# SENTENCE ADJUSTMENT MECHANISMS IN EUROPE:

## European Standards and National Patterns Across Seven European Countries

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CHAPTER 2

# The European Union's Approach: Limited and Subordinated to Member States' Security Interests

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The European Union (EU) has not developed a unified doctrine on sentence adjustment. This is largely due to the fact that the EU was only relatively recently granted broader competence in the field of criminal justice. Key milestones in this gradual expansion were reached between 1999 and 2009, from the formal establishment of the Area of Freedom, Security and Justice (AFSJ) under the Treaty of Amsterdam to the entry into force of the Treaty on the Functioning of the European Union, TFEU, which provides a stronger legal basis for EU action in substantive and procedural European criminal law. As a result, the main EU instruments relevant to this issue date from the early twenty-first century, and the case law of the Court of Justice of the European Union (CJEU) remains limited.

However, an analysis of these limited sources allows for an overview of the EU's approach to sentence adjustment (1). More broadly, an analysis of the EU's approach to prisoners' rehabilitation helps to clarify the EU's understanding of the execution of sentences (2).

# I. The EU's limited approach to sentence adjustment

The EU's approach to sentence adjustment can be analysed through two categories of sources: first, a specific instrument adopted in this area in 2008, and second the case law of the Court of Justice of the European Union (CJEU) relating to surrender and prisoners' transfer proceedings, in which sentence adjustment considerations have arisen.

## 1.2. The limited use of the Framework Decision for the mutual recognition of probation measures

Among the judicial cooperation instruments that the EU has developed in the first decade of the twenty-first century, one is specifically devoted to sentence adjustment measures. Framework Decision 2008/947/JHA (Probation Measures FD, FD 947) provides for the mutual recognition of probation measures, including conditional release.[1] Under this system, the responsibility for supervising the implementation of probation measures can be transferred from one EU Member State (EUMS) to another, thereby permitting the sentenced person subject to such measures to continue their probation in a country different from the country of conviction, with a view to "facilitating [their] social rehabilitation" (Article 1(1)) by "enabling [them] to preserve family, linguistic, cultural and other ties" (Recital (8)).

[1] 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

The transfer of responsibility may only take place with the consent of the person concerned (Article 5(1)).[2] The person is normally transferred to the EUMS in which they were "lawfully and ordinarily residing" (Article 5(1)), but may also be transferred to another EUMS if this would better serve the objective of their social rehabilitation – for example for work or study purposes or for family reasons (Article 5(2), Recital (14)).

Anticipating that significant differences between EUMS probation system might hinder its implementation, the Probation Measures FD allows for the competent authority in the executing EUMS to adapt the probation measure if the "nature and duration" of the measure adopted by the issuing EUMS are incompatible with its legal framework (Article 9). The adapted measure must, however, correspond as closely as possible to the original measure. It cannot be more severe or longer than the original measure (Article 9(3)). At the same time, if it is adapted because the original measure exceeds the executing EUMS' maximum duration, the adapted duration must not be shorter than the maximum provided for equivalent offenses under the law of the executing EUMS (Article 9(2)).

The Probation Measures FD has to date remained only marginally used. While no comprehensive statistics at the EU level appear to be publicly available, a recent evaluation of the implementation of mutual recognition instruments published by the Council in 2023 found that the implementation of this FD remained "quite low across the EU".[3] Among the main factors explaining the limited use, the Council first identifies as a "recurrent problem" the "insufficient awareness and knowledge of, and experience with [… the Probation Measures FD] among Member States' practitioners – not only judges and prosecutors, but also the probation services and defence lawyers, who should be key players in this field".[4]

However, a second factor suggests that the issue is more structural and that awareness-raising alone would not significantly change the situation. Indeed, the Council mentions as an important obstacle "significant differences between national systems in terms of the nature and duration of the applicable probation, alternative and supervision measures". This diversity between national systems, which is also outlined in the present study, leads to a situation where "some [...] domestic measures and sanctions might not have comparable rules in another Member State and [can…] hardly [be] adapted [...] and, in the end, recognised".[5]

The case law of the Court of Justice of the EU (CJEU) concerning the Probation Measures FD, which could have both an awareness-raising and a harmonising effect,

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[2] Academics have pointed that this consent his "rather implicit". By comparison, it is clearly "imperatively requested" in 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. See Ion Durnescu, Framework decisions 2008/947 and 2009/829: state of play and challenges. ERA Forum 18, 2017.

[3] Council of the European Union, Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty, 6741/23, 1 March 2023.

[4] Idem. p. 63.

[5] Stefano Montaldo, „The cross-border enforcement of probation measures and alternative sanctions in the EU: The poor application of Framework Decision 2008/947/JHA", EU Law Enforcement, 31 January 2020. The Council stresses that while "Member States can recognise prison sentences fairly simply, it seems far from straightforward to do so with alternative sanctions and probation measures involving particular types of care or prohibition, for which the executing authority may have no equivalent in its national system", ibid., p. 65.

has remained extremely limited to date, and has mostly concerned the scope of its application. To the best of our knowledge, no case law specifically addresses sentence adjustment measures as defined for the purposes of this study, although some judgments clarify the Framework Decision's scope of application. For instance, the Court has found that the FD does not apply to the recognition and enforcement of a judgment ordering the supervised release of a person serving a custodial sentence, coupled with a special condition requiring that person to undergo "inpatient treatment" for his psychological problems in a closed institution.[6] Conversely, in the area of suspended sentences, the Court has regarded as falling within the scope of the FD a judgment imposing a suspended custodial sentence associated with the obligation not to commit a new criminal offence during a probation period.[7]

## 1.2. Failed opportunities to address sentence adjustment systems in surrender and transfers proceedings

Beyond the specific context of the Probation Measures FD, the CJEU has also addressed issues relating to sentence adjustment systems in transfer and surrender proceedings.

A first example concerns European Arrest Warrant (EAW) proceedings.[8] In the recent *Breian* case, the question of sentence adjustments was indirectly raised by one of the parties to the proceedings. However, this issue – raised in the seventh questions – was not central to the proceedings and did not lead to a detailed analysis by the Court.[9] In essence, the referring court asked whether the executing judicial authority may require the issuing authority to draw up a "precise plan for … [the] execution of the sentence" in respect of the requested person, and whether the absence of such a plan may constitute a ground for refusing execution of the EAW. The circumstances of the case are not set out in detail in the judgment, but it is apparent from the Advocate General's opinion that the requested person was of advanced age, and that his continued detention could, for this reason, give rise to a breach of Article 4 of the Charter of Fundamental Rights of the European Union (CFR).[10] Instead of assessing the risk of a breach of Article 4 CFR by examining the possibility for the requested

[6] CJEU, case C-391/24, Nolgers, ECLI:EU:C:2025:748, 2 October 2025. The Court has ruled that such measures, since they involve a deprivation of liberty, fall within the scope of 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.

[7] CJEU, case C-2/19, A.P., ECLI:EU:C:2020:237, 26 March 2020.

[8] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (EAW FD).

[9] CJEU, case C-318/24, Breian, ECLI:EU:C:2024:658, 29 July 2024. The main question asked in this case was Breian is whether a prior decision by a judicial authority of a Member State refusing to execute a European Arrest Warrant is binding on a subsequent executing judicial authority that is asked to rule on the same EAW.

[10] Opinion of Advocate General Kokott in the case C-318/24, Breian, 11 July 2024, in particular para. 124: "For the sake of completeness, it should be noted that the particular personal characteristics of the convicted person highlighted by the Maltese court, such as his age, must be taken into account in order to avoid a breach of Article 4 of the Charter due to detention".

person to benefit from sentence adjustments in relation to his old age in the issuing State, the Court rejected the possibility of the executing State to require such sentence enforcement plan, reiterating its long-standing position that the executing EUMS "cannot […] demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law" (para. 119).

A second relevant example concerns a case on transfer proceedings under FD 2008/909/JHA (FD 909),[11] which raised a question regarding the criteria for granting automatic reductions of sentences.[12] The case concerned a Bulgarian national who had been imprisoned in Denmark before being transferred to Bulgaria. During his incarceration in Denmark, he had worked for one year and nine months. While working in prison did not lead to any reduction of sentence in Denmark at the material time, it did in Bulgaria, where two days of work allowed for a reduction of three days of deprivation of liberty. The referring Bulgarian court therefore questioned whether, in order to determine the length of sentence still to be served by the concerned person in Bulgaria, it should take into account the work carried out in prison in Denmark. The Court answered negatively and considered that "the principle of *lex mitior* (stating the retroactivity of a more favourable law) does not extend to inter-state transfers and its scope is restricted by the application of the principle of territoriality".[13] In doing so, the Court rejected any possibility of granting greater discretion to national authorities in adjusting the sentences of transferred prisoners.

In a third case, the Court examined in some details the powers granted to a body involved in parole proceedings.[14] The case concerned a surrender proceeding between Ireland and the United Kingdom (UK), under the Trade and Cooperation Agreement concluded between the EU and the UK. The requested person argued, if surrendered to the UK authorities, his right to conditional release in this country would be governed by legislation adopted after the alleged commission of the offences, and which had rendered stricter the parole regime for prisoners sentenced of specific sentences. The referring Court asked whether this situation fell within the scope of the concept of "heavier penalty" within the meaning of Article 49 CFR. The CJEU rejected that interpretation, and, to support its reasoning, it examined the powers granted to the Parole Commissioners, in charge of deciding on the case by assessing the person's "dangerousness". A key criterion was in particular the fact that Parole Commissioners where independent from political authorities, in the sense that, when carrying out their dangerousness assessment, could not "rely on criminal policy considerations independent of that assessment" (para. 45).

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[11] 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.

[12] CJEU, case C-554/14, Atanas Ognyanov, ECLI:EU:C:2016:835, 8 November 2016. Although automatic reductions of sentences are outside the scope of this study, this judgment illustrates the Court's approach to sentence adjustment in the broadest sense.

[13] Adriano Martufi, "Social Rehabilitation, European Penology, and Supranational Courts. Is Judicial Activism a Driver for Penal Change?", in Federica Coppola and Adriano Martufi (ed.), Social Rehabilitation and Criminal Justice, Routledge, London and New York, 2024, p. 120. The author stresses that "Ironically, while the Court's case law strengthens the enforcement capacity of the member states by expanding their reach beyond national borders, the strict application f the principle of territoriality to laws governing the enforcement of sentences […] confines the scope of several aspects of the rehabilitative process within the boundaries of single jurisdictions", p. 121.

[14] CJEU, case C-743-24, Alchaster II, ECLI:EU:C:2025:230, 3 April 2025.

Given the limited case law available, no definitive conclusions can be drawn as to the Court's approach to sentence adjustment, nor as to the existence of a broader EU doctrine in this field. An indirect avenue of analysis would therefore be to examine the EU's approach to prisoners' rehabilitation.

# II. The EU's utilitarian approach to rehabilitation

Indeed, sentence adjustments play an important role in facilitating prisoners' rehabilitation. As argued by ECtHR Judges Tulkens and Yudkivska they are not "a special favour, or a privilege, or a concession, or an indulgence; like any other arrangement for the execution of custodial sentences, […but] a necessary measure in terms of preparing for and envisaging the prospect of the prisoner's release".[15] Consequently, analysing the EU's approach to prisoners' rehabilitation through selected examples may help to approximate its approach to sentence adjustment

## 2.1. Rehabilitation as a general principle…

Prisoners' rehabilitation is frequently invoked in EU texts. Among the FDs adopted in the area of mutual recognition in criminal matters, prisoners' rehabilitation is stated as an objective both by the Probation Measures FD (Article 1(1), see above) and by FD 909 on the transfer of prisoners (Article 3(1)). Similarly, the 2023 European Commission Recommendation on detention conditions[16] also makes a series of recommendations with a view to facilitating prisoners' rehabilitation (para. 12), in particular with regard to prisoner's place of detention (para. 37), prisoners' access to work and education (para. 47) and measures concerning "radicalisation in prison" (para. 86). Less than a year later, the Council adopted conclusions reaffirming the "aim of promoting the social rehabilitation and reintegration of detained persons serving custodial sentences" and, among other measures, encouraging the use of small-scale detention facilities to this end.[17]

It is therefore, at first glance, hard to reconcile these multiple statements of principle with the argument advanced in the academic literaturethat EU's approach to punishment is deeply influenced by the notions of "deterrence and retribution"[18], and

[15] ECtHR, *Boulois v. Luxembourg*, no. 37575/04, 3 April 2012, Joint dissenting opinion of Judges Tulkens and Yudkivska, para. 10. The quote refers specifically to prison leaves, which are a specific sentence adjustment measure.

[16] Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions.

[17] Council of the European Union, Council conclusions on ´Small-scale detention: focusing on social rehabilitation and reintegration in society´, 10105/24, 14 June 2024.

[18] Adriano Martifu, op. cit., p. 115.

that imprisonment constitutes the "barycenter" of EU substantial criminal law.[19] However, a closer look at the implementation in practice at EU level of the principle of prisoners' rehabilitation shows that it is deeply influenced by an utilitarian perspective, which sees prisoners' rehabilitation "as a state's interest rather than an individual right".[20]

## 2.2. … subordinated to EUMS' security interests

A first line of argument would be to point out that the references to prisoners' rehabilitation in the examples discussed above are primarily linked to to security considerations, , notably the prevention of recidivism (European Commission Recommendation, para. 12). The June 2024 Council conclusions also illustrate this utilitarian use of rehabilitation measures by stressing that the way in which criminal sanctions are enforced "contribute[s] to the prevention of reoffending and thereby affect security in society" (para. k), see also conclusion no. 3).

This utilitarian orientation is also visible in the way some mutual recognition FDs are construed and implemented. A clear example is FD 909 on the transfer of prisoners. While, as mentioned above, the FD mentions prisoners' rehabilitation as one of its objectives, it "has been suspected of serving hidden managerial ambitions, namely to facilitate the removal of EU unwanted foreign prisoners with the welcome side-effect of reducing prison overcrowding".[21] This is made possible by the possibility of transferring prisoners without their consent in specific cases – such as a transfer to their country of nationality, if they live there, or the country to which they will be deported after release on the basis of an expulsion or deportation order (Article 6(2) and Recital (5)) – and is further reinforced by the limited opportunities for transferred persons to participate in transfer proceedings.[22]

This subordination of rehabilitation to security objectives is made even clearer in the recent CJEU case law on the EAW. While the EAW was meant to limit the possibilities for an EUMS to refuse the surrender of a requested person, the EAW FD allows an executing authority to refuse surrender and instead execute the custodial sentence itself "where the requested person is staying in, or is a national or a resident of the executing Member State" (Article 4(6)). The CJEU has insisted that this provision is intended "to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on [them] expires".[23] It has also extended the possibility to benefit from this ground of non-

[19] Leandro Mancano, The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual, Hart Publishing, Oxford, 2019, Part II.
[20] Adriano Martufi, op. cit., p. 120.
[21] Julia Burchett and Anne Weyembergh, Prisons and detention conditions in the EU, February 2023, p. 53.
[22] Adriano Martufi, "Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA", New Journal of European Criminal Law, 2018, Vol. 9(1), pp. 43–61. The article mentions that that "the exchange of information between the issuing and the executing states provides the transferees with only limited knowledge of the modalities as to how the sentence will be enforced after transfer" while "active participation in the decision-making process would suppose that the person is informed of all the legal and practical consequences of the relocation and given the chance to weigh up its pro and cons".
[23] CJEU, case C-66/08, Kozłowski, ECLI:EU:C:2008:437, 17 July 2008, para. 45.

execution to persons who are not "resident" within the legal mean of this term, and to non-EU nationals living in the EU.[24]

However, the Court has also delivered judgments that depart from rehabilitation-oriented approach and align more closely with EUMS' security interests. For instance, it has accepted that an may EUMS limit the possibility of applying Article 4(6) to resident who have lawfully resided continuously for at least five years on its territory.[25] Similarly, in a recent judgment, the Court affirmed that, in giving effect to this provision, priority is to be accorded to the "fight against impunity" rather than to the individual's rehabilitation.[26] In that case, which involved a parallel interpretation of the EAW FD and the FD 909 on the transfer of prisoners, the Court examined the position of the executing authority, which had unilaterally decided to enforce the sentence imposed on a requested person lawfully residing in its territory, "to improve the chances of social rehabilitation". The Court held that the executing State cannot assume responsibility for enforcing the sentence pronounced in the issuing EUMS, in accordance with the procedure laid down in FD 909. While acknowledging the importance of the objective of prisoners' rehabilitation, the Court characterised that objective as "not absolute" (para. 62) but subordinated to the rule laid down in EAW FD that EUMS are in principle required to execute EAW requests. More explicitly, the Court stated that, "in view of the various functions of the sentence within society", the issuing EUMS may withhold its consent to the executing State's assumption of responsibility for enforcement "on its own criminal policy considerations […] even where considerations relating to the requested person's reintegration into society might militate in favour of enforcing that sentence on the territory of another Member State" (para. 63).

[24] See respectively Kozłowski cited above, para. 50 (the Court said that the fact that the requested person's stay in the executing country has not been uninterrupted and "does not comply with the national legislation on residence of foreign national [… do not constitute] factors which lead by themselves to the conclusion that he is not 'staying' in that Member State"), and CJEU, case C-700/21, O.G., ECLI:EU:C:2023:444, 6 June 2023.
[25] CJEU, case C-123/08, Wolzenburg, ECLI:EU:C:2009:616, 6 October 2009.
[26] CJEU, case C-305/22, C.J., ECLI:EU:C:2025:665, 4 September 2025.