Framework Decision 2008/909/JHA on the transfer of prisoners in the EU: Advances and challenges in light of the Italian experience

Framework Decision 2008/909/JHA on the Transfer of Prisoners in the EU: Advances and Challenges in Light of the Italian Experience

Stefano Montaldo*

ABSTRACT:

KEYWORDS: prisoner - transfer - enforcement of a sentence - mutual trust - implementation

1. Introduction: Framework Decision 2008/909/JHA and the state of the art of its implementation at national level.

Framework Decision 2008/909/JHA applies the principles of mutual trust and mutual recognition to cross-border transfers of prisoners among the EU Member States .[1] As is the case for many other EU acts concerning judicial cooperation in criminal matters, this instrument replaced the intergovernmental footprint of the pre-existing Convention of the Council of Europe on the Transfer of Sentenced Persons of 1983.[2] In fact, the

* Stefano Montaldo, Assistant Professor of EU Law, University of Turin: stefano.montaldo@unito.it.
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[1] Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

[2] See also its Additional Protocol of December 1997, which entered into force in 2000. A new Additional Protocol amending the previous one was open to signatures in November 2017 and has not yet entered into force. More precisely, within its scope of application, Framework Decision 2008/909/JHA also replaces the European Convention on the transfer of sentenced persons of 1983 and its additional Protocol, the Convention on the International Validity of Repressive Judgments of 1970, the relevant provisions of the Convention implementing the Schengen Agreement, and the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 1991.

Convention had received little attention across the EU and its limited application had proven to be unsatisfactory, mainly because of its lengthy and cumbersome procedures.[3]
On the other hand, the advanced mechanism established by the Framework Decision obliterates the role of the political branch, as it is centred on the golden rule of EU judicial cooperation in criminal matters, namely the duty on the part of the receiving authority to recognise the foreign judgment and to execute the transfer request. Therefore, the Framework Decision minimises unnecessary formalities and reiterates two major recurring features of EU legislation in this domain: the abolition of the double criminality check in relation to a list of serious offences[4] and the provision of an exhaustive list of optional grounds for denying recognition.[5]
However, notwithstanding the initial ambitions,[6] ten years after its adoption, this instrument is stuck at the level of a promising youngster showing auspicious potential for the years to come. Its practical application by the national judicial authorities is still below expectations,[7] although it is slowly increasing on a yearly basis, at least in some Member States.[8] The unexplored potential of transfer procedures has led to a very limited body of EU and national case law and has further fed the silence of legal scholars. As a consequence, most of the remarkable theoretical knots in this Framework Decision are still to be loosened.
The poor state of the art is the outcome of several converging factors. Firstly, the implementation of the Framework Decision was belated in many Member States, most of which did not comply with the transposition deadline of December 2011.[9]
Secondly, the wording of this act represents the result of 3 years of heated negotiations within the Council. The imminent entry into force of the Lisbon Treaty was actually the most effective boost to the achievement of an agreement, under pressure of the foreseen eradication of the third pillar, along with the intergovernmental nature of its legal sources.[10]

[3] J.-C. Froment, 'Les avatars de la Convention sur le transfèrement de détenus en Europe', in J. Ceré, ed., *Panorama européen de la prison* (Paris: L'Harmattan, 2002), p. 33.
[4] See Art. 7(1)(2) of Framework Decision 2008/909/JHA, which reflects corresponding provisions included in most of the EU secondary acts in this domain.
[5] See Art. 9 of Framework Decision 2008/909/JHA. Art. 10 also allows for partial recognition and execution. In addition, Art. 11 provides for postponement of execution if the certificate is incomplete or does not correspond to the judgment. Another key departure from the previous intergovernmental regime is the provision of strict deadlines for handling the procedure and issuing a final decision: see Articles 12(1)(2) and 15(1).
[6] The negotiations started following the 2005 Initiative of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden with a view to adopting a Council Framework Decision on the European enforcement order and the transfer of sentenced persons between Member States of the European Union. The initiative relied heavily on mutual trust between the Member States to impose a "basic duty to take charge of sentenced persons for enforcement of a sentence or order" (recitals 4 and 5).
[7] European Union Agency for Fundamental Rights, 'Criminal Detention and Alternatives: Fundamental Rights Aspects in EU Cross-Border Transfers' (2016), also available online at https://fra.europa.eu/en/publication/2016/criminal-detention-and-alternatives-fundamental-rights-aspects-eu-cross-border (accessed 5 March 2019).
[8] Europris, 'Framework Decision 909 - Reports', available at https://www.europris.org/topics/framework-decision-909 (accessed 5 March 2019).
[9] See *infra*, par. 3 and footnote 16.
[10] V. Mitsilegas, 'The Third wave of Third Pillar Law', *European Law Review* 34 (2009), pp. 523-60.

This final rush led to inevitable compromises affecting the internal coherence and conceptual accuracy of the act.[11] For example, the Framework Decision states that transfer procedures should be directed to favour the sentenced person's social rehabilitation, but does not provide any guidance on the scope of this notion, the elusiveness of which blurs the purpose and content of the duties of cooperation incumbent upon the issuing and executing Member States. In fact, a closer look at the preparatory works to the Framework Decision and at the practice of some Member States[12] unveils the *de facto* managerial ambitions underpinning this instrument, which offers to the national authorities additional forms of control over - and removal of - undesired EU citizens.

Thirdly, Framework Decision 2008/909/JHA covers the criminal execution phase, which is one of the most delicate fields for judicial cooperation procedures. This domain is still nowadays perceived as a secret garden of the Member States, where the process of Europeanization of penal justice faces a solid barrier, delimiting exclusive national competences. The limited room for EU intervention entails the absence of harmonisation measures and a subsequent high degree of fragmentation of domestic legal orders. The wide variety of penitentiary benefits, alternatives to detention and related measures pursuing the goal of enhancing the inmate's chances of successful re-socialisation after conviction is an illustrative example, which touches upon the core of the scope and rationale of transfer procedures.[13]

It follows that, at this stage, several substantive and procedural hurdles block the full effectiveness of this Framework Decision, from both quantitative (number of transfers) and qualitative (genuine attempt to pursue social rehabilitation goals) perspectives.

The combination of elusive notions of EU law, opposing teleological priorities and legal fragmentation represents a favourable breeding ground for the many facets of the dark side of mutual trust: mutual distrust, mutual mistrust, or even just a lack of confidence in the feasibility and usefulness of judicial cooperation procedures.

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

More specifically, Italy represents a promising test-bed for an assessment of the advances and shortcomings of transfer procedures, on two main grounds. Firstly, the rate of inmates who are foreign EU nationals is considerably high. This basically entails remarkable (quantitative) opportunities for resorting to transfer mechanisms. Secondly, in the aftermath of the adoption of the Framework Decision, the Italian penitentiary system faced serious turbulence, mainly due to widespread overcrowding and critical deficiencies concerning detention conditions. The so-called prison emergency was

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[11] A. Martufi, 'Assessing the Resilience of 'Social Rehabilitation' as a Rationale for Transfer: A Commentary on the Aims of Framework Decision 2008/909/JHA', New Journal of European Criminal Law 9 (2018), pp. 49-51.

[12] S. Neveu, *Le transfert de l'exécution des peines alternatives et restrictives de liberté en droit européen. A la recherche d'un équilibre entre intérêts individuels et collectifs* (Limal: Anthemis, 2016), p. 440.

[13] See the analysis of the legislation of the Member States annexed to G. Vermeulen, et al., *Cross-border Execution of Judgments Involving Deprivation of Liberty in the EU. Overcoming Legal and Practical Problems through Flanking Measures* (Anvers: Maklu, 2011), pp. 236-54.

certified by the European Court of Human Rights in the *Torreggiani* pilot judgment,[14] where the Strasbourg Court urged Italy to take action to solve this structural situation. Such a contingency significantly influenced the Italian approach to the transfer of prisoners and led Italy to develop advanced strategies for enhancing the application of Framework Decision 2008/909/JHA.

Building on this broader scenario, this article focuses on the state of the art of cross-border transfers of prisoners in the Italian legal order. The analysis reflects the interim outcomes of a study carried out in the framework of the EU-funded research project RePers - Mutual Trust and Social Rehabilitation into Practice, which considers the application of Framework Decision 2008/909/JHA in Italy, Romania and Spain.

In this context, the next section provides an overview of the main features of the research carried out in the context of the RePers project. These clarifications establish the necessary background to approach, on a more informed basis, the case study on Italy. In fact, paragraph 3 addresses the state of the art of the implementation of Framework Decision 2008/909/JHA in this Member State, providing a varied set of relevant statistics and pointing out the key role played by the bilateral relationship with Romania. The fourth paragraph focuses on some of the most debated procedural and substantive issues regarding the EU regime for the transfer of prisoners, which are considered through the lens of the Italian experience.

More specifically, the study firstly considers the divide between the declared rationale of the Framework Decision and its actual drivers and how the Italian authorities cope with it. Secondly, the study addresses the debated topic of the protection of fundamental rights in the context of judicial cooperation procedures, as a key factor for the overall coherence of EU law and policies in this domain. Lastly, the article analyses the domestic reaction to the complex interconnection between the criminal execution phases of the issuing and executing Member States, in light of the wording of the EU act in question and of the interpretative clarifications offered by the recent case law of the Court of Justice.

2. The research carried out in the framework of the RePers project

The following paragraphs present the preliminary outcomes of the research activity conducted in the context of the above mentioned EU-funded project RePers – Mutual Trust and Social Rehabilitation into Practice. Before considering the substantive issues related to the implementation of Framework Decision 2008/909/JHA in Italy, it is worth briefly introducing the main features of the project and the activity conducted by the research units.[15]

The RePers project mainly focuses on the institutional layer, rather than on the (potential) transferee's perspective. The project activities aim to foster the improvement of transfer procedures in terms of both their effectiveness and their compliance with fundamental rights standards and social rehabilitation goals.

Following a preliminary desk review phase of existing studies and literature, the consortium combined various research methodologies and tools.

Firstly, each unit disseminated an online survey on Framework Decision 2008/909/JHA. The survey was sent to selected categories of recipients, namely members of the

[14] *Torreggiani and Others v Italy*, App. no 43517/09 et al. (ECHR, 8 January 2013).

[15] The research was developed by the University of Turin, the University of A Coruña, the Romanian Center for European Policies, the associations Amapola and Liderjust.

judiciary, ministerial officers, prison administration staff, lawyers and academics. At the time of writing this draft paper, about one hundred replies have been collected from the three Member States involved. The survey is intended to outline a general picture of the degree of knowledge and awareness of the main features of the Framework Decision, as well as to trigger reactions on personal perceptions and views as to the main hurdles to its implementation.

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

The third step of the research entailed both qualitative research of the data collected and a more in-depth analysis of specific files. In particular, the Romanian Ministry of Justice allowed access to specific landmark cases, which are illustrative of the main trends in Romanian practice.

The Italian Ministry of Justice, which is party to the project consortium, authorised the research unit of the University of Turin and Amapola to analyse the folders concerning pending and concluded transfer procedures. This activity is still ongoing. At the time of writing this article, 362 files have been considered, covering most of the transfers processed in 2016 and 2017 by the competent ministerial department. While performing this analysis, specific attention was paid to a series of key factors, namely: the actual role of social rehabilitation concerns, the prisoners' consent/opinion and the way it is expressed and collected, the exchanges of information between the issuing and executing authorities, the role of the lawyer (if any), the length of the transfer procedure and its link with the sentence remaining to be served, the outcome of the transfer procedure.

This remarkable body of information ignited the fourth and final phase of the research, which is still ongoing. The consortium is performing a more in-depth qualitative analysis of the information collected during the previous phases of the project, and is conducting a series of mutual learning meetings involving selected experts and practitioners from Italy, Romania and Spain. Initially, these meetings are aimed at allowing the national authorities to share their concerns and views on the shortcomings of cross-border transfers. At a later stage, they will be more specifically aimed at reaching an agreement on best practices and shared solutions, which could also be beneficial for other Member States in the long run.

3. Italy and Framework Decision 2008/909/JHA: Facts and Figures

In its 2014 report on the state of the art of the implementation of Framework Decision 2008/909/JHA at domestic level, the European Commission depicted a desolating - although quite common in the Third Pillar era - scenario, where only Denmark, Finland, Italy, Luxembourg, and the United Kingdom had complied with the transposition

deadline of 5 December 2011. The Commission also identified thirteen cases of belated implementation, while ten Member States had failed to adopt any relevant measure.[16]
The report listed some recurring flaws in national transposition laws, such as the expansion of the conditions for the adaptation of the sentence, the introduction of new grounds for refusal and the lack of deadlines for national courts to decide on the appeals against the transfer decision. This is nothing new from the perspective of the multilevel normative cycle of judicial cooperation in criminal matters, in actual fact.
However, from an Italian perspective, the Commission's assessment represented a *unicum*, since the Commission manifested its satisfaction with Italy's timely and high quality implementation and used it as an example for the other Member States. In fact, Italy had managed to implement the Framework Decision through legislative decree no. 161 of 7 September 2010, which had been adopted on the basis of the law of delegation from the Parliament to the Government no. 88 of 7 July 2009. This means that the complex transposition process had been launched in the aftermath of the entry into force of the Framework Decision. Moreover, the wording of the domestic law had been carefully tailored to the text of the EU act in question, so that no actual departures from it can be detected.[17]
For any insider of the Italian scenario, this performance[18] and the award of the prize for best player in the game was – so to speak – surprising, especially in the context of those years.[19] The whys and wherefores of this unique virtuous (formal) compliance were compelling questions which commentators should have taken more seriously. A clear answer to these underlying questions can be found in some of the many circular letters issued by the Italian Ministry of Justice to clarify the scope of the law of implementation and to address some of the challenges arising from its initial years of application. In particular, in a document of 18 April 2018, the Department of Penitentiary Administration urged the competent authorities – namely the public prosecutors at both first instance court and court of appeal levels – to prioritise transfers of prisoners to their Member States of origin. Furthermore, on 28 April 2014, another circular letter issued by the Department of Justice Affairs openly framed transfer procedures within the articulated set of measures enacted by the Italian Government to

[16] European Commission, Report on the implementation by the Member States of Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, 5 February 2014, COM(2014) 57 final. This state of the art has gradually improved over time: today only Bulgaria still needs to implement this EU instrument.
[17] V. Ferraris, 'L'implementazione del d.lgs. 161/2010 sul riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento', *Legislazione penale* (2019), available at www.lalegislazionepenale.eu.
[18] Studies on the EU policy cycle point to the performance of the Member States to describe the formal and informal strategies and tools to comply with EU law and the outcomes thereof. M. Scholten, 'Mind the trend! Enforcement of EU law has been moving to Brussels', *Journal of European Public Policy* 24 (2017), pp. 1348-66.
[19] Italy has traditionally been one of the worst performers in terms of its level of compliance with EU law, particularly with regard to the transposition of Directives and Framework Decisions. L. Conant, 'Compliance and What EU Member States Make of It', in M. Cremona, ed., *Compliance and the Enforcement of EU Law* (Oxford: Oxford University Press, 2012), p. 1. The situation has significantly improved in recent years, thanks to several institutional arrangements, such as the establishment of a unit within the structure of the Ministry for European Affairs specifically in charge of securing timely and proper implementation of these EU acts.

cope with the emergency of prison overcrowding, in the aftermath of the above mentioned judgment of the European Court of Human Rights in *Torreggiani*. The Ministry of Justice stressed the need for a more effective use of this mechanism to re-distribute foreign inmates detained in Italy among the "sending" States. Whereas circular letters represent mere soft-law instruments, which usually list guidelines and disseminate useful information and best practices among the relevant stakeholders, these documents provide an illustrative overview of the actual aims underpinning the Italian performance, as they repeatedly refer to the need to reduce the pressure on the domestic prison system.

Another key feature of the Italian implementation of Framework Decision 2008/909/JHA and of the ensuing intense regulatory activity of the Italian Ministry of Justice is the constant focus on the bilateral relationship with Romania.

At the time of transposition, Italy submitted a declaration pursuant to Art. 26(4) of the Framework Decision, which allows the Member States to conclude bilateral or multilateral agreements or arrangements on the subject matter, provided that they expand the scope of transfer procedures or facilitate judicial cooperation and the enforcement of foreign sentences. The Italian Government accordingly notified the Council of its intention to apply a pre-existing *ad hoc* bilateral agreement with Romania, dating back to 2003.[20] Interestingly enough, Romania did not make a similar notification in 2013, when adopting the domestic transposition law, although it submitted several declarations concerning various aspects of the Framework Decision.[21]

This is why the authorities of the two Member States concerned decided to negotiate a new agreement, which was eventually signed on 29 April 2015, aimed at sharing solutions to practical procedural challenges. This document is now described as a memorandum of understanding. Surprisingly, although this document is now the main reference point for managing transfers between these two Member States, neither Romania nor Italy has ever notified it to the Commission or to the Council. Moreover, the text of the arrangement is not public and its actual legal value is blurred, at least in the perception of the key operators, who describe it as a soft flanking measure to the laws of implementation of Framework Decision 2008/909/JHA, but *de facto* feel bound by its content. In addition, the conclusion of this memorandum has no legal basis in the Framework Decision and raises several concerns on the actual level of mutual trust between the national authorities involved, compared to the depiction given by the Court of Justice.[22]

In addition, Romania is a primary and recurring concern in all ministerial circular letters, to the extent that some of them are specifically and solely devoted to issues related to transfers to and – less commonly – from Romania.[23] This centre of gravity can be easily explained by statistics. In fact, Romanians constitute, on a stable basis over the years, the overarching majority of the foreign EU prison population in Italy. The

[20] The agreement was signed in Rome on 13 September 2003 and later ratified by Italy by means of law no. 281 of 30 December 2005.

[21] The declarations are available on the website of the European Judicial Network: https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=36 (accessed on 19 March 2019).

[22] The Court has repeatedly stated that the domestic judicial authorities should trust each other regardless of the fact that the specific features of the legal order of another Member State may see the same case have a different outcome. See ECJ, joined cases C-187/01 and C-385/01, *Gözütok and Brügge*. Instead, this memorandum suggests that trust needs to be agreed, or at least favoured through a prior agreement.

[23] See, for instance, the circular letter of 19 September 2016, which is entirely devoted to the many hurdles concerning the bilateral relationship with the Romanian authorities.

following chart shows the numbers of EU national inmates and reveals a significant gap between the Romanian community and groups of other nationalities. According to the latest available data, there are 2,531 Romanian inmates representing 76.6% of the overall prison population originating from other EU Member States. As far as other Union nationalities are concerned, the second and third places are taken by Bulgaria[24] and Poland, with 145 and 140 inmates, respectively. The different magnitude is undoubtedly remarkable.

Chart no. 1 – Number of foreign EU inmates detained in Italy

Nationality	Accused	Convicted	Total	% of foreign EU inmates
Austria	3	2	5	0.2%
Belgium	4	17	21	0.6%
Bulgaria	55	90	145	4.4%
Czech Republic	5	8	13	0.4%
Croatia	25	69	95	2.9%
Estonia	1	0	1	0%
Finland	0	1	1	0%
France	27	52	79	2.4%
Germany	19	28	47	1.4%
United Kingdom	5	9	14	0.4%
Greece	6	15	21	0.6%
Latvia	15	5	20	0.6%
Lithuania	8	29	37	1.1%
Malta	2	0	2	0.1%
The Netherlands	7	5	12	0.4%
Poland	51	89	140	4.3%
Portugal	5	9	14	0.4%
Romania	763	1,768	2,531	76.6%
Slovak Republic	6	12	18	0.5%
Slovenia	10	19	29	0.9%
Spain	23	18	41	1.2%
Sweden	2	0	2	0.1%
Hungary	3	13	16	0.5%
Total	**1,045**	**2,258**	**3,303**	100.0%

* Data referring to the latest update of 28 February 2019. The Member States which are not listed in the chart have no prisoners detained in Italy.
Source: The original collection listed all foreign inmates, including both EU and third country nationals. The research consortium extracted the data referring to Union prisoners and updated the percentages accordingly.

[24] However, it must be recalled that Bulgaria has not yet transposed Framework Decision 2008/909/JHA into its national legal system.

It follows that, while striving to maximise the application of Framework Decision 2008/909/JHA, regardless of the aim underpinning these efforts, Romania constitutes a key interlocutor for the Italian authorities, deserving specific attention and dedicated procedures. This priority position is clearly reflected by the data on the number of transfers handled by Italy on a yearly basis. In this respect, chart no. 2 covers 2014 onwards and shows the number of procedures launched by Italy as an issuing Member State. The predominance of Romanian cases is striking and reaches the peak of about 85% of the new files in 2014.

Chart no. 2 – New procedures under Framework Decision 2008/909/JHA

		2014	2015	2016	2017	2018*
New cases		498	318	393	324	150
Of which	Romania	424	217	243	216	109
	Other Member States	74	101	150	108	41

* Data referring to the first 6 months of 2018
Source: RePers project consortium. Elaboration of data provided by the Italian Ministry of Justice, General Affairs Department, International Cooperation Office

The flows of actual transfers are also illustrative, as they confirm Romania steadily at the top of the chart of the receiving countries, during the whole relevant period.

Chart no. 3 – Surrenders to other Member States under Framework Decision 2008/909/JHA

Member States	**2014**	**2015**	**2016**	**2017**	**1st half 2018**	**Total**
Romania	42	100	89	67	26	**324**
Spain	0	9	19	14	7	**49**
France	1	3	2	5	0	**11**
The Netherlands	0	1	1	6	3	**11**
Belgium	2	3	3	0	0	**8**
Germany	0	0	0	2	4	**6**
Slovenia	2	1	2	1	0	**6**
United Kingdom	1	1	0	1	2	**5**
Greece	0	0	1	3	1	**5**
Poland	0	2	0	2	0	**4**
Hungary	0	0	0	1	3	**4**
Croatia	0	0	2	1	0	**3**
Portugal	0	0	0	2	1	**3**
Latvia	0	1	1	0	0	**2**
Luxembourg	0	0	1	0	1	**2**
Austria	0	0	0	0	1	**1**
Slovak Republic	0	0	0	1	0	**1**

Sweden	0	0	0	1	0	**1**
Lithuania*	0	0	0	0	0	**0**
Czech Republic *	0	0	0	0	0	**0**
Total	**48**	**121**	**121**	**107**	**49**	**446**

* Zero means that one or more procedures were conducted, but did not lead to an actual transfer.
Source: RePers project consortium. Elaboration of data provided by the Italian Ministry of Justice, General Affairs Department, International Cooperation Office.

Crucially, from an Italian perspective, the main substantive and procedural challenges regarding cross-border transfers are closely connected to the stream of cases with Romania. The research developed so far provides solid evidence of the fact that the main efforts deployed by Italian judicial and governmental authorities address this Member State, also due to the significant number of pending cases. In fact, the statistics highlight increasingly robust reliance on this mechanism by the Italian judicial authorities, which is ultimately leading to an expanding backlog.

Chart no. 4: closed and pending cases from 2014 to 2017

		2014	**2015**	**2016**	**2017**
A	Pending cases at the beginning of the year	n/a	397	594	793
C	Transfers	48	121	121	107
D	Recognition rejected + sentence served	53	n/a	73	2
E	Pending cases at the end of the year	397	594	793	1,008

* Source: RePers project consortium. Elaboration of data provided by the Italian Ministry of Justice, General Affairs Department, International Cooperation Office.

When studying these data in greater detail, evidence from Italy shows that the state of the art varies greatly depending on the public prosecution office concerned. The available data shows that the largest part of cross-border transfers is handled by a handful of offices, namely the biggest ones in size and territorial jurisdiction. Interestingly, they are all characterised by either the presence of a team of prosecutors tasked with international judicial cooperation or the identification of specialised delegates providing support to other colleagues.[25]

Chart no. 5 – Italian Public Prosecution Offices involved in at least 10 surrenders.

Prosecution Office	**Cases closed**	**Cases pending**	**Missing information**	**Total**
Rome	73	105	6	184
Milan	61	97	7	165
Turin	39	56	3	98

[25] In some cases - in particular in the biggest Prosecution Offices such as Rome and Milan - the handling of a case of international judicial cooperation entails a corresponding decrease in the 'ordinary' workload of new or pending domestic cases for the magistrate involved.

Genoa	14	45	3	62
Civitavecchia	25	18	3	46
Padua	14	30	2	46
Naples	18	22	3	43
Brescia	15	23	2	40
Florence	10	28	2	40
Venice	12	25	2	39
Bologna	13	16	1	30
Ancona	14	13	2	29

* Source: RePers project consortium. Elaboration of data provided by the Italian Ministry of Justice, General Affairs Department, International Cooperation Office.

The outlined scenario provides solid evidence that Italy is an important test-bed for assessing the actual functioning, strengths and shortcomings of transfer procedures under Framework Decision 2008/909/JHA. Due to the remarkable number of transfers and of pending cases, although many involving Romania and a few other Member States, the Italian authorities have been confronted with the numerous hurdles connected to the application of this instrument. Therefore, the analysis will now move on to consider the Italian legal system's reaction to three of these major challenges, namely compliance with the formal objective of the Framework Decision, the possibility of blocking a transfer on the grounds of a tangible risk of violation of fundamental rights, and the cross-border coordination of domestic rules governing the enforcement of a sentence.[26]

4. Cross-border enforcement of sentences under Framework Decision 2008/909/JHA: The Italian view to European challenges.

4.1. Questioning the rationale underpinning Framework Decision 2008/909/JHA: The hurdles to pursuing prisoners' social rehabilitation

The active involvement of the offender in a progressive pathway towards a fruitful post-execution reinsertion in his/her social environment is one of the traditional components of criminal punishment at domestic level. In a cross-border scenario, the identification of the best place for serving a sentence is *a fortiori* a key aspect for tailoring the punishment to the individual.[27]

[26] It is not possible to address here several other issues which have been analysed during the project activities and which pose daily obstacles to cross-border judicial cooperation in this domain, such as the overlap between transfers and the European Arrest Warrant, the translation of the certificate and the judgment, the determination of the sentence remaining to be served, in the light of factors such as accumulation of penalties and continuation of crimes.

[27] For an account of the relevance of the notion of offenders' rehabilitation in the EU criminal judicial space see S. Montaldo, 'Offenders' Rehabilitation: Towards a New Paradigm for EU Criminal Law?', *European Criminal Law Review* 8 (2018), pp. 223-43. The aim of social rehabilitation also underpins other EU acts on judicial cooperation in criminal matters, such as Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course

As recalled above, Framework Decision 2008/909/JHA accordingly states that cross-border transfers should be intended to foster prisoners' chances of social rehabilitation.[28] However, despite and beyond the wording of this act, the formal link it establishes between offenders' rehabilitation and the prisoners' transfer has been labelled as a façade veiling the managerial ambitions of the Member State over intra-EU mobility.[29] The national governments' will to add prisoners' transfers to the list of EU instruments imposing on other Member States – and in particular on those of origin – the responsibility for unwanted migrants repeatedly arose during the negotiations of the act and recent researches demonstrate that it still represents a shadow purpose of transfer procedures.[30]

To a certain extent, from a broader perspective, this approach seems to reflect a more general trend – criticised by some legal scholars – towards the fragmentation of Union citizenship into bits and pieces, where a descending scale of guarantees (often coupled by an ascending scale of duties) is tailored to less attractive categories of citizens.[31] In this vein, it has been highlighted that the Member States are interested in reducing prison populations, along with costs related to the detention of foreigners and their involvement in social rehabilitation programmes.[32]

This cost-saving choice is actually reflected at some points by the Framework Decision, which prioritises the effectiveness, the rapidity and the trend towards automaticity of the judicial cooperation mechanism, even to the detriment of a truly individualised assessment of the inmate's situation.

Firstly, Art. 6 lifts the traditional compulsory criterion of the prisoner's consent in the case of a transfer to the Member State of nationality in which the inmate habitually lives or to which he/she will be deported after serving the sentence or has fled or returned before the conclusion of the proceedings pending against him/her or following the conviction in the issuing State. This normative choice marks a departure from the principle of individualisation of punishment and offers leeway to judicial and ministerial authorities to presume that the transfer will be beneficial to the inmate, even if it is contrary to his/her will. However, as it has been widely discussed in legal and criminological studies, tailoring punishment to the individual is a key trigger for social rehabilitation.[33] This entails the difficult assessment of several and multi-faceted personal, institutional, social and legal converging factors, the importance of which is

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of new criminal proceedings. See, in this respect, A. Rosanò, 'Beshkov or the Long Road to the Principle of Social Rehabilitation of Offenders', *European Papers* 3 (2018), p. 433-44.

[28] See supra, para. 1, as well as recitals 8 and 9 and Art. 3(1), of the Framework Decision.

[29] See for instance V. Mitsilegas, *EU Criminal Law after Lisbon. Rights, Trust and Transformation* (Oxford: Hart, 2016), p. 222.

[30] See in particular the outcomes of the research project STEPS2 Resettlement: R. Canton, N. Flynn and J. Woods, 'Social Rehabilitation Through the Prison Gate', available at http://steps2.europris.org/wp-content/uploads/2016/07/Annex-4.12.-Workstream-3-Social-Rehabilitation-Through-the-Prison-Gate.pdf (accessed 7 March 2019).

[31] *Inter alia*, N.N. Shuibhne, 'Limits Rising, Duties Ascending. The Changing Landscape of Union Citizenship', *Common Market Law Review* 52, 2015, pp. 889-938.

[32] 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* (Osijek: University Josip Juraj Strossmayer, 2018), p. 380.

[33] E. Melissaris, 'Theories of Crime and Punishment', in M.D Dubber and T. Hörnle, eds., *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014), p. 355.

further exacerbated by the cross-border dimension of transfers.[34] In fact, as has been correctly pointed out, serving a sentence in the prisoner's State of origin does not amount to an automatic and non-rebuttable presumption of increased chances of achieving the re-socialising goal of criminal punishment.[35]

Secondly, the sentenced person has the right to express his/her opinion regarding the transfer, and the authority of the issuing State must take this into account when deciding whether or not to transfer him/her. However, a negative opinion does not constitute grounds for rejecting recognition, and the Framework Decision does not attach clear consequences to it. Bearing in mind the hidden purposes of the transfer procedures, this soft version of the right to be heard does not impose any substantial limit to the issuing authority's discretion.

Thirdly, from a complementary perspective, the prisoner's opinion is in any event deprived of substance, since the Framework Decision does not provide for any obligation on the part of the domestic authorities to inform the person concerned. As confirmed by some studies,[36] a transfer - or even just an opinion about the possibility of being transferred - is a leap in the dark as to the detention conditions in the State where the inmate will serve the sentence, the details concerning the specific detention facility of destination and the situation thereof. The same applies to the rules governing the execution phase abroad, particularly in relation to the precise scope of reductions and remissions in sentences and other measures intended to favour offenders' rehabilitation. It is no coincidence that, in its 2014 report, the Commission pointed out a generalised lack of information for the sentenced person, affecting the possibility of providing a reliable personal opinion.[37]

The RePers project activities confirm that the Italian practice on Framework Decision 2008/909/JHA is not immune from these criticalities, even though various improvements are being promoted. Three main aspects are particularly illustrative in this regard and blur the actual purposes underpinning the instrument at issue.

First of all, as referred to above, at least in the early years of application of the newly established regime of cross-border transfers, the intense regulatory activity of the Ministry of Justice urged national judicial authorities to resort to this Framework Decision to deflate prison overcrowding. This scenario represented the breeding ground for the development of policies and strategies to increase the number of transfers to some key Member States, with Romania on the frontline.

To provide an example, as from 2015, under the pressure of the emergency certified by the aforementioned *Torreggiani* judgment, the Ministry of Justice launched regular screenings of the prison population, with a view to identifying potential transferees. The prison administration was asked to disseminate a form among the detainees, to inform them of the possibility of being transferred and to gather their opinion.

The problem with this initiative - which is still ongoing on a yearly basis - is twofold. On the one hand, many interviews belie a generalised lack of knowledge and awareness

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[34] I. Durnescu, E. Montero and L.Ravagnani, 'Prisoner transfer and the importance of the release effect', in *Criminology and Criminal Justice* 17, 2017, p. 450.

[35] G. Vermeulen, et al., *Cross-border execution off judgments involving deprivation of liberty*, cit., p. 55.

[36] See I. Durnescu, et al., 'Obstacles and Solutions in the implementation of the FD 2008/909/JHA', report of the STEPS2 Resettlement project, 2016, available at http://steps2.europris.org/wp-content/uploads/2016/07/Annex-4.6.-Workstream-1-Obstacles-and-Solutions-in-the-implementation-of-the-FD-2008909JHA.pdf (accessed 12 March 2019).

[37] European Commission, Report on the implementation by the Member States of Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA, COM(2014) 57 final, cit., p. 7.

of the main features and implications of this instrument among the categories involved. This situation eventually impacts the prisoners, who usually provide a blind and vague opinion on the possibility of serving their sentence abroad. In fact, the analysis of the case files demonstrates that the prisoner's opinion is merely represented by a tick in a box, without any in-depth clarification or statement of reasons. In this respect, following the practice of other Member States, the Italian Ministry of Justice is about to publish a booklet, which will be made available to all EU detainees. This document will provide all necessary information regarding cross-border transfers and other judicial cooperation procedures, along with general explanations of the rules governing the criminal execution phase in some Member States and the contacts with key diplomatic, governmental and judicial authorities.

On the other hand, the prison administration adopts an unselective approach to this initiative and often submits to either the Ministry of Justice or the competent prosecution office all the forms it collects, regardless of their content and the opinion expressed therein. This attitude reflects the original governmental priorities on the use of cross-border transfers and leads to several shortcomings. It has rapidly led to an increasing backlog of procedures, many of which have come to nothing, because of the limited period of detention still to be served or the excessive length of the procedure. This approach triggers purely stalling behaviours from the authorities involved, which are *de facto* encouraged to focus on those procedures showing greater potential for an actual transfer. Some pending transfers are left in limbo by Italian prosecution offices, especially in cases of short-term sentences. Furthermore, the executing authorities quite often rely on the possibility provided by the Framework Decision to consult the issuing authority for additional details and clarifications, thereby slowing down the mechanism.

A second important element refers to the lack of instruments available to the judicial authorities for assessing the chances of social rehabilitation. Their scrutiny is usually based on generic and not carefully verified assumptions, from which the knowledge of the language of the host State and the presence of family links play a paramount role. The analysis of the case files has shown that underestimation of the prisoner's situation is a recurring feature, to the detriment of the individualisation of punishment, which should be a key premise for a successful path of social rehabilitation.

To some extent, this is explained by the survey and the interviews, as many judicial authorities point out that they lack adequate tools and resources (ranging from time to the actual availability of evidence) either to support the prisoner's statements or to better understand his/her economic, social and family context. In particular, they complain that they can only perform a negative assessment, which means that they can only ascertain the absence of grounds for filing a transfer request.

At the same time, the Framework Decision provides for opportunities of exchange of information between the issuing and executing judicial authorities, which could address this concern. However, the backlog and the centralisation of the procedure in the hands of the Ministry of Justice makes it materially difficult to carry out (rapidly) such an *ex ante* in-depth analysis and to coordinate the efforts of the authorities involved.[38] This also applies, as a final point, to the exchange of information on the prison facility of

[38] For instance, during the interviews and the high profile mutual learning groups, the Spanish authorities put forward that they usually try to identify some possible factors facilitating the establishment of the prisoner's centre of gravity, often by means of EU databases and operation cooperation contacts with foreign police forces. Aside from the identification of family links, key examples are searches for registered movable and immovable properties and other (previous) economic assets and activities.

destination of the person concerned and to the legal regime the prisoner will be subject to. In fact, the inmate is usually entirely unaware of the real implications of a transfer.

4.2. Mutual trust is not blind trust: Cross-border transfers, systemic deficiencies and the serious risk of violation of fundamental rights.

Another recurring concern related to the implementation of Framework Decision 2008/909/JHA at national level refers to the fact that the domestic authorities often treat this procedure as a separate continent in the globe of judicial cooperation in criminal matters. It follows that the remarkable advances made in the context of other EU secondary law instruments are seldom extended to cross-border transfers, especially as regards the standards of protection of fundamental rights.

The clearest example concerns the scope of the European Arrest Warrant and the protection of the person to be surrendered from violations of his/her core rights in the issuing State. As is well known, the Court of Justice addressed this issue in its seminal judgments *Aranyosi and Căldăraru* and *Celmer*.[39] In the first case, the Court elaborated on opinion 2/13 and *NS*,[40] to confirm that mutual trust is not blind trust,[41] as the duty to recognise and execute a foreign judgment cannot justify an overruling of fundamental rights.[42]

More specifically,[43] executing judicial authorities must take into due consideration the presence of reliable and up to date evidence demonstrating a structural deficiency of the penitentiary system of the State of execution, amounting to a widespread and real risk of a violation of the prohibition of inhuman and degrading treatment enshrined in Art. 4 of the Charter of Fundamental Rights of the EU. If such a systemic flaw is detected, the executing judicial authority must make a second, more specific and individualised assessment, as it has a duty to verify whether the person concerned would personally face such a risk of violation upon surrender to the requesting State. If so, the authority involved should request reassurances on the compatibility of the penitentiary regime and of the personal situation that the person concerned will face in the event of surrender with fundamental rights standards.

Be that as it may, the body of information collected and the lack of or inadequacy of reassurances compel the judicial authority involved to postpone the execution of the

[39] ECJ, C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*; ECJ, C-216/18 PPU, *LM (deficiencies in the system of justice)*, also known as *Celmer*.

[40] ECJ, opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, par. 191; ECJ, C-411/13 and C-493/10, *NS and Others*, par. 78-80 and par. 94. For a commentary see K. Lenaerts, 'The principle of mutual recognition in the Area of freedom, security and justice', *Il diritto dell'Unione europea* 20 (2015), p. 525. The spillover effect from NS and the Dublin system to judicial cooperation in criminal matters had been envisaged by some commentators: F. Billing, 'The parallel between non-removal of asylum seekers and non-execution of a European arrest warrant on human rights grounds: the CJEU case of N.S. v. Secretary of State for the Home Department', *European Criminal Law Review* 2 (2012), pp. 77-91; 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, *Yearbook of European Law* 31 (2012), pp. 319-72.

[41] K. Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', *Common Market Law Review* 54 (2017), pp. 805-840.

[42] S. Montaldo, 'On a Collision Course! Mutual Recognition. Mutual Trust and the Protection of Fundamental Rights in the Recent Case Law of the Court of Justice', in *European Papers* 2 (2016), p. 984.

[43] The test is explained in *Aranyosi and Căldăraru*, para. 88-104.

European Arrest Warrant and, in the end, if the situation does not improve and no alternatives are identified, to abandon it.[44] In its subsequent case law, the Court of Justice has further clarified the scope of this individualised assessment.[45] Firstly, provided that a systemic deficiency exists, the mere availability of a judicial remedy to challenge the conditions of detention does not rule out the real risk of inhuman and degrading treatment.[46] Secondly, the executing judicial authority is required to assess only the conditions of detention in prisons in which, according to the available information, it is likely that that person will be detained, including on a temporary or transitional basis.[47] Moreover, this evaluation must be confined to the actual and precise detention conditions which are relevant for determining a breach of the Charter in the specific case at issue, for instance in light of the physical and mental situation of the inmate.[48]

Building on this background, the *Celmer* case offered the Court of Justice the opportunity to expand the scope of this two-layered test to the (serious risk of a) plain violation of a pillar of the rule of law, namely the independence and impartiality of the judiciary in the issuing Member State, ultimately affecting the right to a fair trial enshrined in Art. 47(2) of the Charter.

On that occasion, the Court was confronted with the recent reforms of the Polish judiciary and reiterated *mutatis mutandis* the subsequent and intertwined phases of this assessment. Firstly, as far as the identification of a systemic deficiency is concerned, it acknowledged that the executing authority can be satisfied with the issue of a reasoned proposal of the European Commission adopted pursuant to Art. 7(1) TEU, detecting a real risk of breach of the right to a fair trial, on account of structural or generalised flaws with regard to the independence of the judiciary. Secondly, it stated that the executing authority must determine, specifically and precisely, whether the situation of the person concerned, the nature of the offence for which he/she is being prosecuted and the factual context that form the basis of the European Arrest Warrant converge to demonstrate that there are substantial grounds for believing that that person will run the outlined serious risk.

The question is therefore if and how the scope of the *Aranyosi and Căldăraru* test can apply to cross-border transfers of prisoners.[49] This extension is at first sight limited by the inherent difference between the two cooperation procedures under consideration. In fact, the mechanism set by Framework Decision 2008/909/JHA reverses the roles of the

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[44] For a commentary on the various steps of the test and on the possibility of extending it to other human rights violations, see, *inter alia*, S. Gáspár-Szilágy, 'Joined cases Aranyosi and Căldăraru. Converging human rights standards, mutual trust and new grounds for postponing a European Arrest Warrant', *European Journal of Crime, Criminal Law and Criminal Justice* 24 (2016), p. 197-219.

[45] ECJ, C-220/18 PPU, *LM (detention conditions in Hungary)*.

[46] C-220/18 PPU, *LM (detention conditions in Hungary)*, par. 74 and 75.

[47] C-220/18 PPU, *LM (detention conditions in Hungary)*, par. 84-87. Interestingly, the Court reaches this conclusion (also) on the basis of the need to respect the strict deadlines imposed by Framework Decision 2002/584/JHA to execute an European Arrest Warrant and to avoid impunity accordingly.

[48] C-220/18 PPU, *LM (detention conditions in Hungary)*, par. 94.

[49] This is a cross-sectional issue which also applies to other judicial cooperation instruments, in particular those which are described to be complementary to Framework Decision 2008/909/JHA, namely Framework Decision 2008/947/JHA and Framework Decision 2009/829/JHA. Some authors have already ruled out this possibility, but alternative tools - where not alternative approaches to the same test - should be sought, for the sake of the coherence of the judicial cooperation system in the EU. See T. Marguery, 'La confiance mutuelle sous pression dans le cadre du transfert des personnes condamnées au sein de l'Union européenne', *Eucrim* 13 (2018), p. 185.

issuing and executing Member States. According to the definitions envisaged by Art. 1, the former notion is embodied by the sentencing State, while the latter refers to the Member State to which a judgment is forwarded for the purpose of its recognition and enforcement.
This means that the issuing authority submits a request for cooperation and - upon recognition of its judgment - materially performs the transfer of the person concerned, whereas in the framework of the European Arrest Warrant the executing authority is tasked with the surrender. Conversely, Framework Decision 2008/909/JHA connects the notion of executing authority to the execution of the sentence in the Member State of transfer.
It follows that the above outlined twofold test could hardly be reiterated as such in cross-border transfers. In fact, it would require the executing judicial authority to refuse recognition on the grounds of a negative self-assessment of the actual standard of protection of core fundamental rights in its own Member State. This means that the test would be in any event structurally modified, as it would be confined within the realm of the executing State and no cross-border exchange of information and provision of assurances would logically apply. Crucially, we would be faced with a profoundly different assessment, the rationale of which would not be the establishment of exceptional limits to mutual trust and mutual recognition among the Member States but, rather, the empowerment of the domestic constitutional struggle for ensuring the compatibility of the national legal order with the standards set by the Charter. There would also be inevitable constitutional implications at national level, in terms of checks and balances between the judiciary and the executive and legislative branches of a Member State[50]; the test would in any event undergo a genetic paradigm shift. It would be transformed from a horizontal inter-State dynamic of mutual warning on the protection of fundamental rights[51] to a purely domestic and unilateral scrutiny over the suitability of the national legal framework to respect this qualified EU *acquis* and the primacy and effectiveness of Union law.
Nonetheless, from a substantive point of view, the judicial authority in the Member State where the sentence will be enforced could not obliterate the duty to protect fundamental rights when implementing EU law, set forth by Art. 51(1) of the Charter. In line with this, Art. 3(4) of the Framework Decision 2008/909/JHA replicates the wording of many other EU acts implementing the principle of mutual recognition in criminal matters, insofar as it recalls that this mechanism "does not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union". This clause is identical to Art. 1(3) of the Framework Decision 2002/584/JHA, which the Court of Justice has used as a legal basis to establish the *Aranyosi and Căldăraru* test.[52]

[50] From this point of view, it would be to a certain extent materially difficult to perform, as the executing judicial authority would self-acknowledge the existence of widespread challenges to fundamental rights within its own jurisdiction. Even though this would be precisely the role that one would expect to be played by an independent judicial scrutiny over the risk of abuses on the part of the public authorities, it must not be taken for granted that *in concreto* any judicial authority would be ready and fully equipped to take on such a responsibility.
[51] I. Canor, 'My brother's keeper? Horizontal Solange: An Ever Closer Distrust Among the Peoples of Europe', *Common Market Law Review* 52 (2013) p. 383-421.
[52] Moreover, both Framework Decisions do not envisage a general ground for refusal of recognition related to the violation of fundamental rights standards. This is due to a legislative choice which has been reconsidered in recent normative practice in the domain of judicial cooperation in criminal matters. In

From this point of view, the focus on exceptional and systemic flaws and the evidentiary threshold proposed by the Court of Justice in its case law could be reliable reference points for this self-assessment, also due to the fact that any diverging and stricter constitutional requirement would have to be considered through the lens of the *Melloni* doctrine.[53] This would also be in line with the urgent need for EU-wide coherence of the general approach to the limits on cross-border judicial cooperation mechanisms, irrespective of the solutions developed on an individual basis.

In any event, looking at the cross-border transfer mechanism from a broader perspective, the actual feasibility of a (revised) *Aranyosi and Căldăraru* test would not be the sole remedy for fundamental rights concerns. Whereas the role of the executing judicial authority may suffer from additional constraints than occurs in the context of the European Arrest Warrant, it is still possible to rely on the authority involved in the issuing Member State.

In this respect, Framework Decision 2008/909/JHA actually empowers the latter authority. Art. 4(2), provides that the issuing authority forwards the certificate only if it "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". The wording of this provision is broad enough to encompass very different meanings and implications, ranging from the evaluation *stricto sensu* of the future chances of reinsertion into society to a technical assessment of the penitentiary system and legal framework in the Member State of execution. Be that as it may, this preliminary check should also include in-depth scrutiny at least with regard to the detention conditions that the transferee will face abroad. In fact, this information is highly relevant to achieving the objective of the Framework Decision, as the prison environment severely impacts the inmates' situation and inherently facilitates/hampers the path towards a successful reintegration process. This *ex ante* check may well fit also serious risks of further fundamental rights violations, such as the right to a fair trial and the right to personal freedom, which appear to be covered by the exceptional standard of the *Aranyosi and Căldăraru* test.

In summary, Framework Decision 2008/909/JHA envisages tools for ensuring compliance with the Charter on a case-by-case basis, even though the above outlined scrutiny developed by the Court of Justice in the context of the European Arrest Warrant cannot be replicated as such for transfer procedures. In any event, judicial cooperation mechanisms must not lead to violations of fundamental rights; therefore, the issuing and executing authorities are expected to join efforts to avoid such an occurrence. In fact, the adoption of different standards of protection depending on the judicial cooperation mechanisms at stake would amount to an unacceptable systemic inconsistency, which

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fact, Directive 2014/41/EU on the European Investigation Order and Regulation 2018/1805 concerning the implementation of the principle of mutual recognition of freezing orders and confiscation orders do include such a clause as a mandatory ground for refusal of execution. See S. Montaldo, *I limiti della cooperazione giudiziaria in materia penale nel'Unione europea* (Naples: Editoriale Scientifica, 2015), p. 380 et seq.

[53] ECJ, C-399/11, *Stefano Melloni v Ministerio Fiscal*. For a commentary of the Court's approach to the relationship between national constitutional standards and the primacy and effectiveness of EU law see, *inter alia*, L. Besselink, 'The parameters of constitutional conflict after Melloni', *European Law Review* 39 (2014), p. 531-52.

could hardly be hidden behind the prisoners' consent and the purpose of the Framework Decision.[54]
In addition, this approach could address the current gap concerning the vast grey area of poor detention conditions which do not amount to an exceptional situation triggering the *Aranyosi and Căldăraru* test as such, but materially affect the right to liberty, in terms of disproportionate restrictions to Art. 6 of the Charter of Fundamental Rights of the EU.[55]
Notwithstanding this, the gap between the European Arrest Warrant and transfer procedures is a recurring feature in daily practice. The analysis of the Italian scenario confirms that neither the judicial authorities involved - both as issuer and receiver - nor the Ministry of Justice takes these fundamental rights checks seriously when dealing with the transfer of a prisoner.[56] No information is requested or provided concerning the detention facility to which the transferee will be sent and the conditions therein, including remarkable factors such as the possibility to follow social rehabilitation programmes while serving the sentence. This is even more paradoxical if one considers that this mechanism should facilitate the offender's social reinsertion, rather than avoiding impunity and ensuring the effective combating of crime, as it is for the European Arrest Warrant.

4.3. Ognyanov II and the coordination of the domestic rules governing the enforcement of a sentence: Any room for distinguishing?

A third and final structural concern regarding the implementation of transfer procedures refers to the interconnection of the penalty enforcement regimes of the Member States involved, particularly in relation to reduction and remission in sentence and penitentiary benefits in general. In fact, Framework Decision 2008/909/JHA covers the national 'secret garden' of the criminal execution phase, which falls under the exclusive competence of the Member States and where the fragmentation of procedural and penitentiary regulatory frameworks reaches its peak. At the same time, the material transfer of a prisoner also draws a dividing line between the pre and post-transfer legal regime, which must be carefully addressed in order to maximise the chances of achieving the outlined social rehabilitation goal. It is no coincidence that the Court of Justice has been called to clarify the interconnection between these two converging poles and that similar problems have been raised before national courts. Therefore, the aim of this paragraph is to briefly present the stance taken by the Court of Justice in this

[54] This is also due to the fact that some of the rights under consideration - such as the prohibition of inhuman and degrading treatment - are deemed to be absolute ones by the Court of Justice and therefore cannot be restricted upon the concerned person's consent.
[55] For an argument on the link between (non-exceptionally) inadequate detention conditions, compliance with Art. 6 of the Charter and cross-border transfers see L. Mancano, '*Storming the Bastille*: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law', *Common Market Law Review* 56 (2019), p. 61-90.
[56] This has been ascertained through personal interviews, the analysis of case files and the debate during two high-profile mutual learning groups composed of selected experts from Italy, Romania and Spain, which were held in Bucharest and Madrid in October 2018 and March 2019, respectively. During the Bucharest meeting, the representatives of the Romanian Ministry of Justice further acknowledged that the problem of prison overcrowding and of detention conditions are out of the scope of transfer procedures and no preliminary checks have to be made, compared to the European Arrest Warrant. For further information and the reports of the meetings see the website of the project www.eurehabilitation.unito.it.

domain and to consider and discuss the gap between this case law and the reaction of the Italian courts, in particular the Supreme Court of Cassation.
In this respect, in general terms, one of the basic assumptions of judicial cooperation in criminal matters across the Union is that the execution of a foreign decision is entrusted to the law of the State that has recognised it. The prominent role of the State of execution ensues from the principles of sovereignty and territoriality of criminal law. However, horizontal cooperation between the Member States requires balances and the issuing authority usually retains certain powers on either the conduct or the outcome of the cooperation mechanism. These range from light equivalence checks to more stringent controls over the activity of the executing authority. For instance, some Framework Decisions and Directives stipulate that specific aspects of the legal order of the country of origin must be respected even in the territory of the executing State.[57]
From a reverse perspective, if the fragmentation of national legal orders blocks the execution of a foreign decision, the receiving authority will be endowed with the power to adjust that decision, in order to reconcile it with its legal order.[58] Such adaptations mitigate the automaticity of judicial cooperation mechanisms and may incisively modify the nature and consequences of the decision concerned. Therefore, they are usually made conditional upon strict requirements, out of which the consent of the issuing State plays a paramount role and amounts to a right of veto.
The more varied the domestic legal scenario, the more complex the coordination between the Member States involved and specific rules on the distribution of competences between the issuing and the executing authorities are required.
At the time of the negotiations preceding the adoption of Framework Decision 2008/909/JHA, the comparative analysis of the relevant national laws highlighted a considerable variety of means for enforcing sentences and of alternatives to imprisonment.[59] The level of minimum and maximum penalties, prison regimes and prison conditions also revealed major differences. Therefore, the wording of this act was directly influenced by the need to avoid structural conflicts and to build mutual trust in (almost) unexplored areas of criminal procedural law.
On these grounds, on the one hand, Art. 17(1) of the Framework Decision endows the executing authority with the primary and sole responsibility for governing the

[57] For instance, pursuant to Framework Decision 2005/214/JHA, the financial penalties issued against legal persons must be recognised and enforced even if the executing State's criminal liability does not apply to such entities. Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, Art. 9(3). The influence of the issuing State is particularly evident in relation to the Directive on the European Investigation Order. Art. 9(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 Member State of origin prevails over the rules of the executing State, unless key principles of the latter are endangered. See Directive 2014/41/EU of the European Parliament and the Council of 3 April 2014 regarding the European investigation order in criminal matters.
[58] 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. 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, Art. 13.
[59] See *supra*, footnote no. 13.

enforcement of the sentence issued abroad. On the other hand, para. 3 of the same Article grants the issuing authority discretion as to the outcomes of the cooperation mechanism, particularly with regard to the forwarding of the certificate and to its withdrawal. Firstly, regardless of the above recalled concerns on the actual scope of the transfer procedures, the said authority must be satisfied that enforcing the sentence abroad will enhance the prisoner's chances of social rehabilitation, to the extent that it is entitled to have the last and decisive word. Secondly, Art. 17(2), urges the executing authority to deduct the deprivation of liberty already served in another Member State from the total duration of the sentence. In fact, it is more than likely that the enforcement has already commenced in the issuing Member State before the judicial cooperation mechanism is completed, or even prior to the very first steps of the procedure in the issuing State itself.

It follows that, in comparison to other similar instruments, the Framework Decision attempts to empower the issuing authority, particularly with regard to the reciprocal consistency and continuity of enforcement of the sentence in the Member States involved, as a way of avoiding abrupt interruptions of the ongoing path towards social rehabilitation. In fact, a cross-border transfer represents a crucial step for the person concerned and carries significant risks with it. In principle, effective coordination between the domestic authorities can minimise these risks and preserve - if not amplify - the re-socialising essence of criminal punishment.

At the same time, however, as recalled above, Art. 17(1) is clear-cut in describing the execution phases in the issuing and the executing States as separate events. The Court of Justice has taken over the wording of this provision to uphold a strict interpretation of the system governed by the Framework Decision. In *Ognyanov II*,[60] the key question raised to the Court was whether the deduction required in order to quantify the post-transfer remaining period of detention should include the (inevitably substantive) assessment of both the enforcement regime of the issuing Member State and the facts occurring during the first phase of enforcement. The Court of Justice considered that the Framework Decision wards off any overlap of competences: the cross-border enforcement of a sentence is the outcome of the separate but complementary efforts of the authorities involved.[61]

It follows that, in the Court's view, the notion of enforcement under Art. 17 refers only to imprisonment - *id est* enforcement of the sentence - in the executing State and to the related legal regime.[62] As a consequence, in the event of a more lenient regime in the executing State, any more favourable provision cannot operate retroactively. Instead, the scope of application of said measure is strictly limited to enforcement within the

[60] ECJ, case C-554/14, *Ognyanov II*.

[61] From 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 recognised 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 Framework Decision. 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.

[62] It is interesting to point out that the wording of Art. 17(1) of the Framework Decision corresponds in substance to Art. 9(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 in line with the Convention at issue.

territory of that State of destination, as all remissions in sentence connected to the pre-transfer enforcement are to be considered solely by the issuing authority.[63]
Territoriality and the automaticity of mutual recognition are in principle preserved, but the thick line drawn between the complementary sides of the cross-border enforcement of the same sentence has raised criticism on the actual capability of the mechanism set by the Framework Decision 2008/909/JHA to achieve its own goals.[64]
The Italian legal order has been faced with the question underlying the *Ognyanov II* case in the aftermath of the implementation of the Framework Decision at domestic level. The first approach followed by the Italian courts was particularly beneficial to the prisoner. In fact, in a case involving the possibility to apply the Italian rules on early release[65] to the periods of detention served abroad prior to a transfer, the Court of Cassation responded in the affirmative.[66] This stance was taken on grounds that enforcement of the punishment in Italy does not obliterate the steps towards rehabilitation made in another Member State by the sentenced person and that such a cross-border process of re-socialisation should be considered as a *unicum* in its entirety.
This extensive interpretation of the Framework Decision and the national law of transposition was soon absorbed by the lower courts, particularly those of criminal supervision ("*tribunali di sorveglianza*").
However, the stricter view adopted by the Court of Justice in late 2016 again livened up the debate on this issue and urged a reconsideration of the well-established practice of the domestic authorities. The first - and by now the sole - reaction to *Ognyanov II* was another judgment from the Court of Cassation, issued in late December 2017.[67] On that occasion, the Supreme Court acknowledged the clarifications provided by the Court of Justice, but made an effort to keep their implications to a minimum at domestic level. In fact, the domestic Court resorted to the technique of distinguishing, by stressing that the *Ognyanov II* preliminary ruling regarded a very peculiar case, the scope of which was confined by the specific factual circumstances at issue. In that case, at the request of the executing State, the issuing authorities had clearly stated that no reduction in sentence was envisaged by the Danish legal order in relation to working activities performed in prison by the detainee. Therefore, the Bulgarian authorities could not grant such a benefit retroactively, in plain contrast with the legal order of the issuing State. According to the Court of Cassation, the case in question concerned a different situation, where the Italian authorities had not consulted the issuing ones in relation to the scope and implications of the relevant rules governing enforcement in their legal order. Moreover, while *Ognyanov II* focused on the regime of reduction in sentence, the situation faced by the Supreme Court concerned the benefit of early release. As already recalled, the reduction in sentence could have been granted on account of work carried

[63] Having said that, the issuing authority strikes back through Art. 17(3) of the Framework Decision, which endows it with the discretionary power to withdraw the certificate when it does not agree with the executing State's rules on early or conditional release.
[64] A. Martufi, 'Assessing the Resilience of 'Social Rehabilitation' as a Rationale for Transfer', cit.; J. Ddalmulira Mujuzi, 'The Transfer of Offenders Between European Countries and Remission of Sentence', *European Criminal Law Review* 7 (2017), pp. 289-303.
[65] See Art. 54 of the Italian law on the prison system (legge sul'ordinamento penitenziario) no. 354 of 26 July 1975, if the sentenced person takes active part in the process of social reintegration, he/she can benefit from the erasure of 45 days of detention every 6 months.
[66] Italian Supreme Court of Cassation, judgment no. 31012 of 6 June 2012.
[67] Italian Supreme Court of Cassation, judgment no. 33719 of 21 December 2018.

out by the sentenced person while in detention, whereas the Italian legal order makes the early release conditional upon a record of good conduct in prison.
These arguments are quite surprising, as they provide very little substance to the attempt to distinguish the case at hand from the Court of Justice's approach in *Ognyanov II*. In fact, neither the lack of previous contacts between the authorities involved as regards the coordination between the enforcement phases in the issuing and the executing Member States, nor the different penitentiary benefits at stake seems to justify a plain departure from the case law of the Court of Justice and the wording of Art. 17 of the Framework Decision. To a certain extent, the extensive interpretation developed by the Italian Court of Cassation addresses the scholarly concerns on the actual coherence of *Ognyanov II* with the objectives of the Framework Decision 2008/909/JHA. However, it does so by means of completely unconvincing and formalistic arguments, which do not tackle the limited interpretative flexibility left by Art. 17 and the need to avoid undue mutual interferences between the Member States involved. In addition, no role has been conferred at all to offenders' rehabilitation as a primary objective capable of orienting the interpretation of the Framework Decision and its laws of implementation towards the empowerment of the individual and its progressive path to re-socialisation.
In conclusion, by considering that the Italian rules on early release could apply retroactively in relation to the phase of enforcement served abroad, the Court of Cassation has frustrated the scope of *Ognyanov II*. In addition, the criminal supervision courts at territorial level have soon relied upon this approach, thereby amplifying the gap with the stance taken by the Court of Justice.
This leads to the consideration that the interpretation of Art. 17 of Framework Decision 2008/909/JHA urged by the Luxembourg case law is deprived of substance in Italy, to the detriment of the structural features of the procedure for cross-border transfers set out by Union legislature, particularly with regards to the coordination of the national rules governing the enforcement of a sentence.

5. Concluding Remarks: The Sliding Doors of Mutual Trust

Although basically centred on the Italian experience, this article provides evidence of an interesting development in the implementation of Framework Decision 2008/909/JHA. It appears that this instrument is entering a new phase of its cycle, at least in some Member States. Following years of widespread silence and (quantitative) limited practice, cross-border transfers are now increasingly finding their place in the practice of domestic judicial authorities, even though they represent a small piece in the much more complex puzzle of judicial cooperation instruments.[68]
Therefore, the time has come for a more attentive analysis of the procedural and substantive hurdles hampering the full effectiveness of Framework Decision 2008/909/JHA and the achievement of its objective. In fact, the study on the Italian scenario has revealed some inconsistencies between the expected patterns of implementation at the EU level and the need to adapt the functioning of the mechanism to the priorities pursued in the national realm. The governmental will to prioritise the deflation of prison overcrowding and the subsequent focus on the bilateral relationship with Romania have shaped the Italian approach to cross-border transfers accordingly.

[68] Minor brother of EAW more limited scope of application

The study carried out so far in the context of the RePers project highlights that legal fragmentation in the field of criminal punishment enforcement raises serious practical challenges to mutual trust. To some extent, mutual trust is deemed to be inherently and necessarily connected to the achievement of a prior and adequate level of awareness of those foreign rules and practices which matter most in a given case. Admittedly, this raises structural concerns on the actual grip of mutual recognition mechanisms as they are in principle designed, since it reveals the perception that divergences between national legislations hamper judicial cooperation. This phenomenon takes two opposing directions.

On the one hand, legal fragmentation urges national authorities to find a way out of the vacuum of uniformed trust. The memorandum of understanding between Italy and Romania is an illustrative example of the creeping uneasiness with the law in the books of mutual trust and unveils the daily procedural obstacles to the full effectiveness of cross-border transfers. Beyond statement of principles, especially in sensitive areas such as criminal law enforcement, mutual trust needs *de facto* to be built, by means of shared solutions and agreed practices. To some extent, a misconceived attitude towards mutual confidence also triggers unilateral approaches towards the coordination of domestic enforcement regimes, as we have seen in the context of the interpretation of Art. 17 of the Framework Decision 2008/909/JHA in Italy. The acknowledgement of the retroactive and extraterritorial scope of the national rules on penitentiary benefits amounts to a disguised unwillingness to accept foreign legal regimes, their implications on criminal punishment and their underlying rationale. If not properly confined and corrected, especially due to its authoritative domestic source, this peculiar version of mutual (mis)trust could easily expand to an undefined set of issues and instruments of judicial cooperation, thereby hampering its very foundations.

On the other hand, mutual trust strikes back when it comes to key elements of judicial cooperation mechanisms, such as their limits. When compared to the system of the European Arrest Warrant, the current absence of a prior positive fundamental rights assessment as a precondition for a cross-border transfer further exacerbates the incoherence of the national approach to mutual confidence and raises serious structural challenges to the European criminal space. This is even more striking due to the frequent overlap of the scope of Framework Decision 2002/584/JHA and Framework Decision 2008/909/JHA. In this respect, despite the purely technical nature of the mechanisms established at EU level, it appears that the will of the national central governmental authorities is still capable of orienting the practice of the judicial authorities, through their coordination tasks.