEU and which would make it possible to achieve the relevant purpose – namely, the fight against impunity – in an equally effective manner. In light of the principle of sincere cooperation, the Court emphasises that the solutions provided by EU law through the cooperation and mutual assistance mechanisms in criminal matters should be fa-

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<sup>23</sup> One can see the *aut dedere aut judicare* principle lingering in the background. On this topic, see *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, Merits, Judgment of 20 July 2012, 2012 ICJ Rep. at 422 and International Law Commission, Final Report of the International Law Commission, *The obligation to extradite or prosecute*, 2014. As regards scholarly works, see M.C. Bassiouni, E.M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Martinus Nijhoff Publishers, Dordrecht, 1995.

<sup>24</sup> Judgment of 6 September 2016 in *Case C-182/15, Petruhhin*, published in the electronic Reports of Cases, para. 32-35. For a comment, see M. Böse, 'Mutual recognition, extradition to third countries and Union citizenship: *Petruhhin*', in *Common Market Law Review*, Vol. 54, No. 6, 2017, pp. 1781-1797 and S. Saluzzo, 'EU Law and Extradition Agreements of Member States: The *Petruhhin* Case', *European Papers*, Vol. 2, No. 1, 2017, pp. 435-447. On the fight against impunity in the EU, L. Marin, S. Montaldo (Eds), *The Fight Against Impunity in EU Law*, Hart, Oxford, forthcoming.



voured. In this regard, the choice should fall on the EAW. Therefore, the authorities of the State of citizenship must be informed so as to verify whether they intend to issue an EAW and to prosecute the extraditing subject, if the internal legislation so allows for acts committed abroad. This should guarantee the correct balance between the need to protect European citizens and the fight against impunity.<sup>25</sup>

In the case in question, the Estonian citizen had exercised his freedom of movement, so his situation fell within the scope of application of EU law. Therefore, the Court reiterated its orientation, stating that the provisions of the Charter of Fundamental Rights applied to the case.<sup>26</sup> Reasserting the reasoning already expressed in *Aranyosi and Căldăraru*,<sup>27</sup> the Court held that, when the competent authority of the requested Member State can rely on elements that confirm a real risk of inhumane or degrading treatment in the requesting State, it must assess that risk when deciding on the extradition. To this end, its assessment must be based on objective, reliable, specific and properly updated information. These elements may result in particular from international judicial decisions, such as the judgments of the European Court of Human Rights (ECtHR) and judicial decisions of the requesting State, as well as from decisions, reports and other documents prepared by Council of Europe bodies or those belonging to the United Nations system. Therefore, it is the responsibility of the requested Member State to verify that the extradition will not prejudice the rights of the individual, should he/she be extradited.<sup>28</sup>

*Peter Schotthöfer & Florian Steiner* concerned the case of an Austrian doctor, sentenced *in absentia* to life imprisonment in the United Arab Emirates (UAE). The doctor, living in Austria, was invited to talk about the working conditions and the proceedings brought against him in the United Arab Emir-

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<sup>25</sup> *Petruhhin*, para. 41-42, 47-49.

<sup>26</sup> Judgment of 7 May 2013 in *Case 617/10 REC, Åkerberg Fransson*. See N. Lazzarini, 'Il contributo della sentenza *Åkerberg Fransson* alla determinazione dell'ambito di applicazione e degli effetti della Carta dei diritti fondamentali dell'Unione europea', *Rivista di diritto internazionale*, 2013, pp. 883-912 and B. van Bockel, P. Wattel, 'New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after *Åkerberg Fransson*', *European Law Review*, Vol. 38, No. 6, 2013, pp. 866-883.

<sup>27</sup> Judgment of 5 April 2016 in *Case C-404/15, Aranyosi e Căldăraru*. See G. Anagnostaras, 'Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: *Aranyosi and Caldaru*', *Common Market Law Review*, Vol. 53, No. 6, 2016, pp. 1675-1704. Generally speaking, on how the CJEU has changed its approach to this matter and the role played by the protection of fundamental rights in this regard, see K. Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', *Common Market Law Review*, Vol. 54, No. 3, pp. 805-840 and E. Regan, 'The role of the principles of mutual trust and mutual recognition in EU Law', *Il Diritto dell'Unione europea*, 2018, pp. 231-247.

<sup>28</sup> *Petruhhin*, para. 52, 58-60.

ates at a conference organised by a German law firm. However, not having obtained any guarantee from the Federal Republic of Germany as to a possible handing over to the UAE authorities, he decided not to participate in the event, despite having signed a contract. In the context of the dispute that arose between the law firm and the doctor for breach of contract, some preliminary questions were referred to the CJEU.

Reiterating the approach already taken in *Petruhhin*, the CJEU held that the decision of a Member State to extradite a citizen of the Union, in a situation where the citizen has used his right to move freely from the Member State of which he is a citizen to another Member State, falls within the scope of application of EU law. Therefore, the provisions of the Charter of Fundamental Rights of the European Union apply to such a situation. The Member State must verify that the extradition does not prejudice the rights guaranteed in the EU. Therefore, if there are elements regarding a real risk of inhumane or degrading treatment in the requesting third State, the competent authority of the requested Member State must assess the existence of such risk when deciding on extradition using objective, reliable, precise and properly updated information.<sup>29</sup>

Finally, the *Pisciotti* judgment concerned the incredible case of an Italian citizen, who was ultimately extradited to the United States of America due to some anti-competitive behaviours.<sup>30</sup> He was arrested in Germany while on his way to Italy from Nigeria. According to the CJEU, the case fell within the scope of EU law, given that the extradition request was presented in the context of the EU-US extradition agreement concluded on 25 June 2003 and since Mr Pisciotti had used the right to move freely in the EU.<sup>31</sup> Under Article 17 of the agreement, the requested State maintains the right to provide grounds for refusal concerning a matter not governed by the agreement. Furthermore, the requested State and the requesting State consult each other if the constitutional principles of the requested State may prevent the fulfilment of the extradition obligation. Finally, the extradition treaty concluded between the Federal Republic of Germany and the United States of America should be considered, which provides under Article 7(1), that the contracting

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<sup>29</sup> Order of 6 September 2017 in *Case C-473/15, Peter Schotthöfer & Florian Steiner*. As regards the actual case, the Court held that this risk actually existed, given that the prosecutor had requested the application of the death penalty in the main proceedings brought against the Austrian doctor.

<sup>30</sup> On the so-called *Pisciotti* saga, see G. De Stefano, 'Meet the First Extradited Businessman on Cartel Charges', *Journal of European Competition Law & Practice*, Vol. 8, No. 5, 2017, pp. 281-282.

<sup>31</sup> Judgment of 10 April 2018 in *Case C-191/16, Pisciotti*, para. 32-33. See A. Rosanò, 'Aut dedere aut iudicare, sed iudicare in Europa melius est: il caso Pisciotti e il rapporto tra il mandato d'arresto europeo e gli accordi di estradizione con Stati terzi', *Ordine internazionale e diritti umani*, 2018, pp. 583-595.

parties are not obliged to extradite their citizens. In light of this, according to the Luxembourg Court, a Member State may prohibit the extradition of its own nationals. However, such unequal treatment may be admitted only if it is based on objective considerations and is proportionate to the objective pursued, consisting – in the concrete case – of avoiding the risk of impunity. In this kind of situation, it would not have been possible to identify an alternative and less prejudicial measure than extradition. On one hand, the German authorities could not have brought criminal proceedings against Mr Piscioti for acts committed abroad; on the other hand, Italy had been informed of the matter and had decided not to issue an EAW to obtain the surrender of its citizen, as it would have been difficult to prosecute and punish in Italy the offence committed in the United States.<sup>32</sup>

#### 4. Raugevicius

*Raugevicius* originates from an extradition request based on the European Convention on Extradition<sup>33</sup> submitted by the Russian Federation to Finland for executing a custodial sentence. The individual who was to be extradited, a Lithuanian and Russian national, objected to that request, claiming that he had lived in Finland for a long time and that he had two children, who were Finnish citizens, living in that State. The questions referred for a preliminary ruling sought to establish whether the *Petruhhin* case law could apply even to the case of a person who had already been tried.

As highlighted by Advocate General (AG) Yves Bot in his Opinion, the key to this case is the function of offenders' social rehabilitation. In fact, enforcing the sentence in the Member State where the requested person resides with his/her family helps to bridge the gap between him and the community he/she is going to rejoin after serving his/her sentence. It seems necessary to preserve the social ties that he/she holds with that social environment, as they are likely to further his/her social rehabilitation chances after the custodial sentence has been served. A transfer making it possible for the requested person to be close to that environment may prove helpful in this sense, as it would further the social rehabilitation of the sentenced person.<sup>34</sup>

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<sup>32</sup> *Pisciotti*, para. 46-50, 55.

<sup>33</sup> European Convention on extradition, Paris, 13 December 1957, stipulated in the framework of the Council of Europe. For a comment, see P. O'Higgins, 'European Convention on Extradition', *The International and Comparative Law Quarterly*, Vol. 9, No. 3, 1960, pp. 491-494.

<sup>34</sup> Advocate General Yves Bot in *Case C-247/17, Raugevicius*, published in the electronic Reports of Cases, para. 65-67. At para. 68, the AG underlines that "the weight attached by the EU legislature to the objective of social rehabilitation is expressly confirmed, in particular, by Council Framework De-

In this regard, “nationals of other Member States who have a genuine, stable and lasting connection with the society of the requested Member State are in a situation comparable to that of nationals of the latter Member State”; therefore, they should not be treated differently, as this would amount to discrimination on the grounds of nationality and would prevent the rehabilitation function of the sentence serving as “an equal treatment rule which, as such, is an integral part of the status of Union citizen”.<sup>35</sup>

Thus, according to the AG, the enforcement in Finland of a sentence imposed in Russia might be viable. Firstly, the 1983 Convention on the Transfer of Sentenced Persons allows this. Article 3(1)(a) of the Convention provides that the person to be transferred may be a national of the administering State, while pursuant to Article 3(4), any State may, at any time, by a declaration addressed to the Secretary-General of the Council of Europe, define, as far as it is concerned, the term “national” for the purposes of this Convention. By a declaration filed on 29 January 1987, Finland stated that it understood by that term nationals of the administering State or aliens having their residence in the administering State. Secondly, Finnish law on international cooperation for the enforcement of certain criminal law penalties provides that a sentence imposed by a court of a foreign State may be enforced in Finland if the judgment has become final and is enforceable in the State in which it was delivered, and if the State in which the sentence was imposed has requested or agreed to enforcement.<sup>36</sup>

In light of the *Petruhhin* case law, it should be assessed whether the Member State of origin of the requested subject would be willing to issue an EAW (in this case, *in executivis*) in order to have the subject surrendered to it. However, in view of the connections that an individual might have with another Member State to which he/she has moved, it would make no sense to enforce the sentence in the Member State of origin. Thus, there would be no need to inform the Member State of origin and to issue an EAW. Furthermore, one should make good use of all relevant international cooperation mechanisms, in order to balance the need to fight against impunity against the purpose of the offender’s social rehabilitation.<sup>37</sup>

According to the CJEU, if an extradition request has been made by a third country for an EU citizen who has exercised his right to free movement for the purpose of enforcing a custodial sentence, “the requested Member State, whose

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cision 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, (34) Article 3(1) of which states that the FD’s aim is to ‘facilitat[e] the social rehabilitation of the sentenced person.’”

<sup>35</sup> Advocate General Yves Bot, cit., para. 71-72.

<sup>36</sup> Advocate General Yves Bot, cit., para. 74-77 and 80.

<sup>37</sup> Advocate General Yves Bot, cit., para. 81-82.

national law prohibits the extradition of its own nationals out of the European Union for the purpose of enforcing a sentence and makes provision for the possibility that such a sentence pronounced abroad may be served on its territory, is required to ensure that that EU citizen, provided that he resides permanently in its territory, receives the same treatment as that accorded to its own nationals in relation to extradition".<sup>38</sup>

Although the principle of *ne bis in idem* may be an obstacle to the prosecution by a Member State of persons covered by an extradition request for the purpose of enforcing a sentence, there are mechanisms under national law and/or international law that may be exploited in order to avoid that person going unpunished and his/her chances of social rehabilitation not being diminished. This applies in particular to the Convention on the Transfer of Sentenced Persons.<sup>39</sup>

Considering the aim of preventing the risk of impunity, Finnish nationals and nationals of other Member States who reside permanently in Finland and demonstrate a certain degree of integration into that State's society are in a comparable situation. Thus, it is for the referring court to establish whether Mr Raugevicius falls within that category of nationals of other Member States. In that event, the same treatment must be afforded to the foreign national.<sup>40</sup>

## 5. Concluding Remarks

In this chapter, some issues concerning the relationships between FD 2008/909/JHA and other aspects of EU law have been addressed.

The first part concerned the intersections between FD 2008/909/JHA and FD 2002/584/JHA, with specific regard to the EAW *in executivis*. In considering the relevant provisions of the two FDs, Italian legislation and case law, it has been proven that in circumstances where an Italian citizen must be surrendered to another Member State for the execution of a custodial sentence or a measure involving the deprivation of personal liberty, the competent Court of Appeal may refuse the execution. In that event, the sanction must be carried out in Italy. For this reason, the procedure envisaged under Legislative Decree 161/2010 to recognise the decision passed by the foreign judicial authority must be applied. Therefore, it could be said that the peculiar position deriving from being a citizen justifies the execution of the sentence in Italy, in order to promote the offender's social rehabilitation.

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<sup>38</sup> Case C-247/17, *Raugevicius*, published in the electronic Reports of Cases, para. 51.

<sup>39</sup> *Raugevicius*, cit., para. 35-39.

<sup>40</sup> *Raugevicius*, cit., para. 51.

Also in the *Petruhhin* case, which was considered in the second part of the chapter, the fact of being a citizen – in this case, a European citizen – plays a decisive role. Indeed, the EAW has been identified by the CJEU as a better solution than the surrender of a European citizen to the authorities of a third State. Therefore, this favours the surrender of European citizens to the Member States of their citizenship. The *Raugevicius* ruling led to a further development. The enhancement of the function of the offender's social reintegration makes it possible to resist the request for surrender made by a third State, provided that a peculiar condition is met: the European citizen to be extradited must be a permanent resident of a Member State different from that of citizenship. Such a solution has significant consequences not only on the practical level of extradition procedures, but also on a more theoretical – yet, no less important – one.

Thus, in all cases considered in this chapter the solution was based on the very concept of social rehabilitation and on its application to the procedural issues summarised above. This confirms the importance played by this purpose under EU law, although its nature is highly debated.<sup>41</sup> On one hand, there are elements that would allow for this feature to be recognised as a general principle of EU law. On the other hand, one might acknowledge the existence of a fundamental right<sup>42</sup> and – consequently, given the peculiarities of the EU system of legal sources – of a general principle of EU law.

Generally speaking, it could be said that, to date, the Court of Justice has not acknowledged the principle of social rehabilitation of offenders as a general principle of EU law. The reason for this is not easy to identify, but it is quite probably a normative one. In fact, no specific reference to that principle can be found in the Charter of Fundamental Rights of the European Union or in most of the Member States' constitutions. However, as noted by AG Bot, pursuant to Article 10(3) of the International Covenant on Civil and Political Rights, the penitentiary system shall comprise the treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation. As is known, all EU Member States are parties to the Covenant. It could therefore

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<sup>41</sup> For an introduction, see A. Martufi, 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of FD 2008/909/JHA', *New Journal of European Criminal Law*, Vol. 9, No. 1, 2018, pp. 43-61, S. Montaldo, 'Offenders' Rehabilitation: Towards a New Paradigm for EU Criminal Law?', *European Criminal Law Review*, Vol. 8, No. 2, 2018, pp. 223-243 and P. Faraldo-Cabana, 'One step forward, two steps back? Social rehabilitation of foreign offenders under FDs 2008/909/JHA and 2008/947/JHA', *New Journal of European Criminal Law*, Vol. 10, No. 2, 2019, pp. 151-167.

<sup>42</sup> On this matter, see L. Mancano, 'Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law', *Common Market Law Review*, Vol. 56, No. 1, 2019, pp. 61-90 and S. Montaldo, 'Offenders' rehabilitation in the cross-border transfer of prisoners and persons subject to probation measures and alternative sanctions: a stress test for EU judicial cooperation in criminal matters', *Revista Brasileira de Direito Processual Penal*, Vol. 5, No. 2, 2019, pp. 925-960.

be said that the Covenant expresses some core values that are shared by these States. Therefore, the Court of Justice might recall the Covenant and conclude that social rehabilitation is a general principle of EU law, in that the Member States have agreed on the role it plays in shaping the treatment of prisoners.<sup>43</sup> However, the Court has never commented in this regard.

Some slight yet more significant openings may be found in the case law of the ECtHR. When interpreting Article 3 (prohibition of torture), Article 5(1) (right to liberty and security), and Article 8 (right to respect for private and family life) of the European Convention on Human Rights, the Court has identified in these provisions some possible legal bases for imposing limits and obligations on national authorities in order to promote offenders' social rehabilitation. In particular, the ECtHR has interpreted those provisions as requiring the Contracting Parties to ensure that their prison systems and penal policies provide prisoners with "proper opportunities" for resocialisation.<sup>44</sup> However, this duty is not absolute in nature, as national authorities enjoy a broad margin of discretion. As the ECtHR clarified, this duty "is to be interpreted in such a way as not to impose an excessive burden on national authorities".<sup>45</sup>

Considering how the Italian Supreme Court of Cassation and especially the CJEU used the purpose of social rehabilitation to solve the above issues, it could be said that that purpose has been used to fill some interpretative gaps in a manner consistent with that of a general principle of EU law.<sup>46</sup> Focusing on *Raugevicius*, it should be noted that the CJEU held that the requested Member State must guarantee to the European citizen who is a permanent resident in its territory identical treatment to that given to its own nationals in terms of extradition. This means that the European citizen has the right to receive that treatment from that State. The justification for this solution lies in the social rehabilitation function as a guiding principle, obviously of hermeneutical nature, which makes it possible to fill the regulatory gap connected to the absence of a European extradition rule towards third States. However, this is the typical way in which a general principle of European Union law works as an interpretative tool for overcoming a regulatory impasse.

Therefore, the practice of both Courts seems not only to solve the overlapping issues, but also to provide some significant elements for the recognition of the social reintegration function as a general principle of EU law.

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<sup>43</sup> Judgment of 23 November 2010 in *Case C-145/09, Tsakouridis*, para. 48-50.

<sup>44</sup> See *Harachiev and Tomulov v. Bulgaria*, Application No. 15018/11 and 61199/12, Judgment of 8 July 2014, para. 26.

<sup>45</sup> *Murray v. The Netherlands*, Application No. 10511/10, Judgment of 26 April 2016, para. 110.

<sup>46</sup> However, as far as the Italian legal system is concerned, it should not be forgotten that social rehabilitation of offenders is a constitutional principle (see Article 27(3) of the Italian Constitution).

# ***Framework Decision 2008/909/JHA and Deportation of EU Citizens: Encroaching Different EU Law Tools***

José A. Brandariz

**Abstract:** *A number of legal tools are aimed at returning convicted EU nationals serving their sentences abroad to their countries of origin. Initially, transfer procedures are based on principles of rehabilitation and mutual trust. By contrast, forced return arrangements are disconnected from the framework of cooperation among EU member states and are geared towards reducing the number of foreign prisoners. As is widely known, the provisions of Framework Decision 2008/909/JHA have fallen short of cementing EU-wide judicial cooperation frameworks in criminal matters. This shortcoming should be examined against the backdrop of a burgeoning apparatus of deportation that increasingly targets EU nationals, especially those with criminal convictions. This paper analyses if and to what extent the momentum recently gained by the deportation of EU nationals has contributed to hampering the expected consolidation of a Framework Decision 2008/909/JHA-based prisoner transfer system.*

**Keywords:** *Deportation studies, EU citizens' legal regime, deportation of EU nationals, EU enlargement, crimmigration.*

SUMMARY: 1. Introduction. – 2. The Deportation of EU Nationals: An Introduction. – 3. The Deportation of EU Nationals as an Exceptional Measure: Legal Framework. – 4. The Normalisation of the Deportation of EU Nationals. – 5. Deporting EU Nationals: Xenoracism, ‘Criminal Aliens’ and the Management of Public Order. – 6. Conclusion: The Overlapping of Prisoner Transfer Procedures and Deportation Procedures.

## ***1. Introduction***

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’) aims to promote the cooperation of EU member states in the specific field of the transfer of EU national inmates. This is a



meaningful and sensible piece of legislation, since many EU jurisdictions confine large contingents of foreign prisoners, a significant share of whom are either EU citizens or EU residents. As can be seen in Table 1, in January 2018 no less than 32,266 EU citizens were imprisoned in other EU countries. These EU national inmates accounted for 5.9 per cent of the EU prison population and for 29.9 per cent of the foreign prison population.<sup>1</sup> In relative terms, EU national prison populations are particularly significant in Austria, Cyprus, Germany, and Luxembourg, as well as in Finland, Ireland and the Netherlands.

Table 1. – *EU nationals imprisoned in other EU countries (including pre-trial detainees), 2018*

EU member state	Total EU national prisoners	% Prison population	% Foreign prison population
Austria	1,601	17.9%	32.7%
Belgium	----	----	----
Bulgaria	44	0.6%	23.7%
Cyprus	108	16.8%	42.4%
Denmark	336	9.2%	31.8%
Germany	8,691	13.5%	35.5%
Estonia	41	1.6%	17.8%
Greece	749	7.5%	14.2%
Spain	3,863	6.5%	23.3%
Finland	244	8.7%	49.6%
France	5,704	8.2%	37.1%
Croatia	58	1.8%	20.5%
Czech Republic	638	2.9%	35.2%
Hungary	----	----	----
Ireland	355	9.2%	70.3%
Italy	3,412	5.9%	17.2%
Lithuania	33	0.5%	28.9%
Luxembourg	270	39.5%	54.8%
Latvia	36	1.0%	38.3%
Malta	----	----	----

*Following page*

<sup>1</sup> This implies a certain overrepresentation of EU nationals within European prisons, since the percentage of non-national EU citizens living in EU countries was 3.4 in 2018. The percentage of EU nationals within the EU foreign population, though, was 43.8 in 2018 (source: Eurostat. Population data. Retrieved on 9 August 2019 from <https://ec.europa.eu/eurostat/web/population-demography-migration-projections/data/database>).

Netherlands	748	8.0%	41.3%
Poland	230	9.3%	27.4%
Portugal	383	2.8%	17.9%
Romania	82	0.4%	30.1%
Sweden	389	6.8%	32.9%
Slovenia	59	4.4%	31.2%
Slovakia	80	0.8%	36.5%
United Kingdom	4,112	4.8%	43.4%
TOTAL	32,266	5.9%	29.9%

Source: M.F. Aebi & M.M. Tiago, *SPACE I – 2018 – Council of Europe Annual Penal Statistics: Prison Populations*, Council of Europe, Strasbourg, 2018

Given these significant contingents of EU national prisoners, the transfer of EU national and EU resident inmates (Article 4(7) of the Framework Decision) appears to be a particularly useful legal tool to enable the social rehabilitation of the former prisoner either in the country of his/her nationality or in the country in which he or she lives, as stated by Article 3(1) of the Framework Decision.<sup>2</sup> Its potential meaningfulness is further reinforced by the fact that it follows a path already paved, decades ago, by both bilateral agreements and especially the Council of Europe's Convention on the Transfer of Sentenced Persons of 21 March 1983 (see Faraldo-Cabana, in this volume).<sup>3</sup>

In sharp contrast to this, some years after the transposition of the Framework Decision's provisions into (almost) all 28 national legal orders, this legal instrument appears to have failed to meet its expectations.<sup>4</sup> The utilisation of transfer procedures has had little impact on the management of EU national

<sup>2</sup> See R. Canton, N. Flynn & J. Woods, *Social Rehabilitation Through the Prison Gate*, 2016. Retrieved on 9 August 2019 from <http://steps2.europris.org/wp-content/uploads/2016/07/Annex-4.12.-Workstream-3-Social-Rehabilitation-Through-the-Prison-Gate.pdf>; P. Faraldo-Cabana, 'One Step Forward, Two Steps Back? Social Rehabilitation of Foreign Offenders Under Framework Decisions 2008/909/JHA and 2008/947/JHA', *New Journal of European Criminal Law*, Vol. 10, No. 2, 2019, pp. 151-167; A. Martufi, 'Assessing the Resilience of 'Social Rehabilitation' as a Rationale for Transfer: A Commentary on the Aims of Framework Decision 2008/909/JHA', *New Journal of European Criminal Law*, Vol. 9, No. 1, 2018, pp. 43-61; A. Rosanò, 'Beshkov, or the Long Road to the Principle of Social Rehabilitation of Offenders', *European Papers*, Vol. 3, No. 1, 2018, pp. 433-444.

<sup>3</sup> See G. Vermeulen et al., *Cross-Border Execution of Judgments Involving Deprivation of Liberty in the EU. Overcoming Legal and Practical Problems through Flanking Measures*, Maklu, Apeldoorn, 2011.

<sup>4</sup> See FRA, *Criminal Detention and Alternatives: Fundamental Rights Aspects in Cross-border Transfers*, Publications Office of the European Union, Luxembourg, 2016. Retrieved on 9 August 2019 from [http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2016-criminal-detention-and-alternatives\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-criminal-detention-and-alternatives_en.pdf).

prison populations, to the detriment of rehabilitation purposes. In this sense, the Spanish case is particularly telling. In Spain, the number of EU national prisoners affected by transfer procedures has been insignificant in comparison with that of sentenced EU inmates (*see* Table 2).

Table 2. – *EU national sentenced prisoners and EU national prisoners transferred from Spain to other EU countries under Framework Decision 2008/909/JHA procedures, 2008-2017*<sup>5</sup>

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
<b>Sentenced EU national prisoners</b>	2,829	3,337	3,142	3,121	3,127	3,083	2,968	2,847	2,631	2,489
<b>Transferred EU national prisoners</b>	182	228	220	164	205	172	138	137	96	100
<b>% of sentenced EU prisoners</b>	6.4%	6.8%	7.0%	5.3%	6.6%	5.6%	4.6%	4.8%	3.6%	4.0%

Source: Spanish Prison Office<sup>6</sup>

A variety of reasons may explain why the Framework Decision has not been frequently utilised. Firstly, as explored by other chapters of this collection, there are legal reasons stemming from the inadequate transposition of EU provisions into national legal orders,<sup>7</sup> which in some cases has esta-

<sup>5</sup> These data refer to the Spanish prison administration and do not include, therefore, data of the Catalan prison administration.

<sup>6</sup> Retrieved on 5 August 2019 from [www.institucionpenitenciaria.es/web/portal/documentos/publicaciones.html](http://www.institucionpenitenciaria.es/web/portal/documentos/publicaciones.html). According to the Spanish prison administration, FD 2008/909/JHA transfer procedures began to be carried out in 2015. Previous transfer procedures were governed by bilateral agreements and the Strasbourg Convention.

<sup>7</sup> See Council of the European Union, *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 - Paper by the Presidency*, 2018. Retrieved on 9 August 2019 from <http://db.eurocrim.org/db/en/doc/2206.pdf>; 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 <http://eur-lex.europa.eu/procedure/EN/1041647>; Europris, *The European Organisation of Prison and Correctional Services Expert Group on European Commission Framework Decision 2008/909/JHA - Transfer of Prisoners. Working Group Report 2015*, 2015. Retrieved on 9 August 2019 from [www.europris.org/wp-content/uploads/FD-909-Final-Report.pdf](http://www.europris.org/wp-content/uploads/FD-909-Final-Report.pdf); FRA 2016; Vermeulen *et al.* 2011.

blished onerous requirements for recognising the foreign judgment and enforcing the sentence. Secondly, other motives relate to professional cultures and judicial routines. These reasons are associated with the *habitus* of European judges and magistrates, who essentially operate as sovereign-state authorities that have not, traditionally, been very inclined towards engaging in mutual trust-based international cooperation practices. In addition, EU judicial systems tend to be severely overloaded, and according to the fieldwork research we conducted, those involved in judicial matters view transfer procedures as an additional burden which increases the judicial workload.

Still, this chapter examines an additional aspect that is hampering the generalisation of Framework Decision 2008/909/JHA procedures, namely the overlapping of this instrument with the deportation of EU citizens, a legal tool that is, at least in some member states, closely tied to the criminal justice system and its reaction against crimes perpetrated by foreign nationals. For these purposes, after a brief introduction to this topic, the paper explores the legal framework of the deportation of EU nationals. Next, it examines the increasing use of this migration law enforcement instrument, as well as the different meanings and contours that it has been adopting in various national jurisdictions and its relationship with the criminal justice system. Finally, this article scrutinises the divergent consequences of repatriation and prisoner transfer procedures, before analysing the impact of the supranational and national deportation apparatuses on the operation of Framework Decision 2008/909/JHA practices.

## **2. The Deportation of EU Nationals: An Introduction**

As is widely known, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 (OJ 2008 L 348/98) on common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter, the ‘Return Directive’) has consolidated the critical role played by deportation orders in the management of migrations in the EU. However, the EU has a markedly unbalanced deportation system, in which a small number of countries enforce the vast majority of removal orders, while many EU nations play a much more insignificant part in enforcing deportation policies. In fact, only 5 (*i.e.*, the United Kingdom, Greece, Germany, France and Spain) out of 28 EU member states carried out roughly two thirds (66.2 per cent) of the removals enforced in the EU from 2008 to 2018 (*see* Table 3).

Table 3. – *Deportations of third country nationals enforced in the EU, 2008-2018*

EU Member State	Deportations (Total)	Deportations (%)
UK	551,360	22.7%
Greece	327,655	13.5%
Germany	319,630	13.2%
France	203,675	8.4%
Spain	202,100	8.3%
Poland	133,380	5.5%
Sweden	128,590	5.3%
Netherlands	102,445	4.2%
Italy	65,105	2.7%
Belgium	63,360	2.6%
Austria	62,680	2.6%
Others	263,680	10.9%
TOTAL	2,423,660	100.0%

Source: Eurostat. Statistics on Asylum and Managed Migration<sup>8</sup>

These data only refer to the forced repatriation of so-called third country nationals (hereinafter, ‘TCNs’), that is, non-EU citizens. In line with Regulation (EC) No. 862/2007 of the European Parliament and of the Council of 11 July 2007 (OJ L 199, 31.7.2007, pp. 23-29) on Community statistics on migration and international protection (hereinafter, ‘Regulation 862/2007’), Eurostat data on the enforcement of removal orders only focus on TCNs, excluding any reference to return procedures targeting EU citizens. This regulation unambiguously shows that the deportation of EU nationals has never been considered a crucial component of the EU system of coercive management of human mobility, probably because it is a politically and legally controversial practice. In fact, EU policies and the most relevant EU law rules on repatriation measures, such as the Return Directive (Article 2), are only applicable to the deportation of TCNs, not to that of EU citizens. By contrast, in line with the critical relevance of the freedom of movement rights of EU citizens, the forced return of EU nationals is merely regulated as an exception to their freedom of movement within the so-called Citizens’ Rights Directive (Articles 14 and 27-33 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives

<sup>8</sup> Retrieved on 5 August 2019 from <http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database>.

64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, pp. 77-123, hereinafter ‘CRD’).

This legal framework further demonstrates that the deportation of EU citizens is an exceptional legal institution, a secondary component of the EU repatriation system. However, against the backdrop of the EU’s so-called border crisis,<sup>9</sup> the deportation of EU nationals has been gaining momentum in a number of EU jurisdictions over recent years.<sup>10</sup> This recent transformation of migration control practices is challenging one of the apparently consistent binarisms upon which the classification powers of EU border regimes are based, *i.e.* the divide between EU citizens and TCNs.

The following section analyses the legal regime of the deportation of EU nationals, before delving into why and how this legal device has been expanding in the recent past, in sharp contrast to its conception as an apparently exceptional measure. This analysis will assist in exploring if, to what extent and why the consolidation of these deportation practices is impeding the normalisation of Framework Decision 2008/909/JHA transfer procedures, at least in the top EU deporting countries.

For these purposes, this chapter explores – essentially, albeit not exclusively – the Spanish case. Spain is a significant case, as it is one of the main deporting jurisdictions in Europe that has additionally stood out as a critical site for EU migration control innovations since the beginning of this century.<sup>11</sup> Moreover, Spain is one of the EU member states that has witnessed both the gradual consolidation of the deportation of EU citizens<sup>12</sup> and, as pointed out previously, the relative failure of Framework Decision 2008/909/JHA transfer procedures in managing the EU national prison population.

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<sup>9</sup> See N. Vaughan-Williams, *Europe’s Border Crisis: Biopolitical Security and Beyond*, Oxford University Press, Oxford, 2017; see also N. de Genova, ‘Introduction: The Borders of “Europe” and the European Question’, in N. de Genova (Ed), *The Borders of “Europe”: Autonomy of Migration, Tactics of Bordering*, Duke University Press, Durham, 2017, pp. 1-35.

<sup>10</sup> See S. Maslowski, ‘The Expulsion of European Union Citizens from the Host Member State: Legal Grounds and Practice’, *Central and Eastern European Migration Review*, Vol. 4, No. 2, 2015, pp. 61-85.

<sup>11</sup> See A. López-Sala & D. Godenau, ‘Introducción: el estudio del control migratorio en España’, in A. López-Sala & D. Godenau (Eds), *Estados de contención, Estados de detención: el control de la inmigración irregular en España*, Anthropos, Barcelona, 2017, pp. 5-28; D. Moffette, *Governing Irregular Migration: Bordering Culture, Labour, and Security in Spain*, UBC Press, Vancouver, 2018.

<sup>12</sup> See J.A. Brandariz & C. Fernández-Bessa, ‘La crimigración en el contexto español: el creciente protagonismo de lo punitivo en el control migratorio’, in A. López-Sala & D. Godenau (Eds), *Estados de contención, Estados de detención: el control de la inmigración irregular en España*, Anthropos, Barcelona, 2017, pp. 119-143; J.A. Brandariz & C. Fernández-Bessa, ‘The Managerial Turn: The Transformation of Spanish Migration Control Policies since the Onset of the Economic Crisis’, *The Howard Journal of Crime and Justice*, Vol. 56, No. 2, 2017, pp. 198-219.

### 3. *The Deportation of EU Nationals as an Exceptional Measure: Legal Framework*

As previously mentioned, EU citizenship law portrays the forced return of EU nationals as an exceptional restriction to their freedom of movement. Both Article 45 of the Charter of Fundamental Rights of the EU and Article 20 of the Treaty on the Functioning of the EU (hereinafter, ‘TFEU’) set forth the right of EU citizens to move freely and reside within the Union’s territory. This right is regulated by the CRD, which extends these prerogatives to designated EU nationals’ family members, regardless of their citizenship.

Chapter VI of the CRD provides the deportation of EU nationals and their kin, as a limitation to both the right of entry and the right of residence. Still, the CRD contains more requirements and safeguards than the general provisions on return procedures.<sup>13</sup> When EU citizens are involved, deportation orders can only be based upon reasons of public policy, public security, and public health (Articles 28(1) and 29 CRD)<sup>14</sup> due to the personal conduct of an individual that “must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society” (Article 27(2) CRD).<sup>15</sup> In addition, these deportation decisions can only be issued and enforced after having taken into account “considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin” (Article 28(1) CRD).<sup>16</sup> Likewise, the coercive removal of EU citizens who have the right of permanent residence can only be based “on serious grounds” of public policy or public security (Article 28(2) CRD).<sup>17</sup> Further, when the concerned EU citizen has either continuously resided in the host member state for the previous ten years or is underage, removal decisions can only be based on “imperative grounds” of public security (Article 28(3) CRD).<sup>18</sup> Moreover, these return orders “shall com-

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<sup>13</sup> See B. Menezes Queiroz, *Illegally Staying in the EU: An Analysis of Illegality in EU Migration Law*, Hart, Oxford, 2018.

<sup>14</sup> See E. Guild in S. Mantu (Ed), ‘Expulsion and EU Citizenship’, *Nijmegen Migration Law Working Papers Series 2017/02*, 2017.

<sup>15</sup> See on this the Court of Justice of the European Union (hereinafter, the ‘CJEU’) judgment of 13 July 2017 in *Case C-193/16, E*. [2017] ECLI:EU:C:2017:542.

<sup>16</sup> See the CJEU judgment of 2 May 2018 in *Joined Cases C-331/16 and C-366/16, K. and H.F.* [2018] ECLI:EU:C:2018:296.

<sup>17</sup> See the CJEU judgment of 23 November 2010 in *Case C-145/09, Tsakouridis* [2010] ECLI:EU:C:2010:708, which ruled that this provision should be interpreted in line with the concept of ‘particularly serious crime’ referred to in Article 83 of the Treaty on the Functioning of the European Union.

<sup>18</sup> See the CJEU judgments in the following cases: *Joined Cases C-316/16 and C-424/16, B. and Vo-*

ply with the principle of proportionality” (Article 27(2) CRD), which means that they must be suitable and proportionate to the objective pursued and necessary to achieve it.

Interestingly, Article 33(1) CRD acknowledges that these deportation orders can be part of a criminal sentence, provided that all the aforementioned requirements are met. Nonetheless, Article 27(2) CRD establishes that “previous criminal convictions shall not in themselves constitute grounds for taking” such forced return measures.<sup>19</sup>

In summary, in line with the critical importance of freedom of movement rights for the EU project, the forced removal of EU citizens has been regulated as a secondary part of the EU deportation system. The removal of these foreign nationals cannot be based on general migration law breaches, but on more serious motives of public policy and public security. The salience and severity of these motives is further laid bare by the fact that the perpetration of a criminal offence is not in itself enough to warrant the issuance and enforcement of a deportation order.

#### **4. The Normalisation of the Deportation of EU Nationals**

In marked contrast to this legal framework, empirical data illustrate that the deportation of EU nationals is anything but a marginal phenomenon. As previously argued, Spain is a perfect national example for scrutinising the significance of this migration law enforcement institution. In Spain, national legal provisions (Articles 15-18 of Royal Decree 240/2007 of 16 February 2007 on the entry, freedom of movement and residence in Spain of citizens of EU member states and member states of the Agreement on the European Economic Area, hereinafter, ‘RD 240/2007’) adopt essentially the same demanding requirements and safeguards regulated by the EU law framework.<sup>20</sup> However, in contrast to this stringent regulation, the removal of EU nationals has been playing an increasingly salient role within the Spanish deportation apparatus. Indeed, as illustrated by Table 4, this type of deportation has been gaining significant impetus over the last ten years.

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*mero* [2018] ECLI:EU:C:2018:256; *Case C-400/12, M. G.* [2014] ECLI:EU:C:2014:9; and *Case C-348/09, P.I.* [2012] ECLI:EU:C:2012:300.

<sup>19</sup> On this, see the CJEU judgment of 11 June 2015 in *Case C-554/13, Z. Zh. and I. O.* [2015] ECLI:EU:C:2015:377.

<sup>20</sup> See, though, Directorate-General for Internal Policies, *Obstacles to the Right of Free Movement and Residence for EU Citizens and Their Families: Comparative Analysis*, 2016. Retrieved on 28 January 2019 from [www.europarl.europa.eu/RegData/etudes/STUD/2016/571375/IPOL\\_STU\(2016\)571375\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571375/IPOL_STU(2016)571375_EN.pdf).



Table 4. – *Deportations of EU citizens enforced in Spain, 2008-2017*

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
<b>EU nationals deportations</b>	104	135	232	298	398	433	448	560	515	427
<b>Total deportations</b>	10,616	13,278	11,454	11,358	10,130	8,984	7,696	6,869	5,051	4,054
<b>% of enforced deportations</b>	1.0%	1.0%	2.0%	2.6%	3.9%	4.8%	5.8%	8.1%	10.2%	10.5%
<b>EU nationals deportation rate<sup>21</sup></b>	5.1	6.6	11.3	14.4	19.2	21.4	22.8	28.9	26.7	22.3

*Source:* Parliamentary question asked by Mr. Jon Iñárritu, MP in September 2018;<sup>22</sup> 2017 Annual Report of the Spanish National Mechanism for the Prevention of Torture;<sup>23</sup> Spanish National Statistics Office, Population data<sup>24</sup>

These official data unambiguously show that the number of enforced deportations of EU nationals has strikingly increased in Spain over the last decade. Whilst the significance of this type of removal was negligible at the turn of the decade, it constitutes more than ten per cent of all enforced repatriations in recent years. In contrast to its legal regulation, therefore, such forced return orders have become a pivotal component of the Spanish migration law enforcement system.

If and to what extent this migration control shift has been mirrored in other EU member states remains partially unknown.<sup>25</sup> The lack of awareness of these procedures prevails in Spain. Despite the impetus gained by this type of deportation, the forced removal of EU nationals is fully absent from both public and political conversations as well as from academic research.

However, this public unawareness is not the rule elsewhere. In fact, in the United Kingdom, which is a crucial national case in this field, the increasing en-

<sup>21</sup> Reflecting an indicator widely used in the prison field, *i.e.* the incarceration rate, this deportation rate estimates the number of deportations enforced per 100,000 resident EU nationals. Even if the shortcomings of this indicator cannot be ignored, it provides valuable information on the relative impact of these deportation practices.

<sup>22</sup> On file with the author.

<sup>23</sup> Retrieved on 7 August 2019 from [www.defensordelpueblo.es/wp-content/uploads/2018/07/Anexo\\_2\\_datos\\_estadistica\\_media\\_duracion.pdf](http://www.defensordelpueblo.es/wp-content/uploads/2018/07/Anexo_2_datos_estadistica_media_duracion.pdf).

<sup>24</sup> Retrieved on 7 August 2019 from [www.ine.es/dynt3/inebase/es/index.htm?padre=1894&capsel=1895](http://www.ine.es/dynt3/inebase/es/index.htm?padre=1894&capsel=1895). In addition, from 2013 to 2017 an annual average of 121 EU citizens have been detained in Spanish migration detention facilities, the majority of them (72.1 per cent) Romanian nationals.

<sup>25</sup> See, though, Valcke 2017; Directorate-General for Internal Policies 2016.

forcement of these deportations is widely acknowledged.<sup>26</sup> In fact, some EU national administrations do not shy away from recognising this law enforcement practice. This laudable practice has led a number of national statistics offices to make data on the forced return of EU nationals publicly available.

Germany is a paramount example. In Germany, the removal of EU nationals is a long-established migration control practice. Its scope is limited, though, compared with the sizeable dimension of the German deportation system. In addition, in the framework of the recent expansion of this national apparatus, its salience is relatively declining. Nonetheless, 1,007 EU nationals were deported per year in Germany from 2012 to 2018 (see Table 5). Thus, the German Home Office has long been engaged in conducting these deportation operations, many of which are carried out by land to neighbouring countries.

Table 5. – *Forced returns of EU nationals carried out in Germany, 2010-2018*

	2010	2011	2012	2013	2014	2015	2016	2017	2018
<b>EU nationals forced returns</b>	793	----	879	994	963	899	1,024	1,115	1,177
<b>Total forced returns<sup>27</sup></b>	7,558	7,917	7,651	10,198	10,884	20,888	25,375	23,966	23,617
<b>% of enforced returns</b>	10.5%	----	11.5%	9.7%	8.8%	4.3%	4.0%	4.7%	5.0%
<b>EU nationals deportation rate</b>	----	----	28.8	29.5	26.2	22.4	23.9	23.7	24.6

Source: German Parliament<sup>28</sup> and German Federal Statistics Office<sup>29</sup>

<sup>26</sup> See, for example, S. Turnbull, 'Immigration Detention and the Racialized Governance of Illegality in the United Kingdom', *Social Justice*, Vol. 44, No. 1, 2017, pp. 142-164; UK Home Office, *European Economic Area (EEA) Administrative Removal*, 2019. Retrieved on 30 April 2019 from [http://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/775636/European\\_Economic\\_Area\\_-\\_administrative\\_removal.pdf](http://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775636/European_Economic_Area_-_administrative_removal.pdf).

<sup>27</sup> The total return data presented in this paper do not take into account the so-called 'voluntary' return programmes, which in many – albeit not all – EU countries play a significant role within the national deportation system. EU nationals are largely excluded from these voluntary return schemes, which are frequently focused on specific non-EU national groups. Sweden seems to be a significant exception to this. See Migrationsverket, *EMN Annual Report on Migration and Asylum 2017. Sweden*, 2018. Retrieved on 12 August 2019 from [http://ec.europa.eu/home-affairs/sites/homeaffairs/files/17a\\_sweden\\_arm\\_part2\\_2017\\_en\\_1.pdf](http://ec.europa.eu/home-affairs/sites/homeaffairs/files/17a_sweden_arm_part2_2017_en_1.pdf).

<sup>28</sup> Retrieved on 5 August 2019 from [www.proasyl.de/thema/fakten-zahlen-argumente/statistiken/](http://www.proasyl.de/thema/fakten-zahlen-argumente/statistiken/).

<sup>29</sup> Retrieved on 7 August 2019 from [www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Bevoelkerung/](http://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Bevoelkerung/)

In other EU member states, the forced return of EU nationals is a normalised practice as well. In Belgium, on average, 353 Romanian nationals were deported per year to their home country from 2015 to 2018 (according to the Belgian Federal Immigration Office).<sup>30</sup> Although no data on other EU national groups are provided, these repatriation operations alone amount to 8.1 per cent of the coercive return orders enforced over this 4-year period.

Conversely, in other member states the deportation of EU citizens seems to be a phenomenon of little significance. In the Italian case, this appears to be in contrast with the outspoken stance adopted by the national government, which in the late 2000s championed a wide-ranging political agenda aimed at deporting Eastern European EU nationals.<sup>31</sup> Still, the narrow scope of these deportation practices clearly mirrors the ineffectiveness that characterises the operation of the Italian deportation model.<sup>32</sup> In this respect, the Italian National Prison Ombudsman reports<sup>33</sup> record that 39 EU nationals were deported in 2016, whilst 82 Romanian citizens were deported in 2017 and 57 Romanians were forcefully repatriated in 2018.<sup>34</sup>

In contrast to Germany and Spain, Belgium and Italy are not leading deporting countries. Although their migration law enforcement systems show that the consolidation of the deportation of EU nationals is spreading across Europe, neither Belgium nor Italy has spearheaded this migration control change. In order to appraise the future prospects of this migration control

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Migration-Integration/Publikationen/Downloads-Migration/auslaend-bevoelkerung-2010200187004.pdf?\_\_blob=publicationFile.

<sup>30</sup> Retrieved on 6 August 2019 from <http://dofi.ibz.be/sites/dvzoe/FR/Statistiques/Pages/Rapports-statistiques-de-10270E.aspx>; see also Maslowski 2015; Valcke 2017.

<sup>31</sup> See I. Clough Marinaro, 'Between Surveillance and Exile: Biopolitics and the Roma in Italy', *Bulletin of Italian Politics*, Vol. 1, No. 2, 2009, pp. 265-287; S. McMahon, 'Assessing the Impact of European Union Citizenship: The Status and Rights of Romanian Nationals in Italy', *Journal of Contemporary European Studies*, Vol. 20, No. 2, 2012, pp. 199-214. This political stance appears to have been unearthed in recent months. See A. Scarano, 'Rimpatriati 13 Detenuti Romeni. Salvini: "Questo è Solo l'Inizio"', *Il Giornale*, 2 April 2019. Retrieved on 6 August 2019 from [www.ilgiornale.it/news/cronache/rimpatriati-13-detenuti-romeni-salvini-questo-solo-linizio-1672721.html](http://www.ilgiornale.it/news/cronache/rimpatriati-13-detenuti-romeni-salvini-questo-solo-linizio-1672721.html).

<sup>32</sup> See G. Campesi & G. Fabini, 'Immigration Detention as Social Defence: Policing 'dangerous mobility' in Italy. *Theoretical Criminology*, 2019 (Online First); European Commission, *Annex to the Commission Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration: Italy – State of Play Report*, COM(2016)85, 2016. Retrieved on 6 August 2019 from [http://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing\\_the\\_refugee\\_crisis\\_state\\_of\\_play\\_20160210\\_annex\\_03\\_en.pdf](http://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing_the_refugee_crisis_state_of_play_20160210_annex_03_en.pdf).

<sup>33</sup> Retrieved on 6 August 2019 from [www.garantenazionaleprivatiliberta.it/gnpl/it/pub\\_rel\\_par.page](http://www.garantenazionaleprivatiliberta.it/gnpl/it/pub_rel_par.page).

<sup>34</sup> These reports further record that on average 93 EU nationals were confined imprisoned per year in Italian migration detention facilities from 2016 to 2018. As usual, Romanians accounted for the overwhelming majority of these EU national detainees (85.7 per cent).

institution, the United Kingdom and France are much more significant national cases. In fact, the United Kingdom and France are the EU jurisdictions in which the consolidation of the removal of EU citizens is particularly evident.

In the United Kingdom, the analysed type of forced repatriation has long attracted public attention, incidentally sparking political debates. In line with this public interest, this migration law enforcement institution is wholly consolidated in the British context. Both in absolute and relative terms, the United Kingdom is only paralleled by France in the enforcement of these deportation orders. As can be seen in Table 6, on average 4,124 EU citizens were deported annually from the United Kingdom over the last five years, rising by 1,317 deportations carried out per year from 2008 to 2013. In fact, the importance of this repatriation scheme has very significantly increased over the last decade, since it has escalated from 3.9 per cent of all enforced return orders in 2008 to more than 40 per cent in 2017-2018.

Table 6. – *Forced returns of EU nationals carried out in the United Kingdom, 2008-2018*

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
<b>EU nationals enforced returns</b>	676	785	973	1,297	1,815	2,358	3,158	3,848	4,905	4,914	3,797
<b>Total enforced returns</b>	17,239	15,252	14,854	15,063	14,647	13,311	14,395	13,690	12,469	12,049	9,474
<b>% of enforced returns</b>	3.9%	5.1%	6.6%	8.6%	12.4%	17.7%	21.9%	28.1%	39.3%	40.8%	40.1%
<b>EU nationals deportation rate</b>	38.2	41.3	47.6	55.2	75.4	91.9	120.4	128.8	153.1	135.4	98.4

Source: UK Home Office;<sup>35</sup> Eurostat. Population data; UK. Office for National Statistics. Population data<sup>36</sup>

<sup>35</sup> Retrieved on 7 August 2019 from [www.gov.uk/government/publications/immigration-statistics-year-ending-december-2018/how-many-people-are-detained-or-returned](http://www.gov.uk/government/publications/immigration-statistics-year-ending-december-2018/how-many-people-are-detained-or-returned).

<sup>36</sup> Retrieved on 7 August 2019 from [www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/datasets/populationoftheunitedkingdombycountryofbirthandnationality](http://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/datasets/populationoftheunitedkingdombycountryofbirthandnationality).

The deportation of EU nationals is also a very salient phenomenon in France. As will be analysed later, by the turn of the decade the French government ignited a continent-wide debate on the normalisation of this migration law enforcement practice. Since then, thousands of EU citizens (on average, 4,554 from 2010 to 2018) were repatriated from France every single year.<sup>37</sup> Still, in the context of the so-called ‘migration crisis’ that has essentially involved TCNs, the significance of this legal institution has been declining in recent years. Nonetheless, in terms of deportation rates, the scope of this sub-field of the French deportation system is far wider than that of other EU nations.<sup>38</sup> In fact, although reliable pre-2014 population data are not available, it can be inferred that no less than 1 out of 200 EU national residents were targeted by forced return measures in France in the early 2010s.<sup>39</sup>

Table 7 – *Forced returns of EU nationals carried out in France, 2010-2018*

	2010	2011	2012	2013	2014	2015	2016	2017	2018
<b>EU nationals enforced returns</b>	4,243	5,424	7,727	5,300	4,136	4,068	3,653	3,142	3,293
<b>Total enforced returns</b>	19,622	22,927	26,812	22,753	21,489	19,991	16,489	17,567	19,957
<b>% of enforced returns</b>	21.6%	23.7%	28.8%	23.3%	19.3%	20.4%	22.2%	17.9%	16.5%
<b>EU nationals deportation rate</b>	----	----	----	----	282.1	270.3	239.2	198.4	213.4

Source: French Home Office<sup>40</sup> and Eurostat. Population data

<sup>37</sup> See Directorate-General for Internal Policies 2016.

<sup>38</sup> Although no complete data are available, Austria should be added to the list of EU jurisdictions in which the removal of EU citizen is playing a prominent part in the deportation system. In 2018, 22.0 per cent of returns and 33.6 per cent of forced returns carried in Austria involved EU nationals. See European Migration Network, *Austria. Annual Policy Report 2018*, IOM, Wien, 2019. Retrieved on 12 August 2019 from [http://ec.europa.eu/home-affairs/sites/homeaffairs/files/01a\\_austria\\_annual\\_policy\\_report\\_part2\\_2018\\_en.pdf](http://ec.europa.eu/home-affairs/sites/homeaffairs/files/01a_austria_annual_policy_report_part2_2018_en.pdf).

<sup>39</sup> In addition, France is a partial exception to the irrelevance of ‘voluntary’ return programmes for the repatriation of EU citizens. From 2010-2012, on average 5,928 EU nationals were repatriated per year under these allegedly voluntary schemes. Since then, though, the impact of these programmes on EU national resident populations has constantly and dramatically dwindled (on average, according to the French Home Office, 109 EU citizens were voluntarily returned per year from 2013 to 2018).

<sup>40</sup> Retrieved on 7 August 2019 from [www.immigration.interieur.gouv.fr/Info-ressources/Etudes-et-statistiques/Statistiques/Essentiel-de-l-immigration/Chiffres-cles](http://www.immigration.interieur.gouv.fr/Info-ressources/Etudes-et-statistiques/Statistiques/Essentiel-de-l-immigration/Chiffres-cles).

This analysis of the data available in some EU jurisdictions reveals that the removal of EU nationals, in apparent contrast to its regulation, has been normalised across Europe. What is more, in some member states, such as France and the UK, this institution has come to play a very significant role within the deportation system. This largely unacknowledged scenario raises a number of queries, in terms of both ‘why’ and ‘how’. The next section scrutinises the forces that have contributed to the generalisation of this severe restriction of freedom of movement rights.

### **5. Deporting EU Nationals: Xeno-Racism, ‘Criminal Aliens’ and the Management of Public Order**

Even a superficial examination of the removal of EU nationals unveils one of the most distinctive traits of this sub-field of migration control policies, that is, it essentially targets Eastern European national groups, mainly Romanian citizens.<sup>41</sup> The available data are particularly revealing of this markedly biased operation. More than 45 per cent (47.0%) of EU citizens deported from Spain from 2008 to 2017 were Romanian nationals (according to the Parliamentary question asked by Mr. Jon Iñárritu, MP). Romanians and Polish nationals combined account for 52.0 per cent of EU citizens deported from Germany from 2012 to 2018 (according to the German Parliament). As previously mentioned, in Belgium and Italy, Romanians are also the clear leader of this ranking (according to the Belgian Federal Immigration Office and the Italian National Prison Ombudsman). In the United Kingdom, in turn, Romanian nationals and Polish nationals combined accounted for 51.8 per cent of EU citizens forcefully returned from 2008 to 2018 (according to the UK Home Office).<sup>42</sup>

Although some reports show that Romanians rank very highly in the enforcement of removals targeting EU nationals,<sup>43</sup> no comparable data on concrete nationalities are provided by the French statistics offices. However, France is a critical national case with regard to the biased operation of the deportation system. It is estimated that the French government, in implementing

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<sup>41</sup> In 2018, the deportation rates of Romanian citizens in 2018 were 363.7 deportees per 100,000 residents in Belgium, 286.2 in the United Kingdom, 69.0 in Germany, 34.7 in Spain (2017) and 4.8 in Italy.

<sup>42</sup> See also M. Evans in Mantu 2017.

<sup>43</sup> Retrieved on 9 August 2019 from [www.lacimade.org/publication/?numpage=2&numpage=3&numpage=1](http://www.lacimade.org/publication/?numpage=2&numpage=3&numpage=1). See also I. Vrăbiescu, ‘Devised to Punish: Policing, Detaining and Deporting Romanians from France’, *European Journal of Criminology*, 2019 (Online First). These La Cimade reports also note that in recent years 1,000-1,500 Romanians were detained annually in French migration detention facilities.

a migration management policy that was highly criticised by EU Commission officials, removed around 20,000 Roma Bulgarian and Romanian nationals in 2009-2010.<sup>44</sup> Since then, removals of Eastern European citizens, especially Romanians, have continued to be carried out on a daily basis.<sup>45</sup>

It is evident, therefore, that beyond some specific forces operating in certain EU member states, such as the xenophobic wave triggered by the Brexit movement in the UK,<sup>46</sup> the two enlargements of the EU carried out in 2004 and 2007, which resulted in the integration of ten new Eastern and Central EU member states, have paved the way for the subsequent consolidation of the deportation of EU nationals. This is not surprising; the available data show that EU15 nationals play a small part in the enforcement of this migration control institution. These Western European nationals accounted for 34.2 per cent of deportations of EU citizens carried out in Spain from 2008 to 2017, but only 15.9 per cent in Germany (2012-2018), and 15.7 per cent in the UK (2008-2018).

In summary, the accession into the EU of a number of middle income Eastern European countries has resulted in a (biased) devaluation of EU citizenship rights, and more precisely in a significant erosion of the freedom of movement and residence.<sup>47</sup> This reveals that the EU enlargements of the mid-2000s gave rise to both intra-EU racialisation processes and a stratification of citizenship rights, in which some passports are more valuable than others and the restrictions of the freedom of movement are *de facto* dependent on nationality criteria.<sup>48</sup> Singling out the 2000s EU enlargements as a critical turning point in the gradual consolidation of the deportation of EU nationals should not mean, however, seeing them as a sort of unbridgeable cleavage. On the contrary, as will be developed later, the analysed phenomenon reveals the operation of some bureaucratic inertia in the enforcement of migration control policies.

What has been illustrated thus far merely provides a response to a ‘why’ question. In order to gain a deeper understanding of the migration law enforce-

<sup>44</sup> See T. Eremenko, N. El Qadim & E. Steichen, ‘Southern Europeans in France: Invisible Migrants?’, in J.-M. Lafleur & M. Stanek (Eds), *South-North Migration of EU Citizens in Times of Crisis*, Springer Open, 2017, pp. 123-148; J.-M. Lafleur & E. Mescoli, ‘Creating Undocumented EU Migrants through Welfare: A Conceptualization of Undeserving and Precarious Citizenship’, *Sociology*, Vol. 52, No. 3, 2018, pp. 480-496; O. Parker, ‘Roma and the Politics of EU Citizenship in France: Everyday Security and Resistance’, *Journal of Common Market Studies*, Vol. 50, No. 3, 2012, pp. 475-491.

<sup>45</sup> See O. Parker & O. López Catalán, ‘Free movement for Whom, Where, When? Roma EU Citizens in France and Spain’, *International political sociology*, Vol. 8, No. 4, 2014, pp. 379-395.

<sup>46</sup> See K. Hamenstädt & M. Evans in Mantu 2017; Turnbull 2017.

<sup>47</sup> See McMahon 2012; N. Shimmel, ‘Welcome to Europe, but Please Stay Out: Freedom of Movement and the May 2004 Expansion of the European Union’, *Berkeley Journal of International Law*, Vol. 24, No. 3, 2006, pp. 760-800.

<sup>48</sup> See Parker & López Catalán 2014.

ment change in question, ‘how’ questions should also be answered. More specifically, they will significantly contribute to analysing the overlapping prisoner transfer procedures-deportation procedures, which will be addressed in the concluding section. From this ‘how’ perspective, it can be ascertained that the consolidation of the deportation of EU nationals has essentially been the institutional reaction to two key political and social concerns on migration.<sup>49</sup>

It is particularly clear that one of these concerns has been crime, namely criminal offences perpetrated by EU nationals. As has been previously highlighted, the CRD authorises national law enforcement agencies to hand down and enforce deportation orders as part of criminal sentences (Article 33(1)). However, this provision does not mandate member states to punish criminal offences perpetrated by EU citizens with deportation orders. In fact, Article 27(2) CRD conspicuously establishes that “previous criminal convictions shall not in themselves constitute grounds for taking” such removal measures.

Therefore, EU legal provisions, building on the well-established case law of the CJEU,<sup>50</sup> imply that these deportation orders, being a severe limitation of significant freedom of movement rights, should be treated as a sort of *ultima ratio* measure, not as a legal instrument to be regularly used for crime prevention purposes. However, the analysed legal device has not been immune to the crimmigration turn that has spread in recent years across many jurisdictions, EU and non-EU alike.<sup>51</sup> More precisely, the consolidation of the removal of EU citizens should be seen – at least, partially – as a side-effect of one of the quintessential aspects of the crimmigration turn, that is, the increas-

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<sup>49</sup> On these concerns, see D. Siegel, *Dynamics of Solidarity. Consequences of the ‘Refugee Crisis’ on Lesbos*, Eleven, The Hague, 2019.

<sup>50</sup> See, amongst others, the CJEU judgment of 27 October 1977 in case C-30/77, *Bouchereau* [1977] ECLI:EU:C:1977:172.

<sup>51</sup> See B. Bowling, ‘Epilogue: The Borders of Punishment: Towards a Criminology of Mobility’, in K.F. Aas & M. Bosworth (Eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*, Oxford University Press, Oxford, 2013, pp. 291-306; J. Stumpf, ‘The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power’, *American University Law Review*, Vol. 56, No. 2, 2006, pp. 367-419; J. Stumpf, ‘The Process is the Punishment in Crimmigration Law’, in K.F. Aas & M. Bosworth (Eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*, Oxford University Press, Oxford, 2013, pp. 58-75; J. Stumpf, ‘Crimmigration: Encountering the Leviathan’, in S. Pickering & J. Ham (Eds), *The Routledge Handbook on Crime and International Migration*, Routledge, London, 2015, pp. 237-250; J. van der Leun, & M. van der Woude, ‘A Reflection on Crimmigration in the Netherlands’, in M.J. Guia, M. van der Woude & J. van der Leun (Eds), *Social Control and Justice: Crimmigration in the Age of Fear*, Eleven, The Hague, 2013, pp. 41-60; M. van der Woude, J. van der Leun, & J.A. Nijland, ‘Crimmigration in the Netherlands’, *Law and Social Inquiry*, Vol. 39, No. 3, 2014, pp. 560-579; N. Wonders, ‘Sitting on the Fence – Spain’s Delicate Balance: Bordering, Multiscalar Challenges, and Crimmigration’, *European Journal of Criminology*, Vol. 14, No. 1, 2017, pp. 7-26.



ing utilisation of deportation measures as a tool to curb crimes committed by so-called ‘criminal aliens’.<sup>52</sup>

This crimmigration turn in the field of deportation practices has had a particular impact in the United Kingdom.<sup>53</sup> In Britain, this shift was initiated in April 2006, when the UK Home Office acknowledged that since the turn of the century no less than one thousand foreign prisoners had been released without having considered their eligibility for post-prison removal measures.<sup>54</sup> The subsequent public scandal forced the Home Office Secretary to resign and laid the way for the passing of the *UK Borders Act 2007*, which significantly expanded the scope of the deportation system. Specifically, this statute made all foreign prisoners eligible for post-release removal, depending on a judicial decision. In addition, it made these post-custodial deportation orders mandatory for foreign inmates sentenced to one year of imprisonment or more, and for EU inmates sentenced to two years of imprisonment or more.<sup>55</sup>

This legal reform, coupled with a number of organisational and logistical measures<sup>56</sup> significantly heightened the significance of crime-related removals within the British deportation apparatus. The portion of this type of returns, in fact, has gradually increased over the last decade. Still, what is more important is the striking rise in the number of deportations involving former EU

<sup>52</sup> See Brandariz & Fernández-Bessa, 2017a; A. Spena, ‘La Crimmigration e l’espulsione dello straniero-massa’, *Materiali per una storia della cultura giuridica*, Vol. XLVII, No. 2, 2017, pp. 495-514; Stumpf 2013, 2015; van der Woude *et al.*, 2014; Wonders, 2017.

<sup>53</sup> See M. Bosworth, ‘Deportation, Detention and Foreign-National Prisoners in England and Wales’, *Citizenship Studies*, Vol. 15, No. 5, 2011, pp. 583-595; S. Turnbull & I. Hasselberg, ‘From Prison to Detention: The Carceral Trajectories of Foreign-National Prisoners in the United Kingdom’, *Punishment & Society*, Vol. 19, No. 2, 2017, pp. 135-154.

<sup>54</sup> See A. Aliverti, *Crimes of Mobility: Criminal Law and the Regulation of Immigration*, Routledge, London, 2013; H.S. Bhui, ‘Alien Experience: Foreign National Prisoners After the Deportation Crisis’, *Probation Journal*, Vol. 54, No. 4, 2007, pp. 368-382; E. Kaufman, ‘Hubs and Spokes: The Transformation of the British Prison’, in K.F. Aas & M. Bosworth (Eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*, Oxford University Press, Oxford, 2013, pp. 166-182; E. Kaufman, E., *Punish and Expel: Border Control, Nationalism, and the New Purpose of the Prison*, Oxford University Press, Oxford, 2015; F. Pakes, & K. Holt, ‘Crimmigration and the Prison: Comparing Trends in Prison Policy and Practices in England & Wales and Norway’, *European Journal of Criminology*, Vol. 14, No. 1, 2017, pp. 63-77.

<sup>55</sup> See Aliverti, 2013; Bosworth, 2011; M.J. Gibney, ‘Deportation, Crime, and the Changing Character of Membership in the United Kingdom’, in K.F. Aas & M. Bosworth (Eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*, Oxford University Press, Oxford, 2013, pp. 218-236; E. Kaufman & M. Bosworth, M., ‘The Prison and National Identity: Citizenship, Punishment and the Sovereign State’, in D. Scott (Ed), *Why Prison?* Cambridge University Press, Cambridge, 2013, pp. 170-188.

<sup>56</sup> See, on this, Aliverti 2013; Bosworth 2011; Kaufman 2013, 2015; Pakes & Holt 2017; Turnbull & Hasselberg 2017.

national prisoners.<sup>57</sup> In recent years, these national groups have been the target of 2/3 of all removals involving released inmates.

Table 8. – *Returns and Returns of Former Prisoners Carried Out in the United Kingdom, 2009-2018.*

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
<b>Total returns</b> <sup>58</sup>	38,052	41,968	41,482	44,310	45,489	40,179	41,879	39,626	32,551	23,889
<b>Former prisoner returns</b>	5,528	5,344	4,649	4,765	4,993	5,286	5,768	6,171	6,113	5,209
<b>% of returns</b>	14.5%	12.7%	11.2%	10.8%	11.0%	13.2%	13.8%	15.6%	18.8%	21.8%
<b>Former EU national prisoner returns</b>	748	931	1,143	1,653	2,120	2,956	3,361	3,970	4,093	3,516
<b>% of former prisoner returns</b>	13.5%	17.4%	24.6%	34.7%	42.5%	55.9%	58.3%	64.3%	67.0%	67.5%

Source: UK Home Office<sup>59</sup>

In summary, in line with the crimmigration turn, in a critical national case such as the UK, the impulse of the repatriation of EU nationals has been driven by the political will to expand the reach of the deportation system within the criminal justice field. In this regard, the British case is paramount, but not exceptional. Among the other EU member states,<sup>60</sup> Spain has followed – to a certain extent – a similar path, in the wake of the crimmigration turn that has transformed the operation of the Spanish deportation model.<sup>61</sup>

<sup>57</sup> See Turnbull 2017.

<sup>58</sup> This table presents the total number of returns, including both forced returns and so-called voluntary repatriations, because an unknown number of former prisoners were returned following ‘voluntary’ procedures.

<sup>59</sup> Retrieved on 8 August 2019 from [www.gov.uk/government/statistics/immigration-statistics-year-ending-december-2018-data-tables](http://www.gov.uk/government/statistics/immigration-statistics-year-ending-december-2018-data-tables).

<sup>60</sup> Media outlets report that in Austria a very significant number of deportations carried out in recent years targeted sentenced foreigners. See, for example, Der Standard, ‘Abschiebung nur bei “Besonders Schwere Verbrechen” möglich’, *Der Standard*, 16 January 2019. Retrieved on 8 August 2019 from [www.derstandard.at/story/2000096352706/abschiebung-nur-bei-besonders-schweren-verbrechen-moeglich](http://www.derstandard.at/story/2000096352706/abschiebung-nur-bei-besonders-schweren-verbrechen-moeglich).

<sup>61</sup> See Brandariz & Fernández-Bessa 2017b; Fernández Bessa, C., *El Dispositiu de Deportació*.

In Spain, a number of logistical, organisational and legal changes have reinforced the role played by crime-related removals, the percentage of which rose from 14.6 per cent of all deportations enforced in 2008 to 49.9 per cent in 2016 and 45.4 per cent in 2017.<sup>62</sup> This shift, which was vocally championed by the Spanish administration,<sup>63</sup> encompassed non-EU citizens and EU citizens alike. In fact, in March 2015 the Spanish legislature passed a reform of Article 89(4) of the Penal Code which mandates the deportation of EU nationals convicted of a criminal offence and sentenced to one year of imprisonment or more.<sup>64</sup> In addition, the available data illustrate that 48.6% of EU nationals deported from Spain from 2008 to 2017 (*i.e.* 1,772 individuals) were not returned on the basis of a CRD removal order.<sup>65</sup> This infers that in Spain criminal law deportations have had a significant impact on EU citizens, probably even before the 2015 reform was passed.

Having said that, the ‘how’ question previously posed cannot be adequately answered merely by referring to the criminal justice system-deportation system nexus. An additional phenomenon has also significantly contributed to the gradual consolidation of the deportation of EU nationals. Whilst the United Kingdom is the jurisdiction to be examined to grasp the crimmigration dimension of the analysed topic, this additional dimension requires a second critical national case to be considered, that of France.

In France, the impetus of the deportation of EU citizens was not determined by collective anxieties over so-called ‘criminal aliens’. By contrast, this forced return measure has been regularly utilised for the street-level management of public order. Removal procedures in France have primarily targeted destitute – and racialised – Eastern European citizens for any sort of allegedly anti-social behaviour, including homelessness and nomadism.<sup>66</sup> This approach to migration law enforcement devices is consistent with a negative stereotype, particularly cemented in certain EU societies, which brands (Eastern) EU nationals as burdensome foreign populations which put

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*Anàlisi Criminològica de la Detenció, Internament i Expulsió d'Immigrants en el Context Espanyol* (PhD dissertation, University of Barcelona), 2016. Retrieved on 9 August 2019 from <http://diposit.ub.edu/dspace/handle/2445/97108?mode=full>.

<sup>62</sup> See Brandariz & Fernández-Bessa 2017a.

<sup>63</sup> See Brandariz & Fernández-Bessa 2017b.

<sup>64</sup> See D. Boza Martínez, *La expulsión de personas extranjeras condenadas penalmente: el nuevo artículo 89 CP*, Aranzadi, Cizur Menor, 2016; E. García España, ‘La expulsión como sustitutivo de la pena de prisión en el Código Penal de 2015: ¿de la discriminación a la reinserción?’, *Revista Electrónica de Ciencia Penal y Criminología*, Vol. 18-07, 2016, pp. 1-31.

<sup>65</sup> Data obtained from both Mr. Jon Iñárritu, MP and the Spanish Transparency Portal (on file with the author).

<sup>66</sup> See Parker & López Catalán 2014; Vrăbiescu 2019.

untenable pressure on already stressed welfare budgets.<sup>67</sup> The utilisation of return legal tools to cope with so-called ‘welfare abusers’ has, in fact, been implemented in some EU member states, such as Belgium, Sweden, the United Kingdom and France.<sup>68</sup>

This public order-driven mobilisation of removal orders is apparently very distant from the rights-based CRD approach (Articles 14 and 27-33) to these measures.<sup>69</sup> However, not only social protection resources are at stake in these cases. There is evidence that these policing practices are also being used for crime prevention purposes. These administrative return procedures operate as a – cost-effective, albeit questionable – alternative to the regular management of low-level criminal offences by the criminal justice system. In other words, when (especially Eastern) EU nationals are involved, not only anti-social behaviours but also petty crimes are dealt by the French law enforcement agencies by channelling these individuals into removal procedures, thereby circumventing ordinary criminal justice adjudication processes.<sup>70</sup>

Surprising as it may seem, the French case does not appear to be an exception. In Spain, interviews conducted with high-ranking police officials confirm that CRD removals are being used in a very similar way, that is, to tackle petty crimes and misdemeanours committed allegedly on a regular basis by EU citizens, especially Eastern European nationals.<sup>71</sup>

This ordinary utilisation of administrative removal orders for public order purposes reveals an additional and largely unacknowledged aspect of the topic in question. Surely, after the impasse produced by the accession to the EU of ten new Central and Eastern European member states in 2004 and 2007, bureaucratic inertia has come to prevail, by reinstating slightly modified old practices. Since the mid-2000s, general migration law provisions were no longer available to deal with the new EU national groups. However, as illustrated by the French case, law enforcement agencies have ultimately ended up using CRD removal provisions in a very similar way, despite their more restrictive regulation.<sup>72</sup>

From this perspective, the late 2000s French government’s plan to deport

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<sup>67</sup> See, on this, V. Barker, *Nordic Nationalism and Penal Power: Walling the Welfare State*, Routledge, Abingdon, 2018.

<sup>68</sup> See V. Barker, ‘Democracy and Deportation: Why Membership Matters Most’, in K.F. Aas & M. Bosworth (Eds), *Borders of Punishment: Citizenship, Crime Control and Social Exclusion*, Oxford University Press, Oxford, 2013, pp. 237-254; Directorate-General for Internal Policies 2016; Evans in Mantu 2017; Maslowski 2015; Parker & López Catalán 2014; Valcke in Mantu 2017.

<sup>69</sup> See, though, Parker 2012

<sup>70</sup> See Maslowski 2015; Vrăbiescu 2019.

<sup>71</sup> Interviews conducted in February 2019 (on file with the author).

<sup>72</sup> See also Parker 2012; Vrăbiescu 2019.

thousands of Roma Eastern European individuals – allegedly via ‘voluntary’ return protocols – can be seen as an attempt to find an alternative solution to manage these populations coercively once the regular return provisions became inapplicable. Additional data show the strength of these administrative inertias. In the United Kingdom, 1,351 Romanian nationals were deported per year from 2004 to 2006 (according to the UK Home Office). Subsequently, after they became EU citizens, this number dwindled to 175 removals per year from 2007 to 2011. However, it eventually escalated again to 1,056 deportations annually enforced in the subsequent seven years.<sup>73</sup> In Spain, 2,589 Romanian nationals were deported per year from 2001 to 2006.<sup>74</sup> Subsequently, the average number of removals involving Romanian citizens sharply declined to 59 per year from 2008 to 2011, before mounting again to an annual average of 234 enforced returns from 2012 to 2017, in the context of a significant downsizing of the Spanish deportation system (source: information provided by Mr. Jon Iñárritu, MP).

## **6. Conclusion: The Overlapping of Prisoner Transfer Procedures and Deportation Procedures**

This analysis of the gradual consolidation of deportation measures targeting EU citizens leads to a number of robust conclusions. Firstly, in marked contrast to both the apparent goals of the EU legal framework and the widely proclaimed freedom of movement of European nationals,<sup>75</sup> this type of deportation is not an exceptional measure, but a migration law device widespread across EU member states, in many of which it is most frequently enforced. Secondly, the recent impulse of this legal instrument is closely associated with concerns about crime. As previously noted, this is the case not only in countries such as the United Kingdom, in which the expanded utilisation of these removal orders has followed the lines of the reinforcement of crime-related deportations. It is also the case in member states such as France, where these forced return procedures have essentially been used for ordinary street-level management of public order, petty offences and extreme poverty-related behaviours.

Consequently, there is some overlapping between Framework Decision 2008/

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<sup>73</sup> From 2005 to 2009, the annual average of deportations of nationals of the eight Eastern European nations integrated in the EU in 2004 (Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia, and Slovenia) combined was 154. By contrast, it rose to 1,513 removals per year from 2010 to 2018.

<sup>74</sup> See source in Fernández-Bessa 2016.

<sup>75</sup> See Parker & López Catalán 2014.

909/JHA prisoner transfer procedures and deportation practices, as both tackle criminal activities carried out by EU citizens. However, what has been highlighted thus far does not suffice to answer the main question addressed by this chapter: why and to what extent is the consolidation of the deportation of EU nationals hampering the development of Framework Decision 2008/909/JHA procedures?

In principle, despite the aforementioned overlapping, transfers and deportations are heterogeneous legal instruments that target partially different situations. Their consequences are also markedly different. Transfer procedures compel inmates to continue serving their sentences in their home/residence member states, but do not entail the imposition of a subsequent ban on entry. By contrast, removal orders – even crime-related removal orders – lead to the enforcement of ban on entry measures (Article 32 CRD), but they do not entitle the criminal justice agencies of the destination country to hold EU citizens/inmates criminally accountable. In criminal deportation cases, this generally undermines the principles of proportionality and equality before the law.<sup>76</sup> In addition, crime-related deportation orders stand at odds with criminal law goals, namely social rehabilitation.<sup>77</sup> Counterintuitively, they also fail to serve incapacitation purposes. As is widely known, with the exception of Ireland, the United Kingdom, and (still) Bulgaria, Croatia, Cyprus and Romania, the EU member states are part of the Schengen Agreement. The Schengen legal framework, which has essentially lifted internal borders, makes ban on entry measures enforced against EU national deportees partially useless, as they cannot be easily detected as long as they do not travel outside *Schengenland*.<sup>78</sup>

The analysed divergences between transfer procedures and deportations might lead to the conclusion not only that both legal tools may perfectly co-exist but also that transfer procedures should prevail over removal practices targeting suspected, indicted and sentenced EU citizens. However, additional perspectives should be taken into account to have a more nuanced grasp of this issue. In the context of overburdened criminal justice systems that are forced to come to terms with the principle of scarcity, the uncontroversial coexistence of deportation and transfer measures is, in practice, less feasible than legal regulations might lead us to think. This is all the more relevant, since in many jurisdictions the development of the criminal justice system is increasingly driven by efficiency and cost-effectiveness principles.<sup>79</sup> In this

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<sup>76</sup> See Aliverti 2013.

<sup>77</sup> See Boza Martínez 2016.

<sup>78</sup> See on this Hamenstädt & Evans *in* Mantu 2017.

<sup>79</sup> See J.A. Brandariz García, *El modelo gerencial-actuarial de penalidad: eficiencia, riesgo y sistema penal*, Dykinson, Madrid, 2016.

regard, transfer procedures should be preferred from a rule of law viewpoint but deportations rank first when these pragmatic tenets are considered, as they save much needed criminal justice resources, reduce the workload of law enforcement agencies, and ultimately realise the political goal of getting rid of the unwanted alien as expeditiously as possible. Therefore, efficiency-oriented mentalities are surely leading removal orders to prevail over transfer procedures in their conflicting coexistence, making the latter practically inapplicable. Evidently, this trend does not equally affect all EU jurisdictions; on the contrary, it has a potentially significant impact on countries featuring widely developed systems of deportation of EU nationals.<sup>80</sup>

In scrutinising the overlapping transfers-deportations, an additional aspect should be brought to the fore, which considers logistical and organisational arrangements and institutional cultures, interests and *habitus*. Many EU member states have succeeded in articulating a comprehensive, wide-ranging and burgeoning system to deport unwanted EU citizens. Evidently, this is not simple at all, as it requires assembling political will, resources, and complex logistical and organisational measures. In contrast, EU countries seem to have failed in organising a similar institutional structure to expand the utilisation of prisoner transfer measures. This divergence should be explored from the perspective of institutional interests. In carrying out deportation practices, national executives, and especially police agencies, deal with procedures that are almost completely under their control, with few – if any – judicial interventions. Furthermore, deportations are automatic procedures that, in contrast with transfers, are not dependent on decisions made by the state of destination's judicial authorities on a case by case basis. This obviously facilitates the unobstructed development of the migration control agendas of national governments. What is more, the deportation of EU nationals is one of the cases in which EU member states' administrations may ensure their national interests prevail in the framework of a multi-scalar migration management system such as that of the EU.<sup>81</sup>

The judicial actors and bodies, in turn, do not seem to have the political determination and political capital needed to set up an all-encompassing institutional apparatus to enforce transfer procedures.<sup>82</sup> In addition, judicial

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<sup>80</sup> This may explain why the recent plans of the Italian government to repatriate sentenced EU nationals will be apparently funnelled through transfer procedures. See Scarano 2019.

<sup>81</sup> See J.P. Laine, 'The Multiscalar Production of Borders', *Geopolitics*, Vol. 21, No. 3, 2016, pp. 465-482; Moffette 2018; Wonders 2017.

<sup>82</sup> Further research is needed to scrutinise whether national governments have any political incentive to be engaged in this kind of transfer procedures. It is evident that many national executives are deeply committed to repatriating their fellow nationals imprisoned abroad, e.g. Spain in the case of Spanish inmates confined in Latin American prisons. However, it is not

officials, being traditionally self-conceived as nation state-centred players, have a hard time operating within international arenas in which – such as in the case of transfers – no national interests seem to be at play. At least in this respect, the highly praised judicial nature of Framework Decision 2008/909/JHA procedures may have countered the goal of consolidating a continent-wide institutional system of transferring – rather than deporting – sentenced EU citizens.

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clear whether they prefer these repatriations to be carried out as transfer procedures or they actually accept deportations.





# ***Implementation Strategies: Distinctive Features, Advances and Shortcomings in the Application of Framework Decision 2008/909/JHA in Italy, Romania and Spain***

Cristina Fernández Bessa, Valeria Ferraris and Alexandru Damian \*

**Abstract:** *This chapter addresses the main features of the implementation of cross-border transfer of prisoners in Italy, Romania and Spain. It aims to provide the reader with an in-depth analysis of the major strategies enacted by these Member States to ensure the full effectiveness of FD 2008/909/JHA and the difficulties of putting it into practice. Specifically, it shows the particularities regarding the transposition of the European instrument in each country, on the number of transfers effectively executed and their difficulties to ensure the full effectiveness of the FD under consideration. Based on the desk research and fieldwork developed in the RePers project this study addresses the advances in implementing the FD and identifies the shortcomings of the implementation. To conclude, this study provides useful comparative notes and a critical assessment of the main shortcomings of the solutions adopted nationally.*

**Keywords:** *transfer of prisoners, transposition, implementation strategies, national issues, judicial cooperation*

SUMMARY: 1. Introduction. – 2. Transposition of Framework Decision 2008/909/JHA in Italy, Romania and Spain. – 3. Advances. The Number of Prisoners Actually Transferred. – 3.1. Number of Transfers out of Number of Prisoners. – 4. Shortcomings of the Implementation of Transfer Procedures in the Different National Contexts. – 5. Conclusions.

## **1. Introduction**

The freedom of movement and residence of European citizens within the European Union territory poses new challenges for national criminal justice

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\* Cristina Fernandez Bessa drafted para. 1; Valeria Ferraris drafted para. 2; Para. 3, 4 and 5 are the result of joint work. Alexandru Damian amended the parts relating to the Romanian legal order.

and prison systems which must be addressed by the Member States. The enforcement of custodial sentences or measures involving the deprivation of a citizen's liberty issued by a Member State in its own territory and the transfer of a European citizen sentenced by a national court to another Member State to serve the sentence involve strategies that go beyond ordinary practices and routines of legal practitioners, civil servants and judicial authorities. In spite of the common legal provisions of Framework Decision (FD) 2008/909/JHA, factors such as divergences in transposition, different national legal cultures, the situation of communities of EU citizens living in other Member States, and prison conditions entail very distinctive features in the implementation of this instrument and produce varied results.

This chapter addresses the main features of the implementation of cross-border transfer of prisoners in Italy, Romania and Spain. It aims to provide the reader with an in-depth analysis of the major strategies enacted by these Member States to ensure the full effectiveness of FD 2008/909/JHA and the difficulties of putting it into practice. Specifically, the chapter starts with a brief description of the transposition process of this tool into the mentioned legal frameworks. Secondly, it addresses the advances in implementing the FD, by revealing the number of prisoners who have actually been transferred from and to Italy, Spain and Romania in relation to the prison population of EU citizens. Lastly, it identifies the shortcomings of the implementation, in the opinion of practitioners and authorities who actually work on these transfer procedures. To conclude, this study provides useful comparative notes and a critical assessment of the main shortcomings of the solutions adopted nationally.

In order to do this, from a methodological point of view, a desk review of academic literature was carried out, along with an analysis of the Italian, Romanian and Spanish implementing legislations of FD 2008/909/JHA, and other relevant documents. This study was complemented by the analysis of quantitative and qualitative data concerning transfers between the Member States involved. On one hand, we obtained official statistics published in each Member State and requested any missing information through national transparency procedures or other internal procedures. On the other hand, we gathered primary data on the practical shortcomings of the implementation of the FD on prisoner transfers within the EU through an online survey and the report of two meetings organised within the scope of RePers project. The survey was delivered from July 2018 to December 2018, in Italian, Romanian and Spanish, to prosecutors, judges, lawyers, ministerial officials and scholars involved in implementing the FD. Despite some initial problems in obtaining an adequate number of answers to the survey,<sup>1</sup> the research team

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<sup>1</sup> In particular, in Italy, due to the limited numbers of lawyers having expertise in the issue and the fact

ultimately received 85 completed questionnaires (30 in Spain, 32 in Romania and 23 in Italy). The low number of survey respondents in Italy was largely offset by additional activity providing further insights into the functioning of transfer procedures. Unexpectedly, following numerous requests and contacts, the researchers were officially permitted by the Head of the International Cooperation Office of the Italian Ministry of Justice to access the case files regarding transfer procedures under Framework Decision 2008/909/JHA. The results of the surveys were presented on the occasion of two workshops held in Bucharest (October 2018) and Madrid (14 March 2019) with selected practitioners, who were invited to discuss the critical points on the implementation of the FD emerging from the surveys. All these research activities provided us with comprehensive information on the distinctive features of the implementation of FD 2008/909/JHA which will be investigated in the sections below.

## **2. Transposition of Framework Decision 2008/909/JHA in Italy, Romania and Spain**

The main characteristics of the transposition process of FD 2008/909/JHA are important for contextualising the approach and expectations of each Member State towards this instrument, and they provide valuable data for understanding its current implementation.

The timing of the transposition of the FD in Italy, Romania and Spain presents a significant variation which reveals the different policy agendas of the Member States.

This is one of the few times that Italy transposed an act relating to judicial cooperation in criminal matters prior to the deadline, in this case 5 December 2011. The Government – upon delegation by Parliament through Articles 49 and 52 of Italian Law dated 7 July 2009, no. 88 – adopted Legislative Decree dated 7 September 2010, no. 161, which implements the FD in the Italian legal system and defines the procedures for transferring sentenced persons from Italy to other Member States and vice versa.

In the aftermath of the transposition, several circular letters<sup>2</sup> issued by the Italian Ministry of Justice clarified the reasons underpinning this unexpected

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that the members of the judiciary are not used to responding to online surveys. In Spain, it was also difficult to obtain answers from lawyers who were familiar with the legal procedure of prison transfers.

<sup>2</sup>For a detailed presentation of the content of the circular letters, see V. Ferraris (2019), 'L'implementazione del d.lgs. 161/2010 sul reciproco riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento', *Legislazione Penale*, 2019, Available at: <http://www.lalegislazionepenale.eu/limplementazione-del-d-lgs-161-2010-sul-reciproco-riconoscimento-delle-sentenze-di-condanna-a-pena-detentiva-un-caso-di-doppio-fallimento-valeria-ferraris/>

diligence by the Italian authorities. In fact, transfers of prisoners were included in the action plan to reduce overcrowding in Italian prisons, following the well-known ECtHR *Torreggiani* judgment.<sup>3</sup>

Conversely, Spain transposed FD 2008/909/JHA in a complex legal act (Law no. 23/2014 dated 20 November 2014) on the mutual recognition of judicial decisions in criminal matters in the EU. This law is a wide-reaching legal act that regulates or modifies all legal instruments based on the principle of mutual recognition in criminal matters. Such a long delay (more than three years) is quite unusual for Spain which, in general, respects transposition deadlines. This delay was crucially conditioned by the will to simplify the dispersed regulations on mutual recognition by encompassing everything into just one law, but also by the legal – and political – debate on the consequences in Spain of foreign sentences issued in other EU jurisdictions. This controversy was triggered by the adoption of FD 2008/675/JHA regarding the decision to take account of convictions in European Union Member States during the course of new criminal proceedings, which was transposed by Spanish Law no. 7/2014, dated 12 November 2014. The issue at stake was whether prison sentences already served in France by militants of the armed organisation ETA ought to be taken into consideration to mitigate the prison sentences to be enforced for the same offences in Spain. This debate was closed by the aforementioned Law no. 7/2014 (Article 14) and the Spanish Supreme Court's rulings no. 874/2014 of 27 January 2015 and no. 50/2016 of 3 February 2016. The passing of Law no. 7/2014 paved the way for the immediate passing of Law no. 23/2014 and the transposition of FD 2008/909/JHA.

Romania transposed FD 2008/909/JHA through the Law dated 26 December 2013, no. 302, with a two-year delay. The transposition was carried out through Title VI of Law no. 302/2004, on international judicial cooperation in criminal matters, recently republished. There are two explanations for this delay. On one hand, it was partially caused by the lengthy national legislative procedure. On the other hand, only a limited number of public servants are familiar with international cooperation and they are burdened by excessive workloads.<sup>4</sup> This is something of an administrative vulnerability, rather than a pattern for pushing for delayed implementation.

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<sup>3</sup> *Torreggiani and others vs. Italy*, ECHR (2013). In this decision, the Court verified that the space allocated to each applicant in their cell was three square metres and stated that, this being the case, the applicants had suffered a breach of their Article 3 rights. The court gave Italy one year in which to develop effective remedies for dealing with prison overcrowding. See also F. Favuzza, 'Torreggiani and prison overcrowding in Italy', *Human Rights Law Review*, Vol. 17, No. 1, 2017, pp. 153-173.

<sup>4</sup> This comment was obtained by the Romanian researcher in the interviews with civil servants.

It seems clear that each Member State was driven by its own agenda and, as we will demonstrate in the following sections, this is certainly not the best pre-condition for building an efficient procedure based on mutual trust.

The three legal acts largely reproduce the FD,<sup>5</sup> with extremely limited specificities.

The use of the same wording as the FD results, for example in Romania, in inadequate transposition rules, and in the absence of correlation with other rules on international cooperation and other national normative acts, which has led to a series of issues generating non-unitary judicial practice, some of which have already been settled by the High Court of Cassation and Justice (HCCJ).<sup>6</sup>

In the three Member States, the competent authorities are the Ministry of Justice and the judicial authorities. A major difference concerns the role of the central authority. The International Office of the Ministry of Justice in Romania and in Italy plays a central role; the Ministry transmits to the foreign authority the sentence and the certificate previously received from the territorial judicial authorities, handles the official correspondence, takes on a role of coordination, and acts as a reference contact.

Conversely, in Spain, the role of the Ministry of Justice is auxiliary to the judicial authorities and is limited to receiving quarterly statistical bulletins from judges and Courts, together with a list from the General Public Prosecutor containing all mutual recognition instruments issued or executed by Public Prosecutor officers during the half-year. The Prison Supervisory Court (when a convict is in prison) and the Court (when the convict has not begun to serve the sentence) is in charge of all aspects of the procedure.

Thus, in the three Member States concerned (Spain, Italy and Romania), the judicial authorities are responsible for issuing the transfer sentence; however, there are significant differences in the procedure depending on the features of the general functioning of each national judicial system and the chosen manner of transposition.

Two specificities of the Italian and Romanian legal systems can be highlighted. In Italy, the transfer can take place for any offence punished with a penalty having a term of at least three years. The Italian legislator's intention to avoid any limitation of the possibility of transferring detainees to another Member State is, therefore, quite clear. Conversely, the transfer from another Member State is possible only in relation to the offences indicated by the FD.

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<sup>5</sup> See S. Montaldo's introduction in this book.

<sup>6</sup> See HCCJ, Formation on the interpretation of certain points of law in criminal matters, Decision no. 13/2014, Official Gazette no. 505 of 08/07/2014; Decision no. 15/2015, Official Gazette no. 455 of 24/06/2015. See also, HCCJ, Criminal Proceedings, Decision no. 253/A of 11 October 2018, [www.scj.ro](http://www.scj.ro)

Out of the three Member States, Romania is the only one that grants to the sentenced person the right to challenge the transfer decision<sup>7</sup> within 10 days.<sup>8</sup> In the event of appeal, the final decision is made by the High Court of Cassation and Justice.

### **3. Advances. The Number of Prisoners Actually Transferred**

Along with the different legal cultures and rules, many sociological and economic factors (e.g. the mobility of citizens, the labour market, whether or not the country is a tourist destination, etc.) influence the features of implementation of this instrument and mainly the target groups of the transfers in each country. In this section, we reveal the advances in the implementation of the FD by analysing the available data on the transfers performed in Italy, Spain and Romania. To understand the data in context, the number of prisoners effectively transferred to others EU countries from Italy and Spain is compared with the number of EU citizens detained in Italian and Spanish prisons over recent years. With regard to Romania, as it is mainly a receiving State, the data reveal the total number of transfer procedures executed and focus on the number of Romanian nationals transferred from Italy and Spain.

In Romania and Italy, only a basic set of data is made publicly available in the Ministry of Justice's annual report. The Romanian project team was able to obtain data thanks to the national 2001 Freedom of Information Act, Law no. 544/2001, which grants access to information of public interest. The data were later updated with the assistance of the Division for International Judicial Cooperation in Criminal Matters (Ministry of Justice). In Italy, the research team requested access to the statistics of the international office and received all requested data. In Spain, a minimum set of information on prison transfers issued is published in the prison system's annual report (the so-called *Informe General de Instituciones Penitenciarias*);<sup>9</sup> this information was completed by way of an information request via the transparency website. The different means of accessing data reveal why the three research teams gathered data with very varied levels of detail.

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<sup>7</sup> On the right to a redress mechanism, see S. Montaldo's chapter in this book.

<sup>8</sup> Article 166, line 11 of Law 302/2004 (Romania).

<sup>9</sup> However, as of late October 2019, the 2018 report had not been published; this chapter only reveals data on transfers from Spain until 2017.

### 3.1. Number of Transfers out of Number of Prisoners

Both in Italy and Spain – the issuing Member States – data on the number of prisoners divided by nationality are publicly available. This provides information on the number of transfers out of the number of EU prisoners. In Italy, the number of EU citizen detainees is rather stable. They represent almost 20% of the total amount of foreign prisoners. As the following table shows, Romanian detainees form the vast majority, representing over 76% of all EU condemned detainees and almost 15% of all foreign citizens deprived of freedom.

Table 1. – *EU condemned detainees in Italy*

Member States	2016*		2017**		2018**	
	No. of detainees	% of EU detainees	No. of detainees	% of EU detainees	No. of detainees	% of EU detainees
Romania	2720	76.94	1668	76.20	1771	78.71
Bulgaria	163	4.61	84	3.84	80	3.56
Poland	120	3.39	83	3.79	86	3.82
Croatia	91	2.57	75	3.43	64	2.84
France	78	2.21	44	2.01	53	2.36
Lithuania	50	1.41	40	1.83	27	1.20
Germany	41	1.16	34	1.55	27	1.20
Spain	66	1.87	33	1.51	23	1.02
Slovakia	25	0.71	18	0.82	12	0.53
Greece	35	0.99	16	0.73	16	0.71
Slovenia	15	0.42	16	0.73	19	0.84
Portugal	19	0.54	14	0.64	13	0.58
Hungary	25	0.71	13	0.59	12	1
The Netherlands	15	0.42	11	0.50	5	0.22
Belgium	13	0.37	9	0.41	15	0.67
Czech Republic	20	0.57	9	0.41	10	0.44
United Kingdom	13	0.37	8	0.37	9	0.40
Latvia	9	0.25	6	0.27	5	0.22
Austria	8	0.23	5	0.23	2	0.09

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Sweden	4	0.11	2	0.09	0	0.00
Denmark	2	0.06	1	0.05	0	0.00
Cyprus	0	0	0	0.00	0	0.00
Estonia	2	0.06	0	0.00	0	0.00
Finland	1	0.03	0	0.00	1	0.04
Ireland	0	0	0	0.00	0	0.00
Luxembourg	0	0	0	0.00	0	0.00
Malta	0	0	0	0.00	0	0.00
Total	3535	100	2189	100.00	2250	100

\*data do include pre-trial detainees

\*\* data do not include pre-trial detainees

Table 2 shows the number of prisoners transferred from Italy to other EU Member States under FD 2008/909/JHA. In total, around a hundred people were transferred every year. In this case, the Romanian prison population also represents the most important national group of transferred detainees, followed by that of Spain. However, compared to the number of detainees, the number of transfers constitutes less than 3%.

Table 2. – *EU nationals transferred from Italy to other EU Member States under FD 2008/909/JHA*

Member States	2016	% of total transferees	2017	% of total transferees	1st half of 2018*	% of total transferees
Romania	89	73.55	67	62.62	26	53.06
Spain	19	15.70	14	13.08	7	14.29
France	2	1.65	5	4.67	0	-
The Netherlands	1	0.83	6	5.61	3	6.12
Belgium	3	2.48	0	-	0	-
Germany	0	-	2	1.87	4	8.16
Slovenia	2	1.65	1	0.93	0	-
United Kingdom	0	-	1	0.93	2	4.08
Greece	1	0.83	3	2.80	1	2.04
Poland	0	-	2	1.87	0	-
Hungary	0	-	1	0.93	3	6.12
Croatia	2	1.65	1	0.93	0	-

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Portugal	0	-	2	1.87	1	2.04
Latvia	1	0.83	0	-	0	-
Luxembourg	1	0.83	0	-	1	2.04
Austria	0	-	0	-	1	2.04
Slovakia	0	-	1	0.93	0	-
Sweden	0	-	1	0.93	0	-
Lithuania*	0	-	0	-	0	-
Czech Republic*	0	-	0	-	0	-
Total	121	100	107	100	49	100

\* Unfortunately, due to a change in the data collection system of the Italian Ministry of Justice we cannot show the data for the full year.

For Spain, as in Italy, imprisoned EU citizens represent around 20 to 25% of the total foreign prison population. Again in Spain, Romanian citizens form the majority of EU nationals detained in the prison system; however, as can be seen from the following table, despite the absolute numbers of Romanian detainees being similar in both countries, in Spain they represent around 45% of all EU imprisoned citizens, as there are other national groups which are broadly represented (such as Portugal, Bulgaria, France, Italy or the UK). Unlike Italy, in which the number of Romanian detainees is increasing, for Spain it is significantly decreasing. The major dispersion of Romanians residing both in Spain and in Italy for over ten years is one of the factors that explains the high number of Romanian citizens as opposed to other EU citizens in both countries.

Table 3. – EU citizens detained in Spain according to the different nationalities

Member State	2016		2017		2018	
	No. of detainees	% on EU detainees	No. of detainees	% on EU detainees	No. of detainees	% on EU detainees
Romania	1870	46.74	1650	44.26	1788	45.73
Portugal	379	9.47	351	9.42	315	8.06
Bulgaria	260	6.5	273	7.32	279	7.14
France	239	5.97	248	6.65	253	6.47
Italy	252	6.3	249	6.68	233	5.96
United Kingdom	185	4.62	222	5.95	237	6.06
Lithuania	168	4.2	143	3.84	139	3.55

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Poland	144	3.6	118	3.17	114	2.92
The Netherlands	138	3.45	128	3.43	146	3.73
Germany	100	2.5	99	2.66	117	2.99
Belgium	48	1.2	39	1.05	52	1.33
Croatia	37	0.92	37	0.99	34	0.87
Czech Republic	27	0.67	25	0.67	27	0.69
Hungary	24	0.6	24	0.64	17	0.43
Latvia	26	0.65	34	0.91	33	0.84
Estonia	16	0.4	12	0.32	11	0.28
Slovakia	14	0.35	11	0.3	18	0.46
Ireland	18	0.45	17	0.46	20	0.51
Greece	16	0.4	14	0.38	23	0.59
Slovenia	11	0.27	8	0.21	7	0.18
Sweden	10	0.25	3	0.08	20	0.51
Austria	5	0.12	5	0.13	5	0.13
Denmark	6	0.15	10	0.27	15	0.38
Malta	2	0.05	1	0.03	1	0.03
Finland	2	0.05	4	0.11	4	0.10
Luxembourg	3	0.07	0	0	1	0.03
Cyprus	1	0.02	3	0.08	1	0.03
Total	4001	100	3728	100	3910	100

As shown in the following table, the situation in Spain is quite similar to that of Italy, with some specific features. In 2015, the first year of application of FD 2008/909/JHA, the transfers formed about 3.2% of detained EU national citizens and it dropped to 2.4% in 2016 and to 2.7% in 2017. In 2015 the transferred detainees reached 137 units but, in the years thereafter, they did not exceed one hundred per year. In addition, as for Italy, Romania has the highest amount of transferred people. The Netherlands, despite the limited number of detainees from the Netherlands in Spanish prisons, is the second Member State by number of transferees. This is a clear indication that judicial cooperation is functioning very well between these two countries.

The other Member States in which there is a significant number of transferees are mostly neighbouring countries: respectively Spain and France for Italy; Italy and France for Spain.

Table 4. – EU nationals transferred from Spain to other Member States under FD 2008/909/JHA

Member State	2015	% of total transferees	2016	% of total transferees	2017	% of total transferees
Romania	42	30.66	26	27.08	23	23.0
The Netherlands	25	18.25	17	17.71	26	26.0
Italy	12	8.76	11	11.46	7	7.0
France	11	8.03	9	9.38	10	10.0
Portugal	11	8.03	5	5.21	8	8.0
United Kingdom	10	7.3	7	7.29	11	11.0
Bulgaria	9	6.57	4	4.17	5	5.0
Germany	7	5.11	3	3.13	4	4.0
Belgium	4	2.92	6	6.25	3	3.0
Sweden	2	1.46	0	-	1	1.0
Denmark	1	0.73	0	-	0	-
Ireland	1	0.73	1	1.04	0	-
Lithuania	1	0.73	0	-	0	-
Malta	1	0.73	0	-	0	-
Austria	0	-	1	1.04	1	1.0
Czech Republic	0	-	0	-	0	-
Estonia	0	0	1	1.04	0	-
Finland	0	0	1	1.04	0	-
Greece	0	-	0	-	1	1.0
Hungary	0	-	1	1.04	0	-
Latvia	0	-	0	-	0	-
Poland	0	-	2	2.08	0	-
Slovakia	0	-	1	-	0	-
Slovenia	0	-	0	-	0	-
Total	137	100	96	100	100	100

The data regarding the total files of transfers managed by the Romanian authorities confirmed the impressions emerging from the data of Italy and Spain: Romania is mainly an executing State. This means that, as shown in table 5, the number of passive procedures, that is, when Romania is the receiving State for the enforcement of a custodial sentence or a measure involving a depriva-

tion of liberty issued in other EU countries against Romanian citizens or residents, is significantly higher (around 90%) than the number of active procedures (less than 10%), that is when Romania asks another country to execute a sentence issued by a Romanian Court.

Table 5. – *Passive and active procedures in Romania (2014-2017)*

	2014	% of total procedures	2015	% of total procedures	2016	% of total procedures	2017	% of total procedures
<b>Passive Procedures (Romania as receiving/ex ecuting State)</b>	645	98.90	534	91,75	453	94.18	395	90.39
<b>Active Procedures (Romania as issuing State)</b>	7	1.07	48	8.25	28	5.82	42	9.61

Compared to the high amount of transfer files received by Romania, significantly fewer transfers are ultimately implemented. The data on transfers (Table 6) provided by the Romanian authorities are similar to those provided by Italy and Spain, although they do not entirely converge. This divergence may reflect the gap between the number of EU national prisoners released to be transferred and that of released inmates for whom the transfer procedure is ultimately enforced.

Table 6. – *Persons transferred to Romania, from Italy and Spain*

	2014	2015	2016	2017	2018
<b>Persons transferred to Romania by FD 909</b>	85	237	264	249	237
<b>No. from Italy</b>	34 (42)*	109 (100)	92 (89)	61 (67)	77
<b>No. from Spain</b>	--	-- (42)	8 (26)	22	26

\* The number according to Italy and Spain is shown in brackets

As will be seen in the following section, due to the significant length of these procedures, particularly between Italy and Romania, the sentenced person may serve the full sentence before the transfer takes place. However, the case files are not always formally closed and consequently they formally count as a pending procedure even if they are de facto closed. This makes any consideration in terms of efficiency of the system almost impossible. In addition, in Spain, the interconnection with the return procedure significantly reduces the number of potential transferees,<sup>10</sup> and makes the Spanish data difficult to compare with other countries that do not have such a large implementation of return procedures of EU nationals.

The comparison of the data on the number of successful transfer procedures between Member States entails some additional difficulties. The Member States do not collect and process data according to a common standard. In Italy, the international branch of the Ministry of Justice collects and processes the data. It has recently implemented new text analysis software which does not provide accurate time series. However, the collected data confirms that, in recent years, the level of implementation of FD 2008/909/JHA is stable, from a quantitative point of view (around 100 transfers per year issued from Italy and Spain and around 250 transfers received in Romania). This represents a significant step forward in cooperation on criminal matters at EU level. However, the number of transfers actually performed in Spain and Italy is very far from the target group that could benefit from this measure. The next section analyses the shortcomings of this limited implementation.

#### ***4. Shortcomings of the Implementation of Transfer Procedures in the Different National Contexts***

FD 2008/909/JHA has undoubtedly simplified the procedure for transferring prisoners in the EU. However, as the figures show, the number of transfers completed is much lower than one would expect in relation to the prison population that could benefit from this type of measure. This section explores the possible reasons for the unsuccessful implementation of this tool.

The research carried out within the scope of the RePers project identified the most common shortcomings of the implementation of FD 2008/909/JHA in the different countries. Based on a series of exploratory interviews and the analysis of the case files regarding transfer procedures under this FD in Italy, the research team identified the following:

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<sup>10</sup> See the chapter by J.A. Brandariz Garcia in this book.

- Lack of knowledge and awareness of the FD
- Lack of/difficulty in gathering information on the prisoner’s family, social and work background
- Excessive length of the procedure
- Lack of cooperation from foreign judicial authorities
- Lack of mutual trust between national authorities
- Poor quality of the activity of the judicial authorities involved (e.g. accuracy of the certificate)
- Difficulty in identifying the competent foreign authorities
- Lack of cooperation from local prison staff
- Unreliability of information provided by the prisoner
- Inadequate selection of cases actually deserving attention

Through the aforementioned online survey, we asked practitioners how problematic these issues were for the full implementation of FD 2008/909/JHA. The answers to this question provided us with insights into the individual priorities when approaching a case. The results revealed extensive concerns over the difficulties in gathering information on the prisoner’s family, social and work background, followed by the excessive length of the procedure. The third most pressing criticism was the lack of cooperation from the foreign judicial authorities.<sup>11</sup> Conversely, the less important obstacles for practitioners were the unreliability of information provided by the prisoner and the inadequate selection of cases actually deserving attention.

An open question of the survey asking if there were other obstacles to the full effectiveness of the FD allowed us to validate the reliability of the proposed shortcomings and to discover unidentified problems to be further explored. Most of the answers to this question revealed that the practical obstacles to transfers were already outlined in the previous question. In other cases, this question was used to illustrate the aforementioned shortcomings with details and also to add the following problems:

- The lack of knowledge of the prison situation and the laws of the executing countries
- The critical intersection between the European Arrest Warrant (EAW) and FD 2008/909/JHA

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<sup>11</sup> The differences regarding the priority of the shortcomings is very slight between the countries: in Italy, the perceived main problem was the excessive length of the procedure, followed by the difficulties in gathering information on the prisoner’s social ties and the lack of mutual trust between the national authorities. For Spain, the main obstacles were the lack of knowledge and awareness of the Framework Decision and the difficulties in gathering information on the prisoner’s social context, followed by the excessive length of the procedure. In Romania, the main shortcoming was also the lack of knowledge and awareness of the Framework Decision, followed by the lack of cooperation from foreign judicial authorities and, thirdly, difficulties in gathering information on the prisoner’s family, social background, etc.

- Fragmentation of legal orders, decentralisation, lack of a clear distribution of powers and lack of communication between different authorities of the same countries
  - Lack of clear guidelines (to understand and to complete the certificate, to adapt the sentence, etc.)
  - Lack of involvement of the penitentiary authorities
  - Insufficient staff/excessive workload
  - Lack of consent of the detainee/refusal to execute the sentence (in Romania)
  - Overlap with other legal instruments, such as the possibility of serving probation in one's own country and deportation (in Spain)

The research identified two main areas of shortcomings: one related to national issues, i.e. the implementation of the FD in the specific Member States, the other related to cooperation issues. The two areas are connected, particularly as some of the national issues turn into obstacles to cooperation.

Several national issues were identified. The most significant were: the lack of knowledge and awareness of the FD by the different players, including the need for a precise distribution of powers; the fragmentation of legal orders; the decentralisation of the competent authorities and the lack of communication between different national authorities; the lack of knowledge of detention conditions and laws of executing countries; the limited involvement of penitentiary authorities.

These types of issue can usually be resolved with more information, training and new organisational solutions.

The most significant national issue is the lack of knowledge, which is often the primary reason for other shortcomings.<sup>12</sup> This lack of knowledge is not only an issue of the competent authorities at local level, but also of lawyers and detainees. Lawyers are almost always absent in the execution phase and the majority of them are not familiar with the procedure and do not support detainees in their path towards cross-border transfer. The level of knowledge of detainees is also limited. In 2014, the Italian prison administration carried out a mapping of 'transferable' detainees, also obtaining their opinion on a possible transfer. For Italy, this initiative was a way of boosting an increasing number of procedures, but the quality of information given to detainees was generally poor. However, the initial mapping helped to spread information on the existence of the possibility of being transferred to the Member State of origin.

This does not seem to be the case in Spain.

In Spain, a recent directive of the General Secretariat of Penitentiary Insti-

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<sup>12</sup> It is worth mentioning that the lack of competence and specialization is not referred to the authorities at central level.



tutions (I-03/2019)<sup>13</sup> on foreign inmates established that social workers must give to foreign detainees an information leaflet within a maximum period of 5 days from their entry to prison. This leaflet should contain all relevant information on the different possibilities available for applying for a transfer in order to continue the sentence in the country of origin. In the case of the Catalan Prison Service (the penitentiary administration in charge of executing criminal sentences in Catalonia) a 2019 notice was also issued by the Secretary of penal measures, rehabilitation and attention to victims by the Government of Catalonia (notice 2/2019)<sup>14</sup> which states that the person able to serve the sentence in another State must be informed of this possibility. The notice also establishes the requirements for the procedure and the documentation that must be sent to the penitentiary surveillance judge (the competent authority for issuing the transfer). As these measures are relatively new, we are unable to assess their outcome in terms of greater involvement by the penitentiary authorities in the procedure.

The lack of knowledge of authorities is a mixed issue. In some countries, for instance, in Italy, it is connected to difficulties in dealing with ordinary workloads. Transfer procedures generally involve additional work for offices that are already understaffed; this certainly requires a better organisational solution.

The degree of decentralisation of the authorities<sup>15</sup> that take relevant decisions is a further technical issue related to the implementation of the FD. In Italy, the decision is taken by the competent prosecutor at territorial level, under Article 658 or Article 665 of the Italian Criminal Procedure Code, depending on the circumstances. In Spain, the certificate could be issued by both the sentencing judges and the prison supervision judges; in practice, though, these decisions are mostly made by the latter. This means that hundreds of judicial authorities are involved in issuing the certificate, with a lack of specialisation and also an unclear attribution of responsibilities. The issue of fragmentation of competence is closely related to the fragmentation of national legal orders, which is still a hurdle making it difficult for the local courts and prosecution offices to be aware of and to become familiar with foreign legal systems, for the purposes of transfer procedures.

Moreover, the split of powers makes the issue of proper training and knowledge of the procedure crucial for guaranteeing smooth cooperation. For exam-

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<sup>13</sup> Its name in Spanish is '*Normas generales sobre internos extranjeros*'. Available at: [http://www.institucionpenitenciaria.es/web/export/sites/default/datos/descargables/instruccionesCirculares/I\\_3-2019-Extranjeros.pdf](http://www.institucionpenitenciaria.es/web/export/sites/default/datos/descargables/instruccionesCirculares/I_3-2019-Extranjeros.pdf)

<sup>14</sup> Its name in Catalan is: '*Circular 2/2019, sobre estrangeria als centres penitenciaris de Catalunya*'. Available at: [http://justicia.gencat.cat/web/.content/home/ambits/reinsercio\\_i\\_serveis\\_peni/serveis\\_peni\\_tenciaris/instruccions\\_i\\_circulars/circulars/circular-2-2019.pdf](http://justicia.gencat.cat/web/.content/home/ambits/reinsercio_i_serveis_peni/serveis_peni_tenciaris/instruccions_i_circulars/circulars/circular-2-2019.pdf)

<sup>15</sup> See A. Neira-Pena in this book.

ple, the lack of expertise at local courts level involves a huge waste of time in drafting the documentation.

For instance, in the case of multiple sentences, the Romanian authorities require the parties to submit one certificate for each sentence, for the purposes of its formal recognition, on an individual basis. The issuing authorities should then provide a summary of the certificates, aimed at clarifying the overall accumulation of punishments. It often happens that the authorities competent for issuing the certificates are not fully aware of the rules and practices of another Member State, Romania in this case, and this results in the certificates being sent back and forth between the issuing and executing States, due to incompleteness.

The involvement of prison authorities in the process could be very helpful for overcoming some of the obstacles, also due to the identified lack of knowledge. Prison officers or social workers have direct access to the prisoners or easier ways of collecting information regarding their family, work and social ties in the country of origin or in the country where the person was convicted (which is very difficult for judges or prosecutors to obtain) and they are aware of the more convenient possibilities for the social rehabilitation of detainees. Although the FD does not mention the involvement of prison authorities in transfers, at national level, this may be solved by a change in the national law, or even only in practices.

The obstacles to smooth cooperation relate to the variable mutual trust between foreign authorities and differences in the legal cultures (Nelken, 2001; Engle Merry 2010). Some Member States take a more pragmatic approach: the transfer procedure is almost entirely an administrative procedure where communications between the countries occur very easily by e-mail and the recognition of the judgment is carried out without formalities through an official letter. No right to appeal is guaranteed to the detainees. This is the case in the Netherlands. Other Member States take a more rights-based approach: the procedure is entirely judicial, the communications are more formal, the detainees are given more opportunity to oppose a transfer but the procedure is often very lengthy.

The Netherlands, as is clear from the Spanish data, adopts a very pragmatic and efficient approach which facilitates the transfer (and deportation) and which is also driven by the national policy on detention, to avoid, by any means, overcrowding.

The failure to achieve mutual trust (see, on the challenges of mutual trust, Sicurella 2018, Persak 2014) between the countries is certainly the biggest shortcoming for the implementation of any judicial cooperation measure. There may need to be a trade-off between efficiency and a rights-based approach to recognition. On one hand, a high degree of pragmatism risks resulting in a huge re-

duction of the rights of detainees while, on the other hand, a more formal approach risks resulting in a tedious procedure, which fails to achieve the aim of the transfer even in cases where the detainee clearly favours the transfer.

The differences in terms of legal cultures emerge from these different approaches, along with the predominance of the unilateral agenda of the Member States.

The cooperation between Romania and Italy is also a good example of the complex relationship between willingness to cooperate and trust. On 29 April 2015, Italy and Romania signed a Memorandum of Understanding (MoU). This MoU aims to deal with a number of problems that have surfaced over time, relating to the transfer of sentenced persons. Above all, the most important issues concern the difficulty of obtaining additional information from the issuing State, delays due to translation issues and the response times by the competent authorities of the two States, the lack of clarity of the documents sent by Italian authorities, the incomplete completion of the certificate, and difficulties related to the identification of the person to be transferred.

In other words, Italy and Romania resort to *ad hoc* bilateral cooperation mechanisms to overcome issues arising in the wake of the implementation of the FD. Quite interestingly, it seems that the MoU has not been crucial in solving the outlined issues, as a further demonstration that legal obligations do not necessarily enhance mutual cooperation. Instead, mutual trust is a process that cannot be imposed by law or by additional bilateral rules. Mutual recognition reveals that - despite the legal differences - the criminal system of the other country is reliable and aims towards the same common purpose, i.e. the social rehabilitation of the detainee.

The crisis of mutual trust emerges precisely when the Member State is guided by its own agenda and priorities, which intertwine with the purpose of the FD. In the cooperation between Italy and Romania the common problem of prison overcrowding deteriorates the mutual trust between the two Member States.

On one side, Italy pushes for the transfer of Romanian prisoners to Romania irrespective of the relations with the country with the aim of reducing overcrowding in Italy and, on the other side, bureaucratic obstacles may be put in place to avoid the transfer to Romania, which risks definitively hampering mutual trust.

Other issues relate to the costs and time needed for translating the sentence, as well as the critical intersection between the EAW and FD 909 and the overlapping between the return procedure and FD 909. All these issues have been analysed in other chapters of the book.<sup>16</sup>

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<sup>16</sup>On the EAW see A. Rosanò, on deportation see J.A. Brandariz García, in this book.

## **5. Conclusions**

This chapter has focused on the implementation of cross-border transfers of EU detainees and their functioning in practice. The rules always depend on both legal and extra-legal factors and, in the transfer of detainees, the distance between “law in the books” and “law in action” is increasingly significant.

As has been shown in this chapter, the features of the transposition process of the FD in Italy, Spain and Romania provide a better understanding of the approach towards and expectations of each Member State in relation to this European legal instrument which is very insightful for contextualising its implementation in relation to the national agendas.

According to the available data, over recent years there have been some clear advances in the implementation of transfers, in Italy and Spain as issuing countries and in Romania as executing state. However, it seems that in both Italy and Spain the number of transfers has almost reached its inherent peak, at around one hundred transfers per year. This is a very low number compared with the prison population that could, at least in theory, benefit from this procedure. Major shortcomings hamper its more extensive implementation.

Based on our fieldwork, we have identified multiple shortcomings to the implementation of the FD, which could be systematised as national issues and cooperation issues. The first relate to national adaptation to the FD as it differs according to the distribution of powers established by the transposition law, the structure and resources of the judicial system, and the commitment and awareness of the different players in prison transfers. The second kind of obstacle relates to cooperation issues, including the lack of permanent mutual trust in the foreign authorities and differences related to the legal culture of the different EU countries. These issues are translated into a set of more practical problems related to requirements concerning documentation, official communications, language obstacles, etc., all of which contribute to increasing the length of a procedure initially conceived as expedited and simplified. The critical intersection and overlapping of the FD 909 with other EU instruments, such as EAW or the return procedure, also implies a cooperation problem.

Each obstacle requires a different approach. National issues could easily be improved through training and organisational solutions at national and local level. However, cooperation shortcomings pose deeper challenges. It is a fact that there are different legal cultures in the different EU Member States, but effective cooperation in criminal matters and the creation of a European space of justice, liberty and security requires a further standardisation of legal procedures. Mutual trust needs to be strengthened with clearer mutual objectives. Mutual trust is a process that cannot be imposed by law, organisational measures or more training. It is the result of a process of mutual recognition of reliability.

The national agenda and priorities of the different countries regarding, for instance, the situation of their own prison system or the return of unwanted migrants, constitute major shortcomings for mutual trust. Besides, the unequal application of the FD, due to the different forms of transposition, institutional reasons or the amount of resources allocated to the implementation of this instrument, leads to discriminatory treatment of EU citizens in the different countries, but also within the same country. The commitment of Member States to the social rehabilitation of detainees - the main objective of their transfer - as a common purpose should become a guideline for the functioning of this instrument which could provide the necessary equal treatment of citizens and foreigners in EU prisons and mutual trust in the field of criminal cooperation.

# ***The Road Ahead: Proposals for Improving the Implementation of Framework Decision 2008/909/JHA***

Stefano Montaldo, Alexandru Damian and José A. Brandariz \*

**Abstract:** *The chapter gathers together some of the findings of the RePers project in relation to possible improvements in the implementation of Framework Decision 2008/909/JHA, particularly in light of the Italian, Romanian and Spanish experiences and perspectives. The analysis addresses the main phases of the cross-border transfer procedure, from the identification of the potential transferee to the decision on recognition and the possible overlap with other procedures, such as the European Arrest Warrant.*

**Keywords:** *Framework Decision 2008/909/JHA, implementation, certificate, prisoner, mutual recognition.*

SUMMARY: 1. Introduction. – 2. Identification and Selection of Potential Transferees. – 3. The Prisoner’s Opinion and His or Her Consent. – 4. Filling out of the Certificate. – 4.1 Determination of the Sentence and Explanation of the Part of It Remaining to Be Served in the State of Transfer. – 4.2. Filling out of the Certificate: Cases of Accumulation of Sentences And Continuation of Offences. – 5. Transmission of the Judgment and of Its Translated Version. – 6. Assessing the Chances of Social Rehabilitation. – 7. Coordination with the European Arrest Warrant. – 8. Concluding Remarks.

## **1. Introduction**

The book has thus far provided a cross-sectional analysis of the main advances and shortcomings concerning cross-border transfers within the European Union. Specific attention has been paid to three national case studies, namely Italy, Romania and Spain, which were the focus of the activities performed in the context of the RePers project. In fact, as demonstrated in previous chapters,

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\* Stefano Montaldo drafted this chapter in its entirety. Both Alexandru Damian and José A. Brandariz amended the parts relating to the Romanian and Spanish legal orders.

these Member States represent an important test bed for the material functioning of the cooperation mechanism set out in 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’) for two principal and closely related reasons. Firstly, the prison systems of these Member States have high rates of foreign EU nationals serving prison sentences. Secondly, and consequently, as already discussed in the book, the relevant national authorities have enacted extremely diversified normative and operational strategies to cope with this phenomenon, including considerable efforts to facilitate cross-border transfers.

Building on the analysis developed thus far, this closing chapter focuses on some proposals for material improvements to the conduct of cross-border transfer procedures. In fact, the RePers project activities were designed with a view to distilling existing best practices and possible future steps concerning the implementation of the Framework Decision in the three Member States involved and, possibly, beyond. As such, this operational perspective is a direct complement to the analysis of the normative layer developed in the preceding chapter.

Due to the focus on Italy, Romania and Spain, the proposals presented here are not all-encompassing but often stem from the specific features of the domestic legal orders under consideration and from the expertise developed by the relevant competent national authorities. At the same time, many of the pitfalls we identify represent generalised flaws in transfer procedures; accordingly, the respective improvement proposals could be effectively replicated in other Member States, with the due adjustments.

The structure of the chapter is modelled in terms of the timeline of the transfer procedure codified in the Framework Decision and in the national implementing legislations, in relation to certain aspects of the procedure. Therefore, the analysis firstly considers the organisational measures to ensure that potential transferees are appropriately identified and provided with adequate and reliable information on the relevant rules and procedures in the pre-transfer context (Section 2). Section 3 addresses the prisoner’s role, with a specific focus on his or her opinion and consent to the cross-border transfer, whereas the following Section 4 deals with more practical issues concerning the filling out of the certificate, which can have a significant effect on the outcome of the procedure. Section 5 addresses another important practical aspect, namely the forwarding of the certificate and the judgment, along with a translation of the latter document into the official language of the executing State. As already discussed in previous chapters, a key aspect of the entire cross-border transfer mechanism is its objective of enhancing the prisoner’s chances

of social rehabilitation: Section 6 addresses this topic, by highlighting possible solutions to the current loopholes identified in the three Member States involved. Section 7 analyses the possible overlap of the transfer procedure and the European Arrest Warrant, in light of the provisions of the Framework Decision and of the relevant practice.

Lastly, but most importantly, we must provide some words of thanks. In drafting this chapter, we benefited greatly from the crucial contribution of the practitioners and experts involved in the RePers project activities, to whom we are profoundly indebted. They provided vital contributions to many of the research activities we carried out in preparing this chapter and the book as a whole. Aside from a great deal of desk research, this analysis stems from fieldwork conducted in cooperation with a number of national groups of practitioners. The Italian team consulted archives and documents on transfer procedures. In addition, almost one hundred key practitioners answered a questionnaire that was prepared to ascertain their views on the shortcomings and pitfalls of the Framework Decision's procedures. Some of these practitioners were also interviewed. Moreover, this research benefited greatly from the debates raised and the conclusions reached in the framework of a number of mutual learning activities, in which dozens of Italian, Romanian and Spanish judges, public prosecutors, ministerial officials and scholars took part. In short, the comments and perspectives of these selected groups of practitioners were extremely useful and inspiring.

## **2. Identification and Selection of Potential Transferees**

Identifying and selecting potential transferees is as complex as strategic tasks, which can have a significant effect on the (quantitative) success of Framework Decision 2008/909/JHA. Some recurring factors affect the activity of the competent authorities and the expectations of prisoners in this pre-transfer phase.

Firstly, these critical tasks fall outside the scope of the Framework Decision and of the domestic rules of implementation. This normative vacuum means that no minimum common standards apply. The procedure is, in principle, initiated *ex officio* by the domestic judicial authorities, but several factors influence the effectiveness of this phase. For instance, the dialogue between judicial authorities and prison administrations is often poor, limiting the former's opportunities for identifying potential transferees. Moreover, prisoners often lack appropriate legal support, with a view to facilitating the communication to the competent judicial authorities of their will to be transferred. This is even more complicated in cases where the sentenced person is kept in a pri-



son facility which is very distant from the place where he or she was convicted. Prisoners might also be transferred *in itinere* to other detention locations, thereby further blurring their contacts with the relevant stakeholders.

Consequently, this essential preliminary step is dealt with by national authorities in an uncoordinated fashion, very often through unilateral strategies based on soft-law measures and extemporary operational solutions. Moreover, the latter usually lack continuity over time and largely depend on the changing landscape of political priorities and the availability of public funds. Therefore, a key prerequisite for triggering the transfer procedure is left to the goodwill of the domestic authorities – usually national governments and more specifically the Ministry of Justice – in stark contrast with the structure of EU judicial cooperation in criminal matters, which primarily relies on principles of mutual trust and mutual recognition between judicial authorities.

Secondly, in line with existing literature,<sup>1</sup> the RePers project activities demonstrated the limited awareness and knowledge of the existence of a legal framework allowing for fast-track cross-border transfers. This phenomenon is cross-sectional and involves all relevant players, namely prisoners, lawyers, prison staff, public prosecutors and members of the judiciary. This situation is further compounded by a widespread lack of knowledge on the actual functioning of intra-EU prisoner transfers. On the one hand, lawyers very seldom provide appropriate assistance to their clients in this area of the criminal execution phase. On the other hand, judges and public prosecutors often perceive these procedures as an additional burden to their – already heavy – workload, especially in smaller districts, which have no specific units for dealing with international cooperation cases.<sup>2</sup> Moreover, this obstacle is further heightened by the fact that the execution phase is the most disregarded part of the criminal adjudication process, by both judicial authorities and lawyers.

Thirdly, both the prisoners and the professionals concerned suffer from a knowledge gap regarding foreign penitentiary regimes, covering both the main features of in-prison treatment and the rules governing post-sentence criminal law enforcement, as well as post-release re-socialisation programmes of former inmates. This situation highlights the persistent barriers fragmenting the

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<sup>1</sup> See *inter alia* V. Ferraris, 'L'implementazione del d.lgs. 161/2010 sul riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento', *La legislazione penale*, 2019, pp. 1-15. Retrieved on 17 September 2019 from <http://www.lalegislationepenale.eu/limplementazione-del-d-lgs-161-2010-sul-reciproco-riconoscimento-delle-sentenze-di-condanna-a-pena-detentiva-un-caso-di-doppio-fallimento-valeria-ferraris/>.

<sup>2</sup> In some Member States, specific organisational measures have been enacted to cope with these procedures. In Romania, for instance, the competence for cross-border transfers is conferred to the Court of Appeals, with designated judges for international cooperation matters. However, the heavy workload is a persistent concern, which deprives the identification of specialised judicial authorities of its actual effectiveness.

European judicial space. Beyond the surface of mutual trust and mutual recognition, the actual grip of these principles is challenged by the fragmentation of national legal orders and practices, which reaches its peak in the criminal execution phase.

In this context, besides the ordinary support from prison staff, two main practices have been developed in Italy, Romania and Spain.

Firstly, in Italy, screening activity has been conducted since 2015 by the penitentiary authorities, on a yearly basis, to ascertain whether any foreign national detainees are willing to be transferred. The penitentiary staff members distribute a form among these detainees and then send the forms they collect to the Ministry of Justice, which has been identified as the central authority for the purposes of the Framework Decision.

Data show that this screening has contributed to boosting the phenomenon of consensual transfers. However, this approach – although promising – requires some adjustments. Firstly, the final recipient of the forms is not properly identified. On many occasions, the Ministry of Justice is perceived to be the natural addressee of the forms submitted at local level. This situation has two main pitfalls. On the one hand, the office for international judicial cooperation of the Justice Affairs Department at the Ministry of Justice is overloaded by too many files, which its staff members are simply unable to handle promptly and efficiently. On the other hand, this approach unnecessarily duplicates the institutional layers, since the central authority is then expected to alert the competent judicial authority at territorial level, thus wasting time and resources, and exacerbating the risk of unfruitful procedures. In fact, the Italian experience reveals that the competent judicial authority is sometimes not willing to deal with the transfer procedure, or at least to deal with it swiftly, as it ought to do. In other cases, the judicial authority receives no further feedback from the prison service, with which it has limited contacts, and eventually decides to leave the case in limbo, with the passing of time making the transfer increasingly unlikely.

A similar situation occurs in Spain, where the Prison Service Office has not traditionally played an active part in the transfer procedure. The Office's role in this regard is somewhat irrelevant, as it merely informs the Ministry of prisoners who meet the conditions for being transferred. Again, the subsequent institutional steps could be made simpler and smoother.

Secondly, the forms undergo no preliminary selection on the basis of some objective parameters such as duration of the sentence, length of the sentence remaining to be served, or factors regarding the prisoner's personal situation. Therefore, these documents include cases that seemingly justify the start of the relevant procedure, but have no actual chance of reaching a positive conclusion. This situation entails a mismatch between time, resources and costs, the

first two usually being very limited in comparison with the significant expenses related to – *inter alia* – the ministerial staff involved and the translation of the certificate and the judgment.

Thirdly, the form leaves very limited room for an appropriate explanation of the prisoner's opinion and personal and family situation. This is paradoxical, as prison staff members have access to a plethora of information deriving from the treatment and supervision of the inmate, including the activities in which he or she is involved, the rehabilitation programmes and the expectations regarding his or her post-release life. This body of information remains untouched, even though it could be useful in the subsequent steps of the transfer procedure.

In conclusion, periodic screening performed by the prison administration at territorial level could play a significant role in increasing the number of cross-border transfers. However, this screening should be carefully structured at local level, establishing clear and direct communication channels between prison staff and the competent judicial authorities. Moreover, the collection of the forms should be followed by a case-by-case preliminary assessment of the actual chances of successfully completing the transfer procedure. This selection could be made on the basis of objective criteria, such as the duration of the sentence, the length of the sentence remaining to be served, correlation between the rest of the sentence to be served and the duration of the transfer procedure and the rehabilitation programmes in which the prisoner is involved at that time. Lastly, the form should pay specific attention to the prisoner's opinion and situation, with a view to avoiding unnecessary hasty references to this additional information at subsequent steps of the procedure. Clear-cut evidence on the centre of gravity of the person concerned could also be considered, as a way of supporting the activity of the competent judicial authority and helping it to make informed decisions on the transfer proposals.

Another key issue in this preliminary phase of the mechanism refers to the 'if' and to the 'how' prisoners are informed of the possibility of opting for a cross-border transfer, as well as of the main features and requirements of the procedure and the relevant legal regime in the destination Member State. This is a deep-rooted concern regarding the implementation of the Framework Decision which has been ongoing since the very early years after its adoption. Scholars have repeatedly pointed out the need to provide prisoners with a clear set of information, as a way of fostering both the effectiveness of the judicial cooperation mechanism and the prisoner's prospects of rehabilitation. As discussed in-depth by Faraldo-Cabana in this book, timely and substantially complete information is essential to the start of a transfer procedure and to the achievement of its inherent purpose of fostering the prisoner's chances of social rehabilitation.

In this respect, Italy, Romania and Spain display remarkable convergence. In these Member States measures have been adopted to provide proper information support to prisoners who are foreign EU nationals. In Romania, these detainees receive general information on the domestic legal order and on the competent judicial and governmental authorities both in Romania and in the possible State of destination.

In Spain, since 14 February 2019, following an internal order of the Head of the Central Prison Administration, prison staff members have been obliged to inform foreign inmates about transfer procedures immediately as soon as they enter a prison facility. This information includes an explanation of the relevant procedures at national level and the main aspects of the domestic legislation of some key Member States. Prisoners are also provided with useful contacts if they want to request further information from the authorities of their Member State of nationality or residence. Moreover, due to the high incidence of Romanian cases, the Spanish and Romanian authorities have issued a common document providing the relevant information on key aspects of the Romanian legal order.

Finally, the Italian Ministry of Justice has very recently prepared a booklet on the Framework Decision and its implementation at national level. This booklet is currently being printed and will be made available, as a rule, to prisoners who are foreign EU nationals. This tool also includes some information on foreign legal orders, with a specific focus on Romania. However, the information contained in the booklet has not been discussed and agreed in advance with the Romanian authorities.

These sources of information appear to be fit for purpose, as they inform potential transferees of the availability of cross-border transfers at EU level and may trigger requests for further details addressed to institutional players (namely, the prison administration, the competent judicial authority, the central authority) or professionals (primarily lawyers and social assistants).

In conclusion, upon entering a prison facility, foreign EU nationals should be provided with information on the availability of the cross-border transfer mechanism. This information should include the general features of the procedure itself, its scope and its pre-conditions. Prisoners should also be provided with useful institutional contacts (*e.g.* competent judicial authority, relevant office of the central authority, prison ombudsman) as well as with general information on the criminal execution phase and penitentiary rules in the possible destination state.

### 3. *The Prisoner's Opinion and His or Her Consent*

The project activities revealed the extent of the fragmentation and diversity of the scenario – at least in Italy, Romania and Spain – in relation to obtaining the prisoner's opinion and his or her consent to the transfer. This variety of approaches and practices is often due to two converging factors. On the one hand, the Framework Decision does not provide specific requirements and common standards for obtaining the prisoner's opinion. On the other hand, the initial phases of the procedure are usually highly decentralised: prison staff, courts and public prosecution offices (and sometimes even each public prosecutor within a single office) develop their own methodologies and pursue their theoretical preferences and priorities.

In some cases, as recalled above in relation to Italy, the prisoner's opinion is summarised in a form, which merely contains generic statements on the social environment of the person concerned or his or her view on a cross-border transfer. In other legal orders, such as in Sweden, the prisoner is heard by a judge during a hearing. In most cases, no clear rules are provided and the opinion may be obtained either orally or in writing. Be that as it may, usually no real and in-depth information on this aspect is made available to the competent judicial authorities in the issuing and executing Member States: unless the latter requires additional clarifications, the prisoner's opinion takes the shape of a yes/no tick in a box on the certificate.

As discussed earlier in this book,<sup>3</sup> it follows that a decision on transfer is often taken without any clear indication of the prisoner's actual preferences. This situation fragments the implementation of the Framework Decision into as many bits and pieces as the varied domestic practices and endangers the achievement of the primary objective of cross-border transfers, namely offenders' social rehabilitation.

At the same time, the lack of clear normative standards leaves room for radically opposing approaches. As demonstrated by the interviews we conducted, some judicial authorities at territorial level – particularly in Spain and Romania – deem the prisoner's consent to be a *de facto* pre-condition for forwarding a certificate, as it is considered an essential component of the inmate's journey towards rehabilitation. Even though this practice might appear in line with the rationale of a cross-border transfer, it is in plain contrast with the wording of the Framework Decision, which removes the requirement for consent in many cases, as already discussed in the previous chapters.<sup>4</sup>

Therefore, both situations raise concerns as to their compliance with the

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<sup>3</sup> See Faraldo-Cabana's chapter in this book, addressing this topic extensively.

<sup>4</sup> *Ibidem*.

Framework Decision. On the one hand, the prisoner's opinion should be taken into due consideration. On the other hand, it cannot amount to an additional and automatic ground for pre-selecting transfer procedures.

In conclusion, the competent judicial authorities should – as a rule – insist upon obtaining a complete, specific and informed opinion from the person concerned. To do so, some converging measures could be useful:

- improved set of information available to the prisoner (*see* Section 2 above);
- the prisoner should be granted *ex ante* support from a lawyer;
- the obtaining of a written statement from the prisoner or the transcription of his or her oral statements in full. For this purpose, increased importance should be given to this aspect in communications between the institutional players and the professionals involved;
- where possible, the reliability of the prisoner's opinion should be supported by relevant documents and/or the indication of personal contacts;
- the forwarding of the complete prisoner's opinion to the central authority tasked with coordination and communication with the State of transfer, also with a view to minimising the multiplication of *in itinere* requests for clarifications and additional information between the executing and issuing authorities;
- all relevant information and documents should be included in the certificate or attached to it, also depending on the specific circumstances of each case.

#### **4. Filling out of the Certificate**

##### **4.1. Determination of the Sentence and Explanation of the Part of It Remaining to Be Served in the State of Transfer**

The correct, complete and clear filling out of the certificate is a recurring concern in the practice of the Member States involved in the project. Incomplete or imprecise information compels the executing judicial authority to undergo consultations and submit requests for clarifications and amendments, thereby delaying the procedure. In some cases, inaccurate certificates and the subsequent need for *in itinere* bilateral consultations trigger dilatory strategies on the part of the executing authority. In other circumstances, this situation affects the prisoner, who has no effective remedies for overcoming such institutional stumbling blocks.

The analysis of bilateral relationships between Italy and Romania shows that the determination of the sentence is the most critical issue, on two main grounds.

Firstly, the overall length of the sentence is often the outcome of complex domestic legal regimes involving various provisions of criminal law and criminal procedural law (aggravating and alleviating circumstances, specific rules on reoffending, procedural rules on plea bargaining or other deflation mechanisms, rules on parole and early release, incidence of the provisions regarding the application of the more favourable criminal law, determining the resulting punishment for competing offenses, etc.). Multiple legal layers contribute to either scaling up or scaling down the penal tariff provided by the main substantive criminal rule, as the cumulated sentence is rarely a mathematical operation. In Romania, a penalty increase is added to the sentence bearing the harshest punishment (main punishment).

These legal complexities might not be easy to grasp for the executing judicial authority, even if the issuing authority attempts to explain them in the certificate. Secondly, some prison benefits apply *in itinere* and therefore lead to a slight decrease of the sentence remaining to be served while the transfer procedure is pending. This requires the issuing authority to forward additional notices complementing the certificate, with a view to updating the situation of the prisoner concerned. On many occasions, the Romanian authorities, soon before recognising an Italian judgment, ask the issuing authorities whether last-minute updates should be taken into consideration. These additional exchanges of information are necessary but amplify the risk of mistakes and – again – slow down the procedure.

Due to the non-unitary judicial practice in Romania, which often needs to be settled by the High Court of Cassation and Justice, Romanian authorities are often confronted with the issue of determining the remaining sentence to be served in Romania, which delays the transfer process. This has happened predominantly in Romania's relationships with Italy as it was unclear if days of early release granted to sentenced persons or the length of sentence considered to have been served, based upon work carried out and good conduct, were applicable to the remainder of the sentence in Romania. Following a decision by the High Court of Justice, after recognising the decision and transfer of the sentenced person, Romania does not deduct from the sentence to be served in Romania the duration considered served by the sentencing state on the basis of work performed and good conduct.

These difficulties are not confined to Italy and Romania, as the criminal execution phase and the rules governing the imposition of a sentence fall under the exclusive competence of the Member States and therefore follow very different patterns.

Conversely, the Spanish legal order is an exception to this scenario, as *in itinere* reductions in sentences or early release procedures do not condition the execution of the sentence abroad once the final judgment has been issued;

therefore, the custodial sentence remains basically unchanged during the execution phase. As in any other EU member state, Spanish prison law provisions include parole and early release measures. However, in practice, this national regulation does not affect mutual cooperation procedures and does not obstruct prisoner transfers.

The project activities confirmed that the problems stemming from incomplete or incorrect certificates – particularly with regard to the determination of the sentence and the part of it remaining to be served – are crucial factors in the unsatisfactory application of the Framework Decision. Measures should therefore be taken to prevent unnecessary additional exchanges of information and to inform the executing judicial authority of any update on the length of the sentence remaining to be served.

In particular,

- when filling out the certificate, the issuing judicial authority should pay particular attention to describing the rules that have been applied in determining the custodial sentence. It should also describe step-by-step the sequence of steps followed to reach such a final outcome. The text of the relevant provisions should be included in the certificate;

- in the event of *in itinere* changes to the sentence remaining to be served, prompt updates should be sent to the executing judicial authority (through the central authority, if such a task falls under its remit), with a view to complementing the forwarded certificate. No new, additional or revised certificates should be sent or requested.

#### **4.2. Filling out of the Certificate: Cases of Accumulation of Sentences and Continuation of Offences**

The absence of a clear and uniform operational approach towards explaining to the executing authorities the determination of the length of the sentence – and of the part remaining to be served – in cases of accumulation of sentences and continuation of offences is another recurring obstacle which hampers the effectiveness of transfer procedures.

Accumulation of sentences – particularly as far as the Romanian, Italian and Spanish legal orders are concerned – refers to those situations where multiple sentences for different offences are added together, in order to calculate the overall amount of detention period to be served. As such, it is essentially an operation that clarifies the duration of the future deprivation of liberty, but it has no implications on the formal autonomy of each sentence involved. Therefore, in these cases, the judicial authorities face a variety of judgments contributing to the total detention period.



Continuation of offences, on the other hand, involves a formal connection between two or more distinct offences, which are deemed to fall under the umbrella of the same criminal programme. Continuation of offences can be ascertained and declared in the trial or, in some legal orders, during the execution phase.<sup>5</sup> In the former situation, the outcome is a single judgment issued in relation to a plurality of interrelated offences. In the latter case, previously distinct judgments are *ex post* reciprocally and formally connected by the judicial authority competent for the criminal execution phase. This decision *in executivis* influences the sentence remaining to be served, as it involves a slight reduction of the total sentence (namely, the sum of each custodial sentence). Therefore, judicial authorities are faced with a single order formally unifying various judgments, which were previously autonomous and are now merged in a new judicial decision which replaces them all. In addition, this merged sentence usually re-determines the length of the period of deprivation of liberty, based upon criteria pre-defined by national substantive or procedural criminal law.

In both cases, the key question is whether multiple certificates – one for each judgment – or a single certificate should be sent to the executing judicial authority. Clearly, the existence of these alternatives amplifies the risk of diversified solutions on both sides of the judicial cooperation mechanism. On the one hand, different authorities within a given issuing State may opt for the solution they unilaterally consider to be more effective (probably adjusting it further according to their habits or preferences). On the other hand, the central and judicial authorities in the executing Member State may be willing to impose a preferred approach upon any issuing State, regardless of how its authorities deal with this legal loophole and irrespective of the relevant domestic legal background. For instance, in Italy, prosecution offices at district court level follow both approaches, depending on the magistrates involved. This diversified practice is further exacerbated by the Romanian authorities, which sometimes ask for one certificate to be sent for each judgment, basically because they want to check if all of them can be recognised and determine the resulting punishment for competing offences (even though in cases of continuation *in executivis* the merged judgment formally replaces the pre-existing ones).

Following the example of other Member States – e.g. Germany – the Ministries of Justice of Italy and Romania are now pushing for the most efficient and less time-consuming solution, namely the forwarding of a single certificate, in both cases of accumulation of sentences and continuation of crimes.

In order to respond to concerns regarding the possibility of partial recognition, the certificate at issue should be carefully filled out. In particular, it

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<sup>5</sup> That is the case for Italy and Romania, but not for Spain, where there is no further and subsequent judicial decision in the case of continuation of offences. The continued nature of the perpetrated acts is taken into account within the single decision, assessing and sentencing those offences.

should include a detailed explanation of its various components, both in terms of legal and factual descriptions of the offences involved and in terms of calculating the duration of the custodial sentence. Moreover, in cases of accumulation of sentences, all relevant judgments could be attached to the certificate, for the sake of transparency and clarity. This would allow the executing judicial authority to pinpoint the specific part of the overall certificate which refers to a partial sentence that cannot be recognised.

However, from an issuing State perspective, this solution is not completely conclusive for those States – such as Italy – where continuation of offences leads to the issuance of an entirely new and autonomous judicial decision which replaces the sentences merged into it. In principle, since the judicial decision declaring the continuation formally unifies previously autonomous judgments, there should be no room for partial non-recognition. Moreover, the principle of mutual recognition binds the executing judicial authority to accept the judicial decision issued abroad, even if the application of domestic rules would have led to a different outcome. Therefore, in these situations the executing judicial authority should be expected to take into consideration only the last judicial decision. At the same time, this approach could lead to a side-effect, as it could trigger refusals of recognition of the entire judgment even in those cases where recognition is barred only for some of the offences involved. These exceptional situations could be solved by way of the possibility of mutual exchanges of information, leading the issuing authority to expunge the offence at stake from the single certificate for the sole purposes of completing the judicial cooperation mechanism.

In any event, preliminary consultations between the judicial authorities involved represent an effective form of support in these situations.

In conclusion,

- in both cases of accumulation of sentences and continuation of offences (in trial or *in executivis*) only one certificate should be filled-in and forwarded. The certificate should provide clear information on the substantive criminal rules describing the offences involved, the factual background and the specific conduct of the transferee. Moreover, in the event of accumulation of sentences, all relevant judgments should be attached to the certificate, unless agreed otherwise with the executing judicial authority;

- the issuing judicial authority should pay particular attention to the description of how the final length of the sentence to be served has been calculated and to the relevant national legal provisions;

- in the event of partial recognition, the executing authority should clearly point out in relation to which offence and judgment the recognition is denied. In the case of continuation of crimes *in executivis*, a specific solution should be agreed by the judicial authorities involved;

– any doubt or unclear aspect should be solved by means of bilateral consultations between the competent judicial authorities.

### **5. Transmission of the Judgment and of Its Translated Version**

On many occasions, judgments are lengthy and involve several persons having participated in a crime. This raises the question as to what extent the transmission of the whole text of the judgment is actually essential for the purposes of recognition by the executing Member State. Besides the implications in terms of the principles of mutual trust and mutual recognition, much more operational concerns related to data protection – and in particular data minimisation – and to the principle of proportionality suggest that the forwarding of the whole judgment is not always an absolute pre-condition. On the other hand, where possible, the issuing authority should be allowed to attach to the certificate only those parts of the judgment that refer to the transferee and are actually relevant for determining its situation for the purposes of the judicial cooperation procedure.

Another issue refers to the translation of the foreign judgment. From this point of view, Article 23 of the Framework Decision provides that (only) the certificate must be translated into the official language of the executing Member State. Conversely, as clarified by para. 2 of the same article, “no translation of the judgment [attached to the certificate for the purposes of recognition] shall be required”.

Despite this unequivocal wording, the approach of the Member States varies extensively. Some Member States request, on a regular basis, that the complete translation of the judicial decision be sent in their official languages. This practice derives from a declaration submitted by some Member States (Romania is a key example)<sup>6</sup> on the occasion of the transposition of Framework Decision 2008/909/JHA. According to this declaration, the authorities of these Member States – when acting in their capacity as executing authorities – are always entitled to seek the full translation of the judgment. However, as demonstrated by some cases involving Romania as an executing Member State, such translations are time consuming and very expensive, and can influence the effectiveness of the judicial cooperation procedure.

In this respect, in the second half of 2018, the Austrian Presidency of the EU Council expressed doubts on the compatibility of these declarations with

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<sup>6</sup>For a comprehensive view on these declarations, see the page dedicated to the Framework Decision on the website of the European Judicial Network, retrieved on 23 September 2019 from [https://www.ejn-crimjust.europa.eu/ejn/EJN\\_Library\\_StatusOfImpByCat/EN/36](https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat/EN/36).

the founding pillars of judicial cooperation in criminal matters across the EU. In addition, and more specifically, the Austrian Presidency – with the support of some Member States – complained that this practice is not in line with Article 23(3) of the Framework Decision, which is the legal basis for the submission of such declarations. In fact, this provision states that:

Any Member State may, on adoption of this Framework Decision or later, in a declaration deposited with the General Secretariat of the Council state that it, as an executing State, may without delay after receiving the judgment and the certificate, request, in cases where it finds the content of the certificate insufficient to decide on the enforcement of the sentence, that the judgment or essential parts of it be accompanied by a translation into the official language or one of the official languages of the executing State or into one or more other official languages of the Institutions of the European Union. Such a request shall be made, after consultation, where necessary, to indicate the essential parts of the judgments to be translated, between the competent authorities of the issuing and the executing States.

In fact, the wording of the Framework Decision is very clear in providing that the submission of a declaration does not amount to an absolute right to impose the burden of translation of the judgment on the issuing authority. On the other hand, even after a declaration is deposited, the request for translation of the foreign judgment cannot be considered a general rule. In principle, such requests may be made only when the content of the certificate is insufficient for deciding upon the enforcement of the sentence. Accordingly, before requesting the translation, the executing State should undergo preliminary consultations, to agree with the issuing Member State (meaning the issuing judicial authority or the central authority depending on each national case) the essential parts of the judgment that actually need to be translated. In any event, the full translation of the judgment is an exceptional and last resort, to be taken when no less demanding measures are feasible or proportionate in the relevant circumstances.

On the occasion of the meetings of the project experts, the representatives of Italy, Romania and Spain shared the view that the proper and complete compilation of the certificate is an essential pre-requisite and may minimise the need for translations and further information. This applies, in particular, to those sections of the certificate concerning the relevant domestic provisions of substantive criminal law, the determination of the sentence, and the description of the facts of the case.

In principle, the Romanian representatives expressed the intention to stick to the declaration of their government. Nonetheless, they acknowledged that, despite the declaration itself, there are cases where Romanian judicial authorities are satisfied with the partial translation of a foreign judgment, as long as it

is essential for the purposes of recognition, in line with Article 23(3) of the Framework Decision.

In this context, the experts involved in the RePers project identified the possible content of the notion of ‘essential parts’ of a judgment, worthy of being translated into the official language of the executing State, namely the parts providing a more precise understanding of:

- the relevant national legislation;
- the elements of the offence(s);
- the offenders’ conduct;
- the operative section of the judgment, including the determination of the punishment.

The experts also agreed on the fact that a solution on a case-by-case basis should be sought, for instance through preliminary consultations between the issuing and the executing authorities pursuant to Articles 4(2), 9(4) and 10(1) of the Framework Decision, especially in cases of very long judgments, judgments involving many offenders, judgments concerning highly sensitive personal information of third parties, and repetitive judgments issued in relation to minor offences.

Another important and very practical issue refers to the costs of such translations. The Framework Decision is not unequivocal on who must bear the (heavy) burden of these translations. Whereas the final part of Article 23(3) of the Framework Decision seems to allocate these expenses to the issuing authority, unless the executing one decides differently, Article 24 states that the costs stemming from the application of the Framework Decision shall be borne by the State of execution “except for the costs of the transfer of the sentenced person to the executing State and those arising exclusively in the sovereign territory of the issuing State”. Once again, normative gaps leave room for diversified practices. The example of the Italy-Romania bilateral cooperation can be used, as Italy always bears the expenses of the translations imposed by the Romanian authorities as a pre-condition for recognition. Conversely, in Spain, the costs of translation services are allocated to the foreign judicial authority which requests them.

In conclusion, as a rule, for the purposes of recognising a foreign judicial decision, the executing judicial authority should be satisfied with the content of the certificate, provided that the latter is clear and complete.

On the other hand, the full translation of the judgment(s) should be considered an exceptional and last resort measure. If this service is needed, the translation of selected (essential) parts of the judgment should be prioritised. For this purpose, the essential parts of the judgments are considered to be the relevant national legislation; the elements of the offence(s); the offenders’ conduct; and

the operative section of the judgment, including the determination of the punishment.

In any event, particularly in complex cases involving many offenders and/or characterised by very lengthy judgments, the judicial authorities involved could undertake bilateral consultations on a case-by-case basis, in order to identify more carefully the parts of the judicial decision worthy of translation.

Moreover, in cases where third parties are involved, attention should be paid to data protection principles and duties (e.g. data minimisation and the need to process sensitive data).

## 6. Assessing the Chances of Social Rehabilitation

The project activities have repeatedly addressed the issue of how the prisoner's future chances of social rehabilitation are and should be assessed by the competent judicial authorities. This topic has been widely addressed earlier in this book by Faraldo-Cabana, so we focus here only on some specific aspects of the complex set of measures and factors that contribute to achieving the primary objective of the Framework Decision.

Understandably, practices regarding the assessment of the prisoner's prospects of social rehabilitation are extremely varied. Once again, the lack of common normative standards offers leeway to the national authorities, both in terms of methods and of criteria for evaluating an inmate's situation. As extensively noted by scholars,<sup>7</sup> the discretion entrusted to the domestic authorities leaves room for the 'managerial ambitions' of the Member States.

Aside from any theoretical analysis concerning the actual rationale underpinning the implementation of the Framework Decision, practice demonstrates that the issuing Member State usually lacks clear evidence on the prisoner's personal situation, especially when it comes to his or her family and societal environment in the executing Member State. As Italy and Romania both face overcrowded prisons, there have been cases where Italy has requested transfers of prisoners to Romania despite their connection with Romania being minimal, a procedure that depended solely on the citizenship of each individual (in this case, Romanian), not taking into consideration the chances of social rehabilitation.

Moreover, the competent judicial authorities are sometimes bewildered by the specific features of the cross-border assessment they are expected to per-

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<sup>7</sup> V. Mitsilegas, 'The Third Wave of Third Pillar Law', *European Law Review*, Vol. 34, Issue 3, 2009, p. 523, and A. Martufi, 'Assessing the Resilience of 'Social Rehabilitation' as a Rationale for Transfer: A Commentary on the Aims of Framework Decision 2008/909/JHA', *New Journal of European Criminal Law*, Vol. 9, Issue 1, 2018, p. 49.

form, as it is inherently different from ordinary checks made at domestic level by prison supervision courts. In the latter case, the competent judicial authorities can use a significant series of reliable documents, such as the reports of prison staff and the notices of social assistance services. Many of these documents have little relevance in cross-border cases, unless they are used from a negative perspective, namely to demonstrate that the prisoner's centre of gravity is in the issuing Member State.

These difficulties are further exacerbated by the widespread absence of the technical support of defence lawyers. In addition, the analysis of the state of the art has shown that the role of the detainees' ombudsmen is also, generally, limited.

Bearing in mind this scenario, the project activities have been focused on discussing the most promising criteria and tools (and their respective order of priority/importance) for assessing a prisoner's prospects of rehabilitation abroad, also in light of the practice of the experts involved.

In particular, the issuing judicial authority should take into due consideration the objective and subjective factors capable of demonstrating that the prisoner's social bonds are essentially focused on the issuing Member State. Particular attention must be paid to the relationship between Romania and Italy due to the high number of Romanian citizens involved in the Italian prison system with minimal or inexistent connections to Romania at the time of sentencing.

For this purpose, a reliable body of information, such as the reports of prison staff and of social assistance services, should play a prominent role. In order to assess the actual chances of social rehabilitation abroad, the issuing judicial authority should consider: the prisoner's current nationality/residence/domicile; the grounds on which he or she resides/lives in the issuing State and the duration of such a situation; the previous residence(s)/domicile(s) and their duration; the family situation (if there are minor children, special consideration should be given to their best interests); the current and previous work activities and the possibility of finding a job in the issuing or executing Member State (if any information is provided/available on the latter aspect); the prisoner's opinion; whether the prisoner will be deported after the sentence has been served; the knowledge of the language of the issuing State; the social environment in the issuing and executing Member States; any other economic, cultural and social links in the issuing and executing Member States.

Even though this list reflects the importance usually attached to the criteria listed therein by the experts involved, the actual importance of each of these factors should be assessed on an individual basis, depending on the circumstances of each case.

## **7. Coordination with the European Arrest Warrant**

Another recurring stumbling block to bilateral cooperation is the overlapping of the scope of application 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) and Framework Decision 2008/909/JHA. The subject is partially covered by Article 25 of the latter instrument, which provides that:

Without prejudice to Framework Decision 2002/584/JHA, provisions of this Framework Decision shall apply, *mutatis mutandis* to the extent they are compatible with provisions under that Framework Decision, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that Framework Decision, or where, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned.

However, the two Framework Decisions do not provide specific rules for cases in which the respective procedures overlap. This happens when a State issues a European Arrest Warrant (hereinafter, 'EAW') but then seeks a transfer in the State of execution of the EAW, while surrender is pending or is about to be performed.

Again, the Italian-Romanian experience is illustrative, as, on many occasions, the Italian judicial authorities issue two parallel certificates, the first pursuant to Framework Decision 2002/584/JHA and the second under Framework Decision 2008/909/JHA, with a view to soliciting the arrest of the requested person and in the meantime allocating the execution of the sentence in the Member State where he or she lives. In other cases, the Italian authorities have submitted a request for suspension of the surrender, with a view to forwarding a new certificate under Framework Decision 2008/909/JHA, to replace the EAW. These approaches concretely go right to the heart of the problem, but raise several concerns as to their actual compliance with the Framework Decisions under consideration. For instance, no such ground for suspending the surrender is provided by Framework Decision 2002/584/JHA. Moreover, a certificate under Framework Decision 2008/909/JHA cannot automatically replace an EAW: They are two complementary but different procedures and any certificate requires formal recognition from the executing authority. Since the two mechanisms pursue very different purposes, a judgment could be recognised for the purposes of an EAW, but not in the framework of a cross-border transfer. In addition, the Framework Decision on the EAW imposes strict deadlines for keeping the requested person in custody. Any suspension



or undue delay may see the executing authorities being forced to release the person concerned, thereby increasing the risk of absconding and impunity.

On the other hand, considering the aforementioned relationship between Romania and Italy, the Romanian authorities consider that they are overburdened with two overlapping procedures: The European Arrest Warrant procedure and the transfer based upon the Framework Decision 2008/909/JHA, which have different conclusions: surrender to Italy or delegation (transfer of enforcement) to Romania. The Romanian authorities consider that it would be better for only one procedure to be requested by the Italian authorities: either on the basis of the EAW, or delegation of the procedure on the basis of Framework Decision 2008/909/JHA.

The handbook on the issuing and the execution of EAW allows the issuing authorities to forward directly a certificate under Framework Decision 2008/909/JHA, without a previous EAW having been issued. The handbook is not clear-cut in describing which situations could lead to this straightforward solution. However, the inherent differences between the two instruments lead us to believe that such an outcome should apply when:

- the requested person is in the territory of the State of execution, and
- having due regard to the maximisation of the requested person's chances of social rehabilitation, it seems more appropriate to allocate the enforcement of the custodial sentence in the executing Member State itself.

The approach suggested by the European Commission handbook avoids cumbersome overlapping of different mechanisms and too lengthy procedures. In addition, it is in line with the rationale of the two instruments. In fact, while Framework Decision 2008/909/JHA is entirely devoted to enhancing the prisoner's chances of social rehabilitation, Article 4(6) of Framework Decision 2002/584/JHA provides for a specific optional ground for refusing surrender if the wanted person is a national of the executing State or lives or resides therein. As the Court of Justice has clarified,<sup>8</sup> the latter provision is precisely intended to prioritise the person's centre of gravity and to avoid his or her family and societal environment being plainly disrupted due to surrender.

The issuing authority is then expected to assess whether issuing an EAW or a certificate pursuant to Framework Decision 2008/909/JHA better fits the circumstances of a given case. The choice ultimately reflects the identification of the place in which the sentence should be served, in light of the future opportunities of rehabilitation in a post-release era. If the executing State is considered the best option, the issuing authority should start a cross-border transfer

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<sup>8</sup> See, for instance, Judgment of 6 October 2009 in case C-123/08, *Dominic Wolzenburg*, [2009] ECLI:EU:C:2009:616.

procedure, even though the person concerned is already in the territory of the destination State.

In conclusion, the parallel issuing of an EAW and of a certificate under Framework Decision 2008/909/JHA should be avoided. The issuing authority should give priority to the certificate under Framework Decision 2008/909/JHA, if it deems that the enforcement of the sentence in the Member State in which the requested person is/resides/lives would better suit the rehabilitation goals underpinning transfer procedures. For this purpose, the issuing authority could undergo preliminary consultations with the competent judicial authorities in the executing Member State.

## **8. Concluding Remarks**

The general, everyday implementation of the principle of mutual recognition puts mutual trust under stress. Besides theoretical assumptions, the daily practice unveils multi-faceted approaches to centrally harmonised judicial co-operation procedures within the EU. This variety of domestic practices and strategies reflects differences which are inherent to the construction of the European judicial space and to the different legal cultures converging under the aegis of the Union. From this point of view, the practical and legal difficulties raised by the implementation of the Framework Decision highlight the core of potential flaws and centrifugal forces affecting the mutual trust and mutual recognition paradigm.

Four main aspects are worthy of attention in this brief concluding section.

Firstly, the system of cross-border transfers relies heavily on the organisational capacity and efficiency of the Member States. Several converging factors, such as the variety of stakeholders involved and the complex dynamics of prison life, often make it very difficult to identify inmates who are suitable for a transfer (and, hopefully, willing to be transferred) and to conduct the procedure appropriately. Crucially, today's practice shows that the Member States – or at least those involved in this research – face the risk of being unable to transfer rapidly prisoners asking for their removal.

Secondly, notwithstanding the wording of the Framework Decision and the increasing debate on this issue, the social rehabilitation objective underpinning cross-border transfers still raises concern. The use of cross-border transfers with a view to deflating prison overcrowding and expelling undesired Union citizens is a recurring challenge to the mechanism at issue, as confirmed by the interviews held with practitioners during the project. The spectre of public order and budgetary concerns may trigger abuses of the Framework Decision and thus require appropriate checks and judicial remedies.

Thirdly, legal fragmentation – which reaches its peak precisely in the domain of the criminal execution phase – is still today one of the most pressing factors of departure from mutual trust and mutual recognition. Whether it is how prison benefits are regulated, the normative standards for determining prison conditions, or the regime of reductions and remissions in sentence, the differences (and the often related lack of mutual knowledge and awareness) between the legal orders of the Member States involved is a recurring concern. While it seldom blocks cooperation *per se*, legal fragmentation triggers several obstacles, such as incomplete or ineffectively filled out certificates, repeated clarification requests, and requests for various updates *in itinere* on the sentence remaining to be served, thereby slowing down the procedure and discouraging the already overloaded judicial authorities.

Finally, various problems of interconnection of the Framework Decision with other parallel and complementary instruments are gradually emerging. As we have seen, the choice between issuing a certificate under Framework Decision 2008/909/JHA or an EAW requires the competent authority to make a difficult preliminary assessment, without conclusive normative and jurisprudential guidance. This issue is just one example of a new future branch of litigation in this domain. Thus far, the overarching success of the EAW has led national courts and the Court of Justice of the European Union to focus almost exclusively on this instrument. However, the increasing practice of cross-border transfers and the introduction of other instruments such as Framework Decisions 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 (OJ L 337, 16.12.2008, pp. 102-122) and 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 (OJ L 294, 11.11.2009, pp. 20-40) will put to the test the internal coherence of the judicial cooperation system set up by the EU legislature.

All these aspects – which highlight just some of the issues raised by cross-border transfers – have a key common denominator, namely the need for tailor-made conduct of the transfer procedure, in light of the circumstances of each individual case. This is actually one of the most challenging aspects of the implementation of Framework Decision 2008/909/JHA. The RePers activities have led the research consortium to stress how the combination of diversified domestic legal solutions and informal implementation strategies with the specific situation of the prisoner concerned makes it difficult to identify all-encompassing and easily replicable solutions to existing problems. This factor further requires the judicial authorities and professionals involved to take their tasks seriously on a case by case basis.

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