JUSTICE

Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers

FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

The report addresses matters related to human dignity (Article 1), the prohibition of inhuman or degrading treatment or punishment (Article 4), the right to liberty (Article 6), the right to respect for private and family life (Article 7), and the right to a fair trial (Article 47), falling under Titles I 'Dignity', II 'Freedoms', and VI 'Justice' of the Charter of Fundamental Rights of the European Union.

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Foreword

Mutual recognition – the process of default recognition of decisions and judgments made by, for example, a court in another Member State – hinges greatly on Member States' mutual trust in each other's justice systems. Such trust, in turn, is highly dependent on respect for fundamental rights.

The three European Union (EU) Framework Decisions at the heart of this study were designed to facilitate mutual recognition between EU Member States when transferring individuals serving prison sentences, persons subject to probation measures and alternative sanctions, and individuals awaiting trial (pursuant to the so-called European Supervision Order). The Framework Decisions instruct Member States to be guided by fundamental rights principles, including by considering alternatives to detention. Moreover, in its EU Justice Agenda for 2020 – entitled 'Strengthening trust, mobility and growth within the Union' – the European Commission emphasises the need to promote effective application of the Charter of Fundamental Rights of the EU. The agenda underscores that effective rights protection is crucial for promoting trust in the proper functioning of the European area of justice. It is also in light of this Justice Agenda that this report explores fundamental rights considerations in the application of the three Framework Decisions.

Criminal justice systems themselves are inherently linked with fundamental rights. They serve to protect the rights and safety of victims and society as a whole, but also to offer rigorous safeguards to suspects, accused and sentenced persons. This is important both for these individuals themselves and for society as a whole. Beyond principles of humanity, societies benefit from the reintegration of persons who have served time in detention or have otherwise been constrained by the justice system. This also recalls the goal of reducing recidivism.

Societal interests include making greater use of alternatives to detention in order to avoid the need to reintegrate persons after periods in detention. This is particularly important at the pre-trial stage, where individuals remain innocent until proven guilty in a court of law. Using detention for serious crimes is certainly appropriate, albeit it may at times be counter-productive. This is particularly important to stress at times when short-term political gains may encourage harsh sentencing.

The implementation deadlines for these instruments have passed, and EU Member States have by and large implemented them; making it timely for an assessment of how fundamental rights are safeguarded both in law and in practice. This study provides an overview of experiences in Member States, and highlights best practices and shortcomings. In so doing, it brings much-needed attention to both the potential and the risks these instruments entail in terms of fundamental rights protection.

Michael O'Flaherty
Director

Country codes

Country code	EU Member State
AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
HR	Croatia
HU	Hungary
IE	Ireland
IT	Italy
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SK	Slovakia
SI	Slovenia
UK	United Kingdom

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Acronyms

CAT	(UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)
CEP	Confederation of European Probation
CJEU	Court of Justice of the European Union
COPEN	*Coopération en matière pénale;* Working Party on Criminal Matters (Council of the EU)
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	(UN) Convention on the Rights of the Child
CRPD	(UN) Committee on the Rights of Persons with Disabilities
CSES	Centre for Strategy and Evaluation Services
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESO	European Supervision Order
EPIS	European Prison Information System
EU	European Union
EuroPris	European Organisation of Prison and Correctional Services
FRA	European Union Agency for Fundamental Rights
GDP	Gross Domestic Product
GYDPs	Garda Youth Diversion Projects
HEUNI	European Institute for Criminal Prevention and Control
ICPS	International Centre for Prison Studies
IRCP	Institute for International Research on Criminal Policy (Ghent University)
ISTEP	Implementation Support for the Transfer of European Probation Sentences
LGBTI	Lesbian, gay, bisexual, transgender and intersex persons
NHRI	National Human Rights Institution
NPM	National Preventive Mechanism
NOMS	National Offender Management Service
OPCAT	Optional Protocol to the (UN) Convention against Torture

OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
SDGs	Sustainable Development Goals
SPACE I/II	*Statistiques Pénales Annuelles du Conseil de l'Europe*; Annual Penal Statistics of the Council of Europe
STEPS 2	Support for Transfer of European Prison Sentences towards Resettlement
STICS	Strategic Training Initiative in Community Supervision
TEU	Treaty on European Union
UNIL	University of Lausanne
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
WPB	World Prison Brief

Executive summary and FRA Opinions

This report deals with fundamental rights issues related to three European Union (EU) instruments: the Framework Decision on transfer of prisoners (Council Framework Decision 2008/909/JHA), the Framework Decision on probation and alternative sanctions (Council Framework Decision 2008/947/JHA), and the Framework Decision on the European Supervision Order (ESO) (Council Framework Decision 2009/829/JHA).

The Framework Decision on transfer of prisoners outlines rules on the recognition of judgments "imposing custodial sentences or [other] measures involving the deprivation of liberty". By providing for such transfers across Member States, the Framework Decision has the overall purpose of facilitating social rehabilitation.

This is also the overall purpose of the Framework Decision on probation and alternative sanctions, which additionally aims to improve the protection of victims as well as the general public. It applies to a variety of probation measures or alternative sanctions. As specified in Article 4 of the instrument, these include "an obligation for the sentenced person to inform a specific authority of any change of residence or working place"; "an obligation not to enter certain localities, places or [...] areas"; "an obligation containing limitations on leaving the territory"; instructions on "behaviour, residence, education and training, leisure activities", etc.; "an obligation to compensate financially for the prejudice caused by the offence"; "an obligation to carry out community service"; "an obligation to cooperate with a probation officer"; and "an obligation to undergo therapeutic treatment or treatment for addiction".

Improving victim protection is also one of the main objectives of the third instrument analysed in this report – the Framework Decision on the European Supervision Order. This instrument aims to facilitate the "recognition of decisions on supervision measures as an alternative to [...] detention". Article 8 specifies that it applies to measures such as "an obligation to inform [authorities] of any change of residence"; "an obligation not to enter certain localities or defined areas"; "an obligation to report at specified times to specific authorities"; or "an obligation to avoid contact with specific persons".

Social rehabilitation is a relatively open-ended term. The Framework Decisions do not offer an explicit definition, but Recital 9 of the Framework Decision on transfer of prisoners refers to social rehabilitation as including elements such as "the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State".

The EU's and its Member States' actions must be consistent with international standards. The leading global instrument – the United Nations (UN) Standard Minimum Rules for Treatment of Offenders, as revised in December 2015 – stresses that the purpose of prison sentences "can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life." Accordingly, Rules 4 (2) and 59 state that "[p]risoners shall be allocated, to the extent possible, to prisons close to their homes or their places of social rehabilitation." It thus appears that social rehabilitation – or at least the similar concept of 'reintegration', in the language of the rules – entails a process that starts during detention and is facilitated by being detained as close to 'home' as possible.

The three Framework Decisions supplement each other by covering different aspects of cross-border transfers:

- The Framework Decision on the European Supervision Order encourages using and transferring alternatives to pre-trial detention to permit individuals to maintain 'social connections' (such as family, work, or education) in an EU Member State while awaiting trial – by way of monitoring them with means other than detention in that Member State, typically the 'home' state.
- The Framework Decision on probation and alternative sanctions encourages monitoring of early releases and using alternatives to post-trial detention, for reasons similar to those underlying the ESO (i.e. family, work, or education).
- The Framework Decision on transfer of prisoners encourages having post-trial detainees serve their sentences 'closer to home'.

This report aims to identify barriers to, and opportunities for, the protection, promotion and fulfilment of fundamental rights in the implementation and application of the three Framework Decisions. This is achieved by taking as a base the existing standards in international human rights law and the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), as they apply to transfers under the three Framework Decisions and related issues. The national laws and practices in effect in the 28 EU Member States are also considered, showing how states are implementing common standards, and how promising practices have developed.

The research was undertaken based on a request from the European Commission to better understand the fundamental rights challenges and opportunities the three

Framework Decisions entail. For this reason, the report reviews the application of the three instruments and explores aspects that are of particular relevance from a fundamental rights-perspective – both problems and potentially positive impacts. While the report underscores the importance of EU Member States' mutual trust in each other's judicial systems, and what is needed to improve such trust, it does not address in detail how this could be achieved. Thus, the report does not discuss aspects such as how detention could be reduced or how alternatives to detention should be used more frequently.

The report is intended to be particularly useful for practitioners in EU Member States who may apply the three instruments. It hopes to help avoid the development of fundamental rights concerns in the application of the Framework Decisions – but also to encourage their use, given their inherent potential to strengthen fundamental rights.

A range of other actors are looking at the implementation and practical application of one or more of the three instruments, focusing on various aspects thereof. FRA's report contributes to these efforts by presenting a fundamental rights perspective on all three Framework Decisions.

The data and information on EU Member States presented in this report cover the period up to 1 June 2015, which is 2–3 years after the three Framework Decisions' implementation deadlines. The information was obtained through desk research and consultations with government officials, judges, and other professional groups involved in the criminal justice process to get a comprehensive picture of both law and practice.

Chapter 1 examines how EU Member States have implemented and made use of the Framework Decisions as they relate to fundamental rights. The report also considers advantages and concerns with the Framework Decisions from a fundamental rights perspective, and analyses the instruments' overall goals – mainly social rehabilitation (Chapter 2) and promoting alternatives to detention (Chapter 4), both of which are closely related to fundamental rights. Social rehabilitation forms part of the UN Standard Minimum Rules for the Treatment of Prisoners and also relates directly to specific fundamental rights, such as dignity and family life, but also, for example, the right to education. International human rights conventions promote alternatives to detention as more compatible with dignity and family life, but also to avoid inhuman and degrading treatment, which detention can entail. For serious crimes or certain other situations, detention – both pre- and post-trial – may be called for. But particularly for less serious crimes, it is important to consider alternatives, albeit not exclusively.

The report also explores what could be done to improve mutual trust between Member States in relation to detention and its alternatives, in terms of drawing on, enhancing and making more EU-specific existing international monitoring mechanisms. Mutual trust is a precondition for mutual recognition of judicial decisions and can be significantly enhanced by full fundamental rights compliance. Reform could also be encouraged by linking recommendations made by such monitoring bodies to available funds that could help improve detention conditions (discussed in Chapter 2).

Against this background, Chapter 3 also examines fundamental rights concerns in relation to detention, such as overpopulation and prison conditions, and touches on radicalisation in prison. Chapter 5 explores issues relating to persons in situations of vulnerability – including children, parents of young children, people with disabilities, and lesbian, gay, bisexual, trans and intersex (LGBTI) persons, in particular transgender persons. Chapter 6 analyses procedural aspects, particularly access to information and – where applicable – consent. Finally, Chapter 7 assesses whether victims' rights, as made explicit in the Victims' Rights Directive, are taken into account in the implementation and application of the Framework Decisions.

The potential fundamental rights impact of the Framework Decisions should not be underestimated. Use of the instruments could increase, which could boost the social rehabilitation of post-trial detainees by allowing them to serve time or be on conditional release closer to home. It could also encourage greater use of alternatives to detention, and even improve detention standards (e.g. by reducing overcrowding) – all with great importance for fundamental rights. This, in turn, could enhance mutual trust between Member States. If implemented and applied correctly, the instruments can benefit suspects, accused and sentenced persons and their families, but also victims of crime by, for instance, ensuring that victims are also properly informed about early releases in cross-border cases, and more generally society at large by, for instance, reducing costs for detention and facilitating social rehabilitation.

FRA Opinions

Based on its research findings, FRA has formulated opinions to offer concrete guidance on fundamental rights standards that are relevant in the context of the Framework Decision on transfer of prisoners, the Framework Decision on probation and alternative sanctions, and the Framework Decision on the European Supervision Order (ESO). Unless noted otherwise, the following FRA Opinions apply to these three Framework Decisions.

Facilitating implementation, application, and assessment of the framework decisions to improve fundamental rights compliance

The three Framework Decisions are rooted in international instruments adopted by the Council of Europe and the United Nations. More effective tools were deemed necessary for the EU's area of justice. With an increase in the number of persons detained or subjected to alternatives to detention in EU Member States other than 'their own' comes a greater need for the application of these instruments. If well-implemented and carefully applied to ensure compliance with fundamental rights, they have the potential to – for instance – boost social rehabilitation, encourage greater use of alternatives to detention, and even improve detention conditions (by reducing overpopulation). To date, the use of the instruments has been relatively limited. The three Framework Decisions were also implemented rather late by EU Member States, often several years after the respective implementation deadlines. Since December 2014, the European Commission can launch infringement proceedings with respect to these instruments.

Obstacles that delay the implementation and limit the application of the Framework Decision on the European Supervision Order are particularly problematic – especially because the instrument concerns suspected and accused persons, not persons who have been found guilty by a court of law. Pre-trial detention risks being more frequently used for suspects and accused persons from other EU Member States, given concerns that they may leave the country. This may have discriminatory effects if risk assessments are simply based on nationality. This, in turn, may influence the presumption of innocence by having persons from other Member States in detention in situations in which persons from the Member State in question would benefit from alternatives to detention. Therefore, it is vital to not only collect data and information on experiences with applying the instrument, but also on failures to apply it. This would make it possible to identify and address the reasons underlying decisions not to apply the instrument, such as the absence of appropriate alternatives to detention.

FRA Opinion 1

For proper implementation of the Framework Decision on the European Supervision Order, the EU and its Member States need to assess the instrument's non-application. This would permit the identification of obstacles to the full use of the instrument. The application of the instrument to non-nationals also requires close scrutiny to identify potential discriminatory use. Applying the European Supervision Order equitably across EU Member States would contribute to an EU system of justice that does not discriminate between persons from different EU Member States, better respects the presumption of innocence, and limits the use of pre-trial detention.

For implementation of the Framework Decisions to work well, there is a need to collect information and data on how the three instruments are being used. The information and data, in turn, are essential for assessing the performance of the instruments – including, importantly, with respect to fundamental rights. Some Member States have opted for a strong de-centralised approach by designating many courts or prosecutors' offices as 'central authorities' (one or more entities in each EU Member State charged with interaction across borders under the instruments). These entities are important for the smooth functioning of the instruments, but also serve as potential sources for pooling experiences and collecting much-needed data and information in a more uniform manner across a particular country. The manner in which central authorities operate and how many there are affect the potential for gathering experiences and could influence data collection.

FRA Opinion 2

For the practical implementation of the three Framework Decisions to work well, information on how the three instruments are being used needs to be gathered and data collection needs to be improved, standardised, and consistently used for feedback and improvements. All EU Member States should, via their central authorities, regularly collect data and information on the use of the instruments and use the data and information to map, analyse, and improve their implementation thereof. Central authorities in EU Member States should also work together to improve the consistency of such data and information collection across the EU.

Ensuring that the instruments' overall goals are maintained and upheld – for effective cross-border justice benefiting society and upholding fundamental rights

The three Framework Decisions partly share and partly have individual overarching goals. In general, the instruments seek to promote social rehabilitation and, apart from the Framework Decision on transfer of prisoners, also promote alternatives to detention, as well as the protection of crime victims and the public in general. The fundamental rights-links to these concepts include explicit provisions calling for a minimal use of detention, especially pre-trial, as well as the prohibition of torture and degrading treatment. For the pre-trial instrument, the presumption of innocence is also highly relevant. Fundamental rights linked to social rehabilitation include respect for family life, the rights of the child, as well as the right to work. The EU instruments must, as always, be applied in line with fundamental rights and international human rights standards.

FRA's findings show that a large majority of EU Member States considers fundamental rights and social rehabilitation prospects when deciding on transfers of prisoners. Family and social ties are the most important factors, followed by humanitarian concerns and detention conditions. However, the research shows that many Member States approach social rehabilitation rather narrowly, focusing merely on transferring persons to their 'home country'. Prospects for social rehabilitation should be assessed on a case-by-case basis and be taken very seriously. There is an assumption that social rehabilitation is only possible in the offender's state of nationality; this assumption runs contrary to the objectives of the Framework Decision on transfer of prisoners. This Framework Decision emphasises the need to assess whether a transfer would indeed facilitate the sentenced person's social rehabilitation. If a transfer would not do so, a state is free to refuse the transfer. Hence the Framework Decision itself does not assume that transfers to the home country always positively affect social rehabilitation. Certain factors need to be considered, such as the capacity to facilitate social rehabilitation during detention, family and social ties, linguistic and cultural ties, and place of residence after release. This also permits supporting particular fundamental rights, such as rights related to family life, work and education.

FRA Opinion 3

It should not be assumed that social rehabilitation is only possible in the offender's state of nationality. In applying the three Framework Decisions, EU Member States must remain true to the instruments' objectives, particularly social rehabilitation, and avoid simply sending persons back to 'their home country'. Social rehabilitation prospects should be assessed on a case-by-case basis, and the capacity to facilitate social rehabilitation during detention, for instance, must be considered.

The principle of mutual recognition underpinning the three Framework Decisions hinges on mutual trust – a sufficient level of confidence between Member States as to the level and quality of justice systems. When assessing fundamental rights implications, states have clear guidelines from the jurisprudence of the ECtHR and the CJEU. FRA's analysis of recent CJEU judgments in particular underscores that EU Member States are prohibited from transferring people to places where their fundamental rights will be at risk, especially their right to dignity and to freedom from inhuman and degrading conditions. It is particularly important that the individual situation in a Member State is strictly evaluated.

FRA Opinion 4

In light of international human rights and EU fundamental rights standards and jurisprudence, EU Member States are prohibited from transferring people to places where their fundamental rights will be at risk, especially their right to dignity and to freedom from inhuman and degrading conditions. It is particularly important that individual situations are strictly evaluated when the issue is raised, and when practitioners – such as judges – are required to determine detention conditions in the state to which a person is to be transferred. This is particularly true when there is objective evidence of systemic shortcomings in a given state's detention facilities.

In this context, the EU – in cooperation with the Member States – should consider making much more easily available information on detention conditions (as well as on alternatives) in all EU Member States, drawing on existing international, European, and national monitoring reports. This would include a more objective, accessible and operational information system that could also be coupled with indicators on detention conditions and benchmarks for such conditions, allowing for greater clarity on when transfers could be made without fundamental rights concerns. This would be a useful tool for judges and others who need to make decisions about detention conditions in other Member States.

Moreover, the availability of EU funds could be linked to recommendations by monitoring mechanisms – such as the European Committee on the Prevention of Torture (CPT) – on detention conditions, so as to create incentives, and realistic opportunities, for addressing identified shortcomings as a priority.

Reducing the use of detention to comply with international human rights standards, ensure rights of detainees and protect societal interests

International human rights law requires making pre-trial detention – when a suspect has not yet been found guilty – the exception rather than the rule. For example, Article 6.1 of the UN Standard Minimum Rules for Non-Custodial Measures (the so-called Tokyo Rules) refers to pre-trial detention as a means of "last resort". Similarly, Article 37 (b) of the UN Convention on the Rights of the Child provides that detention of children shall be a measure of last resort, and Article 5 of the European Convention on Human Rights (ECHR) outlines limitations on the use of detention generally. UN and European experts and expert bodies warn against the overuse of detention. Detention should be used as penalty for crimes against individuals and society, to deter potential offenders from committing crimes, and to protect victims and society.

Compared to data relating to the specific Framework Decisions covered in this study, existing data and information on detention in the EU Member States are rather good, with the Council of Europe providing particularly useful sources. Further harmonisation of categories, even such basic aspects as what constitutes pre-trial detention, would certainly still be needed to improve the quality and level of detail of the data, and, as has been stated, more could be done to make the data and information more accessible.

While the use of detention varies significantly across EU Member States, according to FRA's comparison, the average across the 28 is reasonable when compared globally. However, in several EU Member States, and to some extent in all of them, detention could and should be used less. The number of persons in detention who are from other EU Member States (and the proportion of these) logically also varies significantly across the EU. But there is a potential for greater use of the three Framework Decisions, more so in some EU Member States than in others.

According to the data analysed by FRA and the information available from international monitoring mechanisms, fundamental rights-related problems with detention in the EU include – in addition to over-use – overcrowding and poor detention conditions. This can undermine mutual trust, and also undermine a central goal of the three Framework Decisions: to enhance social rehabilitation.

FRA Opinion 5

To ensure effective implementation of the three Framework Decisions, the EU and its Member States need to take further action. Pre-trial detention must be reduced in many Member States to comply with international human rights standards and, as stated, to avoid discrimination on the basis of nationality. A general reduction of detention must also be sought to avoid overcrowding, which can lead to poor prison conditions. The interests of society in terms of the financial costs of detention and poorly rehabilitated former detainees must also be considered. To facilitate this, transfers of best practices and full use of the Framework Decisions are needed.

Increasing the use of alternatives to pre- and post-trial detention and harmonising the approach to comply with international human rights standards

As noted, two of the three Framework Decisions aim to encourage alternatives to detention. This is also emphasised by the UN Standard Minimum Rules for Non-Custodial Measures (the so-called Tokyo Rules, adopted in 1990), and by the UN Standard Minimum Rules for the Treatment of Prisoners (the so-called Nelson Mandela Rules, the revised version of which was adopted in December 2015). States should make available alternative measures for rehabilitating, monitoring and punishing suspects, accused, and sentenced persons that can equally or more effectively achieve criminal justice goals, as provided by the two Framework Decisions dealing with alternatives to detention.

As indicated, justifying a disproportionate application of pre-trial detention to citizens of other EU Member States, who may be considered as at risk of escape, can have discriminatory effects. There is also rather significant divergence among EU Member States when it comes to the types of alternatives to detention, particularly in terms of when and under what conditions they are used, both

pre-and post-trial. FRA's research shows that authorities can choose from a wide range of alternatives to detention, which can be tailored to the individual circumstances of a case to achieve the best outcome – for example, barring orders to protect victims or medical rehabilitation to treat offenders with addictions. However, these options are applied quite differently across Member States. Some states have limited sentencing options; for example, just over half of the EU Member States have the possibility of conditional sentencing, which postpones the imposition of a sentence in favour of community supervision measures. The availability of such measures offers a *de facto* second chance to offenders.

There is room for EU Member States to use alternative measures both for new and repeat offenders. All Member States offer early conditional release from prison sentences, which allows persons a chance to reform and reintegrate into society at an earlier stage. Some regimes are more restrictive than others, and most states have different rules for release from detention – for example, only for certain types of offences or after a certain period of time. The research also shows that many states have alternative sanctions with the victim in mind, including financial reparations or a formal apology from offender to victim. A more harmonised approach to, and greater use of, alternatives to detention across EU Member States would not only bring practice more in line with international human rights standards but would also facilitate applying the Framework Decisions to their full extent. All this would also reinforce mutual trust between EU Member States.

FRA Opinion 6

International and European human rights law requires that pre-trial detention is the exception rather than the rule. To ensure effective implementation of the three Framework Decisions, EU Member States should treat detention as a last resort – especially at the pre-trial stage, when suspects have not been found guilty. This will also reduce costs, improve detention conditions, and facilitate social rehabilitation. Greater use of alternatives to detention, both pre- and post-trial, must be achieved across EU Member States, with the greatest importance reasonably to be placed on the pre-trial phase.

To ensure effective implementation of the three Framework Decisions, the EU and the Member States must ensure a more harmonised approach across the EU in terms of when detention is used, what alternatives to detention are in place and when they are used, and what social rehabilitation entails. This would also reinforce mutual trust across EU Member States, which is the basis for effective mutual recognition of judicial decisions.

Taking persons in situations of vulnerability fully into account

While detention can generally have negative effects, the impact can be greater for persons in situations of vulnerability, such as children, persons with disabilities, and lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. Discrimination is only one of many risks that transgender persons, for example, face in detention. Studies show that there are also problems with insufficient medical attention and with abuse, including sexual assault. Such vulnerabilities must be given due consideration, and detention should only be used very exceptionally.

Rule 2 (2) of the UN's Nelson Mandela Rules states that "for the principle of non-discrimination to be put into practice, prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings. Measures to protect and promote the rights of prisoners with special needs are required and shall not be regarded as discriminatory." Rule 5 (2) notes that "[p]rison administrations shall make all reasonable accommodation and adjustments to ensure that prisoners with physical, mental or other disabilities have full and effective access to prison life on an equitable basis." The EU Charter of Fundamental Rights, in particular Article 21 on non-discrimination and Article 20 on equality before the law, is also essential in this context. Additionally, the 'best interests of the child' should be of primary consideration – as prescribed by, for instance, Articles 3 and 9 of the UN Convention on the Rights of the Child and the Council of Europe's *Guidelines on child-friendly justice*.

According to FRA's research findings, very few EU Member States have special provisions securing the rights of persons in situations of vulnerability in their laws implementing the Framework Decisions. However, several states have put in place particular alternatives to detention to accommodate vulnerability. For children, such measures include various forms of 'light monitoring', such as by guardians, or educational efforts. For parents with young children, the right to family life may be undermined by detentions of parents. Having children stay with detained parents is largely not a viable option, underscoring the usefulness of alternatives to detention.

The needs of persons with disabilities similarly call into question the appropriateness of detention. International human rights standards stress that alternatives should be sought, while also calling for detention facilities that appropriately accommodate persons with disabilities. Providing information to individuals in situations of vulnerability might require using special techniques, such as braille for people with visual impairments or sign language for people with speech and hearing impairments. Providing information to persons with intellectual

disabilities might require involving officers with special training or facilitators.

The Framework Decision on probation and alternative sanctions even includes provisions that permit refusing a transfer if there is insufficient capacity to accommodate the needs of a transferee. Member States offer a range of alternatives that are more appropriate than detention. The examples of issues encountered by persons in situations of vulnerability given in this report point to the need for careful consideration of appropriate measures, pre- and post-trial – in particular alternatives to detention.

FRA Opinion 7

To ensure effective implementation of the three Framework Decisions, the EU and the Member States must ensure compliance with international and European human rights law obligations, as well as the EU Charter of Fundamental Rights, regarding people in situations of vulnerability. In this context, and by way of example, rules set out in the Directive on procedural rights safeguards for children who are suspects or accused persons in criminal proceedings *and the European Commission's* Recommendation on the procedural safeguards for vulnerable suspected and accused persons who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities*, could also serve as guidance in the context of transfer proceedings.*

Setting out effective procedures by giving a role to the person concerned in the transfer process

EU Member States are still in the process of establishing relevant rules on transferring prisoners, probation orders and supervision measures under the three Framework Decisions, and clearer practices will likely emerge in future. From a fundamental rights perspective, affected persons should ideally not be treated as mere objects of transfers but instead be involved in the process to ensure that they are aware of possibilities for transfers, and that they understand the transfer process and its consequences. For instance, social rehabilitation should not be used deceptively or as an excuse to effectively 'deport' persons. Adequately involving potential transferees in the process will support the Framework Decisions' overarching goals, including social rehabilitation and, thus, societal interests. Involvement includes being properly informed about options and consequences of transfers, as well as a realistic time line for the process. This would also be in the spirit of Article 1 of the EU Charter of Fundamental Rights, which guarantees the right to human dignity.

FRA's research shows that further safeguards are needed to ensure the overall fairness of the transfer process and to achieve the overall goals of the instruments. For example, findings highlight considerable divergence among the EU Member States when it comes to informing persons potentially subjected to transfer and ways of obtaining their consent.

It is important that foreign nationals are provided with translations of essential documents and interpretation to protect their rights. Directive 2010/64/EU on the right to translation and interpretation in criminal proceedings could be used to inspire responses to such needs in the context of transfer proceedings. EU-wide guidance on information about cross-border transfer proceedings and their implications could draw on Directive 2012/13/EU on the right to information in criminal proceedings. Legal aid may also be needed, at least in particular cases.

Where consent is required, the applicable requirements need to be stricter, making sure that consent is provided based on objective facts about transfers and their consequences. Where consent is required, it would appear logical to grant a right to revoke such consent, at least during a certain period, given the very serious consequences of such consent. Additionally, for this reason, a mechanism to ensure that consent was provided in full understanding of the consequences should be introduced. Where there is no consent requirement, it would similarly be logical to include a right to appeal against transfers. The right to appeal or a right to judicial review of a decision taken by an administrative body is a well-established aspect of rule of law-based societies, and expressed in the EU Charter of Fundamental Rights (Article 47); it would also boost the instruments' credibility and overall mutual trust. Finally, the possibility, under all three decisions, for issuing states to stop transfers (withdraw certificates) at any point before actual execution/supervision has begun in executing states is important. States could make use of this option if it becomes clear that a transfer would not serve the goals of the instruments, such as social rehabilitation.

FRA Opinion 8

To ensure effective implementation of the three Framework Decisions, and to stay true to their objectives, but also to ensure compliance with the EU Charter of Fundamental Rights, in particular the right to human dignity (Article 1), the EU and the Member States need to take further action to ensure that the three Framework Decisions cannot be interpreted in a manner that sees potential transferees as mere objects of transfer. Instead, all potential transferees should be involved in the process to ensure that they are aware of possibilities for transfers, and that they understand the transfer process and its consequences. Minimum rules – which could be inspired by the EU legislation on interpretation and translation, as well as on the right to information – should be established to ensure that consent is provided based on a sufficient level of information.

Similarly, when consent is not required (possible under the Framework Decision on transfer of prisoners), it should be ensured that the information provided is adequate for a sufficient level of understanding of the process and its consequences. Additionally, where consent for transfers is required, EU Member States should explicitly allow for withdrawals of such consent within a certain time limit given the potential consequences of transfers for individuals. Member States should also consider an appropriate remedy for cases where potential transferees object to transfers. To strengthen mutual trust and, by extension, mutual recognition, Member States should apply similar rules on how to inform persons potentially subjected to transfer and how to obtain their consent or inform them about the transfer process and its consequences.

Ensuring effective protection of victims' rights

In the context of cross-border transfers of suspects, accused and sentenced persons, victims' rights to information and participation are affected. Two of the three Framework Decisions on transfers identify the protection of victims as overarching goals. Rights of victims are not explicitly mentioned in any of the three Framework Decisions. The Victims' Rights Directive – adopted three to four years after the Framework Decisions – contains relevant rules in this regard. FRA's overall findings show that, while it is not common for Member States to address victims in legislation implementing the three Framework Decisions, some states in practice do take victims into consideration and keep them informed when organising and making decisions on transfers.

While a victim's right to information on transfers of suspects or sentenced persons is not established, the right to receive information related to an offender's release or escape – including in transfer situations – stems from Article 6 (5) of the Victims' Rights Directive. Regardless of whether or not Member States have laws or practices establishing victims' right to receive information, FRA's research suggests that, in general, information is not automatically offered but is dependent on victims actively requesting the information from authorities. FRA's findings on the implementation of the Framework Decisions show that such rights are granted to victims in the post-trial phase only in a minority of Member States. However, the deadline for transposing the Victims' Rights Directive –16 November 2015 – had not passed at the time of data collection for this research, and Member States are expected to make progress in this area in the coming months and years.

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To ensure effective implementation of the three Framework Decisions, further action is needed. Recalling and building upon FRA opinions from the 2015 report on Victims of crime in the EU: the extent and nature of support for victims, *EU Member States should introduce measures ensuring that – at all stages of the criminal process, including during the post-trial phase – victims have access to information about their rights and available support services, as well as to relevant information about their cases, including post-sentencing. Member States should implement the minimum standards established in Article 6 of the Victims' Rights Directive, ensuring that victims also have a right to information, in cross-border settings through effective EU cooperation – including the right to be informed of suspects'/sentenced persons' transfers or release.*

Introduction

Criminal justice systems, with their powerful enforcement procedures, entail sensitive fundamental rights considerations. Detention is a severe form of such procedural powers, and at times is needed during pre-trial procedures to ensure that criminal investigations are not undermined. Detention, both pre- and post-trial, can also be important for the protection of victims and public safety in general. As with all kinds of power, with detention comes a great responsibility to ensure that the measure is proportionate in terms of what it seeks to achieve in relation to the restrictions placed on the rights of suspects, accused or sentenced persons. In other words, there has to be a good balance between restrictions on personal liberty and the necessities of the criminal process, with due regard to the gravity of the crime in question.

There are strong societal interests in finding such a balance:

- Suspects and accused persons should as far as possible not be detained in line with the presumption of innocence.[1]
- Sentenced persons will eventually have to be reintegrated into society; the 'social rehabilitation' process needed for such reintegration, which should start from the very beginning of detention, is facilitated by reducing the detention period.
- The costs of detention are generally much higher than alternatives to detention.
- Mutual trust in each other's justice systems among Member States is dependent on a sufficiently high 'level' or quality of the justice systems, including the conditions and application of detention.
- A well-functioning European Union (EU) justice area based on trust, in turn, is needed to accommodate the increasingly cross-border nature of crime.

The EU, while seeking to protect victims and the general public, has adopted a legal instrument promoting the reduction of pre-trial detention. It has also adopted a legal instrument on reducing detention post-trial. This post-trial instrument shares another overarching goal with a third instrument: social rehabilitation. These three instruments, adopted in 2008 and 2009, deal with transfers across EU-borders of 1) alternative measures to pre-trial detention, 2) alternative measures to post-trial detention as well as probation (conditional release), and 3) prison sentences.

The main purpose of these three Framework Decisions is arguably to avoid the need for, or facilitate, the social rehabilitation of suspects, accused or sentenced persons by permitting them to be 'closer to home'. This could be achieved with alternatives to detention in pre-trial as well as post-trial settings, by encouraging probation, or by having individuals serve their sentences in a country where they have habitual residence and other connections, such as family and friends – important elements for successful social rehabilitation.

A **Framework Decision** is the equivalent of a Directive, used before the Lisbon Treaty entered into force in 2009 in the area of police and judicial cooperation in criminal justice matters. However, Framework Decisions did not have direct effect before they were implemented and were not enforceable through the EU courts until December 2014, five years after the Lisbon Treaty entered into force. Framework Decisions had to be 'implemented' while Directives are 'transposed'.

The European Commission requested the EU Agency for Fundamental Rights (FRA) to undertake research assessing the fundamental rights implications of these three instruments. As a consequence, this FRA report explores fundamental rights implications in the practical application of the three Framework Decisions. Due regard is given to relevant standards and guidance from, in particular, the Council of Europe and the United Nations. Examples include the Council of Europe recommendations and resolutions relating to penitentiary questions[2] as well as subsequent developments of ECHR standards by the European Court of Human Rights (ECtHR), but also United Nations standards and norms in crime prevention and criminal justice.[3]

1 The presumption of innocence is subject to EU legislation, with a Directive (pre-) adopted by the Council on 12 February 2016. The instrument does not deal with detention, other than making clear that pre-trial detention in itself does not violate the presumption of innocence.

2 Council of Europe (2014), Compendium of conventions, recommendations and resolutions relating to penitentiary questions, May 2014.

3 UNODC (2006a).

The three Framework Decisions at the centre of this study are:

1. Framework Decision on transfer of prisoners[4] – providing for transfers of prison sentences to be served in other EU Member States;
2. Framework Decision on probation and alternative sanctions[5] – providing for transfers of probation measures and alternative sanctions to be supervised in other EU Member States; and
3. Framework Decision on the European Supervision Order (ESO)[6] – providing for transfers of decisions on supervision measures as alternatives to provisional detention to be supervised in other Member States.

The Framework Decision on transfer of prisoners provides for transferring sentenced persons to serve their terms in their 'home countries' or, in some circumstances, in other EU Member States. The Framework Decision on probation and alternative sanctions allows persons sentenced to non-custodial measures to have the measure imposed on them supervised in their home country. Finally, the Framework Decision on the European Supervision Order covers suspects and accused persons awaiting trial and allows for transfers of non-custodial supervision measures to other EU Member States.

The instruments should apply to everyone, regardless of whether they are EU nationals or not. They do not cover transfers to non-EU countries. Correct implementation and application of the instruments facilitates social rehabilitation of prisoners as they can serve their sentences in familiar environments in their home countries, while persons sentenced to non-custodial measures and suspects and accused people can have the measures imposed on them supervised in their home country. Additionally, non-custodial measures can be transferred to other Member States, to enable studying or working in those countries. In this aspect the Framework Decisions reflect and conform to the principles of the free movement of people and free movement of workers, and reinforce the EU area of justice.

These instruments should be seen in light of the well-established Framework Decision on the European Arrest Warrant (EAW)[7] of 2002, which at the time of adoption was rather controversial but proved to be functional and operational – although some criticism persists. The three Framework Decisions on transfer constitute a next step in strengthening mutual recognition.

Pursuant to the principle of mutual recognition, decisions made by judicial authorities in one EU Member State are recognised – and, where necessary, enforced – by entities in another EU Member State. Endorsed by the 1999 European Council meeting in Tampere, this principle has become the cornerstone of judicial cooperation in both civil and criminal matters within the EU.[8] In a nutshell, Member States accept the outcomes of each other's judicial processes, as long as EU law is applied and fundamental rights are respected. This entails some restrictions on Member States' autonomy, as EU law is to be applied without taking into consideration the practice within individual Member States. The international law principle of 'reciprocity' is thus done away with in the EU context.[9]

The three instruments differ from the EAW in that they deal with persons already brought before the justice system while the EAW considers people who knowingly or unknowingly absconded and are sought after to have them appear before a criminal tribunal. It is partly for this reason that the three Framework Decisions have to date received less media attention and less criticism. This is also due to the fact that Member States have been rather slow in their implementation (see Figure 1). Therefore, while reading the summary of findings, it should be noted that, at the time of data collection, not all Member States had implemented all three Framework Decisions; and, even if the decisions were implemented in law, relevant practice had not yet been established.

However, the Framework Decisions' potential impact should not be underestimated: reliance on these instruments could increase, and this could boost social rehabilitation, encourage greater use of alternatives to detention, and even improve detention standards – all with great importance for fundamental rights. All of this

4 Council of the European Union (2008), Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ 327, 5 December 2008 (Council Framework Decision 2008/909/JHA).

5 Council of the European Union (2008), Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16 December 2008 (Council Framework Decision 2008/947/JHA).

6 Council of the European Union (2009), 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, OJ L 294, 11 November 2009 (Council Framework Decision 2009/829/JHA).

7 Council of the European Union (2002), Council Framework Decision 2002/584/JHA of 13 June 2002, on the European Arrest Warrant and the surrender procedures between Member States, OJ L 190, 18 July 2002 (Council Framework Decision 2002/584/JHA).

8 European Council (1999).

9 CJEU, Joined Cases, C-404/15 and C-659/15 PPU, *Pál Aranyosi* and *Robert Căldăraru*, 5 April 2016, paras. 75–80.

would in turn enhance mutual trust between Member States. If implemented and applied correctly, the instruments can be of benefit to suspects, accused and sentenced persons and their families, but also to victims of crime and to society at large.

A particular EU-angle on the instruments is the possible discriminatory effects on EU citizens from other EU Member States, who may be held in pre-trial detention to prevent escape or may not be able to take advantage of family visits or leave during post-trial detention as frequently as citizens of the country in which the sentence is served. The EU has taken some steps to address these more overarching issues – for example, by soliciting views from the Member States on the desirability of legislating or taking other action on detention,[10] with follow-up to be expected.

This report aims to:

- contribute to the work of the European Commission in supporting the proper application of the three EU Framework Decisions;
- support EU Member State efforts to implement and apply the three instruments, with due attention to fundamental rights;
- allow judges, prosecutors, government agencies, and ministry personnel deciding on or supporting transfers to better take fundamental rights into consideration;
- inform decision-making by the detention and probation staff that prepares and follows up on transfers;
- support lawyers representing persons (or the persons themselves) who could potentially be transferred under the three Framework Decisions;
- provide insights that benefit civil society organisations that monitor detention conditions, support detainees, or advocate for fundamental rights – or could step up efforts in this regard.

Research objective and methodology

The main objective of this study is to explore the practical application of the three Framework Decisions – how the instruments are used in reality – with respect to fundamental rights. The research focuses on transfers of suspects, accused and sentenced persons. Detention of asylum seekers and other particular forms of detention, such as to prevent the spreading of disease and other forms of non-criminal detention, fall outside of the scope of this study.

In addition to the overarching assessment of fundamental rights implications in the application of the three Framework Decisions, this study aims to:

- examine how EU Member States have implemented and made use of the Framework Decisions in terms of fundamental rights (see Chapter 1);
- consider advantages and potential drawbacks of the Framework Decisions from a fundamental rights perspective (see Chapter 2);
- explore the risks of fundamental rights violations, including for persons in situations of vulnerability, in the practical application of the Framework Decisions (see Chapters 3 and 5);
- analyse whether the overall goals of the Framework Decisions – mainly promoting social rehabilitation (see Chapter 2) and alternatives to detention (see Chapter 4), both closely associated with fundamental rights – are achieved in practice;
- scrutinise whether affected persons are given the opportunity to 'participate' in the transfer proceedings in the sense of being aware of the possibility; being informed and made to understand the transfer process and its consequences; as well as, where applicable, consenting to the transfer (see Chapter 6);
- explore whether victims' rights as made explicit in the Victims' Rights Directive are taken into account in the implementation and application of the Framework Decisions (see Chapter 7).

The research identifies barriers to, and opportunities for, implementation in practice, with a focus on the fundamental rights of the persons concerned. It also highlights promising practices.

The research design was based on very detailed guidelines developed by FRA, formulated to capture law and practice in a comparative way from diverse systems across the EU. These guidelines were then used by FRA's contracted research teams in each of the 28 EU Member States, focusing on key fundamental rights aspects, including the nature of social rehabilitation, consent/information, and rights of victims. The data and information had a cut-off line of 1 June 2015, so the findings from the Member States cover developments up to that date – with the exception of comparative material from the Council of Europe and the EU, which is up to date as of 1 May 2016. FRA drafted this comparative report in late 2015 and early 2016, drawing on the reports from the national research teams, on analyses of international human rights law standards, EU law, and jurisprudence, as well as on additional desk research.

10 European Commission (2011a); European Commission (2011b).

The three Framework Decisions and their application in practice

The three Framework Decisions – on transfer of prisoners, probation and alternative sanctions, and on the European Supervision Order – were adopted in 2008 and 2009, with implementation deadlines of December 2011 and December 2012, respectively. However, at the time of data collection (May 2015), not all Member States had implemented the decisions. Moreover, in many states that had implemented the legislation, the instruments had not yet been applied in practice. It was thus very difficult and sometimes impossible to assess the Framework Decisions' practical implications for transfers of prisoners, probation measures and alternative sanctions.

The research teams in the EU Member States conducted desk research and occasionally consulted government officials, judges, and other professional groups involved in criminal processes to get a comprehensive picture of both law and practice. In addition, FRA conducted a preparatory consultation, including with key experts in the area, during the initial stages of the project. FRA researchers additionally had extensive conversations with practitioners and experts in around 10 EU Member States to get a more detailed and practical understanding of the situation, including problems and promising practices. This information, though not presented systematically here, did inform the drafting and the views presented in this report.

FRA attempted to capture the perspective of persons who have had their 'cases' transferred under the three Framework Decisions, but this proved difficult. When FRA conducted the research, few Member States had implemented the decisions and even fewer had actually applied them. For instance, not a single case had been completed under the European Supervision Order (only failed attempts without any transfers being completed); while there was more practical experience with the other decisions, it was limited and access proved complicated.

Interviews with transferees under the Framework Decision on transfer of prisoners

An EU-funded project led by the National Offender Management System (NOMS), an agency of the United Kingdom government, included a Bucharest University survey of transferees before and after actual transfers between EU Member States. The researchers received 88 questionnaire responses and conducted 41 interviewees. The project included interviews with Romanian prisoners held in Spain and Italy and related to possible transfers under the Framework Decision on transfer of prisoners.

All involved detainees in Italy were aware of the possibility to transfer, seemingly having been informed by staff, while less than two thirds of detainees in Spain were aware of this. The detainees' awareness of details on how transfers functioned was rather poor in both countries. Over 40 % of the detainees in Spain wanted to be transferred to be closer to their families, but apparently also to benefit from earlier release available in Romania. (Considerably fewer detainees in Italy did, possibly due to the comparative advantages of early prison release in Italy compared to Romania.) Demotivating factors for the procedure were its duration and the unpredictability of its outcome. The researchers caution that due to the selection effect of those volunteering to take part in the research, the general view towards transfers would likely be less positive.

Overall, the conclusions are that, while the Framework Decision's overarching goal is to increase social rehabilitation, detainees mainly saw the instrument as a possibility to shorten their sentence, irrespective of where or under what conditions.

Source: Prof. Ioan Durnescu, University of Bucharest; Deputy Director Esther Montero Perez de Tudela, Huelva Penitentiary Institution, Spain; and Dr. Luisa Ravagnani, University of Brescia, Prisoner transfer and the importance of 'release effect' *(article forthcoming)*

This report employs terminology that distinguishes between pre- and post-trial where needed, and applies more general terms when not. Table 1 provides an overview, and brief explanations, of terms used in this report.

Table 1: Terminology used and main equivalents

Pre-trial	Post-trial
Suspects and accused persons	Sentenced persons
Pre-trial detention	Post-trial detention
Remand prison (untried/non- convicted prisoners)	Prison (prisoners)
Preventive detention	Imprisonment
Generally (pre- and post-trial)	
Term	**Explanation**
Probation measure	Obligations and instructions imposed by a competent authority in connection with a criminal conviction
Detention (detainee)	A place of deprivation of liberty in relation to criminal investigations or sanctions (a person in detention)
Social rehabilitation	No clear definition exists, but authoritative instruments provide guidance on related concepts. The purpose of a sentence "can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration [of the persons concerned] into society upon release so that they can lead a law-abiding and self-supporting life." "Prisoners shall be allocated, to the extent possible, to prisons close to their homes or their places of social rehabilitation." Rules 4 (2) and 59 of the UN Standard Minimum Rules for Treatment of Offenders (as revised in December 2015)
Certificate	A standardised document accompanying a judgment or decision forwarded to an executing state
Double criminality	A recognition of the criminal nature of an act in both states involved
Issuing state	A state where an offence (in most circumstances) was committed and which issued a judgment/decision to be executed in another state
Executing state	A state that supervises execution of a judgment/decision forwarded from an issuing state
Specialty rule	A rule that a transferred person may only be tried or deprived of liberty in connection with offences constituting a basis for transfer and may not be tried for any previous, unspecified offences
Mutual recognition	The process of default recognition of decisions and judgments made by, for example, a court in another Member State

Source: FRA, 2016

Related research

FRA's research on the three Framework Decisions should be viewed relative to its parallel project on rights of suspects and accused persons in criminal proceedings, as well as FRA's extensive research on rights of crime victims,[11] large-scale survey on violence against women,[12] work on measuring fundamental rights performance,[13] and work on children and justice.[14] FRA has also previously conducted research on detention and alternatives, with a focus on migration.[15]

FRA's research should also be considered in the context of a number of initiatives around the EU, several of which are funded by the EU. FRA has participated in some of the network exchanges that these projects included, and benefited greatly from the stimulating discussions among practitioners, academicians, and government officials. Table 2 provides an overview of research (and training) activities that relate to one or more of the three Framework Decisions. Several of the studies are initiated and/or funded by the European Commission, such as the work by the Centre for Strategy and Evaluation Services. In this context, FRA's contribution at meetings and indeed with this report consists of adding a fundamental rights perspective, stressing existing instruments and jurisprudence, and also covering all three instruments in all 28 EU Member States.

11 FRA (2015a).
12 FRA (2014).
13 FRA (2016); FRA project (2014), *Fundamental Rights Survey*. More information is available on FRA's website.
14 FRA project (2012), *Children and Justice*. More information is available on FRA's website.
15 FRA (2015c); FRA (2010).

Table 2: Overview of recent or ongoing studies related to the Framework Decisions

Lead organisation / Project	Focus	Reference
Centre for Strategy and Evaluation Services (CSES)	A study on pre-trial detention and alternatives in EU Member States, based on desk research, focus groups and fictional case studies.	More information is available on the CSES website.
European Organisation of Prison and Correctional Services (EuroPris)/European Prison Information System (EPIS)	A project mapping the European prison systems in a database with key information.	More information is available on the EuroPris website.
EuroPris, CEP/STEPS2	Support for Transfer of European Prison Sentences towards Resettlement. A project comprising problem analysis as well as guidance for implementation and improvement of the Framework Decision on transfer of prisoners.	EuroPris (2015), STEPS2 Resettlement
EuroPris, Prisons of the Future	A project searching for alternatives to imprisonment and advising on innovative solutions for future implementation.	Prisons of the Future (2014)
Implementation Support for the Transfer of European Probation Sentences (ISTEP)	A handbook providing information to support implementation of the Framework Decision on probation and alternative sanctions, identifying obstacles and challenges and providing recommendations.	ISTEP (2013), European Handbook
Fair Trials International	A research project, involving 10 Member States, that collects data on pre-trial detention by conducting surveys and interviews, analysing judgments and court hearings, and using already existing statistical data.	Fair Trial (2014), The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making
Council of Bars and Law Societies of Europe (CCBE)	A research project drawing on the experience of defence practitioners in the EU with the implementation of Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and with surrender procedures between Member States. It outlines both critiques and best practices, and provides concrete and useful recommendations for improving legislation and implementation.	EAWRights: Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners (2016)
International Juvenile Justice Observatory	A manual based on the European project Juvenile Offenders Detention Alternative in Europe (JODA), conceived as a support instrument for an online training course.	Alternatives to Detention for Juvenile Offenders: Manual of good practices in Europe (2016)
Offender Supervision in Europe	A network comprised of 23 European countries that organises conferences, working group meetings, short-term scientific missions, and training schools for researchers on the topic of supervision of offenders.	More information is available on the network's website.
Alternatives to immigration and asylum detention in Europe	A project focusing on Recital 16 of the Return Directive and on alternatives to detention.	Odysseus Network (2015), Alternatives to immigration and asylum detention in the EU. Time for implementation

Lead organisation / Project	Focus	Reference
University of Ferrara	A project promoting the development and implementation of alternatives to detention at EU level, in collaboration with participants from Italy, Belgium, and Spain.	International project at the University of Ferrara (2014-2016), Prison Overcrowding and Alternatives to Detention
Utrecht University	A project that analyses mutual recognition between EU Member States in the field of criminal cases and to what extent fundamental rights arguments can be used to refuse transfer.	More information is available on the university's website.
Ludwig Boltzmann Institute of Human Rights, European Law Academy	A project aiming to strengthen cooperation between the judiciary and national mechanisms for improving implementation of the EAW and other mutual recognition instruments relating to detention in accordance with fundamental rights.	More information is available on the academy's website.
UK Extradition Law Committee	A debate on whether the UK should remain part of the EAW system.	Select Committee on Extradition Law (2014), First Report. The European Arrest Warrant Opt-in
Belgian Ministry of Justice	An EU-funded project focusing on implementation of the Framework Decision on probation and alternative sanctions by providing an overview of current legal systems in EU Member States.	More information is available on the project's website.
Social Rehabilitation	A project executed by Romania, concerning mutual learning, exchange of good practices, and cooperation in relation to social integration of sentenced persons.	Social reintegration of sentenced persons: a comprehensive European approach (2015)

Note: *A range of additional projects focus on the more well-known Framework Decision: the European Arrest Warrant (Council Framework Decision 2002/584/JHA).*

Source: *FRA, 2016*

This research also adds to existing initiatives as it explores the implications of cross-border transfers of prisoners and alternatives to pre- and post-trial detention. None of the aforementioned studies focus on all three Framework Decisions or aim to examine the potential risks and benefits of their practical implementation from a fundamental rights perspective.

1 EU instruments: The Framework Decisions

- This chapter introduces the three Framework Decisions – on transfer of prisoners, probation and alternative sanctions, and the ESO.
- It also outlines the broader context in which these instruments developed.
- The chapter also explores data collection and gathering of experience related to the instruments.

This report addresses fundamental rights questions related to the three Framework Decisions. The decisions refer to fundamental rights only generally – they do not refer to any specific fundamental rights of persons affected, i.e. suspects, accused, sentenced persons or victims of crime. However, they do confirm that Member States are obliged to comply with fundamental rights standards (see Chapter 2). The instruments do not operate in a legal vacuum and should be seen in the context of applicable human rights standards, such as the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights (ECHR), the UN Convention on the Rights of the Child, and the Victims' Rights Directive. EU Member States are bound by these instruments, and the rights enshrined therein should be ensured even if the Framework Decisions do not specifically mention them.

The three Framework Decisions dealt with in this report are presented schematically in Table 3, showing the full titles and short names, dates of adoption and implementation, and the number of EU Member States to which they apply.

1.1. Functioning and implementation of the Framework Decisions

The Framework Decisions are intended to be more effective than preceding inter-governmental agreements by drawing on the principle of mutual recognition and the fact that all Member States are participating. To expedite the transfer process, the three Framework Decisions set clear time limits and standardised procedures.

The process that the three Framework Decisions seek to regulate can schematically be described as follows (see Figure 1): A crime has been committed in an EU Member State. However, pursuant to these instruments, the suspect, accused or sentenced person can have their sentence executed, or the measure imposed on them supervised, in another EU Member State in order to permit them to be in a country in which they have closer family or work/study connections. The state in which the criminal proceedings were instituted becomes the 'issuing state' if it issues a mutual recognition decision. The issuing state forwards the decision to what then becomes the 'executing state'.[16] If the executing state recognises the decision, it takes on the responsibilities of the issuing state for the execution of the sentence or the supervision of the measure concerned. A possibility to return someone is provided for only under the European Supervision Order; specifically, if a suspect or accused person breaches the supervision requirements, the executing state may return the person to the issuing state.

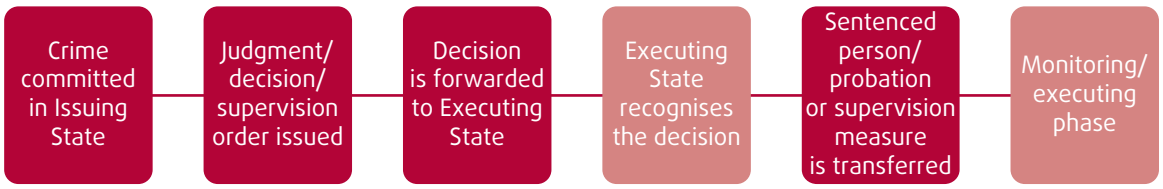
16 Council Framework Decision 2008/909/JHA, Art. 1 (d); Council Framework Decision 2008/947/JHA, Art. 2 (9); Council Framework Decision 2009/829/JHA, Art. 4 (d).

Table 3: Overview of the three Framework Decisions – basic facts

Short name	Transfer of prisoners	Probation and alternative sanctions	European Supervision Order (ESO)
Full title	Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union	Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions	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
Reference	2008/909/JHA	2008/947/JHA	2009/829/JHA
Date of adoption	27 November 2008	27 November 2008	23 October 2009
Deadline for implementation	5 December 2011	6 December 2011	1 December 2012
Full name (emphasis added)	"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"	"on the application of the principle of **mutual recognition** to judgments and **probation decisions** with a view to the supervision of probation measures and **alternative sanctions**"	"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**"
Applicable to EU Member States	28	27 (UK not taking part)	28

Source: FRA, 2016

Figure 1: Main stages of mutual recognition and transfer of measure and roles of issuing and executing state

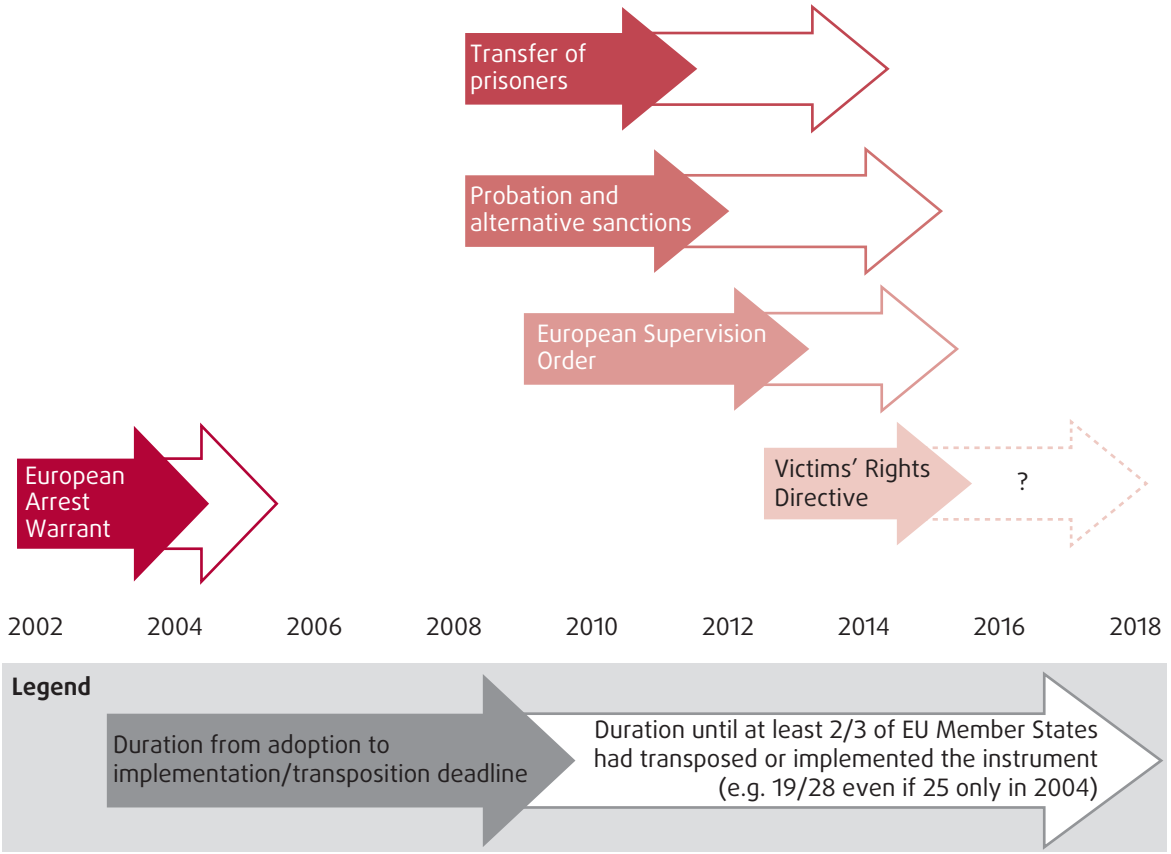


Source: FRA, 2016

Fulfilling the potential of the three Framework Decisions requires proper and effective implementation into national legislation. However, according to the European Commission's February 2014 implementation assessment, many Member States had not implemented these Framework Decisions – although the respective deadlines had passed (5 December 2011 for the Framework Decision on the transfer of prisoners, 6 December 2011 for the Framework Decision on probation and alternative sanctions, and 1 December 2012 for the Framework Decision on the ESO).[17] Figure 2 provides an overview of the implementation timelines for the three Framework Decisions, the related European Arrest Warrant, and the Victims' Rights Directive, which is also of relevance.

17 European Commission (2014).

Figure 2: Overview of the three Framework Decisions, the European Arrest Warrant and the Victims' Rights Directive: duration from adoption to deadline for implementation/transposition as well as duration until at least 2/3 of EU Member States implemented/transposed the respective instrument



Source: *FRA, 2016*

There have been significant developments since the Commission's 2014 implementation assessment, with only a handful or fewer Member States not yet having formally implemented the instruments. The European Judicial Network provides updated information online on the status of implementation.[18] As of 1 May 2016, Bulgaria and Ireland had not fully implemented the Framework Decision on transfer of prisoners (implementation processes are ongoing in both countries). For the Framework Decision on probation and alternative sanctions, only Ireland had not completed implementation, but this is pending (the United Kingdom is not taking part). Twenty-three EU Member States had implemented the Framework Decision on the ESO, with an additional three (Cyprus, Ireland, and Luxembourg) being in the process of implementation and two (Belgium and Bulgaria) having yet to implement it.

According to the European Commission, wide variations exist in the transposition of some of the provisions, such as those related to the role of the person concerned in the transfer process, the principle that sentences should not be adapted in the executing state, and the application of grounds for refusal. For example, some Member States have added additional grounds based on which executing states are to refuse transfers. Adding grounds for refusal and making these mandatory seems to be contrary both to the letter and spirit of the Framework Decisions.[19]

EU Member States have also issued declarations regarding some provisions of the decisions. The Framework Decision on transfer of prisoners in Article 7 (1) on double criminality lists offences that must be recognised by executing states without verification of double criminality; this will not be applied by Austria, the Czech Republic, France, Hungary, Ireland, Lithuania, Poland, Romania, and Slovenia. Some EU Member States have also declared that the decisions will only be applicable to judgments issued after the date of entry into force or the date of implementation. With regard to the Framework Decision on the ESO, Lithuania, Poland and

18 European Judicial Network (EJN), Judicial Library.

19 European Commission (2014), p. 10.

Romania will not apply Article 14 (1) on double criminality.[20] However, not recognising the double criminality provisions is not expected to lead to any fundamental rights concerns.

The following sections provide brief overviews of the three Framework Decisions. The subsequent sections discuss how experiences are pooled and processes are analysed in Member States, and address promising practices.

1.2. Framework Decision on transfer of prisoners

Table 4: Overview of Framework Decision on transfer of prisoners

Full title	Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union
Deadline for implementation	5 December 2011
Full name (emphasis added)	"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"
Applicable to number of EU Member States	28

Source: *FRA, 2016*

As regards transfers of prisoners between the 28 EU Member States, the Framework Decision on transfer of prisoners is designed to replace the procedure for transferring prisoners under the 1983 Council of Europe Convention on the Transfer of Sentenced Persons and the Convention Implementing the Schengen Agreement provisions on matters relating to transfers between EU Member States. Its underlying purpose is the social rehabilitation of sentenced persons (see Table 4).[21]

The Framework Decision provides for a faster and more streamlined procedure[22] than the Council of Europe instruments. The sentencing state forwards a judgment to the Member State to which it wishes to transfer the sentenced person, accompanied by a standardised certificate[23] that includes the reasons for the transfer.

Article 6 of the Framework Decision restricts defendants' possibility to oppose transfers (a veto is provided for in the 1983 Convention). Although sentenced persons are allowed to state their opinion, their consent is not required in the following situations:

- the person is a national of the executing state and also lives there;
- the person would be deported to the executing state on completion of their sentence; or
- the person has fled or otherwise returned there in response to the pending criminal proceedings or his/her conviction.[24]

The Framework Decision on transfer of prisoners also contains the following central elements:

- Double criminality: Article 7 lists 32 offences that give rise to recognition of the judgment without verification of the double criminality, provided they are punishable in the issuing state.
- The 'specialty rule': Article 18 provides that sentenced persons who have been transferred must not be prosecuted, sentenced or otherwise deprived of their liberty for an offence committed before their transfer other than that for which they were transferred.
- Grounds for refusal of transfer: Article 9 includes a number of technical grounds as well as, for instance, double jeopardy (*ne bis in idem*).
- The Framework Decision sets a time limit of 90 days for the potential executing state to decide on a transfer – in contrast to the Council of Europe's 1983 European Convention on the Transfer of Sentenced Persons, which did not include a procedural time limit, an element that significantly curtailed its effectiveness.

20 Council of the European Union (2015), Implementation of Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, 5859/15 COPEN 25 EUROJUST 22 EJN 9, 3 February 2015.

21 Council Framework Decision 2008/909/JHA, Art. 3 (1).
22 Library of the European Parliament (2013), p. 3.
23 Council Framework Decision 2008/909/JHA, Annex I.
24 *Ibid.*, Art. 6 (2).

e-Learning platform on the Framework Decision on transfer of prisoners

The European Organisation of Prison and Correctional Services (EuroPris) has created an 'e-learning platform' on the Framework Decision on transfer of prisoners. The platform was designed to assist decision-makers responsible for transferring the execution of custodial sentences.

The tool explains the Framework Decision's objectives and basic principles and guides users through the entire process of a transfer, including composing and evaluating a certificate. The tool is more interactive than a webpage and allows users to take quick, multiple-choice tests to assess how well they know the Framework Decision. The tool also has a map that display tips from national decision-makers, providing more jurisdiction-specific information.

The platform is currently available in English and Spanish.

Source: Steps 2, EuroPris

1.3. Framework Decision on probation and alternative sanctions

Table 5: Overview of Framework Decision on probation and alternative sanctions

Full title	Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions
Deadline for implementation	6 December 2011
Full name (emphasis added)	"on the application of the principle of **mutual recognition** to judgments and **probation decisions** with a view to the supervision of probation measures and **alternative sanctions**"
Applicable to number of EU Member States	27 (UK not taking part)

Source: FRA, 2016

The Framework Decision on probation and alternative sanctions[25] applies to post-trial situations in which a non-custodial punishment has been imposed or release on parole has been granted in one Member State, and these measures are transferred to another Member State for supervision. The Framework Decision facilitates recognition of these types of measures between Member States, with the goal of facilitating rehabilitation by allowing offenders to serve their sentences in an environment in which they have the strongest social and cultural connections and support or where they wish to work or study (see Table 5).[26]

The Framework Decision on probation and alternative sanctions enables Member States to transfer a probation measure or a sanction alternative to detention to another Member State, in which it will be monitored. The decision applies to the following measures:

- conditional releases following probation decisions;
- suspended sentences;
- conditional sentences;
- alternative sanctions.

The decision does not apply to judgments involving deprivations of liberty. Measures that offer alternatives to pre-trial detention are dealt with by a parallel instrument, the Framework Decision on the ESO, which allows Member States to transfer the supervision of suspects or accused persons during criminal investigations and proceedings.

The rationale behind the Framework Decision on probation and alternative sanctions is identical to that of the 1964 Council of Europe Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders:[27] to facilitate the social reintegration of sentenced persons by allowing the measure imposed on them to be supervised in the state with which they have the closest ties. The Framework Decision provides for the following procedure: the issuing state forwards a judgment and, when applicable, a probation decision together with a standardised certificate. It is then for the executing state to recognize the judgment or the decision, and from this moment on, the executing state is responsible for supervising the probation measures or alternative sanctions. If needed, the executing state can adapt the measure in line with domestic provisions regarding similar offences; however, the measure should not be rendered more severe.[28] The Framework Decision also provides for grounds for refusing recognition and supervision, which will be discussed in detail in Chapter 2.[29]

25 Council Framework Decision 2008/947/JHA.

26 Council Framework Decision 2008/947/JHA, Art. 1 (1).
27 Council of Europe, European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, CETS No. 51, 1964.
28 Council Framework Decision 2008/947/JHA, Art. 9 (3).
29 *Ibid.*, Art. 11.

Although the Framework Decision recognises, in Recital 13, that individualized decisions on transferring supervision are of fundamental importance, the role of sentenced persons is limited. The instrument simply refers to the sentenced person's "wish to return" and assumes such wish exists when a sentenced person has returned to their state of residence.[30] This implies that the sentenced person's consent is not required. However, sentenced persons can request transfers to a state other than a state of residence. Such transfers depend on the request of the sentenced person and the consent of that state.

1.4. Framework Decision on the European Supervision Order

Table 6: Overview of Framework Decision on the ESO

Full title	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
Deadline for implementation	1 December 2012
Full name (emphasis added)	"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**"
Applicable to number of EU Member States	28

Source: *FRA, 2016*

The Framework Decision on the European Supervision Order (ESO) enables Member States to transfer to another Member State the supervision of pre-trial measures alternative to detention. This allows suspects or accused persons to await trial in the Member State in which they reside or work/study and have the measures that were imposed on them supervised there.

One of the Framework Decision's objectives is the "promotion, where appropriate, of the use of non-custodial measures as an alternative to provisional detention" (Recital 4). Mutual recognition of pre-trial orders is also important because of the risk of different treatment between residents and non-residents, with the decision pointing out that non-residents run a higher risk of being remanded in custody pending trial than nationals in similar circumstances (Recital 5).

The basic principle is that one Member State recognises a decision on supervision measures issued in another Member State, monitors it and surrenders a suspect in case of a breach of these measures (Article 1).

The decision contains a list of supervision measures to which it applies (Article 8 (1)):

1. Obligations to inform authorities about any change of residence;
2. Obligations not to enter certain places;
3. Obligations to remain at a specific place;
4. Obligations containing limitations on leaving the state territory;
5. Obligations to report to authorities;
6. Obligations to avoid contact with specific persons.

Member States can also monitor additional measures and are supposed to notify the General Secretariat of the Council if they are prepared to do so (Article 8(2)).

The operational mechanism of the Framework Decision is as follows: following mutual consultations, the issuing state forwards a decision on supervision to the executing state, in which the measure will be monitored. The executing state might be the suspect's state of habitual residency, provided that the suspect has consented; or any other Member State, provided that the suspect has requested that state and the state has consented. The judgment must be accompanied by a certificate that follows the standard format set out in the Annex to the Framework Decision (Article 10). The monitoring in the executing state begins after the competent authority recognises the decision and informs the competent authority of the issuing state. The time limit for recognition is set as 20 working days after receipt of the decision with certificate and can be extended by another 20 days in case of introduction of a legal remedy (Article 12).

The competent authority in the executing state may adapt the supervision measures under domestic law to be in line with measures normally applicable to similar offences. However, the adapted measure should not be more severe than the original one (Article 13).

The Framework Decision lists 32 offences that give rise to recognition of the decision on supervision measures

30 *Ibid.*, Art. 5 (1).

without verification of the act's double criminality; other categories of offences can be added under certain circumstances. Additionally, the executing state can recognise measures related to other offences if they are criminalised in that state (Article 14). The Framework Decision also leaves the opportunity for the non-recognition of measures (Article 15).

Following recognition, the domestic law in the executing state applies to the monitoring of the measure (Article 16). However, it is for the competent authority in the issuing state to decide about renewal, review, withdrawal and modification of the measure as well as about issuing an arrest warrant. If an arrest warrant has been issued, the executing state should surrender a person in accordance with the Framework Decision on the European Arrest Warrant (Articles 18 and 21). The authorities in both states should remain in contact and information concerning – for example – a breach of a measure should immediately be forwarded to the issuing state. Similarly, information about any modification of a measure should immediately be forwarded to the executing state (Article 19).

1.5. Council of Europe and United Nations building blocks

The three instruments, in particular the two concerned with post-trial measures, build on and relate to work under the auspices of the Council of Europe and the United Nations. The Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983, a precursor to the EU Framework Decision on transfer of prisoners, establishes that sentenced persons may be transferred only to their state of nationality and only with their consent and that of the states involved.[31] The convention does not oblige states to co-operate, but only provides a framework should both states wish to initiate a transfer.[32] The Additional Protocol to the Convention of 18 December 1997 provides for two instances when consent of the sentenced person is not required: when the person has fled the sentencing state to go to the state of nationality, and when the person is subject to expulsion or deportation as a consequence of the sentence.[33] Although these instruments have been ratified by the majority of Council of Europe member states, their success rate is relatively low, with only around half of the requests by a state for transfer – or even less – leading to an effective transfer.[34]

The Schengen members decided to overcome the difficulties in applying these instruments by introducing the notion of "forced transfer" in the 1990 Convention Implementing the Schengen Agreement (CISA).[35] Consent is accordingly not necessary if the person has deliberately sought to frustrate the judicial process by fleeing from justice or in case the sentence includes expulsion or deportation once the sentence is completed. Even though the CISA Convention was initially formulated outside the Community legal framework, the Amsterdam Treaty integrated the Schengen legislation into the EU framework.[36]

On the occasion of the 30th anniversary (2013) of the 1983 Convention, the Council of Europe Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC) devoted a special session to the functioning of this convention and its protocol, which concluded that there was a need to improve the functioning of both instruments.[37]

Furthermore, the Parliamentary Assembly of the Council of Europe (PACE) adopted on 18 November 2014 a report with recommendations to prevent abusive use of Article 12 of the Convention on the Transfer of Sentenced Persons, which recognises that state parties have a sovereign right to grant pardons and amnesties to persons sentenced to imprisonment.[38] PACE underscored the importance of applying the convention in good faith and, in interpreting its provisions, adhering to the principles of the rule of law, in particular in transfer cases that might have political or diplomatic implications.

In addition, the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders[39] of 30 November 1964, another Council of Europe treaty, focusses on the mutual assistance necessary for the social rehabilitation of offenders given suspended sentences or released conditionally. However, only 13 EU Member States are parties (Austria, Belgium, Croatia, the Czech Republic, Estonia, France, Italy, Luxembourg, the Netherlands, Portugal, Slovakia, Slovenia and Sweden) with, in some cases, numerous

31 Council of Europe, Convention on the transfer of sentenced persons, CETS No. 112, 1983.
32 Klip, A. (2012), p. 414.
33 Council of Europe, Additional protocol to the convention on the transfer of sentenced persons, CETS No. 167, 1997.
34 Goeth-Flemmich, B. (2013), p. 10.
35 Official Journal of the European Union (2000), The Schengen acquis as referred to in Article 1 (2) of Council Decision 1999/435/EC of 20 May 1999, OJ L 239, 22 September 2000, Chapter 5, Art. 68 and 69.
36 Library of the European Parliament (2013), p. 3.
37 Council of Europe, Special session on the transfer of sentenced persons, ETS 112 and 167, 27 November 2013.
38 Council of Europe, Parliamentary Assembly (PACE) (2014), Resolution 2022 (2014) on the measures to prevent abusive use of the Convention on the Transfer of Sentenced Persons (ETS No. 112), 18 November 2014.
39 Council of Europe, European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, ETS No. 51, 30 November 1964.

reservations (see Recital 4 of the Framework Decision on probation and alternative sanctions).[40]

Moreover, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted a Model Agreement on the Transfer of Foreign Prisoners and recommendations on the treatment of foreign prisoners in 1985.[41] In the Model Agreement, transfer is also based on a system of mutual respect for national sovereignty and jurisdiction and on the consent of the sentenced person. Although only providing a 'template' for both bilateral and multilateral agreements, it shows the global community's commitment to fostering such practice. In 2012, the UNODC published a Handbook on the International Transfer of Sentenced Persons.[42]

Also at the United Nations level, the Convention against Transnational Organized Crime[43] and the Convention against Corruption[44] explicitly refer to the possibility for state parties to enter into bilateral or multilateral agreements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty. The EU itself is party to the two conventions (since 2004 and 2008, respectively).

1.6. Gathering experiences and collecting data

All three Framework Decisions require designating a central authority to act as point of contact for incoming and outgoing requests for transfers.[45] States are to inform the General Secretariat of the Council which authorities are competent to act under the Framework Decision.

Pursuant to the Framework Decisions, central authorities are established to coordinate transfers and mutual recognition of decisions and to act as national points of contact in these matters. They have a duty to communicate with each other and to engage in information exchanges for the smooth operation of the Framework Decisions. Central authorities shall exchange information on suspects, their compliance with supervision measures, their criminal records, and changes in their circumstances. Research shows that, in general, states rely on courts, the Ministry of Justice, the police, prison and probation services, and diplomatic missions.

40 Four other EU Member States have also signed the convention. Among the non-EU Member States, there are 6 additional state parties and one state that has only signed.
41 UN, Office on Drugs and Crime (UNODC) (1985).
42 UNODC (2012).
43 United Nations (UN), Convention against transnational organized crime (*Palermo Convention*), 15 November 2000, Art. 17.
44 UN, Convention against corruption, 31 October 2003, Art. 45.
45 Council Framework Decision 2008/909/JHA, Art. 2; Council Framework Decision 2008/947/JHA, Art. 3; Council Framework Decision 2009/829/JHA, Art. 6.

Judicial Atlas

The European Judicial Network has an interactive web tool to facilitate judicial cooperation. The Judicial Atlas allows users to identify the locally competent authority that can receive a request for judicial cooperation and provides a fast and efficient channel for the direct transmission of requests regarding a selected measure. The tool offers information on all 28 Member States, candidate countries and associated European countries. The site also offers information on the three Framework Decisions, as well as on other European instruments on judicial cooperation.

Source: European Judicial Network, Judicial Atlas

According to FRA's findings, 14 Member States[46] collect information about their experiences with transfers through the Framework Decision on transfer of prisoners. 12 Member States[47] do not gather information on such transfers. No information was available from Malta and Sweden.

When one turns to the Framework Decision on probation and alternative sanctions and the Framework Decision on the ESO, the extent of information collected by Member States' competent authorities drops: 17 and 19 Member States do not provide for the compilation of transfer-related information, respectively.

FRA's findings also show that only a few competent national authorities collate personal data, or at least only few of them are required to do so on a legal basis: eight Member States for the Framework Decision on the transfer of prisoners, five for the Framework Decision on probation and alternative sanctions, and none for the Framework Decision on the ESO. This could be problematic because data on individual cases are necessary for the overall improvement of national mechanisms for accessing treatment and assistance. Privacy safeguards must certainly also be in place to rule out incorrect usage of the data.

Promising practices in Member States

The Framework Decisions have not been frequently utilised and practical examples of activities that go beyond the standard operational procedure of institutional collaboration are therefore rather modest. Out of the 28 Member States, FRA identified six[48] with

46 Austria, Belgium, Croatia, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, Poland, Portugal and the United Kingdom.
47 Bulgaria, Cyprus, the Czech Republic, Greece, Hungary, Italy, Luxembourg, the Netherlands, Romania, Slovakia, Slovenia and Spain.
48 Poland, Portugal, Romania, Slovakia, Slovenia and the United Kingdom.

examples of best practices in relation to the availability of information on the Framework Decisions. Additional promising practices are described throughout this report. The following three examples are highlighted as transferable promising practices.

In Ireland,[49] the Probation Service has an 'international desk' to deal with transfers of sentenced persons subject to probation or other supervision orders and other requests. For both inward and outward transfers, the sentenced person can seek assistance by contacting the 'international desk' through their assigned probation officer. It is then up to the probation services of the two countries involved to liaise regarding the transfer application. If a translator or interpreter is required to complete the procedure, this is provided by the court. The authorities, if in agreement, will then come to an informal arrangement for carrying out the order in the other jurisdiction.

As far as inward transfers are concerned, the Probation Service in Ireland shall undergo relevant inquiries, including with the family of the sentenced person to assess familial and other connections. The Probation Service also tries to assign someone to the sentenced person to ensure that they have adequate support on arrival. Sometimes no direct equivalent community sanction is available in Ireland – for example, Ireland does not impose electronic monitoring, something which is common in England and Wales. However, a pragmatic and constructive approach is taken in these cases, with a coherent – though not identical – sentence agreed on. This may require the agreement of the sentencing court in the issuing state.

In Ireland, when a case is prepared, the key questions asked in both inward and outward transfers are:

- Do they have a base in the country to which they are to be transferred?
- Do they have family support in the country to which they are to be transferred?
- Is it in their best interests to be transferred? (including humanitarian concerns)
- How will it affect their rehabilitation?
- Are there any significant risks or dangers?

In Poland there is a noteworthy practice of a purely informative nature: the prison service provides a compendium. It aims to help detainees understand their rights and to increase their awareness of the rules governing the execution of their sentence by providing information in a more practical and standardised manner. The compendium is a source of practical information regarding the process of transferring prison sentences abroad. It also describes the rules governing early conditional releases and prison furloughs in Poland. The information is provided in eight languages. The compendium is available on the website of the Prison Service Board and in the penitentiary facilities.[50]

To enhance cooperation regarding sentenced persons between Germany and the Czech Republic and Poland, specific contact points have been established. Two "European Contact Points" exist in the Polish-German and the Czech-German border regions; they provide help with organizing and supervising community service in the respective home countries of the sentenced offenders.[51] As for the contact point at the Polish-German border, the European Union has funded a cooperative mechanism with the purpose of organizing and supervising community services in the respective home countries of the sentenced offenders. Once a week, a representative of a legal assistance organization runs consultations for Polish citizens who have been in conflict with German law. The center also plays a mediatory role between victims and perpetrators.

In the United Kingdom, an online tool, 'Tracks',[52] is designed to help foreign national prisoners and professionals working with foreign national prisoners to plan for their resettlement upon release. The project is commissioned by the National Offender Management Service of the United Kingdom (NOMS), and designed and maintained by Praxis,[53] a migrant advice NGO based in London. It serves as an important informational resource for prison and probation staff on a wide range of issues related to this prisoner group, and aims to assist them in their work on resettling foreign national prisoners abroad in the context of deportations and prison transfers. It was launched in January 2015. Prison and probation staff can access 'Tracks'' via internet-enabled terminals and on stand-alone computers using a 'Tracks' CD. Foreign national prisoners can use the 'Tracks' toolkit themselves, or assisted by 'mentors', other prisoners, or prison staff on stand-alone computers using the 'Tracks' CD.

In Finland, the authorities charged with transfers of prisoners have developed handbooks to provide guidance on, and encourage, transfers.[54]

49 Although Ireland is still in the process of implementing the Framework Decisions, it has a standard operating procedure worth outlining as a transferable good practice.

50 Arabic, Bulgarian, English, French, German, Polish, Romanian and Russian.

51 Germany, *Europäische Beratungsstelle für Straffälligen- und Opferhilfe* (EBS). More information is available on the website of the *Sächsischer Landesverband für soziale Rechtspflege e.V.*

52 More information is available on the organisation's website.

53 More information is available on the organisation's website.

54 The National Prosecutor's Office has published three handbooks targeting prosecutors, one for each of the three Framework Decisions covered in this report (information provided to FRA by representatives of the relevant authorities in Finland). Similarly, in the European Economic Area-state Norway, a handbook was developed with an EU Member State to which the potential for transfers of prisoners is great (information provided to FRA by representatives of the relevant authorities in Norway).

Conclusion and FRA Opinions

The three Framework Decisions are rooted in international instruments adopted by the Council of Europe and the United Nations. More effective tools were deemed necessary for the EU's area of justice. With an increase in the number of persons detained or subjected to alternatives to detention in EU Member States other than 'their own' comes a greater need for the application of these instruments. If well-implemented and carefully applied to ensure compliance with fundamental rights, they have the potential to – for instance – boost social rehabilitation, encourage greater use of alternatives to detention, and even improve detention conditions (by reducing overpopulation). To date, the use of the instruments has been relatively limited. The three Framework Decisions were also implemented rather late by EU Member States, often several years after the respective implementation deadlines. Since December 2014, the European Commission can launch infringement proceedings with respect to these instruments.

Obstacles that delay the implementation and limit the application of the Framework Decision on the ESO are particularly problematic – especially because the instrument concerns suspected and accused persons, not persons who have been found guilty by a court of law. Pre-trial detention risks being more frequently used for suspects and accused persons from other EU Member States, given concerns that they may leave the country. This may have discriminatory effects if risk assessments are simply based on nationality. This, in turn, may influence the presumption of innocence by having persons from other Member States in detention in situations in which persons from the Member State in question would benefit from alternatives to detention. Therefore, it is vital to not only collect data and information on experiences with applying the instrument, but also on failures to apply it. This would make it possible to identify and address the reasons underlying decisions not to apply the instrument, such as the absence of appropriate alternatives to detention.

FRA Opinion 1

For proper implementation of the Framework Decision on the European Supervision Order, the EU and its Member States need to assess the instrument's non-application. This would permit the identification of obstacles to the full use of the instrument. The application of the instrument to non-nationals also requires close scrutiny to identify potential discriminatory use. Applying the European Supervision Order equitably across EU Member States would contribute to an EU system of justice that does not discriminate between persons from different EU Member States, better respects the presumption of innocence, and limits the use of pre-trial detention.

For implementation of the Framework Decisions to work well, there is a need to collect information and data on how the three instruments are being used. The information and data, in turn, are essential for assessing the performance of the instruments – including, importantly, with respect to fundamental rights. Some Member States have opted for a strong de-centralised approach by designating many courts or prosecutors' offices as 'central authorities' (one or more entities in each EU Member State charged with interaction across borders under the instruments). These entities are important for the smooth functioning of the instruments, but also serve as potential sources for pooling experiences and collecting much-needed data and information in a more uniform manner across a particular country. The manner in which central authorities operate and how many there are affect the potential for gathering experiences and could influence data collection.

FRA Opinion 2

For the practical implementation of the three Framework Decisions to work well, information on how the three instruments are being used needs to be gathered and data collection needs to be improved, standardised, and consistently used for feedback and improvements. All EU Member States should, via their central authorities, regularly collect data and information on the use of the instruments and use the data and information to map, analyse, and improve their implementation thereof. Central authorities in EU Member States should also work together to improve the consistency of such data and information collection across the EU.

2 Overall goals and fundamental rights

- This chapter focuses on the role of fundamental rights in decisions to transfer suspected, accused or sentenced persons between EU Member States.
- It discusses fundamental rights standards and refusal grounds.
- This chapter also provides a vision for improved mutual recognition.

The three Framework Decisions, as mutual recognition instruments, seek to contribute to the European area of justice by making cross-border justice more efficient and strive towards a more coherent system that treats persons more similarly, irrespective of where they are from and where actions are taken. The instruments also have overarching goals (see Table 7). The two post-trial instruments aim to facilitate social rehabilitation. This is to be achieved by having persons serve their sentences, or having suitable alternatives to detention (probation measures) supervised, 'closer to home'. The Framework Decision on probation and alternative sanctions also aims to improve the protection of victims and the general public while encouraging suitable alternatives to detention. Finally, the Framework Decision on the ESO seeks to ensure justice while encouraging alternatives to detention (non-custodial measures) for individuals suspected or accused in an EU Member State other than their own.

Like the Framework Decision on probation and alternative sanctions, the ESO also aspires to protect victims and the general public. Recital 3 clarifies that this should be achieved by "the monitoring of a defendants' movements in the light of the overriding objective of protecting the general public and the risk posed to the public by the existing regime, which provides only two alternatives: provisional detention or unsupervised movement. The measures will therefore give further effect to the right of law-abiding citizens to live in safety and security." Recital 4 further elaborates that the aim is also to "enhanc[e] the right to liberty and the presumption of

Table 7: Overall aims of the three Framework Decisions

Short name	Transfer of prisoners	Probation and alternative sanctions	European Supervision Order (ESO)
Aim (emphasis added)	Art. 3 (1): "The purpose [...] is to establish the rules under which a Member State, with a view to facilitating the **social rehabilitation** of the sentenced person, is to recognise a judgment and enforce the sentence."	Art. 1: "This [...] aims at facilitating the **social rehabilitation** of sentenced persons, improving the **protection of victims** and of the general public, and facilitating the application of **suitable probation measures** an alternative sanctions, in case of offenders who do not live in the State of conviction."	Art. 2 "Objectives [are] (a) to ensure the due course of justice [...]; (b) to promote, [...] **non-custodial measures** for persons who are not resident in the Member State where the proceedings are taking place; (c) to **improve the protection of victims and of the general public.**" Recitals 3 and 4 elaborate on the cited objectives.

Source: FRA, 2016

innocence in the European Union [...]. As a consequence, the present Framework Decision has as its objective the promotion, where appropriate, of the use of non-custodial measures as an alternative to provisional detention."

It is thus clear that, in general, the instruments seek to promote social rehabilitation – the ESO by not depriving anyone of their liberty in the first place, avoiding the need for rehabilitation – and apart from the Framework Decision on transfer of prisoners, also promote alternatives to detention, in addition to the protection of crime victims and the general public. Social rehabilitation is of great importance for individuals to adjust to life back in liberty. But it is also of great importance to society in that it seeks to reintegrate sentenced persons into society. Social rehabilitation is therefore important for the criminal justice system and its capacity to reduce recidivism, but also because it helps society avoid the financial costs associated with prosecuting repeat offenders.

Promoting alternatives to detention has a clear fundamental rights-basis – not only the provisions explicitly calling for minimising the use of detention, especially pre-trial, but also the prohibition of torture and degrading treatment. For the pre-trial instrument, the presumption of innocence is also highly relevant. The link between social rehabilitation and fundamental rights may be less apparent, but the respect for family life and the rights of the child (for children to see their parents) play a role.

The three Framework Decisions do not explicitly grant any specific fundamental rights. They do refer to fundamental rights generally in the operative provisions,

Table 8: References to fundamental rights in the three Framework Decisions

	Transfer of prisoners	Probation and alternative sanctions	European Supervision Order (ESO)
Article on fundamental rights (identical)	3 (4) "This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU]."	1 (4) "This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU]."	5 "This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU]."
Recital on fundamental rights (differences in bold)	(13) "This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 [TEU] and reflected by the [Charter], **in particular Chapter VI thereof**. Nothing in this Framework Decision should be interpreted as prohibiting refusal **to execute a decision when there** are objective reasons to believe that the **sentence** was imposed for the purpose of punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that **person's position** may be prejudiced on any one of **those grounds**."	(5) "This Framework Decision respects fundamental rights and **adheres** to the principles recognised in Article [TEU], **which are also expressed in** the [Charter], **especially in Chapter VI thereof**. **No provision of this** Framework Decision should be interpreted as prohibiting refusal to recognise a judgment and/or supervise a probation measure or alternative sanction if there are objective reasons to believe that the **probation measure or alternative sanction** was imposed to punish a person because of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation or that this person might be disadvantaged for one of these reasons."	(16) "This Framework Decision respects fundamental rights and observes the principles recognised, in particular, by Article 6 [TEU] and reflected by the [Charter]. Nothing in this Framework Decision should be interpreted as prohibiting refusal **to recognise a decision on supervision measures** if there are objective **indications** that **it** was imposed to punish a person because of his or her sex, race, religion, ethnic origin, nationality, language, political **convictions** or sexual orientation or that this person might be disadvantaged for one of these reasons."

Source: FRA, 2016

and note that refusing to recognise sanctions imposed to punish someone based on their sex, race, or other protected ground is permissible. Table 8 provides a comparative overview of the three decisions in this regard.

However, a number of human rights – as expressed in the European Convention on Human Rights (ECHR) – and fundamental rights – as expressed in the Charter of Fundamental Rights of the European Union (Charter) – are most relevant for persons subjected to transfers. They include:

- the right to dignity (ECHR: general reference to the Universal Declaration of Human Rights, which refers to dignity in the preamble; Charter: Article 1)
- freedom from inhuman or degrading treatment (ECHR: Article 3; Charter: Article 4)
- the right to liberty (ECHR: Article 5; Charter: Article 6)
- the right to a fair trial (ECHR: Article 6; Charter: Article 47)
- the right to respect for private and family life (ECHR: Article 8; Charter: Article 7).

The last of these rights – respect for private and family life – relates to the three Framework Decisions' overarching goal of social rehabilitation. This chapter provides an overview of these rights as they are relevant to the Framework Decisions; the subsequent chapters focus in more detail on particular aspects of the decisions and the related fundamental rights.

Persons subjected to measures foreseen in all three Framework Decisions benefit from the guarantees of the ECHR and the EU Charter of Fundamental Rights. Nevertheless, this section focuses mainly on the Framework Decision on transfer of prisoners because it provides for cross-border transfers of individuals who are deprived of their liberty and are non-nationals of the sentencing EU Member State – circumstances that require a very careful consideration of fundamental rights as well as of prospects of rehabilitation. The individuals involved can be characterised as vulnerable by virtue of being both non-nationals and prisoners.

It is important to note that the transfer proceedings do not intend to – and should not – replace expulsion proceedings (removal). The transfer proceedings are easier, faster and less formalised and authorities might be tempted to use them instead of proper removal proceedings. It should be remembered that, according to the Free Movement Directive,[55] Member States are only exceptionally allowed to institute removal proceedings of Union citizens – on grounds of public policy, public security or public health. Measures taken must be based on personal conduct, which must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, and previous criminal convictions do not themselves constitute grounds for taking such measures. Persons affected must be fully informed – in an understandable manner – about the decision to remove them and the grounds for that decision. Additionally, an effective remedy must be at the disposal of the person to be removed. Moreover, expulsion orders may not be issued as a legal consequence of a custodial penalty.[56] In light of these provisions, it is obvious that removal proceedings are lengthy and that strict conditions apply. In contrast, proceedings for transferring prisoners are intended to be quick, and facilitating social rehabilitation is the overarching aim. With respect to decisions on transfer proceedings, there is no requirement for an effective remedy. For these reasons, Member States should ensure that the transfer proceedings do not operate as a 'lighter' version of removal/expulsion proceedings. If there are grounds for expelling someone in accordance with domestic law, expulsion proceedings should be instituted – with all procedural guarantees secured.

Persons benefiting from the Framework Decision on probation and alternative sanctions and the Framework Decision on the ESO run less risk of having their fundamental rights violated because they are not deprived of their liberty. Moreover, they are subjected to measures alternative to detention, which often include social or community elements, and that fact alone facilitates social rehabilitation. The Framework Decision on probation and alternative sanctions provides for transferring probation measures only, and not sentenced persons. Additionally, a probation measure can only be transferred when a sentenced person has returned or wants to return to their home country, or when this person requests a transfer to another Member State (for example, to study or work there). Similarly, according to the ESO, a measure is only transferred for supervision in another EU Member State with the suspect's consent. Nevertheless, the objective of achieving social rehabilitation is mentioned in Article 1 and Recital 14 of the Framework Decision on probation and alternative sanctions. The Framework Decision on the ESO does not refer to social rehabilitation.

The Council of Europe Convention on the Transfer of Sentenced Persons refers to the social rehabilitation of sentenced persons as one of the grounds for supporting such transfers.[57] The objectives of the convention are:

- achieving greater unity between the Council of Europe Member States;

55 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158.

56 *Ibid.*, Articles 27–33.

57 Council of Europe, Convention on the transfer of sentenced persons, Preamble.

- developing international co-operation in the field of criminal law;
- promoting justice and the social rehabilitation of sentenced persons.

Likewise, the Framework Decision on transfer of prisoners repeatedly states that transfers aim to facilitate social rehabilitation of sentenced persons.[58]

It is important to note that all persons deprived of their liberty shall have their human rights secured (save for restrictions of the right to liberty), and rehabilitation is one of the basic principles of the European Prison Rules.[59]

International promising practice

Social rehabilitation and transfer of federal prisoners in the USA

The International Prisoner Transfer Program began operating in the USA in 1977. With more than one hundred annual transfers (based on statistics presented in 2011), the country has extensive experience, based on which guidelines on assessing prospects of social rehabilitation have been adopted. These offer a great learning opportunity.

The United States Department of Justice Guidelines for the Evaluation of Transfer Applications of Federal Prisoners lists factors to be considered when assessing the likelihood of social rehabilitation. These include: acceptance of responsibility, criminal history, seriousness of the offense, criminal ties to the sending and receiving countries, family and other social ties to the sending and receiving countries, humanitarian concerns, and the length of time spent in the sending country.

Source: United States Department of Justice

A handbook developed by the United Nations Office on Drugs and Crime (UNODC) on the international transfer of sentenced persons also places special emphasis on the rehabilitative and re-integrative value of such transfers. The handbook underscores that "sentenced persons who serve their sentences in their home countries can be rehabilitated, resocialized and reintegrated into the community better than elsewhere. This is a positive reason for transferring sentenced persons to a state with which they have social links to serve their sentences. Imprisonment in a foreign country, away from family and friends, may also be counterproductive as families may provide prisoners with social capital and support, which improve the likelihood of successful resettlement and reintegration".[60]

Transferring sentenced prisoners can also address humanitarian concerns: "Differences in language, culture and religion and distance from family and friends may increase the difficulties of imprisonment and aggravate the impact of the sentence imposed".[61] There is also a strong humanitarian argument for transferring someone if the prison conditions and regimes in the sentencing state are particularly poor or are not in line with international minimum standards.

2.1. Fundamental rights standards

It is important to note that neither the ECHR nor the EU Charter of Fundamental Rights establishes a right not to be – or to be – transferred. However, according to established ECtHR and CJEU case law, states have certain obligations when making decisions about transferring people across state borders. The current volume of case law on transfers of prisoners is quite modest. However, some guidance can be drawn from jurisprudence concerning expulsion and extradition measures and the European Arrest Warrant proceedings. Whether someone is transferred abroad as a result of a transfer or the European Arrest Warrant, the principles remain the same. It appears from the jurisprudence that the most relevant fundamental rights are:

- the prohibition of torture and inhuman and degrading treatment or punishment (Article 3 of the ECHR and Article 4 of the EU Charter of Fundamental Rights);
- the right to respect for family and private life (Article 8 of the ECHR and Article 7 of the Charter);
- the right to access a court and to a fair trial (Article 6 of the ECHR and Article 47 of the Charter).

Prohibition of torture and degrading and inhuman treatment

The most important obligations arise from Article 3 of the ECHR, which prohibits torture and degrading and inhuman treatment. In accordance with the so-called Soering principle, states are responsible for potential future violations of the convention, when there is a serious risk of such violations occurring on the territory of the receiving state.[62] The ECtHR has confirmed this

58 Council Framework Decision 2008/909/JHA, Recital 9, Art. 3 and 4.
59 Council of Europe, Committee of Ministers (2006), Recommendation Rec (2006)2 of the Committee of Ministers to member states on the European Prison Rules, 11 January 2006 (Council of Europe, Rec (2006)2).
60 UNODC (2012), pp. 9–10.
61 *Ibid.*, pp. 12–13.
62 ECtHR, *Soering v. the United Kingdom,* No. 14038/88, 7 July 1989.

principle on many occasions, and has made clear that it applies equally to persons accused or convicted of very serious crimes.[63]

While this report does not deal with detentions of migrants or asylum, a parallel can be drawn with jurisprudence in these areas. In 2011, the CJEU referred to the well-known ECtHR decision in *M.S.S. v. Belgium and Greece*[64] and stated that EU Member States have an obligation to conduct a test of conformity with fundamental rights prior to transferring asylum seekers to another Member State. According to the CJEU, Member States may not transfer detained persons to a place where they are at risk of inhuman treatment. The judgment further concludes that EU law does not permit an absolute presumption that Member States observe the fundamental rights conferred on asylum seekers.[65] This principle should also apply to transferring prisoners to another EU Member State, and has been expressed in the context of the EAW by the CJEU (as will be explored further in this report).

The most relevant fundamental rights concern for transfers of prisoners would be the conditions of detention in the destination state, and it should be noted that the ECtHR has found numerous EU Member States guilty of violations of Article 3 of the ECHR in relation to these conditions.[66] In a case regarding the refusal of a transfer from Romania to Turkey, the applicant complained about detention conditions in Romania, in particular: poor hygiene, bedbugs, a lack of activities or work, and the fact that the food was not adapted to his diabetes. The ECtHR found that the combination of these conditions amounted to inhuman and degrading treatment prohibited by Article 3.[67] When assessing detention conditions, the ECtHR generally relies on the following principles:

- prisoners' human rights need to be protected as they are entirely dependent on the state and therefore vulnerable;
- the ECtHR looks at the conditions as a whole, including various elements (overcrowding, absence of beds, lack of time outdoors, etc.) and the length of the detention;
- overcrowding might constitute the most serious element and may suffice to find a violation;
- an accumulation of other elements – such as a lack of private access to a sanitary annex, the unavailability of fresh air, and a lack of access to natural solar light and time outdoors – might also constitute a violation.[68]

A long-awaited judgment of the CJEU confirmed that states are obliged to assess detention conditions in the receiving state when surrendering persons under the European Arrest Warrant. The CJEU explained that, where there is objective evidence that an individual will be exposed to inhuman or degrading treatment in detention in the receiving state, the Member State must postpone the decision on the individual's surrender until it obtains supplementary information necessary to assess the real risk in a concrete case.[69] The judgment considered the surrender of individuals from Germany to Hungary and Romania.

Taking into account this jurisprudence, it seems logical that, prior to considering any transfers of prisoners, if there is evidence of systemic shortcomings in detention conditions in an executing state and this is raised by the person subjected to transfer, the issuing state should further examine these conditions and assess whether, in a concrete case, an individual would run a real risk.

The established risk of being subjected to inhuman and degrading treatment should be real and beyond doubt; a mere general reference to expected detention conditions being worse than present conditions, without further substantiation, would not suffice to establish possible violations of the prohibition of inhuman and degrading treatment. The ECtHR dismissed such unsubstantiated complaints by prisoners transferred from Sweden to Hungary. The court added that the applicants could lodge complaints against Hungary if they believed that this state violated their rights.[70]

63 ECtHR, *Saadi v. Italy,* No. 37201/06, 28 February 2008.
64 ECtHR, *M.S.S. v. Belgium and Greece,* No. 30696/09, 21 January 2011.
65 CJEU, Joined cases C-411/10 and C-493/10, *N. S. v. Secretary of State for the Home Department and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform,* 21 December 2011 (hereinafter *N. S. and M.E cases*).
66 See, for example, ECtHR, *Florea v. Romania,* No. 37186/03, 14 September 2010; *Vasilescu v. Belgium,* No. 64682/12, 25 November 2014; *Tali v. Estonia,* No. 66393/10, 13 February 2014; *Mandić and Jovic v. Slovenia,* Nos. 5754/10 and 5985/10, 20 October 2011; *Torreggiani and Others v. Italy,* No. 43517/09, 8 January 2013; *Varga and Others v. Hungary,* Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, 10 March 2015; *Piechowicz v. Poland,* No. 20071/07, 17 April 2012. For an overview of number of ECtHR judgments finding a violation under Article 3 ECHR in 2014 by EU Member State, see FRA's website.
67 ECtHR, *Serce v. Romania,* No. 35049/08, 30 June 2015.
68 ECtHR, *Torreggiani and Others v. Italy,* No. 43517/09, 8 January 2013, paras. 65–69.
69 CJEU, Joined Cases: C-404/15 and C-659/15 PPU, *Aranyosi* and *Căldăraru,* 5 April 2016, para. 104.
70 ECtHR, *Csoszánszki v. Sweden,* No. 22318/02, 26 October 2004; *Szabó v. Sweden,* No. 28578/03, 26 October 2004.

ECtHR on excessive transfers

The ECtHR has concluded that repeated transfers to different prison facilities combined with solitary confinement amount to a violation of the prohibition of torture and inhuman and degrading treatment. The applicant was transferred 43 times within 12 years. He was also deemed a dangerous inmate and subjected to a strict regime. He was isolated from other inmates for 7 years. The applicant developed a severe psychological condition, requested to be subjected to euthanasia, and started a hunger strike. He complained about the strict regime and the repeated transfers and argued that these negatively influenced his mental health. The court found that the government could not justify the transfers with the risk of absconding.

Source: ECtHR, Bamouhammad v. Belgium*, No. 47687/13, 15 November 2015*

The ECtHR has also dealt with cases involving transfers of prisoners from Thailand to the United Kingdom at their request. Already present in the United Kingdom, the applicants complained that the sentences imposed in Thailand were grossly disproportionate to the offences committed and that their continued detentions were arbitrary as the trials in Thailand were flagrantly unfair. The ECtHR dismissed the complaints. It found that the terms of their imprisonment did not attain the requisite level of humiliation or hardship and explained that the deprivation of liberty resulted from the final sentence, which was only executed in the United Kingdom. The ECtHR acknowledged that imprisonment following a flagrantly unfair trial would be contrary to human rights standards, but, in the cases at issue, found that the applicants failed to demonstrate that they were denied the right to a fair trial in Thailand. The ECtHR took into account that the transfers occurred within the framework of international cooperation in the administration of justice, which in principle is in the interests of the persons concerned. It emphasised that "prisoner-transfer agreements are generally intended to serve the laudable aims of eliminating the adverse effects of serving a sentence in an environment which is socially, culturally or linguistically unfamiliar and facilitating future reintegration into society."[71]

In exceptional cases, a transfer might be impossible for humanitarian reasons – for example, when the sentenced person is terminally ill, not medically fit for transfer and likely to be deprived of any medical and social care in the executing state.[72] However, these cases should be treated as very exceptional, given that, where applicants are not that seriously ill, the ECtHR tends to find that a transfer (expulsion in case cited) is permitted.[73]

Respect for private and family life

Cases finding that transferring people across borders violates their right to private or family life (Article 8 of the ECHR) are also relevant. Article 8 allows interferences with someone's family or private life when these are in accordance with law, proportionate and necessary in a democratic society. The ECtHR has outlined relevant criteria for assessing whether a transfer (expulsion) measure was necessary in a democratic society and proportionate to the aim pursued:

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age;
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.
- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination.[74]

If the measure proves to be unnecessary or disproportionate, the expulsion will violate Article 8. In the context of prisoner transfers, a transfer to the state of nationality might violate the right to family life when a sentenced person has close family ties in the issuing state and family members visit the person in prison, whereas it would be very difficult for them to maintain those visits in case of transfer. If a sentenced person has children, their best interest has to be taken into account. For less serious offences and good conduct during detention, transfer might be found less necessary. On the other hand, refusing a transfer might constitute

71 ECtHR, *Willcox and Hurford v. the United Kingdom,* Nos. 43759/10 and 43771/12, 8 January 2013.
72 ECtHR, *D. v. the United Kingdom,* No. 30240/96, 2 May 1997.
73 ECtHR, *N. v. the United Kingdom,* No. 26565/05, 27 May 20008; *Tatar v. Switzerland,* No. 65692/12, 14 April 2015.
74 ECtHR, *Üner v. the Netherlands*, No. 46410/99, 18 October 2006, paras. 57–58.

a violation if family members reside in a state other than the issuing state. The ECtHR dealt with a refusal to transfer a British national, sentenced and detained in the United Kingdom, to the Netherlands, where his wife and children lived. In the communication note, the court asked the government whether the refusal violated the prisoner's and his family's right to respect for family life. However, the case was settled and the United Kingdom agreed to transfer the applicant under certain conditions.[75]

The ties with both states – issuing and executing – should also be assessed. Furthermore, it should be noted that, in most cases, maintaining family life will benefit social rehabilitation; in fact, there is strong evidence that family support is one of the most important factors contributing to successful rehabilitation.[76]

Nevertheless, in 2015, while examining a refusal to transfer a Turkish national from Romania to Turkey, where his wife and four children lived, the ECtHR stated that there is no right to choose the place to serve a sentence and dismissed a complaint about respect to family life as incompatible *ratione materiae* with the provisions of the ECHR.[77] This decision is rather surprising given previous case law concerning the right to family life; it remains to be seen how this jurisprudence will develop.

Right to a fair trial

In light of established ECtHR jurisprudence, transfer proceedings would probably not fall within the scope of Article 6 of the ECHR, which guarantees the right to a fair trial. The ECtHR has not dealt with issues arising under the Framework Decision on transfer of prisoners, but has dealt with the Council of Europe Convention on the Transfer of Sentenced Persons and the Additional Protocol. In these cases, it stated that Article 6 does not apply to the transfer proceedings because there is no determination of a criminal charge or a civil claim,[78] unless the transfer proceedings influenced the outcome of the actual criminal proceedings.[79]

As the proceedings provided for in the three Framework Decisions bear resemblance to the proceedings provided for in the Transfer Convention, it could be expected that they will remain outside of the scope of Article 6 unless very particular circumstances trigger its application. This presumption is also reinforced by a case dealing with the European Arrest Warrant proceedings, in which the ECtHR noted that the European Arrest Warrant procedure replaces the standard extradition procedure between EU Member States and does not concern the determination of a criminal charge, meaning Article 6 would not apply.[80]

Other fundamental rights

The ECtHR has also examined the applicability of Articles 5 and 7 of the ECHR, which prohibit arbitrary deprivation of liberty and punishment without law, respectively. The court has stated that deprivations of liberty in the executing state are based on convictions in the issuing state and are therefore compatible with Article 5 (1)(a). Article 7(1), on the other hand, is inapplicable in cases of different conditions of conditional release in the issuing state and the executing state, because Article 7 refers to the notion of penalty while conditional release falls in the scope of sentence execution.[81]

Article 9 could be also invoked – when freedom of religion would suffer in the receiving state, as established in a case regarding the expulsion of Christians from the United Kingdom to Pakistan.[82] However, these cases appear to be less relevant in an EU context. Additionally, Article 4 of Protocol No. 4 to the ECHR prohibits collective expulsions of aliens. An expulsion is 'collective' if it affects aliens as a group, without individual examinations of every particular case.[83] This provision could come into play if authorities targeted certain groups of prisoners of the same nationality and qualify them to transfer as a group without individual consideration. However, it seems that the wording of the Framework Decision on transfer of prisoners prevents such a possibility – the decision repeatedly refers to the purpose of facilitating the social rehabilitation of the sentenced person and assessments of the prospects of achieving this goal. Hence all transfers should be individually assessed.

It should be noted that whenever issues under the ECHR arise, the persons subject to transfer should have access to an effective remedy in accordance with Article 13. Correspondingly, Article 47 of the EU Charter of Fundamental Rights provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. It follows that, when a sentenced person does not consent to a transfer and alleges, for example, that detention conditions in the executing state violate the

75 ECtHR, *H.S. and Others v. the United Kingdom*, No. 16477/09, 5 October 2010.
76 UNODC (2006b), p. 1.
77 ECtHR, *Serce v. Romania,* No. 35049/08, 30 June 2015.
78 ECtHR, *Szabó v. Sweden,* No. 28578/03, 27 June 2006.
79 ECtHR, *Buijen v. Germany*, No. 27804/05, 1 April 2010.
80 ECtHR, *Monedero Andora c. l'Espagne*, No. 41138/05, 7 October 2008.
81 ECtHR, *Szabó v. Sweden*, No. 28578/03, 27 June 2006; *Csoszánski v. Sweden*, No. 22318/02, 27 June 2006; *Ciok v. Poland*, No. 498/10, 23 October 2012. For a detailed explanation of the notions of 'penalty' and 'sentence execution', see ECtHR, *Del Río Prada v. Spain*, No. 42750/09, 21 October 2013.
82 ECtHR, *Z. and T. v. the United Kingdom,* No. 27034/05, 28 February 2006.
83 ECtHR, Čonka v. Belgium, No. 51564/99, 5 February 2002.

prohibition of inhuman and degrading treatment, this complaint should be examined by competent authorities with recognised decision-making powers.

The right to engage in work (Article 15 of the Charter) and the right to education (Article 14 of the Charter) are also relevant in the context of transfers – for example, an individual has greater chances to hold a job if an alternative to detention can be executed closer to home.

Additionally, in line with Article 8 of the Charter of Fundamental Rights and in particular with Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters,[84] personal data of persons subjected to transfers must be protected at national and international level. FRA's findings show that the vast majority of states (25) apply general data protection laws when processing data of persons subjected to transfers, both at national and international level. Only three states apply additional rules regarding data of persons in detention (Estonia, Croatia and the Netherlands). There appears to be a common understanding that all EU Member States have adequate levels of data protection and no special regulations regarding transfer of prisoners are therefore needed. This issue falls outside of the scope of this report, so will not be further explored.

In principle, the ECtHR's jurisprudence shows an appreciation of the benefits of transfers to home countries and of serving sentences in familiar environments. Even where penitentiary conditions worsen after a transfer, the ECtHR is of the opinion that this is counterbalanced by better prospects of reintegration into society, being closer to family and being in an environment with which one has closer linguistic and cultural ties.

Member States' approaches

EU Member States consider fundamental rights implications in their legislation on transfers of prisoners in various ways. For example, the Ministry of Justice in Denmark will not initiate transfer proceedings if a transfer would be contrary to fundamental rights – for example, the ECHR.[85] Likewise in Spain, any decision concerning the transfer of persons convicted or awaiting trial must consider their fundamental rights.[86] In Germany, the public prosecutor's report on which a decision to transfer is based must include information on the social ties of the person concerned along with information on the marital status, number of children and place of residence of family members. The report must also include the request of the person concerned, or if the request was initiated by the public prosecutor, a statement of the person, which may also elaborate on social reintegration. According to the regulatory provisions of the German state of Brandenburg, the prison authority's statement shall determine whether a transfer is advisable considering general preventative aspects and specific deterrence of the individual offender.[87] However, the implementing law does not explicitly require taking the additional considerations into account. Similarly, Estonian practitioners consider the personal and family situation of the sentenced person, language, and cultural and economic ties with the executing state.[88] While the United Kingdom will take into account fundamental rights such as right to family life and implication of prison conditions, access to education would not normally prevent transfer. Initially, conditions in the proposed receiving state would be assessed if this issue was raised by a prisoner. However, as the majority of prisoners now raise conditions as a ground to prevent transfer, conditions are now more routinely assessed. An example of a condition often raised is prison overcrowding. Information is gathered from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) reports and until now these have never led to a transfer being cancelled.[89] In Sweden, if there is a documented risk of fundamental rights violations, including inhuman conditions of detention, a judgment might not be forwarded.[90]

84 Council of the European Union (2008), Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ 2008 L 350.

85 Denmark, Representative of the Danish Ministry of Justice.

86 Spain, Law 23/2014 of 20 November on mutual recognition of criminal judgments in the European Union (*Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea*), 21 November 2014, Art. 3.

87 Germany, Law of the state of Brandenburg (*Landesrecht Brandenburg*) (2008), Regulatory provisions on implementing the Council of Europe Convention of 21 March 1983 on the transfer of sentenced persons and the additional protocol (*Erlass des Ministeriums für Justiz vom 03. Juli 2008: Ausführung des Übereinkommens vom 21. März 1983 über die Überstellung verurteilter Personen und des Zusatzprotokolls vom 18. Dezember 1997*), 3 July 2008, No. II.3.1 and 3.3.1.

88 Estonia, Ministry of Justice (*Justiitsministeerium*) (2013).

89 United Kingdom, Representative of NOMS.

90 Sweden, Ministry of Justice (*Justutiedepartementet*), Government bill on judgments imposing custodial or other forms of deprivation of liberty sentences within the European Union (*Regeringens proposition 2014/15:29 Erkännande och verkställighet av frihetsberövande påföljder inom Europeiska unionen*), 4 December 2014, p. 72.

2.2. Goal of social rehabilitation

Social rehabilitation should be seen as the main purpose of transfers of prisoners. The impact on rehabilitation is taken into account in the majority (at least 25) of Member States. According to the Framework Decision on transfer of prisoners, the authorities in the issuing state may contact competent authorities in the executing state to inquire whether an individual's transfer would indeed facilitate social rehabilitation.[91]

Nelson Mandela Rules on social rehabilitation

The UN Standard Minimum Rules for Treatment of Offenders (SMRs), originally adopted in 1955, were upgraded starting in 2011, culminating in the adoption of the revised rules by the UN General Assembly in December 2015. The SMRs were also given the additional name of the Nelson Mandela Rules.

The SMRs address social rehabilitation in quite some detail, noting that: "the purposes of a sentence of imprisonment or similar measures deprivative of a person's liberty are primarily to protect society against crime and to reduce recidivism. Those purposes *can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release* so that they can lead a law-abiding and self-supporting life." (Rule 4 (1), emphasis added.)

The Nelson Mandela Rules go on to specify what this means: "[P]rison administrations and other competent authorities should *offer education, vocational training and work, as well as other forms of assistance* that are appropriate and available, including those of a remedial, moral, spiritual, social and health- and sports-based nature. All such programmes, activities and services should be delivered in line with the *individual treatment needs* of prisoners." (Rule 4 (2), emphasis added.)

The SMRs also state that "it is desirable that the necessary steps be taken to ensure for the prisoner *a gradual return to life in society*. This aim may be achieved, depending on the case, by a prerelease regime [...] or by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid." (Rule 87, emphasis added.) Moreover, the rules stipulate that the "*treatment of prisoners should emphasize not their exclusion from the community but their continuing part in it*. Community agencies should therefore be enlisted wherever possible to assist the prison staff in the task of social rehabilitation of the prisoners." Finally, they also assert that "There should be *in connection with every prison social workers* charged with the duty of maintaining and improving all desirable relations of a prisoner with his or her family and with valuable social agencies. [...]". (Rule 88 (1) and (2), emphasis added.)

Source: UN, Resolution adopted by the General Assembly, Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, 17 December 2015; Council of Europe, Committee of Ministers,* Recommendation Rec(2006)2 with commentary*, 11 January 2006*

Some states believe that rehabilitation can be successful either in the state of nationality or in another state. For example, according to Austrian legislation, when strong ties with Austria exist, it may be assumed that social rehabilitation may better be achieved in Austria than in a state of citizenship.[92] Legislation in Spain states, like the Framework Decision on transfer of prisoners, that if the aim of rehabilitating the convicted person is not achieved, this can be a reason for discontinuing transfer proceedings.[93] The same requirement applies when Spain is the executing state.[94] Correspondingly, law in Finland provides that a prerequisite for a transfer is that it promotes the sentenced person's opportunities to reintegrate into society. Factors considered are the person's nationality, place of permanent residence, personal situation and other special reasons that are not further defined in the act.[95] Family ties are the most

91 Council Framework Decision 2008/909/JHA, Art. 4 (3) and (4).

92 Austria, Federal law on judicial cooperation in criminal matters with the Member States of the European Union, *Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union (EU-JZG)*, 30 April 2004, para. 42 (b) (3).

93 Spain, Law 23/2014 of 20 November on mutual recognition of criminal judgments in the European Union, Art. 74.1.b.

94 *Ibid.*, Art. 78.3.

95 Finland (2011), Act on National Implementation of Provisions Belonging to the Legislative Field of the Framework Decision on Transfer of Sentenced Persons in the European Union and Application of the Framework Decision *(Laki tuomittujen siirtoa Euroopan unionissa koskevan puitepäätöksen lainsäädännön alaan kuuluvien säännösten kansallisesta täytäntöönpanosta ja puitepäätöksen soveltamisesta/Lag om det nationella genomförandet av de bestämmelser som hör till området för lagstiftningen i rambeslutet om överföring av dömda personer inom Europeiska unionen och om tillämpning av rambeslutet)* 1169/2011, 25 November 2011.

important factor considered by the Irish authorities. As the Irish Council for Prisoners Overseas notes, family visits while in prison are essential in ensuring that people have the best opportunity to reintegrate upon their release from prison. In this respect, the consideration of close family ties appears to be the main factor for approving a transfer.[96] In Portugal, a sentenced person's health needs are likewise taken into account and are indicated in documents sent to the executing state to obtain its agreement. If need be, the medical or welfare report about the person in question is included along with a recommended follow-up treatment.[97]

Findings from project on cross-border execution of judgments involving deprivation of liberty

"Only 67 % of the [practitioners interviewed] indicated that they thought the terms of the Framework Decision required MS to *assess the social rehabilitation of prisoners on a case by case basis* rather than assuming that serving a sentence in the prisoner's home state would automatically facilitate their social rehabilitation. Coupled with the remarkable results that over 20 % of all respondents did not consider it to be important to have *information* on material detention conditions in the prison of the executing state, on a prisoner's home circumstances in the executing state and on education, work and training facilities in the executing state's prison system, it can be concluded that there is reason for concern here."

Source: Vermeulen, G., van Kalmthout, A., Paterson, N., Knapen, M., Verbeke, P., and deBondt, W., Institute for International Research on Criminal Policy (2011), Cross-border Execution of Judgments Involving Deprivation of Liberty, *Apeldoorn: MAKLU, p. 55 (emphasis added)*

Some Member States (the Netherlands, Slovenia and the United Kingdom) presume that a person's social rehabilitation is only possible in their country of origin. According to the National Agency of Correctional Institutions in the Netherlands (*Dienst Justitiële Inrichtingen*), rehabilitation in a foreign country (i.e. the Netherlands) is not considered possible.[98] Likewise, in Slovenia, it is at least initially presumed that social rehabilitation will be better achieved in the state of nationality.[99] The United Kingdom authorities mainly focus on transfer prisoners who are subject to deportation and therefore will not be allowed to remain in the United Kingdom. It is believed that it would normally be in the best interest of the prisoner's social rehabilitation to serve his or her sentence in the country in which he or she will be living after the release.

According to FRA's research, only Bulgarian legislation does not refer to the requirement of social rehabilitation; however, Bulgaria has not yet implemented the Framework Decision on transfer of prisoners and applies the Council of Europe Transfer Convention. In practice, consideration is given only to the arguments pointed out by sentenced persons in their requests for transfer. Most often these refer to the sentenced person's need to be closer to their family and the lack of knowledge of the Bulgarian language.[100]

Promising practice

Obtaining adequate information before deciding on transfers

Before agreeing to transfers, the Belgian Ministry of Justice obtains information about the sentenced person's personal situation. Prospects for rehabilitation are examined and family members are interviewed. This social inquiry can also be requested by the public prosecutor, upon the request of the issuing state, or on the sentenced person's own motion.

Source: Belgium, Representative from the Ministry of Justice

When assessing prospects for social rehabilitation, states take into account various criteria, such as detention conditions, humanitarian concerns, and family and social ties. Figure 3 presents an overview of these criteria.

Of these criteria, family ties remain the most important factor. Authorities of at least 22 Member States consider family and social ties in the decision-making process. However, fewer than half of the Member States consider

96 Ireland, Representative of the Irish Council for Prisoners Overseas.

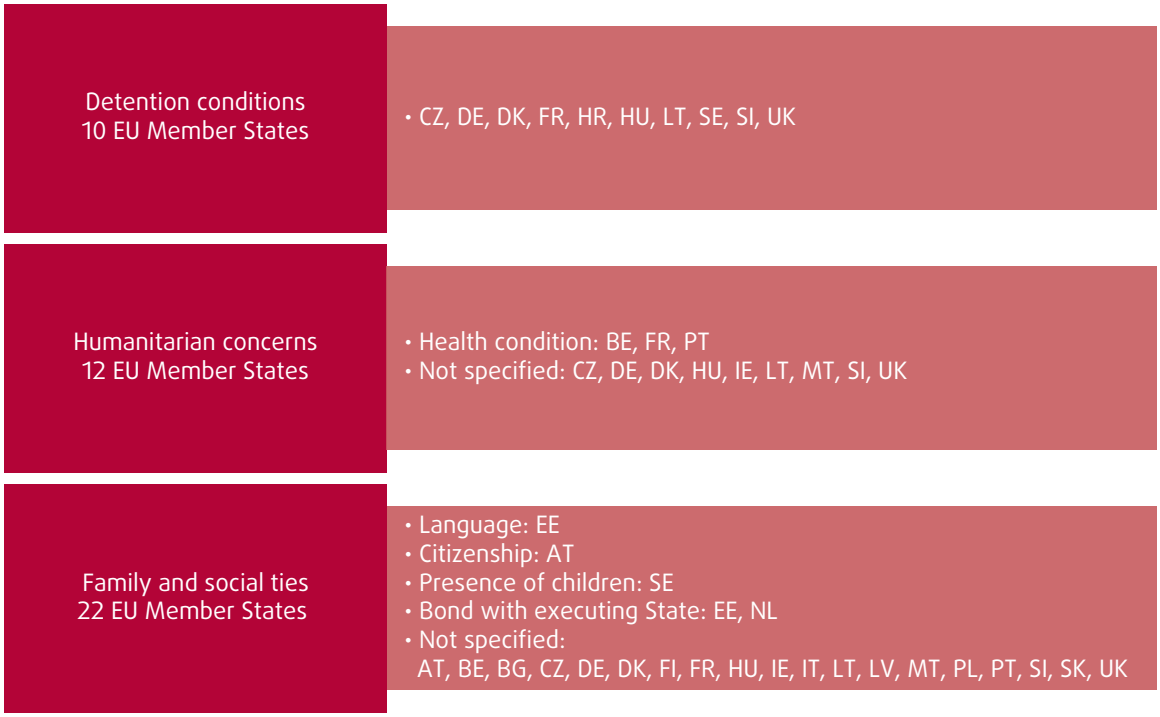
97 Portugal, Law 144/99 amended by Laws 104/2001 of 25 August, 48/2003 of 22 August and 115/2009 of 12 October, Execution of Foreign Criminal Sentences and the transferrence of persons sentenced to imprisonment and security measures involving the deprivation of freedom (*Lei n.º 144/99, alterada pelas Leis n.º 104/2001, de 25 de Agosto, n.º 48/2003, de 22 de Agosto e n.º 115/2009 de 12 de Outubro sobre a execução de sentenças penais estrangeiras e transferência de pessoas condenadas a penas e medidas de segurança privativas da liberdade*), 31 August 1999, Article 117 (2) d); District Office of the Public Prosecutor General (Procuradoria-Geral Distrital), the Lisbon Court of Appeal (2013), International Judiciary Cooperation in Criminal Matters: Procedural Guidelines and Notes by the Public Prosecutor's Office and the Appeal Court (*Tribunal da Relação de Lisboa: Cooperação Judiciária Internacional em Matéria Penal, Orientações e Notas de Procedimento do Ministério Público no Tribunal da Relação*)'.

98 Netherlands, Custodial Institutions Agency (*Dienst Justitiële Inrichtingen*) (2013).

99 Slovenia, Representative of the District Court of Ljubljana.

100 Bulgaria, Supreme Prosecution Office of Cassation (*Върховна касационна прокуратура*) (2015), Letter No. 5676/2015 to the Center for the Study of Democracy (*Писмо № 5676/2015 до Центъра за изследване на демокрацията*), 28 May 2015.

Figure 3: Criteria issuing states use to assess prospects for social rehabilitation



Note: *A number of EU Member States refer to more than one criterion, so they are listed repeatedly in the chart.*
Source: *FRA, 2015*

humanitarian concerns or detention conditions in the executing state (12 and 10, respectively). It appears that some states presume that all EU Member States comply with the minimum standards – as reflected in the Slovenian statement that "there is a common understanding that conditions in all EU Member States are comparable to the ones in Slovenia".[101]

2.3. Fundamental rights refusal grounds

States have numerous options to refuse a transfer, both as issuing state and as executing state. Under the Framework Decision on transfer of prisoners, an issuing state might refuse to initiate proceedings requested by the executing state or the sentenced person (Article 4 (5) of the Framework Decision on transfer of prisoners). The issuing state might refuse to forward a judgment and certificate if, after consultations with the executing state, it is not satisfied that enforcement of the sentence by the executing state would serve the purpose of facilitating the sentenced person's social rehabilitation (Article 4 (2)). Additionally, the issuing state might refuse a transfer after considering the opinion of the sentenced person (Article 6 (3)). Moreover, the issuing state may withdraw a certificate from the executing state, giving reasons for doing so, as long as enforcement of the sentence in the executing state has not begun (Article 13).

Under the Framework Decision on probation and alternative sanctions and the Framework Decision on the ESO, an issuing state might refuse to initiate proceedings when requested by the sentenced person or suspect (Article 4 (2) and Article 9 (2), respectively). Issuing states might also withdraw a certificate without giving reasons, provided that supervision in the executing state has not yet begun (Article 9 (4) of the Framework Decision on probation and alternative sanctions, Article 13 (3) of the Framework Decision on the ESO).

As stated in Chapter 1, while reading the summary of findings, it should be noted that not all Member States had implemented all three Framework Decisions at the time of data collection.

The executing state's consent is required when a transfer is directed to a Member State other than a state of nationality where the sentenced person lives or where they will be deported (Article 4 (1) (c) the Framework Decision on transfer of prisoners). States should take into account the purpose of facilitating the sentenced person's social rehabilitation (Article 4 (6)). Pursuant to this provision, some states have adopted specific measures based on which the competent authorities make their decisions. For example, Austria recognises

101 Slovenia, Representative of the District Court of Ljubljana.

that, in some cases, rehabilitation of non-citizens could be better achieved in Austria.[102] Similar measures have also been adopted in Belgium, Hungary, Spain and the United Kingdom. Correspondingly, the executing state's consent is required for transfers of probation measures/supervision measures upon request of the sentenced person/suspect to a state other than a state of residency (Article 5 (2) of the Framework Decision on probation and alternative sanctions and Article 9 (2) of Framework Decision on the ESO). As emerges from Recital 14 of the Framework Decision on probation and alternative sanctions, such consent may be given, with a view to social rehabilitation, where the sentenced person intends to move to another Member State to work, study, or join family members.

Additionally, each decision contains a list of grounds based on which executing states can decide not to recognise judgments or decisions. The Framework Decision on transfer of prisoners and the Framework Decision on probation and alternative sanctions both list 12 grounds for such non-recognition (in Article 9 and Article 11, respectively). The Framework Decision on the ESO provides for nine grounds for non-recognition (in Article 15).

The following grounds are common to all three decisions:

- related to the certificate, which by law has to accompany the judgment or the decision – when it is incomplete or manifestly does not correspond to the judgment or decision, and has not been corrected within a set deadline;
- related to the executing state – when the criteria for forwarding the judgment or decision have not been met and the judgment or decision cannot be forwarded to that state (for example, the sentenced person is not a national of that state or that state did not consent to transfer and such consent is necessary);
- related to legal obstacles arising from the executing state's domestic law, namely:
  - recognition of the judgment or decision would contravene the *ne bis in idem* principle
  - the act in question does not constitute an offence (except for acts of fiscal nature)
  - the enforcement of criminal prosecution is statute-barred
  - immunity prevents the executing state from supervising the measure
  - a person, owing to their age, could not be held criminally liable.

Four procedural barriers are common to the Framework Decision on transfer of prisoners and the Framework Decision on probation and alternative sanctions:

- less than six months of the sentence are to be served, or the probation or alternative sanction is of less than six months' duration;
- the judgment was rendered *in absentia*, unless the sentenced person was properly summoned;
- the territorial jurisdiction of the executing state applies to the criminal offences addressed in the judgment or decision;
- the judgment or decision refers to a psychiatric or health care measure that could not be executed or supervised in accordance with the law of the executing state.

Additional grounds for non-recognition are specific to certain instruments:

- when a certificate relates to measures that cannot be supervised by the executing state (the Framework Decision on probation and alternative sanctions, and the Framework Decision on the ESO);
- when an issuing state does not give its consent for non-application of the specialty rule (the Framework Decision on transfer of prisoners);
- if the executing state, in the case of a breach of the supervisory measures, would have to refuse to surrender the person concerned in accordance with the Framework Decision on the European Arrest Warrant[103] (Framework Decision on the ESO).

According to FRA's research, as of 1 June 2015, Bulgaria had refused several transfers as issuing state because its authorities did not accept the consequences that the adaptions of the sentences by potential executing states would have had.[104] In Ireland, in respect of prisoners requesting to transfer out of the country, applications can be, and already have been, refused when substantial reductions in sentences can be expected or if there is good reason to believe that an applicant would not ordinarily reside in the jurisdiction he or she is applying to.[105]

Belgium has also refused numerous transfers as executing state when finding that an individual requested a transfer for reasons incompatible with the law's objectives (e.g. to benefit from a more flexible regime).

102 Austria, Federal law on judicial cooperation in criminal matters with the Member States of the European Union, *Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union (EU-JZG)*, para. 39 (1) 3; Explanatory Remarks on the Act Implementing Framework Decision 2008/909/JHA (*1523 der Beilagen XXIV. GP - Regierungsvorlage - Vorblatt u. Erläuterungen*).

103 Council Framework Decision 2002/584/JHA, Art. 3 and Art. 4.

104 Bulgaria, Supreme Prosecution Office of Cassation (2015), Letter No. 5676/2015 to the Center for the Study of Democracy.

105 Ireland, Department of Justice and Equality (2015), p. 9.

Additionally, Belgium has refused a couple of transfers because of a lack of reintegration prospects for the persons concerned.[106] Hungary has refused some transfers because there was no connection between the sentenced person and the executing state.[107] Slovakia has also refused to execute several judgments – in cases where the condition of criminality on both sides was not fulfilled, the time limit had passed, or executing the sanction was not possible under the laws of the Slovak Republic. One of the cases concerned an Austrian court judgment that sentenced a mother to imprisonment together with her child. In Slovakia, a child cannot be sent to prison, so the transfer was refused because the judgment conflicted with Slovakia's legal order. Slovakia has also refused several requests to execute judgments delivered by German judicial authorities. These concerned persons sentenced to detention in detention centres; as such centres do not exist in Slovakia, the state was not able to execute these judgments. [108]

Ireland seems to refuse transfers as executing state frequently. In respect of prisoners requesting transfers into Ireland, grounds for refusal most commonly fall under one of three categories. First, the transfer may be refused because there are not sufficient family ties in Ireland to merit the person's transfer back to the country.[109] Second, the lack of a similar sentence in Ireland may result in a refusal.[110] For example, prisoners from the United Kingdom may not be transferred back to Ireland because there is no equivalent sentence to that imposed in the United Kingdom, although they are not prohibited from applying.[111] A third issue – in the context of Irish prisoners in the United Kingdom – is when a prisoner might be released 'on license.' No such regime exists in Ireland. The case of *Sweeney v. Governor of Loughan House*[112] involved a defendant on whom the United Kingdom had imposed a 16-year sentence, half of which he was supposed to serve in the community. In Ireland, he was released after serving 8 years in prison because the country has no equivalent to the 'on license' regime. As a result of this precedent, there appears, according to anecdotal evidence, to be a freeze on transfers from the United Kingdom into Ireland.[113] Meanwhile, the United Kingdom has refused some transfers from abroad based on less than six months being left to serve, as permitted pursuant to Article 9 (1) (h) of the Framework Decision on transfer of prisoners.[114]

Regarding the Framework Decision on probation and alternative sanctions, only four states have recorded refusals. The Czech Ministry of Justice reported cases where the persons were not found on the territory of the Czech Republic and it was not possible to deliver the judgments or start execution.[115] The Netherlands refused to recognise a few probation judgments where there was not enough evidence that the sentenced persons resided in, or were otherwise connected with, the Netherlands.[116] Similarly, in Ireland, refusals to supervise probation orders in the state will generally be based on the lack of sufficient family ties. Generally, if there are sufficient family ties, a transfer will go ahead. When no direct equivalent alternative to detention is available in Ireland – for example, Ireland does not commonly impose electronic monitoring, something which is common in England and Wales – a pragmatic and constructive approach is taken and a coherent (though not identical) sentence is usually agreed on. The authorities come to an informal arrangement for the order to be completed in the other jurisdiction.[117] The only state that seems to have records of refusing to execute the Framework Decision on the ESO is Hungary; however, no further details are available.

2.4. Visions for improved mutual trust through enhanced monitoring and incentives

Mutual recognition only works well with a sufficient level of trust between Member States. The necessary foundation for establishing, maintaining or enhancing trust includes legal, judicial, penitentiary, probationary, and even social systems that are at least relatively comparable. How these systems operate must be clear and transparent.

Effective communication is essential for cooperation, both in terms of the means of communications used and the standard of language. Is the 'school English' of a German judge or prison official sufficient to communicate effectively with an Irishman about the alternatives to detention or the comparative elements of the sanctioning systems in Germany and Ireland? Are interpreters available and providing sufficiently high quality services for an exchange to be fully understood in both directions, i.e., between the German officials and the

106 Belgium, Representative of Legalia.
107 Hungary, Representative of the Ministry of Justice.
108 Slovakia, Representative of the Criminal legislation department in the Ministry of Justice.
109 Ireland, Representative of the Irish Prison Service.
110 Ireland, Transfer of Sentenced Persons Act, 17 July 1995, Section 7 (5).
111 Irish Council for Prisoners Overseas.
112 Irish Supreme Court (IESC) (2014), *Sweeney v. Governor of Loughan House Open Centre*, IESC 42, 3 July 2014.
113 Ireland, Representative of the Irish Council for Prisoners Overseas.
114 United Kingdom, Representative of NOMS.
115 Czech Republic, Representative of the Ministry of Justice.
116 Netherlands, Representative of the Centre for International Legal Aid.
117 Ireland, Representative of the Irish Probation Service.

Irishman in the scenario above? Are judges sufficiently equipped to assess the fundamental rights situation in another Member State in terms of detention conditions to be able to decide whether or not to transfer a detainee from one Member State to another?

In April 2016, the CJEU ruled in two joined cases – *Aranyosi* and *Căldăraru* – on transfers under the EAW from Germany to Hungary and Romania, respectively.[118] (These cases are also briefly discussed in Section 2.1). The CJEU (Grand Chamber) concluded that a judge has to consider objective and reliable evidence of systemic concerns with detention conditions in the issuing state, and, if the risk of inhuman or degrading treatment cannot be dismissed, the transfer could be brought to an end. More specifically, the CJEU ruled that:

"[W]here there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State."

The CJEU then elaborated on the need to request information on detention conditions from the issuing state:

"The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end."

This places a significant burden on judges in terms of having insight into problems in other countries (that are not based on mere stereotypes) and access to reliable and current sources of information – and also requires sufficient time and incentives to ensure that these issues are given the necessary attention. It also makes it vital for judges in the EU to approach such assessments as uniformly as possible for the sake of legal clarity and predictability.

For the three Framework Decisions focused on in this report, not only judges but, as stated, prison and probation officials or ministry civil servants would also need support to fully operationalise the instruments and mutual recognition.

Repercussions of CJEU's *Aranyosi-Căldăraru* ruling: transfer denied

A first instance court ruling in Sweden, issued after the *Aranyosi-Căldăraru* cases, similarly led to a refusal to transfer a sentenced person back to Romania under the EAW. The case provides much insight into the process that preceded the decision and the court's considerations.

For instance, the Swedish prosecutor inquired at which prison, and at which security level, the person would serve, and requested details on prison conditions. The response indicated the security level and provided information on general conditions at Romanian prisons, such as average square meters per inmate and access to hygienic facilities. The EU agency for judicial cooperation, Eurojust, was consulted on transfers to Romania. The defence attorney provided additional details on prison conditions in Romania, including at the likely prison, which underscored the very poor conditions. The prosecutor considered the CJEU's decisions in *Aranyosi-Căldăraru*, and concluded that no sufficient guarantees had been received.

The Swedish court decided to reject the transfer request and that the restrictions imposed on the sentenced person (reporting duty and travel restrictions) should be lifted. In addition to concerns about prison conditions in Romania, there were also concerns about the fairness of the trial as well as the legality and proportionality of the sentence imposed by the Romanian court. The Swedish court also noted that more concrete and individualised opinions must be made available from a country with documented problems with detention conditions.

Source: Solna Tingsrätt [Solna first instance court], Case Number B 2768-16, 18 May 2016

This recent jurisprudence underscores the need for mutual trust for instruments like the three Framework Decisions to work, as repeatedly highlighted in this report. Taking the starting point in the shortcomings identified in this report, three overarching problems prevail. These relate to a lack of:

- Accessibility of data and information on detention conditions and available alternatives for practitioners – be they judges, prison and probation officials,

118 CJEU, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi* and *Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, 5 April 2016.

or ministry civil servants – who need such access across the EU at an operational level;
- A harmonised approach to checking and assessing fundamental rights concerns in individual cases by judges, prison and probation officials, or ministry civil servants;
- A solid monitoring system connected to best practices and incentives for change. This could be based on an EU-encouraged and sponsored enhanced existing monitoring in terms of frequency and particular focus on EU law-relevant aspects. Additionally, such an enhanced system should be linked to incentives, such as linking fund allocation (for example, EU structural funds) to recommendations by monitoring bodies, building on promising practices elsewhere.

FRA Opinion on measuring fundamental rights compliance

In April 2016, pursuant to a request by the European Parliament, FRA issued an opinion that provided advice on developing "an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values listed in Article 2 TEU based on existing sources of information". It explored how existing monitoring data and information can be used more systematically to assess compliance with fundamental rights.

Relevant monitoring is carried out by the United Nations and the Council of Europe in particular, but also by the EU itself, and Member States certainly monitor performance and situations with various tools, some of which relate to fundamental rights. The opinion concluded that it is indeed possible to draw on existing data and information to make meaningful assessments of fundamental rights compliance. A case in point relates to detention standards. The opinion was drafted in parallel with this report, and inspires much of this chapter.

Source: FRA (2016), Opinion on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values listed in Article TEU based on existing sources of information

Accessibility of data and information

Detention conditions are an important factor in developing the trust needed for mutual recognition instruments, such as the three Framework Decisions, to function properly. These conditions are monitored, but more could be done. At each 'governance level' – from the United Nations to the Organization for Security and Co-operation in Europe (OSCE), the Council of Europe, the EU, the national and even sub-national level – a range of monitoring mechanisms with a human rights remit exist.[119] Data and information from these mechanisms, particularly of the United Nations and Council of Europe, offer insight into a range of human rights, including relating to detention. These must be drawn on and made available and accessible. The Council of Europe is of particular relevance for the EU, as expressed in the Memorandum of Understanding between the two organisations, in which the EU recognises that "the Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe", and regards the Council of Europe as the Europe-wide reference source for human rights.[120]

The monitoring of human rights performance carried out through these mechanisms at various levels provides information and analysis. However, not all of these bodies presently produce data and information that can be used for comparisons across EU Member States. Their task is first and foremost to assess the states against applicable standards, which does not necessarily require a modus operandi that enables comparison. Assessments have to be relatively stringent to make it possible to draw comparative conclusions. Some of the monitoring mechanisms do provide for such elements of comparison.

Complaints-based mechanisms such as the ECtHR do lend themselves to comparison. It should be underscored, however, that a high number of complaints does not necessarily indicate a greater human rights problem. Instead, it could reveal stronger rights awareness or a better capacity to bring cases 'to Strasbourg'. At the same time, the proportion of violations of certain rights identified by the ECtHR can point to structural problems, even though the absence of violations in other states could be due to reasons other than the situation there being 'better'. The ECtHR also issues so-called 'pilot judgments' for repetitive types of cases from a particular country that come before the court, which would be a further way of analysing the more systemic problems identified.[121]

Another monitoring mechanism at the Council of Europe level that generates more comparable assessments is the European Committee for the Prevention of Torture (CPT), the Council of Europe monitoring body on deprivation of liberty. Following up on its visits, the CPT issues reports that are first shared with the government in question and will be made public at governments' request. States' agreement to have the monitoring reports published automatically is a promising sign.

119 For a more comprehensive overview of UN treaty bodies and Council of Europe monitoring mechanisms, see FRA (2012a).
120 Council of Europe and European Union (2007), Memorandum of Understanding between the Council of Europe and the European Union, May 2007, para. 11.
121 ECtHR, Press Unit (2015).

Apart from such commitments by Moldova and the Ukraine, two EU Member States – Bulgaria and Luxembourg – have allowed for this.[122]

More tellingly, however, is a mechanism at the CPT's disposal to address severe situations – the so-called 'public statement' (Article 10 (2)).[123] Where a state fails to implement the committee's actual recommendations, the CPT may, as a last resort, make a public statement. As of 1 April 2016, there are public statements with regard to four Member States of the Council of Europe,[124] including two EU Member States.[125] The reports issued by the CPT also state whether an Article 10 (2) procedure is open or that opening one is being considered, which – like the public statements – gives an indication of the level of severity of concerns. However, it should be noted that this is not a system of absolute comparability since the CPT may base its decision to warn about or open an Article 10 (2) procedure, or indeed issue a public statement, on strategic choices as to what will have the best impact. Still, the procedure does indicate systemic concerns as well as a general unwillingness or inability to act on the CPT advice. CPT reports also include other comparative aspects relating to the quality of detention, using clear and precise standards. Additionally, the number of visits by the CPT to a state provides guidance on the level of concern as to detention conditions in that particular country.

At the level of the UN, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture, CAT) is equipped with a monitoring body as well as a Sub-Committee on Prevention of Torture (SPT). The CAT assesses states' performance against the human rights standards by scrutinizing reports submitted by states, and through dialogue. It also processes individual complaints. The SPT monitors places of detention.

Linked to the UN but at a national level are other useful resources that can contribute to assessing human rights. The optional protocol to the CAT, the so-called OPCAT, obliges states to set up a National Preventive Mechanism (NPM). However, not all EU Member States are parties to the OPCAT. (Latvia and Slovakia have not signed it; Belgium and Ireland signed in 2005 and 2007, respectively, but have not yet ratified it). The effectiveness of such bodies also offers objective criteria that lends itself to comparison, in addition to the monitoring work they do.

Additionally, the willingness of potential transferees to actually be transferred, in particular under the Framework Decision on transfer of prisoners, could provide an indication of concerns about prison conditions in a particular EU Member State (or even particular places of detention, when these are known).

A harmonised approach

These resources are not easily accessible, however, and the various levels and instruments are not well-linked; the information about a given state is scattered across a variety of different sources. Awareness and use of these sources could be enhanced by creating a single access point. This should be put at the disposal of judges, prison and probation officials, or ministry civil servants, in an accessible and simple format, and in a language they understand.

A first step would be the pooling of existing data, information and analyses. This could be done through an EU fundamental rights information system, with a module or scoreboard focusing on detention conditions, similar to the EU's Justice Scoreboard used to assess court efficiency.[126] Such a system would bring together all relevant monitoring data and assessments delivered under the different international and European instruments mentioned in a single online entry point. The large amount of existing information would be tagged by thematic areas (like pre-trial detention) and made searchable by these and various other relevant categories – like time and Member State – thereby allowing for instant comparisons across Member States and the identification of trends over time.

When a system is in place that provides objective data and information in an accessible way, a practice could also be designed that would harmonise how this is used, when, and by whom. For instance, such practice guidance could stipulate that a certain level of criticism would place the burden on the state with the problems to prove that they have a system that is at a sufficiently high level to enable transfers.

122 Council of Europe (2016a).

123 The provision of the ECPT reads: "If the Party fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two-thirds of its members to make a public statement on the matter".

124 More information is available on the HUDOC website.

125 Council of Europe, Committee for the Prevention of Torture (2015), 'Public statement concerning Greece', CPT/Inf (2010) 10, 15 March 2011; 'Public statement concerning Bulgaria', CPT/Inf (2015) 17, 26 March 2015.

126 European Commission, DG Justice, EU Justice Scoreboard.

Developing an EU-funded network to promote fundamental rights of prisoners

The Criminal Justice Programme of the EU is providing financial support to a 'Prison litigation network', which seeks to improve knowledge of EU law requirements in relation to prisoners and provide information on detention standards in various EU Member States. It will also share national litigation experiences. To date, information on 10 EU Member States is available online, outlining aspects such as complaints bodies, remedies, procedures and rights – all related to prisons and prisoners.

For further information, see *www.prisonlitigationnetwork.eu/*

A solid monitoring system connected to incentives for change

An accessible system applied in a harmonised manner is a good start. But the monitoring is not always sufficiently frequent and all-encompassing to provide thorough and up-to-date overviews of the various places of detention in a Member State. Some of the monitoring is less frequent (up to five years), which may limit its usefulness. While some data are annual, others are ad hoc – on 'a need to' basis. The nature of the monitoring may also not be fully adjusted to the specificities of the EU legal instruments, such as the concept of social rehabilitation or even rights of crime victims (see Chapters 4 and 6, respectively).

The work of the CPT, for instance, could be reinforced through support and an agreement with the EU to provide more frequent and targeted monitoring in the EU Member States. Enhanced monitoring for the EU Member States could also be boosted by stronger support to, and monitoring schemes by, National Preventive Mechanisms (NPM).[127]

An accessible system with a harmonised application across the EU, connected with a solid monitoring system boosted by EU-supported and EU-specific monitoring, would need to be coupled with incentives for change. Two efforts would be essential in this regard. First, to identify promising practices and provide 'twinning' systems that bring together Member States or other actors that need to improve and those that know how to achieve the desired results. The advice given could range from political advice on how to allocate state resources for detention and alternatives (as opposed to schools or hospitals), to advice on more efficient and fundamental rights-complaint systems for transfer and improved detention standards.

Second, recommendations issued by monitoring bodies, such as the CPT, could be linked to financial resources – for instance, those already available via the EU's Structural and Investment Funds[128] or EEA and Norway Grants.[129] For funds to be made available, shortcomings pointed out by the CPT would have to be addressed. This would further enhance the needed trust between the EU Member States and would ensure constructive fundamental rights improvements. With these steps, the vision of an operational EU area of justice in compliance with fundamental rights could be realised, and the EU would be a global leader on this issue.

Conclusion and FRA Opinions

The three Framework Decisions partly share and partly have individual overarching goals. In general, the instruments seek to promote social rehabilitation and, apart from the Framework Decision on transfer of prisoners, also promote alternatives to detention, as well as the protection of crime victims and the public in general. The fundamental rights-links to these concepts include explicit provisions calling for a minimal use of detention, especially pre-trial, as well as the prohibition of torture and degrading treatment. For the pre-trial instrument, the presumption of innocence is also highly relevant. Fundamental rights linked to social rehabilitation include respect for family life, the rights of the child, as well as the right to work. The EU instruments must, as always, be applied in line with fundamental rights and international human rights standards.

FRA's findings show that a large majority of EU Member States considers fundamental rights and social rehabilitation prospects when deciding on transfers of prisoners. Family and social ties are the most important factors, followed by humanitarian concerns and detention conditions. However, the research shows that many Member States approach social rehabilitation rather narrowly, focusing merely on transferring persons to their 'home country'. Prospects for social rehabilitation should be assessed on a case-by-case basis and be taken very seriously. There is an assumption that social rehabilitation is only possible in the offender's state of nationality; this assumption runs contrary to

127 For more details on the role and potential of NPMs, see Ludwig Boltzmann Institute of Human Rights and the Human Rights Implementation Centre of the University of Bristol (2015). For an overview of available monitoring, particularly of detained children, see Defence for Children (DCI) – Belgium (2015).

128 For resources available from the European Commission, see, e.g., European Commission (2015a) (taking its starting point in the EU Charter of Fundamental Rights and reiterating that these legally binding provisions are obligatory when European Structural or Investment Funds are used).

129 More information is available on the EEA and Norway Grants website.

the objectives of the Framework Decision on transfer of prisoners. This Framework Decision emphasises the need to assess whether a transfer would indeed facilitate the sentenced person's social rehabilitation. If a transfer would not do so, a state is free to refuse the transfer. Hence the Framework Decision itself does not assume that transfers to the home country always positively affect social rehabilitation. Certain factors need to be considered, such as the capacity to facilitate social rehabilitation during detention, family and social ties, linguistic and cultural ties, and place of residence after release. This also permits supporting particular fundamental rights, such as rights related to family life, work and education.

FRA Opinion 3

It should not be assumed that social rehabilitation is only possible in the offender's state of nationality. In applying the three Framework Decisions, EU Member States must remain true to the instruments' objectives, particularly social rehabilitation, and avoid simply sending persons back to 'their home country'. Social rehabilitation prospects should be assessed on a case-by-case basis, and the capacity to facilitate social rehabilitation during detention, for instance, must be considered.

The principle of mutual recognition underpinning the three Framework Decisions hinges on mutual trust – a sufficient level of confidence between Member States as to the level and quality of justice systems. When assessing fundamental rights implications, states have clear guidelines from the jurisprudence of the ECtHR and the CJEU. FRA's analysis of recent CJEU judgments in particular underscores that EU Member States are prohibited from transferring people to places where their fundamental rights will be at risk, especially their right to dignity and to freedom from inhuman and degrading conditions. It is particularly important that the individual situation in a Member State is strictly evaluated.

FRA Opinion 4

In light of international human rights and EU fundamental rights standards and jurisprudence, EU Member States are prohibited from transferring people to places where their fundamental rights will be at risk, especially their right to dignity and to freedom from inhuman and degrading conditions. It is particularly important that individual situations are strictly evaluated when the issue is raised, and when practitioners – such as judges – are required to determine detention conditions in the state to which a person is to be transferred. This is particularly true when there is objective evidence of systemic shortcomings in a given state's detention facilities.

In this context, the EU – in cooperation with the Member States – should consider making much more easily available information on detention conditions (as well as on alternatives) in all EU Member States, drawing on existing international, European, and national monitoring reports. This would include a more objective, accessible and operational information system that could also be coupled with indicators on detention conditions and benchmarks for such conditions, allowing for greater clarity on when transfers could be made without fundamental rights concerns. This would be a useful tool for judges and others who need to make decisions about detention conditions in other Member States.

Moreover, the availability of EU funds could be linked to recommendations by monitoring mechanisms – such as the European Committee on the Prevention of Torture (CPT) – on detention conditions, so as to create incentives, and realistic opportunities, for addressing identified shortcomings as a priority.

3 Detention: extent and concerns, including radicalisation

- Of the three Framework Decisions, only the Framework Decision on transfer of prisoners focuses on post-trial detention.
- This chapter explores various aspects of detention in the EU to assess the potential of this instrument.
- This chapter also looks at the extent to which detention is used in the EU and highlights fundamental rights concerns. A section is devoted to detention's connection to radicalisation.
- This chapter, as well as the whole report, deals exclusively with criminal detention – other forms of detention, especially detentions of asylum-seekers, are outside of the scope of this research.

The fundamental right to liberty – such as expressed in Article 6 of the Charter and Article 5 of the ECHR ("Everyone has the right to liberty and security of person") – is obviously not absolute. State authorities may restrict a person's liberty and even detain them as a precaution (pre-trial) or as a sanction (post-trial).

Pre-trial detention is applied before the (final) judgment; when imposed, a suspect or accused person awaits trial in a detention facility. Such detention is compatible with the ECHR as long as it is in accordance with law and reasonably considered necessary to prevent a suspect from committing an offence or fleeing (Article 5 (1) (c) of the ECHR). However, the detention must be proportional, meaning it must be strictly necessary to ensure the suspect's presence at the trial and no less stringent measure could have sufficed for that purpose.[130]

Post-trial detention is the deprivation of a person's liberty after a conviction by a competent court (Article 5 (1) (a) of the ECHR). According to the standards adopted by the ECtHR, the detention has to be in accordance with national law[131] and must follow fair trial proceedings.[132]

The extent to which detention is used is revealing. While there can be significant discrepancies between legal systems due to procedural differences, the comparative use of pre-trial detention particularly says a lot about a legal system. Prior to a judgment, a person should be presumed innocent, and restricting liberty so severely as to detain a person must only be used very sparingly. The significance of pre-trial detention is underscored by the fact that in the Sustainable Development Goals, one of two indicators for access to justice is the proportion of pre-trial detainees among the total number of detainees (pre- and post-trial).

130 ECtHR, *Ladent v. Poland,* No. 11036/03, 18 March 2008, para. 55.
131 ECtHR, *Del Río Prada v. Spain*, No. 42750/09, 21 October 2013, para. 125.
132 ECtHR, *Willcox and Hurford v. the United Kingdom*, Nos. 43759/10 and 43771/12, 8 January 2013, para. 95.

The Sustainable Development Goals and measuring access to justice

The United Nations 2030 Agenda for Sustainable Development includes Sustainable Development Goals (SDGs). Among the 17 SDGs, goal 16 is concerned with "peace, justice and strong institutions". Global efforts are made to measure the various targets contributing to the goals. For goal 16 there are 12 targets, one of which (16.3) relates to access to justice: "Promote the rule of law at the national and international levels and ensure equal access to justice for all". This in turn has two indicators that will be populated with data in the years to come, and benchmarks will be set as to what should be achieved by 2030. The first of the two indicators concerns the proportion of victims of violent crimes who reported their victimisation to some form of official complaint mechanism. The other one (16.3.2) deals with "unsentenced detainees as proportion of overall prison population". While the benchmark for the level to be achieved for this indicator is yet to be determined, it will encourage a reasonably low rate of pre-trial detainees (unsentenced) compared to the overall number of detainees.

Source: UN, Sustainable development knowledge platform; UN, Economic and Social Council, E/CN.3/2016/2/Rev.1, 19 February 2016, p. 62

Chapter 4 deals with alternatives to detention and in that context also explores international human rights standards.

3.1. Extent of detention

The extent of detention in Europe is fairly well documented, with data being collected from national public sources, such as prison administrations, government ministries or statistical offices, often through questionnaires. There are some methodological concerns that compromise the comparability of the data across countries, including national definitions of categories that do not clearly distinguish, for instance, between detention and alternatives to detention. Still, the larger picture that emerges is relatively reliable and comparable. The main collectors of this data are the following (with some details on coverage):

- UNODC, with data from 2003 to 2015, including disaggregation by pre- and post-trial, gender and children (juvenile);[133]
- The Council of Europe's Annual Penal Statistics (SPACE, *Statistiques Pénales Annuelles du Conseil de l'Europe*), with data from 1983 to 2015, include two main strands:[134]
  a. SPACE I, on number of detentions (pre- and post-trial), includes data disaggregated by type of crime but also number of places available in penal institutions, surface area per inmate, age structure of post-trial detainees, number of children, female percentage, percentage of foreign inmates (EU and non-EU), length of sentences, escapes, deaths, costs, as well as the number of penitentiary staff;
  b. SPACE II, on number of sanctions that are not strictly detention (non-custodial or semi-custodial sanctions and measures – so-called alternatives to prison), includes information on administrative structure of probation services, but does not include data on children (juveniles);
- Eurostat-UNODC joint data collection on crime and criminal justice statistics from 2008–2013;[135]
- The European Institute for Criminal Prevention and Control (HEUNI), European Sourcebook of Crime and Criminal Justice Statistics (currently fifth edition), with data from 2007 to 2011, deals with detention in addition to crime statistics during criminal investigations;[136]
- Institute for Criminal Policy Research, University of London, World Prison Brief (WPB), contains two strands:[137]
  a. World Pre-trial/Remand Imprisonment List (latest data, second edition, 2014), with data from 2014
  b. World Prison Population List (latest data, eleventh edition, 2016).

Improved methodology for collecting data on alternatives to detention

The European Institute for Criminal Prevention and Control (HEUNI) conducted a project that sought to improve and complement existing standards for defining and categorising community sanctions and measures as well as assessing attrition. A final report was published in 2014.

Source: European Institute for Crime Prevention and Control, affiliated with the United Nations (2014), Recording Community Sanctions and Measures and Assessing Attrition. A Methodological Study on Comparative Data in Europe, Helsinki

Figure 4 shows the change in the total number of persons in detention in the 28 EU Member States between 2008 and 2014.

133 UNODC (2013).

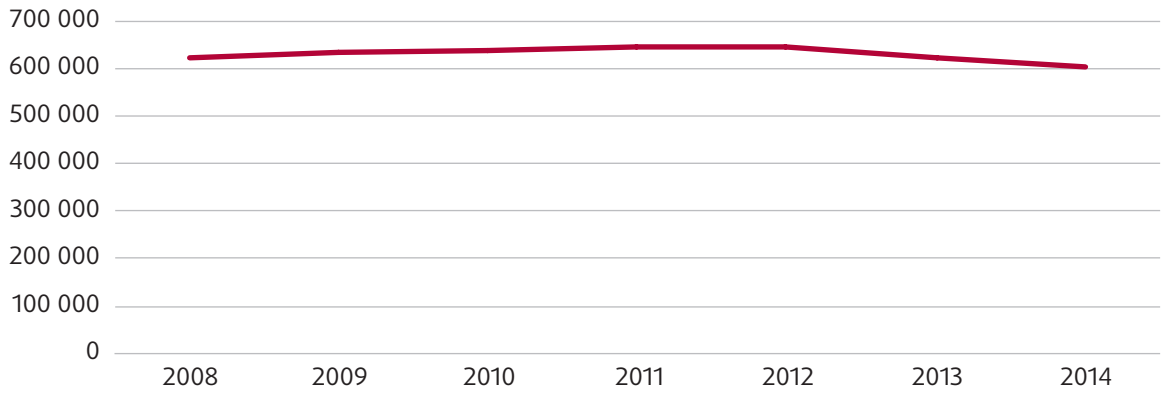
134 Council of Europe Annual Penal Statistics (SPACE), hosted by the University of Lausanne (UNIL). The EU provides funding to the Council of Europe in support of this data collection.

135 European Commission, Eurostat (2015).

136 The European Institute for Crime Prevention and Control (HEUNI) (2014).

137 World Prison Brief (WPB).

Figure 4: Total number of persons in detention (pre- and post-trial) in the 28 EU Member States, 2008 through 2014



Note: *For BE, CY, and LU, the 2013 data was also used for 2014.*
Source: *Eurostat*

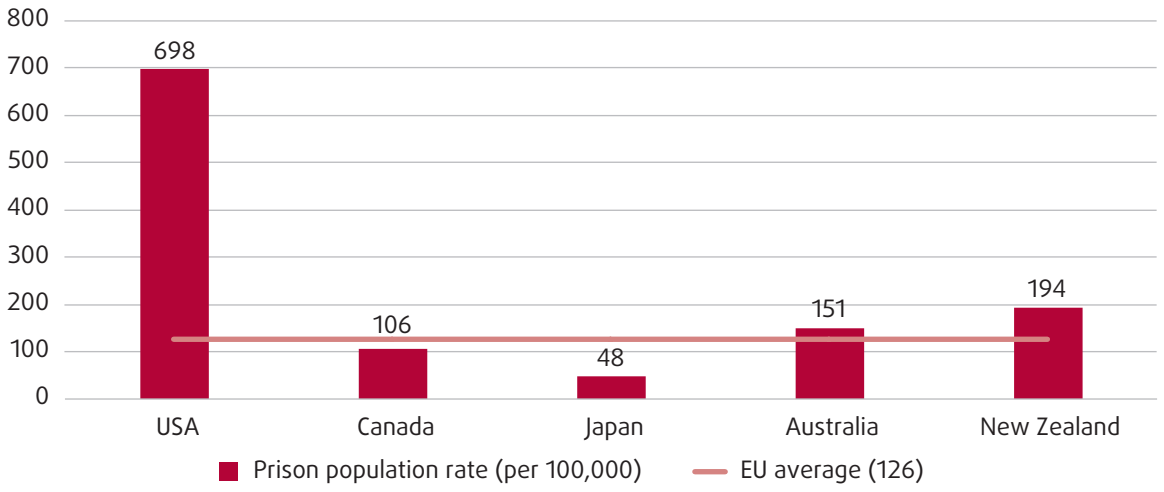
Even though the detention rate in the EU is generally considered to be too high, an international comparison provides perspective. Figure 5 shows the EU average number (126) of pre- and post-trial detentions per 100,000 members of the population, and a comparison with select countries across the globe with a similar Gross Domestic Product (GDP) to that of the EU. The rates in the EU are on par with Australia but lower than those in the United States and New Zeeland. Still, the EU's rate is higher than Canada's and significantly so compared to Japan.

3.2. Concerns about detention in the EU

There are various problems related to the extent of detention in EU Member States. In addition to overuse, there is overcrowding and other forms of poor detention conditions, as well as insufficient attention to social rehabilitation. These main concerns are relevant for the application of the three Framework Decisions and thus explored in this study.

The overuse of criminal detention, both pre- and post-trial, is a world-wide problem, including in the EU. International human rights obligations to make only limited use of pre-trial detention are flouted in many cases (an issue further addressed in Chapter 2). Council of Europe

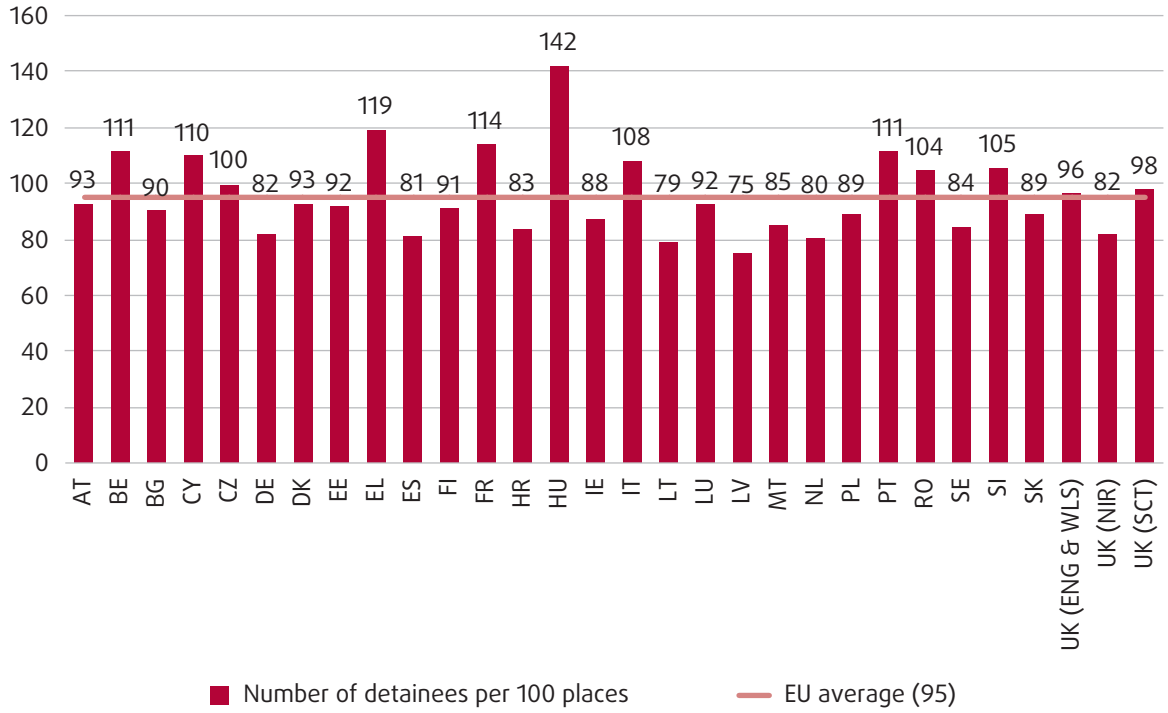
Figure 5: Detention rate (pre- and post-trial) per 100,000 population in select states with GDP per capita similar to that of the EU, compared with EU average



Note: *For the sake of comparability, the selected non-EU states have a high GDP per capita, similar to that in the EU.*
Source: *Institute for Criminal Policy Research (ICPR), University of London, World Prison Population List (eleventh edition). The information comes largely from national prison administrations or responsible ministries. The data are for the latest reference year available when the statistics were published in October 2015*

data show that despite an increased use of alternatives to detention, overcrowding remains a problem.[138] For instance, the average number of detainees in the EU Member States is approximately 95 per 100 places. This does not take into consideration that some of the spaces may not comply with the minimum requirements for a place. The number of detainees per 100 places, as presented in Figure 6, shows the potential strain on facilities in EU Member States compared to the EU average. (The information on the United Kingdom is separately specified for each of its three regions.) Hungary has around 140 % occupation, and Belgium, Cyprus, France,

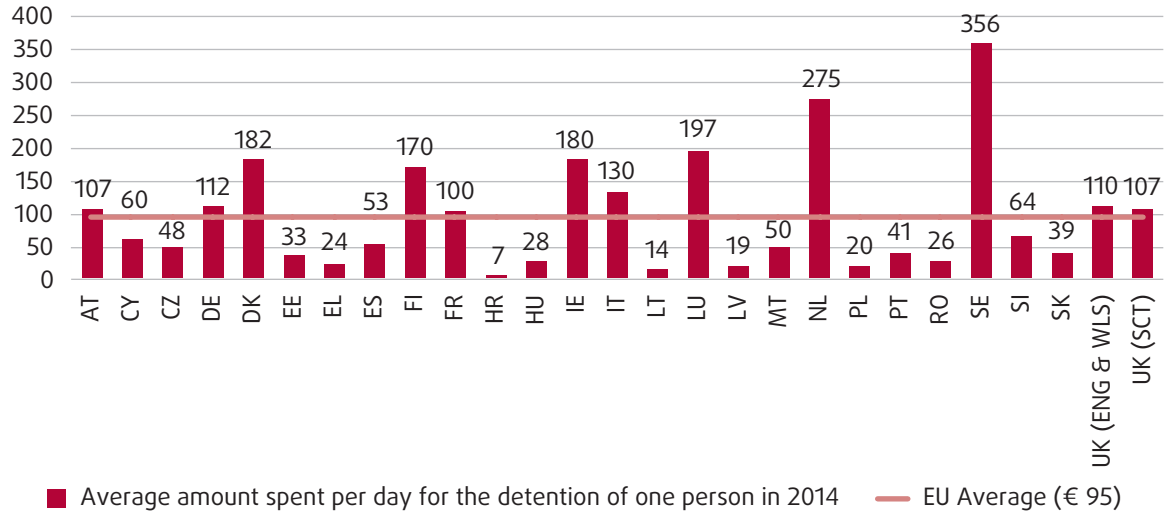
Figure 6: Number of detainees per 100 places in EU Member States, compared with EU average



Note: *Data as of 1 January 2016 (1 January 2015 for CY, DE, EL, IT, LU, PL; 1 September 2014 (Space I 2014) for UK (SCT), BG, HU, MT and PT). Information for UK specified separately for each of its three main regions. Data accessed in May 2016.*

Source: *Council of Europe, Space I, 2014, Table 1 and the continuously updated Table*

Figure 7: Average daily cost (in €) per detainee in select EU Member States, compared with EU average



Note: *Data not available for BE, BG and UK (NIR). Information on two of UK's three main regions specified separately.*

Source: *Council of Europe, Space I, 2014, Table 14*

138 See in particular Council of Europe Annual Penal Statistics (SPACE I and SPACE II).

Greece, Italy and Portugal all have around 110 persons per 100 places.

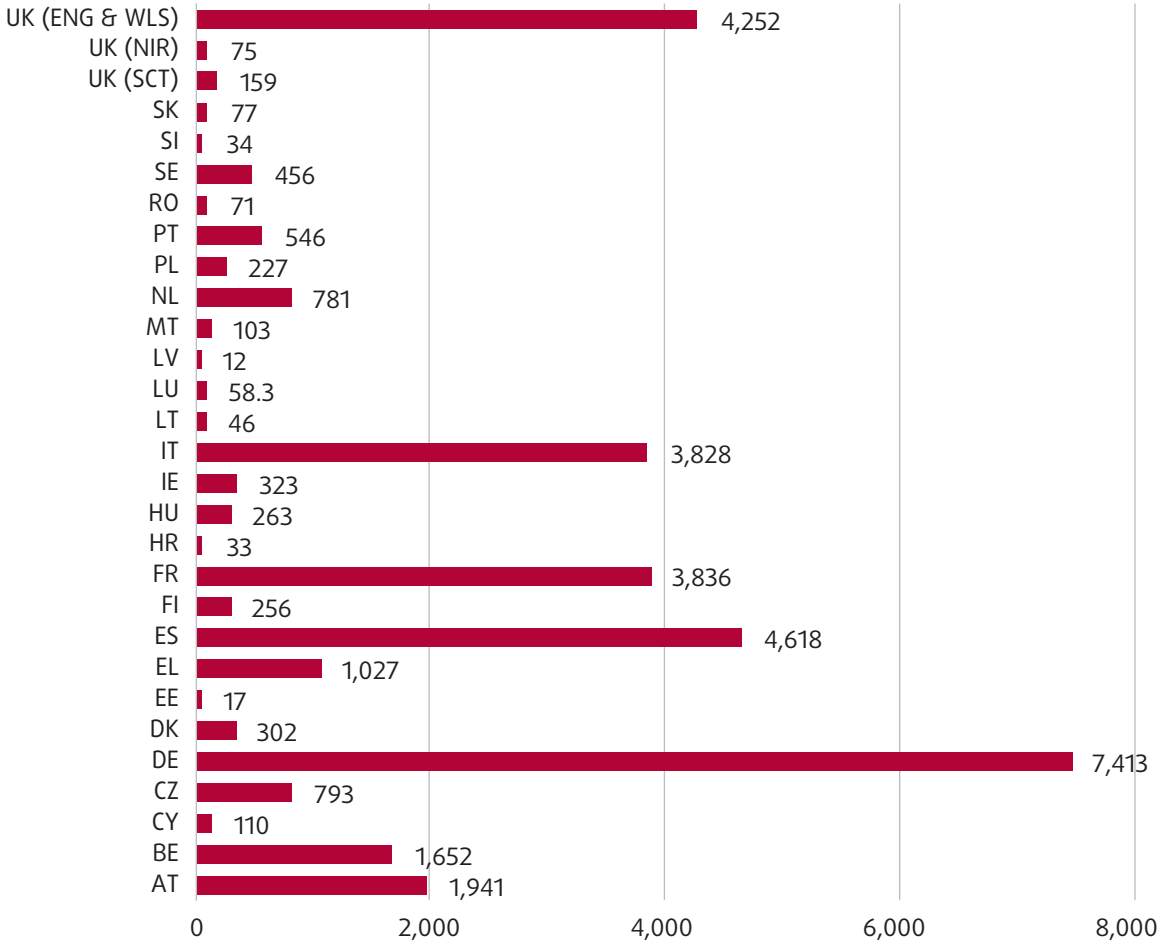
Apart from concerns about the effect of detention conditions on individuals and about insufficient preparations for peoples' return to society after detention, the cost of detention should be kept in mind. Figure 7 shows the average cost of detention per day and detainee in select EU Member States (regarding which data are available) in relation to the EU average.

While the 'costs of living' and the level of GDP varies significantly across the EU, Figure 7 still reveals the marked difference between Member States such as Croatia, Greece, Hungary, Lithuania, Latvia, Poland and Romania spending less than € 30 per day and detainee, and Denmark, Finland, Ireland, Luxembourg, the Netherlands, and Sweden spending well above € 100. The expense is almost 50 times higher in Sweden than in Croatia.

EU instruments regulating cross-border transfers of suspects, accused and sentenced persons relate mostly to people who are from another EU Member State. Figure 8 shows the number of persons detained pre- or post-trial in EU Member States other than their own. At the time of data collection, these totalled more than 33,000. Consequently, the number of persons potentially affected by the three Framework Decisions across the EU is sizeable – and this calculation only considers those detained, excluding suspects, accused or sentenced persons who are not in detention.

While some Member States have very few detainees from other EU Member States – such as Latvia (12), Estonia (17), and Croatia (33) – some have significant numbers, such as Germany (7,413), Spain (4,618), and a part of the United Kingdom (4,252) (England and Wales).

Figure 8: Number of detainees (pre- and post-trial) who are from another EU Member State, by EU Member State



Note: *Data for DE, EL and HU are from Space 1, 2012; no data are available for BG. Information for UK specified separately for each of its three main regions.*

Source: *Council of Europe, SPACE I, 2014, Table 4*

How many transfers potentially? An example from a Member State

In 2015, Sweden reported transferring 65 prisoners (in part while the relevant instruments were being implemented in the country). These included 15 transferred to the Netherlands, 14 to Finland, seven to both Denmark and Poland, six to Lithuania, and four to Germany. Reasons for not implementing transfer decisions included, in particular, a lack of consent from receiving states (which is expected to be less problematic with the EU legislation), as well as long processing times in receiving states, so that too little time of the sentences remained to be served. Sweden is seeing smaller numbers of 'foreign' sentences being served in the country – for example, 10 from Denmark and about 10 from other EU Member States in 2015.

Source: Sweden (2016), Kriminalvården, Annual Report 2015 (Årsredovisning 2015), pp. 28 and 97

Radicalisation in prison

Concerns about detention include concerns relating to radicalisation. Factors driving radicalisation include human rights violations and marginalisation.[139] Detention conditions and activities during detention to reduce exclusion and enhance reintegration into society upon release are essential aspects in this regard.

Radicalisation in prisons has become an increasing threat throughout the world, including in the EU. People accused of, or sentenced for, terrorist charges are imprisoned throughout Europe and radicalisation in prisons has become a serious concern to EU Member States. Radicalisation is defined as "a dynamic process whereby an individual increasingly accepts and supports violent extremism. The reasons behind this process can be ideological, political, religious, social, economic or personal."[140] Detainees, particularly post-trial detainees, are commonly seen as at risk of becoming radicalised. The European Parliament has identified prisons as "breeding ground[s] for the spread of radical and violent ideologies and terrorist radicalisation" and called on the Commission to establish and implement EU strategies for combating radicalisation.[141] Additionally, EU counter-terrorism coordinator Gilles de Kerchove promotes "a rehabilitation programme as an alternative to prosecution [...] with equivalent programmes for people that are already in prison".[142]

In some Member States, accused or convicted terrorists are held together with the general prison population and no special regulations apply to them. This promotes contact with inmates holding different socio-cultural and religious beliefs – which can have a positive effect on the perspective of a presumed terrorist – but also bears the risk of creating contact between like-minded people and other criminal networks that might lead to future collaboration.[143] For example, ETA prisoners are scattered around high security prisons in Spain and France to keep them separated from each other. (Since the ETA ceasefire in 2011, requests for prisoner transfers to the Basque country – where they would be closer to family, which would contribute to social rehabilitation – are becoming more frequent.)[144] In these types of facilities, prison staff do not receive special training on how to identify radicalisation or people who are at risk.

By contrast, some prison facilities in some Member States have separate terrorist wings. Individuals are believed to be more easily monitored and observed for any radical behaviour within these wings, and do not have opportunities to radicalise other inmates. The guards are usually specially trained to work with suspected or convicted terrorists. The limited contact prisoners have with other people might be counter-productive in terms of their social rehabilitation and their lives after being imprisoned. The Netherlands has special terrorist units in two prisons[145] and has been criticised for its isolation policies by the UN monitoring body.[146]

Prison can also be a place for de-radicalisation. In January 2016, France started a programme to de-radicalise individuals in prisons. Terrorists are being held away from other prisoners, and they can receive study sessions if wanted, have interfaith encounters organised and family ties reconstructed. In addition, stronger surveillance and monitoring, as well as specific preventive efforts, are applied – this includes, for example, hiring Muslim chaplains and special training for prison guards.[147] Another example can be found in Denmark, where the 'Back on track' (BOT) project focuses on prisoners who are sentenced for terrorism offences. As part of the project, mentors are trained to work with inmates who have been sentenced for extremist or terrorist crimes. Prisoners who are considered to be at risk

139 OSCE ODIHR (2014), p. 36.
140 Council of Europe (2016b), para. 1.
141 European Parliament (2015a), Resolution on the Prevention of radicalisation and recruitment of European citizens by terrorist organisations, P8_TA-PROV(2015) 0410, 25 November 2015, Section I (4), II (10), (12) and (13).
142 European Parliament (2015b).
143 Radicalisation Awareness Network (RAN) (2015).
144 Spain, National Press Bulletin (*Boletín de Prensa* Nacional) (2011); TransConflict (2015); Neumann, P. R. (2010), p. 16; Various demonstrations and organisations, such as the Basque Peace Process.
145 Neumann, P.R. (2010), p. 17; Government of the Netherlands (2015).
146 UN, Committee against Torture (CAT) (2013), Section 74 (26).
147 France, Ministry of Justice (2015a); France, Ministry of Justice (2015b).

of becoming radicalised are included in the mentoring programme.[148]

The best way to prevent radicalisation in prison is likely genuinely good prison management that effectively addresses fundamental rights problems and ensures that social rehabilitation is taken very seriously from the very outset of the sentence served.

Conclusion and FRA Opinion

International human rights law requires making pre-trial detention – when a suspect has not yet been found guilty – the exception rather than the rule. For example, Article 6.1 of the UN Standard Minimum Rules for Non-Custodial Measures (the so-called Tokyo Rules) refers to pre-trial detention as a means of "last resort". Similarly, Article 37 (b) of the UN Convention on the Rights of the Child provides that detention of children shall be a measure of last resort, and Article 5 of the European Convention on Human Rights (ECHR) outlines limitations on the use of detention generally. UN and European experts and expert bodies warn against the overuse of detention. Detention should be used as penalty for crimes against individuals and society, to deter potential offenders from committing crimes, and to protect victims and society.

Compared to data relating to the specific Framework Decisions covered in this study, existing data and information on detention in the EU Member States are rather good, with the Council of Europe providing particularly useful sources. Further harmonisation of categories, even such basic aspects as what constitutes pre-trial detention, would certainly still be needed to improve the quality and level of detail of the data, and, as has been stated, more could be done to make the data and information more accessible.

While the use of detention varies significantly across EU Member States, according to FRA's comparison, the average across the 28 is reasonable when compared globally. However, in several EU Member States, and to some extent in all of them, detention could and should be used less. The number of persons in detention who are from other EU Member States (and the proportion of these) logically also varies significantly across the EU. But there is a potential for greater use of the three Framework Decisions, more so in some EU Member States than in others.

According to the data analysed by FRA and the information available from international monitoring mechanisms, fundamental rights-related problems with detention in the EU include – in addition to over-use – overcrowding and poor detention conditions. This can undermine mutual trust, and also undermine a central goal of the three Framework Decisions: to enhance social rehabilitation.

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To ensure effective implementation of the three Framework Decisions, the EU and its Member States need to take further action. Pre-trial detention must be reduced in many Member States to comply with international human rights standards and, as stated, to avoid discrimination on the basis of nationality. A general reduction of detention must also be sought to avoid overcrowding, which can lead to poor prison conditions. The interests of society in terms of the financial costs of detention and poorly rehabilitated former detainees must also be considered. To facilitate this, transfers of best practices and full use of the Framework Decisions are needed.

148 European Network of Deradicalisation; European Commission, DG Migration and Home Affairs.

4 Alternatives to detention

- The Framework Decision on probation and alternative sanctions and the Framework Decision on the ESO both seek to promote alternatives to detention.
- Both decisions provide for transferring measures alternative to detention across borders, to another EU Member State.
- The Framework Decision on probation and alternative sanctions deals with post-trial situations, while the Framework Decision on the ESO deals with pre-trial situations.
- This chapter focuses on alternatives to detention to assess the practical potential of these instruments.

Detention may instinctively appear to be the logical option for dealing with suspects, accused and sentenced persons, but alternatives to detention are often the better choice. The fundamental right to liberty should only be limited when absolutely necessary. People are presumed innocent pre-trial and should thus not be detained as a rule, but only in the rare cases when they are at risk of affecting criminal investigations or absconding. UN and Council of Europe human rights instruments therefore provide that detention should not be the default, and that instead, non-custodial monitoring and other alternatives to detention – such as medical treatment, restraining orders, victim reparations or financial sanctions – should be resorted to. The European Court of Human Rights has also confirmed that some forms of post-trial detention may violate human rights.

As noted, the overall purpose of the Framework Decision on probation and alternative sanctions and the Framework Decision on the ESO is to encourage alternatives to detention and the recognition thereof across EU borders. The two instruments relate to measures such as, for example, obligations to inform authorities of one's residence or "an obligation not to enter certain localities, places or [...] areas".[149]

Greater use of alternatives would have a positive impact on fundamental rights generally in that detention, which is very intrusive, would be used less; social rehabilitation would be facilitated by not removing persons from society in the first place; and persons would be able to maintain or establish contacts with society, and family in particular, through more regular interaction. Alternatives to detention thus support respect for the right to family life as well as the right to dignity. To the extent that detention is used more frequently for non-citizens, based on the fear that individuals will escape beyond the reach of the national justice system, equality and non-discrimination also play a role.

There is no doubt that, in certain cases, detention is the only measure possible, both as a penalty and for the protection of victims and society in general. But it is important to consider alternatives to both pre- and post-trial criminal detention.

149 See Council Framework Decision 2008/947/JHA, Art. 4; Council Framework Decision 2009/829/JHA, Art. 8.

Alternatives to custodial measures to promote rehabilitation and reduce recidivism

"Custodial measures should be avoided for less serious crimes. This should be done in order to promote rehabilitation and reduce recidivism," says Nils Öberg, Director-General of the Swedish Prison and Probation Service.

As he notes:

"A sanctioning system serves several purposes: punishment, deterrence, and credibility of the legal system. Punishment should also be executed in ways so as to reduce the risk of new criminality. [...] A well-balanced consideration of punishment and rehabilitation is needed. It is thus unfortunate that policy debates are about making longer punishments even longer. We need to talk more about short sentences and alternatives, such as fines, conditional release, supervision and special care. [...]

Incentives for the sentenced person to actively engage with the established rehabilitation plan during shorter sentences diminish in favour of simply serving the short prison time that often remains after deducted pre-trial detention. For constructive measures such as treatment, support, influence and control to be effective, apart from resources and competence, also time is needed. [...]

There is good scientific support for non-custodial sentences to be more effective in this regard – and such sanctions can be made longer, more nuanced and adjusted to individual needs and every-day life. In 2016 and 2017, Sweden will reinforce efforts with four steps to support alternaties to imprisonment:

1. *New 'conversational' method that has proven effective in Canada (called STICS, Strategic Training Initiative in Community Supervision), aimed at addressing criminality;*
2. *An app for persons subjected to alternatives to detention is being developed, with reminders for regular visits to phsyciatric or addiction treatment, for instance. There is also a pilot project for young offenders with supervision via videolink.*
3. *Stricter policy on non-compliance – if conditions for early release or alternatives to pr-trial detention are not complied with, the consequences will be clearer, faster and more forceful.*
4. *More focused work on preventing recidivism and improving reintegration, through, for instance, enhanced capacity to make correct assessments of risks, needs, and receptivity of released persons. In addition, educational and information material is launched, aimed at local and appeals courts to increase awareness of options and limitations of different alternative sentence measures. It is the intention that this will lead to closer dialogue and cooperation with the courts through these efforts.*

The perspective is simple. People who have commited crimes are part of our society and shall return after having served their sentence. Opting for the right sentencing measure is an important element in being successful in terms of reducing the risk of recidivism, and thus using resources effictively. In this light it is very difficult to see the point of extensive use of short prison sentences."

Source: Nils Öberg, Dagens Nyheter, op-ed of 21 March 2016, available in Swedish [translation by FRA]

The rest of this chapter discusses various measures that provide alternatives to detention. Chapter 5, which addresses issues relating to people in situations of vulnerability, also covers alternatives specially designed for children.

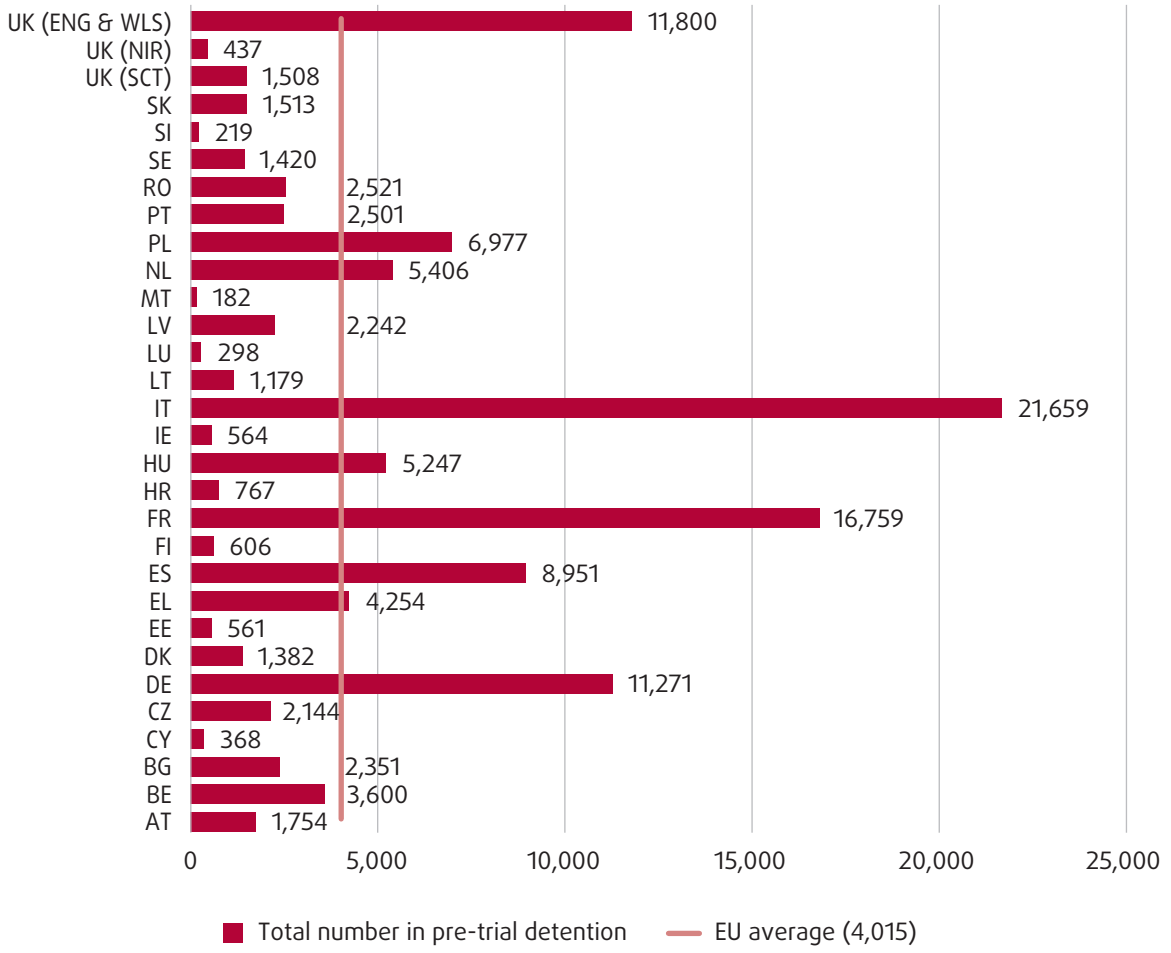
4.1. Alternatives to pre-trial detention

Using detention during the pre-trial phase of criminal proceedings should not be default practice. Alternative measures should be the first resort, and detention only used where strictly necessary, and for as limited a length of time as needed. This is clear from a range of international human rights and criminal justice instruments, which agree that the presumption of innocence should lead to a presumption in favour of liberty, meaning pre-trial detention should be the exception and not the norm. Additionally, detention on remand should be as short as possible.[150] ECtHR jurisprudence makes very clear that authorities must convincingly justify any period of pre-trial detention; moreover, they are obliged to consider alternative measures for ensuring the suspect's presence at trial.[151]

150 For example: Council of Europe, Committee of Ministers (2006), Recommendation Rec (2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, 27 September 2006, General Principles III (3); United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), Annex to UN, General Assembly (GA) (1990a), *Basic Principles for the Treatment of Prisoners*, A/RES/45/110, 14 December 1990; UN, GA (1985), *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, A/RES/40/33, 29 November 1985.

151 ECtHR, *Idalov v. Russia,* No. 5826/03, 22 May 2012.

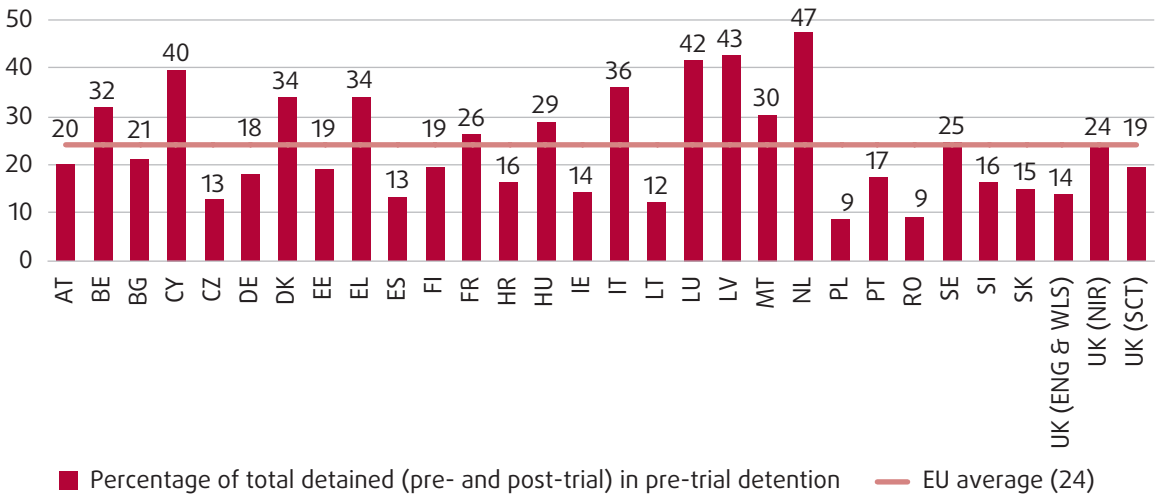
Figure 9: Total number of persons in pre-trial detention in EU Member States, compared with EU average



Note: *The information comes largely from national prison administrations or responsible ministries. The data are mainly from 2013 and 2014, but are slightly older in some cases. Information for UK specified separately for each of its three main regions.*

Source: *Institute for Criminal Policy Research (ICPR), University of London, World Pre-trial/Remand Imprisonment List (2nd ed.)*

Figure 10: Total detained (pre- and post-trial) in pre-trial detention, compared with EU average (%)



Notes: *The information comes largely from national prison administrations or responsible ministries. The data are mainly from 2012 and 2013, but in some cases are slightly older. Information for UK specified separately for each of its three main regions.*

Source: *Institute for Criminal Policy Research (ICPR), University of London, World Pre-trial/Remand Imprisonment List (2nd ed.)*

However, the number of persons detained pre-trial is still high, especially in some EU Member States. Figure 9 provides an overview of the use of pre-trial detention across the EU. The figure includes absolute numbers, so larger countries have a greater population.

Figure 10 shows the percentage of total detained (pre- and post-trial) in pre-trial detention. This proportion is interesting because it is comparable across countries, irrespective of population size, and shows how frequently pre-trial detention is used compared to the overall use of detention. The SDGs, as noted in Chapter 3, include a target under goal 16 ("peace, justice and strong institutions") on access to justice, with one of the indicators (16.3.2) dealing with "[u]nsentenced detainees as proportion of overall prison population". Measuring this indicator will encourage a reasonably low rate of pre-trial detainees (unsentenced) compared to the overall number of detainees pre- and post-trial.

Figure 11 presents the number of pre-trial detainees per 100,000 population in the Member States, which varies quite significantly.

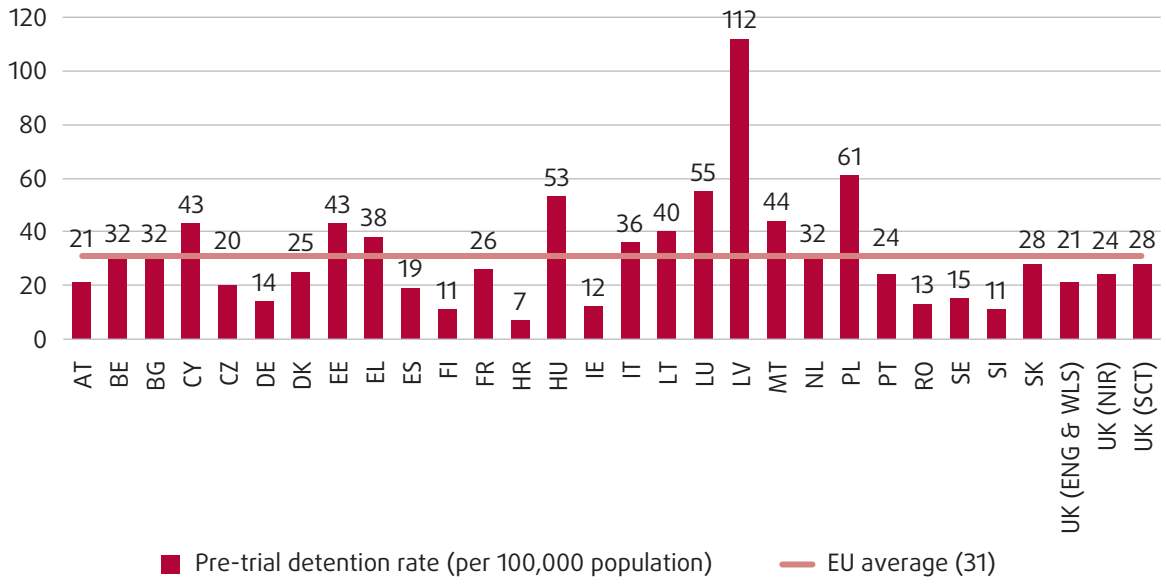
Legal and cultural traditions of responding to alternatives to pre-trial detention

Research shows that approaches to pre-trial detention vary in different EU Member States. Diverse traditions and cultural differences might offer some explanation. Examples of practice from the United Kingdom and Ireland demonstrate the common law approach.

In England and Wales, by law, every defendant has a prima facie right to bail, which must be granted unless statutory grounds for withholding it are satisfied. Studies show that bail is granted in approximately two-thirds of initial pre-trial hearings, which include serious offences, although it was found that bail conditions were breached in 40 % of cases reviewed. The most frequently imposed condition is a residence condition. Therefore, bail hostels, while not always available, are important to enable releases of suspects without fixed addresses.[152] While bail may bring its own problems, in Ireland, bail, rather than detention, is the 'default position' in pre-trial criminal investigations. "If you oppose bail, there must be a reason. Bail is the default position," says an Irish judge. The conditions vary from a so-called "mobile phone condition" – which requires the suspect to carry a fully-charged phone at all times and answer it whenever the police calls – to money bail from € 100 to € 10,000.[153]

In other states, however, pre-trial detention is perceived as a measure of first resort. In some countries, the prosecution is the most powerful stakeholder driving the use of pre-trial detention, and judges will for a variety of reasons often comply with their request. To effectively and efficiently reduce the use of pre-trial detention or

Figure 11: Detention rate (pre-trial) per 100,000 population in the EU Member States (UK by its three main parts), compared with EU average



Notes: *The information comes largely from national prison administrations or responsible ministries. The data are mainly from 2013 and 2014, but in some cases are slightly older. Information for the UK specified separately for each of its three main regions.*

Source: *Institute for Criminal Policy Research (ICPR), University of London, World Pre-trial/Remand Imprisonment List (2nd ed.)*

152 Fair Trials (2015).
153 *Ibid.*

Table 9: Alternatives to pre-trial detention available in EU Member States

	Restriction on movement	Communication restrictions / removal orders	Electronic Monitoring	Duty to report / mandatory registration	Supervision	Social rehabilitation	Medical rehabilitation	Financial Surety	Seizure of documents	Other restrictions on liberties
AT	✔	✔	✔	✔	✔		✔	✔		
BE	✔	✔	✔		✔		✔	✔		
BG	✔			✔				✔		
CY		✔						✔		
CZ	✔	✔			✔					✔
DE	✔	✔	✔	✔	✔			✔		
DK	✔	✔			✔		✔			
EE	✔	✔		✔						
EL	✔	✔	✔					✔		
ES	✔	✔		✔			✔			
FI	✔	✔	?	✔			✔	?		
FR	✔	✔	✔	✔			✔	✔		✔
HR	✔	✔		✔					✔	
HU	✔	✔								
IE	✔	✔		✔					✔	
IT	✔	✔	✔	✔						
LT	✔	✔		✔	✔			✔	✔	
LU	✔	✔		✔	✔	✔	✔	✔	✔	
LV	✔	✔		✔	✔	✔		✔		
MT	✔	✔						✔		
NL	✔	✔	✔		✔	✔	✔	✔		
PL	✔	✔		✔	✔	✔		✔	✔	✔
PT	✔			✔						
RO	✔	✔	✔	✔	✔		✔			✔
SE	✔			✔						
SI	✔	✔		✔			✔	✔		
SK	✔	✔						✔		✔
UK	✔		✔						✔	

Note: ✔ = *Alternative measure available (as opposed to no alternative established/unclear); ?=Measure has been proposed and is being discussed in a formal process; N/A = No information available. For the UK, Northern Ireland does not have electronic monitoring or seizure of documents.*

Source: FRA, 2015

unconditional bail, it would therefore be crucial to convince prosecutors to request alternatives.

In Finland, the only alternative to detention is a travel ban, which is rarely used – and even less often in respect to foreigners. The travel ban often appears to be understood by judges to apply only when a suspect has permanent residence in Finland.[154]

Alternatives to pre-trial detention in light of the Framework Decision on the ESO

Article 8 (1) of the Framework Decision on the ESO lists the pre-trial supervision measures to which it applies. These are:

- Obligations to inform authorities of any change of residence
- Restrictions in movement, in particular in entering certain places or an obligation to remain at a specified place, as well as limitations on travelling across state boarders
- Restrictions on contacting certain persons.

Additionally, according to Article 8 (2), following notification to the Council, states may also choose to apply the ESO to other measures, for example:

- Restrictions on engaging in certain activities
- Restrictions on driving a vehicle
- Obligations to deposit a certain sum of money
- Obligations to undergo certain treatment
- Restrictions on contacting specified objects.

The most common measures will be described in detail in subsequent parts of this chapter. It should be noted that not all types of measures are available in all EU Member States. Table 9 provides an overview of measures available in EU Member States.

Restrictions on movement

All Member States that have implemented the ESO envisage alternative measures that relate to some form of restriction on movement of the person awaiting trial (Article 8 (1) (b)-(d)). The following alternative measures to pre-trial detention are commonly available in these Member States:

- Prohibition from leaving the national territory
- Prohibition from leaving the designated premises (house arrest)
- Prohibition on entering certain locations.

154 *Ibid.*

Restrictions on communication

Together with measures imposing restrictions on movement, the most common alternative measure used at the pre-trial stage by EU Member States involves restrictions on communications with specific members of society. When individuals are accused of domestic and/or sexual violence, restrictions on communicating with specific persons related to the alleged offences apply in almost all Member States (Article 8 (1) (f)). Such measures, also known as barring orders or restraining orders, may be directed both at impeding any contact with the direct victim of the alleged offence, or with any other member or category of members of society who might be under possible threat. According to FRA's research, Bulgaria, Portugal and Sweden do not provide for an obligation to avoid contact with specific persons related to the alleged offence.

Strict supervision measures

Another related alternative measure that is widely used at the pre-trial stage within the EU is that of mandatory registration, also known as the duty to report. According to FRA's findings, 18 Member States[155] require mandatory registration at pre-trial stage, with Ireland and Italy providing analogous requirements notwithstanding their lack of transposing legislation. Direct supervision by the national probation services is envisaged in 11 Member States,[156] while seizure of documents occurs at the pre-trial stage in seven Member States.[157]

Electronic monitoring

Electronic monitoring, which has steadily grown in popularity amongst Member States' criminal justice systems, is directly related to the abovementioned alternative measures. FRA's findings show that, due to its dependency on relatively cumbersome technology, only 10[158] out of the 22 Member States that have implemented the instrument make use of electronic monitoring at the pre-trial stage. Italy (where implementation was lacking as of 1 October 2015) also utilises electronic monitoring as an alternative to pre-trial detention. Finland reportedly set up a working group on the matter; its deliberations are still to be finalised.

155 Austria, Bulgaria, Croatia, Estonia, Finland, France, Germany, Ireland, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovenia, Spain and Sweden.
156 Austria, Belgium, the Czech Republic, Denmark, Germany, Latvia, Lithuania, Luxembourg, the Netherlands, Poland and Romania.
157 Croatia, Ireland, Lithuania, Luxembourg, Poland, Spain and the United Kingdom.
158 Austria, Belgium, France, Germany, Greece, Italy, the Netherlands, Romania, Spain and the United Kingdom.

Social and medical rehabilitation schemes

At the pre-trial stage, only 10 EU Member States[159] provide for access to medical rehabilitation schemes, such as: admission to psychiatric treatment facilities, outpatient treatment for mental health or addiction, or treatment for addiction to alcohol or narcotics. Merely four Member States[160] have included in their pre-trial criminal justice system social rehabilitation schemes, such as: youth rehabilitation programmes, social integration programmes, community return programmes, citizenship training courses, road traffic training, programmes preventing violent behaviour and participation in cultural programmes. This unavailability of social rehabilitation schemes at the pre-trial phase might suggest a difficulty in transferring such measures between Member States or incompatibility between the measures offered across Member States. If an executing state does not provide for the same rehabilitative measures as the issuing state, it must ensure that the accused is offered a new measure that is as close as possible to the original and that the accused is no worse off due to the transfer.[161]

Financial surety and other alternatives to pre-trial detention

Financial surety is an alternative to pre-trial detention in 16 Member States,[162] while a ban on driving may be ordered in France, Poland, Romania, Slovakia and Spain. A ban on carrying alcoholic beverages may be issued in both the Czech Republic and Romania, while in both France and Romania, a ban on writing cheques during one's pre-trial stage can be imposed.

4.2. Alternatives to post-trial detention

> "[T]he principle according to which prison shall be used as a last resort, [requires] a variety of individually tailored sanctions and measures [that] shall be applied where possible in order to keep offenders in the community and to improve their crime-free life prospects."
>
> *Council of Europe, Committee of Ministers,* Guidelines for prison and probation services regarding radicalisation and violent extremism*, 2 March 2016.*

The Framework Decision on probation and alternative sanctions defines alternative sanctions as "a sanction, other than a custodial sentence, involving deprivation of liberty or a financial penalty, imposing an obligation or instruction."[163] Article 2 (7) defines probation measures as "obligations and instructions imposed by a competent authority on a natural person, in accordance with the national law of the issuing State, in connection with a suspended sentence, a conditional sentence, or a conditional release."[164]

Other related terms are to be understood as follows:

- *conditional release*: "the early release of sentenced prisoners under individualised post-release conditions"[165]
- *suspended sentence*: a custodial sentence imposed by a court, which will not be executed, depending on compliance with imposed probation measures[166]
- *conditional sentence*: a judgment of guilt has been made against a person, but the imposition of a sentence is deferred on the condition that the convicted person complies with probation measures.[167]

FRA's research indicates that conditional release from a custodial sentence is an option in all EU Member States. There are variations between the Member States on the eligibility for conditional release. Some allow this only for sentences of a certain length, or exclude some crimes from eligibility. There is also a difference in how conditional release is offered; some states have an authority charged with making probation decisions, while in others, the courts have the power to release a prisoner before the end of the sentence.

Data show that 25 of the 28 EU Member States offer suspended sentences. Conditional sentencing appears to be a less available alternative: 16 out of 28 offer conditional sentences (Belgium, Cyprus, the Czech Republic, Germany, Estonia, Finland, France, Croatia, Hungary, Ireland, Malta, Poland, Romania, Sweden, Slovenia, and the United Kingdom).

The Framework Decision on probation and alternative sanctions lists, in Article 4 (1), probation measures and alternative sanctions to which it applies, but it is not compulsory for Member States to make all of these measures available. The listed measures are:

159 Austria, Belgium, Denmark, Estonia, Finland, France, Luxembourg, the Netherlands, Romania and Slovenia.
160 Luxembourg, Latvia, the Netherlands and Poland.
161 Council Framework Decision 2009/829/JHA, Art. 13 (2).
162 Austria, Belgium, Bulgaria, Cyprus, France, Germany, Greece, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Slovakia, Slovenia and Spain.
163 Council Framework Decision 2008/947/JHA, Art. 2 (4).
164 *Ibid.*, Art. 2 (7).
165 Council of Europe, Committee of Ministers (2003), Recommendation Rec (2003)22 of the Committee of Ministers to Member States on conditional release (parole), 24 September 2003.
166 Council Framework Decision 2008/947/JHA, Art. 2 (2).
167 *Ibid.*, Art. 2 (3).

Table 10: Post-trial alternatives to detention available in EU Member States

	Restriction on movement	Financial Sanctions	Community Service	Education	Social rehabilitation	Medical rehabilitation	Victim reparations	Other restrictions on liberties
AT	✔							
BE	✔	✔	✔					
BG	✔		✔	✔				
CY	✔			✔				
CZ	✔	✔	✔		✔			
DE		✔	✔		✔	✔	✔	✔
DK	✔		✔			✔	✔	
EE	✔		✔			✔		
EL		✔	✔					
ES	✔			✔	✔	✔		✔
FI	✔		✔					
FR	✔		✔		✔			
HR		✔	✔					
HU	✔	✔	✔					✔
IE	✔	✔	✔		✔		✔	✔
IT	✔			✔				
LT	✔	✔	✔	✔	✔	✔	✔	✔
LU		✔	✔	✔		✔	✔	✔
LV	✔	✔	✔					
MT			✔	✔		✔	✔	
NL		✔	✔					
PL	✔	✔	✔	✔		✔	✔	✔
PT	✔		✔	✔	✔	✔	✔	✔
RO	✔	✔	✔	✔	✔		✔	✔
SE		✔	✔			✔		
SI		✔				✔		✔
SK	✔	✔	✔					✔
UK	✔		✔	✔	✔	✔		

Note: ✔ = *Alternative measure available (as opposed to no alternative established/unclear)*
Source: *FRA, 2015*

- an obligation to inform authorities about any change of residence or working place
- restrictions on movement, in particular, an obligation not to enter certain places, limitations on leaving a state's territory
- instructions relating to behaviour, residence, education and other activities
- an obligation to report to a specific authority and/or to cooperate with certain officers
- an obligation to avoid contact with specific persons or objects
- an obligation to pay financial compensation
- an obligation to carry out community service and
- an obligation to undergo certain treatment.

States may also notify the Council which other measures they are prepared to supervise. FRA data show that some Member States offer many more alternatives to detention than other states, which may affect the recognition of sentences between Member States in practice. Table 10 shows categories of probation measures and alternative sanctions available in the EU Member States.

An analysis of the availability and application of alternatives to detention in the EU Member States reveals that community service is the most commonly available alternative sanction. All but five (Austria, Cyprus, Italy, Slovenia and Spain) of the 28 EU Member States use community service either as an alternative to custodial punishment or as part of the probation measures placed on a sentenced person.

Financial sanctions are excluded from the definition of 'alternative sanctions' in the Framework Decision on probation and alternative sanctions.[168] However, FRA's findings show that 16 of the 28 Member States use financial sanctions in different ways, such as for redistribution in the community or in the form of damages and expenses paid to victims of crime.[169] In some EU Member States, prison sentences can be converted into monetary fines, or where a convicted person cannot afford it, into equivalent hours of 'unpaid' work in the community. For example, this is the case in Greece.[170]

In France, day-fines can be imposed. This means a daily contribution for a certain number of days, with a failure to pay resulting in the sentence being transformed into days of imprisonment.[171]

Many EU Member States include measures that are focused on victims. These include obligations to refrain from contacting victims or their family, payments of damages to victims, payments of medical costs, formal apologies to victims, and reconciliation measures. Ten Member States offer some form of victim-focused measure (Germany, Denmark, Ireland, Latvia, Luxembourg, Malta, Poland, Portugal, Romania and Spain).

Nineteen Member States have some form of rehabilitative sanctions that include social rehabilitation and integration measures, education and training, and therapeutic programmes for mental health and addiction. For example, in France, convicted persons may be obliged to attend citizenship training courses.[172]

Restrictions of movement as an alternative sanction can come in many forms. These include house arrest with electronic monitoring; prohibitions on entering certain locations; limitations on leaving the country; or deportation orders. House arrest with electronic monitoring is commonly used among EU Member States. The states that allow electronic monitoring include: Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Ireland, Italy, Latvia, Poland, Portugal and Spain. In Cyprus, this sanction is discretionary for prison authorities; decisions to allow it are made by a special committee consisting of various specialists within the prison staff.[173] Belgium has a system of home detention with voice recognition. Vocal recognition is a simplified version of electronic monitoring: a sentenced person may be called at any time and their presence verified through vocal recognition via a secured phone line.[174]

Pre-trial detention in the EU – a 'measure of last resort'?

Fair Trials International, an advocacy organisation, in May 2015 published results from EU-funded research into the application of pre-trial detention in EU Member States. The research showed a strong preference for detention rather than alternatives in practice. It also revealed worrying practises, including judges using pre-trial detention for punitive purposes. However, the results also highlighted promising practices that avoid the persistent practice of using detention as default rather than as an exception.

Source: Fair Trials (2016), Policy Report: Pre-Trial Detention in the EU

Conclusion and FRA Opinion

As noted, two of the three Framework Decisions aim to encourage alternatives to detention. This is also emphasised by the UN Standard Minimum Rules for Non-Custodial Measures (the so-called Tokyo Rules, adopted in 1990), and by the UN Standard Minimum Rules for the Treatment of Prisoners (the so-called Nelson Mandela Rules, the revised version of which was adopted in December 2015). States should make available alternative measures for rehabilitating, monitoring and punishing suspects, accused, and sentenced persons that can equally or more effectively achieve criminal justice

168 Council Framework Decision 2008/947/JHA, Art. 2 (4) and 1 (3) (b).
169 FRA (2012b).
170 Greece, Criminal Code (Ποινικός Κώδικας), 31 May 1985, Art. 82 as modified by Art. 1 of Law 4093/2012 'Approval of the Medium Term Fiscal Strategy for 2013-2016 - Urgent Measures on Application of Law 4046/2012 and the Medium Term Fiscal Strategy for 2013-2016' (Έγκριση Μεσοπρόθεσμου Πλαισίου Δημοσιονομικής Στρατηγικής 2013–2016 – Επείγοντα Μέτρα Εφαρμογής του ν. 4046/2012 και του Μεσοπρόθεσμου Πλαισίου Δημοσιονομικής Στρατηγικής 2013–2016), 12 November 2012.
171 France, Law 2014-896 on the individualisation of penalties and strengthening of the criminal sanctions' effectiveness (*Loi n° 2014-896 relative à l'individualisation des peines et renforçant l'efficacité des sanctions pénales*), 15 August 2014; France, Criminal Code (*Code pénal*), Art. 131-4-1.
172 *Ibid.*
173 Cyprus, Law on prisons of 1996 (**Ο Περί Φυλακών Νόμοςτου 1996**) N. 62(I)/1996, Art. 21A.
174 Belgium, Ministerial Circular n°1771 setting up the release after the execution of part of the imposed sentence (*La circulaire ministérielle 1771 prévoit la mise en liberté après l'écoulement d'une partie prescrite de la peine),* 17 January 2005; Belgium, Ministry of Justice (2011).

goals, as provided by the two Framework Decisions dealing with alternatives to detention.

As indicated, justifying a disproportionate application of pre-trial detention to citizens of other EU Member States with the risk of escape can have discriminatory effects. There is also rather significant divergence among EU Member States when it comes to the types of alternatives to detention, particularly in terms of when and under what conditions they are used, both pre- and post-trial. FRA's research shows that authorities can choose from a wide range of alternatives to detention, which can be tailored to the individual circumstances of a case to achieve the best outcome – for example, barring orders to protect victims or medical rehabilitation to treat offenders with addictions. However, these options are applied quite differently across Member States. Some states have limited sentencing options; for example, just over half of the EU Member States have the possibility of conditional sentencing, which postpones the imposition of a sentence in favour of community supervision measures. The availability of such measures offers a *de facto* second chance to offenders while also deterring reoffending.

There is room for EU Member States to use alternative measures both for new and repeat offenders. All Member States offer early conditional release from prison sentences, which allows offenders a chance to reform and reintegrate into society. Some regimes are more restrictive than others, and most states have different rules for release from detention – for example, only for certain types of offences or after a certain period of time. The research also shows that many states have alternative sanctions with the victim in mind, including financial reparations or a formal apology from offender to victim. A more harmonised approach to, and greater use of, alternatives to detention across EU Member States would not only bring practice more in line with international human rights standards but would also facilitate applying the Framework Decisions to their full extent. All this would also reinforce mutual trust between EU Member States.

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International and European human rights law requires that pre-trial detention is the exception rather than the rule. To ensure effective implementation of the three Framework Decisions, EU Member States should treat detention as a last resort – especially at the pre-trial stage, when suspects have not been found guilty. This will also reduce costs, improve detention conditions, and facilitate social rehabilitation. Greater use of alternatives to detention, both pre- and post-trial, must be achieved across EU Member States, with the greatest importance reasonably to be placed on the pre-trial phase.

To ensure effective implementation of the three Framework Decisions, the EU and the Member States must ensure a more harmonised approach across the EU in terms of when detention is used, what alternatives to detention are in place and when they are used, and what social rehabilitation entails. This would also reinforce mutual trust across EU Member States, which is the basis for effective mutual recognition of judicial decisions.

5 Detention and people in situations of vulnerability

- This chapter explores developments in the field of detention and alternatives to detention with respect to people in situations of vulnerability.
- It focuses on select groups of individuals – specifically, children, parents of young children, persons with disabilities and transgender persons.
- The discussion on these groups provides examples of how the specific needs of persons in situations of vulnerability can be protected.

The Framework Decision on the ESO and the Framework Decision on probation and alternative sanctions seek to encourage alternatives to detention. Detention can generally have negative effects on detainees, but on persons in situations of vulnerability the impact can be greater. As noted in Table 8 in Chapter 2, the recitals of the three Framework Decisions all stress that refusal to transfer is possible if there are objective reasons/indications that a person was punished or may be disadvantaged based on discriminatory reasons, such as race, sex or religion. Therefore, individuals in situations of vulnerability should be given particular attention. This chapter provides an overview of select groups of individuals who may be in situations of vulnerability.

Public international law obliges states to protect vulnerable individuals. The Preamble to the UN Convention on the Rights of the Child (CRC), to which all EU Member States are party, refers to the "need to extend particular care to the child" and notes that the need to afford special protection to children has been recognised in various international instruments.[175] Article 24 of the EU Charter of Fundamental Rights also offers strong protection for the best interests of the child.

Moreover, the UN Convention on the Rights of Persons with Disabilities (to which the EU itself is also a party) aims to protect all persons with disabilities' full enjoyment of all human rights and fundamental freedoms. Article 13 stipulates that persons with disabilities should have effective access to justice on an equal basis with others. States should ensure appropriate accommodations to facilitate their effective role as direct and indirect participants.[176] In addition, Article 26 of the EU Charter of Fundamental Rights, recognises the right of persons with disabilities to benefit from measures designed to ensure their social and occupational integration and participation in the life of the community. Additionally, in paragraph 44, the European Code of Police Ethics provides that police personnel shall act with integrity and respect towards the public and with particular consideration for people in situations of vulnerability.[177] Finally, the ECtHR has repeatedly stated that "children and other vulnerable individuals, in particular, are entitled to effective protection from the State".[178]

This chapter explores legislative and policy developments in the area of detention and alternatives to detention (pre- and post-trial) with respect to particular suspects/accused or sentenced persons. Many EU Member States have measures particularly aimed at people in situations of vulnerability. In focus here are children, mothers with young children, and persons

175 UN, Convention on the Rights of the Child, 20 November 1989.

176 UN, Convention on the Rights of Persons with Disabilities, 13 December 2006.

177 Council of Europe, Committee of Ministers (2001), Recommendation Rec (2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics, 19 September 2001.

178 ECtHR, *X and Y v. the Netherlands*, No. 8978/80, 26 March 1985, Series A No. 91, pp. 11–13, paras. 23–24 and 27; *August v. the United Kingdom*, No. 36505/02, 21 January 2003; *Bouyid v. Belgium,* No. 23380/09, 28 September 2015.

with disabilities. Transgender detainees also require urgent attention; they have received less attention in the context of detention even though they face particular problems that need to be highlighted. The discussion on these groups provides examples of how the specific needs of vulnerable persons can be protected. It should also be noted that individuals may fit into more than one group – for example, women with disabilities. The UNODC Handbook on Prisoners with Special Needs notes that such individuals are at a particularly high risk of manipulation, violence, sexual abuse and rape.[179] It is therefore important to consider the holistic impact of detention on each individual while examining what alternatives to pre- and post-trial detention are in place for particular groups.

This chapter first explores the applicable UN and Council of Europe standards, together with relevant EU legal provisions. FRA's research findings are then analysed, offering comparisons of alternatives to pre- and post-trial detention in each EU Member State. A general overview is offered with regard to transgender detainees, with specific examples from select EU Member States.

The Framework Decision on transfer of prisoners provides in Article 6 (3) that, where an issuing state considers it necessary in view of the sentenced person's age or physical or mental condition, their legal representative shall be given an opportunity to state an opinion. The two other decisions do not address the topic of applying special policies in cases involving especially vulnerable persons.

According to the research findings, very few states include special provisions securing the rights of vulnerable individuals in their laws implementing the Framework Decisions. Legislation in Belgium[180] and Spain[181] provides for mandatory legal representation for children and people with mental disorders. In Bulgaria, the consular service of the national embassy is asked for assistance when a person seems to have special needs.[182]

In Croatia[183] and France,[184] legal guardians are present and heard during proceedings. In Italy, children are not subject to transfer. In Ireland, in case of any doubt, an assessment of mental capacity is carried out. In some states, special regulations regarding a child's participation in legal proceedings are also applicable in transfer proceedings. For example, in Cyprus, there is an obligation for legal representation. In Croatia, the assistance of pedagogues, social workers and psychologists is foreseen; however, the law implementing the Framework Decisions is silent on this matter.

Additionally, according to practitioners from some states (Austria, Cyprus, Italy, the Netherlands and Sweden), transfers of certain vulnerable individuals hardly happen in practice and, when they do, each transfer is treated individually.

UNODC Handbook on dealing with foreign detainees

The United Nations Office on Drugs and Crime (UNODC) has published a Handbook on Prisoners with Special Needs, covering the needs of different groups of prisoners who have a particularly vulnerable status in prisons. One chapter is exclusively dedicated to prisoners who are foreign nationals.

Although the handbook focuses on prisoners, alternative measures to detention are stressed throughout the publication as being the most adequate form of rehabilitative justice for people in situations of vulnerability. The handbook notes that, in detention, "their requirements can rarely be met and [...] their situation is likely to deteriorate". Due to their vulnerability in detention, imprisonment amounts to a disproportionately harsh punishment. Therefore, the handbook includes suggestions relating to possible legislative reforms and the use of community sanctions and measures as alternatives to imprisoning vulnerable people when they do not pose a threat to public safety.

In addition to concerns about increasingly punitive measures being adopted against foreign nationals in many countries, foreign nationals are also at a disadvantage following detention.

179 UNODC (2009), p. 45.

180 Belgium, Act related to the application of the mutual recognition principle to custodial sentence or measure deprivative of liberty pronounced in a European Union Member State (*Loi relative à l'application du principe de reconnaissance mutuelle aux peines ou mesures privatives de liberté prononcées dans un Etat membre de l'Union européenne/Wet inzake de toepassing van het beginsel van wederzijdse erkenning op de vrijheidsbenemende straffen of maatregelen uitgesproken in een lidstaat van de Europese Unie)*, 15 May 2012, Art. 33, paras. 1 and 4; Belgium, Legal counsels for Legalia.

181 Spain, Law 23/2014 of 20 November on mutual recognition of criminal judgments in the European Union, Art. 67.3.

182 Bulgaria, Supreme Prosecution Office of Cassation (2015), Letter No. 5676/2015 to the Center for the Study of Democracy.

183 Croatia, The Judicial Cooperation in Criminal Matters with the EU Member States, (*Zakon o pravosudnoj suradnji s državama članicama Europske unije*), Art. 105 (3).

184 France, Code of Criminal Procedure (*Code de procédure pénale*), 2 March 1959, Art. 728-17.

With regards to the transfer of foreign prisoners, the handbook outlines the ideal standards in a dedicated subchapter. For clarity's sake, 'transfer' is defined as completely different to 'deportation' – the former "aiming to assist with the social reintegration of offenders and reduce the harmful effects of imprisonment", whereas the latter is "experienced as a punitive measure undertaken in addition to the prison sentence and most often against the will of the prisoner concerned".

Source: UNODC (2009), Handbook on prisoners with special needs

5.1. Children

More than 1 million children are involved in criminal proceedings throughout the EU each year, with some facing pre- and post-trial detention.[185] It should be remembered that Member States set their own rules for the minimum age of criminal responsibility (MACR), including the minimum age for being tried in juvenile systems, the minimum age for being tried in adult systems, and the minimum age for incarceration. Some states set their MACR as low as ten years of age, while some are as high as 18. The age of liability even varies within states, depending on the severity of the crime or the individual child's capacity to understand the crimes committed.[186] The CRC specifies that a child is any person below the age of eighteen, unless under law applicable to the child, majority is attained earlier. This definition is underscored by the Council of Europe *Guidelines on child-friendly justice*, which makes the cut-off line of eighteen absolute. In addition to measures to protect the best interests of the child, the guidelines recommend means of ensuring child-friendly justice before and during judicial proceedings.[187] Importantly, the guidelines state that "[a]ny form of deprivation of liberty of children should be a measure of last resort and

FRA ACTIVITY

Report on child-friendly justice

In 2010 alone, thousands of children across 11 EU Member States took part in criminal and civil judicial proceedings, affected by parental divorce or as victims or witnesses to crime. Such proceedings can be stressful for anyone, prompting FRA to investigate whether children's rights are respected in these proceedings. FRA's report on child-friendly justice, published in 2015, focuses on the child's rights to be heard, to information, to protection, to privacy and to non-discrimination. The research involved 570 interviews and focus groups with professionals working with children before, during, and after criminal proceedings. It found that, although all EU Member States have committed themselves to ensuring that children's best interests are the primary consideration in any action that affects them, their rights to be heard, to be informed, to be protected and to non-discrimination are not always fulfilled in practice. The EU is promoting the Council of Europe's 2010 *Guidelines on child-friendly justice* since adoption of the EU Agenda for the Rights of the Child on 15 February 2011. These guidelines aim to help EU Member States improve the protection of children in their judicial systems and enhance their meaningful participation, thereby improving the workings of justice.

Source: FRA (2015), Child-friendly justice – Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States*, Luxembourg, Publications Office*

Upcoming report on detention of migrant children

Migrant children should not be subjected to detention, nor should they be separated from their family members. Nevertheless, separated and/or unaccompanied children are detained to prevent unauthorised entry or to arrange their transfer in various EU Member States. Alternatives to detention should always be considered, especially when evaluating whether children will be detained with their parents. Children require a thorough assessment that considers all relevant circumstances, including their wishes.

An upcoming FRA report will map laws and practices in all 28 EU Member States regarding migration detention of both unaccompanied children and children with families/guardians, for the purpose of collecting information on migration detention of children who are deprived of liberty under EU law regarding asylum or return. The report will address, among others: the deprivation of liberty of children not admitted at official border-crossing points; short-term arrest of children apprehended for irregular entry or stay; detention of children with parents/guardians; detention conditions focusing on specialised detention facilities for families/unaccompanied children; compulsory education and healthcare; identification of child victims of trafficking and children in need of international protection; remedies and complaint mechanisms; and finally, the monitoring of the child's well-being by child protection authorities.

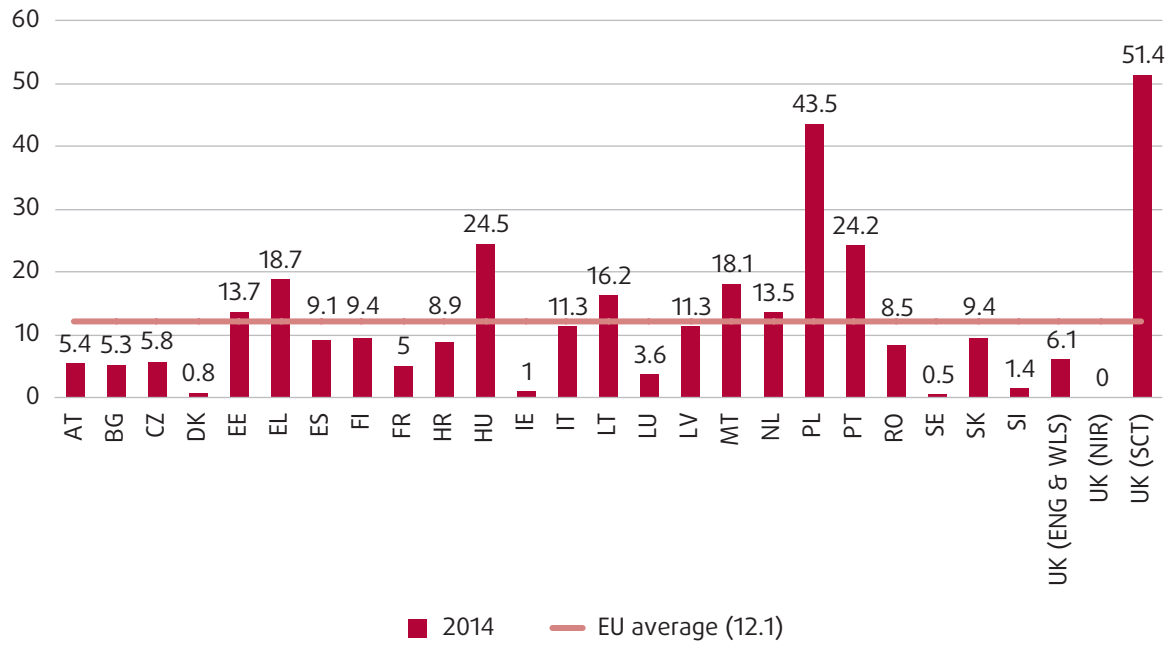
The report will be published in 2017. For more information, see FRA's website

185 Kilkelly, U. *et al.* (2016).

186 European Commission (2015a), p. 7

187 Council of Europe, Committee of Ministers (2010), Articles II a), III b) and IV.

Figure 12: Number of children (under 18 years) in detention (pre- and post-trial) per 100,000 child population in EU Member States, compared with EU average



Note: *Data are not available for Belgium and Germany; for Luxembourg, the latest available data are from 2013. Information for UK specified separately for each of its three main regions.*

Source: *UNODC (2014), Juveniles held*

be for the shortest appropriate period of time." They add: "[g]iven the vulnerability of children deprived of liberty, [...] family ties and promoting the reintegration into society" are essential.[188] Protection of the rights of the child is also stressed in the Treaty on European Union (Article 3 (3)) and provided as a primary law right in the EU Charter of Fundamental Rights (Article 24).

Children and justice is a vast topic, and could be covered from many different angles. This report focuses only on aspects relevant to transfers of imprisoned children or transfers of probation measures applied to children. The detention of migrant children and detention of children for educational purposes will remain outside this study's scope; for references to other FRA projects covering these topics, please see the box highlighting select FRA publications.

The extent of pre- and post-trial detention of children in the EU is shown in Figure 12, which specifies the number of detained children per 100,000 child population by EU Member State, and compared to the EU average.

Figure 12 shows that some Member States – particularly the United Kingdom (Scotland), Poland, Hungary, Portugal, Greece, and Malta – have rather high numbers of children in detention compared with the EU average. The United Kingdom (Scotland) has the highest number at more than 50 children per 100,000 child population – followed by Poland, with over 40. At the other end of the spectrum are the United Kingdom (Northern Ireland), Sweden, Denmark, Ireland, and Slovenia, with 1.5 or fewer children detained per 100,000 children. In total, in 2014, across the EU Member States – excluding Belgium and Germany – almost 10,000 (9,569) children were in criminal detention (pre- and post-trial), with an average of some 350 per EU Member State.[189] A portion of these would be from other EU Member States and would thus be potential 'child-clients' for the three EU Framework Decisions, in addition to those who are subjected to alternative measures to detention.

As for fundamental rights standards relating to the detention of children, the starting point for an analysis of alternatives to pre- and post-trial detention is the CRC; it provides, in Article 37 (c), that "[t]he arrest, detention or imprisonment of a child must be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."[190] This is repeated in Rules 13 and 19 of the UN Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules').[191]

188 *Ibid.*, Preamble IV A 6 (19 and 21).

189 UNODC (2014).
190 UN, Committee on the Rights of the Child (2007), para. 70.
191 UN, GA (1985).

This is also reiterated and detailed by the Council of Europe's Committee of Ministers' *Guidelines on child-friendly justice*,[192] which, though not binding, have been adopted by all 47 Member States of the Council of Europe (and consequently by all 28 EU Member States). Guidelines 19 and 20 stipulate that remedies that involve detention, in whatever form:

- need to be avoided as far as possible,
- should only be a measure of last resort,
- used for the shortest time possible, and
- restricted to serious cases.[193]

This position is supported by UN[194] and Council of Europe Recommendations[195] and the European Prison Rules.[196] Child-friendly justice for all children is an overarching goal of the Council of Europe Programme 'Building a Europe for and with Children', established in 2006, and of the two Council of Europe Strategies for the Rights of the Child adopted so far, the most recent to cover the period 2016-2021, to achieve effective implementation of existing children's rights standards.[197]

These standards have been adopted on the basis that alternatives to imprisonment can promote rehabilitation, especially for children. The International Covenant on Civil and Political Rights emphasizes (in Article 14 (4)) the desirability of promoting the rehabilitation of juvenile offenders. This is supported by the Beijing Rules. Strictly punitive approaches to juveniles are also inappropriate from the perspective of the need to reduce post-trial detention.[198] Attention should instead be focussed on the child's reintegration into society, a need that is more acute amongst children because of their early stage of development.[199] This is grounded in the necessity of reducing the "criminal contamination"[200] of juveniles caused by incarceration with other offenders, particularly amongst children who are vulnerable to negative influences, and is a part of "progressive criminology which advocates the use of non-institutional over institutional treatment."[201]

Alternatives to detention should be applied to avoid institutionalization to the greatest extent possible.[202] The Beijing Rules recommend measures such as care, guidance and supervision orders, probation, community service orders, financial penalties and educational settings. The Council of Europe Committee of Ministers' *Recommendation Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice*[203] emphasises that the main aims of juvenile justice are to prevent offending and re-offending, (re) socialise and (re)integrate offenders, and address the needs and interests of victims.

The ECtHR has supported this view. For example, in *Nart v. Turkey,* the court stated that "the pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults."[204]

There is a movement to extend the specific measures for children to young adults. This group of persons has been identified as also being at risk – as highlighted in the Beijing Rules, which recommend extending the principles applicable to children to young adult offenders.[205] This is supported by Council of Europe *Recommendation Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice* because the age of legal maturity does not necessarily coincide with the age of maturity, so that young adult offenders may require certain responses comparable to those for juveniles.[206] This flexibility of approach is seen in a number of Member States. For example, in Portugal, the Criminal Code states that, taking into account the personal or family circumstances of a sentenced person under the age of 21, a prison sentence of up to two years may be replaced with house arrest.[207] In Germany, young adults aged 18 to 20 do not fall within the scope of the Juvenile Justice Act (*Jugendgerichtsgesetz 1988*); nevertheless, the age and age-related living situation must be considered by courts.[208] In Sweden, a person under the age of 21 who commits a crime can

192 Council of Europe, Committee of Ministers (2010).
193 Council of Europe, Committee of Ministers (2008), Recommendation Rec (2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures, 5 November 2008, para. 59 (1).
194 UN, Secretary-General (2008); Council of Europe, Committee of Ministers (2003), Council of Europe recommendation Rec (2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, 24 September 2003 (Council of Europe, Rec (2003)20).
195 Council of Europe, Parliamentary Assembly (2014), Resolution on Child-friendly juvenile justice: from rhetoric to reality, Resolution 2010 (2014), 27 June 2014, para. 6.4.
196 Council of Europe, Rec (2006)2, Section I, 3.
197 Committee of Ministers (2012), Programme "Building a Europe for and with children", 15 February 2012; Council of Europe, Ministers' Deputies (2016).
198 UN, GA (1985), Commentary to para. 17 (1) (b).
199 *Ibid.*, Commentary to para. 19.
200 *Ibid.*, Commentary to para. 13 (5).
201 *Ibid.*, Commentary to para. 19.
202 *Ibid.*, para. 18 (1).
203 Council of Europe, Rec (2003)20.
204 ECtHR, *Nart v. Turkey*, No. 20817/04, 6 August 2008, para. 31.
205 UN, GA (1985), para. 3 (3).
206 Council of Europe, Rec (2003)20.
207 Portugal, Criminal Code, Decree-Law 48/95 (*Código Penal, Decreto-Lei n.º 48/95*), 15 March 1995, Art. 44.
208 When applying Article 116 of the German Code of Criminal Procedure (Strafprozeßordnung), Federal Parliament (*Bundestag*) (2015) BT-Drs. 18/4894, 13 May 2015, p. 15.

be sentenced to youth service if they give their consent and the arrangements are considered appropriate.[209]

There is therefore an international obligation to ensure that alternatives to imprisonment exist for children at both the pre- and post-trial stage.

Some alternatives to detention are particularly suitable for children. Non-institutionalised educational measures are a less disruptive form of tackling offending behaviour because children are typically able to continue to live at home and continue going to their regular school. For instance, in Belgium, children can be supported by a program of scholastic reintegration or social or educational monitoring.[210] In the Czech Republic, a number of educational limitations or educational measures can be imposed.[211] These measures do not necessarily have to be school-related. Indeed, the ECtHR has stated that the words "educational supervision" must not be equated rigidly with notions of classroom teaching, but should embrace many aspects of the exercise, including supervision by parents and local authorities.[212] In Finland, for instance, a programme of monitoring meetings, monitored assignments and programmes support the child's social adaptation and introduction to working life.[213] Such non-institutional educational measures can also be supported by institutional measures in cases where a greater degree of supervision is required.

The most commonly available alternative to pre- and post-trial imprisonment for children across EU Member States appears to be supervision by non-judicial bodies. These can include parents, guardians, or non-judicial bodies. Such measures are available in 15 Member States: Belgium, Bulgaria, Croatia, Denmark, Finland, Germany, Greece, Ireland, Lithuania, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom (England and Wales, Northern Ireland and Scotland).

In Bulgaria, for example, children can be placed under the supervision of their parents or guardians, the administration of the educational establishment in which they have been placed, an inspector from a child pedagogical facility, or a member of a local commission for combating juvenile delinquency. In Portugal, this supervisory measure may be prolonged until the young person reaches the age of 21. The choice of supervisory measure is flexible, and courts give preference to measures that least interfere with a child's independence as regards their decision-making and conduct in life. This method hopes to achieve better compliance from the child as well as their parents, legal guardians or persons possessing legal custody.[214] Such supervision has the advantage of enabling children to maintain their social contacts, and of promoting their reintegration into society and a constructive role in society.

5.2. Parents with young children

This section focuses on parents – in particular mothers – with young children (typically under the age of ten), in situations involving detentions of the main care-giver for a child. It is important that contact with the child is continued, as this is an important aspect of the parent's right to family life and rehabilitation.[215] This is also important from the child's perspective: it is a clearly established principle that children should benefit from contact with their family.[216] Thus, efforts should be made to ensure that children are not separated from their parents. It is certainly essential to avoid having children accompanying parents in detention. This again underscores the need for a greater use of alternatives to detention. The UN Guidelines for the Appropriate Use and Conditions of Alternative Care for Children state that, when a child's sole or main carer may be deprived of liberty as a result of preventive detention or sentencing decisions, non-custodial remand measures and sentences should be taken in appropriate cases wherever possible.[217]

209 Sweden, Ministry of Justice (*Justitiedepartementet*), Penal Code (*Brottsbalken*), 1 January 1965, Chapter 32, para. 2.

210 Droits des jeunes (2007); Belgium, Act of 8 April 1965 on the protection of young persons, the treatment of minors who have committed an act deemed to constitute an offence and reparation for damage caused thereby (*Loi relative à la protection de la jeunesse, à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé par ce fait*), 8 April 1965 as amended by the Act of 15 May 2006 on the protection of young persons and the treatment of minors who have committed an act deemed to constitute an offence amended (*Loi relative à la protection de la jeunesse, à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé par ce fait*), JDJ No. 258, Brussels, 15 May 2006.

211 Czech Republic, Act on Judicial Procedure in the Area of Juvenile Affairis (*Zákon o soudnictví ve věcech mládeže*), June 2003, paras. 19, 21 and 25.

212 ECtHR, *P. and S. v. Poland*, No. 57375/08, 30 January 2013, para. 147.

213 Finland, Juvenile Penalty Act *(Laki nuorisorangaistuksesta/ Lag om ungdomsstraff)*, 21 December 2001, Section 2.

214 Portugal, Decree-Law 48/95, Criminal Code, Art. 4–6.

215 Council of Europe, European Convention on Human Rights (ECHR), 4 November 1950, Art. 8; ECtHR, Öcalan v. Turkey (No. 2), No. 24069/03, 197/04, 6201/06 and 10464/07, 18 March 2014, paras. 154–159. ECtHR, *Messina v. Italy*, No. 25498/94, 28 December 2000, paras. 59–65.

216 UN, Committee on the Rights of the Child, Art. 9, 10 and 37 (c); UN, GA (1985), Beijing Rules, No. 13.3, 26.5 and 27.2; UN, GA (2015), *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, A/ Res/70/175, No. 37; UN, GA (1990b), *UN Rules for the Protection of Juveniles Deprived of their Liberty*, A/ Res/45/113, No. 59.

217 UN, GA (2010), para. 48.

ECtHR on detaining mothers with infants

In 2013, the ECtHR dealt with the case of a woman arrested while nine months pregnant. The woman was interrogated during the very last stage of her pregnancy and gave birth in detention. Her husband was allowed to see the baby only twice for 30 minutes, and the mother only after she was released, 6 weeks after delivery of the baby.

The court struck the case out of its list of cases after the government issued a unilateral declaration admitting that the manner of detention violated Article 3 of the ECHR; that the applicant's detention was not necessary to conduct the investigation, which violated Article 5 (1)(c); that the legality of detention was not properly examined, contrary to the requirements of Article 5 (4); and that the right to family life, guaranteed by Article 8 of the ECHR, was violated in respect to both the parents and the baby.

Source: ECtHR, M.S.-D. and I.D. v. Poland, No. 32420/07, *(dec.) 22 October 2013, and* Dziedzic v. Poland, No. 62637/11, *(dec.) 22 October 2013*

The rights of fathers must also be considered, especially when they are the sole carers of the children. Some Member States, such as Sweden and France, have specific legislation on the right of fathers with young children to have their children with them. In Sweden, both men and women can request a licence to have their children with them following the opinion of a social welfare committee.[218] In France, too, attention is paid to the role of the father – prison sentences can be suspended for fathers if they have parental authority over a child who is less than 10 years old and has their usual residence with this parent.[219]

Using alternatives to imprisonment for mothers and fathers with young children directly benefits the children, the mothers, and the fathers. There are fewer possible alternative sanctions for women with young children than for children themselves. Of the various measures in place in Member States, only home detention is specifically mentioned in the Framework Decision on the ESO (in Art. 8 (1) (c)). Other sanctions tend to focus on some form of deprivation of liberty, at the pre- and post-trial stage, which is relaxed in special consideration of the needs of the mother and child. Such measures vary among Member States. Some adopt a short-term strategy, allowing women to give birth outside of prison by postponing the prison sentence. This is the case in Bulgaria[220] and Hungary, where this postponement is for the duration of one year following the expected date of birth, though there are exceptions, mainly related to public security or the risk of absconding.[221] Sweden also allows women who have recently given birth, in situations where pre-trial detention is deemed damaging to the child, to instead be subject to travel bans and a continuous duty to report to police authorities.[222]

Other EU Member States have a long-term approach, reflected in the creation of special family-friendly institutions and forms of day release. Both Italy[223] and Portugal[224] have a form of home detention that permits women to serve their sentences in their own homes, which allows the mother and child, and other family members, to stay together in their local community. Other Member States, such as Denmark, France, Hungary, and Spain, have family-friendly institutions in which young children can live with their mothers. This allows them to spend time together and also often allows fathers and other family members to have easier access to the child, which, as noted, is important for the family member and for the child itself. These institutions have the potential to allow the family nucleus to be protected and may be a positive reflection of the European Prison Rules, which state that "[t]he arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible."[225]

In France, for example, children can be kept in detention with their mothers until the age of eighteen months, in specially adapted buildings. In the twelve months following a child's departure, the child can return to the mother for short periods.[226] France also allows offenders to suspend their sentences and be released on parole if they have parental authority over a child who is less than ten years old and who has their usual residence with this parent.[227] This parole can take the form of day-release, external placement or placement under electronic tagging,[228] allowing the parent a long-term alternative to post-trial detention that enables them to develop family relationships in as normal a manner as

218 Sweden, Ministry of Justice, The prison ordinance (*Fängelseförordning (2010:2010)*), 2010, para. 11.
219 France, Code of Criminal Procedure, Art. 720-1 and 729-3.
220 Bulgaria, Criminal Procedure Code (Наказателно-процесуален кодекс), 28 October 2005, Art. 415.
221 Hungary, Act CCXL of 2013 on the implementation of punishments and penal measures, coercive measures and offence custody (*2013. évi CCXL. törvény a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról*), 2013, Art. 39 (1), (3) and (4).
222 Sweden, Ministry of justice, Code of judicial procedure (*Rättegångsbalk* 1942:740), 1 January 1948, Chapter 24, para. 4.
223 Italy, Law 354, Norms governing the prison system and the enforcement of measures involving deprivation of, and limitation to liberty (*Legge n. 354, Norme sull'ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della libertà),* 26 July 1975, Art. 47b, para. 1.
224 Portugal, Decree-Law 48/95, Criminal Code, Art. 44.
225 Council of Europe, Rec (2006)2, Rule 24.4.
226 France, Code of Criminal Procedure, Art. D 401.
227 *Ibid.*, Art. 720-1 and 729-3.
228 *Ibid.*, Art. 720-1 and 729-3.

possible. In Spain, mothers in prison have the right to have their children with them until they are three years old. "Mother units" have been created to accommodate mothers with children; when both parents are imprisoned, "family sections" are created to let families live together. Additionally, mothers on parole can be moved to the "dependent units" – small homes outside the prison where they have a semi-free regime. In 2005, the "*Unidades Externas de Madres*" (external units of mothers) system was created: a mixture of the traditional prison units and the dependent units, which allow mothers to live with their children outside the prison from the very beginning. Inside the unit, mothers have an apartment to live separately with their children. They can follow educational and social programmes inside the building and even – if they are allowed – outside the unit, accompanying their children to ordinary activities. This unit is optional for mothers, but if they want to live there, they have to comply with some therapeutic requirements.[229]

5.3. Persons with disabilities

Persons with disabilities are individuals who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.[230] The UNODC recommends that imprisonment is used as a last resort for this group. This principle should be followed in light of the additional impact a prison sentence can have on this vulnerable group: the closed and restricted environment and violence resulting from overcrowding and the lack of proper prisoner differentiation and supervision can accelerate the disabling process.[231]

The UN Committee on the Rights of Persons with Disabilities (CRPD Committee) has published guidelines on Article 14 (liberty and security) of the Convention on the Rights of Persons with Disabilities (CRPD).[232] These guidelines recommend that state parties ensure that places of detention are accessible and provide humane living conditions, and that they guarantee the right to dignity for persons with disabilities detained in prisons.[233] The ECtHR has also noted that imprisonment for persons with severe disabilities can violate Article 3 ECHR (prohibition of inhuman or degrading treatment) if adjustments are not made to accommodate the individual.[234] It is therefore important to have a number of alternatives to imprisonment available for this group to avoid the often disproportionate effects a prison sentence has upon them. It should be noted that the Framework Decision on probation and alternative sanctions allows Member States to refuse to recognise decisions providing for medical/therapeutic treatments that the executing state cannot supervise. In the preamble it is explained that such measures may particularly affect mentally ill persons.[235]

FRA identified the following alternatives to detention as applicable to persons with disabilities in EU Member States:

- suspension of sentence or pre-trial detention;
- pre-trial psychiatric treatment or treatment for addiction;
- home detention;
- placement under guardianship;
- internment – placement in psychiatric observation/treatment in specially adapted institution;
- release owing to mental disorders or terminal illness.

At the pre-trial stage, psychiatric treatment can be prescribed as a precautionary measure as an alternative to imprisonment. This is done in three Member States (Belgium, Croatia and Hungary). For example, in Belgium, investigating judges can issue orders to place persons under observation in the psychiatric annex of a prison, instead of putting them in detention.[236] In Spain, the accused can be sent to an official institution for treatment of addiction to narcotic substances or detoxification.[237]

The most commonly available alternative to imprisonment for persons with disabilities is internment in an adapted institution, which is available in 10 Member States (Cyprus, Denmark, Estonia, France, Hungary, Ireland, the Netherlands, Poland, Sweden and the United Kingdom). This follows the recommendations of the European Prison Rules, which state that "[p]ersons who are suffering from mental illness and whose state of mental health is incompatible with detention in a prison should be detained in an establishment specially designed for the purpose."[238] In Denmark, a sentenced

229 Spain, Spanish Ministry of Interior (1979), Unidades de madres and Unidades externas de madres, General Organic Law on Prisons *(Ley Organica 1/1979, General penitenciaria)*, 26 September 1979, Art. 38.
230 UN, Convention on the Rights of Persons with Disabilities, Art. 1.
231 UNODC (2009), p. 44.
232 UN, CRPD Committee (2015).
233 *Ibid.*, Art. IX.
234 ECtHR, *Price v. the United Kingdom*, No. 33394/96, 10 October 2010; *Vincent v. France*, No. 6253/03, 26 March 2007, and *Helhal v. France*, No. 10401/12, 19 May 2015.
235 Council Framework Decision 2008/947/JHA, Art. 11 (1) (i), Recital 16.
236 Belgium, Act on social protection for defectives and habitual offenders (*Loi de défense sociale à l'égard des anormaux et des délinquants d'habitude/Wet tot bescherming van de maatschappij tegen abnormalen en de gewoontemisdadigers*), 1 July 1964, Art. 1.
237 Spain, Code of Criminal Procedure (*Código Procesal Penal*), Art. 508.1.
238 Council of Europe (2006), No. 12.1.

person may be placed in a hospital, in family care, or in a suitable home or institution if the person needs special treatment and care.[239] Another commonly available alternative to imprisonment, at both the pre- and post-trial stage, is home detention; it is used in five Member States (Greece, Italy, Portugal, Slovenia and Spain).[240] This allows an individual to serve their prison sentence in their home, which is often already adapted for their specific needs. Any care or medication which is in place can therefore be more readily available for the individual, who is not confronted with the shock of moving, or the unavailability of treatments in the prison environment. This can also relieve the state of the financial burden of organising care within the prison environment, which may not be readily able to absorb the strain of these additional needs. In Italy, home detention is available in a variety of circumstances, including where a person is suffering from serious physical infirmity, where he/she is suffering from AIDS or similar diseases, their health conditions are incompatible with detention, or they are over 70.[241] In Slovenia, home detention is also an option that can be granted for persons with deteriorating health conditions who require special care, if their prison sentence is no longer than nine months.[242]

Various other measures are in place in other Member States. For example, in Croatia, individuals with certain disabilities may be able to make use of day release to visit medical facilities for their treatment.[243] This allows an individual to get the support they need and can relieve the burden on the state to provide it within the prison environment. In the United Kingdom, individuals with disabilities can be placed under guardianship.[244] This grants the person named as guardian – typically the nearest relative of the patient, or an approved social worker – the power to require the suspected, accused or sentenced person to reside at a specified place; to attend medical treatment, occupation, education or training; and to allow access to the patient to be given to any registered medical practitioner.

In Belgium, persons with physical disabilities are subject to the same rules of detention or imprisonment as persons without disabilities and special needs. They are, however, entitled to adequate care when detained.[245] Accordingly, judicial assistants must adapt the execution of pre- or post-trial detention measures to the individual's physical disabilities.

ECtHR on detaining persons with disabilities

According to ECtHR jurisprudence, even very short detentions of persons with physical disabilities in unsuitable conditions may violate the prohibition of torture and degrading or inhuman treatment. This approach is reflected in the case of a woman with severe disabilities (four-limb deficient) and numerous health problems, who was committed to prison for three nights and four days for contempt of court. She was taken to the prison directly, without even having been allowed to fetch the battery charger for her wheelchair. The applicant spent the first night in a police station, in a very cold cell with no suitable bed, and she was forced to sleep in her wheelchair. She was later transferred to a hospital detention unit. Although she was properly helped with using the toilet, she risked developing sores because her bed was too hard. The court found that Article 3 of the ECHR was violated.

Source: ECtHR, Price v. the United Kingdom, No. 33394/96, *10 July 2001*

5.4. Transgender persons

Lesbian, gay, bisexual, transgender and intersex persons (LGBTI) commonly face a higher risk of discrimination in criminal justice systems – not least in detention – by authorities as well as fellow detainees.[246] This calls for special attention and underscores the need to develop and implement policies that guarantee equal access to justice. A 2012 ECtHR case demonstrates the types of challenges encountered in such efforts by illustrating how difficult it can be for authorities to ensure sufficient protection for homosexual inmates.

239 Denmark, Consolidated Act No. 435 of 15 May 2012 on the Enforcement of Sentences, as amended *(Bekendtgørelse nr. 435 af 15. Maj 2012 af lov om fuldbyrdelse af straf m.v. med senere ændringer)*, 15 May 2012, Section 78; Administrative Order No. 404 of 9 April 2015 on the Placement of Sentenced Persons etc. outside a State or Local Prison (Section 78-Administrative Order) *(Bekendtgørelse nr. 404 af 9. april 2015 om anbringelse dømte i institution m.v. uden for fængsel eller arresthus (§ 78-bekendtgørelsen)*, 9 April 2015; Guideline No. 9204 of 13 April 2015 on the Placement of Sentenced Persons etc. outside a State or Local Prison (Section 78-Guidelines) *(Vejledning nr. 9204 af 13. april 2015 om anbringelse dømte i institution m.v. uden for fængsel eller arresthus (§ 78-vejledningen)*, 13 April 2015.

240 In Spain, this measure is only available if imprisonment would be a danger to the health of the individual.

241 Italy, Criminal Code (*Codice penale italiano*), 1 January 1890, Art. 47b, para. 1, letter b of Law No. 354/1975 pursuant to Art. 146 - 147 of the Criminal Code.

242 Slovenia, Act amending the Criminal Code *(Kazenski zakonik, KZ-1B)*, 2 November 2011.

243 Croatia, The Protection of Persons with Psychosocial Disabilities Act (*Zakon o zaštiti osoba s duševnim smetnjama*), Official Gazette 76/14, 1 January 2015, Art. 51 (2).

244 United Kingdom, England and Wales, Mental Health Act 1983, 9 May 1983, Sections 35–40; Northern Ireland, Mental Health (Northern Ireland) Order 1986, 26 March 1986, Sections 42-46; Scotland, Criminal Procedure (Scotland) Act 1995, 8 November 1995, Sections 58–59.

245 Belgium, Ministry of Justice (2010); Service Public Fédéral Justice (2015).

246 See report on gender perspectives by UN, Human Rights Council (2016). See also UNODC (2009), p. 104.

In *X. v. Turkey*,[247] the homosexual applicant requested to be placed in a cell with other homosexual inmates. However, no other homosexual persons were detained in the facility at the time, so he was placed in solitary confinement. The ECtHR found that this violated his right to freedom from inhuman and degrading treatment, as he was deprived of all social relations and access to the outdoors, and was kept in a very small cell, for more than 13 months. The ECtHR acknowledged that the applicant needed protection from physical and mental abuse, but found that the fear of such abuse did not justify completely isolating the applicant from other inmates.

This section focuses on discrimination in prison based on gender identity. People whose gender identity does not correspond with the sex assigned at birth are commonly referred to as transgender persons. This group includes persons who wish at some point in their life to undergo gender reassignment treatments, as well as persons who 'cross-dress' or persons who do not, or do not want to, consider themselves exclusively as being 'men' or 'women'".[248] As of today, the situation of transgender prisoners has not been well researched, with most contributions from academia covering the United Kingdom, the United States, Canada and Australia. According to this research, transgender prisoners are more likely to experience high levels of social marginalisation; do not always receive the necessary professional medical assistance to start or continue with their hormone treatments, which can cause serious physiological and/or psychological health problems; and face a higher risk of abuse than the general prison population, especially with regard to sexual assault.[249]

The treatment of transgender prisoners is alarming, and their extreme vulnerability in the criminal justice system needs to be highlighted. Access to justice is extremely challenging, as LGBTI persons "may be further subjected to victimization by the police, including verbal, physical and sexual assault and rape"[250] when arrested for an alleged offence because of possible homophobic or transphobic tendencies among police officers.[251] Body searches, from as early on as the first arrest to first admission to a detention facility, pose a serious threat to maintaining the dignity of the prisoner, whose wish of having the search performed by a police officer with a different gender often remains unheard.[252] Further disrespectful treatment by prison authorities or lack of access to gendered clothes or makeup complicates transgender prisoners' stay in detention.[253]

Other prisoners pose an additional threat to transgender persons, especially transwomen, who are "highly overrepresented as victims of [...] sexual crimes"[254] while in detention.[255] Prison guards may not interfere when an LGBTI person gets assaulted or raped, or may even "facilitate sexual violence [themselves]".[256] In such cases, complaints about the assaults are often not treated appropriately. Health is another issue due to the higher frequency of sexually transmitted diseases, like HIV and AIDS, among LGBTI prisoners, with prison rape even increasing this number.[257] Necessary medication is not available at all times, nor are prisoners always adequately medically treated after an assault has occurred.[258] Another point of criticism is the allocation and accommodation of prisoners. Even though prisoners should be involved "in decisions regarding the place of detention appropriate to their sexual orientation and gender identity",[259] transgender persons are usually placed in prisons according to the gender on their birth certificate, where they face a higher risk of sexual assault.[260] To avoid the risk of sexual harassment or abuse, transgender prisoners are often placed in solitary confinement, which is an unjustified response that amounts to aggravated punishment.[261]

After two transwomen committed suicide in all-male prisons in the United Kingdom, the House of Commons released a briefing paper on transgender prisoners in December 2015. Pursuant to this, "prisoners must be located according to their gender as recognised by UK law". In the case of a prisoner requesting a transfer to a prison "opposite to their gender as recognised by law", senior prison staff is in charge of reviewing every individual case together with medical and other experts. In the case of the above-mentioned transwomen, the transfer to a female facility was in one case not granted and in the other not requested.[262] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) addressed gender identity for the first time in its report on Austria.

247 ECtHR, *X. v. Turkey*, 24626/09, 9 October 2012, para. 42.
248 FRA (2013), p. 8.
249 Castagnoli, C. (2010); Sexton, L. *et al.* (2009); Jeness, V. (2009) (presented at the California Department of Corrections and Rehabilitation Wardens' Meeting); Penal Reform International (2013).
250 UNODC (2009), p. 105.
251 Council of Europe (2011), Chapter IV (26); ECtHR, *G.G. v. Turkey*, No. 10684/13, 24 November 2012, Third Party Intervention as of 31 March 2013, Section C (16).
252 UNODC (2009), pp. 118 and 121.
253 ECtHR, *G.G. v. Turkey*, No. 10684/13, 24 November 2012, Third Party Intervention as of 31 March 2013, Section E (27).
254 UNODC (2009), p. 105.
255 UN, GA (2001), para. 23.
256 UNODC (2009), p. 106.
257 *Ibid.*, p. 107.
258 *Ibid.*, p. 108.
259 Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, March 2007, principle 9c.
260 UNODC (2009), pp. 105–108; ECtHR, *Bogdanova v. Russia*, No. 63378/13, 19 September 2013, para. 24.
261 UNODC (2009), p. 108; ECtHR, *G.G. v. Turkey*, No. 10684/13, 24 November 2012, Third Party Intervention as of 31 March 2013, Section E (26).
262 United Kingdom, House of Commons Library (2015).

Currently, to transfer a transgender prisoner to another prison, a gender change first has to have taken place in the register of births. In its report issued on 6 November 2015, the CPT recommends that Austria enables trans-persons in detention to access trans-specific hormone and legal gender recognition and, additionally, to develop non-discrimination policies. The committee noted that "gender reassignment procedures such as hormone treatment, surgery and psychological support are available to transgender persons in Austria"; therefore, the same rules should apply to transgender individuals in prison.[263] In a ground-breaking May 2016 judgment by the Regional Court for Criminal Matters in Vienna, the court ruled that transsexual persons have a right to sex change treatment in jail and ordered the penitentiary to initiate the treatment.[264] In Ireland, transgender prisoners are placed in prisons based on their sex characteristics, in violation of their gender identity. Notwithstanding, Irish courts have the power to place a prisoner in a male or female prison by issuing a warrant.

ECtHR on detention and gender reassignment

The ECtHR has not yet examined questions relating to the special needs of detained transgender persons in EU Member States. However, such cases have been communicated to the respective governments, and are currently pending.

In one of these cases, the applicant – who had gender reassignment surgery (male-to-female) prior to her conviction – was sentenced to two years' imprisonment. The applicant was refused hormone replacement medication by the authorities despite numerous complaints and the fact that this life-long therapy was required after her surgery. According to the applicant, the discontinuation of her hormone therapy led to the development of "gender dystrophy", meaning the return of the secondary sexual (male) characteristics. Her mental condition also allegedly deteriorated significantly. Authorities suggested that she should pay for the hormone therapy herself, which she could not afford.

In addition, she was subjected to threats and violence from other inmates, prompting her segregation from the general prison population to keep her safe. After a year, the applicant applied for provisional release, referring to her poor state of health and inability to receive hormone replacement therapy. Her request was dismissed on the ground that her condition was not included in the list of illnesses calling for a release.

The applicant complained about the absence of necessary medical treatment, and the lack of an effective remedy to complain about the violation. Moreover, she complained about the conditions of her detention as a result of the authorities disclosing information about her transsexuality.

Another case concerns a transsexual detainee who was refused funds for gender reassignment surgery despite very strong medical indications.

The judgments are currently pending. The cases were communicated to the respective governments under the prohibition of torture and inhuman and degrading treatment, as well as under the right to respect for private life.

Source: ECtHR, Bogdanova v. Russia, No. 63378/13, *19 February 2015;* D.Ç. v. Turkey, *No. 10684/13, 15 November 2013*

Conclusion and FRA Opinion

While detention can generally have negative effects, the impact can be greater for persons in situations of vulnerability, such as children, persons with disabilities, and lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. Discrimination is only one of many risks that transgender persons, for example, face in detention. Studies show that there are also problems with insufficient medical attention and with abuse, including sexual assault. Such vulnerabilities must be given due consideration, and detention should only be used very exceptionally.

Rule 2 (2) of the UN's Nelson Mandela Rules states that "for the principle of non-discrimination to be put into practice, prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings. Measures to protect and promote the rights of prisoners with special needs are required and shall not be regarded as discriminatory." Rule 5 (2) notes that "[p]rison administrations shall make all reasonable accommodation and adjustments to ensure that prisoners with physical, mental or other disabilities have full and effective access to prison life on an equitable basis." The EU Charter of Fundamental Rights, in particular Article 21 on non-discrimination and Article 20 on equality before the law, is also essential in this context. Additionally, the 'best interests of the child' should be of primary consideration – as prescribed by, for instance, Articles 3 and 9 of

263 Council of Europe, European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT) (2015), para. 116.
264 Rechtskommitee LAMBDA (2016).

the UN Convention on the Rights of the Child and the Council of Europe's *Guidelines on child-friendly justice*.

According to FRA's research findings, very few EU Member States have special provisions securing the rights of persons in situations of vulnerability in their laws implementing the Framework Decisions. However, several states have put in place particular alternatives to detention to accommodate vulnerability. For children, such measures include various forms of 'light monitoring', such as by guardians, or educational efforts. For parents with young children, the right to family life may be undermined by detentions of parents. Having children stay with detained parents is largely not a viable option, underscoring the usefulness of alternatives to detention.

The needs of persons with disabilities similarly call into question the appropriateness of detention. International human rights standards stress that alternatives should be sought, while also calling for detention facilities that appropriately accommodate persons with disabilities. Providing information to individuals in situations of vulnerability might require using special techniques, such as braille for people with visual impairments or sign language for people with speech and hearing impairments. Providing information to persons with intellectual disabilities might require involving officers with special training or facilitators.

The Framework Decision on probation and alternative sanctions even includes provisions that permit refusing a transfer if there is insufficient capacity to accommodate the needs of a transferee. Member States offer a range of alternatives that are more appropriate than detention. The examples of issues encountered by persons in situations of vulnerability given in this report point to the need for careful consideration of appropriate measures, pre- and post-trial – in particular alternatives to detention.

FRA Opinion 7

To ensure effective implementation of the three Framework Decisions, the EU and the Member States must ensure compliance with international and European human rights law obligations, as well as the EU Charter of Fundamental Rights, regarding people in situations of vulnerability. In this context, and by way of example, rules set out in the Directive on procedural rights safeguards for children *who are suspects or accused persons in criminal proceedings and the European Commission's* Recommendation on the procedural safeguards for vulnerable suspected and accused persons who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities*, could also serve as guidance in the context of transfer proceedings.*

6 Procedural aspects: Information and Consent

- This chapter looks at the procedural rights of individuals subject to transfer proceedings, focusing on the availability of information regarding the possibility of transfer and on consent.
- It explores the principle of informed consent in the context of the three Framework Decisions.
- This chapter also examines whether suspects or sentenced persons are provided sufficient information to understand transfer procedures and their consequences.

This chapter looks at the informed consent of persons subjected to transfers in accordance with the three Framework Decisions – on transfer of prisoners, probation and alternative sanctions, and the ESO. It explores whether suspects or sentenced persons are provided with information and support to make them aware of, and help them fully understand, the procedures and their consequences, and to express their consent or opinions thereon.

As noted, the three Framework Decisions do not grant rights to be transferred or not to be transferred, nor do they grant a right to request alternatives to detention. However, specific procedural principles are relevant. The most relevant principles are those of the rights to participation and to equal treatment.

Informing foreign nationals of the possibility to transfer to another country

The European Prison Rules, which outline recommendations by the Committee of Ministers of the Council of Europe, provide that "[p]risoners who are foreign nationals shall be informed of the possibility of requesting that the execution of their sentence be transferred to another country".

Source: Council of Europe, Committee of Ministers, Recommendation Rec(2006)2 with commentary*, 11 January 2006, Rule 37.5.*

The notion of informed consent in the context of transfers of sentenced persons was first introduced by the Convention on the Transfer of Sentenced Persons (Transfer Convention).[265] It implies that the sentenced person is fully aware of all legal and practical consequences and that they consent to the transfer voluntarily.[266] The Additional Protocol to the Transfer Convention[267] – which has been signed by 27 EU Member States, Slovakia being the exception – provides for two instances in which consent is not required. According to Article 2 (1), consent is not required when sentenced persons, nationals of a state party to the convention, flee to their home country before having served their sentence. The second option applies in cases of foreseen expulsion or deportation. If sentenced persons will be subject to expulsion or deportation after having served their prison sentence, their consent to the transfer of judgment is not required (Article 3 (1)). However, in such cases, the sentenced persons have a right to express their opinion, which should be taken into consideration (Article 3 (2)).

265 Council of Europe, Convention on the transfer of sentenced persons.
266 *Ibid.*, Art. 7.
267 Council of Europe, Additional protocol to the convention on the transfer of sentenced persons.

Table 11: Consent requirements in the Framework Decisions

Destination EU Member State	Framework Decision on transfer of prisoners	Framework Decision on probation and alternative sanctions	Framework Decision on the ESO
To the MS of nationality and residence	Consent not required Opportunity to state an opinion	Consent not required (condition of actual return or willingness to return)	*Informed* Consent required
To the MS of lawful and usual residence	Consent required Opportunity to state an opinion	Consent not required (condition of actual return or willingness to return)	*Informed* Consent required
To the MS of nationality but not of usual residence	Consent required Opportunity to state opinion	Upon request (condition of the consent of that MS)	Upon request (condition of the consent of that MS)
To the MS of nationality but not of usual residence, where the person will be deported	Consent not required Opportunity to state opinion	Consent not required (condition of actual return or willingness to return)	The Framework Decision is silent on this issue
To the MS to which the person fled or returned	Consent not required Opportunity to state an opinion	Consent not required (condition of actual return or willingness to return)	Upon request (condition of the consent of that MS)
Other MS	Consent required Opportunity to state an opinion (condition of the consent of that MS)	Upon request (condition of the consent of that MS)	Upon request (condition of the consent of that MS)

Source: FRA, 2016; Framework Decision on transfer of prisoners, Framework Decision on probations and alternative sanctions, Framework Decision on the ESO

The Framework Decision on transfer of prisoners departs from the consent requirements set by the Transfer Convention and its Additional Protocol. Although it recognises, in Recital 5, "the need to provide the sentenced person with adequate safeguards", it explicitly states that "their involvement in the proceedings should no longer be dominant by requiring in all cases their consent to the forwarding of a judgment to another Member State".

The Framework Decision on probation and alternative sanctions does not refer to the consent of the sentenced person at all, but to their actual willingness to return to their home country or a request to transfer.

The Framework Decision on the ESO is the only one of these three Framework Decisions to refer to the notion of informed consent rather than just consent, opinion or request. Table 11 summarises the consent requirements in the three Framework Decisions.

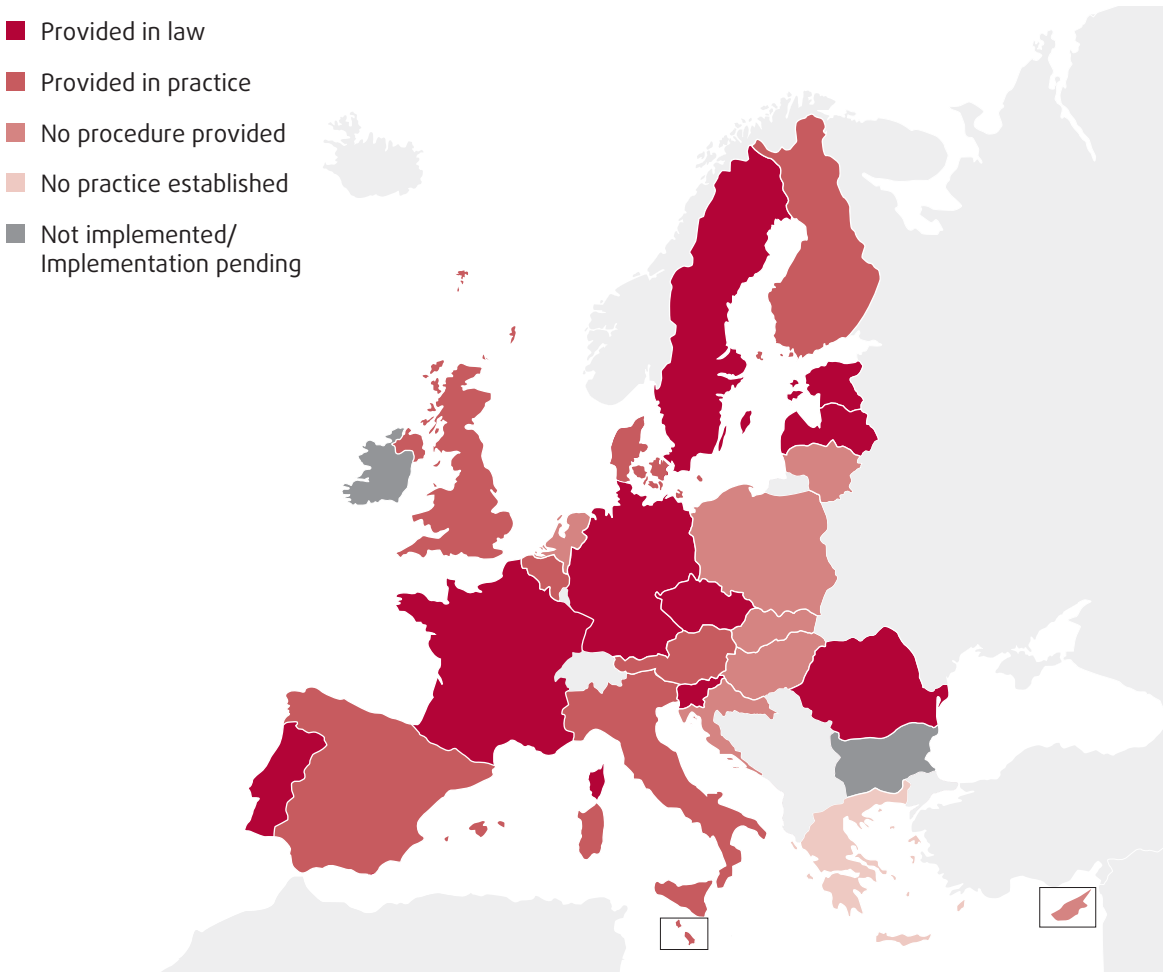
As Table 11 shows, under the Framework Decision on transfer of prisoners, a transfer without the sentenced person's consent is the rule, and seeking consent is the exception. The issuing state does not need to obtain a sentenced person's consent when it plans to transfer them:

a. to the state of nationality in which the sentenced person lives (two conditions required: nationality and residence);
b. to the state of nationality, where the person does not live but to which the person will be deported after having served their sentence;
c. to the state to which the person has fled or otherwise returned.

All other cases would require the sentenced person's consent. However, sentenced persons shall be given the opportunity to state an opinion orally or in writing (Article 6 (3)). The opinion shall be taken into account and forwarded together with the judgment and certificate. The person shall be informed in an understandable language about the decision to transfer.

According to Article 5 (1) of the Framework Decision on probation and alternative sanctions, consent is not required when a judgment and a probation decision is to be forwarded to the Member State of lawful and ordinary residence and when a sentenced person has returned or wants to return to that state. A judgment and a probation decision might also be forwarded to another state when a sentenced persons requests such transfer and the destination state consents to it (Article 5 (2)). Moreover, the Framework Decision does not oblige authorities to consider the sentenced person's opinion.

Figure 13: Framework Decision on transfer of prisoners: procedure in issuing state to inform sentenced persons of option to transfer judgments or decisions to another Member State



Note: *Bulgaria and Ireland have not implemented the Framework Decision on transfer of prisoners. However, transfer is possible in accordance with the Transfer Convention.*

Source: *FRA, 2015*

The European Supervision Order provides, in Article 9 (1), that a decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, where the person, having been informed about the measures concerned, consents to return to that Member State. Article 9 (2) stipulates that, upon request of the affected person, the decision may be forwarded to a Member State other than the usual place of residence, on condition that authorities of that state consent to this.

This chapter focuses on the procedural rights of persons subject to transfer proceedings. It first examines what information relating to the possibility of transfers is made publicly available or provided to suspects/sentenced persons. The chapter then examines the consent procedure and analyses the notion of 'informed consent'.

As stated in Chapter 1, while reading the summary of findings, it should be noted that not all Member States had implemented all three Framework Decisions at the time of data collection.

6.1. Information on the possibility to transfer

FRA's research shows that, in a majority of the EU Member States, the only information made publicly available about the Framework Decisions is the legislation implementing its content. Seventeen states make available only the text of the law implementing the Framework Decision (Austria, Belgium,[268] Croatia,

268 Council Framework Decision 2008/909/JHA; Council Framework Decision 2008/947/JHA.

Promising practice

Informing accused or sentenced persons about the possibility of transfer

Promising practices are emerging in how states provide information to accused/sentenced persons. While published national laws serve as the only source of information in many states, others summarise relevant information and package it in an accessible and understandable manner for accused/sentenced persons.

Factsheets

In conjunction with the text of the law, some states offer explanatory factsheets and brochures explaining the process for transfers of sentences and supervision measures. This information is either made publicly available on the website of the Ministry of Justice or the Prison and Probation Services, or the information is provided directly to sentenced persons when they receive their sentence or arrive in prison.

Sweden, Poland, Croatia and Germany provide information directly to prisoners, either in the form of a Prisoner's Manual on arrival or in the form of information sheets for foreign prisoners (it is unclear in what languages other than the local language this is provided). Romania, Luxembourg, Ireland, Hungary, the Netherlands and Finland also make relevant information sheets publicly available online. For example, Luxembourg provides general information online that makes it clear that under domestic law consent is necessary for transfers under all three Framework Decisions. The Netherlands has a range of factsheets covering different topics, including general information for foreign prisoners about the mutual acknowledgment of detention and probation sanctions; general information on serving sentences in the Netherlands; a factsheet explaining the transfer of criminal judgments; a brochure on conditional release; and a brochure on mutual recognition of supervision measures in pre-trial situations.

Telephone Information Desk

In the Netherlands, information on the Framework Decisions and the rights of prisoners is made publicly available through a telephone information desk run by the Department of Justice.

Web-based resources

The United Kingdom has a web-based resettlement toolkit named 'Tracks', which is designed for prisoners, prison officers and probation staff, and provides information on resettlement options, including prisoner transfer arrangements.

Source: Netherlands, Telephone Information Desk: Ministry of Security and Justice (Ministerie van Veiligheid en Justitie) (2015), Buitenlandse straf uitzitten in Nederland; Factsheet in English: Custodial Institutions Agency (Dienst Justitiële Inrichtingen) (2013), WOTS. Serving a sentence in your own country? Information sheet for foreign prisoners in the Netherlands; United Kingdom, Tracks

Cyprus[269], the Czech Republic, Estonia,[270] Finland, Greece, Hungary, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia and Spain). Four Member States (Italy, Latvia, Slovakia, and Slovenia) appear to have no information available.

This section looks at the existence of special procedures, either in law or in practice, to inform suspects, accused persons or sentenced persons of the option to transfer a judgment or decision to another EU Member State. The Framework Decisions do not provide for any special procedure; hence it is up to national legislators and practitioners to decide on how to provide information to suspects and sentenced persons. Figure 13 shows how many Member States have established procedures to provide information to sentenced persons about the option to transfer.

Specifically, it shows that more than half of the EU Member States[271] have established a procedure – either in law or in practice – to inform sentenced persons about the option to transfer in accordance with the Framework Decision on transfer of prisoners. Nine states have not established any such procedure.

In practice, in many states – Austria, Belgium, Denmark, Finland, Ireland, Italy, Latvia, Malta, Portugal, Romania, Spain, Sweden and the United Kingdom – prison authorities inform sentenced persons about the option to transfer. In Latvia, the administration of the penitentiary institution informs foreign citizens convicted in Latvia or persons whose permanent place of residence is not in Latvia, that they have the right to express their wish to serve their punishment in the state of their citizenship or permanent residence. The information must be provided within 10 days after the

269 *Ibid.*

270 Council Framework Decision 2008/909/JHA; Council Framework Decision 2008/947/JHA; Council Framework Decision 2009/829/JHA.

271 Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Latvia, Malta, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom.

penitentiary institution receives a judgment's execution order. A convicted person should have the legal consequences of the transfer explained to them.[272] For example, in the *Ilguciems* prison, convicted foreign citizens receive an excerpt from the Criminal Procedure Law as well as an explanation of their right to express the wish to serve the sentence in the country of their citizenship or permanent residence (it is unclear whether this is provided in any language other than Latvian). If a convicted person has additional questions about these rights, they can sign up for a meeting with Registration Unit (*Uzskaites daļa*) officials.[273]

In some Member States, information leaflets in various languages are distributed among prisoners (Austria, Belgium, Germany and Finland). In others, law enforcement or judicial authorities may be in charge of informing individuals about the transfer option (Bulgaria, the Czech Republic, Bulgaria, France and Slovenia).

Even fewer Member States have established such procedures for the Framework Decision on probation and alternative sanctions and the Framework Decision on the ESO. It appears that, where there are no procedures for providing information about the possibility to transfer, affected persons must rely on the goodwill of lawyers or others, seek information from official websites, or obtain it through the word of mouth.

6.2. Right to interpretation assistance when considering transfers

The three Framework Decisions concern foreigners, who may not speak the language of the state in which they were the subject of criminal proceedings. The Framework Decisions make only cursory reference to the issue of linguistic understanding. The Framework Decision on transfer of prisoners only imposes an obligation on the issuing state to inform sentenced persons, in a language they understand, that it has been decided to forward the judgment together with the certificate (Article 6 (4)). The decision refers to a language the sentenced person understands, and not their mother tongue. This conforms with ECtHR case law.[274] The Framework Decision on transfer of prisoners does not address interpretation assistance or translation of pending proceedings. Article 23 provides that the certificates that accompany judgments shall be translated into the official language, or one of the official languages, of the executing state; however, this provision serves the purpose of facilitating international cooperation and not providing information to the sentenced person. The two other decisions similarly provide that the certificates should be translated into the official language, or one of the official languages, of the executing state (Framework Decision on probation and alternative sanctions in Article 21, and Framework Decision on the ESO in Article 24). There is no reference to the necessity of informing the person in a language they understand.

FRA ACTIVITY

FRA report on rights in criminal procedures

FRA has issued a report on procedural rights in criminal procedures in parallel with this study on the three Framework Decisions. That report explores the legal and practical situation of suspects and accused persons in relation to the right to interpretation and translation as well as the right to information on rights and charges (covered by Directive 2010/64 of 20 October 2010 and Directive 2012/13 of 22 May 2012).

The rights provided for in these two EU instruments apply during criminal proceedings, and may thus be applicable to the ESO in some circumstances. However, they do not apply to transfer proceedings after final convictions. The logic underlying the right to be informed about suspicions or criminal charges and to some form of mechanism to ensure that suspects or accused persons have understood the message could also be applied to information for detainees on the possibilities and consequences of transfers. This is touched upon in Section 6.5, which covers verifications of suspects'/sentenced persons' understanding of the transfer process. The Opinions outlined in this report also draw parallels between the EU legislation on criminal proceedings and transfer proceedings.

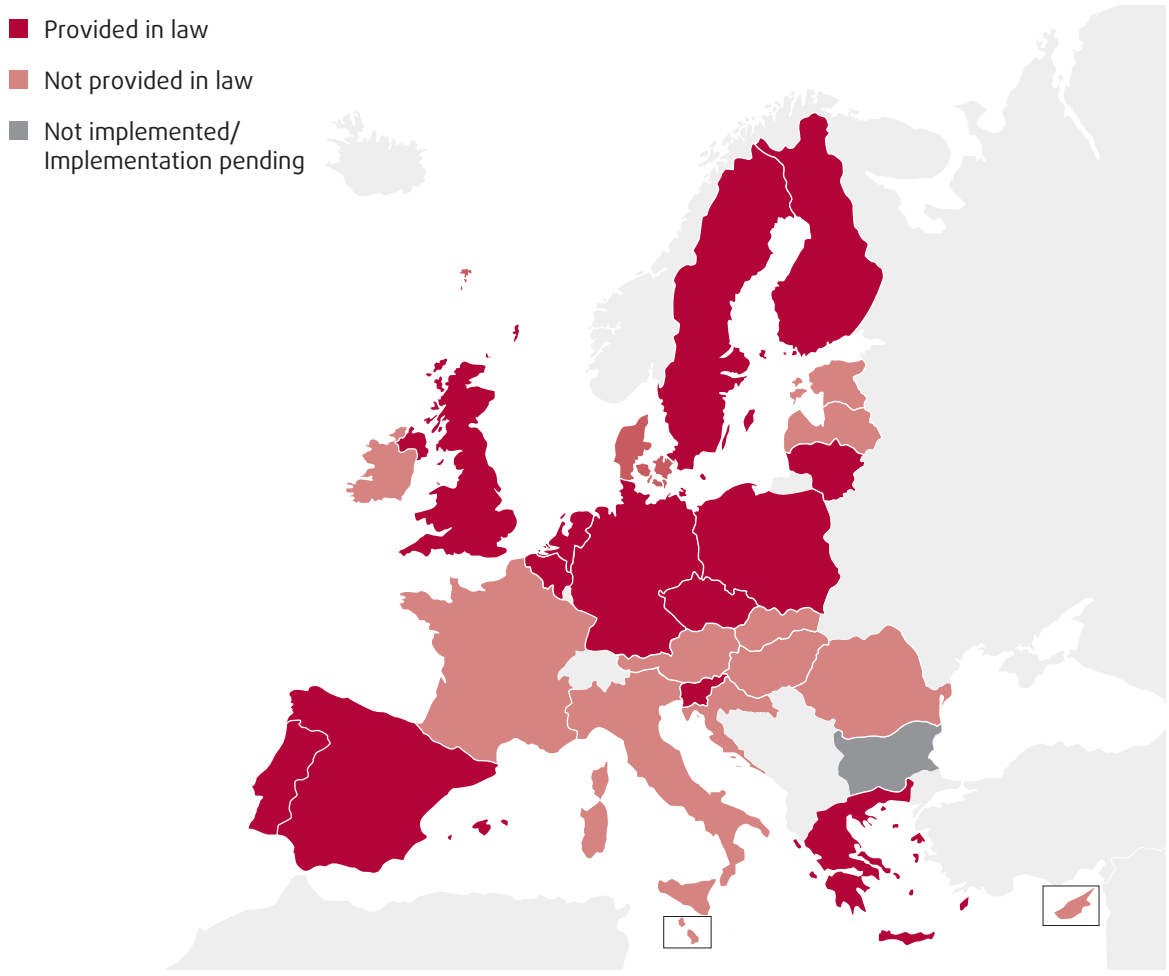
Source: FRA (2016), Rights of suspected and accused persons across the EU: translation, interpretation and information, *Luxembourg, Publications Office*

Possible entitlements to assistance from interpreters would therefore stem from domestic law. However, parallel efforts by the EU on interpretation and translation in criminal procedures as well as on understanding criminal charges – addressed in the box highlighting a new FRA report on rights in criminal procedures – underscore the usefulness of providing language assistance and quality control for such assistance to potential transferees. Figure 14 shows which EU Member States provide prisoners with a right to interpretation and translation during transfer proceedings.

FRA's research shows that 16 states provide interpretation assistance for sentenced persons, either while

272 Latvia, Criminal Procedure Law (*Kriminālprocesa likums*), 21 April 2005, Section 819, para. 1.
273 Latvia, Representative of the *Ilguciems* prison security and registration unit.
274 ECtHR, *Brozicek v. Italy,* No. 10964/84, 19 December 1989, paras. 38–42.

Figure 14: Right to interpretation assistance and/or translation while consenting to and requesting transfers with regard to the Framework Decision on transfer of prisoners



Source: FRA, 2015

consenting to or requesting a transfer, in accordance with the Framework Decision on transfer of prisoners; 10 do not provide for such an entitlement. Ireland has still not implemented the decision; however, in the current legal situation, sentenced persons eligible for transfer have a right to be assisted by an interpreter.

Some EU Member States use alternative means of communication. For example, in Austria, there are forms drafted in all official languages of the EU, excluding Irish (Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish).[275] The forms are distributed among persons eligible for transfers. In Bulgaria, there is a possibility to ask for an interpreter; however, in practice, sentenced persons are advised to ask for assistance from the consul or other officials from their country's embassy.[276] It should be remembered, however, that Bulgaria has still not implemented the Framework Decision on transfer of prisoners.

In Hungary, prison staff with certain linguistic competences may act as ad hoc interpreters. According to information provided by officials of the Szeged Regional Court, an officer of the prison service acts as ad hoc interpreter on a regular basis in Szeged Strict and Medium Regime Prison.[277]

Officials from Italy and Estonia indicated that interpretation is not needed in practice, as foreigners detained in Italian prisons are mainly from Romania and speak Italian[278] and, in prisons in Estonia, staff members and

275 Austria, Representative of the Austrian Federal Ministry of Justice.

276 Bulgaria, Supreme Prosecution Office of Cassation (2015), Letter No. 5676/2015 to the Center for the Study of Democracy.

277 Hungary, Representative of the Szeged Regional Court.

278 Italy, Representative of the Ministry of Justice.

sentenced persons communicate in a language that is mutually understandable.[279]

In cases of transfers of probation measures and supervision orders, almost half of the Member States provide interpretation assistance for individuals when they are consenting to a transfer and requesting a transfer.

6.3. Right to legal assistance and legal aid

The three Framework Decisions do not address legal counsel in the issuing state; this matter is left for national laws. Since the Framework Decisions were adopted, the EU also has in place legislation on the right to a lawyer (with a transposition deadline of 27 November 2016). However, the Directive on the right on access to a lawyer in criminal proceedings applies only to criminal proceedings and European Arrest Warrant proceedings; hence it is not applicable to transfer proceedings. Therefore, it is for domestic law to determine whether a prisoner would be entitled to consult a lawyer in the course of transfer proceedings. Similarly, national law sets the rules for entitlement to legal aid.

Framework Decision on transfer of prisoners

Only nine Member States (Belgium, the Czech Republic, Germany, Finland, Hungary, Portugal, Romania, Spain and Sweden) included the right to legal assistance in their statutes concerning transfer of prisoners. Eight of them expressly provide for the entitlement to legal aid, including conditions for eligibility. However, in many states general provisions apply that provide that all persons in detention – as all persons falling under the scope of the Framework Decision on transfer of prisoners would be – have a right to contact a lawyer of their choice, who can be consulted face-to-face and present at any formal acts. This is the case in at least 14: Austria, Bulgaria, Denmark, Estonia, France, Greece, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Slovakia and the United Kingdom). Similarly, in 14 States (Croatia, Estonia, France, Greece, Hungary, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and the United Kingdom) entitlement to legal aid is regulated by general provisions that are also applicable to transfer cases. For example, Article 18 of the Constitution of the Netherlands states that everybody has the right to receive subsidised legal aid, which means that suspects/sentenced persons are also entitled to request this support in transfer cases. The assistance can be provided face-to-face, or via telephone or video screen.[280] In Belgium, sentenced persons in detention always have a right to be assisted by a legal counsel at their request.[281] Legal advice is provided face-to-face and the legal counsel is also present during their appearances before the public prosecutor.[282] In the Czech Republic, the principle of mandatory legal representation applies to all people in detention.[283]

In Cyprus, this issue seems to be problematic, as the right to unlimited visits from legal counsel applies only to persons arrested on remand. Access to a lawyer for persons serving prison sentences is more restricted: according to prison regulations, lawyers may visit detainees only for as long as a charge is pending against them in court or following a request from a detainee and permission from the prison director.[284] The preconditions of the prisoner's request and the director's permission may operate as obstacles; the Ombudsman has identified cases in which the prison claimed that a prisoner did not request to see a lawyer, which was disputed by both the prisoner and the lawyer. In a report published in 2013, in response to a complaint from a prisoner whose access to a lawyer was denied, the Ombudsman criticized the prison authorities for unjustifiably denying the prisoner's right to legal counsel and stressed that prisoners' access to legal counsel is a necessary and key issue for the implementation of Article 6 of the ECHR.[285] In Italy, according to consulted staff in the Court of Appeal of Turin, the prison registration office conducts hearings involving detainees without any legal assistance. In one case involving a lawyer in Italy with a Romanian client who was transferred to Romania in May 2014, the lawyer was only informed about the transfer via a letter from the client after already having been transferred to Romania.[286]

Framework Decision on probation and alternative sanctions

When it comes to transfers in accordance with the Framework Decision on probation and alternative sanctions, FRA's findings indicate that general rules regarding a right to be assisted by legal counsel when appearing before a public institution apply in 12 states

279 Estonia, Representative of the International Judicial Co-operation Division.

280 Netherlands, Constitution (*Grondwet*), 24 August 1815, Art. 18.
281 Belgium, Act related to the application of the mutual recognition principle to custodial sentence or measure deprivative of liberty pronounced in a European Union Member State, Art. 33, paras. 1 and 4.
282 Belgium, Representative of the Ministry of Justice.
283 Czech Republic, Act on International Justice Cooperation in Criminal Matters (*zákon o mezinárodní justiční spolupráci ve věcech trestních*), 20 March 2013, para. 19 (2) (a).
284 Cyprus, Prison Regulations (General) of 1997 as subsequently amended, Regulation 116, Art. 10 (i) and 10 (ii). Not available online.
285 Cyprus, Commissioner for Administration and Human Rights (2013).
286 Italy, Legal practitioner.

(Bulgaria, Denmark, France, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania and Slovakia). Only laws in Belgium and Finland explicitly provide for a right to legal assistance in the course of proceedings on transfers of probationary measures.

Framework Decision on the ESO

In at least 13 states (Denmark, Estonia, France, Greece, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania and Spain), all suspects benefit from a general right to legal assistance. As the Framework Decision on the ESO concerns transfers of measures alternative to detention, suspects are presumed to be free to hire a lawyer of their choice or apply for legal aid if they fulfil the criteria. According to FRA's findings, only the legislation implementing the Framework Decision on the ESO in Finland actually includes provisions on access to legal assistance in the course of the transfer proceedings.

A majority of states do not have procedures to ensure that the legal counsel speaks the same language as the suspect/sentenced person; however, eight states (Belgium, Germany, Finland, France, Lithuania, the Netherlands, Poland and Portugal) provide for the assistance of interpreters to facilitate communication between lawyers and foreign clients.

6.4. Duty to inform when a decision is adapted before transfer

According to all three Framework Decisions, the authorities of the executing state may adapt a judgment or measure before the transfer. Article 8 of the Framework Decision on transfer of prisoners provides for such a possibility only when a sentence exceeds the maximum penalty for a similar offence under the national law of the executing state. The sentenced person's situation should not get worse – the adapted sentence shall not aggravate the sentence imposed in the issuing state in terms of its nature and duration. It should be noted that, according to Article 17, the enforcement of a sentence, including the grounds for early or conditional release, are governed by the laws of the executing state. There is nevertheless a possibility to be conditionally released in accordance with the law of the issuing state (pursuant to Article 17 (4)); this provision could be useful when the law of the executing state is more severe for the sentenced person.

ECtHR on adapting judgments

The ECtHR has examined the question of adapting judgments in several cases arising under the Council of Europe Transfer Convention. In two cases against Sweden, the applicants – Hungarian citizens – were convicted in Sweden and subsequently transferred to Hungary to serve their ten-year sentences. In Sweden, they would have been eligible for parole after serving two-thirds of the sentence – that is, after six years and eight months. As a consequence of the judgment being adapted in Hungary, they were eligible for conditional release after having served four-fifths of the sentence – after eight years. The ECtHR concluded that the longer *de facto* term of imprisonment did not violate Article 5 of the ECHR on the right to liberty. The court reasoned that the deprivation of liberty in Hungary resulted from the conviction in Sweden, and the Hungarian courts converted the sentence into the same term of imprisonment without making any fresh assessments. Referring to the *de facto* longer term of imprisonment, the ECtHR noted that the additional period of detention in Hungary corresponded to 20 % of the time they could have expected to serve in Sweden. In the court's opinion this was not disproportionate and did not amount to a breach of Article 5.

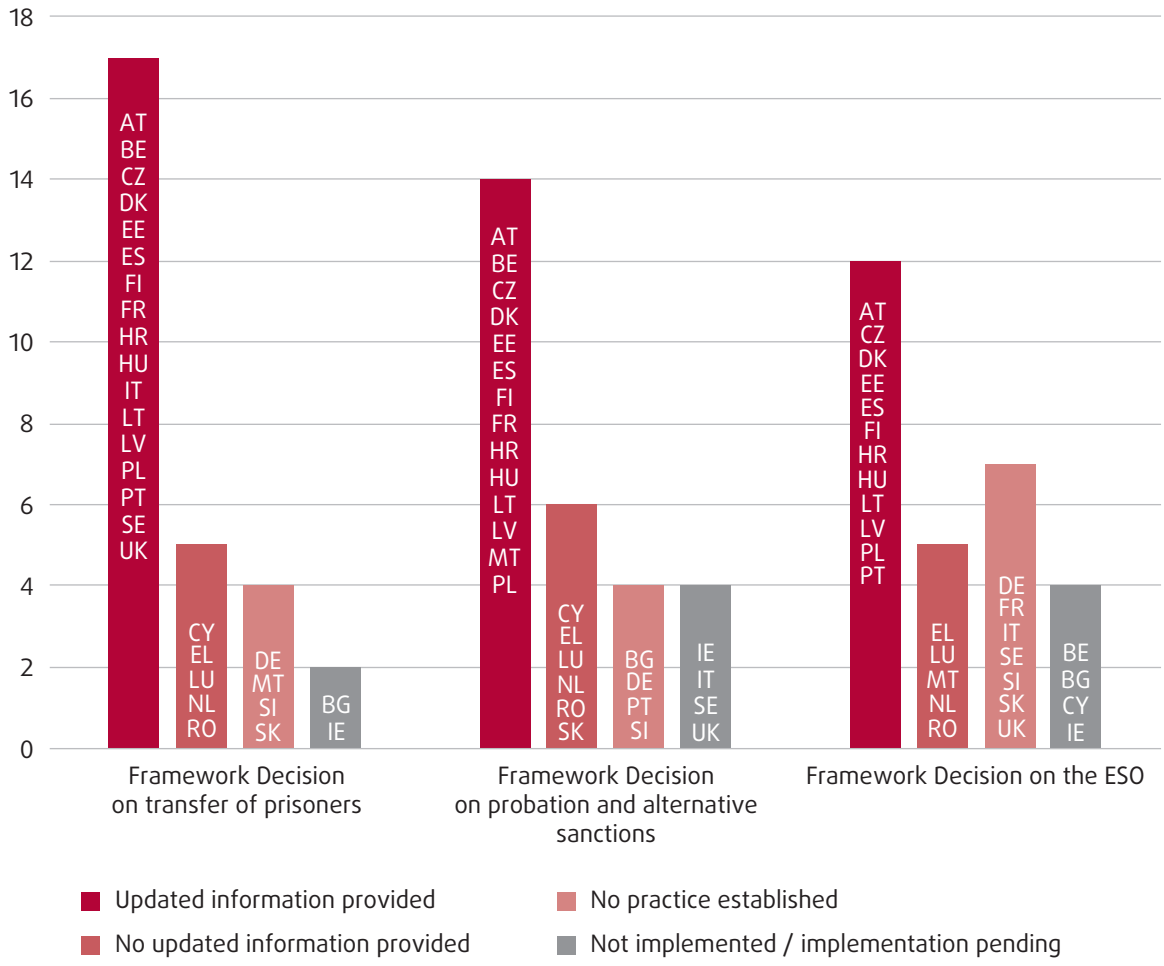
Additionally, the ECtHR stated that Article 7, which prohibits punishment without law, was not violated. The court explained that the "penalty" of ten years' imprisonment was imposed by a Swedish court and did not exceed the maximum penalty under Hungarian law and no additional penalty was imposed. The court also reiterated that a primary objective of transferring sentenced foreigners to their native country is to further their social rehabilitation.

The ECtHR reached the same conclusion in the case of a Polish citizen sentenced to life imprisonment in Belgium. In Belgium, he would have been eligible for parole after ten years; following a transfer to Poland, he would only have been eligible after 25 years' imprisonment. The court reinforced its view by explaining that Article 7 applies to the notion of "penalty" and that the conditions of release fall under the scope of "execution of a sentence".

Source: ECtHR, Csoszánszki v. Sweden*, No. 22318/02, 27 June 2006;* Szabó v. Sweden*, No. 28578/03, 27 June 2006;* Ciok v. Poland*, No. 498/10, 23 October 2012*

The Framework Decision on probation and alternative sanctions and the Framework Decision on the ESO prohibit increasing the severity of measures (*reformatio in peius)* in Articles 9 and 13, respectively. The executing state may adapt a measure if it is incompatible with its national laws; however, it must not be more severe or apply for a longer term than the measure originally imposed.

Figure 15: EU Member States in which suspects, accused or sentenced persons receive updated information about adaptations of relevant measures



Source: *FRA, 2015*

The Framework Decisions do not oblige any authorities to inform sentenced or suspects and accused persons that their sentence has been adapted. Only authorities of the issuing state have to be informed of the adjustments made. Whether or not authorities in the issuing state inform suspects/sentenced persons about the adapted terms depends on domestic law. Figure 15 illustrates in how many EU Member States suspects, accused or sentenced persons receive updated information about adaptations of relevant measures.

Given that the Framework Decisions are silent about informing affected persons and some national laws implementing the acts follow the wording of the decisions, the question of forwarding updated information appears to be unclear in some states. The obligation to provide information might be derived from other provisions and general rules. However, in the majority of states that implemented the relevant Framework Decisions, the affected persons will receive updated information if the executing state adapts a judgment or decision.

In most cases, this information is provided by law enforcement authorities. For example, in Denmark, the Ministry of Justice informs the sentenced person of the decision rendered by the executing state;[287] in Latvia, the Ministry of Justice is responsible for informing a person about any specific activity in the case.[288] The Public Prosecutor might also notify the sentenced person about the executing state's decision, as is done in France[289] and Belgium.[290] Another solution is to send a letter directly from the relevant court. This applies, for example, in Lithuania, where the court has the obligation to promptly, but not later than within one working day, send a copy of the decision to the convict and

287 Denmark, Representative of the Danish Ministry of Justice.
288 Latvia, Representative of the Judicial Cooperation Department of the Ministry of Justice.
289 France, Code of Criminal Procedure, Art. 728-48.
290 Belgium, Representative of the Ministry of Justice.

their legal counsel and to the prosecutor.[291] This is also the case in Austria.[292]

However, in some states, it is not clear who will furnish the information. Spanish law implementing the Framework Decision on transfer of prisoners does not indicate anything expressly. However, given that there is an obligation to always inform the convicted person of the transfer and any implications arising therefrom, this information should include the possible adaptation of the sentence pursuant to the law of the executing state.[293] The Criminal Procedure Act of Croatia stipulates that all persons with legal interest shall be publicly informed regarding the content of a sentence/judgment. The verified copy of a judgment/decision must be delivered personally to the sentenced person.[294] Prisoners in the United Kingdom receive all relevant information provided by the executing state concerning the administration of the sentence in that state. The information is normally provided in the individual's own language.[295]

However, in the absence of any practice, in some states it is not clear who will provide the information and how it will be provided. For example, respondents from Slovenia explicitly stated that, since the law does not regulate the issue, and the practice is very limited, the procedure is unclear.[296] This is highlighted here but may be a more general issue across the areas covered by this report.

6.5. Verification of full understanding of transfer procedure

Fully understanding the transfer procedure is a crucial element of suspects/sentenced persons providing informed consent or an informed opinion. This includes not only pure linguistic understanding but also an actual understanding of the facts and consequences. The decisions are silent about the duty to make sure that the affected persons fully understand the proceedings. However, this stems from the right to good administration,[297] and ECtHR jurisprudence on Article 6 of the ECHR. As observed by the ECtHR, if defendants do not understand all the information provided in the course of criminal proceedings, they find themselves in a particularly vulnerable position that prevents them from fully participating in the proceedings.[298] Irrespective of the nature of the proceedings, this principle should be applicable to all official proceedings in which individuals' rights are at stake. However, the Framework Decision on transfer of prisoners states in Recital 5 that, although there is a need to provide a sentenced person with adequate safeguards, "their involvement in the proceedings should no longer be dominant" by requiring their consent in all cases. Therefore, the decision itself does not require the full participation of a sentenced person in transfer proceedings.

Nevertheless, at least six EU Member States (Bulgaria, France, Hungary, Lithuania, Slovenia and Spain) have practices for checking whether prisoners fully understand the transfer procedure in accordance with the Framework Decision on transfer of prisoners. Only three states (Lithuania, Slovenia and Spain) verify the individuals' full understanding when coordinating transfers under the Framework Decision on probation and alternative sanctions and in the course of ESO proceedings.

In Bulgaria,[299] Hungary,[300] Lithuania,[301] Slovenia,[302] and Spain[303] relevant courts inform sentenced persons about the option to transfer and check if they fully understand it. In France this task belongs to the public prosecutor; when obtaining consent, they must confirm this by checking "comprehension of the transfer procedure".[304]

Individuals' full understanding of transfers of probation orders or supervision measure procedures is only checked in Lithuania,[305] Slovenia[306] and Spain.[307] How-

291 Lithuania, Law on mutual recognition and execution of judicial decisions in criminal matters of EU Member States (*Lietuvos Respublikos įstatymas „Dėl Europos Sąjungos valstybių narių sprendimų baudžiamosiose bylose tarpusavio pripažinimo ir vykdymo"*), 21 November 2014, Art. 7 (5).
292 Austria, Representative of the Austrian Federal Ministry of Justice.
293 Spain, Law 23/2014 of 20 November on mutual recognition of criminal judgments in the European Union, Art. 68.
294 Croatia, The Criminal Procedure Act (*Zakon o kaznenom postupku*) (2014), Official Gazette (Narodne novine), Nos. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13,145/13, and 152/14, 17 December 2014, Art. 108, 273 and 413.
295 United Kingdom, NOMS (England and Wales) (2014).
296 Slovenia, Representative of the District Court of Ljubljana.
297 European Union, Charter of Fundamental Rights of the European Union, OJ C 326, Art. 41.
298 ECtHR, *Salduz v. Turkey,* No. 36391/02, 27 November 2008, para. 54.
299 Bulgaria, Supreme Prosecution Office of Cassation (2015), Letter No. 5676/2015 to the Center for the Study of Democracy.
300 Hungary, Representative of the Budapest Environs Regional Court and the Szeged Regional Court.
301 Lithuania, Law on mutual recognition and execution of judicial decisions in criminal matters of EU Member States, Art. 22.
302 Slovenia, Representative of the District Court of Ljubljana.
303 Spain, Law 23/2014 of 20 November on mutual recognition of criminal judgments in the European Union, Art. 67.1.
304 France, Representative of the Department for criminal matters and graces.
305 When the decision is taken by a prosecutor, the full understanding of the transfer is checked during interrogation. When the decision to transfer is taken by a court, the full understanding of the transfer is checked in the court proceedings.
306 Slovenia, Representative of the District Court of Ljubljana.
307 Spain, Law 23/2014 of 20 November on mutual recognition of criminal judgments in the European Union, Art. 67.1.

ever, practitioners in some Member States (Denmark, Estonia, Finland, Greece, Hungary, Latvia and Slovakia) pointed out that it is difficult to recognize whether certain practices exist because there have only been very few cases, or no cases at all, under these two Framework Decisions.

6.6. Obtaining informed consent

As noted, only the Framework Decision on the ESO refers to the notion of 'informed consent' (in Article 9 (1)). As a general rule, under the Framework Decision on transfer of prisoners, consent is not required when a sentenced person is to be transferred to the Member State: of nationality and residence; to which the sentenced person will be deported following expulsion proceedings; or to which the sentenced person fled or otherwise returned in view of the criminal proceedings. Consent for transfer is required in all remaining cases, which might include a transfer to the Member State of nationality but not habitual residence, or to the Member State of habitual residence but not nationality, or another state. Even when obtaining an individual's opinion is not legally required, when a sentenced person is still in the issuing state, they should be given an opportunity to state their opinion in all cases. Such opinion is not binding, but nevertheless should be taken into account by authorities. Finally, the Framework Decision on probation and alternative sanctions neither requires consent nor an opportunity to express one's opinion.

It is for domestic laws or practice to establish procedures aimed at obtaining informed consent from, or the opinion of, affected persons. Table 12 presents an overview of the situation in EU Member States in regard to the Framework Decision on transfer of prisoners.

Table 12: Procedures in EU Member States for obtaining informed consent for/opinion on transfers with regard to Framework Decision on transfer of prisoners

	Consent	Opinion (when consent not required)
AT		
BE		
BG		
CY		
CZ		
DE		
DK		
EE		
EL		
ES		
FI		
FR		
HR		
HU		
IE		
IT		
LT		
LU		
LV		
MT		
NL		
PL		
PT		
RO		
SE		
SI		
SK		
UK		

Legend

	Procedure established in law
	Procedure established in practice
	No practice established
	No procedure
	Not implemented

Source: FRA, 2015

Table 12 shows that more than half of the Member States have established some procedures, either in law or in practice, regarding consent or opinion under the Framework Decision on transfer of prisoners. In general, the domestic laws or practices of those states are very flexible, and allow the interested persons to express their consent or opinion in writing or orally, which later is recorded in writing by officials.

According to FRA's research, in all states with established procedures, sentenced persons are informed by the competent authorities about the purpose and meaning of consent. They are informed that after a transfer, the sentence will be served in accordance with the law of the executing state, including possible eligibility for parole (this information is explicitly provided in Finland, for example). Some states – for example, Latvia – use special forms containing all the relevant information.[308] Additionally, in Spain, prisoners subjected to transfer procedures must be assisted by a lawyer and an interpreter to ensure full understanding.

Sentenced persons can express their consent either before prison authorities (Austria, Denmark, Estonia, Finland, the Netherlands and Sweden) or before law enforcement/judicial authorities (Belgium, the Czech Republic, Germany, Lithuania, Latvia, Poland, Portugal, Romania, Slovakia and Spain). In Belgium, consent is expressed before the public prosecutor. Sentenced persons are informed that consenting to a transfer entails renouncing one's entitlement to the rule of specialty in accordance with Article 18 (2) (e) of the Framework Decision on transfer of prisoners. Pursuant to this provision, when sentenced persons consent to transfers, the specialty rule will not apply to them, meaning they can be prosecuted, sentenced or detained in connection with offences committed before the transfer and not covered by the transfer decision. In addition, sentenced persons are informed that any remaining imprisonment sentence will be directly and immediately enforceable in the executing state, in accordance with the laws of that state. Finally, sentenced persons are informed that the executing state can adapt the sentence pronounced in Belgium if its duration or nature is incompatible with the laws of the executing state. The sentenced person's consent is officially given in writing. [309]

Similarly, opinions can be stated either before prison authorities (Austria, Denmark, Estonia, Finland, the Netherlands, Sweden and the United Kingdom) or before prosecutors or judges (Croatia, the Czech Republic, France, Germany, Greece, Hungary, Lithuania, Poland, Slovakia and Spain).

Only five Member States have established a consent procedure – either in law or in practice – for transfers to be carried out in accordance with the Framework Decision on probation and alternative sanctions. However, it should be remembered that this decision does not explicitly require any consent. Nevertheless, the prosecutor of the Netherlands claims that since some EU countries set informed consent as a precondition for transfers, written consent of the sentenced person is always asked for.[310]

The states that have special procedures – namely Finland, Malta, Ireland, the Netherlands and Spain – allow for consent to be expressed before probation supervising officers (Finland, Malta and the Netherlands) or before the judicial authorities (Ireland and Spain).

In Spain, before transmitting a judgment on probation, the judicial authority asks the convicted person if they want to return to the state of their residence, allowing them thirty days to answer. If a convicted person wants to have the measures transferred, the judicial authority contacts the competent authority of that state and ask for its consent to transmission of the judgment. Consent, even if expressed verbally, is always documented by the judge.[311]

The ESO has not been used much by Member States. Therefore, the research showed that, in numerous states, relevant procedures have not been established and it has been not determined how consent will be obtained. This is the case in Austria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Lithuania, Latvia, the Netherlands, Poland, Portugal and Romania. However, three states have clear guidelines on how to obtain suspects' or accused persons' informed consent to forwarding supervision measures to their home country. In Spain, suspects or accused persons are informed about the option by the court and given 30 days to decide. If the proceedings were held in various courts, the accused's consent in one case applies to all others.[312] In Hungary, the court must obtain the consent of the person concerned when it orders the supervision measure and fills out the model template

308 Latvia, Cabinet of Ministers Regulations No. 176 'Regulations on the form and content of a special document for co-operation in criminal proceedings with the Member States of the European Union' (*Ministru kabineta noteikumi Nr. 176 "Noteikumi par īpaša dokumenta formu un saturu krimināltiesiskajā sadarbībā ar Eiropas Savienības dalībvalstīm"*), 17 March 2008, Annex 6.

309 Belgium, Act related to the application of the mutual recognition principle to custodial sentence or measure deprivative of liberty pronounced in a European Union Member State, Art. 6, para. 1 and Art. 33, paras. 1–2.

310 Netherlands, Representative of the Centre for International Legal Aid.

311 Spain, Law 23/2014 of 20 November on mutual recognition of criminal judgments in the European Union, Art. 98.2.

312 *Ibid.*, Art. 114.3 and 4.

for transfer.[313] In Slovenia, the suspect or accused person is interrogated and asked to give their consent orally by an investigative judge. The suspect can also give their consent in written form within eight days after the interrogation.[314]

6.7. Right to revoke consent or change one's opinion

From a legal point of view, it appears problematic for suspected or sentenced persons to revoke their consent or to change their opinion. To reiterate – in principle, consent is not required for transfers of prisoners in accordance with the Framework Decision on transfer of prisoners; it is required only in exceptional cases. Nevertheless, in all cases, sentenced persons should have an opportunity to state their opinion and this opinion should be taken into consideration by the relevant authority deciding on the transfer. The Framework Decision does not address the possibility of revoking one's consent to a transfer or changing one's opinion. The Framework Decision on probation and alternative sanctions does not require any consent for transfers of probationary measures. By contrast, the Framework Decision on the ESO requires informed consent. Neither the Framework Decision on probation and alternative sanctions nor the Framework Decision on the ESO provide for a possibility to change one's consent or opinion.

It follows that this issue would be regulated by Member States' domestic law, if at all. As the issue is fairly new, there may be no established practice and the rules may evolve. Where no provisions expressly prevent suspected, accused or sentenced persons from revoking their consent, actual practice or judicial interpretation might clarify whether such a possibility exists. Table 13 provides an overview of EU Member States in which sentenced persons have a right to revoke their consent or change their opinions in relation to the Framework Decision on transfer of prisoners.

Table 13: Right to revoke consent or change one's opinion in EU Member States with regard to Framework Decision on transfer of prisoners

	Right to revoke consent	Right to change one's opinion
AT		
BE		
BG		
CY		
CZ		
DE		
DK		
EE		
EL		
ES		
FI		
FR		
HR		
HU		
IE		
IT		
LT		
LU		
LV		
MT		
NL		
PL		
PT		
RO		
SE		
SI		
SK		
UK		

Legend

	Procedure established in law
	Procedure established in practice
	No practice established
	No procedure
	Not implemented

Source: FRA, 2015

313 Hungary, Act CLXXX of 2012 on the judicial cooperation in criminal matters with Member States of the European Union (*2012. évi CLXXX. törvény az Európai Unió tagállamaival folytatott bűnügyi együttműködésről*), Art. 87 (1).

314 Slovenia, Cooperation in Criminal Matters with the Member States of the European Union Act (*Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije* (ZSKZDČEU-1)), 23 May 2013, Art. 123, paras. 2–3.

In some states, there are no clear rules – hence, whether it is possible to revoke consent will depend on the jurisprudence and practice. The interpretation can go either way: if the law does not provide for such a possibility, it is not allowed; or, since the law does not explicitly prohibit it, it is allowed.

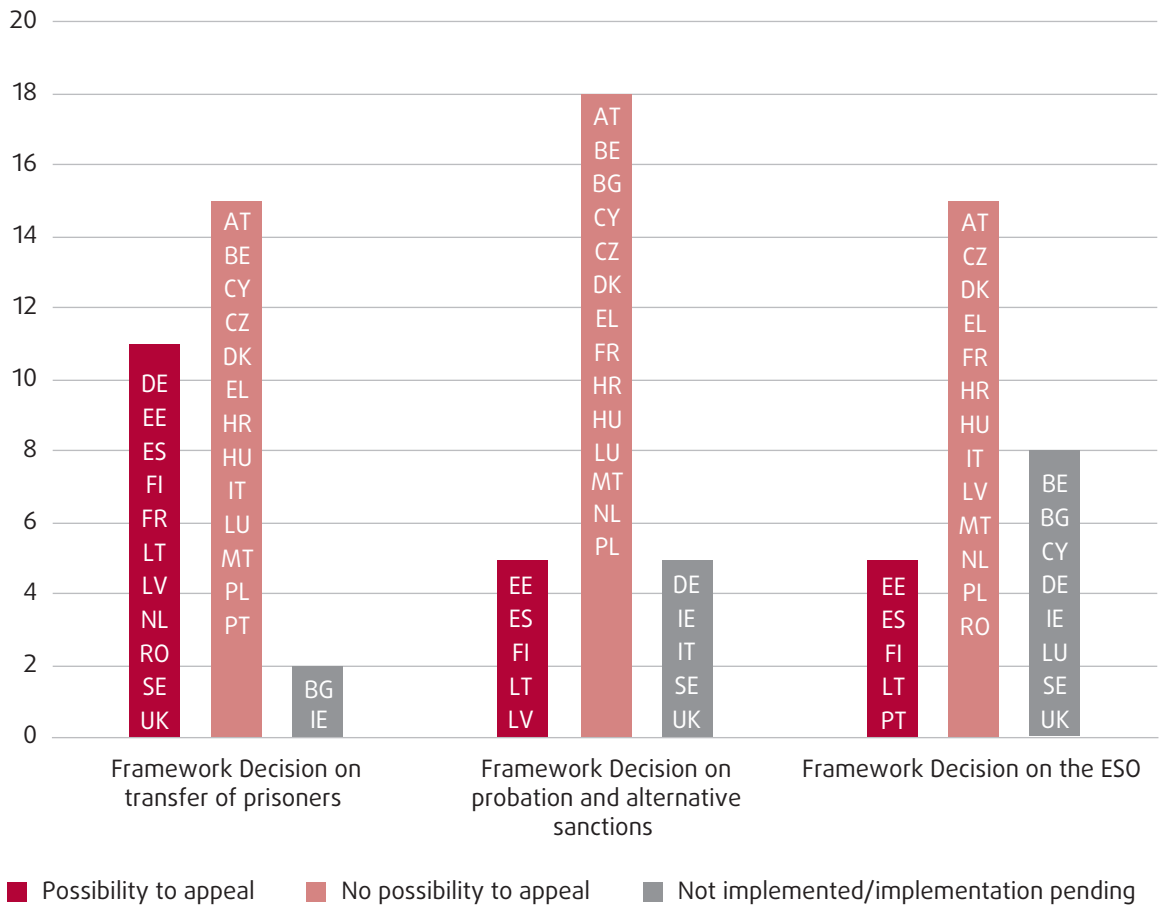
Ten EU Member States (Belgium, Denmark, Finland, Hungary, Ireland, Italy, the Netherlands, Portugal, Sweden, and the United Kingdom) provide for a possibility to revoke consent for transfers of prisoners either in law or in practice. Eleven (Belgium, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Portugal and the United Kingdom) allow for changing one's opinion. In Italy, very few cases of actual withdrawals of consent have been reported, as confirmed by a representative of the Italian Ministry of Justice.[315] Likewise, in practice in Portugal, consent is withdrawn in very few situations, and when it is, it is normally linked to the sentenced person having obtained his/her conditional release.[316]

When it comes to revoking consent to transfers of probation measures, the law or practice of only five states (Denmark, Finland, Hungary, Malta and the Netherlands) provide for such a possibility. Only four states – Denmark, Finland, Hungary and Latvia – allow for revoking consent to transfers of supervision measures.

6.8. Right to appeal forwarding decisions in the issuing state

Decisions on forwarding judgments/decisions together with the certificates are made in accordance with domestic law. The three transfer decisions provide that each EU Member State shall determine which authorities are competent in accordance with a given Framework Decision, when that Member State is the issuing state or the executing state.[317] However, none contains a provision about a right to appeal decisions made by

Figure 16: Possibility to appeal transfer decisions in EU Member States



Source: *FRA, 2015*

315 Italy, Representative of the Directorate General for Criminal Justice.
316 Portugal, Representative of the Prosecutor General's Office.
317 See Council Framework Decision 2008/909/JHA, Art. 2 (1); Council Framework Decision 2008/947/JHA, Art. 3 (1); Council Framework Decision 2009/829/JHA, Art. 6 (1).

those authorities in the issuing state. It follows that this question is to be regulated by domestic law.

Figure 16 provides an overview of EU Member States in which there is a possibility to appeal decisions about transfers.

A majority of EU Member States do not provide for the right to appeal against decisions to forward measures taken in the issuing state. Only 11 states provide for such a possibility in transfer of prisoners cases. However, in other states – as, for example, in Ireland – there might not be a need to appeal. Transfers only occur based on tripartite consent, so there is no requirement for an appeals mechanism. Consent can be revoked at any point.[318]

The opposite view was recently expressed by the Italian Court of Cassation. According to the court, a sentenced person is not a party to transfer proceedings because these are conducted on an international level and concern Member States, not individuals. A decision to transfer – more specifically, the certificate (Annex I of Framework Decision on transfer of prisoners) – is "an act addressed not to the detainee but to the foreign authority, clearly ancillary and secondary to the sentence that has to be executed."[319]

Only six states provide a right to appeal in cases involving transfers of probation and supervision measures. This appears problematic with regard to transfers of probation: as the transfers themselves do not require the sentenced persons' consent or opinion, in light of the absence of a right to appeal, individuals are practically deprived of any possibility to express their views. Transfers of supervision measures should only occur with suspects' informed consent or upon their request – hence they have a chance to present their opinion.

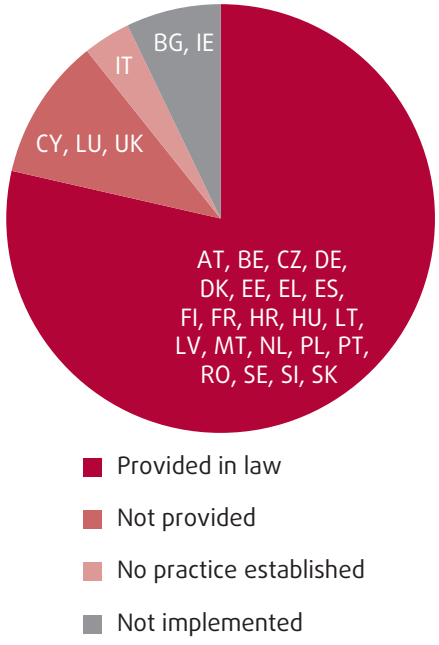
6.9. Right to legal assistance in the executing state

The Framework Decisions do not provide for any right to legal assistance in the executing state. The Framework Decision on transfer of prisoners only states that sentenced persons have a right to legal counsel in relation to the specialty rule. Accordingly, sentenced persons should have a right to legal assistance when, after a transfer, they decide to renounce entitlement to the specialty rule (Article 18 (2) (f)). Apart from this, the decision is silent about legal assistance. The two other Framework Decisions do not mention the right to legal counsel at all.

However, Member States are free to provide for legal assistance in their own domestic legal systems. Figure 17 provides an overview of executing states that afford legal assistance in relation to the Framework Decision on transfer of prisoners.

In a majority of EU Member States (22), sentenced persons have a right to legal counsel after a transfer under the Framework Decision on transfer of prisoners. The statistics are also promising in regard to the Framework Decision on probation and alternative sanctions (17 states) and the Framework Decision on the ESO (14 states). Article 11 of the Code of Enforcement of Punishments of the Republic of Lithuania[320] guarantees the right to legal aid to every suspect and sentenced person. These persons may be advised by their chosen lawyer or, if they do not have sufficient means to pay for legal assistance, by a legal aid lawyer, in accordance with the procedure provided for by the law regulating the

Figure 17: Framework Decision on transfer of prisoners: right to legal assistance in the executing state in EU Member States



Source: *FRA, 2015*

318 Ireland, Representative of the Irish Council for Prisoners Overseas.

319 Italy, Circular Letter Ministry of Justice, Department of Prison Administration (2014), 'Transfer of EU detainees in execution of a penalty toward the origin country in implementation of the Framework Decision 2008/909/JHA' (*Circolare Ministero della Giustizia. Dipartimento Amministrazione Penitenziaria 18 aprile 2014 Trasferimento dei detenuti comunitari in esecuzione pena verso il loro paese di origine in attuazione della decisione quadro 2008/909/JHA*), 18 April 2014, p. 3 (see attachment No. 2); judgment of the Joint Penal Chambers of the Court of Cassation No. 30769 of 21 June 2012 on European Arrest Warrant, filed on 27 July 2012, plaintiff: Caiazzo.

320 Lithuania, Seimas of the Republic of Lithuania (*Lietuvos Respublikos Seimas*) (2002), Code of the Enforcement of Punishments of the Republic of Lithuania (*Lietuvos Respublikos bausmių* vykdymo kodeksas), No. IX-994, 27 June 2002.

provision of state-guaranteed legal aid.[321] In Finland and Sweden it is believed that such assistance is only needed in exceptional cases, but is nevertheless available.

FRA's research shows that, in Austria and Malta, the laws implementing the Framework Decision on the ESO and the Framework Decision on probation and alternative sanctions do not regulate the issue, which, in the absence of practice, is therefore not clear.

Conclusion and FRA Opinion

EU Member States are still in the process of establishing relevant rules on transferring prisoners, probation orders and supervision measures under the three Framework Decisions, and clearer practices will likely emerge in future. From a fundamental rights perspective, affected persons should ideally not be treated as mere objects of transfers but instead be involved in the process to ensure that they are aware of possibilities for transfers, and that they understand the transfer process and its consequences. For instance, social rehabilitation should not be used deceptively or as an excuse to effectively 'deport' persons. Adequately involving potential transferees in the process will support the Framework Decisions' overarching goals, including social rehabilitation and, thus, societal interests. Involvement includes being properly informed about options and consequences of transfers, as well as a realistic time line for the process. This would also be in the spirit of Article 1 of the EU Charter of Fundamental Rights, which guarantees the right to human dignity.

FRA's research shows that further safeguards are needed to ensure the overall fairness of the transfer process and to achieve the overall goals of the instruments. For example, findings highlight considerable divergence among the EU Member States when it comes to informing persons potentially subjected to transfer and ways of obtaining their consent.

It is important that foreign nationals are provided with translations of essential documents and interpretation to protect their rights. Directive 2010/64/EU on the right to translation and interpretation in criminal proceedings could be used to inspire responses to such needs in the context of transfer proceedings. EU-wide guidance on information about cross-border transfer proceedings and their implications could draw on Directive 2012/13/EU on the right to information in criminal proceedings. Legal aid may also be needed, at least in particular cases.

Where consent is required, the applicable requirements need to be stricter, making sure that consent is provided based on objective facts about transfers and their consequences. Where consent is required, it would appear logical to grant a right to revoke such consent, at least during a certain period, given the very serious consequences of such consent. Additionally, for this reason, a mechanism to ensure that consent was provided in full understanding of the consequences should be introduced. Where there is no consent requirement, it would similarly be logical to include a right to appeal against transfers. The right to appeal or a right to judicial review of a decision taken by an administrative body is a well-established aspect of rule of law-based societies, and expressed in the EU Charter of Fundamental Rights (Article 47); it would also boost the instruments' credibility and overall mutual trust. Finally, the possibility, under all three decisions, for issuing states to stop transfers (withdraw certificates) at any point before actual execution/supervision has begun in executing states is important. States could make use of this option if it becomes clear that a transfer would not serve the goals of the instruments, such as social rehabilitation.

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To ensure effective implementation of the three Framework Decisions, and to stay true to their objectives, but also to ensure compliance with the EU Charter of Fundamental Rights, in particular the right to human dignity (Article 1), the EU and the Member States need to take further action to ensure that the three Framework Decisions cannot be interpreted in a manner that sees potential transferees as mere objects of transfer. Instead, all potential transferees should be involved in the process to ensure that they are aware of possibilities for transfers, and that they understand the transfer process and its consequences. Minimum rules – which could be inspired by the EU legislation on interpretation and translation, as well as on the right to information – should be established to ensure that consent is provided based on a sufficient level of information.

Similarly, when consent is not required (possible under the Framework Decision on transfer of prisoners), it should be ensured that the information provided is adequate for a sufficient level of understanding of the process and its consequences. Additionally, where consent for transfers is required, EU Member States should explicitly allow for withdrawals of such consent within a certain time-limit given the potential consequences of transfers for individuals. Member States should also consider an appropriate remedy for cases where potential transferees object to transfers. To strengthen mutual trust and, by extension, mutual recognition, Member States should apply similar rules on how to inform persons potentially subjected to transfer and how to obtain their consent or inform them about the transfer process and its consequences.

321 Lithuania, Seimas of the Republic of Lithuania (2005), Law on State-guaranteed Legal Aid (*Valstybės* garantuojamos teisinės pagalbos įstatymas), No. X-78, 20 January 2005.

7 Rights of crime victims in cross-border transfers

- This chapter examines the effects of the three Framework Decisions on the rights of crime victims.
- It also explores the relevance of the Victims' Rights Directive in the context of cross-border transfers.
- In addition, this chapter looks at how EU Member States take victims and their rights into account in their implementation of the Framework Decisions.

This chapter examines the three Framework Decisions' effects on the rights of victims of crime. It first recalls how victims' rights are protected in EU law, including the three Framework Decisions and the Victims' Rights Directive. The chapter then explores Member States' implementation of the decisions, as this relates to the involvement of crime victims. The chapter concludes with observations on steps Member States could take to fully comply with their obligations under EU law.

Rights of crime victims are a vast subject. This chapter will only elaborate on specific rights relevant in the context of cross-border transfers. Therefore, rights such as the right to support and the right to participation in criminal proceedings will remain outside of the scope of this report. This report only addresses issues of transfers of supervision measures, probation measures or prisoners to another EU Member State, and explores how such transfers might affect rights of victims.

FRA ACTIVITY

FRA research on victims

FRA has conducted extensive research on victims of crime, leading to, among others, a report that maps and analyses support services for crime victims in EU Member States. The report looks at practical aspects of access to justice for victims, exploring how victim support services – an obligation under EU law – are organised and how victims' rights have developed over the past few decades. FRA's research identified promising practices that Member States looking to improve their victim support structures might turn to for inspiration. It also found several areas in which Member States currently fall short of meeting the legal requirements.

Another report looks at access to justice for victims of hate crime as well as at support services for such victims. In addition, four large-scale surveys by FRA have to date scrutinised the victimisation of minorities and LGBT persons, anti-Semitic offences, and violence against women. An ongoing FRA project explores country-specific data on access to justice for victims of violent crimes. The findings will be available in 2017.

Sources: FRA (2015), Victims of crime in the EU: the extent and nature of support for victims*; FRA (2014),* Violence against women: an EU-wide survey: Main results*; FRA (2013),* EU LGBT survey – European Union lesbian, gay, bisexual and transgender survey – Results at a glance*; FRA (2013),* Discrimination and hate crime against Jews in EU Member States: experiences and perceptions of antisemitism*; and FRA (2009),* EU-MIDIS Main Results Report

7.1. Legal context

Article 82 (2) of the TFEU provides that the Parliament and Council may establish minimum rules concerning the rights of crime victims.[322] To this end, the Victims' Rights Directive came into effect, with a transposition deadline of 16 November 2015.[323] The directive instructs Member States to act in the interest of victims "before, during and for an appropriate time after criminal proceedings".[324] It should be noted that the directive was adopted after the three Framework Decision at the centre of this study and that the legal rights of victims are not mentioned in any of the three Framework Decisions. Moreover, the Framework Decisions do not provide for any mechanisms that would safeguard the rights of victims in the post-trial stage. However, the Framework Decision on probation and alternative sanctions and the Framework Decision on the ESO both list "improving the protection of victims" as one of their objectives.[325] Additionally, with regard to execution of the ESO, issuing states must take due account of the risk suspects might pose to victims and to the general public.[326] Moreover, the decisions do not operate separately from other legal instruments and Member States should ensure that transfers are carried out in accordance with rights and obligations conferred by other applicable legal acts. Granting victims a right to information, or the right to express their views on transfers, would be an important step forward in respecting the interests of victims.[327] Of the three Framework Decisions, only the ESO relates to the course of criminal proceedings, whereas the Framework Decision on transfer of prisoners and the Framework Decision on probation and alternative sanctions concern the timeframe following criminal proceedings.

On the whole, EU legislation has focused less on victims' rights after a final sentence has been imposed, with academics noting that "there seems to be an imbalance between victims' rights in the (pre)trial stage and those in the post-trial or execution stage: the first are well developed while the latter appear almost non-existent."[328] FRA's 2015 report on 'child-friendly justice' found that, regarding child victims, post-trial provision of information on court decisions seems to be the weakest element of the right to information in all Member States.[329]

However, the Victims' Rights Directive – adopted three to four years after the Framework Decisions – entitles victims to receive information related to offenders' release or escape. It specifies that "Member States shall ensure that victims *are offered the opportunity* to be notified, without unnecessary delay, when the person remanded in custody [pre-trial detention], prosecuted or sentenced for criminal offences concerning them is released from or has escaped detention".[330] This right is not absolute and is described in the directive as an *opportunity*. The subsequent paragraph provides that information about the offender's release or escape shall be provided upon a victim's request, at least when victims are in danger or run risk of harm, unless such notification would endanger the offender. This may also be relevant to transfers foreseen by the Framework Decisions.

Victims' Rights Directive on the right to receive information about cases

"Member States shall ensure that victims are offered the *opportunity to be notified*, without unnecessary delay, *when the person remanded in custody, prosecuted or sentenced for criminal offences concerning them is released from or has escaped detention*. Furthermore, Member States shall ensure that victims are *informed of any relevant measures issued for their protection* in case of release or escape of the offender. [...] Victims shall, upon request, receive the information provided for in paragraph 5 at least in cases where there is a danger or an identified risk of harm to them, unless there is an identified risk of harm to the offender which would result from the notification."

Source: Victims' Rights Directive (2012/29/EU), Art. 6 (5)-(6) (emphasis added)

In the context of transfers, victims' right to information is affected. Under Article 6, victims have a right to information about criminal prosecutions and criminal proceedings. As noted above, Article 6 (5) states that Member States should notify victims if a detainee is released from or has escaped detention. In the context of the Framework Decision on probation and alternative sanctions, a victim should be informed when an offender is released on probation in view of the subsequent transfer of the probation measure to another Member State. The same principle should be applied in the context of the ESO – i.e. when a suspect/accused

322 European Union, Treaty on the Functioning of the European Union (TFEU), OJ C 326.
323 Council Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA (Victims' Rights Directive), OJ L 315/57.
324 *Ibid.*, Art. 8 (1).
325 Council Framework Decision 2008/947/JHA, Recitals 8 and 24, Art. 1; Council Framework Decision 2009/829/JHA, Art. 2.
326 Council Framework Decision 2009/829/JHA, Art. 22 (2).
327 Van der Aa, S. (2014).
328 *Ibid.*, pp. 239–256.
329 FRA (2015b), p. 73.
330 Victims' Rights Directive (2012/29/EU), Art. 6 (5)–(6) (emphasis added).

Table 14: EU Member States that have procedures to inform victims

	Transfer of prisoners	Probation and alternative sanctions	European Supervision Order (ESO)
Procedure established in law	CZ, PL, UK	CZ, PL	CZ, PL
Procedure established in practice	CY, SI	CY, SI	SI

Source: FRA, 2015

Table 15: Member States that provide information at a victim's request

	Transfer of prisoners	Probation and alternative sanctions	European Supervision Order (ESO)
Provided in law	BE, CZ, PL, UK	BE, CZ, PL	CZ, PL
Provided in practice	CY, FI, IE, NL, SE, SI, SK	CY, FI, IE, NL, SI, SK	NL, SI

Source: FRA, 2015

person is released from remand and alternative supervision measures are employed – particularly because the ESO relates to pending criminal proceedings. However, it should be remembered that only supervision measures are transferred abroad – the criminal proceedings would still be pending in the state in which the crime was committed, and the suspect would be required to appear in court there.

In the context of the Framework Decision on transfer of prisoners, victims' right to information kicks in when a sentenced person is transferred to another Member State and then released on parole in accordance with the law of that state, or escapes from detention.

The Victims' Right Directive establishes that Member States will protect victims and their families from secondary and repeat victimisation.[331] This will be further explored in the following sections.

7.2. Implementation and promising practices

This section looks at how EU Member States take victims and their rights into account in their implementation of the Framework Decisions. It outlines the right of crime victims to be informed about transfers of sentenced and convicted persons, looking at their role in the process and at when and how they are informed, if at all. The accompanying charts highlight the more common practices in EU Members States and the varying levels of victim involvement provided for in implementations of the different Framework Decisions.

As stated in Chapter 1, while reading the summary of findings, it should be noted that not all Member States had implemented all three Framework Decisions at the time of data collection.

FRA's research shows that while it is not common for Member States to include victims in legislation implementing the three Framework Decisions, some states take victims into consideration and keep them informed when organising and making decisions on transfers. Table 14 provides an overview per Framework Decision. Member States that have established procedures in law for providing victims with information include the Czech Republic, Poland (under all three Framework Decisions) and the United Kingdom (under the Framework Decision on transfer of prisoners). Similarly, Slovenia (under all three Framework Decisions) and Cyprus (under the Framework Decision on transfer of prisoners and the Framework Decision on probation and alternative sanctions) have established such procedures in practice.

Some EU Member States take on a facilitator's role and provide information to victims when it is directly requested. Table 15 provides an overview by Framework Decision. Four Member States provide for this in law (Belgium, the Czech Republic, Poland, and the United Kingdom), while in practice, authorities in seven Member States (Cyprus, Finland, Ireland, the Netherlands, Slovakia, Slovenia, and Sweden) also respond to requests for information about transfers of suspected or sentenced persons – depending on certain conditions, which are explored in the next section.

331 Victims' Rights Directive, Art. 18 (1).

Right to be informed of release

According to Article 6 (5)–(6) of the Victims' Rights Directive, victims have a right to request to be informed when an offender will be released from, or has escaped, detention. Authorities should provide such information at least when victims are in danger, unless this would put the offender at risk. This is especially important in the context of violent crimes, where a sentenced person's release may involve a threat of retaliation to victims and their families. Member States should consider informing victims if suspects or sentenced persons are released back into the community under the Framework Decision on the ESO or the Framework Decision on probation and alternative sanctions. FRA's evidence shows that in at least two-thirds of Member States, victims have the right to be informed about the impending release of an offender – especially in, and sometimes limited to, cases where authorities believe that the victim is at risk as a result of the release.

Member States that have, either as issuing state or executing state, established in law the right of victims to be informed of suspects', accused or sentenced persons' release include Belgium, Croatia, the Czech Republic, France, Lithuania, Malta, Poland, and Portugal. Figure 18 provides an overview by issuing state and executing state. Other states offer this information to victims in practice only (Cyprus, Germany, Denmark, Spain, Finland, Hungary, Ireland, Latvia, the Netherlands, and Slovakia). In the remaining states, either no practice has been established or insufficient data was provided in the course of the research.

In the Netherlands, while there is no procedure for providing such information in cases of transfers of sentences, according to general procedure, the prosecutor has to inform the victim about the release of the sentenced person in cases involving serious crimes.[332] In Latvia, recognised victims have a right to request and receive information about the perpetrator's release or escape from prison or temporary detention if there is a danger to the victim and there is no risk of harm to the detained or sentenced person.[333] Similar rules apply in Slovakia[334] and in Cyprus, where victims have the right to be informed of the sentenced person's release only in cases of sexual abuse or sexual exploitation of children and in cases of human trafficking, and provided the police believe the victim to be at risk.[335]

In practice, victims are often not informed unless they have expressed this wish beforehand. For example, in Austria, the victim must be informed about the initial release, as well as the forthcoming or concluded release of the convict. However, the victim must have requested to be informed about this issue during the course of the trial.[336] Victims in Lithuania also have a general right to be informed of the convict's release from a correctional institution[337] or a suspect's release from detention if they express their wish to be informed.[338] Other Member States have a clearer procedure in place with regard to informing victims; for example, in Croatia, the Probation Office must produce a report on preparing a victim and his or her family for the temporary release of a prisoner,[339] while victims must also be informed about terminations of pre-trial detention.[340] The victim's right to information about release becomes more complex where a prisoner has been transferred; for example, in Germany, once a prisoner has been transferred, the victim would have to request the information from the authorities in the executing state, and foreign law applies.[341] Other Member States are careful to balance a victim's right to information with the rights of the offender. In Denmark, notifications of release can be denied if, in the interest of the perpetrator, there are strong reasons not to grant them.[342] This could, for

332 Netherlands, Code of Criminal Procedure (*Wetboek van Strafvordering*), 11 March 1979, Art. 51 a.

333 Latvia, Draft Law on Amendments to the Criminal Procedure Law (*Likumprojekts 'Grozījumi Kriminālprocesa likumā'*), 11 June 2015.

334 Slovakia, Criminal Procedure Code (*Zákon č. 301/2005 Z. z. Trestný poriadok*) Section 46, paras. 8 and 9.

335 Cyprus, Law on the prevention and combating of sexual abuse and sexual exploitation of children and child pornography (*Ο περί της Πρόληψης και της Καταπολέμησης της Σεξουαλικής Κακοποίησης, της Σεξουαλικής Εκμετάλλευσης Παιδιών και της Παιδικής Πορνογραφίας Νόμος του 2014*) No. 91(I)/2014, 4 July 2014, Art. 36 (2); Law revising the legal framework regulating the prevention, combating of trafficking and exploitation of persons and protection of victims (*Νόμος που αναθεωρεί το νομικό πλαίσιο που διέπει την πρόληψη και την καταπολέμηση της εμπορίας προσώπων και την προστασία των θυμάτων*) No. 60(I)/2014, 15 April 2014, Art. 32 (2).

336 Austria, Penitentiary System Act (*Bundesgesetz vom 26. März 1969 über den Vollzug der Freiheitsstrafen und der mit Freiheitsentziehung verbundenen vorbeugenden Maßnahmen (Strafvollzugsgesetz – StVG)*), BGBl. No. 144/1969, 26 March 1969, para. 149 (5).

337 Lithuania, Code of Enforcement of Punishments of the Republic of Lithuania (*Lietuvos Respublikos bausmių vykdymo kodeksas*), Art. 180 (8).

338 Lithuania, Code of Criminal Procedure (*Baudžiamojo proceso kodeksas*), 14 March 2002, Art. 128 (1) and 128 (4).

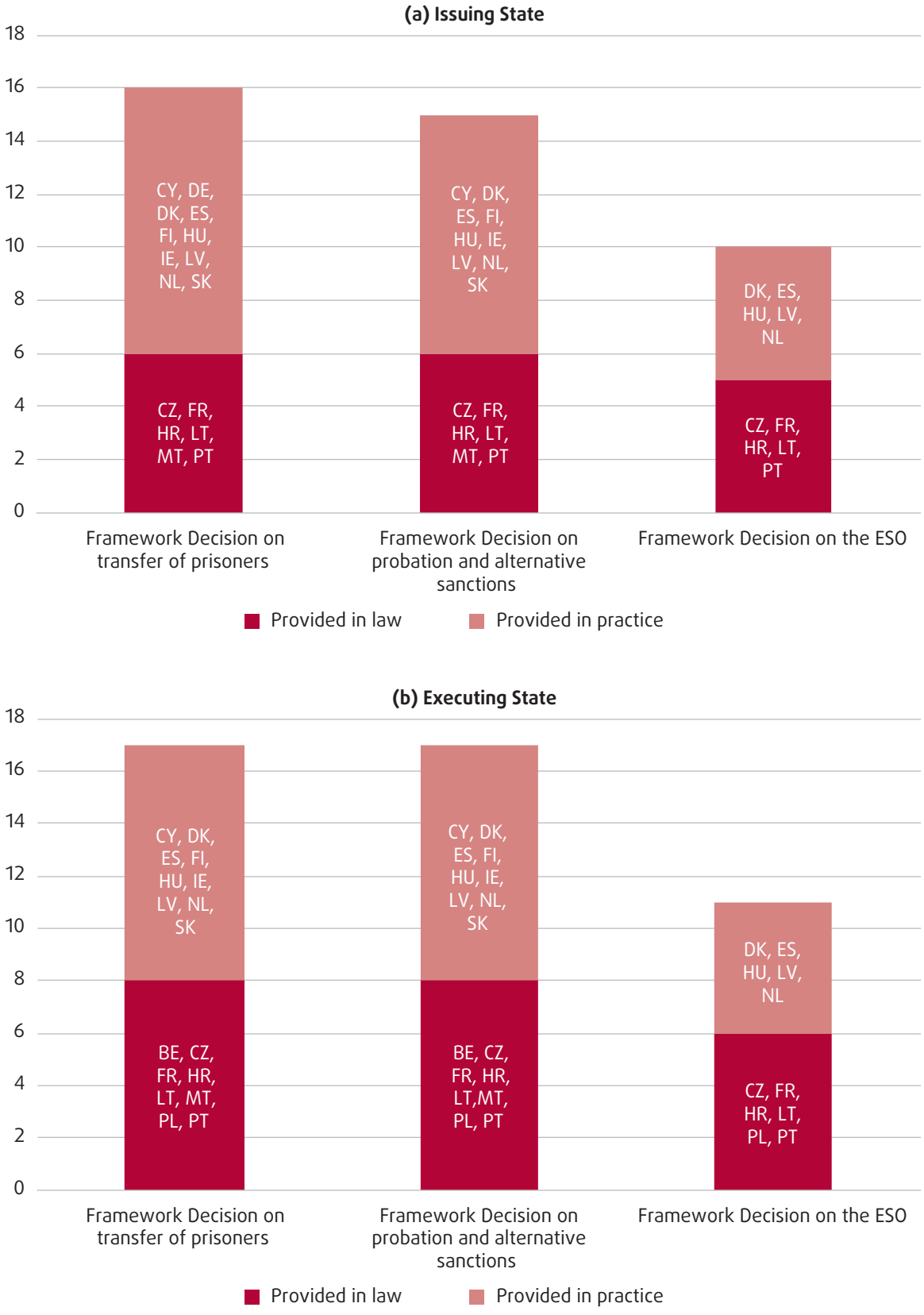
339 Croatia, The Ordinance on the Administration of Probation (*Pravilnik o načinu obavljanja probacijskih poslova*), Art. 7 (1).

340 Croatia, The Criminal Procedure Act, Official Gazette, Nos. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13,145/13, and 152/14, Art. 125 (9).

341 Germany, Representative of the Ministry for Justice of North Rhine Westphalia (*Justizministerium des Landes Nordrhein-Westfalen*).

342 Denmark, Consolidated Act No. 1308 of 9 December 2014 on Administration of justice, as amended (*Bekendtgørelse nr. 1308 af. 9. December 2014 af lov om rettens pleje med senere ændringer*), 9 December 2014, Section 741 g.

Figure 18: EU Member States providing for victims' right to be informed of suspects', accused or sentenced persons' release as (a) issuing state and (b) executing state



Note: *Only includes EU Member States in which this could be established in law or in practice.*
Source: *FRA, 2015*

instance, be the risk of revenge by the victim in gang-related offences. The respect for the private life of the perpetrator can also exceed the victim's need for safety if there is a concrete risk of harassment of the perpetrator by a third party.[343]

It should be remembered that, like many aspects of the Framework Decisions, whether the right to information about releases includes information about transfers is not entirely clear, owing to the relative newness of the instruments, their very recent implementation, and a lack of established practice. As pointed out by the Ministry for Justice of North Rhine Westphalia, not many requests to provide information about transfers are made in practice.[344]

Right to receive information on decisions to transfer

The Victims' Rights Directive does not explicitly provide for the right to information on transfer decisions. Instead, it provides – in Chapter 2 – for a general right to be informed about criminal proceedings, and specifies – in Article 8 (1) – that Member States shall ensure support to victims of crime before, during and for an appropriate time after criminal proceedings.

In about one third of Member States, victims have a right to receive information on decisions to transfer prisoners/suspects. These Member States have established a positive duty to inform victims on decisions to transfer perpetrators of crime against them either through law (Belgium, the Czech Republic and the United Kingdom) or practice (Germany, Malta, the Netherlands, Poland, Spain and Sweden).

In some Member States this right is not explicitly established in law – for example, in the Netherlands, the legislation does not refer to victims in the context of transfer or is only partially applicable – i.e. under certain conditions/circumstances only, or only for victims of certain types of crime.

Again, in many Member States, receiving this information appears to be dependent on the victim making a request (for example, in Belgium,[345] Germany,[346] and the Netherlands).[347] Addressing this victims' right appears to be standard practice only in the United Kingdom; although victims do not have a statutory right to be involved in the transfer process, where victims or their families are in contact with a 'Victim Liaison Scheme', they will be informed through their 'Victim Liaison Officer' that a prisoner is being considered for transfer.[348] In other Member States – for example, Malta – it is unclear whether a transfer would be considered a form of 'release' and the duty of notification would therefore apply – the relevant law was enacted only in April 2015.

Right to receive information on the status of transfers

Victims have a right to receive information on the status of transfers of prisoners/suspects in only six states (Belgium, Germany, Malta, the Netherlands, Spain, and the United Kingdom). As with the right to receive information on transfers of suspected, accused, or sentenced persons, in four of the six Member States, this right is not fully established in law or only applies to certain categories of victims. There are virtually no explicit procedures in place in any Member State to provide this information, although, as mentioned, authorities can often provide such information at the victim's request in about a third of Member States – again, with certain conditions. For example, in Cyprus, the duty to inform the victim applies both as issuing and as executing state, provided the authorities are in possession of information which, according to the laws on trafficking and sexual abuse, must be disclosed to victims.[349] In such cases, the party responsible for providing the information varies in Member States. They include judges, such as in Belgium, Poland, and Slovenia. They can also include prosecution services or the police, such as in Cyprus, the Netherlands and Slovakia; prisons or probation or other detention facilities – such as in the Czech Republic, Ireland and Sweden; or others, such as the official with the relevant information in Finland and the National Offender Management Service's Victims Liaison Unit in the United Kingdom. In most cases, the required format of the information is not specified and can be either oral or written. The United Kingdom appears to have the clearest procedure in place: information on victims residing in the executing state may

343 Denmark, Preparatory works to Bill L 134, amending the Administration of Justice Act and Act on state compensation to victims of crimes (Notification of leave and release etc. and extended time limits for police reporting for state compensation to victims of crimes) (*Forslag til lov nr. L 134, folketingsåret 2010-11 (1. samling) om ændring af retsplejeloven og lov om erstatning fra staten til ofre for forbrydelser. (Underretning ved udgang og løsladelse m.v. og udvidelse af fristen for politianmeldelse ved erstatning fra staten til ofre for forbrydelser)*), parliamentary year 2010–2011 (1st session).

344 Germany, Representative of the Ministry for Justice of North Rhine Westphalia.

345 Belgium, Representative of the Ministry of Justice.

346 Germany, Criminal Procedure Code (*Strafprozessordnung*), 7 April 1987, Art. 406 d.

347 Netherlands, Code of Criminal Procedure, Art. 51 b.

348 United Kingdom, Representative of the NOMS.

349 Cyprus, Law on the prevention and combating of sexual abuse and sexual exploitation of children and child pornography, Art. 36 (2); Law revising the legal framework regulating the prevention, combating of trafficking and exploitation of persons and protection of victims, Art. 32 (2).

be passed to authorities there, and victims are kept informed through the Victims Liaison Unit.

Right to interpretation and translation assistance

As cross-border transfers involve different working languages of foreign authorities, victims may have difficulties communicating with authorities to get the information they seek. The United Kingdom appears to be the only EU Member State that, through legislation, provides interpretation and translation services to victims of crime to assist them in understanding information related to transfers of persons who have been convicted of a crime against them. This applies to circumstances falling under the Framework Decision on transfer of prisoners. In practice, five other EU Member States also provide this service to victims of crime, in relation to two or more of the Framework Decisions (the Czech Republic, Ireland, Latvia, Slovakia and Spain).

Promising practice

Informing victims of crime

In implementing the Framework Decision on probation measures and alternative sanctions, the Ministry of Justice in Belgium issued a Joint Circular on 19 August 2014, which provides that the public prosecutor must pay attention to the situation of the victim before transferring a judgment to another Member State.

Source: Belgium, Ministry of Justice, 5 June 2015

Right of victims to express their views on transfers

As for active involvement in the transfer procedure, only a handful of Member States provide victims with a right to be heard when making decisions on whether or not to transfer suspects or sentenced persons. The United Kingdom provides for this in law, while Belgium and Spain have an established practice of hearing the opinions of victims. In the United Kingdom, victims or their families can enter written representations in relation to transfers, which can be presented in any language to be translated into English. While victims do not have a veto over transfers, any representations will be considered carefully when determining whether to proceed with a transfer. It is possible, therefore, that a transfer may not go ahead if a victim's representations are considered compelling.[350] In Spain, in the case of probation, victims can request measures to ensure their safety, and they must be heard.[351] In Belgium, while there is no legal provision,[352] in practice, the opinion of the victim may exceptionally be requested when the competent authority deems it useful in adopting a decision.[353]

Conclusion and FRA Opinion

In the context of cross-border transfers of suspects, accused and sentenced persons, victims' rights to information and participation are affected. Two of the three Framework Decisions on transfers identify the protection of victims as overarching goals. Rights of victims are not explicitly mentioned in any of the three Framework Decisions. The Victims' Rights Directive – adopted three to four years after the Framework Decisions – contains relevant rules in this regard. FRA's overall findings show that, while it is not common for Member States to address victims in legislation implementing the three Framework Decisions, some states in practice do take victims into consideration and keep them informed when organising and making decisions on transfers.

While a victim's right to information on transfers of suspects or sentenced persons is not established, the right to receive information related to an offender's release or escape – including in transfer situations – stems from Article 6 (5) of the Victims' Rights Directive. Regardless of whether or not Member States have laws or practices establishing victims' right to receive information, FRA's research suggests that, in general, information is not automatically offered but is dependent on victims actively requesting the information from authorities. FRA's findings on the implementation of the Framework Decisions show that such rights are granted to victims in the post-trial phase only in a minority of Member States. However, the deadline for transposing the Victims' Rights Directive – 16 November 2015 – had not passed at the time of data collection for this research, and Member States are expected to make progress in this area in the coming months and years.

350 United Kingdom, Representative of NOMS.
351 Spain, Law 4/2015 on the Statute of Crime Victims (*Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito*), 28 April 2015, Art. 13.
352 Belgium, Representative of the Ministry of Justice and Joyn Legal law firm.
353 Belgium, Representative of the Ministry of Justice.

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To ensure effective implementation of the three Framework Decisions, further action is needed. Recalling and building upon FRA opinions from the 2015 report on Victims of crime in the EU: the extent and nature of support for victims, *EU Member States should introduce measures ensuring that – at all stages of the criminal process, including during the post-trial phase – victims have access to information about their rights and available support services, as well as to relevant information about their cases, including post-sentencing. Member States should implement the minimum standards established in Article 6 of the Victims' Rights Directive, ensuring that victims also have a right to information – in cross-border settings through effective EU cooperation – including the right to be informed of suspects'/sentenced persons' transfers or release.*

Conclusions

This report examines fundamental rights concerns related to the three EU instruments on transfers, between EU Member States, of prison sentences, probation measures and alternative sanctions, as well as pre-trial supervision measures: the Framework Decision on transfer of prisoners, the Framework Decision on probation and alternative sanctions, and the Framework Decision on the European Supervision Order. This is done by highlighting risks of fundamental rights violations in the execution of transfers or as a result of transfers, such as due to poor prison conditions. The Framework Decisions' potential impact on fundamental rights should not be underestimated. If fully applied, they could boost the social rehabilitation of detainees, prompt greater use of alternatives to detention, and even improve detention standards – all with great importance for fundamental rights and, in turn, for enhanced mutual trust between Member States. The instruments could be of benefit not just to suspects, accused and sentenced persons and their families, but also to victims of crime and to society at large.

Opinions formulated on the basis of the research findings aim to offer concrete guidance on how the EU and its Member States can promote fundamental rights by making greater use of the instruments, improving fundamental rights aspects in their implementation, and creating incentives for improvements relating to detention and its alternatives.

More specifically, the Opinions suggest improvements related to risks of fundamental rights violations as to, for instance, the dignity of persons, the prohibition of inhumane treatment, privacy, and the right to family life, but also regarding persons in situations of vulnerability. In addition, the report and the Opinions deal with social rehabilitation, another issue with strong fundamental rights implications. They also scrutinise to what extent transferees are given an opportunity to 'participate' in transfer proceedings in the sense of being made aware of the possibility, being informed of and made to understand the transfer process and its consequences, as well as – where applicable – consenting to a transfer. In addition, the Opinions offer guidance on the interlinkages between the instruments and the Victims' Rights Directive.

This report underscores that the deprivation of liberty, and detention in particular, entails a great responsibility to ensure proportionality in terms of what it seek to achieve in relation to the restrictions of rights involved for suspects, accused or sentenced persons. Finding a good balance between restrictions on personal liberty and the necessities of the criminal process is vital. The three Framework Decisions bring both risks and potential in this regard. Given continuous developments in their implementation, further research would be most useful once relevant practices have been established.

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EU Member States have largely implemented, and started applying, three instruments on transferring prison sentences, probation measures and alternative sanctions, as well as pre-trial supervision measures, to other Member States. This report provides an overview of their first experiences with these measures, highlighting both best practices and shortcomings. It also scrutinises the use of detention in the EU, as well as available alternatives, including with respect to individuals in situations of vulnerability. Taking into consideration the rights of suspects, accused and sentenced persons and the rights of crime victims, as well as the interests of society as a whole, the report offers a timely and comprehensive assessment of the instruments' potential from a fundamental rights perspective.

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