EU CONSTITUTIONAL LIMITS TO THE EUROPEANIZATION OF PUNISHMENT: A CASE STUDY ON OFFENDERS' REHABILITATION

Irene Wieczorek*

This article aims to contribute to the debate on the functions and limits of cross-border punishment. It uses two existing FDs as case studies, namely on Transfer of Prisoners (2008/909) and on Transfer of Probationers (2008/947). These texts include promoting the rehabilitative function of punishment in cross-border cases among their objectives. However, they have been criticized for not being fit for their purpose and being just an instrument for 'covert' deportation of foreign offenders. This article argues that EU norms on punishment should be assessed considering the broader EU constitutional law framework, which requires EU norms not to compress disproportionately national regulatory autonomy (Art. 5 TEU). Against this background, it submits that some of the criticisable features of these FDs are not a neglect of the core objective of offenders' rehabilitation but, in fact, the result of a legitimate balance with the interest of national regulatory autonomy. In broader terms, this illustrates that the Europeanization of criminal justice can help to ensure the certainty of punishment in transnational cases. Yet, due to some institutional limits, it can also compromise the effective achievement of all its functions.

I. INTRODUCTION

Since the Roman age the State has taken upon itself the task of administering justice, replacing private revenge. In this task, the public authority does not have full discretion. *Firstly*, criminal sanctions cannot be imposed for just any reason or be purposeless. They should aim, and be accordingly designed, to achieve the three legitimate functions of punishment: deterrence (persuading the offender, and the collectivity not to offend in the future); retribution (associating a wrong with a sanction); and rehabilitation (helping the offender in his/her process of desistance from crime and reintegration into society).[1] *Secondly*, punishment must

* Post-doctoral Research Associate, University of Cambridge and Université Libre de Bruxelles, sponsored by the Wiener Anspach Foundation, and FWO Postdoctoral Fellow. This article was firstly presented at the Workshop 'A reflection on the right to liberty within the AFJS, in a post Brexit scenario' held in Cambridge in September 2017. I would like to thank the Wiener-Anspach Foundation for its generous support in organising the workshop, and the editor of this special issue for their comments.

[1] Cavendino M and Dignan J, The Penal System: An introduction, (SAGE 2007), 33 ff.

respect the fundamental rights of the offender.[2] Effectively securing the various functions of punishment while also respecting fundamental rights can be a challenging task, as the two can be in tension with one another.[3] One of the core questions of criminal legal theory is indeed how to give due consideration to both aspects.

The tension between functions and limits to punishment becomes further complex in a transnational setting. Nationally based criminal justice systems are ill-equipped to address crime which transcends national borders, and cooperation between States is required. To this aim the European Union (EU) adopted instruments such as the European Arrest Warrant (EAW)[4] allowing the arrest of offenders fleeing abroad, or the Transfer of Prisoners,[5] and the Transfer of Probationers[6] Framework Decisions (FDs), allowing the transfer of foreign offenders serving either a prison sentence or a probation order or community sanction[7] to an EU state different than then sentencing one to complete their sentence. While the EAW mainly pursues deterrence and retribution,[8] the two FDs explicitly mention fostering rehabilitation as their goal.[9] The idea is to have offenders serve their sentence in a country to which they have stronger ties, and thus where reintegration would be easier.

Whether these EU instruments effectively pursue the different functions of punishment while remaining within the relevant limits has however been the object of debate. The discussion has mainly concerned the tension between certainty of punishment and respect of fundamental rights in EAW procedures.[10] Yet, also the Transfer of Prisoners FD has been criticized for unduly compressing individuals' rights,[11] and for not being adequately designed to achieve rehabilitation, despite this being its declared aim. It is argued that the FD seem rather designed

[2] Cavendino and Dignan, cit n 2, 57 ff.

[3] For instance, effectively deterring the general public from offending requires particularly severe sanctions. Yet, this might challenge the respect of offender's fundamental rights, and could jeopardize the achievement of retribution, which conversely requires sanctions to be proportionate to the specific wrong committed by the offender

[4] Framework Decision 584/2002/JHA.

[5] Framework Decision 909/2008/JHA (hereinafter Transfer of Prisoners FD).

[6] Framework Decision 947/2008/JHA (hereinafter Transfer of Probationers FD).

[7] These are sanctions alternative to detention, such as the obligation to avoid certain locations, which are served amid the community, and under the supervision of a probation officer. See Art. 2(4), Transfer of Probationers FD.

[8] See however also Art. 4(6) and Art. 5(3) which serve the purpose of offenders' rehabilitation.

[9] Art. 3, Transfer of Prisoners FD, Art. 1, Transfer of Probationers FD.

[10] Marin L, Effective and Legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant, (2014) 5(3) New Journal of European Criminal Law, 326.

[11] Ddamulira Mujuzi J, Legal Pluralism and the convention on the transfer of sentenced person in practice: highlighting the jurisprudence of the European Court of Human Rights on the transfer of sentenced persons within and to Europe, 47(2) The Journal of Legal Pluralism and Unofficial Law (2015) 324.

to allow Member States to 'ship' offenders to foreign prisons so to solve domestic overcrowding problems.[12]

This article aims to contribute to the debate on functions and limits to cross-border punishment, focusing on both the FD on Transfer of Prisoners, and the FD on Transfer of Probationers, which has so far received limited attention. It argues that EU norms on punishment should be assessed considering that, contrary to national norms, they have to reconcile not two, but three dimensions. Next to pursuing a legitimate purpose, and respect for fundamental rights, which is incidentally also requested by EU constitutional law,[13] they must not disproportionately compress national regulatory autonomy. This further limit is arguably dictated by the EU constitutional principle of proportionality (Art. 5 TEU). Against this background, the article submits that some of the features of these FDs that scholars criticize for neglecting the core objective of offenders' rehabilitation are, in fact, expression of a legitimate balance with the said EU constitutional limit of safeguarding national regulatory autonomy. Nevertheless, other policy choices in the texts, which similarly risk compromising the rehabilitation objective, still remain evidence of the lack of evidence-based policy.

The article is articulated in two main parts. The first part designs an analytical framework for the assessment of the EU texts. It maps the different policy implications of ensuring effective rehabilitation, and respecting EU constitutional limits, and identifies possible tensions among them. The second part turns to the core of the analysis, scrutinizing actual EU policy choices in the two EU FDs against this background.

II – REHABILITATING CROSS-BORDER OFFENDERS: REQUIREMENTS AND LIMITS TO EU POLICY CHOICES

Admittedly, rehabilitation[14] is an individualized difficult path, with little chances of success.[15] Nevertheless, criminological literature has identified a number of contributing factors which

[12] The argument is mentioned, in different forms in De Wree E., Vander Beken T., Vermeulen G, 'The Transfer of Sentenced Persons in Europe', 11(1) Punishment and Society (2009) 111, Mitsilegas V., *EU after Lisbon. Rights, Trust and Transformation* (Hart 2016) 222, Martufi Adriano, Assessing the resilience of 'social rehabilitation' as a rationale for transfer. A commentary on the aims of Framework Decision 2008/909/JHA, 9(1) *New Journal of European Criminal Law* (2018).

[13] See infra II.b.

[14] Rehabilitation is used here as an all-encompassing term. For a more detailed discussion on rehabilitation and possible differences with reintegration or resettlement see De Wree E., Vander Beken T, Vermeulen G, 'The Transfer of Sentenced Persons in Europe', in 11(1) *Punishment and Society* (2009) 111.

[15] McNeill F et al. 'How and why people stop offending: discovering desistance' IRISS paper, 2015, available at: https://www.iriss.org.uk/sites/default/files/iriss-insight-15.pdf

criminal justice systems should try to favour. The next paragraph discusses what are the concrete policy implications of this literature for rehabilitation of offenders in a cross-border scenario, namely where an offender is convicted in a state different from the one of nationality or of residence (a). As mentioned nonetheless EU norms must remain within specific constitutional limits. The following paragraph details what this implies in practice in the context of cross-border offenders' rehabilitation (b).

a. How to rehabilitate cross-border offenders: a survey of criminological literature

Literature investigating desistance from crime identiy, among many, at least four key factors: **age** of the offender,[16] capacity to build **individual** and **social capital**, [17] and a **change of identity** in the offender.[18] Briefly, young offenders tend to abandon the criminal path as they grow older, especially if they acquire professional skills they can use in reintegrating into society, if they maintain ties with friends and family, and if they change perception of themselves from criminals to new agents of their new law-abiding life. Such change towards a more agentic identity is all the more likely if **autonomy of decision making** on one's own rehabilitation process is promoted during sentence execution, where possible.

Normative compliance literature also teaches us that that citizens who perceive an authority as legitimate are more prone to live by the rules,[19] and that legitimacy depends on whether individuals feels treated fairly by that authority. [20] This happens when they received adequate **explanation** for authorities' decisions concerning them, [21] when they are allowed to express **informed opinions** on such decisions, [22] and when they feel treated with **dignity and respect**.[23] Moreover, **trust-based** and **uninterrupted relation** between offenders and authorities in charge of them, probation officers or prison staff, are particularly important in triggering in

[16] Glueck S and Glueck E, 'Later criminal careers' (Kraus 1937), later discussed also in Rutter M 'Transitions and turning points in developmental psychopathology: As applied to the age span between childhood and mid-adulthood', 19 *Journal of Behavioral Development* (1996) 603.
[17] Hill M 'What's the Problem? Who Can Help? The Perspectives of Children and Young People on their Well-Being and on Helping Professionals', 13(2) *Journal of Social Work Practice* (1999) 135.
[18] Maruna S, Making Good How Ex-convicts Reform and Rebuild their Lives (American Psychological Association 2001).
[19] See as general references Tyler T, Procedural Justice, Legitimacy, and the Rule of Law, 30 *Crime and Justice* (2003) 283, and Bottoms A, `Compliance with community penalties', in Bottoms A, Loraine Gelsthorpe and Sue Rex (eds) *Community Penalties: Change and Challenges* (Cullompton: Willan 2001).
[20] Tyler, supra n 19.
[21] Tyler, supra n 19, 298.
[22] Tyler, supra n 19, 300.
[23] Tyler, supra n 19, 299.

offenders an internalized commitment to the law. [24] What should be avoided are sudden changes in applicable legal frameworks,[25] or frequent changes of probation officers, as 'transfers of supervisory responsibility might not come with a transfer of psychological legitimacy'.[26]

Depending on the situation, promoting each of these factors might have different concrete policy implications. In the case of cross-border offenders, the subject matter of this article, the biggest challenge is helping them maintain a *social capital*. Individuals who commit crimes abroad and are subsequently prosecuted and convicted there might have difficulties reintegrating into society if family and friends are in another country. In this context, transferring the offender to the state of origin, and have that state take responsibility for the execution of the sentence can improve the offenders' chance of rehabilitation. However, transfers should not be an automatic measure for any foreign offender. Foreign criminals might have resided for a long time in the convicting state, and actually have social capital there. Alternatively, they might have social capital in their home state, but which has criminogenic effects. Rather than helping reintegration, family background might be the reason why the person re-lapses into crime. Finally, the convicting state might have better structures and resources to finance reintegration. In this case, serving the sentence in the convicting state might better serve the rehabilitation of the foreign citizen. Briefly, transfers *might* help offenders, but a case by case analysis should always be carried out.

Next to this, one should bear in mind that the decision to transfer an offender is a very significant step in the course of a sentence execution. Thus, the same policy recommendations applicable to any authorities' decision, in terms of *motivation*, *informed participation* and promotion of *autonomy*, should also apply to it. Bottoms observes that "…every instance of brutality in prisons, every casual racist joke and demeaning remark, every ignored petition, every unwarranted bureaucratic delay, every inedible meal, every arbitrary decision to segregate or *transfer* without giving clear and unfounded reasons, every petty miscarriage of justice, every futile and inactive period of time – is delegitimating."[27] A transfer to another country where different rules apply, where sentences can be de facto longer due to different early release regimes, detention conditions might be worse, or enforcement rules for breach of

[24] Burnett R and McNeill F, 'The Place of the office-offender relationship in assisting offenders to desist from crime', 52(3) European Probation Journal (2005) 221.
[25] Padfield N, and Maruna S, The Revolving Door at the Prison Gate: Exploring the Dramatic Increase in Recalls to Prison', 6 Criminology and Criminal Justice (2006) 329, McNeill and Robinson, op. cit., 66, 127.
[26] McNeill F and Robinson G, 'Liquidy legitimacy and community sanctions' in Crawford A and Anthea H (eds.), *Legitimacy and Compliance in Criminal Justice* (Routledge 2013) 116, 130.
[27] Sparks and Bottoms, n 27, 60.

probation orders can be stricter, is certainly not a minor event in the life of an offender. It has a larger impact than an inedible meal or an internal transfer. Therefore, it must not be carried out arbitrarily, without giving enough information or explanation to the offender, or marginalizing his/her role in the procedure.

Lastly, transfers by definition interrupt any quality relation prisoners or probationers might have established with prison staff and probation staff in the convicting state. The possible offenders' loss of trust in the authority caused by such interruption should be balanced against the gain in terms of higher possibilities of building social capital in the state of execution. Still, an option to minimize the negative consequences stemming from transfers is envisaging them as early as possible in the execution of the sentence, so to allow the majority of the sentence to take place in the state of execution. This would allow to build trust-based relationship in that state in an early stage, and not having them interrupted by a transfer.

Ideally, EU norms regulating transfers of offenders would implement all of these aspects, to ensure higher rehabilitative chances to cross-border offences. Yet, they also have to pay due consideration to the limits imposed by EU constitutional law.

b – EU constitutional law limits to cross-border punishment: fundamental rights *and* national regulatory autonomy

EU norms on punishment are no different from national ones, in that they have to respect fundamental rights. This is established at Article 52 of EU Charter of Fundamental Rights (EUCFR). The most relevant rights involved in transfer situations are connected with prison conditions, such as the rights not to be subject to inhuman and degrading treatment,[28] or possibly the right to family life.[29] Transfers as a result of which these rights are violated, for instance due to the prison conditions in the executing state, are not admissible, regardless of higher possibility of rehabilitation. Moreover, the transfer procedures themselves must respect fundamental rights. [30]

Secondly, EU norms on transfer of offenders, as any other EU norm must not disproportionally compress Member States' regulatory autonomy. The EU is a special multi-level regulatory

[28] Art. 4 EUCFR

[29] Art. 7 EUCFR.

[30] For a broader discussion of fundamental rights implication of transfers see the 2016 Fundamental Rights Agency Report on Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers (hereinafter FRA Report), available at: http://fra.europa.eu/en/publication/2016/criminal-detention-and-alternatives-fundamental-rights-aspects-eu-cross-border , second chapter.

system, where the EU and the Member States share legislative competences in a great number of policy areas.[31] To avoid over-centralisation several safeguards exist within EU constitutional law. Among these, the principle of proportionality, established at Article 5(4) of the TEU requires that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". In national constitutional legal orders proportionality traditionally applies to the relation between state and individuals and protects the liberty and fundamental rights of the latter.[32] This 'fundamental rights' proportionality is also acknowledged within the EU charter of fundamental rights (Art. 52). For the purpose of our discussion respect of this kind of proportionality is subsumed in the general requirement of 'respect of fundamental rights'.[33] Yet, it was authoritatively argued that in Art. 5 of the TEU proportionality is meant to regulate also a different relation, specific to the EU, namely that between the central entity, the EU, and the periphery, Member States. [34] Art. 5 TEU requires centralised regulation not to compress disproportionately national regulatory autonomy. EU norms pursuing a common objective must be proportionate to the latter, meaning they need to suitable and necessary to achieve the pursued policy objective, that is no less intrusive norms must be available. Moreover, there must be an ultimate balance between the advantage of having a EU-wide norm, and the compression of national preferences on how to regulate the matter.[35] This last step is normally referred to as 'proportionality *strictu sensu*'. How to strike this balance between these two interests is ultimately a policy choice.[36]

The assumption made in the previous section is that envisaging an EU wide system of transfer of offenders is a suitable and necessary measure to ensure that punishment has a rehabilitative function also in cross-border cases. Yet proportionality requires a balance between *the*

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[31] Art. 2(2) TFEU.

[32] See with respect to the Italian System, Manes V, The Entrenchment of the European Convention on Human Rights in the Italian Legal System – Following the Jurisprudence of the Italian Constitutional Court (2013) 3(1) EuCLR, 65.

[33] For a more detailed discussion of both kinds of fundamental rights proportionality and their application in criminal matters see Mancano L, Mutual Recognition in Criminal Matters, Deprivation of Liberty and the Principle of Proportionality, (2018) 24(5) Maastricht Journal of European and Comparative Law.

[34] This can be arguably derived from the Titanium Dioxide Case (C-300/89) as interpreted in Kumm M, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' (2006) 4(12) *European Law Journal* 503, 523. Davies G actually even argues that proportionality testing should substitute subsidiarity as a principle to monitor power allocations between Member States and the Union. Gareth Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 Common Market Law Review 63.

[35] Kumm, *supra* n 42.

[36] According to Alexy one must the first establishing the degree of non-satisfaction or of detriment to the first interest that a certain policy choice satisfying the competing interest would entail. Then one must consider the importance of satisfying the competing interest. Finally, one must establish whether the importance of satisfying the competing interest justifies the detriment to or non-satisfaction of the former. Alexy R, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 *Ratio Juris* 433, 436, 437.

advantage that having EU-wide norms brings to the policy objective of rehabilitating cross-border offenders, and the *compression of Member States' regulatory autonomy on matters of sentence execution*. For simplicity sake, when referring to this proportionality *strictu sensu* step, the rest of the article will speak of a balance between 'rehabilitation' and 'national regulatory autonomy'.

Member States have a strong interest in autonomously defining the rules on when sentences are to be executed on their territory, and not having an EU-defined, automatic system of allocation of offenders across countries. Executing a sentence has financial costs linked to maintaining the person in prison, or financing probation services, and logistical costs linked to overcrowding of prisons or overburdening of social services. Moreover, there are costs in terms of 'internal security' in the case of sanctions alternative to detention. When assessing whether to impose an imprisonment sanction, or an alternative sanction,[37] the authorities must carry out a delicate balance. They must weigh the need for incapacitating the offender, in light of his/her social dangerousness, and other factors such as the limited seriousness of the crime, or the possible criminogenic effects of imprisonment, which militate in favour of an alternative sanction. When a decision is taken in favour of a probation order, such as limiting freedom of movement with an electronic bracelet, rather than an imprisonment sentence, the competent authority accepts the risk of having an offender free to circulate, although with limitations, on national territory.

In a purely national case, sentence execution costs are naturally borne by the convicting state. If, however, the case involves a foreign offender, it is not self-evident which state has to bear such costs. If rehabilitation would be better achieved in the state of origin, the burden ideally should fall on the latter states. This however implies further political costs in terms of compression of sovereignty, since that State has to execute a sentence it did not impose. Conversely, if rehabilitation is better achieved in the convicting state,[38] this one should bear the costs. Yet, justifying to tax-payers that a state bears prison and-or internal security costs for non-nationals, as opposed to expelling them might not be easy.

In light of the above, the most protective choice for national regulatory autonomy on matters of sentence execution is to design a system where states have a wide margin to deciding when an offender's transfer should occur. This might however create tensions with some of the policy implications listed above, serving the objective of cross-border rehabilitation. The next section

[37] *Supra* n 7.

[38] For instance, where contacts between the offender and his family in his country of origin might have criminogenic rather than rehabilitative effects.

turns to the analysis of whether or how the EU has incorporated the different policy implications serving the relevant function of punishment, namely rehabilitation, and the respect of the EU constitutional law limits, and addressed the possible tensions, in the two FDs on transfer of offenders.

II – EU NORMS ON OFFENDERS' REHABILITATION: LEGITIMATE COMPROMISE OR LACK OF EVIDENCE-BASED POLICY?

In order to assess the success of EU norms on offenders' rehabilitation in reconciling function and limits to punishment, this second part proceed as follows. It scrutinizes whether both FDs have effectively incorporated each of the factors key to rehabilitation. If this is not the case, it discusses whether this is the result of a need to respect EU constitutional limits, or simply a regrettable lack of evidence-based policy. The next paragraphs respectively focus on the promotion of offenders' social capital (a), and autonomy (b), on offenders' rights to participation (c), and to information (d), and on the need to safeguard trust-based offenders-authority relationship (e).

a. Transfers' potential to increase offenders' social capital

The preamble of both FDs includes offenders' rehabilitation as an objective of the transfers and connects it to higher chances of maintaining a social capital.[39] Yet there are a number of features of the texts which lead one to question whether this outcome always follows from transfers. *Firstly*, admittedly the Transfer of Prisoners FD includes an obligation for the issuing state only to forward transfers request when they are satisfied that higher chances of rehabilitation exist in the executing state.[40] Conversely, the Transfer of Probationers FD does not even include a similar obligation. However, there are limited avenues to enforce the obligation present in the Transfer of Prisoners FD. In principle, the consent to the transfer of both the executing state and also of the offender are requested.[41] If ties with the executing state are lacking, making rehabilitation unlikely, either the requested state or the offender can deny such consent. Yet this rule suffers important exceptions. Consent of the executing State is not necessary when that is the State of nationality and where the person lives, or the State of

[39] Recital 9 Transfer of Prisoners FD and Recital 8 Transfer of Probationers FD speak of family, linguistic, cultural social and economic ties.
[40] Art. 4(2) Transfer of Prisoners FD.
[41] Art. 4(1) Transfer of Prisoners FD, Art. 5(2) Transfer of Probationers FD.

nationality and where the person would be deported after sentencing, in the case of the Transfer of Prisoners,[42] or the State where the person is lawfully residing, in the case of the Transfer of Probationers framework decision.[43] In these situations, the transfer should be automatically authorized unless any of the exhaustively-listed grounds for refusal are present. Yet, the lack of rehabilitative prospects does not feature among such grounds in neither framework decision. [44] As is explained in greater detail in the next section, these situations generally do not require the consent of the offender either. As a result, offenders cannot object to poorly-reasoned transfers unless they have a right to appeal transfers decisions, which not all member states grant.[45]

Secondly, neither FD specify how the authorities of the convicting state should acquire information about the conditions in the executing member state. They only state that the convicting State *may* consult with the authorities of the executing state.[46]

Briefly, both framework decision de facto envisage a system where in principle a convicting state could unilaterally transfer offenders towards the country of nationality, regardless of their higher chances of having higher social capital there.

This legal framework is not as such in tension with fundamental rights. Case law of the Strasbourg court has ruled out that offenders should enjoy a right to be transferred for rehabilitation purposes,[47] nor a right not to be transferred.[48] A transfer which does not aim this purpose is not *per se* a violation of fundamental rights. This is provided that no additional violations of fundamental rights occur during the transfer, or as a result of it, for instance if an offender is transferred to a prison which does not meet fundamental rights standards. In any case, both FDs include a general respect of fundamental rights clause.[49]

Yet, the discretion granted to the issuing Member State on the decision to transfer has been criticized in literature. It was argued this is inconsistent with the texts' declared objective of offenders' rehabilitation, and is revealing of the real objective of the FDs, namely 'getting rid' or unwanted individuals and relieving the state of the burden of sentence execution. [50] It is

[42] Art. 4(1) a, b Transfer of Prisoners FD.
[43] Art. 5(1) Transfer of Probationers FD.
[44] Article 9 FD on transfer of prisoners, Art. 11 Transfer of Probationers FD.
[45] 10 Member States do not grant right to appeal a transfer decision, FRA Report 96.
[46] Art. 4(3) Transfer of Prisoners FD. Art. 15. Transfer of Probationers FD.
[47] On rehabilitation in the ECHtR case law see extensively Martufi A., The Paths of Offender Rehabilitation and the European Dimension of Punishment: New Challenges for an Old Ideal? (2018) 24(5) Maastricht Journal of European and Comparative Law.
[48] FRA Report, 38.
[49] Art. 3(4) Transfer of Prisoners FD, Art. 1(4) Transfer of Probationers FD.
[50] *supra* n 12.

submitted here that these policy choice are not a neglect of the common objective, but the outcome of a legitimate compromise with other competing interests. In this case, full achievement of offenders' rehabilitation, which would have required stricter controls on the actual objectives of transfers, was assumingly considered disproportionately compressing the convicting state's autonomy on sentence execution. This balance of interests which the EU framework decision strike in the context of proportionality *strictu sensu* text explained above can be an undesirable one to some, yet it is an EU constitutional law legitimate one. One should note however, that Member States do not necessarily always abuse their discretion. [51] There are cases of good practice, for instance in Spain, of transfers occurring only after due consultations with the state of execution.[52]

Admittedly, the transfers system does not accommodate the execution state's interest in preserving its regulatory autonomy. The latter could have to execute foreign sentences on its territory without having consented to it. Yet, the two States have a competing interest in maintaining decision-making control over the procedure. Privileging one or the other is thus a matter of choice. Admittedly, in order to have a slightly more balanced system consultations with the execution state could have at least been made mandatory.

Conversely, the system of transfers as designed might be in tension with other EU constitutional law norms, namely those on free movement. EU citizens enjoy a wide right of residence in EU Member States.[53] Their deportation is only admitted in specific cases and following particularly elaborated procedures.[54] In particular, the Court of Justice has ruled out that EU citizens can be expelled from an EU Member States solely on the basis of having committed a crime.[55] Transfers of offenders which do not specifically serve a rehabilitation purpose cannot thus not become 'covert deportations', which follow a simpler procedure, under the 'excuse' of rehabilitation. This would simply be a way to circumvent EU norms on free movement. To avert this risk, a clause ensuring that nothing in the FDs should be interpreted as interfering with offenders' free movement rights, similar to the one on the respect of fundamental rights, could have been inserted.

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[51]Canton R, Social Rehabilitation Through the Prison Gate, (2015), Available online at http://steps2.europris.org/wp-content/uploads/2016/07/Annex-4.12.-Workstream-3-Social-Rehabilitation Through-the-Prison-Gate.pdf (accessed 1st August 2017), 20.

[52] Intervention of Ester Montero Perez de Tudela on the Spanish system, Foreign National Offender Policy, Her Majesty Prison and Probation Service, at the Cambridge Workshop "A reflection on the Right to Liberty in the AFJ, in a post Brexit Scenario", Cambridge 28 September 2017, in file with the author.

[53] Art. 21 TFEU, Directive 38/2004/EC.

[54] Directive 38/2004/EC, Chapter VI.

[55] C-348/96, Criminal proceedings against Donatella Calfa.

b. Offenders' autonomy of decision-making in transfers' decisions

Autonomy of decision-making, especially in the context of community sanctions,[56] was said to be key to rehabilitation, especially because it fosters a change towards a more agentic identity. Yet it is not an absolute principle, as coercion of autonomy and freedom is at the core of sentence execution, especially prison sentences. An offenders' autonomy of decision-making cannot concern the *opportunity* of punishment itself. Yet, it should be promoted on its variable elements, such as optional work or other activities during sentence execution. In the case of transfers, autonomy of decision-making can and should be promoted as to the opportunity of the transfer itself. Ideally, offenders should be able to obtain transfers, and to veto transfers the authority might propose them. What is at stake with transfers is not *whether* to punish, but rather *where* to punish. Admittedly, in the case, envisaged by both framework decisions, in which offenders already find themselves on the territory of the execution state, it is not the offender physically who is transferred, but simply the responsibility for sentence execution.[57] If the offenders find themselves in the state of execution for having fled there, then transfer of responsibility to execute sentences is one way to ensure certainty of punishment. Allowing offenders to object on the transfer might seem as allowing them to have a say on whether they should be punished. However, the option remains to issue a European Arrest Warrant to have the person arrested, and then still provide him/her with the option of choosing where to serve his/her sentence.

The two FDs however do attach significant importance to offenders' autonomy. The Transfer of Prisoners FD explains in its preamble that the prisoner's 'involvement in the proceedings should no longer be dominant'.[58] This is reflected in a number of specific policy choices. First, the text does not create an obligation to inform prisoners about the possibility of being transferred, and not all Member States provide for it in national legislation.[59] Where informed, the sentenced person can advance a request to be transferred, however the convicting state does not have any binding follow-up obligation.[60] Secondly, in the event that offenders do *not* want to be transferred, they might nonetheless have to serve the prison sentence in another country anyway. Offenders' consent is, in principle, necessary. However, regrettably, eight Member

[56] *Supra* n 7.
[57] Art. 6(2) c Transfer of Prisoners FD, Art. 5(1) Transfer of Probationers FD.
[58] Recital 5, Transfer of Prisoners FD.
[59] At least 8 Member States do not envisage a procedure in this respect, FRA Report, 85, 86.
[60] Article 4(5) Transfer of Prisoners FD.

States still haven't established any procedure for obtaining the offender's consent.[61] Moreover, as mentioned above, there are three exceptions to this. Compulsory transfers can occur when the executing state is the state of nationality or of legal residence, when it is the State where the offender will be deported after the sentence, and when the offender is already present on the territory of the executing state having fled justice elsewhere. [62]

Transfer of Probationers occur, as a general rule, following a request by an individual.[63] Yet firstly, it is stated that the convicting state *may* forward the judgement requesting a transfer upon request of the offender. This implies that the state does not have an obligation to follow up to the offender's request. Moreover, there are two notable exceptions. Outside the case of explicit offenders' request, convicting states can authorize transfers when the offender has 'already returned' or 'wishes to return' to the State of habitual residence.[64] The wording of the FD seems to suggest a mild 'consent requirement'. However, 'wanting to return to the state of residence' is not the same thing as 'wanting to serve one's sentence there'. Offenders might want to return just temporarily and might prefer to serve the sentence in the issuing state because of better probation services. Moreover, the FD does not envisage any obligation actually to verify the presence of such consent, and only five Member States have established an ad hoc procedure in national law.[65] It is thus theoretically possible that a transfer of supervisory responsibility from one Member State to another happens without probationers being aware of it,[66] or where their consent is only presumed but not verified.[67]

Such compression of an offender's autonomy with regard to decision making, is the aspect which has received the most criticisms in literature. Compulsory transfers are considered in stark contrast with the rehabilitation objective, while conversely serving the covert objective of expelling foreigners from the country. [68] The choice appears at odds with the pre-existing Council of Europe instruments which always required the consent of the offender before authorizing a transfer.[69]

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[61] FRA Report, 93.
[62] Art. 4(1) and Art. 6(1) Transfer of Prisoners FD.
[63] Art. 5(2) FD on probation measures.
[64] Art. 5(1) FD on probation measures.
[65] FRA Report, 94.
[66] Interview with Marina Beun, Dutch Prosecutor, Dutch Central Authority for 947/2008 and 829/2009 framework decisions. Practice in the Netherland shows that it can actually happen that consent is not verified at all. The legislator did not include an explicit consent requirement in national law, under the assumption that in most cases the offender would already be present in the executing state. In fact, what can happen is that the cases eligible for transfers are forwarded to the central authority for transfer, and if the person cannot be found to ask for consent, the transfer of the responsibility of supervision is carried out anyway.
[67] Art. 5(1) Transfer of Probationers FD.
[68] *Supra* n 12.
[69] Convention on the Transfer of Sentenced Persons Strasbourg, 21.III.1983, ETS 112, Art. 3(1)d.

In this respect the same considerations made in the previous sections, with respect to the actual capacity of transfers to increase social capital, apply. Offenders do not enjoy a right to be transferred, or not to be transferred, therefore there is no inherent tension between compulsory transfers and fundamental rights, unless other violations occur in specific cases. The choice of keeping the autonomy of decision-making on transfers in the hands of Member States is a legitimate choice to safeguarding national regulatory autonomy, as allowed by the EU principle of proportionality. Yet, As was stated above a disclaimer on individuals' free movement rights would have been desirable.

Lastly, one should note that Member States' practice includes both non-consensual transfers like in the UK,[70] but also good practices of only authorizing voluntary transfers as in Spain.[71] It is therefore not automatic that actual transfer procedures would compress offenders' autonomy.

c. Offenders' participation rights in transfers' decisions

It was mentioned afore that procedural justice is key to ensuring that offenders perceive the authority as legitimate and are therefore more inclined to comply with the law, even after release. When dissecting procedural justice Tyler's work shows that individuals have an equal, if not higher interest, in having the possibility of simply expressing themselves on the procedures, than influencing their outcome.[72] In the context of transfers this means that offenders are equally, if not more interested, in having their voice heard on the possibility of being transferred, rather than on the need of autonomously deciding on the opportunity of the transfer.

In light of this, it should be welcome that the Transfer of Prisoners FD gives the right to offenders to state a reasoned opinion in writing in all those cases in which consent is not required. This opinion must be considered by the issuing State authorities.[73] This key

[70] Intervention of Graham Wilkinson, Foreign National Offender Policy, Her Majesty Prison and Probation Service, at the Cambridge Workshop "A reflection on the Right to Liberty in the AFJ, in a post Brexit Scenario", Cambridge 28 September 2017, in file with the author.
[71] *Supra* n 52.
[72] *Supra* 22.
[73] Article 6 of the framework decision on the transfer of prisoners. A reported example of forced transfer is that of person who refused his transfer to Hungary for fear of the detention conditions. Yet, the relevant authorities found that he had family and social contacts in Hungary and this aspect weighted heavier than the person's refusal. Minutes of the Meeting with EU Member States' experts on the implementation of the Framework decisions 2008/909/JHA (Transfer of Prisoners), 2008/947/JHA (Probation and Alternative Sanctions and 2009/829/JHA (European Supervision Order), 18.

requirement has been implemented by two-thirds of the Member States, which have put in place different procedures for receiving the consent or the opinion of the offenders. [74]

The situation is partially different in the Transfer of Probationers FD. As mentioned, when the State of execution is that of nationality or residence, the EU texts do not introduce any obligation to envisage a procedure through which the consent of the person is required. Where there is no right to appeal a decision under national law,[75] offenders risk having no occasion to have their voice heard on the possibility of transfer.[76] Admittedly, in some cases transfers of supervisory responsibility occur without the probationer's knowledge, simply because the offender has not left any address or contact, and therefore cannot be found.[77] Lack of an offender's participation in the transfer procedure, therefore, can be due to the offenders' behavior. In this case, however, an alternative choice would be not to carry on with a transfer at all, unless the person can be found and consulted.

One should note that the choice to allow offenders' participation is not in tension with any offender's fundamental rights, nor with the interest in preserving national regulatory autonomy. In this context the reconciling function and limits to punishment was not a challenging task.

d. Offenders' information rights about transfers' decisions

The degree of information that offenders receive with regard to the transfer procedure is important in two respects. First, offenders should receive information on the reasons for the transfer. Justification of authorities' decisions was mentioned as a key factor in ensuring that offenders perceive them as unbiased and fair, which influences offenders' perception of authority as legitimate, and foster their internalized commitment to the law. This is admittedly less important when it is the offender who requests or consents to the transfer, but it is crucial when transfers are authorised against offenders' will or awareness. Offenders' should receive details on the justification for the transfer and on how it is going to contribute to improving their rehabilitation chances. For instance, they should receive information on the location of

[74] See the different procedures for obtaining consent mentioned in the Minutes of the Meeting with EU Member States' experts on the implementation of the Framework Decisions 2008/909/JHA (Transfer of Prisoners), 2008/947/JHA (Probation and Alternative Sanctions and 2009/829/JHA (European Supervision Order), Brussels 13 November 2012 , 17, 20. One of the question debated in this respect concerned the differences in assessing and obtaining consent of prisoners held in a mental health institution.

[75] This is the case in 19 Member States, FRA Report, 96.

[76] FRA Report, 97.

[77] Interview with Marina Beun Marina Beun, Dutch Prosecutor, Dutch Central Authority for 947/2008 and 829/2009 framework decisions, 10 November 2017. In file with the author.

the prison to which they will be transferred, on what the visiting rights would be for locally present family, or on available rehabilitative activities for inmates.

Secondly, linked to what was stated in the previous section offenders' participation to transfers' decision, and consent where required, should ideally be an informed one. If not correctly informed, even if consulted, offenders might still feel 'tricked' for having been misled in their own decision-making process and might thus perceive the procedures as unfair. This can lead to judicial challenges against decisions to transfer.[78] To prevent this, offenders should receive information including on the kind of sentence they are going to serve in the executing state, if there is an adaptation of sentence,[79] and on the applicable norms in the executing state. For instance, they should be informed on when detention follows a breach of a probation order, or on what are the norms on early release, which could influence the overall length of the sentence. This last aspect is particularly important to prisoners and significantly influence their decisions on transfers.[80] The information should be provided to offenders before they have delivered their opinion or consent, or if provided afterwards, offenders should be able to revoke their statements.[81]

The Transfer of Prisoners FD only envisages an obligation to inform the individual prisoners, that they are going to be transferred in a language that they understand.[82] The Transfer of Probationers FD does not include any obligation to forward any information to the offender on the legal and practical implications of the transfer. Other EU instruments, such as the directives on the right to information, and to translation and interpretation are not helpful in this context, since their scope of application does not extend to post-trial procedures.[83]

Interestingly, the execution State has an obligation to forward some information, in some cases upon request, to the authorities of the convicting State. These include information on possible amendments to the sentence,[84] applicable norms on early conditional release for the Transfer of Prisoners FD, [85] and details about when a custodial sentence can be imposed for breach of a

[78] An Irish case involved a prisoner who contested a consensual transfer. The appellant argued that he had not received all the relevant information. His consent was thus not informed. Had he been thoroughly briefed he would have not consented to the transfer. Irish Court Case on Transfer with Consent but not *informed consent*. See the declaration of the Irish Government, Minutes *supra* 74, 20.

[79] Art. 9 Transfer of Probationers FD.

[80] Durnescu I, Montero Perez De la Tudela E, Ravagnani L, 'Prisoner transfer and the importance of the 'release effect'' (2016) 17(4) *Criminology and Criminal Justice* 450.

[81] On national legislations on the right to revoke one's consent see FRA Report, 95.

[82] Art. 6(4) Transfer of Prisoners FD.

[83] Art. 2 of the 2012/13 Directive on right to information, and Article 3 of the 2010/64 Directive on right to translation and interpretation.

[84] Art. 16 Transfer of Probationers FD, and Art. 21(e) on Transfer of Prisoners FD.

[85] Art. 17 on Transfer of Prisoners FD.

probation order for the Transfer of Probationers FD.[86] After having received this information, the convicting state can decide to withdraw its request to transfer.[87] However, the question of whether such information actually reaches the offender depends entirely on the law and the practice of the Member States. Some good practices exist. For instance, at least 17 (for prisoners) and 14 (for probationers) member states keep offenders who are the object of a transfer informed as to the adaptation of the sentence.[88] When information rights exist, practice shows that linguistic barriers are not a particular problem so far as there if often a common language between authorities of the issuing state and offender.[89] Yet, only six (or three in the case of probation measures) Member States have in place procedures for *verifying* that prisoners have fully understood all the practical and legal implications of the transfer.[90]

Briefly, there are good chances that, even if the offender has an opportunity to give an opinion or consent to the transfer, these won't be informed, and that he/she won't be provided with adequate explanations about the reasons for the transfer. This can have a detrimental impact on the overall rehabilitation process, to the extent that it undermines authorities' legitimacy in the eyes of offenders.

Contrary to what was mentioned for the other factors contributing to rehabilitation, on information rights EU norms could have been more effective in securing the rehabilitative function of punishment in cross-border cases, while still remaining within the EU constitutional law boundaries. Admittedly, EU human rights law does not create specific information rights during the post-trial, phase, and in particular for transfer procedures.[91] However, enlarging offenders' information rights would have served the rehabilitation objective without disproportionally compressing Member States regulatory autonomy on sentence execution. The execution states should be bound to forward the relevant information in all cases, and not only upon request, and the convicting states should be bound to forward these to the offender.

e. Safeguards of offenders' trust-based relationship with authority

The final key aspect of the rehabilitation process is a trust-based relationship between an offender and the representative of authorities. Transfer interrupts the unity of the penalty and

[86] Art. 16 Transfer of Probation measures FD.
[87] Art. 9(4) Transfer of Probation measures FD, see also Art. 17(3) of Transfer of Prisoners FD.
[88] 17 Member States as far as the Transfer of Prisoners FD, and 14 for the Transfer of Probationers FD, FRA Report, 91.
[89] FRA Report, 87.
[90] FRA Report, 92.
[91] See ECHR, Szabo vs Sweden, 27 June 2006, Application no. 28578/03.

therefore interrupts such relations.[92] In order to minimize the detrimental effect that these interruptions, it was argued that transfers, where desirable, should occur as soon as possible in the course of the execution of the sentence. However, the deadlines set by the two framework decisions allow in fact to request transfers much later.

The Transfer of Prisoners FD does not set any limit on the absolute length of the sentence, for which transfers can be authorized. It only states transfer requests can be sent up to six months before the end of the sentence. [93] The Transfer of Probationers FD allows request to be sent at any point during the execution of the sentence, provided that the sentence itself is at least six months long.[94] After a request is sent, respective deadlines of three months for prisoners[95] and two months binding for probationers[96] are set for authorising and actually carrying out transfers. If these deadlines are not met due to 'exceptional circumstances', the EU texts simply require the requested Member State to alert the issuing State and to provide an estimated deadline for the transfer.[97] The language of the framework decision is quite loose if compared with deadlines set, for instance, in EAW FD.[98]

In practice, what happens is that deadlines are often not met, and procedures can take, at least with respect to transfer of prisoners, up to a year after the request to transfer.[99] Considering that there are not 'length threshold', and thus that transfers can be requested also for short sentences, such as a two years, or 18 months sentences, a transfer occurring after already a year is quite a late one.

Admittedly, delays can also occur for valid reasons, namely the need thoroughly to inform the prisoner, or the launch of an appeal.[100] Yet they can also be due to incomplete and poorly-drafted requests or, interestingly, to different styles of drafting indictments. This was

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[92] On transfers and the unity of punishment see Caeiro P, Filgado S, Prata Rodriguez J, The evolving notion of mutual recognition in the cjeu's case-law on detention, (2018) 4(5) Maastricht Journal of European and Comparative Law.

[93] Art. 9(1)h Transfer of Prisoners FD.

[94] Art. 11(1)b Transfer of Probationers FD.

[95] Art. 12(2) Transfer of Prisoners FD.

[96] Art. 12(1) Transfer of Probationers FD.

[97] Art. 12(2) Transfer of Prisoners FD, Art. 12(2) Transfer of Probationers FD.

[98] The EAW FD sets a 60-days (Art. 17(3)) deadline for deciding on surrender, and 10 days one (Art. 23 (2)) for carrying out the surrender itself. These can be extended if circumstances exist which are not under the control of the executing state, yet other fixed deadlines are set respectively of 30 (Art. 17(4)), and 10 days (Art. 23(3)). Finally, exceptional circumstances prevent the executing Member State to take a decision on the surrender Eurojust must be informed (Art. 17(4)). The deadline for the actual surrender can be temporarily postponed if serious humanitarian reasons are present.

[99] See the 2016 Report of the Commission's meeting with Member States' experts on the implementation of FD 2008/909 on transfer of prisoners, 5. Intervention of Graham Wilkinson, *supra* n 70.

[100] 2016 Report of the Commission's meeting with Member States' experts on the implementation of FD 2008/909 on transfer of prisoners, 5.

highlighted as a problem in prisoners' transfers from the UK to Czech Republic.[101] The judges in the latter state struggled with English judges' concise certificates and have had several times to send back transfer requests asking for further information. Another issue is that some member states request the translation of the full judgement, even if this is not required by the EU texts.[102] Briefly, the law and the practice allow for situations in which transfers can take place long after the start of the execution of the sentence in the issuing State, fragmenting the prison sentence, and most problematically the probation supervision.[103]

On this point too, the FDs could have adopted more effective norms, securing the rehabilitative function of cross-border punishment, while still remaining within EU constitutional boundaries. Admittedly, delays due to inexperience with the procedure do not depend on the shape of the law, and will diminish with an increased use of the FDs, as well as with closer monitoring of compliance with the specific requirements (e.g. not requesting full translation of the judgements). However, both FDs could have included the obligation to request transfers earlier in the procedure, or even contextually with the imposition of the sentence as advocated by some practitioners,[104] unless it is the offender requesting a transfer. This would have better served the objective of rehabilitation, by eliminating structural reasons for late transfers. However, it would have not disproportionally compressed Member States' regulatory autonomy, as what is at stake is not *whether* the transfer should take place, but *when*.

III. CONCLUSIONS

The Europeanization of crime, that is criminals operating across-borders, has necessarily triggered the Europeanization of criminal justice, that is the need for States to cooperate in the fight against crime. Such process of europeanization is not without consequences though. In particular, the underlying hypothesis of the special issue to which this article contributes[105] is that the Europeanization of criminal justice has important implications for the conceptualization, and the regulation of punishment. This is because, among other aspects, the

[101] Interview with Ms Martina Hlustikova, Deputy to the National Member for Czech Republic at Eurojust, of 15 March 2015.
[102] See the declaration of the Austrian Government in the 2016 Report *supra* n 99, 3.
[103] Interview with Marina Beun Marina Beun, Dutch Prosecutor, Dutch Central Authority for 947/2008 and 829/2009 framework decisions, 10 November 2017. In file with the author.
[104] This was mentioned during the discussion at the at the ERA Conference, Alternative to Detention in the EU, 23-24 February, Bucharest. See also the 2016 CEP Expert Meeting 'Enhancing the implementation of Framework decision 2008/JHA/947 & 2009/JHA/829' Minutes, 6.
[105] Wieczorek I (in cooperation with Weyembergh A and Padfield N) (Eds.), Punishment, Deprivation of Liberty and the Europeanization of Criminal Justice, (2018) 25(4) Maastricht Journal of European and Comparative Law.

legitimacy of punishment rests on its capacity to reconcile its function and its limits, and this 'reconciliation exercise' might have a different dynamic at the European level.

This article has developed this argument with respect to the rehabilitative function of punishment, taking as case studies the FDs on Transfer of Prisoners and on Transfers of Probationers, which include rehabilitation of offenders among their objectives. It started from the premise that, while national rules on punishment have to reconcile two aspects, namely the different functions of punishment and fundamental rights, EU norms on punishment must also pay attention to a third dimension. The EU constitutional law principle of proportionality requires that EU norms not compress disproportionally national regulatory autonomy. The article showed that the need to safeguard national regulatory autonomy has arguably led to design a system of transfers that might not always serve the objective of offenders' rehabilitation. What this tells us in broader terms is that the Europeanization of criminal justice might be necessary, and effective, in securing the certainty of punishment on a general level. Yet, the fact that EU norms on punishment must respect some specific EU constitutional limits, may also imply that certain functions of punishment are not fully achievable in transnational cases. Punishment in cross-border cases may remain just a tool to prevent further crimes to occur, and not be conceptualized in broader terms as an instrument to mend the bond between the offender and the collectivity, which the first has breached by breaking the law.

Admittedly, the principle of proportionality does not impose specific policy choices, it only imposes to include national regulatory autonomy in the equation. The text of the FDs is the result of a specific EU policy choices on how much to protect Member States' interests. Moreover, states practice shows that Member States do not necessarily abuse of their regulatory autonomy, and compromise in practice the rehabilitative chances of cross-border offenders. However, the point here is that the fact that EU has a specific constitutional framework can have, and has had, an impact on what the EU norms on punishment can achieve. Different policy choices are available, but they would always compress the general rehabilitative objective, if national regulatory autonomy is to be given any weight in the discussion.

Nevertheless, this should not dispense EU policy makers from always striving to find the best compromise between functions of punishment, and EU constitutional limits to it. As was explained, some aspects of the two FDs could have been better designed to serve the rehabilitation objective, while still respecting EU constitutional limits to punishment.