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# One step forward, two steps back? Social rehabilitation of foreign offenders under Framework Decisions 2008/909/JHA and 2008/947/JHA<sup>1</sup>

## Introduction

Explanatory reports, preambles, and contents of the instruments and agreements adopted in Europe since the 1960s, which allow sentenced persons to be transferred to their country of nationality/origin or permanent residence, have consistently referred to the offenders' social rehabilitation as an important objective of such transfers.<sup>2</sup> Further, the declared purpose of the ad hoc legal instrument for the transfer of prisoners across the EU is to facilitate the social rehabilitation of the sentenced person (Article 3(1) of the 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). Social rehabilitation is the main goal and the leading principle of this instrument. The driving rationale behind this instrument is that allowing prisoners to serve their sentence close to home improves their chances of social rehabilitation. It is commonly accepted that, on the whole, enforcement of a judgment in surroundings familiar to the prisoner is more likely to facilitate his or her social rehabilitation. Social ties, particularly employment and relations with family, should be given sufficient attention during and after punishment.<sup>3</sup> It is also widely assumed that transfer to the home country is in a foreign prisoner's interest since the problems offenders experience in prison are generally exacerbated when they are foreign. 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. They are often unable to attend work or school in prison because of language difficulties and selection criteria that exclude them, making it likelier that they will relapse into crime.<sup>4</sup> It is

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<sup>2</sup> See the Preamble and Article 1 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (Strasbourg, 30 November 1964, hereinafter the 1964 European Convention); Explanatory Report to the European Convention on the International Validity of Criminal Judgments (The Hague, 28 May 1970, hereinafter the 1970 European Convention); Explanatory Report and Preamble to the Convention on the Transfer of Sentenced Persons (Strasbourg, 21 March 1983, hereinafter the 1983 European Convention); Explanatory Report and text of the UN Model Agreement on the Transfer of Foreign Prisoners, adopted by the Seventh Crime Congress on the Prevention of Crime and the Treatment of Offenders (Milan, 16 August-6 September 1985) and endorsed by the General Assembly in resolution 40/32 (29 November 1985); 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). Preamble of the Recommendation R (92) 18, concerning the practical application of the Convention on the Transfer of Prisoners (adopted by the Committee of Ministers of the Council of Europe on 19 October 1992), also mentioned the importance of the social rehabilitation of sentenced persons and to that end the transfer of such persons to the country where their own society is.

<sup>3</sup> F McNeill, 'A desistance paradigm for offender management' (2006) 6 CCL 39.

<sup>4</sup> See A Tarzi and J Hedges, *A Prison Within a Prison* (Inner London Probation Service 1990); P Green, *Drug Couriers* (Howard League for Penal Reform 1991); A Tarzi and J Hedges, *A Prison Within a Prison - Two Years On: An Overview* (Inner London Probation Service 1993); P Green, *Drugs, Trafficking and Criminal Policy - the Scapegoat Policy* (Waterside Press 1998); CK Pourgourides, et al., *A Second Exile: The Mental Health Implications of Detention of Asylum Seekers in the UK* (University of

(falsely) assumed that all of them will be deported once released, thus they are not offered the range of welfare-oriented services that may otherwise be an integral part of imprisonment.<sup>5</sup> Therefore, 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>

To facilitate the social rehabilitation of sentenced persons is also one of the main objectives 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, according both to Recital 24 and Article 1. Recital 8 adds another concept, reintegration, emphasising that the aim of the Framework Decision is to enhance the prospects of the sentenced person being reintegrated into society by enabling that person to preserve family, linguistic, cultural and other ties. This rationale mirrors that of the 1964 European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, which aims to facilitate the social rehabilitation of sentenced persons by allowing the measures imposed on them to be supervised in the state with which they have the closest ties. Courts are reluctant to pass a non-custodial sentence when there are doubts as to how such sentences will be delivered in another country. Knowing that these measures will be effectively implemented irrespective of the country in which the sentenced person will choose to reside, courts are more likely to treat foreign offenders as nationals, therefore avoiding the discriminatory treatment regarding the use of probation measures and other alternatives to imprisonment observed in practice, in spite of all recommendations and rules.<sup>7</sup> In fact, it is widely

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Birmingham/Cadbury Trust 1996); R Ellis, *Asylum-Seekers and Immigration Act Prisoners - The Practice of Detention* (Prison Reform Trust 1998); HS Bhui, *Going the distance: Developing effective policy and practice with foreign national prisoners* (Prison Reform Trust 2004); HS Bhui, 'Foreign National Prisoners: Issues and Debates' in HS Bhui (ed), *Race and Criminal Justice* (Sage 2009), 154; S Easton and P Piper, *Sentencing and Punishment: The Quest for Justice* (3<sup>rd</sup> edn, Routledge 2012); T Ugelvik, 'The Incarceration of Foreigners in European Prisons' in S Pickering and J Ham (eds.), *The Routledge Handbook on Crime and International Migration* (Routledge 2014), 107.

<sup>5</sup> T Ugelvik, 'Seeing Like a Welfare State: Immigration Control, Statecraft, and a Prison with Double Vision' in KF Aas and M Bosworth (eds.), *The Borders of Punishment. Migration, Citizenship, and Social Exclusion* (Oxford University Press 2013), 183.

<sup>6</sup> M Płachta, 'Human Rights Aspects of the Prisoner Transfer in a Comparative Perspective' (1993) 53 *Louisiana Law Review* 1043; AMM Orie 'Problems with the effective use of prisoner transfer treaties' in R Atkins (ed.), *The alleged transnational offender* (Martinus Nijhoff Publishers 1995) 59; D van Zyl Smit 'International imprisonment' (2005) 54 *ICLQ* 357.

<sup>7</sup> Recommendation Rec(92)16 of the Committee of Ministers of the Council of Europe to member States on the European rules on community sanctions and measures (adopted by the Committee of Ministers on 19 October 1992 at the 482<sup>nd</sup> meeting of the Ministers' Deputies) recommended 'no discrimination in the imposition and implementation of community sanctions and measures on grounds of race, colour, ethnic origin, nationality, gender, language, religion, political or other opinion, economic, social or other status or physical or mental condition' (Rule 20). Lack of compliance compelled to include a reminder in following instruments of the Council of Europe on the matter. For instance, Recommendation CM/Rec(2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules (adopted by the Committee of Ministers on 20 January 2010 at the 1075<sup>th</sup> meeting of the Ministers' Deputies) reiterated the prohibition of discrimination. The same did Recommendation CM/Rec(2017)3 of the Committee of Ministers to member States on the European Rules on community sanctions and measures (adopted by the Committee of Ministers on 22 March 2017 at the 1282<sup>nd</sup> meeting of the Ministers' Deputies). More detailed, 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), '[r]ecognising the difficulties which these [foreign] prisoners may face on account of such factors as differences in language, culture, customs and religion,

recognised that, with regard to foreigners or persons residing abroad, information about their previous criminal and prison records is often lacking, which makes risk assessment difficult. Risk of flight is routinely invoked disproportionately against foreign nationals. As a result, foreign offenders are not considered for the same range of alternative sanctions and measures as national offenders. Those who would normally have qualified for a suspended sentence or probation are given a term of confinement, kept in prison until their sentence expires, or released only in order to be expelled from the country. Further, because they are regarded as being at risk of absconding, such persons are not considered for transfer to more open regimes. Probation systems designed to reduce the risk of offending and support prisoners through to release are effectively unavailable. Parole is not granted to foreign offenders. In sum, existing discrimination against foreign offenders when considering probation and alternative measures is generally recognised in literature.<sup>8</sup>

It is no surprise that European instruments on the transfer of prisoners and on probation and alternative sanctions aim to promote the social rehabilitation of offenders. Social rehabilitation as the essential aim of the penitentiary system is widely accepted in international law<sup>9</sup>, with punishment and deterrence usually omitted or mentioned only

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and lack of family ties and contact with the outside world', and '[d]esirous of alleviating any possible isolation of foreign prisoners and of facilitating their treatment with a view to their social reintegration', established two basic principles to be followed: 'Foreign suspects and offenders shall be entitled to be considered for the same range of non-custodial sanctions and measures as other suspects and offenders; they shall not be excluded from consideration on the grounds of their status' (4), and '[f]oreign offenders sentenced to imprisonment shall be entitled to full consideration for early release' (6).

Prohibition of discrimination on the grounds of nationality is usually included in all international instruments on alternatives to imprisonment and community sanctions. The UN Standard Minimum Rules for Non-Custodial Measures, adopted by General Assembly resolution 45/110 of 14 December 1990 (hereinafter the Tokyo Rules), indicate that they 'shall be applied without any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status' (Rule 2.2). In a similar sense, Rule 2.1 of the UN Standard Minimum Rules for the Administration of Juvenile Justice, adopted by General Assembly resolution 2010/16 of 29 November 1985 (the Beijing Rules).

<sup>8</sup> AM van Kalmthout, FH van der Meulen and F Dünkel, 'Comparative overview, conclusions and recommendations' in AM van Kalmthout, FH van der Meulen and F Dünkel (eds.), *Foreigners in European prisons* (Wolf Legal Publishers 2007) 7; HS Bhui, 'Foreign National Prisoners: Issues and Debates' in HS Bhui (ed), *Race and Criminal Justice* (Sage 2009) 154, 161-2; 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 and T de Roos (eds.) *Fervet Opus. Liber Amicorum Anton van Kalmthout* (Maklu 2010) 113, 118; J Banks, 'Foreign national prisoners in the UK: explanations and implications' (2011) 50 *Howard Journal* 184; E Kaufman, 'Finding foreigners: race and the politics of memory in British prisons' (2012) 18 *Population, Space and Place* 701; G McNally and I Burke, 'Implementation of the Framework Decision on the transfer of Probation Measures between States in the European Union' (2012) 2 *EuroVista* 70, 71; T Ugelvik, 'Seeing Like a Welfare State: Immigration Control, Statecraft, and a Prison with Double Vision' in KF Aas and M Bosworth (eds.), *The Borders of Punishment. Migration, Citizenship, and Social Exclusion* (Oxford University Press 2013), 183, 190-4, and 'The Incarceration of Foreigners in European Prisons' in S Pickering and J Ham (eds.), *The Routledge Handbook on Crime and International Migration* (Routledge 2014), 107, 113, 116-7; J Warr, 'The deprivation of certitude, legitimacy and hope: Foreign national prisoners and the pains of imprisonment' (2016) 16 *CCL* 301; I Durnescu, 'Framework decisions 2008/947 and 2009/829: state of play and challenges' (2017) 18 *ERA Forum* 355, 357.

<sup>9</sup> See Article 10, paragraph 3, of the International Covenant on Civil and Political Rights, which specifies that the 'essential aim' of a penitentiary system is the 'reformation and social rehabilitation' of prisoners. The Standard Minimum Rules for the Treatment of Prisoners echo this duty. Similarly, the revised European Prison Rules on managing detention put a strong emphasis 'so as to facilitate the reintegration into free society of persons who have been deprived of their liberty' (rule 6).

in passing. As already shown (see footnote 1), the argument for encouraging the transfer of prisoners on the grounds of promoting social rehabilitation also has a strong basis in international and EU law. From the perspective that community measures and alternative sanctions constitute important ways of avoiding the negative effects of imprisonment, many instruments and agreements adopted in Europe since the 1960s refer to offenders' rehabilitation as an important objective of such documents,<sup>10</sup> although Council of Europe recommendations also mention other related concepts, such as social adjustment or reintegration.<sup>11</sup> Unlike the Framework Decision 2008/909/JHA, however, Framework Decision 2008/947/JHA explicitly combines offenders' rehabilitation with other purposes, such as the improvement of the protection of victims and of the general public and the facilitation of the application of suitable probation measures and alternative sanctions for offenders not residing in the country of conviction. Does this introduce a fundamental change in the understanding of the concept of social rehabilitation? Is there a European concept of social rehabilitation?

A review of the literature suggests that this article is one of the first attempts to provide an analysis of the concept of 'social rehabilitation' used in both Framework Decisions, and of its limited usefulness, in spite of it being regarded as one of the most relevant features of European penal policy.<sup>12</sup> This comparison will be made by considering the associated aims and purposes of both instruments. Little investigation has been done in this field, especially regarding mutual recognition of probation measures and alternatives sentences. In fact, while Framework Decision 2008/909/JHA has received quite extensive attention in the literature,<sup>13</sup> Framework Decision 2008/947/JHA has

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<sup>10</sup> See Explanatory Report, Preamble and Article 1 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (Strasbourg, 30 November 1964). Similarly, the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (2001/C 12/02), adopted by the Council of the European Union on the 30 November 2000, also signalled that the transfer of sentenced persons should be promoted 'in the interests of social rehabilitation' (measure 3.1.4).

<sup>11</sup> See, for instance, Recommendation Rec(92)16 on the European rules on community sanctions and measures, Recommendation Rec(2000)22 on improving the implementation of the European rules on community sanctions and measures, and Recommendation Rec(2003)22 on conditional release (parole).

<sup>12</sup> S Snacken and D van Zyl Smit, *Principles of European Prison Law and Policy* (Oxford University Press 2009) 83.

<sup>13</sup> G Vermeulen, AM van Kalmthout, N Paterson, M Knapen, P Verbeke and W de Bondt, *Cross-border execution of judgments involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures* (Maklu 2011); W de Bondt and A Suominen 'State Responsibility When Transferring Non-Consenting Prisoners to Further their Social Rehabilitation – Lessons Learnt from the Asylum Case Law' (2015) 5 *European Criminal Law Review* 347; S Montaldo 'Judicial Cooperation, Transfer of Prisoners and Offenders' Rehabilitation: No Fairy-tale Bliss. Comment on Ognyanov' (2017) 2 *European Papers* 709; S Montaldo 'Offenders' Rehabilitation: Towards a New Paradigm for EU Criminal Law?' (2018) 8 *European Criminal Law Review* 223; J Mujuzi 'The Transfer of Offenders between European Countries and Remission of Sentences: A Comment on the Grand Chamber of the Court of Justice of the European Union's Judgment in Criminal Proceedings against Atanas Ognyanov of 8 November 2016 Dealing with Article 17 of Council Framework Decision 2008/909/JHA' (2017) 7 *European Criminal Law Review* 289; G Conway 'Prospects and Problems for European Legal Cooperation Concerning Prisoners' (2018) 10 *European Journal of Probation* 136; T Marguery (ed.), *Mutual trust under pressure. The transferring of sentenced persons in the EU* (Wolf Legal Publishers 2018); A Martufi, 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA' (2018) 9 *NJECL* 43; A Martufi 'The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?' (2018) 25 *MJECL* 672; M Pleić 'Challenges in cross-border transfer of prisoners: EU framework and Croatian perspective' in D Duić and T Petrašević (eds.), *EU Law in Context – Adjustment to Membership and Challenges of the Enlargement* (University Josip Juraj Strossmayer 2018) 375.

garnered much less.<sup>14</sup> The present study aims to bridge this research gap. The topic is definitely a timely one, particularly if one considers that the application level of both instruments is less than satisfactory, which partially relates to the perceived contradiction between what they declare to be their main purpose – the social rehabilitation and reintegration of offenders – and their other explicit or implicit objectives – mainly, promoting mutual recognition of decisions in criminal matters, reducing prison population and removing undesired aliens. Timeliness is also prompted by the tens of thousands of EU citizens that are convicted in another member state of the European Union who could benefit from the repatriation measures, of which a considerable number end up in a European prison. In 2018, 15.9% of the prison population in Europe were foreign nationals, of which 32.8% were EU citizens, around 37,000 people.<sup>15</sup>

In the next two sections the concept of social rehabilitation in both Framework Decisions will be explored. Mentioning social rehabilitation as the main rationale for transferring foreign offenders to another member state is considered one important step towards a more humane model of judicial cooperation in the EU area of freedom, security, and justice. Attention will be paid to the ambiguous role played by offenders' consent in the context of transfer procedures, and other aspects that do not entirely fit the purpose of increasing the prospects of rehabilitation of foreign offenders. The fourth section shall provide a more in-depth analysis of the aims underlying the adoption of both European instruments. More specifically, the contradictory relation between offenders' social rehabilitation and the other explicit or implicit aims of the transfer procedure will be discussed. The last section contributes to the idea that the effectiveness of judicial cooperation in criminal matters, in the case of the EU, and the interest in reducing prison populations and getting rid of unwanted foreign offenders, in the case of the issuing member states, are the true governing criteria of transfer procedures. This conclusion situates both Framework Decisions two steps back from their point of origin, the Council of Europe conventions on the matter.

### **Social rehabilitation in Framework Decision 2008/909/JHA**

'Social rehabilitation' is the term historically used in international transfer conventions and now in Framework Decision 2008/909/JHA. This concept is not defined at the EU level. Only its contours have been gradually defined in case law of the European Court of Human Rights.<sup>16</sup> It should be stressed that, according to the Court of Justice of the European Union, 'the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope

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<sup>14</sup> C Morgenstern 'European Initiatives for Harmonisation and Minimum Standards in the Field of Community Sanctions and Measures' (2009) 1 *European Journal of Probation* 128; M Knapen 'Implementation of Framework Decisions on the Enforcement of Foreign Criminal Judgments: (How) Can the Aim of Resocialisation be Achieved?' in M Groenhuisen, T Kooijmans and T de Roos (eds.) *Fervet Opus. Liber Amicorum Anton van Kalmthout* (Maklu 2010) 113; G McNally and I Burke, 'Implementation of the Framework Decision on the transfer of Probation Measures between States in the European Union' (2012) 2 *EuroVista* 70; I Durnescu, 'Framework decisions 2008/947 and 2009/829: state of play and challenges' (2017) 18 *ERA Forum* 355; I Wieczorek 'EU constitutional limits to the Europeanization of punishment: A case study on offenders' rehabilitation' (2018) 25 *MJECL* 655.

<sup>15</sup> MF Aebi, MM Tiago, *SPACE I - 2018 – Council of Europe Annual Penal Statistics: Prison populations* (Strasbourg: Council of Europe, 2018), 58.

<sup>16</sup> S Meijer 'Rehabilitation as a Positive Obligation' (2017) 25 *European Journal of Crime, Criminal Law and Criminal Justice* 145.

must normally be given an autonomous and uniform interpretation throughout the EU'.<sup>17</sup> Seemingly, the Court has made little use of this interpretative technique in the area of judicial cooperation in criminal matters.<sup>18</sup> However, in view of the objectives of the Framework Decision, which seeks the establishment of a new simplified and more effective system for the transfer of prisoners to facilitate and accelerate judicial cooperation within the EU, it should be considered that the forwarding of the judgment and the certificate may only take place where the competent authority of the issuing state is satisfied that the enforcement of the sentence by the executing state would serve the purpose of facilitating the social rehabilitation of the sentenced person (Article 4(2)). It is clear that a uniformly interpreted, European-wide notion of social rehabilitation could better achieve the EU objective of becoming an area 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 in the member states.<sup>19</sup>

In EU law, the meaning of social rehabilitation corresponds today more closely to 'reintegration', understood as the re-entry of the offender into society following imprisonment, than to the classical understanding of 'rehabilitation' as a process of internal change.<sup>20</sup> Recital 9 of the Preamble to Framework Decision 2008/909/JHA offers some guidance about what aspects need to be considered: '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 both with the Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe to member states on the European Prison Rules<sup>21</sup> and the United Nations Standard Minimum Rules for the Treatment of Prisoners (known as Nelson Mandela Rules),<sup>22</sup> according to which prisoners should serve their sentences in prisons close to their homes or their places of social rehabilitation, to the extent possible (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 of the European Prison Rules and Rule 24.1 of the Mandela Rules). Case law of the

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<sup>17</sup> Case C-294/16 PPU JZ v. Prokuratura Rejonowa Łódź – Śródmieście, Judgment of the Court (Fourth Chamber) of 28 July 2016; EU:C:2016:610, para. 36.

<sup>18</sup> The Court has rejected its application in core-areas of domestic criminal law. See, for instance, the judgment in Taricco I (Case C-105/14 Ivo Taricco and others, Judgment of the Court (Grand Chamber) of 8 September 2015; EU:C:2015:555) where the Court did not take into consideration the Attorney General's argument on the need to define the statutes of limitations autonomously at the EU level.

<sup>19</sup> A Martufi 'The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?' (2018) 25 MJECL 672, 673.

<sup>20</sup> See E de Wree, T Vander Beken and G Vermeulen 'The transfer of sentenced persons in Europe' (2009) 11 P&S 111, 112; S Meijer 'Rehabilitation as a Positive Obligation' (2017) 25 European Journal of Crime, Criminal Law and Criminal Justice 145, 160-1. In the European instruments 'rehabilitation' is an all-encompassing term, often used interchangeably with 'reintegration'. We will do the same, although we know that there are differences between the two.

<sup>21</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.

<sup>22</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at 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.

European Court of Human Rights repeatedly stresses that state authorities should assist prisoners in maintaining effective contact with close family members as an important means of facilitating re-entry after release.<sup>23</sup> According to this understanding, pursuing social rehabilitation with regards to the transfer of 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>24</sup>

But social rehabilitation also refers to assisting with the moral, vocational and educational development of the imprisoned individual via working practices, 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 programs and interventions in the context of community sanctions and measures. The idea that providing prisoners with a real opportunity for rehabilitation requires that they are 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 programmes positively aiming at rehabilitating the offender.<sup>25</sup> It appears, however, that this criterion has not been taken into consideration in Framework Decision 2008/909/JHA, even though literature consistently underlines its importance,<sup>26</sup> maintaining that the transfer should

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<sup>23</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>24</sup> D MacKenzie 'The impact of formal and informal social controls on the criminal activities of probationers' (2002) 39 *Journal of Research in Crime and Delinquency* 243; M Maguire and P Raynor 'How the resettlement of prisoners promotes desistance from crime: Or does it?' (2006) 6 *CCL* 19; S De Li and D Layton MacKenzie 'The Gendered Effects of Adult Social Bonds on the Criminal Activities of Probationers' (2003) 28 *Criminal Justice Review* 278; JR Hepburn and ML Griffin 'The Effect of Social Bonds on Successful Adjustment to Probation: An Event History Analysis' (2004) 29 *Criminal Justice Review* 46; D van Zyl Smit 'International imprisonment' (2005) 54 *ICLQ* 357; E de Wree, T Vander Beken and G Vermeulen 'The transfer of sentenced persons in Europe' (2009) 11 *P&S* 111. However, family background and social capital in the home state may also stem relapse into crime, which calls for a case-by-case analysis rather than broad generalisations regarding rehabilitation. See I Wieczorek 'EU constitutional limits to the Europeanization of punishment: A case study on offenders' rehabilitation' (2018) 25 *MJECL* 655, 659.

<sup>25</sup> Cases *James, Wells and Lee v. UK*, Judgment of the Court (Fourth 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>26</sup> E Rotman 'Beyond punishment' in A Duff and D Garland (eds.) *A reader on punishment* (Oxford University Press 1994) 281-305; A Duff, *Punishment, communication and community* (Oxford University Press 2001); G Robinson 'Late-modern rehabilitation: The evolution of a penal strategy' (2008) 10 *P&S* 429; R Canton, *An Introduction to the Philosophy of Punishment* (Palgrave MacMillan 2018).



improve foreign prisoners' access to treatment and assistance,<sup>27</sup> particularly if there are language barriers<sup>28</sup> or major cultural differences.<sup>29</sup> Framework Decision 2008/909/JHA assumes that possibilities of training, education and work are usually greater in the prisoner's own country.

Something similar happens 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, managing 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>30</sup> In the absence of material, psychological and social support during this transitional period, many offenders are likely to be caught up 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 amongst prison authorities, services, and agencies that supervise and assist released prisoners to enable them to re-establish themselves in the community (Rule 107.4). In this sense, the issuing state might have better structures and resources to finance post-release services. But, again, this criterion has not been taken into consideration in Framework Decision 2008/909/JHA, which does not even mention post-sentencing alternatives in order to assist offenders in their reintegration into society.

In sum, it is commonly accepted that using a rehabilitation perspective implies that 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>31</sup> However, Framework Decision 2008/909/JHA only focuses on facilitating the

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<sup>27</sup> AM van Kalmthout, FH van der Meulen and F Dünkel, 'Comparative overview, conclusions and recommendations' in AM van Kalmthout, FH van der Meulen and F Dünkel (eds.), *Foreigners in European prisons* (Wolf Legal Publishers 2007) 7; E de Wree, T Vander Beken and G Vermeulen 'The transfer of sentenced persons in Europe' (2009) 11 P&S 111, 121-122.

<sup>28</sup> HS Bhui, *Going the distance: Developing effective policy and practice with foreign national prisoners* (Prison Reform Trust 2004); T Ugelvik, 'The Incarceration of Foreigners in European Prisons' in S Pickering and J Ham (eds.), *The Routledge Handbook on Crime and International Migration* (Routledge 2014), 107.

<sup>29</sup> E de Wree, T Vander Beken and G Vermeulen 'The transfer of sentenced persons in Europe' (2009) 11 P&S 111, 122.

<sup>30</sup> Banks D and Gottfredson DC (2003) The Effects of Drug Treatment and Supervision on Time to Rearrest among Drug Treatment Court Participants. *Journal of Drug Issues* 33(2): 385-412; Visher CA, Winterfield L and Coggeshall MB (2005) Ex-offender Employment Programs and Recidivism: A Meta-analysis. *Journal of Experimental Criminology* 1(3): 295-315; Bahr SJ, Harris L, Fisher JK and Harker Armstrong A (2010) Successful reentry: what differentiates successful and unsuccessful parolees? *International Journal of Offender Therapy and Comparative Criminology* 54(5): 667-692.

<sup>31</sup> E de Wree, T Vander Beken and G Vermeulen 'The transfer of sentenced persons in Europe' (2009) 11 P&S 111, 115. See another conceptualization of rehabilitation, from the perspective that a sentence served in the community against which the offence was committed is more rehabilitative, in G Conway 'Prospects and Problems for European Legal Cooperation Concerning Prisoners' (2018) 10 *European Journal of Probation* 136.

social circumstances necessary for 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 is not only about societal and family ties, but also about employment, education, mental health care, drug abuse treatment, and so on.<sup>32</sup>

Another problem is that Framework Decision 2008/909/JHA does not require the consent of the sentenced person to the transfer even if the transfer is initiated 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 completion of their sentence; and (3) the person has fled or otherwise returned there in response to the criminal proceedings. Even though transfer of the sentenced person without his or her consent is only provided in these three limited circumstances, no appropriate safeguards are in place to take into account his or her opinion. The prisoner's opinion will be consulted when deciding the issue of forwarding the judgment together with the certificate, but it can be dismissed if the issuing state is satisfied that such transfers further the social rehabilitation of the prisoners involved. Framework Decision 2008/909/JHA does not provide sentenced persons whose consent is unnecessary with a remedy against the decision to forward the judgment. Not only does this have a significant negative impact on the position of the sentenced person, but it also raises questions with respect to the compatibility between the transfer of non-consenting prisoners and the rehabilitation perspective,<sup>33</sup> given that social rehabilitation intrinsically requires the cooperation of the person involved. Lack of consent may create frustration and disappointment in the offenders, which in turn may negatively reflect in their behaviour.

Last but not least, Framework Decision 2008/909/JHA does not take into account that the material conditions of detention in the state to which the prisoner is transferred may not be as positive compared with the ones in the issuing state. Prison conditions may be a challenge to the prevention of ill-treatment,<sup>34</sup> as explained in the Court of Justice of

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<sup>32</sup> G Robinson 'Late-modern rehabilitation: The evolution of a penal strategy' (2008) 10 P&S 429.

<sup>33</sup> E de Wree, T Vander Beken and G Vermeulen 'The transfer of sentenced persons in Europe' (2009) 11 P&S 111, 124; 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 and T de Roos (eds.) *Fervet Opus. Liber Amicorum Anton van Kalmthout* (Maklu 2010) 113, 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 2011) 15; G Vermeulen 'Material Detention Conditions and Cross-border Execution of Custodial Sentences in the EU' in *Framework Decisions on the Transfer of Prisoners and on Probation, Abstracts* (European Commission 2012) 111-112; L Mancano 'The right to liberty in European Union Law and mutual recognition in criminal matters' (2016) 18 Cambridge Yearbook of European Legal Studies 215, 231-2; A Martufi 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA' (2018) 9 NJECL 43.

<sup>34</sup> M Muñoz de Morales Romero 'The role of the European Court of Justice in the execution of sentence' in A Bernardi (ed.), *Prison overcrowding and alternatives to detention. European sources and national legal systems* (Jovene 2016) 67, 98; J Tomkin, G Zach, T Crittin and M Birk 'The future of mutual trust and the prevention of ill-treatment. Judicial cooperation and the engagement of national preventive mechanisms' (2017) <[http://bim.lbg.ac.at/sites/files/bim/anhang/publikationen/final\\_version\\_the\\_future\\_of\\_mutual\\_trust\\_and\\_the\\_prevention\\_of\\_ill-treatment\\_1.pdf](http://bim.lbg.ac.at/sites/files/bim/anhang/publikationen/final_version_the_future_of_mutual_trust_and_the_prevention_of_ill-treatment_1.pdf)> accessed 4 February 2019, 45; M Pleić, 'Challenges in cross-border transfer of prisoners: EU framework and Croatian perspective' in D Duić and T Petrašević (eds.), *EU Law in Context – Adjustment to Membership and Challenges of the Enlargement* (University Josip

the European Union ruling in joint cases Aranyosi and Căldăraru,<sup>35</sup> but also to the possibilities of social rehabilitation.<sup>36</sup> In fact, the judicial cooperation mechanism should not be initiated if the offender's perspectives of social rehabilitation are better in the issuing state. Only insofar as the issuing state is satisfied that enforcing the sentence in the executing state will enhance the offender's chances of social rehabilitation should transfer be promoted.<sup>37</sup> However, 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>38</sup> The existence of deficiencies in detention conditions should constitute grounds for non-transfer under Framework Decision 2008/909/JHA, which includes a general respect of fundamental rights clause (Article 3(4)), but the lack of rehabilitative prospects does not feature as one of them. The question here could be that the issuing state is not interested in undertaking this analysis 'specifically and precisely', as required by the Court of Justice of the European Union in the context of the European Arrest Warrant, particularly if it has problems with prison overcrowding or is concerned with financial costs linked to maintaining foreign citizens in prison. Intervention of the executing state in this assessment is not required, as there is no need for an exchange of information between judicial authorities. Framework Decision 2008/909/JHA clearly relies more 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 prisoner does not have in all cases the opportunity to file a complaint in this regard, given that the Framework Decision does not provide a right to appeal the forwarding decision in the issuing state, which not all member states grant.<sup>39</sup>

### **Social rehabilitation in Framework Decision 2008/947/JHA**

Probation measures and alternative sentences pose a different problem than custodial sentences with regards to foreign offenders, although a key guiding principle in such cases remains the social rehabilitation of offenders. The aim is to facilitate the social reintegration of sentenced persons by allowing the measure imposed on them to be supervised in the state with which they have the closest ties. The challenge here is to make intra-European supervision effective in terms of ensuring compliance with the

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Juraj Strossmayer 2018) 375, 386 ff.; I Wiczorek 'EU constitutional limits to the Europeanization of punishment: A case study on offenders' rehabilitation' (2018) 25 MJECL 655, 660.

<sup>35</sup> Joint Cases C404/15 and C659/15 PPU, Pál Aranyosi and Robert Căldăraru, [2016] EU:C:2016:198. According to this ruling, whenever there is evidence that there are deficiencies with respect to detention conditions in the executing member state, the issuing judicial authority should determine whether there are substantial grounds to believe that the individual will be exposed to a real risk of inhuman or degrading treatment. It should postpone – but not abandon – its decision on the transfer of the individual concerned until it obtains the information that allows it to discount the existence of such a risk.

<sup>36</sup> 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 2011) 15; A Martufi 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA' (2018) 9 NJECL 43.

<sup>37</sup> S Montaldo 'Judicial Cooperation, Transfer of Prisoners and Offenders' Rehabilitation: No Fairy-tale Bliss. Comment on Ognyanov' (2017) 2 European Papers 709, 716.

<sup>38</sup> J 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' (2015) 47 The Journal of Legal Pluralism and Unofficial Law 324; A Martufi 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA' (2018) 9 NJECL 43.

<sup>39</sup> European Union Agency on Fundamental Rights, *Criminal detention and alternatives: fundamental rights in EU cross-border transfers* (Publications Office of the European Union 2016) 96.

requirements and avoiding re-offending alongside the opportunity to reduce discriminatory treatment of foreign prisoners and to develop confidence in the implementation of alternatives to imprisonment across all EU member states. By encouraging courts to impose community measures and alternative sanctions on foreigners, an excessive use of incarceration is avoided. Further, by stimulating early release of foreign prisoners through parole, electronic monitoring, house arrest and so on, prison populations are reduced. The use of these combined strategies promote both offenders' social rehabilitation *and* the interests of EU member states.

The principle is underlined in the Preamble of Framework Decision 2008/947/JHA: when dealing with consent of member states for forwarding a judgment, it is provided that such consent will be given 'with a view of social rehabilitation' of the sentenced person. Article 1 explicitly mentions that the Framework Decision 'aims at facilitating the social rehabilitation of sentenced persons'. Recital 8 describes how Framework Decision 2008/947/JHA contributes to offenders' rehabilitation: 'by enabling the person to preserve family, linguistic, cultural and other ties'. Offenders' rehabilitation is connected to higher chances of maintaining societal and family bonds. Again, nothing is said about the need to provide prison-based and post-release treatment and assistance.<sup>40</sup> Although the rehabilitation concept is in this sense similar to the one used in Framework Decision 2008/909/JHA, its use is particularly short-sighted here, because compliance and reintegration are dynamic processes that have a clear connection to how sentences are enforced, the involvement of the offender in the rehabilitation treatment, as well as other factors. Moreover, there are signs of a step backwards. On the one hand, the current aim is not only to enhance the prospects of offenders being rehabilitated, but also 'to improve monitoring of compliance with probation measures and alternative sanctions, with the view to preventing recidivism, thus paying due regard to the protection of victims and the general public' (Recital 8). It is not clear in the text how these aims will be achieved, particularly if one takes into account that the words 'victim' and 'general public' are mentioned only when the aims of the Framework Decision are stated. No further reference to the protection of victims and the general public or how the transfer will contribute to it is made in the rest of the text. Nor is the Framework Decision clear regarding how the issuing state should assess whether a person should be transferred with a view to better opportunities for rehabilitation. Nevertheless, states will surely have to weigh the relevant interests, considering not only the social rehabilitation of the sentenced person, but also the interests of victims and society in general. Such an assessment is quite delicate, because several interests play a part.<sup>41</sup> Certainly, the inclusion of other purposes of probation and alternative sanctions beyond offenders' social rehabilitation is not a novelty. Since the 1990s, Council of Europe recommendations have taken into account the need to protect society and to maintain legal order at the same level as the need to support social rehabilitation.<sup>42</sup> During the 1990s, instruments were adopted with a view to reducing the

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<sup>40</sup> Previously, Article 1 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, when defining the assistance necessary for the social rehabilitation of the offenders, mentioned 'the form of supervision designed to facilitate the good conduct and readaptation to social life of such offenders'. Article 6 presumed that the state in whose territory the offender establishes his or her ordinary residence is the one in the best position for improving his or her social rehabilitation.

<sup>41</sup> I Wieczorek 'EU constitutional limits to the Europeanization of punishment: A case study on offenders' rehabilitation' (2018) 25 MJECL 655, 662-4.

<sup>42</sup> See Recommendation R(92)16 of the Committee of Ministers of the Council of Europe to member states on the European Rules on community sanctions and measures (adopted by the Committee of

use of imprisonment, expanding the use of community sanctions and measures, and providing for compensation to victims. In 2000, while recognising that ‘reintegration into the community is an important aim of community sanctions and measures’, it was considered necessary to emphasise that ‘community sanctions and measures can involve the effective supervision and control of offenders’.<sup>43</sup> The problem is that the explicit display of punitive credentials has become a part of the quest for legitimacy whenever foreign offenders are involved. In this context, the potential of probation measures and alternative sentences as an instrument to further offenders’ social rehabilitation is arguably less important than their contribution to the maintenance of legal order and the protection of victims and the general public.

On the other hand, in contrast to the regulation of Framework Decision 2008/909/JHA in Article 4(3) and (4), it is not provided that the authorities of the issuing state may contact competent authorities in the executing state to enquire whether the offender’s transfer would indeed facilitate social rehabilitation. This shows that the interest in social rehabilitation is modulated by the increasing interest in an effective and efficient implementation of the Framework Decision in all jurisdictions.

### **Two steps back: The other aims of the mutual recognition of decisions in criminal matters**

As already shown, all explanatory reports and preambles of every convention regarding the transfer of prisoners mention their societal bonds as an important reason for transfers. Framework Decision 2008/909/JHA is no exception. However, in spite of its declared purpose, the decision-making process in Framework Decision 2008/909/JHA does not entirely suit the purpose of increasing the prospects of rehabilitation of the prisoner. The possibility of transferring non-consenting prisoners is one of the many loopholes that exist,<sup>44</sup> making the European instrument appear more concerned with reducing the prison population, getting rid of unwanted foreign criminals, and protecting victims and the general public in the issuing member states than with those of

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Ministers on 19 October 1992 at the 482<sup>nd</sup> meeting of the Ministers’ Deputies), whose Preamble declares that the application of the rules ‘must aspire to maintain a necessary and desirable balance between, on the one hand, the need to protect society both in the sense of the maintenance of legal order as well as the application of norms providing for reparation for the harm caused to victims, and, on the other hand, the essential recognition of the needs of the offender having regard to his social adjustment’. Later, Recommendation of the Committee of Ministers to member States on the European Rules on community sanctions and measures (adopted by the Committee of Ministers on 22 March 2017 at the 1282<sup>nd</sup> meeting of the Ministers’ Deputies), intended to provide member states with guidance on these instruments, mentions the three purposes.

<sup>43</sup> 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 (adopted by the Committee of Ministers on 29 November 2000 at the 731<sup>st</sup> meeting of the Ministers’ Deputies).

<sup>44</sup> There are others. Only two examples. Framework Decision 2008/909/JHA allows transfer between member states other than the home member state in particular circumstances, which seems to bear no relation to rehabilitation (G Conway ‘Prospects and Problems for European Legal Cooperation Concerning Prisoners’ (2018) 10 European Journal of Probation 136, 154). Moreover, 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.

the affected individuals.<sup>45</sup> Another loophole is the assumption that serving a sentence in the offenders' home state will automatically facilitate their social rehabilitation, even without information on material detention conditions, education, work, healthcare, and training facilities in the executing state.<sup>46</sup> Although the issuing state, before deciding to forward the judgment, should be satisfied that the transfer will serve the purpose of facilitating social rehabilitation, there is no mechanism of control over its assessment as to whether the transfer would actually serve this purpose.<sup>47</sup> It follows that the national understanding of social rehabilitation in each issuing state prevails over any kind of European common approach to such an important objective, making it impossible to provide for an autonomous and uniform interpretation throughout the EU.

In comparison to the Council of Europe convention on the Transfer of Prisoners, the focus seems to have shifted from the perspective of offenders' rehabilitation to that of the issuing states that want to get foreigners out of their prisons.<sup>48</sup> First of all, EU member states needed an instrument that is not 'rigid, slow and bureaucratic' in its practical application, as the previous 1983 Council of Europe Convention was.<sup>49</sup> Therefore, Framework Decision 2008/909/JHA 'provides for a faster and more streamlined procedure than the Council of Europe instruments'.<sup>50</sup> Framework Decision 2008/909/JHA is based on the principle of mutual trust and the presumption that member states respect fundamental rights throughout the Union and comply with the

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<sup>45</sup> R Mulgrew 'The international movement of prisoners' (2011) 22 *Criminal Law Forum* 103, 109; V Mitsilegas, *EU after Lisbon. Rights, Trust and the Transformation of Justice in Europe* (Hart 2016) 222; S Montaldo 'Judicial Cooperation, Transfer of Prisoners and Offenders' Rehabilitation: No Fairy-tale Bliss. Comment on Ognyanov' (2017) 2 *European Papers* 709; M Pleić 'Challenges in cross-border transfer of prisoners: EU framework and Croatian perspective' in D Duić and T Petrašević (eds.), *EU Law in Context – Adjustment to Membership and Challenges of the Enlargement* (University Josip Juraj Strossmayer 2018) 375, 380-381, 394-395.

<sup>46</sup> 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 2011) 55; I Wieczorek 'EU constitutional limits to the Europeanization of punishment: A case study on offenders' rehabilitation' (2018) 25 *MJECL* 655, 662.

<sup>47</sup> S Montaldo, 'Judicial Cooperation, Transfer of Prisoners and Offenders' Rehabilitation: No Fairy-tale Bliss. Comment on Ognyanov' (2017) 2 *European Papers* 709, 718; M Pleić 'Challenges in cross-border transfer of prisoners: EU framework and Croatian perspective' in D Duić and T Petrašević (eds.), *EU Law in Context – Adjustment to Membership and Challenges of the Enlargement* (University Josip Juraj Strossmayer 2018) 375, 380.

<sup>48</sup> G Vermeulen 'Mutual Instrumentalization of Criminal and Migration Law from an EU Perspective' (2007) 9 *European Journal of Migration and Law* 347, 353; E de Wree, T Vander Beken and G Vermeulen 'The transfer of sentenced persons in Europe' (2009) 11 *P&S* 111, 117; 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 and T de Roos (eds.) *Fervet Opus. Liber Amicorum Anton van Kalmthout* (Maklu 2010) 113, 122-3; V Mitsilegas, *EU after Lisbon. Rights, Trust and the Transformation of Justice in Europe* (Hart 2016) 222; Neveu, 2016: 440; A Martufi 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA' (2018) 9 *NJECL* 43. Not only does the executing state have to recognise and enforce the judgment if the sentencing state forwards it – except when there are formal grounds for refusal (Article 9) -, but the consent of the home country can also be dispensed with in cases of enforcement of a sentence imposed on a national residing in the state of nationality or awaiting expulsion/deportation towards it.

<sup>49</sup> JC Froment 'Les avatars de la Convention sur le transfèrement des détenus en Europe' in J Céré (ed.), *Panorama européen de la prison* (L'Harmattan 2002) 119, 133.

<sup>50</sup> European Union Agency on Fundamental Rights, *Criminal detention and alternatives: fundamental rights in EU cross-border transfers* (Publications Office of the European Union 2016) 28.

minimum standards regarding the penal system.<sup>51</sup> This presumption calls for a high degree of automaticity, which, in turn, allows discretion to the issuing state when deciding on transfer procedures and the dispensing with offender's consent in some cases, as well as narrowing the grounds upon which the executing state may decline to enforce a sentence. Of course, dispensing with the offender's consent is related to the fact that the more similarity there is between the criminal systems, traditions and policies of the concerned states, the less reason there might be to afford the sentenced person an enforceable right to challenge a decision to transfer him or her.<sup>52</sup> Moreover, the offender's veto might be considered detrimental to relevant interests of the EU, but also, and more importantly, of the issuing member states. Those interests of the EU can be summarised in the need to enhance effectiveness in the activity of law enforcement agencies and judicial authorities across Europe to compensate for the absence of a single area of criminal law - as both substantive and procedural criminal law remain national - and to reduce the risk of impunity that may result as consequence of the increased mobility of EU citizens across borders.<sup>53</sup> These objectives are expressly acknowledged in the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (OJ C 012, 15/01/2001, p. 0010-0022) and in Framework Decision 2008/909/JHA. Mutual recognition promotes compatible conditions for enforcement of penalties between the member states and the rehabilitation of persons by allowing them to serve their sentence in a member state other than the one where they were convicted. Those interests of the issuing member states were acknowledged in the Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union (COM/2004/0334 final), which explicitly indicates that '[i]n general, the recognition of a penalty and its enforcement in the Member State of permanent residence is therefore not only in the interest of the sentenced person but also in that of the sentencing State and the enforcing State. For the sentencing State, the enforcement of penalties imposed on foreign nationals involves considerable extra cost (to overcome the abovementioned problems) which it can avoid by transferring enforcement. Lastly, the sentenced person's reintegration into society in the enforcing Member State - where this is the State in which the sentenced person permanently resides - also serves that State's interests'. These interests do not receive formal recognition in the Framework Decision, but are equally if not more important than those of the EU. They are centred on reducing the prison population, getting rid of unwanted foreign criminals, and protecting victims and the general public. The problem is that these interests are not understood as something that can be achieved *through* rehabilitation - which reduces prison population and protects victims and the public by reducing reoffending - but as distinct objectives that may contradict the social rehabilitation of offenders.

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<sup>51</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 Cooperation to the Slow Emergence of the Individual' (2012) 31 Yearbook of European Law 319, and case law of the Court of Justice of the EU, especially on the European Arrest Warrant Framework Decision. Particularly interesting is Opinion 2/13 of the Court (Full Court) 18 December 2014, where the Court expressly acknowledged for the first time that mutual trust is not blind trust. See K Lenaerts 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (2017) 54 Common Market Law Review 805.

<sup>52</sup> The increased automaticity of the transfer procedure is 'premised on the presumption that fundamental rights are respected fully across the European Union' (V Mitsilegas, *EU after Lisbon. Rights, Trust and the Transformation of Justice in Europe* (Hart 2016) 126). See also I Durnescu 'Framework decisions 2008/947 and 2009/829: state of play and challenges' (2017) 18 ERA Forum 355, 356-7.

<sup>53</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' (2018) 9 NJECL 43, 48.

The decision-making process in Framework Decision 2008/947/JHA takes into account the position of the person concerned in the transfer process, but only in a limited way. Transfer occurs, as a general rule, following a request by an individual (Article 5(2)). Yet, the issuing state may forward the judgment requesting a transfer upon the offender's request, but does not have an obligation to do so. Moreover, in the absence of an explicit request from the concerned individual, the transfer may take place to the state where the sentenced person 'has returned or wants to return' (Article 5(1)). The reason for this is that this Framework Decision only comes into play if the person has already been released in the issuing state and wants to return as a free person to his or her home country and is ready to cooperate with the supervising authorities. But this instrument simply refers to the sentenced person's 'wish to return', and assumes such a wish exists when a sentenced person has returned to the state of residence. It is assumed that once the person has returned or wants to return to the member state where he or she is lawfully residing or has a job or wishes to continue studying, he or she implicitly consents to the transfer. Here, once again, the offender's consent lacks appropriate safeguards.<sup>54</sup> Moreover, a sufficient level of information about how supervision requirements are understood in the executing state is not provided, leaving the sentenced person unable to make an informed decision.<sup>55</sup> Nor does the sentenced person have a right to be informed about the adaptation of the sentence - information that must be exchanged only between the issuing and the executing state -, or to revoke such consent in case he or she considers the adapted sentence detrimental for his or her interests. Framework Decision 2008/947/JHA does not enable offenders to present their case to a judge in such situation, even though disappointment with a supervision system that the offender was unfamiliar with before making the decision of transfer may have serious consequences on compliance with requirements.<sup>56</sup> The objective of the Framework Decision to ensure that justice is served while enhancing the social rehabilitation of the sentenced person cannot be properly achieved.

Similar to Framework Decision 2008/909/JHA, Framework Decision 2008/947/JHA seems to be 'motivated mainly by the pragmatic approach to get rid of EU-foreigners in national prisons for whom an unsuspended prison sentence is not adequate but who nonetheless received such a penalty due to the fact that they were foreigners and therefore deemed not eligible for probation'.<sup>57</sup>

In the literature the fear that the transfer can be easily used as a political instrument to expel undesired aliens from the country is clearly perceptible.<sup>58</sup> This concern is well-founded. Both Framework Decisions exacerbate previous developments in the field of 'crimmigration' in Europe. As a result of legislative and policy shifts in the face of increasingly acute fears about sovereignty and migration control, European prisons have

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<sup>54</sup> (FRA, 2016: 30, 98; I Durnescu 'Framework decisions 2008/947 and 2009/829: state of play and challenges' (2017) 18 ERA Forum 355, 362.

<sup>55</sup> L Mancano 'Mutual recognition in criminal matters, deprivation of liberty and the principle of proportionality' (2018) 25 MJECL 718, 728 ff.

<sup>56</sup> I Wiczorek 'EU constitutional limits to the Europeanization of punishment: A case study on offenders' rehabilitation' (2018) 25 MJECL 655, 668.

<sup>57</sup> C Morgenstern 'European Initiatives for Harmonisation and Minimum Standards in the Field of Community Sanctions and Measures' (2009) 1 European Journal of Probation 128, 138.

<sup>58</sup> 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 and T de Roos (eds.), *Fervet Opus. Liber Amicorum Anton van Kalmthout* (Maklu 2010) 113, 123.



become sites for border control. They are no longer exclusively about punishment, deterrence or rehabilitation, or indeed about returning the reformed criminals to the population at large.<sup>59</sup> In many member states, governments use penal institutions to identify and deport foreign offenders. Prison services and border agencies share information, training, and staff. Many foreign offenders leave the prison only to be immediately deported, even if they have been granted conditional release or have completed their sentences. Deportation is also used as a substitute penalty for prison sentences of certain length. A vastly increasing number of prisoners in European prisons are under deportation orders. In fact, European prisons have been partially re-oriented towards the goal of migration control, in spite of the Court of Justice of the European Union having condemned the use of prisons for immigration purposes. In such a context, the use of the transfer of prisoners and the mutual recognition of probation measures for migration control purposes is probably unavoidable.

## Conclusions

Based on the observations made here, we can conclude that overall both Framework Decisions are less focused on offenders' social rehabilitation and more on expediting the procedure and making it more predictable to actively promote mutual trust and cooperation amongst the member states. They prioritise EU and member states' interests over those of the individual. It is expected that doing so will reduce the average presence of foreigners in European penitentiary systems and the extra costs imposed on the issuing member states.

Certainly, the central thrust of the transfer of prisoners and the mutual recognition of probation measures and alternative sanctions should be a humanitarian attempt to better assist foreign offenders in readapting to society, as it is officially declared. Individuals primarily benefit – not states. Nevertheless, in practical terms the repatriation of sentenced persons may not only be in their best interests, but also of the states concerned, given the high number of foreign sentenced persons and prisoners in some EU member states. Issuing states may consider it their interest to remove foreign offenders from the country, as a way of preventing further offences on the part of the individual concerned and deterring others from committing them in the first place, while also saving money otherwise destined to their maintenance and treatment in prison or their control once outside. Difficulties may arise whenever these interests conflict, because the governmental ones are clearly prioritised in the European instruments analysed in this paper. More precisely, transfer procedures have been designed to serve the interests of the issuing state rather than those of individuals affected by transfer or of the executing state. There is a clear risk that social rehabilitation can be used deceptively or as an excuse to effectively deport foreign offenders, in particular where consent is not a requirement. Steps should be taken to ensure that the transfer of sentenced foreign nationals is not used as an indirect form of deportation.

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<sup>59</sup> M Bosworth 'Deporting Foreign National Prisoners in England and Wales' (2011) 15 *Citizenship Studies* 583; E Kaufman, *Punish & Expel. Border Control, Nationalism, and the New Purpose of the Prison* (Oxford University Press 2015).