



# JUDICIAL COOPERATION, TRANSFER OF PRISONERS AND OFFENDERS' REHABILITATION: NO FAIRY-TALE BLISS. COMMENT ON *OGNYANOV*

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**ABSTRACT:** This *Insight* analyses the first preliminary ruling (Court of Justice, judgment of 8 November 2016, case C-554/14, *Ognyanov* [GC]) concerning a provision of the Council Framework Decision 2008/909/JHA on the cross-border transfer of prisoners in the EU. The Court of Justice clarifies the notion of enforcement of the sentence, for the purposes of the horizontal division of competences between the issuing State and executing authority. In this context, despite the quasi-automatic nature of judicial cooperation mechanisms, a prominent role is given to the issuing authority. In particular, the issuing State is entitled to assess unilaterally the prisoner's chances of social rehabilitation abroad. It is contended that this prudent approach, albeit reasonably inspired by the well-established principle of territoriality of criminal law, is capable of undermining the effectiveness of the Council Framework Decision 2008/909. This approach also blocks a gradual emergence of a common European approach to offenders' social rehabilitation, which is a key objective of judicial cooperation in criminal matters. A common attitude towards crime prevention through offenders' rehabilitation could be the feeding ground favouring future evolution of cooperation in criminal matters, besides the current overarching focus on *ex post* crime repression.

**KEYWORDS:** judicial cooperation in criminal matters – enforcement of a sentence – territoriality – penalty – more lenient national legislation – offenders' rehabilitation.

## I. BETTER LATE THAN NEVER: THE FIRST CASE CONCERNING THE COUNCIL FRAMEWORK DECISION 2008/909/JHA ON THE TRANSFER OF PRISONERS IN THE EUROPEAN UNION

*Ognyanov*<sup>1</sup> is the first preliminary ruling concerning the interpretation of a provision of the Council Framework Decision 2008/909/JHA on the transfer of prisoners within the

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<sup>1</sup> Court of Justice, judgment of 8 November 2016, case C-554/14, *Ognyanov* [GC]. Another request for a preliminary ruling was made by the same Bulgarian Court, the Sofia City Court, in relation to a different aspect of the same proceedings. On that occasion, the *Sofiyski gradski sad* raised a series of interpretative

EU.<sup>2</sup> This act is a key tool for judicial cooperation in criminal matters, as it is intended to maximise the offenders' chances of social rehabilitation while ensuring deterrence, via the cross-border enforcement of custodial sentences and measures involving deprivation of liberty.<sup>3</sup>

The ruling addresses an important aspect of the Council Framework Decision 2008/909, namely the law applicable to the enforcement of a custodial sentence where a person is transferred. Pursuant to Art. 17, enforcement is to be governed by the executing State's law and procedures. However, the Council Framework Decision 2008/909 does not clarify if and to what extent such applicable law needs to consider the issuing Member State's prison regime, in order to tailor the punishment to the individual. Therefore, the judgment sheds light on the issuing and executing authorities' respective roles, when confronted with complex cross-border enforcement of sentences in a fragmented legal scenario.

Despite the systemic implications on the functioning of the mechanism set by the Council Framework Decision 2008/909, the question at issue was raised about six years after the expiry of the implementation deadline. In fact, the Council Framework Decision 2008/909 has been largely neglected by the Member States so far, mainly due to the legacy of the former Third Pillar. The frequent lack of timely implementation in national legal orders has been exacerbated by the absence of comprehensive studies on its theoretical implications and practical challenges.<sup>4</sup> Following the expiry of the five years transitional period,<sup>5</sup> the situation is now gradually improving,<sup>6</sup> as confirmed by

questions concerning Art. 267 TFEU and Art. 94 of the Rules of Procedure of the CJEU, with regard to the content of the questions referred and the duties incumbent upon the national court after the delivery of the preliminary ruling: Court of Justice, judgment of 5 July 2016, case C-614/14, *Ognyanov* [GC].

<sup>2</sup> 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 is intended to replace Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983.

<sup>3</sup> The Council Framework Decision 2008/909, cit., at issue is complementary to other instruments, namely the Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions and the Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between the Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures.

<sup>4</sup> European Union Agency for Fundamental Rights, *Criminal Detention and Alternatives: Fundamental Rights Aspects in EU Cross-Border Transfers*, 2016, fra.europa.eu.

<sup>5</sup> Art. 10 of Protocol no. 36 on Transitional Provisions.

<sup>6</sup> Communication COM(2014) 57 final of 5 February 2014 from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, p. 6 *et seq.*

other preliminary rulings concerning this Council Framework Decision 2008/909 that were recently delivered by the Court of Justice.<sup>7</sup>

## II. FACTS OF THE CASE

Mr. Ognyanov, a Bulgarian national, was sentenced to 15 years imprisonment for murder and aggravated robbery by a Danish Court. From January 2012, he served imprisonment in Denmark.<sup>8</sup> While in prison, Mr. Ognyanov did a small amount of work in the general interest, which did not amount to grounds for remission of the sentence under Danish law. At the beginning of October 2013, he was eventually transferred to the Bulgarian authorities.<sup>9</sup>

The Bulgarian Criminal Code however provides for a more lenient regime concerning work done whilst in prison,<sup>10</sup> pursuant to which two days of work equate to three days of imprisonment. The Bulgarian Supreme Court of Appeal also supports an extensive interpretation of the relevant national provisions. According to its settled case law, the prisoner can seek a reduction in the period of incarceration against work done abroad, as a means of enforcing a foreign criminal conviction, "even if that is not provided for in that State's national legislation".<sup>11</sup>

<sup>7</sup> Court of Justice, judgment of 11 January 2017, case C-289/15, *Grundza*; Court of Justice, judgment of 25 January 2017, case C-582/15, *van Vemde*.

<sup>8</sup> It must be underlined that the Framework Decision at issue applies to all Member States, despite the opt-out regimes provided for by some Protocols annexed to the Treaties. In particular, the United Kingdom exercised the block opt-out pursuant to Art. 10, para. 4, of Protocol no. 36, but then included this Council Framework Decision 2008/909, cit., in the list of instruments it wanted to opt back in, under Art. 10, para. 5, of the same Protocol. See Commission Decision 2014/858/EU of 1 December 2014 on the notification by the United Kingdom of Great Britain and Northern Ireland of its wish to participate in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon and which are not part of the Schengen *acquis*. Moreover, Art. 2, para. 1, of the Protocol no. 22 on the Position of Denmark states that this Member State is exempted from any measure regarding Title V of the Third Part of the TFEU. However, Denmark is still bound by the acts adopted before the Treaty of Lisbon. In case these acts are amended, they continue to be binding upon and applicable to Denmark unchanged.

<sup>9</sup> It is important to remark that Mr. Ognyanov's transfer was not carried out on the basis of the Framework Decision at issue, rather on the Council of Europe Convention on the Transfer of Sentenced Persons. In fact, whereas the deadline for implementing the Council Framework Decision 2008/909, cit., expired on 5 December 2011, Bulgaria has not transposed it yet. However, the preliminary questions referred focus on Art. 17 of the unimplemented Framework Decision and the Court of Justice considers that the Bulgarian regime can be interpreted in conformity with this act: *Ognyanov* [GC], C-554/14, cit., paras 54-70. Council of Europe, Convention on the Transfer of Sentenced Persons of 21 March 1983. See also the Additional Protocol to the Council of Europe Convention on the Transfer of Sentenced Persons of 18 December 1997.

<sup>10</sup> See Art. 29, para. 1, of the *Nakazatelen Kodeks*, the Bulgarian Criminal Code.

<sup>11</sup> Opinion of AG Bot delivered on 3 May 2016, case C-554/14, *Ognyanov*, para. 33.

Under Bulgarian law, therefore, Mr. Ognyanov shall benefit from a more favourable regime and be entitled to early release. In this context, the referring Bulgarian Court raises some doubts on the interpretation of Art. 17 of the Council Framework Decision 2008/909.

On one hand, this provision endows the executing authority with the primary responsibility for governing enforcement of the sentence. On the other hand, enforcement has probably already commenced in the issuing Member State before the judicial cooperation mechanism is completed. So, in practice, the enforcement phase often requires the issuing and executing authorities' actions to be carefully coordinated.

This is why Art. 17, para. 2, urges the executing authority to deduct the time already served in another Member State from the total length of the sentence. In the light of this provision, the key question is whether the definition of the remaining period of detention requires the executing authority to assess the issuing State's enforcement regime and to consider the facts occurred during the first phase of enforcement. The question touches upon the peculiar features of the division of competences between national authorities codified by the Council Framework Decision 2008/909. However, it also requires more general reflections on the relationship between judicial cooperation mechanisms that are governed by the mutual recognition principle and the gradual emergence of truly European objectives in the EU judicial area. In particular, in the case at issue hand, the principle of territoriality of criminal law and the objective of facilitating social rehabilitation of a sentenced person, which is the cornerstone of Council Framework Decision 2008/909, lock swords.<sup>12</sup>

### III. THE NOTION OF ENFORCEMENT OF A SENTENCE AND THE DIVISION OF COMPETENCES BETWEEN THE ISSUING AND EXECUTING STATES

The Court of Justice acknowledges that Art. 17 of the Council Framework Decision 2008/909 does not circumscribe the notion of enforcement. So in theory, the latter could encompass any measure adopted since the judgment has been delivered.<sup>13</sup> Nonetheless, the Court upholds a restrictive approach to the concept at issue and limits its scope of application, along with the executing authority's subsequent responsibilities. According to the Court of Justice, the wording of the Council Framework Decision 2008/909 only refers to the deprivation of liberty within the Member State of transfer. Two main arguments lead to this conclusion: the contextual interpretation of the cooperation mechanism provided by the Council Framework Decision 2008/909 and the quasi-automatic nature of the principle of mutual recognition. The following subsections briefly illustrate these lines of reasoning.

<sup>12</sup> Recitals 8 and 9 of Council Framework Decision 2008/909, cit.

<sup>13</sup> *Ognyanov* [GC], C-554/14, cit., para. 32.

### III.1. WHICH ENFORCEMENT? THE APPLICABLE LAW IN THE LIGHT OF THE DIVISION OF COMPETENCES BETWEEN NATIONAL AUTHORITIES

Art. 17 needs to be considered within the overall mechanism of the Council Framework Decision 2008/909. In this wider context, the provision at hand is a specific aspect of a more complex procedure, which the act describes in chronological order.

Firstly, Arts 4 to 14 establish the requirements and duties incumbent upon national authorities when transferring a sentenced person. Secondly, Arts 15 and 16 govern the transfer and transit through other Member States' territories. These provisions mark a clear dividing line between the pre and post transfer regimes. As such, they also imply a logical division of competences between the issuing authority and the executing one. From this point of view, under Art. 13, the issuing authority retains the power to withdraw a certificate "as long as the enforcement of the sentence has not begun". Conversely, in the light of Art. 22, the issuing State may no longer exercise the sovereign *ius puniendi* "once [...] enforcement in the executing State has already begun". Therefore, the handover phase between the respective national authorities corresponds to the enforcement beginning in the executing State. Until then, the issuing authority retains its competence and the relevant national law applies.<sup>14</sup>

In order to prevent conflicts of laws and jurisdictions, the general scheme of the Council Framework Decision 2008/909 wards off any overlapping of competences: the cross-border enforcement of a sentence is the outcome of separate, but complementary efforts of the authorities involved.<sup>15</sup> It follows that the notion of enforcement under Art. 17 of the Council Framework Decision 2008/909 refers only to imprisonment in the executing State.<sup>16</sup>

As far as reductions in sentences are concerned, this approach is more specifically reflected by the template certificate which the issuing authority transmits along with the

<sup>14</sup> This is further confirmed by Art. 22, para. 2, of the Council Framework Decision 2008/909, cit., pursuant to which "the right to enforce the sentence shall revert to the issuing State" if the person has escaped from custody and enforcement is subsequently impossible in the executing State.

<sup>15</sup> In this perspective, the AG Bot underlines the need to preserve the principle of territoriality in criminal law, which he considers an inherent expression of core aspects of national sovereignty, widely recognized by all Member States. Opinion of AG Bot, *Ognyanov*, cit., paras 79-81. The Court does not rest on this argument, at least *expressis verbis*, and prefers to lay out its line of reasoning on the basis of the wording of the Council Framework Decision 2008/909, cit. There again, the general scheme of the act at issue *de facto* identifies and protects the territorial competence of the issuing State and is intended to prevent territorial conflicts of law.

<sup>16</sup> It is interesting to point out that the wording of Art. 17, para. 1, of the Council Framework Decision 2008/909, cit., corresponds in substance to Art. 9, para. 3, of the Convention on Transfers of Sentenced Persons of the Council of Europe of 1983. However, the title of Art. 9 offers additional interpretative guidance, since it refers to the "Effects of transfer for the administering State". Therefore, with regard to the territorial competence of the authorities involved, the scheme of the Framework Decision is patterned after the Convention at issue.

judicial decision. Section (i)2 collects all necessary information on the length of the sentence and its para. 2 requires the issuing State to indicate the days of deprivation of liberty already served in connection with the sentence at issue. Para. 3 also allows the issuing authority to quantify the number of additional days to be deducted from the remaining period of imprisonment due to supplementary reasons identified by the national legal order. Reductions for work carried out in detention are not explicitly specified in the non-exhaustive list of particular circumstances provided therein, but it is clear that they must be taken into account when filling in the template certificate.

It follows that the more lenient regime of the executing State is not retroactive. Instead, its scope of application is strictly limited to the post-transfer enforcement within that State's territory, as all remissions in sentence connected to the pre-transfer enforcement are to be considered by the issuing authority.<sup>17</sup>

### III.2. MUTUAL RECOGNITION AND THE ROLE OF THE NATIONAL AUTHORITIES

The Court of Justice reaches the same conclusion by virtue of the "special mutual confidence in other Member States' legal systems" which characterises judicial cooperation in criminal matters in the EU.<sup>18</sup> Falling to the country of origin to determine reductions in sentence connected to the period of detention served on its territory, the retroactive application of the law of the executing State would entail a re-examination of that phase of enforcement. The executing authority would then be entitled to revert the assessment made by the one issuing it, pursuant to different rules on remission of the sentence.<sup>19</sup>

According to the Court of Justice, such overlapping plainly undermines mutual trust and frustrates the principle of mutual recognition, which is the cornerstone of judicial cooperation mechanisms.<sup>20</sup> In fact, the receiving Member State has the duty to recognise and execute a foreign judicial decision in full compliance with its form and content, without additional formalities. Therefore, the case law underlines that national executing authorities are required to accept the implications of the law in force in the country of origin, even if "the outcome would be different if their own national law were applied".<sup>21</sup>

<sup>17</sup> *Ognyanov* [GC], C-554/14, cit., para. 40.

<sup>18</sup> Recital 5 of Council Framework Decision 2008/909, cit.

<sup>19</sup> What is more, in the case at hand the Danish authorities had expressly stated in the certificate that they had not granted remission of the sentence on account of work done in detention.

<sup>20</sup> *Ognyanov* [GC], C-554/14, cit., paras 44-49.

<sup>21</sup> Court of Justice, judgment of 11 February 2003, joined cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 33. See also opinion of AG Bot, *Ognyanov*, cit., para. 119.

#### IV. NO FAIRY-TALE BLISS: IS THIS JUST A WATERED DOWN VERSION OF MUTUAL RECOGNITION, TO THE DETRIMENT OF A COMMON APPROACH TO OFFENDERS' SOCIAL REHABILITATION?

Judicial cooperation takes different shapes, depending on the nature of the decisions to be recognised, as well as the objectives underpinning each mechanism. The basic assumption is that execution is entrusted to the executing State's law, in the light of the principles of sovereignty and territoriality.

However, the issuing authority usually retains certain powers, ranging from light equivalence checks to more stringent controls over the executing authority's activity. For instance, some Framework Decisions and Directives stipulate that specific aspects of a country of origin's legal order must be respected even within an executing State territory.<sup>22</sup> When the fragmentation of national laws blocks the execution of a foreign decision, the receiving authority is endowed with the power to adjust that decision, in order to reconcile it with its legal order.<sup>23</sup> Such adaptations affect how automatic the judicial cooperation mechanisms are and may incisively alter the nature and consequences of the judicial decision concerned. Therefore, they are usually made conditional upon strict requirements such as the consent of the issuing State, which can often play a prominent role.

From this point of view, the Council Framework Decision 2008/909 implements the principle of mutual recognition through a specific distribution of competences between the issuing and the executing authorities. In fact, in comparison to other similar tools, it gives remarkable discretion to the issuing authority regarding the outcomes of the judicial cooperation mechanism and, in particular, the forwarding of the certificate and its possible withdrawal.

<sup>22</sup> For instance, pursuant to the Framework Decision 2005/214/JHA, the financial penalties issued against legal persons must be recognized and enforced even if the executing State criminal liability does not apply to such entities (Art. 9, para. 3, of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties). The influence of the issuing State is particularly evident in relation to the Directive on the European investigation order. Art. 9, para. 2, states that "The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority [...] provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State". It follows that the legal order of the country of origin prevails over the rules of the executing States, unless key principles of the latter are endangered (Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European investigation order in criminal matters).

<sup>23</sup> The Framework Decision on the European supervision order stipulates that if the supervision measure is incompatible with the law of the executing State, "the competent authority in that Member State may adapt them in line with the types of supervision measures which apply, under the law of the executing State, to equivalent offences". In any event, the adjusted measure shall not be more severe than the original one (Art. 13 of Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention).

The judicial cooperation mechanism is initiated only insofar as the issuing authority is satisfied that enforcing the sentence in the executing State will enhance the offender's chances of social rehabilitation.<sup>24</sup> Such evaluation is unilateral and can also be made *in itinere*.<sup>25</sup> The Council Framework Decision 2008/909 provides for duties of consultation between the respective authorities. Accordingly, Art. 17, para. 3, of the Council Framework Decision 2008/909 provides for a discretionary power to withdraw the certificate when the issuing State does not agree with the executing State's rules on early or conditional release.

The distribution of competences between the States concerned aims at addressing the significant fragmentation of national procedural systems. At the time of negotiations preceding the adoption of this act, the comparative analysis of the relevant national laws highlighted a considerable variety of means to enforce sentences and alternatives to imprisonment.<sup>26</sup> The level of minimum and maximum penalties, prison regimes and prison conditions also revealed major differences. To a certain extent, the wording of the Council Framework Decision 2008/909 was watered down by the need to avoid conflicts and build mutual trust in a new national secret garden affected by the European integration process. This is reasonable and, indeed, the prudent approach has boosted the application of the Framework Decision. Even if a lot remains to be done and the potential of the mechanism still needs to be fully explored, national authorities resort to prisoners' transfers more often than to other complementary judicial cooperation tools.<sup>27</sup>

However, much has changed since the preparatory work and subsequent adoption of this act. Sooner or later, some factors may urge a reconsideration of the mechanism outlined in the Council Framework Decision 2008/909 and urge a truly European attitude towards the objective of a prisoners' rehabilitation.

Firstly, the binding status acquired by the Charter of Fundamental Rights of the European Union has particular significance for judicial cooperation instruments.<sup>28</sup> In relation to the Council Framework Decision 2008/909, one of the most debated threats to a prisoner's rights is the partial removal of his/her consent to transfer, in certain situa-

<sup>24</sup> Art. 4, para. 2, of Council Framework Decision 2008/909, cit.

<sup>25</sup> The Council Framework Decision 2008/909, cit., provides for duties of consultation between the respective authorities. However, they are not bound by the outcomes of such consultations.

<sup>26</sup> For an in-depth analysis of national legal orders concerning the subject at issue see G. VERMEULEN, A. VAN KALMTHOUT, N. PATERSON, M. KNAPEN, P. VERBEKE, W. DE BONDT, *Cross-Border Execution of judgments Involving Deprivation of Liberty in the EU. Overcoming Legal and Practical Problems through Flanking Measures*, Antwerpen: Maklu, 2011.

<sup>27</sup> European Union Agency for Fundamental Rights, *Criminal Detention and Alternatives*, cit., p. 34.

<sup>28</sup> T.P. MARGUERY, *The Protection of Fundamental Rights in European Criminal Law after Lisbon: What Role for the Charter of Fundamental Rights?*, in *European Law Review*, 2013, p. 444.



tions.<sup>29</sup> Therefore, the issuing authority is entitled to make a unilateral assessment and presume that the transfer will better serve the purposes of the Council Framework Decision 2008/909. The removal of consent has been harshly criticised and described as a veiled expulsion from the issuing State,<sup>30</sup> eluding the guarantees provided by EU law.<sup>31</sup> A revision of this aspect would avoid any abuse and ensure that the Charter's essential provisions are respected, while pursuing the Council Framework Decision 2008/909 objectives more effectively. In fact, offenders' rehabilitation is considered to be closely linked to Arts 1 and 7 of the Charter, which enshrine the principle of human dignity and the right to a private and family life.<sup>32</sup>

Secondly, approximation of national substantive criminal law has expanded and is showing a trend towards increasingly specific common rules concerning maximum penalties, the nature of penalties and the circumstances aggravating or alleviating penalties. Moreover, following the Lisbon Treaty's entry into force, the EU has mooted the possibility of harmonising minimum maximum penalties.<sup>33</sup> Even if this competence has not been exercised yet, it is capable of imposing stricter limits on national legislator's discretionary choices in this domain, in the near future.

To a certain extent, such a limitation can be considered an inherent consequence of the rise of truly European interests in need of protection through criminal law. Cross-border crimes, crimes against the financial interests of the EU and particularly serious crimes represent (and are increasingly perceived as) a common threat to cope with. These factors challenge the principle of territoriality and predict the slow emergence of a new model of criminal law and judicial cooperation in criminal matters, as shared tools to tackle common concerns in the light of EU objectives.<sup>34</sup>

<sup>29</sup> Art. 6, para. 2, of Council Framework Decision 2008/909, cit. Consent is not necessary when the prisoner is transferred to the State of nationality where he lives, to the Member State where he will be deported after the enforcement of the sentence, to the Member State where he fled or otherwise returned in view of the pending criminal proceedings.

<sup>30</sup> V. MITSILEGAS, *The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?*, in *European Law Review*, 2009, p. 541 *et seq.* The problem is further amplified by the unclear meaning of the verb "lives", which is not reiterated elsewhere in similar EU acts.

<sup>31</sup> See for instance, with regard to EU citizens and protection from expulsion, the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. For a critical analysis, U. BELAVUSAU, D. KOCHENOV, *Kirchberg Dispensing Punishment: Inflicting "Civil Death" on Prisoners in Oneukwere (C-378/12) and MG (C-400/12)*, in *European Law Review*, 2016, p. 557 *et seq.*

<sup>32</sup> P. MENGOSI, *La cooperazione giudiziaria europea e il principio fondamentale di tutela della dignità umana*, in *Studi sull'integrazione europea*, 2014, p. 225 *et seq.*

<sup>33</sup> W. DE BONDT, S. MIETTINEN, *Minimum Criminal Penalties in the European Union: in Search of a Credible Justification*, in *European Law Journal*, 2015, p. 722 *et seq.*

<sup>34</sup> K. NICOLAIDES, *Trusting the Poles? Constructing Europe through Mutual Recognition*, in *Journal of European Public Policy*, 2007, p. 685; C. JANSSENS, *The Principle of Mutual Recognition in EU Law*, Oxford: Oxford University Press, 2013, pp. 270-275.

In fact, prisoners' re-socialisation features among the core objectives of judicial co-operation in criminal matters as a whole, its role and implications are largely underestimated and still need to be adequately assessed. As implicitly confirmed by the AG and the Court of Justice,<sup>35</sup> the current division of competences between the issuing and executing authorities is based on the assumption that offenders' rehabilitation through the enforcement of a sentence is solely a matter of national policy. Therefore, the Council Framework Decision 2008/909 merely sticks together national criminal policies and priorities that run in parallel and reflect the perception of a certain legal order concerning the (theoretically) common challenge of enhancing the prisoners' chances of rehabilitation.

It follows that the notion and perception of social rehabilitation elaborated within the issuing State's territory in principle prevails over the executing State's approach, despite its allegedly European scale.<sup>36</sup> From this point of view, paradoxically, the prominent role given to the issuing State can constitute a threat to mutual confidence and the full effectiveness of the Council Framework Decision 2008/909.<sup>37</sup> In fact, from a systemic perspective, it is exacerbated by the lack of in-depth analysis of the European dimension of offenders' rehabilitation and partitions the aim the Council Framework Decision 2008/909 is intended to achieve. The sum of national expectations of such a goal blocks the emergence of a truly EU approach to prisoners' rehabilitation, despite the strategic importance attached to such a common objective.

The watered-down version of mutual recognition codified by the Council Framework Decision 2008/909 is better than silence. However, in times of programmatic reflections on the future of the European integration process, a serious reconsideration of the scale and coherence of the objectives pursued in the European judicial area is needed, including in terms of a new balance between issuing and executing authorities. A common attitude towards crime prevention through offenders' rehabilitation could be the feeding ground that favours the future evolution of cooperation in criminal matters, besides the current overarching focus on *ex post* crime repression.

<sup>35</sup> Of course, the principle of mutual recognition requires a model of interaction between the authorities involved to be identified. It implies a distribution of powers as a means to govern a complex mechanism. However, this concern should not lead to underestimate the substantive problem at the basis of the judicial cooperation mechanism. This *a fortiori* applies in the event of a common objective identified by the European legal order, which all the authorities involved should contribute to. On the lack of a clear strategy as to the implications of offenders' social rehabilitation as well as on the interactions of this principle/objective with judicial cooperation mechanisms and the EU citizenship rights see L. MANCANO, *The Place for Prisoners in European Union Law?*, in *European Public Law*, 2016, p. 717 *et seq.*

<sup>36</sup> Art. 4, para. 3, of Council Framework Decision 2008/909, *cit.*

<sup>37</sup> On the national authorities' approach to the assessment of the chances of social rehabilitation abroad see G. VERMEULEN, A. VAN KALMTHOUT, N. PATERSON, M. KNAPEN, P. VERBEKE, W. DE BONDT, *Cross-Border Execution of Judgments*, *cit.*, pp. 47-55.