Two worlds colliding: Offenders' rehabilitation and victims' protection through mutual recognition of probation measures

Abstract

Framework Decision 2008/947/JHA explicitly combines offenders' rehabilitation with other purposes, such as the improvement of the protection of victims. This article provides one of the first analysis of the aim of 'victim protection' in the Framework Decision and of its limited usefulness. The relationship between victims' right after sentencing and the transfer of probation measures reveals a contradictory system unable to coordinate victims' protection and compensation and offenders' social rehabilitation.

Keywords

Directive 2012/29/EU, Framework Decision 2008/947/JHA, mutual recognition, probation measures, protection measures, social rehabilitation, victim's rights

Introduction

International instruments and agreements adopted since the 1960s, which allow prisoners 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. From the perspective that community measures and alternative sanctions constitute important approaches to avoid the negative effects of imprisonment, many European instruments and agreements have also referred to offenders' rehabilitation as an important objective of such measures, starting with the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (Strasbourg, 30 November 1964). In addition, Council of Europe recommendations mentioned other related concepts, such as social adjustment, social inclusion or reintegration, as did Recommendation Rec(2003)22 on conditional release (parole) (adopted by the Committee of Ministers on 24 September 2003 at the 853rd meeting of the Ministers' Deputies) and 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 1282nd meeting of the Ministers' Deputies).

On 30 November 2000, the Council of the European Union adopted the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (2001/C 12/02, hereinafter Programme of measures), which signalled that the transfer of sentenced persons should be promoted 'in the interests of social rehabilitation' (measure 3.1.4). This purpose is also declared in the ad hoc legal instrument for the transfer of judgments and probation decisions across the EU, as can be seen in Recital 24 and Article 1 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 (hereinafter, the Framework Decision). Recital 8 adds the concept of reintegration and emphasises that the Framework Decision aims to enhance the prospects of the sentenced person being reintegrated into society by allowing the measure imposed to be supervised in the state with which the person has the closest ties, whether they be family, linguistic, or cultural. Arguably though, the facilitation of suitable probation measures and alternative sanctions for offenders not residing in the country of conviction is not done for its own sake but to reduce the use of imprisonment of foreign and non-resident nationals by allowing them to serve a community sentence

in their own country (Morgenstern, 2009; Van Zyl Smit et al., 2015). Therefore, the aim of this Framework Decision is not only to enhance the prospects of rehabilitating offenders, as highlighted by Snacken and McNeill (2012), 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).

In fact, unlike other mutual recognition instruments, such as 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, the Framework Decision on probation measures explicitly combines offenders' rehabilitation with other purposes. Among these purposes are the improvement of the protection of victims and of the general public. It is one of the seven parameters identified to determine the effectiveness of mutual recognition in the Programme of measures to implement the principle of mutual recognition, which describes it as 'mechanisms for safeguarding the rights of third parties, victims and suspects.' The reason beyond this mention is easy to understand: 'if in case of custodial sanctions and measures the offender is confined and cannot represent any threat to the public in general or the victim, in particular, when alternative non-custodial sanctions are applied, there is a theoretical risk to the general public and the victim' (Niţu, 2016: 63). Nonetheless, it is not clear in the text how this due attention to the protection of victims will be achieved, particularly if one takes into account that the word 'victim' is mentioned only when the aims of the Framework Decision are stated. The text provides no further reference to the protection of victims or how the transfer will contribute to this. How are victims protected through mutual recognition of probation measures? Are their rights and interests really balanced when deciding on the transfer of judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions?

Based on a theoretical exploration of the relevant legal instruments, this paper provides an analysis of the aim of 'victim protection' in the Framework Decision and of its limited usefulness. A review of the literature suggests that this paper is one of the first attempts to provide such an analysis. With the purpose of bridging this research gap, the present study aims to demonstrate that, in practice, victims' rights play a secondary role to other interests, in particular offenders' social rehabilitation, during the mutual recognition procedure for the transfer of probation measures. This secondary status exists despite the emphatic proclamation of victims' rights in the more comprehensive European legal instrument, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (hereinafter, the Victims' Directive).

To achieve this goal, section two offers an analysis of social rehabilitation as the main rationale for transferring probation measures imposed to foreign and non-resident offenders to another member state. Section three aims to present an integrated perspective on victims' rights beyond trial, which is done by describing the relevant parts of the Victims' Directive. Section four studies the implementation of victims' rights to information, protection and compensation within the mutual recognition procedure designed in the Framework Decision. Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (hereinafter, the EPO Directive) is also mentioned here, because it extends protective measures to victims that travel between EU member states, and explicitly addresses its

relationship with the transfer of probation measures. As we will see, regulation of victims' rights in both instruments cannot be defined as satisfactory. The concluding section contributes to the idea that the relationship between offenders' social rehabilitation and victims' rights can only be defined as a collision of two worlds, making contemporarily clear that instruments specifically dealing with victims' rights should not be considered in isolation. Instead, such instruments require a broader view to adequately assess to what extent they penetrate legislation and whether they are effective.

The topic is definitely a timely one, particularly if one considers that the application level of the Framework Decision is less than satisfactory, as consistently indicated in the specialised literature (Durnescu, 2017: 361-362; Faraldo-Cabana and Fernández Bessa, 2019; Hofmann and Nelen, 2020). This outcome is particularly disappointing since tens of thousands of EU citizens convicted in another member state of the European Union could benefit from these kinds of repatriation measures. In 2018, the year of the last available data (Aebi and Tiago, 2018: 58), 15.9% of the prison population in Europe were foreign nationals, of which 32.8% were EU citizens, around 37,000 people. Current numbers and percentages of foreign probationers under the supervision of EU member states' probation agencies are much more difficult to determine, because practically no data was available before the introduction of the revised version of SPACE II in 2009, and even since then there has been a lack of information from many countries (Aebi et al., 2019). The last available data stem from 2015. In any case, while for some countries foreign national prisoners and probationers are not a significant issue (for instance, Eastern Europe), many prison systems have to deal with 30-70% share of foreign inmates (Germany, Italy, France, Spain), and 5-20% share of foreign probationers (Austria, France). The interest of the topic is further promoted by the increased mobility of people in the EU and the increasingly globalized nature of crime, which means more people are perpetrating crime in a State other than their own.

Offenders' social rehabilitation

Social rehabilitation as the essential aim of the prison system is widely accepted in international law, with punishment and deterrence usually omitted or mentioned only in passing. Social rehabilitation is also an important aim of probation, conditional and suspended sentences, and other alternatives to incarceration which include various instruments. All these instruments certainly involve hardships or even 'pains' (Durnescu, 2011) that consent them to be regarded as 'punishments', but, as it happens with the prison sentence, they have long been associated with rehabilitation as well. In fact, scholars and practitioners have often advocated their value on the grounds of effectiveness regarding not only the punitive aspect, but also the subsequent reintegration (Canton, 2018a).

But what is intended for social rehabilitation in the context of the transfer of probation measures? It is commonly accepted that enforcement of a judgment in surroundings familiar to the offender is more likely to facilitate his or her social rehabilitation. Therefore, social ties, particularly employment and relations with family, should be given sufficient attention during and after punishment (MacKenzie, 2002; Hepburn and Griffin, 2004; McNeill, 2006: 39). Following these considerations, the aim of facilitating social rehabilitation of offenders who ordinarily reside in another member state will be better reached if they are offered the possibility to return to their home country and to be dealt with there by way of probation measures or alternative sanctions

which have been imposed by another member state. In this regard, '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', and '[f]oreign offenders sentenced to imprisonment shall be entitled to full consideration for early release', according to Recommendation CM/Rec(2012)12 of the Committee of Ministers to member States concerning foreign prisoners (adopted by the Committee of Ministers on 10 October 2012 at the 1152nd meeting of the Ministers' Deputies). Prohibiting discrimination on the grounds of nationality is usually included in all international instruments on alternatives to imprisonment and community sanctions, from the UN Standard Minimum Rules for Non-Custodial Measures (adopted by General Assembly resolution 45/110 of 14 December 1990), which 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)), to a similar rule in the UN Standard Minimum Rules for the Administration of Juvenile Justice (adopted by General Assembly resolution 2010/16 of 29 November 1985). However, in spite of all recommendations and rules, existing discrimination against foreign offenders when considering probation and alternative measures is generally recognised in literature (Van Kalmthout et al., 2007: 7; Knapen, 2010: 118; Banks, 2011: 184; Kaufman, 2012: 701; McNally and Burke, 2012: 71; Ugelvik, 2013: 190-194; Warr, 2016: 301; Durnescu, 2017: 357). Foreign and non-resident offenders are not considered for the same range of alternative sanctions and measures as national offenders. Information about their previous criminal and prison records is often lacking, which makes risk assessment difficult (Bhui, 2009: 161-162). Risk of flight is routinely invoked disproportionately against them. Because they are regarded as being at risk of absconding, such persons are not considered for transfer to more open regimes (Ugelvik, 2014: 116-117). Further, 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 (Warr, 2016: 314-315; Durnescu, 2010: 63ff.). Probation systems designed to reduce the risk of repeat offenses and to support prisoners up until release are effectively unavailable. Parole is not granted to foreign and non-resident offenders. Moreover, courts are reluctant to pass a non-custodial sentence when there are doubts as to how such sentences will be carried out in another country (Knapen, 2010: 121). Therefore, the establishment of a new simplified and more effective system for the transfer of probation measures serves the purpose of facilitating the social rehabilitation of the sentenced person by allowing an increased use of probation measures and alternative sanctions, as well as by facilitating the re-entry of foreign and non-resident offenders into the society to which they have family, linguistic, cultural, social or economic links (Van Zyl Smit, 2005; De Wree et al., 2009).

But literature also consistently underlines that social rehabilitation refers to assisting with the moral, vocational and educational development of offenders via working practices, educational, cultural and recreational activities (Rotman, 1994; Duff, 2001; Robinson, 2008; Canton, 2018b). It includes addressing the special needs of offenders with programmes on substance addiction, mental or psychological conditions, anger and aggression, amongst others, which may lead to re-offending behaviour. In this sense, 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. It appears, however, that this criterion has not been taken into consideration in the Framework Decision, which simply assumes that possibilities of training, education and work are usually greater in the offender's own country.

Something similar happens with probation and 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 accessing 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 (Banks and Gottfredson, 2003; Visher et al., 2005; Bahr et al., 2010). In the absence of material, psychological and social support during this period, many offenders are likely to be caught up in a vicious cycle of release and re-arrest. The issuing state might have better structures and resources to finance probation and post-release services. But again, this criterion has not been taken into consideration in the Framework Decision.

In sum, it is commonly accepted that using a rehabilitation perspective implies that offenders' societal and family bonds must be established, maintained or restored in order to increase their chances of reintegration, but also that treatment, assistance and post-release services are important to diminish the risk of recidivism. 'The chosen interventions when focusing on rehabilitation are, therefore, treatment, assistance and the stimulation of societal bonds' (De Wree et al., 2009: 115). However, the Framework Decision only focuses on establishing or restoring offenders' societal and family bonds in their home country. It fails to guarantee offenders' access to 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 other factors. Furthermore, even though reducing discriminatory treatment of foreign and non-resident offenders and building confidence in the implementation of alternatives to imprisonment across all EU member states will promote, at least partially, both offenders' social rehabilitation and the interests of EU member states, are these interests and rights in balance with those of the victims?

Victims' rights beyond the trial

Safeguards to protect victims' rights appear across various domains and levels, ranging from EU primary law to the national level. The already respectable body of European measures mainly aims at providing victims with their fundamental right of access to justice, in line with Article 47 of the Charter of Fundamental Rights of the EU. This is the case of the Victims' Directive, which represents the most important legislative development for victims' rights at the EU level to date.[1] It responds to the European Council's call for an integrated and coordinated approach to victims, contained in the Stockholm Programme and in the Resolution of the Council of 10 June 2011 on a

[1] Other European instruments address particular categories of victims. For example, victims of terrorism (Council Framework Decision of 13 June 2002 on combating terrorism, whose Chapter V explicitly lays down provisions on protection of, support to, and rights of victims of terrorism).

Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings, which concentrate specifically on strengthening the rights and protection of victims.

Article 1 of the Victims' Directive declares that its purpose 'is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings.' However, most of the rights recognized by the Victims' Directive only operate in the context of a criminal investigation or proceeding (Van der Aa, 2015: 249). Once the person charged is convicted, victims' rights radically decrease. This imbalance between victims' rights in the pre-trial and trial stage and those in the post-trial or execution stage reflects the intense debate on the role of the victim in the criminal justice system, in particular once her or his function as witness is accomplished (for instance, illustrating the ambiguity that arises from the victim's participatory role, see Edwards, 2004: 979ff.; De Mesmaecker, 2012: 133ff.). This is not the moment to provide a thorough contribution to debates surrounding the complex and controversial issues of the role of the victim in the criminal justice system, and more specifically in the post-trial phase. It should suffice to say that the victim remains a contentious and contested participant of justice. It is generally assumed that potential risks for offenders' social rehabilitation are only partially compensated with the benefits of such participation for the victim, particularly with regard to some criminal justice adjudications that could be influenced by the victim, such as alternative sanctions, probation, conditional release and parole. After all, offenders' punishment and its circumstances should depend upon their guilt and possibilities of social rehabilitation, and not on their 'good or bad luck as to the forgiving or vindictive nature' of their victims (Robinson, 2002: 757). Still, one thing is promoting victims' right as a way to allow victims greater influence in the punishment decision – a heatedly debated topic in literature, since participatory victims' rights in the sentencing process have been charged with leading to more severe punishment, longer and more rigid judicial procedures and disparity in sentencing (Ashworth, 2000; Edwards, 2004; Doak, 2005; O'Hara, 2005; Doak et al., 2009: 651ff.) - and another one is to offer victims during the execution of the sentence information, protection and compensation, as the Victims' Directive does.

In fact, during the execution of the sentence and the probation period, victims have the right to receive information about their case. According to Article 6(5) of the Victims' Directive,

> Member States shall ensure that victims are offered the opportunity to be notified, without unnecessary delay, when the person remanded in custody, prosecuted or sentenced for criminal offences concerning them is released from or has escaped detention. Furthermore, Member States shall ensure that victims are informed of any relevant measures issued for their protection in case of release or escape of the offender.

After sentencing, the Victims' Directive provides that member states must ensure that victims and their family members have free-of-charge access to confidential victim support services, irrespective of whether or not the crime has been reported, before, during and for an appropriate time after criminal proceedings (Article 8(1)). The explanatory memorandum also indicates that victims may require support both during the period of court (or any) proceedings and in the long term. Moreover, according to Article 18, victims have the right to be protected 'from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of

emotional or psychological harm.' Article 22 of the Victims' Directive reaffirms that victims of crime have a right to a thorough assessment of their risk of repeat victimisation, in particular in cases of relational violence or organised crime.

Finally, victims' right to compensation is enshrined in the Victims' Directive as well as in Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims. This directive establishes a system of cooperation to facilitate access to compensation for victims of crimes in cross-border situations.

Other potential needs of victims have not been taken into consideration. Their recognition as rights would imply a stronger procedural position for crime victims that is not uncontroversial. For example, there is no victim's right to be heard or to influence the decision-making process on the custodial status of the sentenced offender, and it is debatable whether there should be. For many, it could collide with the rights of the sentenced person. For instance, for Van der Aa (2015: 247), '[g]iven the current state of play, there seems little room for a true balancing of interests of the sentenced person (rehabilitation) against those of the victim (eg safety).' Although a non-influential right to be heard finds some support in literature (Röhl, 1997; Wemmers and Cyr, 2004; Kirchengast, 2016: 205ff.; Van der Aa, 2015: 256) and has been incorporated in the post-trial phase in many jurisdictions (Braun, 2019: 181ff.), debates like this have prevented a further extension of victims' rights in the Victims' Directive.

Protection of victims' rights in the transfer of probation measures procedure

How are victim rights to information, protection and compensation considered in the decision-making process for the transfer of probation measures designed by the Framework Decision?

Victims' right to information about the offender's release is not mentioned in the Framework Decision, even though it continues to be of relevance in the post-trial phase. This is an important issue, because the right to information is crucial not only to ensure that victims can continue to participate in the criminal justice process relating to their case once the trial has been concluded, but also to guarantee their right to safety. The relevant information for the victim includes, first of all, any conditions and requirements attached to the sentence, particularly the protection measures envisioned for the victim's own safety and the way in which they will be supervised to monitor compliance (Van der Aa, 2015: 245-246, 254). In addition to information regarding the parameters of the sentence, the victim should be informed how the sentence will be served. For instance, if the offender is sentenced to prison, the victim should be informed whether or not there is a possibility of the offender being released early or serving part of the sentence on licence, or of the prison sentence being suspended or substituted. In case of release or escape of the offender, the victim should be immediately informed. When the sentenced person serves the penalty abroad, the danger he or she poses to the victim significantly decreases. Victims, therefore, should receive information regarding, at least, the transfer of the offender from the issuing state, the adopted supervision measures in the executing state and the expected date of completion of the monitoring. The Framework Decision has no specific provision in this regard, whereas in the Victims' Directive, when the interest of the victim and the offender are conflicting, those of the offender are prioritised. Illustrative of this point is the fact that Article 6(6) stipulates that the right to know about the escape or release of the offender where there is a danger or an identified risk for the victim is forfeited whenever 'there is an identified *risk of harm to the offender* which would result from the notification' (emphasis added) (with strong criticism, Van der Aa, 2015: 254-255).

Lack of information may result in lack of protection, which means an increased risk of repeat victimization.

Moreover, whenever the victim is also moving to another member state, only she or he may submit a request for the issuing of a European protection order either to the competent authority of the issuing state or of the executing state (Article 6.3 of the EPO Directive). The victim can only initiate the procedure in case one of the probation measures or alternative sanctions imposed to the offender in the issuing state is a protection measure – such as an obligation for the sentenced person not to enter certain localities, places or defined areas in the issuing or executing state or an obligation to avoid contact with specific persons (Article 5 of the EPO Directive). Protection offered by the EPO is therefore pending on information received by the victim about the custodial status of the offender. In this case, the relevant information for the victim also concerns the level of protection she or he will enjoy in the executing state. Usually, victims have no knowledge of the judicial system of the country in which they are going to live, work or travel. Leaving apart paid or free legal counselling – something not every EU member state offers to all victims, irrespective of the type of the crime they have been victims of -, only the competent authority in the executing state could properly inform them, but, again, there is no provision in this regard. This is an important gap because available data suggest that there are enormous discrepancies among protection order laws and levels of protection across the EU (Van der Aa and Ouwerkerk, 2011; Freixes and Román, 2015; Lonati, 2018).

As a matter of fact, precisely regarding the level of protection that the victim can expect to receive in the executing state, it is expressly indicated that the measure adopted by the competent authority of the executing state shall, to the highest degree possible, correspond to the protection measure adopted in the issuing state (Article 9(2) of the EPO Directive). In this way, the EPO Directive grants the executing state a degree of discretion to adopt any measure which it deems adequate and appropriate under its national law in a similar case in order to provide continued protection to the protected person. The protection of the victim from harm in the member state in question is guaranteed on the same basis as that of nationals and persons residing there, which is a corollary of the freedom of movement and intends to avoid discrimination against victims who move to the executing state by comparison with victims benefiting from protection measures enacted by that state. However, the wide disparity of national laws can be a problem (Van der Aa and Ouwerkerk, 2011: 267-288), particularly when the level of protection is significantly higher in the issuing state. For example, even though all twenty-six member states to which the EPO Directive applies (Denmark and Ireland did not take part in the adoption of this Directive and are not bound by it or subject to its application) provide the prohibition from entering certain localities, places or defined areas where the protected person resides or visits under their national law, its application is not regulated in the same context and under the same conditions for its execution. Requisites, modes of supervision and patterns of enforcement are substantially different (Flore et al., 507ff.; Lonati, 2018: 338). Moreover, some member states provide for a prohibition or regulation of contact, in any form, with the protected person, including by phone, electronic or ordinary mail, fax or any other means, and for the prohibition or regulation on approaching the protected person closer than a prescribed distance. Similarly, only a minority of member states has expanded opportunities for victim participation and input in case proceedings (Erez and Roberts, 2013: 251-270; Braun, 2019: 183ff.). Relevant laws include those that require prosecutors and other legal actors to consult with victims when making decisions about a case - including such proceedings as pre-trial release, filing of charges, plea bargains,

sentencing and parole -, provide victims with an opportunity to submit a victim impact statement at sentencing (spoken or written, in person or via video recording) and create mechanisms to protect victims from intimidation or harassment related to their court participation. Another example concerns the protection of certain types of vulnerable victims, such as victims of gender-based and sexual violence, who receive very different levels of protection according to each member state (Freixes and Román, 2015). As a result, differences in the level of victim's protection are still too great to allow for the creation of a minimum standard.

The relationship of the transfer of probation measures with the European protection order is explicitly addressed in the EPO Directive. Article 20(2) indicates that '[t]his Directive shall not affect the application of Framework Decision 2008/947/JHA or Framework Decision 2009/829/JHA.' If the victim is protected by a EPO resulting from a protection measure adopted by the issuing state, one of the grounds for discontinuation of measures taken by the state of supervision is that 'a judgment within the meaning of Article 2 of Framework Decision 2008/947/JHA […] is transferred to the executing State after the recognition of the European protection order' (Article 14(1) of the EPO Directive). The protected person only has a right to be informed of such a decision 'where possible' (Article 14(2) of the EPO Directive). Before discontinuing measures in accordance with this norm, the competent authority of the state of supervision may invite the competent authority of the issuing state to provide information as to whether the protection provided for by the EPO is still needed in the circumstances of the case in question (Article 14(3) of the EPO Directive). Such an invitation is not made to the protected person. An additional problem is that the competent authority to discontinue the protection measures may not initially be the same one that recognizes and orders the execution of a probation decision. Although collaboration between the national authorities concerned is particularly important in order to coordinate the application of both mutual recognition instruments, neither the Directives, the Framework Decision nor many national implementing laws provide for an obligation of communication between them. There is not a European central register for the mutual recognition instruments adopted with regard to a sentenced person. This means that the national authority initially competent to execute a European protection order may be completely unaware of the probation measures already recognized and executed by the other national authority competent for this issue, and of the fact that he or she is no longer competent.

Again, victims' right to compensation is not explicitly mentioned in the Framework Decision. Financial penalties and confiscation orders are excluded from its scope of application as these are covered by other EU instruments (Article 1(3) of the Framework Decision). One of the meanings of 'financial penalties' is 'compensation imposed in the same decision for the benefit of victims, where the victim may not be a civil party to the proceedings and the court is acting in the exercise of its criminal jurisdiction', and 'a sum of money to a public fund or a victim support organisation, imposed in the same decision' (Article 1 b) ii and iv) of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties). The instrument for the mutual recognition of financial penalties should be used, then, when compensation is imposed on the offender in the criminal sentence. Victim's compensation may be transferred together with the probation decision only if its payment functions as an obligation imposed by a competent authority on the offender, in accordance with the national law of the issuing state, in connection with a suspended sentence, a conditional sentence or a conditional release, which is not always the case. Lastly, whenever victim's compensation is

imposed as an autonomous obligation in a civil, not criminal sentence, it is necessary to resort to the mechanisms of judicial cooperation in civil matters. As both national compensation schemes and mutual recognition procedures are complex, victims have to trail through an enormous amount of information before finding the instrument that applies to their situation.

These regulations raise important issues about victims' rights that should have been dealt with at the European level, before the beginning of national implementation procedures. A more attentive integration of victim rights and interests could have resulted in a panoply of post-trial rights oriented to afford the victim substantive access to justice within the mutual recognition procedure. That opportunity is now lost.

Conclusions

Since the 1990s, Council of Europe recommendations on community sanctions and measures have taken into account the need to protect society and victims and to maintain legal order at the same level as the need to support offender's social rehabilitation. Agreements have since then been adopted with a view to exercising an effective supervision and control of offenders, while at the same time reducing the use of imprisonment, expanding the use of community sanctions and measures and providing for compensation to victims. By encouraging courts to impose community measures and alternative sanctions on foreigners and non-residents, the Framework Decision aims to further effective intra-European supervision in terms of ensuring compliance with the early release and community sanctions requirements, avoiding recidivism, reducing discriminatory treatment of foreign and non-resident offenders, and building confidence in the implementation of alternatives to imprisonment across all EU member states, benefitting the whole society. Further, by stimulating early release of foreign and non-resident prisoners through parole, electronic monitoring, house arrest and other measures, prison populations will shrink. Knowing that probation measures and alternative sanctions will be effectively implemented irrespective of the country in which the sentenced person will choose to reside, courts will be more likely to treat foreign and non-resident offenders as resident nationals (Durnescu, 2017: 357). The social reintegration of sentenced persons will be facilitated by allowing the measure imposed on them to be supervised in the state with which they have the closest ties. However, in the current state of play it is not possible to say that the Framework Decision really meets the needs of victims. Victims' rights, as recognised both in the Victims' and the EPO Directives, are not sufficiently addressed within the transfer of probation measures procedure, in which they only play a secondary role.

Even considering doctrinal objections to victim participation in the post-conviction stage, this conclusion is quite surprising, for at least two reasons. Firstly, the protection of the rights of crime victims has always constituted one of the main priorities of the European Union in the area of freedom, security and justice. Accordingly, the European Council and the Commission acknowledged that the effectiveness of mutual recognition depends not only on the attention paid to offenders' rights, *but also to those of the victims*. Promises implicit in this recognition seem to not have materialised in this particular area, which may have negative effects on the free movement of people (Van der Aa, 2015: 255). Secondly, the explicit display of punitive credentials which has become a part of the quest for legitimacy whenever offenders are involved, and even more so if they are foreign nationals, has generally resulted in a greater focus on risk assessment and victim safety issues and protection within the supervision and rehabilitation of offenders in the community (Mair and Burke, 2012;

Van Zyl Smit et al., 2015; Canton, 2018a), particularly serious violent or sexual offenders. For example, 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' (Recommendation Rec(2000)22). In such a context, one could think that the potential of probation measures and alternative sentences as an instrument to further offenders' social rehabilitation in cross-national contexts would be arguably less important than their contribution to the protection of victims. However, such a shift towards a more victim-centred approach in the transfer of probation measures procedure has not taken place. Instead, what we witness is a collision between victims' and offenders' rights, a crash in which the key question should not be how to avoid unavoidable conflicts between competing interests, but how to manage them effectively.

Moreover, with the enactment of the Victims' Directive the European Union has certainly emphasized the rights of victims to be treated with dignity, to have access to information, to receive medical, psychological and social assistance and support, to understand and be understood, to be protected at the various stages of the procedure and to be compensated by the offender or by the State. Such a balanced approach strongly contrasts with national differences. In each member state's legal system, different protection standards and entitlements have been provided for victims in the course of proceedings. The result is a protection which varies according to the geographical location, bound to the basic rules governing each national system. Mutual recognition presupposes mutual trust, but the diversity of national regulations and legal cultural traditions relating to victims' rights in the various member states raises the question whether the principle of mutual recognition is really beneficial for victims and provides them with adequate tools to apply the rights granted to them at EU level. It is generally acknowledged that mutual recognition should be accompanied with a form of minimum harmonisation (Peers, 2004; Asp, 2005: 31-33; Andreou, 2009: 344; Allegrezza, 2015: 6). This applies even more in relation to judicial cooperation in criminal matters,[2] particularly in areas in which legislative differences between the member states are considerable, such as protection measures (Van der Aa, 2012; Lonati, 2018: 350). An effort of harmonisation is probably unavoidable if we want them to be effectively and equally applied to national and foreign and non-national offenders in all EU member states (Morgenstern, 2009), in accordance with the considerable consensus about their value. Such an effort will also have a positive effect for victims whenever national regulations balance offenders' right to reintegrate into society with victims' rights to information, protection and compensation. Until then, the success of the victimological movement towards enforceable and effective rights for crime victims will continue to mostly depend on the national level, even when considering mutual recognition instruments in criminal matters.

References

Aebi MF, Berger-Kolopp L, Burkhardt C, Chopin J, Hashimoto YZ and Tiago MM (2019) *Foreign offenders in prison and on probation in Europe. Trends from 2005 to*

[2] So it is explicitly recognized in the Communication from the Commission to the Council and the European Parliament - Disqualifications arising from criminal convictions in the European Union {SEC(2006)220} (COM/2006/0073 final).

2015 (inmates) and situation in 2015 (inmates and probationers). Strasbourg: Council of Europe.
Aebi MF and Tiago MM (2018) *SPACE I - 2018 – Council of Europe Annual Penal Statistics: Prison populations.* Strasbourg: Council of Europe.
Allegrezza S (2015) Victim's statute within Directive 2012/29/EU. In: Lupária L (ed) *Victims and criminal justice. European standards and national good practices*. Wolters Kluwer, pp.3-19.
Andreou P (2009) *Gegenseitige Anerkennung von Entscheidungen in Strafsachen in der Europäischen Union*. Baden-Baden: Nomos.
Ashworth A (2000) Victims' Rights, Defendants' Rights and Criminal Procedure. In: Crawford A and Goodey J (eds) *Integrating a Victim Perspective within Criminal Justice*. Aldershot: Ashgate, pp.185-204.
Asp P (2005) Mutual Recognition and the Development of Criminal Law Cooperation within the EU. In: Husabo E and Strandbakken A (eds) *Harmonization of Criminal Law in Europe*. Antwerp: Intersentia, pp.23-40.
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.
Banks J (2011) Foreign national prisoners in the UK: explanations and implications. *The Howard Journal of Criminal Justice* 50(2): 184-198.
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.
Bhui HS (2009) Foreign National Prisoners: Issues and Debates. In: Bhui HS (ed) *Race and Criminal Justice*. London: Sage, pp.154-169.
Braun K (2019) *Victim Participation Rights. Variation Across Criminal Justice Systems*. Cham: Palgrave Macmillan.
Canton R (2018a) Probation and the philosophy of punishment. *Probation Journal* 65(3): 252-268.
Canton R (2018b) *An Introduction to the Philosophy of Punishment*. Palgrave McMillan.
De Mesmaecker V (2012) Antidotes to Injustice? Victim Statements' Impact on Victims' Sense of Security. *International Review of Victimology* 18(2): 133-153.
De Wree E, Vander Beken T and Vermeulen G (2009) The transfer of sentenced persons in Europe. *Punishment & Society* 11(1): 111-128.
Doak J (2005) Victims' Rights in Criminal Trials: Prospects for Participation. *Journal of Law and Society* 32(2): 294-316.
Doak J, Henham R and Mitchell B (2009) Victims and the Sentencing Process: Developing Participatory Rights? *Legal Studies* 29(4): 651-677.
Duff A (2001) *Punishment, communication and community*. Oxford: Oxford University Press.
Durnescu I (2010) Foreign Prisoners and Probation. To Discriminate or Not. In: Groenhuijsen MS, Kooijmans T and de Roos TA (eds) *Liber Amicorum Anton Van Kalmthouth*. Maklu: Apeldoorn, Antwerpen, Portland, pp.63-70.
Durnescu I (2011) Pains of probation: Effective practice and human rights. *International Journal of Offender Therapy and Comparative Criminology* 55(4): 530-545.
Durnescu I (2017) Framework decisions 2008/947 and 2009/829: state of play and challenges. *ERA Forum* 18(1): 355-363.

Edwards I (2004) An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making. *British Journal of Criminology* 44(6): 967-982.
Erez E and Roberts J (2013) Victim participation in criminal justice. In: Davis RC, Lurigio A and Herman S (eds) *Victims of Crime* (4th edn). Thousand Oaks, CA: Sage, pp.251-270.
Faraldo Cabana P and Fernández Bessa C (2019) ¿Fracaso del reconocimiento mutuo de resoluciones de libertad vigilada? Una reflexión sobre la situación de los condenados extranjeros de nacionalidad comunitaria. *Migraciones* 47: 151-175.
Flore D, Bosly S, Honhon A and Maggio J (eds) (2012) *Probation measures and alternative sanctions in the European Union*. Cambridge: Intersentia.
Freixes T and Román L (dirs) (2015) *The European protection order. Its application to the victims of gender violence*. Madrid: Tecnos.
Hepburn JR and Griffin ML (2004) The Effect of Social Bonds on Successful Adjustment to Probation: An Event History Analysis. *Criminal Justice Review* 29(1): 46-75.
Hofmann R and Nelen H (2020) Cross-border cooperation in the execution of sentences between the Netherlands, Germany and Belgium: an empirical and comparative legal study on the implementation of EU framework decisions 2008/909/JHA and 2008/947/JHA. *Crime, Law and Social Change* 74: 381-404.
Kaufman E (2012) Finding foreigners: race and the politics of memory in British prisons. *Population, Space and Place* 18(6): 701-714.
Kirchengast T (2016) *Victims and the Criminal Trial*. Palgrave Macmillan.
Knapen M (2010) Implementation of Framework Decisions on the Enforcement of Foreign Criminal Judgments: (How) Can the Aim of Resocialisation be Achieved? In: Groenhuijsen G, Kooijmans T and de Roos T (eds) *Fervet Opus. Liber Amicorum Anton van Kalmthout*. Apeldoorn-Antwerp-Portland: Maklu, pp.113-123.
Lonati S (2018) Is the European Protection Order Sufficiently Robust to Prevent any Discrimination among Victims Moving Across the European Union? An Assessment of the First Seven Years. *European Criminal Law Review* 8(3): 332-367.
MacKenzie D (2002) The impact of formal and informal social controls on the criminal activities of probationers. *Journal of Research in Crime and Delinquency* 39(3): 243-276.
McNeill F (2006) A desistance paradigm for offender management. *Criminology and Criminal Justice* 6(1): 39-62.
McNally G and Burke I (2012) Implementation of the Framework Decision on the transfer of Probation Measures between States in the European Union. *EuroVista* 2(2): 70-77.
Mair G and Burke l (2012) *Redemption, Rehabilitation and Risk Management: A History of Probation*. London: Routledge.
Morgenstern C (2009) European Initiatives for Harmonisation and Minimum Standards in the Field of Community Sanctions and Measures. *European Journal of Probation* 1(2): 128-141.
Niţu D (2016) Non-custodial sanctions and measures. Principles and rules in the framework of EU legislation. In: Bernardi A (ed) *Prison overcrowding and alternatives to detention*. Naples: Jovene, pp.49-66.
O'Hara EA (2005) Victim Participation in the Criminal Process. *Journal of Law and Policy* 13(1): 229-247.
Peers S (2004) Mutual Recognition and Criminal Law in the European Union. Has the Council Got it Wrong? *Common Market Law Review* 41(1): 5-36.

Robinson G (2008) Late-modern rehabilitation: The evolution of a penal strategy. *Punishment & Society* 10(4): 429-445.
Robinson PH (2002) Should the Victims' Rights Movement Have Influence over Criminal Law Formulation and Adjudication? *McGeorge Law Review* 33(4): 749-758.
Röhl KF (1997) Procedural Justice: Introduction and Overview. In: Röhl KF and Machura S (eds) *Procedural Justice*. Aldershot: Ashgate, pp.1-35.
Rotman E (1994) Beyond punishment. In: Duff A and Garland D (eds.) *A reader on punishment*. Oxford: Oxford University Press, pp.281-305.
Snacken S and McNeill F (2012) Scientific recommendations. In: Flore D, Bosly S, Honhon A, et al. (eds) *Probation Measures and Alternative Sanctions in the European Union*. Cambridge: Intersentia, pp.561-571.
Ugelvik T (2013) Seeing like a Welfare State: Immigration Control, Statecraft, and a Prison with Double Vision. In: Aas KF and Bosworth M (eds) *The Borders of Punishment. Migration, Citizenship, and Social Exclusion*. Oxford: Oxford University Press, pp.183-198.
Ugelvik T (2014) The Incarceration of Foreigners in European Prisons. In: Pickering S and Ham J (eds) *The Routledge Handbook on Crime and International Migration*. London and New York: Routledge, pp.107-120.
Van der Aa S (2012) Protection Orders in the European Member States: Where do we stand and where do we go from here? *European Journal of Criminal Policy and Research* 18: 183-204.
Van der Aa S (2015) Post-Trial Victims' Rights in the EU: Do Law Enforcement Motives Still Reign Supreme? *European Law Journal* 21(2): 239-256.
Van der Aa S and Ouwerkerk J (2011) The European Protection Order: No Time to Waste or a Waste of Time. *European Journal of Crime, Criminal Law and Criminal Justice* 19(4): 267-288.
Van Kalmthout AM, Van der Meulen FH and Dünkel F (2007) Comparative overview, conclusions and recommendations. In: Van Kalmthout AM, Van der Meulen FH and Dünkel F (eds) *Foreigners in European prisons*. Nijmegen: Wolf Legal Publishers, pp.7-90.
Van Zyl Smit D (2005) International imprisonment. *International and Comparative Law Quarterly* 54(2): 357-386.
Van Zyl Smit D, Snacken S and Hayes D (2015) "One cannot legislate kindness": Ambiguities in European legal instruments on non-custodial sanctions. *Punishment & Society* 17(1): 3-26.
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.
Warr J (2016) The deprivation of certitude, legitimacy and hope: Foreign national prisoners and the pains of imprisonment. *Criminology and Criminal Justice* 16(3): 301-318.
Wemmers J and Cyr K (2004) Victims Perspective on Restorative Justice. How Much Involvement are Victims Looking for? *International Review of Victimology* 11(2-3): 1-16.