1 Foiled transnational justice?

An exploration of the failures of EU judicial cooperation procedures

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Introduction

Back in the late 2000s, EU institutions gave a significant boost to their cooperation in criminal matters agenda. That impulse was not new. On the contrary, judicial cooperation efforts had already led to noteworthy results, such as the passage of the Council Framework Decision 2002/584/JHA of 13 June 2002 creating the European Arrest Warrant (hereinafter EAW). Subsequently, these efforts received new impetus in the 2010s when EU institutions enacted a number of legislative acts regarding common minimum standards for criminal proceedings (e.g. Directive (EU) 2016/1919), exchange of information between criminal justice agencies of EU Member States (e.g. Directive 2014/41/EU on the European investigation order), protection of crime victims (e.g. Directive 2012/29/EU), confiscation and freezing of assets (e.g. Regulation (EU) 2018/1805 on freezing orders and confiscation orders), and mutual recognition of judgements, among other aspects.

Several framework decisions issued in the last years of the first decade of the century shaped a specific sphere of this EU justice agenda, that of detention and transfer of prisoners. In fact, judicial cooperation in this area was fostered through the passage of three framework decisions: Council Framework Decision 2008/909/JHA of 27 November 2008 on the transfer of prisoners (hereinafter FD 909), Council Framework Decision 2008/947/JHA of 27 November 2008 on the transfer of probationers and individuals sentenced to non-custodial penalties (hereinafter FD 947), and Council Framework Decision 2009/829/JHA of 23 October 2009 on the European supervision order and alternatives to pre-trial detention (hereinafter FD 829). Much more recently, this legislative package was supplemented with the publication of the European Commission's *Handbook on the transfer of sentenced persons and custodial sentences in the European Union* in November 2019. The goals to be pursued by these transfer procedures appear to be particularly ambitious, as presented by the recitals of the corresponding framework decisions. Beyond references to 'the protection of victims and the general public' (FD 947, recital 8; see also FD 947, recital 24 and FD 829, recital 3), FD 909 and FD 947 are both aimed at reintegration of the sentenced individual into society, not least by enabling them 'to preserve family, linguistic, cultural and other ties' (FD 947, recital 8; see also FD 909, recital 9, and FD 947, recital 24). The goals to be served by FD 829

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procedures dealing with pre-trial measures are even more ambitious, since they 'aim at enhancing the right to liberty and the presumption of innocence', as well as promoting 'the use of non-custodial measures as an alternative to provisional detention' (recital 4). Moreover, FD 829 provisions are expected to 'ensure that a person subject to criminal proceedings who is not resident in the trial state is not treated any differently from a person subject to criminal proceedings who is so resident' (recital 5).

Despite the thrust given by EU authorities to these judicial cooperation procedures, more than one decade after the enactment of the three FDs, it is still doubtful whether they have succeeded in consolidating transfer procedures. There are good reasons to adopt a glass half-empty viewpoint in this regard. Section 2 of this chapter will show that EU institutions have long acknowledged that the FDs on transfer procedures have been failing to meet their expectations, particularly FD 947 and FD 829. Both institutional and academic actors have put significant efforts into pinpointing why these legal procedures are not widely used across EU jurisdictions. In the framework of this exploration, legal factors have largely taken centre stage. This chapter, though, casts a light on certain extra-legal aspects that have been clearly underexplored. For these purposes, Section 3 examines a law enforcement measure relatively similar to the transfer procedures under study which has been gaining significant momentum across Europe, the deportation orders targeting EU nationals. Drawing on the lessons to be inferred from this 'success story', the last, concluding section scrutinises the role played by certain factors, crucially among them the judicial nature of FD 909, FD 947 and FD 829 procedures in hampering their consolidation.

Before moving into Section 2, some brief methodological notes are in order. This chapter relies on a number of secondary quantitative data on transfer procedures and deportation measures which have been largely overlooked in the institutional and academic conversations on these topics (see FRA, 2016). However, it also builds on primary data collected in the framework of two research projects funded by the Directorate-General Justice and Consumers of the European Commission and is aimed at scrutinising the conditions hindering the regular utilisation of transfer measures, 'Mutual Trust and Social Rehabilitation into Practice – RePers' (2017–2019; www.eurehabilitation.unito.it/repers_project) and 'Trust and Social Rehabilitation in Action – Trust and Action' (2018–2020; www.eurehabilitation.unito.it/trust_action). These research actions were carried out by a cross-national consortium formed by scholars, criminal justice practitioners and government officials from Italy, Romania and Spain. I participated in this three-year research effort as a member of the University of A Coruña's ECRIM team. In the framework of the RePers and Trust and Action projects, national teams carried out a variety of research activities that resulted in the publication of a collective book presenting the main conclusions of these projects (Montaldo, 2020b; see also Fernández-Bessa, Ferraris & Damian, 2020). These data and conclusions, though, are of limited use for the purposes of this chapter, since they were largely focused on legal obstacles preventing transfer procedures from gaining momentum across European jurisdictions. Still, those EU research actions involved a number

of so-called 'mutual learning' activities engaging Italian, Romanian and Spanish scholars, practitioners and government officials in a cross-national conversation on FD 909, FD 947 and FD 829 pitfalls.[2] The data collected in the framework of these organised conversations are of particular importance for the exploration presented in this chapter. In fact, those lively debates allowed participant observers to grasp the underlying, non-legal factors impeding the increasing consolidation of transfer procedures.

1. An unpromising beginning: the troublesome implementation of transfer procedures

EU officials have long been concerned over the implementation and actual impact of transfer regulations. Various evaluation documents reflect this institutional concern. In early 2014, the first official report on the implementation of the three FDs (European Commission, 2014) pinpointed several obstacles obstructing the regular utilisation of transfer procedures. After having praised the many positive aspects of these legal regulations, the report pointed out that 'member States have little practical experience in the application of the Framework Decisions so far'. More precisely, it noted that "the limited figures available show that the Transfer of Prisoners is already used whereas no transfers have yet taken place under Probation and Alternative Sanctions and European Supervision Order" (European Commission, 2014, p. 6). Apparently, a key reason for this limited application of transfer practices was the delayed transposition process. The report stressed that "at the time of writing, respectively 10, 14 and 16 Member States have not yet transposed the Framework Decisions" (European Commission, 2014, p. 5), although all EU Member States were obliged to have transposed them into their legal orders before either early December 2011 (FD 909 and FD 947) or early December 2012 (FD 829).

Institutional concerns persisted for a few more years. The EU Agency for Fundamental Rights (FRA) published a comprehensive report on the human rights aspects of transfer procedures in 2016 (FRA, 2016). In this document, the FRA portrayed a relatively bleak scenario. The report recognised that "The Framework Decisions have not been frequently utilised" (p. 32). This limited use led the FRA to put forward several recommendations aimed at consolidating transfer measures. Implementation shortcomings seemed to be particularly worrying in the case of the uncharted European Supervision Order, with regard to which the report stressed that "the EU and its Member States need to assess the instrument's non-application" (p. 34).

Recent institutional evaluations are less sombre than mid-2010s European Commission and FRA reports. In an assessment of the field of mutual recognition in criminal matters released in May 2019, the Romanian Presidency of the Council of the EU openly mentions FD 909 as one of the legal instruments in this area that "are used relatively often". In stark contrast, though, this official memorandum points out that FD 947 and 829 "are used less frequently" (Council of the EU, 2019b, p. 3). This pitfall led the Council's Presidency to single out the "identification of

gaps in the application of mutual recognition instruments and possible solutions to fill these gaps" (p. 5) as one of the critical tasks to be urgently carried out in this sphere of judicial cooperation in criminal matters. A contemporary Council's Presidency document selecting the three FDs as critical topics to be addressed in the ninth round of mutual evaluations of the measures taken to fight against organised crime also highlighted that FD 947 and FD 829 "have not been sufficiently implemented" and "are less used in practice than other mutual recognition instruments" (Council of the EU, 2019a, p. 3 and p. 5).

Although these EU Council documents unambiguously put the spotlight on the hindrances preventing the FDs on non-custodial measures and alternatives to pretrial detention from being widely used, it is not clear whether its assessment on the current FD 909 scenario is too optimistic or not. Whereas comprehensive, harmonised data on the application of these transfer procedures are still missing (FRA, 2016), the scattered data provided by national databases and the SPACE I programme of the Council of Europe are not particularly promising. This impression is corroborated when these data are compared with those related to the utilisation of the EAW, which has been considered as the benchmark in terms of best practices in the field of judicial cooperation (see Council of the EU, 2019b). EU Member States issued no less than 20,226 EAWs in 2019, following a significant rise initiated in 2011 (source: European Commission, 2021).[3] It is certainly true that the execution rate is actually low (34.2 per cent from 2015 to 2019),[4] and that the EAW landscape is markedly unbalanced, with just four countries (Poland, Germany, France and Romania) accounting for 55.7 per cent of the EAWs issued from 2005 to 2019. However, it is not adventurous to conclude that this pivotal legal instrument makes up the gold standard of success in the field of mutual recognition.

Against this backdrop, the scale and scope of FD 909 prisoner transfers seem relatively insignificant. The Council of Europe's SPACE I programme[5] has been releasing data on the utilisation of these transfers in recent years. Although these SPACE I data are grossly incomplete, the general picture is reasonably clear. The number of FD 909 transfers either received or carried out is markedly insignificant (from 0 to 5 cases per year) in various European countries, such as Croatia, Ireland,[6] Malta, Portugal and Slovenia. Other jurisdictions such as Cyprus and Norway have very rarely acted as executing states,[7] that is, as the jurisdictions receiving transfers.

Some European jurisdictions are a bit more active in this field; still, the number of transfer procedures carried out per year in these countries is counted in the dozens (e.g. Luxembourg and Sweden; Czech Republic, Lithuania and Poland in their capacity as executing states; Norway acting as issuing state,[8] that is, as the jurisdiction requesting the transfer to be accepted). Drawing on SPACE I data, there are only two exceptions to this general landscape. The Spanish criminal justice system has been intensively participating in these FD 909 procedures as an issuing state in the recent past, averaging 158.5 transfers annually from 2015 to 2019.[9] Spain ranks also relatively well as an executing state, with 56.7 transfers received per year from 2013 to 2019. In addition, Romania has been turned into the country of destination of prisoner transfers par excellence, with an average of 982 transfer procedures annually concluded from 2014 to 2019. However, Romania's role as an issuing

state is much more insignificant. In fact, Romania averaged only 8.8 transfers per year as an issuing state from 2015 to 2019 (see also Fernández-Bessa, Ferraris & Damian, 2020).[10]

Additional data provided by national databases do not differ significantly from this general image. In stark contrast to its leading role in the EAW sphere, Germany seems to be making a moderate use of FD 909 transfers.[11] Italy, in turn, averaged no more than 99.3 outward transfers per year from 2014 to 2017 (Ferraris, 2019; see also Fernández-Bessa, Ferraris & Damian, 2020). Sweden has annually completed 45.5 FD 909 transfers as an issuing state and 9.3 transfers as an executing state from 2015 to 2020 (source: Kriminalvården, 2018, 2021).[12] Belgium, in turn, on average carried out 41.6 FD 909 transfers as an issuing state from 2013 to mid-2018 (Hofmann & Nelen, 2020; Nelen & Hofmann, 2019; see also Service Public Fédéral Justice, 2017, 2020). By contrast, the Austrian criminal justice system has been more active in this field, with 129.3 outward transfers annually carried out from 2018 to 2020 (source: Federal Ministry of Justice; see www.parlament.gv.at/PAKT/VHG/XXVII/AB/AB_03718/index.shtml#; accessed 10 January 2022). Although no complete data are publicly available, there is evidence to infer that the Netherlands should also be included in this group of countries relatively involved in FD 909 transfers, especially as an executing state.[13] Surprisingly, UK criminal justice agencies have used these transfer procedures more sparingly; on average, the UK completed 58.5 transfer cases per year as an issuing state from 2013 to 2018 and 14.3 cases per year as an executing state from 2012 to 2018 (source: Ministry of Justice; see questions-statements.parliament.uk/written-questions/detail/2019–02–12/220146; accessed 10 January 2022).[14]

Beyond these cross-national variations, the main conclusion to be drawn from the available data is that FD 909 transfer procedures are hardly relevant in most European jurisdictions and that in many of them their significance is close to none. In fact, the low number of FD 909 transfers starkly contrasts with those of issued and enforced EAWs. What is more, the scope and actual significance of current FD 909 practices should be assessed by comparing them with the scale of the group potentially affected by those transfers, that of EU nationals imprisoned abroad (see also European Commission, 2014; Fernández-Bessa, Ferraris & Damian, 2020; FRA, 2016; Hofmann & Nelen, 2020). According to SPACE I data (Aebi & Tiago, 2018), at least 32,266 EU national prisoners were incarcerated in a different EU28 country in January 2018, accounting for 29.9 per cent of the noncitizen prison population and for 5.9 per cent of the total prison population.[15] EU national prisoner contingents are particularly relevant in Austria, Cyprus, Ireland and Luxembourg, where they account for more than 10 per cent of the incarcerated population. In stark contrast to this prison demography scenario, at least in Cyprus and Ireland FD 909 transfers are very rarely utilised. Considered through this comparative lens, it is evident that FD 909 transfers are having a very limited impact on noncitizen prison populations, as has been acknowledged by various national administrations (Ferraris, 2019; see also questions-statements.parliament.uk/written-questions/detail/2018–11–13/190835; accessed 11 January 2022).

In short, almost one decade after the continent-wide legal transposition of FD 909 provisions, there are very few – if any – reasons to be optimistic with regard to the degree of utilisation of FD 909 procedures. Still, the judicial cooperation scenario is even more concerning in the case of FD 947 and FD 829 procedures, which seem to be applied even more sparingly. Data on the utilisation of these measures are scanter than in the case of FD 909 practices. Yet the Spanish General Council of the Judiciary reports that Spanish courts issued 3.5 FD 947 procedures and 4 FD 829 procedures per year, and received 2.5 FD 829 procedures per year from 2015 to 2020 (see www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Aspectos-internacionales/Cooperacion-con-organos-judiciales-extranjeros/Solicitudes-de-cooperacion-tramitadas-directamente-por-los-organos-judiciales/; accessed 11 January 2022). Romania, in turn, annually carried out 7.4 FD 947 transfers as an issuing state from 2014 to 2019 (source: SPACE II. Council of Europe; see wp.unil.ch/space/space-ii/annual-reports/; accessed 11 January 2022). Certain data also show that Germany is having a very low profile with 947 transfers.[16] Sweden has been relatively more active in this field, averaging 17.4 FD 947 cases per year as an issuing state but only 3.6 FD 947 cases per year as an executing state from 2016 to 2020 (Kriminalvården, 2018, 2021). In contrast to other national cases, the Netherlands stands out for its involvement in FD 947 procedures, but mainly as an issuing state.[17]

These extremely low numbers show that the official reports monitoring the implementation of FD 947 and FD 829 are right, that is, these transfer procedures are failing to improve the legal and material conditions of the many EU citizens serving non-custodial sentences or being in pre-trial detention abroad. More than 12 years after the passage of both framework decisions, no transposition issues are impeding the regular implementation of FD 947 and FD 829 measures (Council of the EU, 2021a, 2021b; see also Montero Pérez de Tudela et al., 2019).[18] Consequently, the factors preventing these transfer measures from being widely used across Europe are unrelated to transposition issues. The last section of this chapter will be devoted to scrutinising those factors. Before then, the next section examines what might be considered as a 'success story' – so to speak[19] – in the cross-national management of noncitizen offending in Europe, that is, the increasing utilisation of deportations targeting EU nationals.

2. A contrasting 'success story': the deportation of EU nationals

There are remarkable differences between judicial cooperation transfers and deportations targeting EU citizens. To begin with, FD 909, FD 947 and FD 829 procedures are expected to be regularly implemented and utilised by European criminal justice agencies. By contrast, the deportation practices regulated by the Citizenship Rights' Directive (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; hereinafter CRD) are legally considered as exceptional measures. Paradoxically, though, transfer procedures have been used sparingly, whereas CRD

deportations have gained significant momentum across many EU countries in the recent past.

This law enforcement shift is certainly intriguing from an EU law perspective, since CRD deportations are regulated as exceptional restrictions to the freedom of movement rights attributed to EU citizenship. Indeed, pursuant to chapter VI of the CRD these coercive return orders can only be enforced for serious reasons of public policy and public security, that is, essentially when the corresponding EU citizen is considered to be a serious threat to fundamental social interests (Guild, Peers & Tomkin, 2014).

This uncontested legal nature, though, does not mirror what has been happening on the ground, in terms of the actual extent of these allegedly exceptional deportation orders. In many EU jurisdictions, CRD deportations are far from being a marginal phenomenon. In fact, they are an increasingly pivotal part of European immigration enforcement systems.

Spain is one of the EU countries in which this shift is particularly evident. The Spanish immigration enforcement apparatus averaged 409.4 CRD deportations enforced per year from 2010 to 2018, a period in which their share mounted from 2 per cent of all deportations in 2010 to 10.5 per cent in 2017 (Brandariz, 2021a). Germany has also been enforcing an increasing number of CRD deportations in recent years, averaging 1048.7 deportations per year from 2012 to 2020 (6.1 per cent of all forced returns; source: German Parliament; www.proasyl.de/thema/fakten-zahlen-argumente/statistiken/; accessed 14 January 2022). In the Netherlands, some 6.2 per cent of the noncitizens returned from 2016 to 2020 were EU nationals; in other words, some 310 CRD deportations were annually enforced over this five-year period (source: Dutch Statistics Service; data.overheid.nl/dataset/immigratie-dtenv-vertrek#panel-resources; accessed 14 January 2022).

In other European jurisdictions, though, CRD deportations are playing a relatively minor – and sometimes declining – part in national immigration enforcement systems. Greece annually carried out 385.2 CRD deportations from 2014 to 2019 (2.7 per cent of all forced returns; source: Greek Data Office; see catalog.data.gov.gr/dataset/apelaseis-mh-nomimwn-metanastwn-ana-yphkoothta; accessed 14 January 2022). In Italy, 67.5 deportations targeting Romanian nationals were annually enforced from 2017 to 2020 (source: National Prison Ombudsman; see www.garantenazionaleprivatiliberta.it/gnpl/it/pub_rel_par.page; accessed 14 January 2021).

In stark contrast to this second group of countries, in various EU jurisdictions CRD deportations have gained significant momentum in the recent past, being turned into a vital piece of their immigration enforcement systems. In Belgium, at least 19 per cent of the forced returns carried out in 2019 and 2020 were CRD deportations, mainly based on the previous perpetration of a criminal offence (source: Belgian Federal Immigration Office; dofi.ibz.be/fr/themes/figures/rapports-annuels; accessed 14 January 2022).[20] The Norwegian immigration enforcement system, in turn, has carried out on average 1099.3 CRD deportations per year from 2013 to 2020 (source: Norwegian Directorate of Immigration; www.udi.no/en/statistics-and-analysis/annual-reports/; accessed 14 January 2022). This significant number of removals targeting EU nationals accounts for 24.5 per cent

of the returns enforced over these eight years. In a national system in which immigration enforcement practices are guided by the need to meet certain annual quotas (Franko, 2020), the impact of CRD deportations is so remarkable in Norway that deportation rates were higher than 400 EU national deportees per 100,000 EU national residents from 2014 to 2016.

CRD deportations are extensively used as well in two additional European jurisdictions, France and the UK. In Britain, removal practices have been on the decline in the recent past, and CRD deportations have not been an exception to this rule. However, the momentum gained in the UK by these deportations targeting EU nationals is almost unparalleled across Europe. On average, the British immigration enforcement system deported 3,551 EU nationals per year from 2013 to 2020; CRD deportations accounted for 38.4 per cent of all forced returns carried out over this period (source: UK Home Office; see www.gov.uk/government/statistics/immigration-statistics-year-ending-december-2020/how-many-people-are-detained-or-returned; accessed 18 January 2022). Also in France CRD deportations are playing a pivotal role within the national deportation regime since the early 2010s (Vrăbiescu, 2021a, 2021b). Although the astonishing number of EU nationals deported in the first years of the last decade has not been matched recently (see Eremenko, El Qadim & Steichen, 2017; Lafleur & Mescoli, 2018), France averaged 4,230 CRD deportations per year from 2010 to 2020, which account for 20.8 per cent of all returns carried out over these 11 years (source: French Home Office; see www.immigration.interieur.gouv.fr/Info-ressources/Etudes-et-statistiques/Statistiques/Essentiel-de-l-immigration/Chiffres-cles; accessed 19 January 2022). Deportation rates in France have been slightly higher than 200 deportees per 100,000 EU national residents in recent years, but they were close to 500 deportees per 100,000 EU national residents in the early 2010s.

In short, the particularly large contingents of EU citizens deported from European countries such as France and the UK, as well as from Belgium, Germany, the Netherlands, Norway, Spain and elsewhere across the continent show that CRD deportations are far from being exceptional legal measures. The apparently rights-based EU law regulation of these deportation orders has not prevented them from being widely used in many jurisdictions.

This immigration enforcement scenario stands in stark contrast to the poor performance of FD 909 and – especially – FD 947 and FD 829 measures. Consequently, the next section will focus on the lessons to be drawn from this 'successful' deportation experience to grasp the obstacles hampering the regular utilisation of transfer procedures.

However, before addressing that research question, an additional clarification is in order. In principle, there seems to be a loose connection between FD transfer procedures and CRD deportations. The former are a critical tool of judicial cooperation in criminal matters and therefore a legal instrument to be used by criminal justice agencies. The latter are a specific exception to the freedom of movement rights EU citizens are entitled to. The significant amplification of their scope, though, has turned CRD deportations into something close to an immigration control device, in the sense that they are massively utilised to remove unwanted (EU national) noncitizens.

Consequently, these notable differences might make any comparison between those legal measures particularly futile. Still, a thorough exploration unveils that despite their diverse legal nature FD transfers and CRD deportations are closely interrelated. Both of them have become – more or less – vital pieces of institutional efforts aimed at reacting against noncitizen offending. That is especially evident in the case of FD transfers, which try to combine institutional interests of criminal justice agencies in prosecuting EU national offenders, holding them accountable and making them serve their sentences with human rights concerns and rehabilitation purposes (Martufi, 2018; Montaldo, 2019, 2020a; see also FRA, 2016). By contrast, crime-fighting purposes are not manifest in the case of CRD deportations. In fact, although these deportation orders can be part of a criminal sentence (Article 33(1) of the CRD), Article 27(2) of the CRD establishes that "previous criminal convictions shall not in themselves constitute grounds for taking" such forced return measures.[21]

Notwithstanding this legal regulation, CRD deportations have been recruited for crime prevention efforts (Brandariz, 2021a). In the framework of the crimmigration turn-changing immigration control practices in various global north jurisdictions (Stumpf, 2006, 2015; van der Woude, van der Leun & Nijland, 2014), law enforcement agencies are giving increasing preference to criminalised noncitizens in organising their detention and deportation regimes (Stumpf, 2013; Wonders, 2017). CRD deportations have not been immune to this shift. There is much evidence showing that CRD deportations actually garnered traction when they began to be treated primarily as measures to coercively deal with EU national offenders. This is especially the case in the two countries that have spearheaded the expansion of CRD deportation practices, France and the UK (Bosworth, 2011; Kaufman, 2015; Turnbull & Hasselberg, 2017). However, both there and elsewhere across Europe, a significant part of the EU national deportees is made up of former prisoners having been in pre-trial detention or having completely or partly served their imprisonment sentences. This phenomenon has been confirmed in many European jurisdictions, such as Austria (see Heilemann, 2019), Belgium (Breuls, 2017; Service Public Fédéral Justice, 2020), the Czech Republic (source: European Migration Network Contact Point in the Czech Republic; ec.europa.eu/home-affairs/emn-annual-reports_en; accessed 17 January 2022), Finland (Könönen, 2020), Norway (Aas, 2014; Franko, 2020), Spain (Brandariz & Fernández-Bessa, 2017), Sweden (Barker, 2018), and the UK (Turnbull, 2017). Hence, thousands of EU national prisoners that FD transfer procedures fail to manage are being channelled into CRD deportations on a continental scale. In some countries, the gap between both law enforcement procedures is shockingly wide. In the UK, the proportion between CRD deportations enforced against former EU national prisoners and FD 909 transfers carried out as an issuing state was 57.8 to 1 from 2013 to 2018 (sources: UK Home Office; UK Ministry of Justice).

In other cases, these deportation practices contribute to circumvention of regular criminal justice procedures in a different way. In a conspicuous manifestation of the instrumentalism characterising immigration enforcement policies (Brandariz, 2021b; Sklansky, 2012),[22] CRD deportations are also being used to quickly get

rid of alleged troublesome EU national groups instead of funnelling them into the time- and resource-consuming criminal justice adjudication processes (Brandariz, 2021b; see also Aliverti, 2020). Deportation practices in France are a telling example of this instrumentalism rationale (see also Maslowski, 2015; Vrăbiescu, 2021a, 2021b).

In sum, there are good reasons to think that academic conversations on transfers may have much to gain from closely scrutinising the consolidation of CRD deportations. That exploration may actually lead to consider FD transfers pitfalls under a new light. The shortcomings affecting FD 909, FD 947 and FD 829 procedures have been mostly considered as a legal issue, that is, as obstacles of legal nature requiring legal remedies. The CRD deportation impulse suggests that legal aspects are only part of the story, a may not even constitute the vital part (see also Hofmann & Nelen, 2020; Nelen & Hofmann, 2019). The conclusions to be drawn from that comparative perspective are explored in the last, concluding section.

3. Regulations, actors, logistics: the obstacles hampering the consolidation of transfer procedures

The scant utilisation of FD 909, and especially FD 947 and FD 829 procedures, has been a motive of concern for both institutions and academic communities. The various stakeholders engaging in a conversation on the obstacles preventing transfer procedures from being widespread have largely adopted legal viewpoints. This is unsurprising, since those transfers are sophisticated legal procedures mainly involving judicial actors. Therefore, the legal lens has led officials and scholars to put the spotlight on the shortcomings of EU law provisions and national regulations. This is the path followed, for example, by the 2019 European Commission's *Handbook on the transfer of sentenced persons*, which provides recommendations on how the corresponding legal requirements should be understood to facilitate transfers. This legal guidance task is also carried out by other bodies, crucially among them Europris (see www.europris.org/topics/framework-decision-909/; accessed 1 February 2022) and the European Judicial Network (hereinafter EJN; see www.ejn-crimjust.europa.eu/ejn/libcategories/EN/7/-1/0; accessed 3 February 2022). Moreover, academic voices have given particular relevance to legal obstacles and have proposed solutions focusing on legal reforms and the interpretation of legal provisions. These recommendations chiefly address procedural issues related to, for example, decentralised competence and the need for cooperation, the assessment of the potential transferee's opinion, the certificate, the translation, the description of the corresponding sentence, the evaluation of social rehabilitation needs, the role to be played by prison conditions in making a decision on transfer requests (see Marguery, 2018), and the coordination with the EAW (Durnescu, 2017; Klimek, 2017; Montaldo, Damian & Brandariz, 2020; Montero Pérez de Tudela et al., 2019; Nelen & Hofmann, 2019).

However, the apparently resilient nature of the pitfalls preventing transfers from being widely used seems to have led EU institutions to adopt a broader perspective on FD 909, 947 and 829 shortcomings. The 2019 Council of the EU's document

outlining a way forward in the field of mutual recognition (Council of the EU, 2019b) is a good example of this wide viewpoint. This policy report assumes that legal factors may be playing a critical role in hindering the regular, unobstructed application of mutual recognition instruments. More precisely, in addressing the infrequent utilisation of FD 947 and FD 829 procedures, the Council highlights that "it is also important to establish whether the less frequent application of the two Framework Decisions might not simply be the consequence of insufficient harmonisation of substantial procedural provisions and of the differences in the transposition processes" (Council of the EU, 2019b, p. 16). In addition, the document gives significant weight to awareness obstacles and promotes an ambitious training agenda. In fact, the Council of the EU stresses that "it is important to establish whether the less frequent application of the two Framework Decisions (FD 2008/947/JHA and FD 2009/829/JHA) is due to the fact that practitioners are not aware of the legal possibilities they offer/do not have enough experience in their application" (Council of the EU, 2019b, p. 16). Certainly, awareness-raising and training strategies are widely mentioned. They have been recommended by many stakeholders examining the application of transfer procedures (see e.g. Council of the EU, 2019a; see also Durnescu, 2017; Fernández-Bessa, Ferraris & Damian, 2020; Montero Pérez de Tudela et al., 2019). However, those aspects fail to grasp why some mutual recognition instruments are widely consolidated while others are not. Concerning the comparison proposed in this chapter, training and awareness-raising issues cannot explain either why CRD deportations are thriving or FD transfers are facing apparently unsurmountable obstacles to be generally applied.

Consequently, there are good reasons to venture beyond these already beaten paths in addressing the topic under study. Specifically, "practical and operational aspects" (Council of the EU, 2019a, p. 6) need to be particularly scrutinised (see also Hofmann & Nelen, 2020; Nelen & Hofmann, 2019). Institutional actors seem to be moving in that direction. The aforementioned Council of the EU's document embraces an audit culture in emphasising the need to identify "gaps in the application of mutual recognition instruments and possible solutions to fill these gaps" (2019b, p. 5). That laudable perspective is also adopted by the FRA (2016), which strongly recommends collecting and analysing data on the non-application of transfer procedures. These pragmatic audit efforts may bring to the fore non-legal factors that negatively condition the utilisation of FD transfers. Some of these factors have been recurringly pointed out by the literature, be it grey literature or academic literature. Long processing times are one of these practical issues significantly challenging transfer procedures, especially in cases involving short custodial or non-custodial sentences (FRA, 2016; Nelen & Hofmann, 2019). Communication issues are also crucial, as has been recognised by the 2019 European Commission's *Handbook on the transfer of sentenced persons*. Indeed, the permanent communication between judicial authorities may greatly contribute to the smooth application of mutual recognition procedures (Montero Pérez de Tudela et al., 2019).

Moving beyond these critical aspects, the Council of the EU singles out the institutional framework as a key additional dimension to be seriously considered. Specifically, it stresses the need to enhance "the institutional framework which

allows for a proper functioning of judicial cooperation in criminal matters at EU level" (Council of the EU, 2019b, p. 5). In this regard, the Council recommends heightening the involvement of Eurojust and the EJN, as well as their cooperation with COPEN, the Working Party on Judicial Cooperation on Criminal Matters. However, consolidating a continent-wide transfer system has already proven to be an extremely arduous task. Therefore, more actors should be brought to cooperate in this joint effort. In this regard, prison authorities are critical to foster the utilisation of FD 909 and FD 829 procedures (Durnescu, Montero & Ravagnani, 2017; Montaldo, Damian & Brandariz, 2020), no less than probation officials are pivotal to give a boost to FD 947 measures.

All these proposals should be taken into serious consideration to expand the scope of transfer procedures. Specifically, the institutional aspects the Council of the EU reports have recently referred to are particularly crucial. The experience of the very few countries in which 909 transfers are regularly utilised (i.e. Romania and the Netherlands) demonstrates the pivotal role to be played by political will and institutional resources in enabling judicial cooperation in this field (Leerkes & van Houte, 2020). Nonetheless, the comparative gaze examining CRD deportations also suggests exploring logistical aspects. In fact, in any subfield of the criminal justice system that has a cross-national, potentially global nature (Franko, 2017, 2020) logistical issues are of utmost importance (see Walters, 2018, 2022). The comparison with the 'successful' CRD deportations brings to the fore an additional dimension, that is, professional cultures and the character of the institutional actors involved in these EU-wide criminal justice procedures. In fact, the main structural difference between FD transfers and CRD deportations is that the former are essentially judicial procedures, whereas in the latter judicial players are largely absent.

Judicial ethnographies and publications exploring the professional cultures of judicial actors do not rank very high in criminology studies. In stark contrast to what happens with regard to, for example, policing, top criminology handbooks and textbooks largely overlook these topics or address them mainly from a legal perspective (see e.g. Liebling, Maruna & McAra, 2017; Newburn, 2017). Yet the judicial texture of FD transfer procedures is a critical issue to be much further scrutinised. The fieldwork carried out in the framework of the RePers and Trust and Action mutual learning activities back in 2018 and 2019 suggests that at least two specific points should be considered here: the judicial mindset and its professional ethos, and the structure of incentives promoting the involvement of judicial actors in supranational mutual recognition procedures.

Judges and magistrates, as well as public prosecutors and other judicial officials usually have a markedly corporative mindset, which makes the judiciary relatively reluctant to change and partly impervious to critique (Anitua, 2017; Ferrari, 2004). In fact, courts frequently operate as 'closed communities' (Hester & Eglin, 2017). This feature interacts with an additional trait which is of particular importance with respect to judicial cooperation measures. The increasing authority and force of transnational law is putting under strain national legal systems and criminal justice agencies, which essentially have a national character (see Cotterrell, 2017). Evidently, this strain is also having an impact on judicial actors. To be true, RePers

and Trust and Action mutual learning activities showed that many judicial actors are willing and even eager to engage in this emerging EU-wide dimension of their criminal justice tasks. Exceptions aside, though, judicial actors are still closely tied to legal education, legal conceptions, and constitutions and statutory law of national nature. In fact, the extant literature has already highlighted that the diversity of legal cultures may actually obstruct the consolidation of transfer procedures (Conway, 2018; Fernández-Bessa, Ferraris & Damian, 2020). The already mentioned mutual learning activities laid bare the limited capacity of judicial participants to alter their national legal conceptions and to challenge the legal solutions consolidated in their jurisdictions.[23]

These professional ethos obstacles are further compounded by incentive issues and organisational impediments. Judicial authorities and court personnel use to be compelled by 'organisational imperatives' conditioning their activities. In fact, in carrying out their professional tasks, they constantly have to deal with organisational issues such as "the resources available, the time at hand, the working relationships that must be sustained between setting co-inhabitants, the division of labour, the flow of cases, etc." (Hester & Eglin, 2017, p. 178). In this regard, rank-and-file judges and prosecutors, which in many countries are involved in either issuing or executing transfer cases, are largely overwhelmed by demanding caseloads (Blay & González, 2020; Campesi, Pannarale & Pupolizio, 2017; Jurka, 2017). Understandably, they tend to be uneager to further expand their caseloads. For organisational reasons, judges are generally willing to engage in cross-national procedures that may assist in bringing cases to completion. That is the main reason why EAW procedures were consolidated and notably widespread in a short period of time. The European Investigation Order seems to be garnering increasing traction for these same reasons. In these cases, there are evident incentives for national judges to join mutual cooperation efforts. The scenario is markedly different when what is at stake has no connection to caseloads and investigative tasks but rather to relatively vague rehabilitation concerns and the harms the criminal legal system inflicts onto EU nationals sentenced and imprisoned abroad. In these cases, which encompass FD 909, FD 947 and especially FD 829 procedures, the incentives to engage in the frequently taxing cross-jurisdictional procedures are negligible (Neira Pena, 2020; see also Montero Pérez de Tudela et al., 2019).

In sum, both recent CRD deportation changes and the fieldwork conducted in the framework of the RePers and Trust and Action projects show that legal reforms are not the main issue to be considered to give a boost to transfer procedures. Both legal remedies and awareness-raising and training efforts are actually needed, but they alone cannot overcome the analysed obstacles. The measures to be taken relate not only to regulations but also to actors and logistics. With regard to the institutions and authorities involved in these procedures, the already mentioned FRA report poses a compelling question. In reminding that 'effective communication is essential for cooperation', the report openly wonders "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?" (FRA, 2016, p. 47). That

rhetorical question deeply resonates with the kind of cultural and legal-cultural barriers we encountered in carrying out the RePers and Trust and Action mutual learning activities.

The Italian criminologist Dario Melossi (2005, 2014) persuasively claims that sharing a common language – regardless of whether it is a mother tongue or not – is a first, decisive step in giving shape to a European public, to a continent-wide public sphere. The question posed by the FRA report some years ago may be understood in pragmatic terms, as referring to the practical hurdles hampering the communication between national authorities. However, it may also have a deeper meaning. Supranational legal procedures unavoidably need criminal justice practitioners with a supranational inclination who may be willing to foster the EU judicial cooperation agenda. That is a pivotal aspect to be targeted by EU institutions' strategies to promote the application of mutual recognition instruments.

Notes

1 This chapter is a deferred outcome of the projects 'Mutual Trust and Social Rehabilitation into Practice – RePers' and 'Trust and Social Rehabilitation in Action – Trust and Action', funded by the European Union Justice Programme 2014–2020 (www.eurehabilitation.unito.it). The content of this chapter represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.
2 The Trust and Action project's plans to carry out mutual learning activities were severely disrupted by the emergence of the coronavirus pandemic. However, before that the RePers and Trust and Action projects led to the organisation of three inspiring mutual learning meetings gathering 30–40 officials, practitioners and scholars each. These meetings were held in Bucharest in October 2018, Madrid in March 2019 and Rome in July 2019. Mutual learning activities were subsequently moved online, dramatically eroding their usefulness for participant observation purposes.
3 EU national criminal justice agencies issued 6,894 EAWs in 2005 and 6,889 EAWs in 2006, whilst the number of warrants issued in 2011 was 9,784 (source: European Commission 2021).
4 This is an underestimation, because a small number of EU countries do not supply data on executed EAWs. Whether this execution rate is slightly or significantly misleading, it means that 6,015 EAWs were executed per year from 2015 to 2019.
5 See wp.unil.ch/space/space-i/annual-reports/ (accessed 7 January 2022).
6 Hurley (2021) informs that Ireland enforced only 1 transfer as an executing state and 14 transfers as an issuing state from 2016 to 2020. These data, though, bring all prisoner transfer programmes together. Therefore, FD 909 data are even lower.
7 Article 1(d) of the FD 909 describes 'executing state' as 'the Member State to which a judgement is forwarded for the purpose of its recognition and enforcement'.
8 Article 1(c) of FD 909 defines 'issuing state' as 'the Member State in which a judgement is delivered'.
9 This is actually a four-year estimation, because SPACE I did not publish 2016 data.
10 For the same reason mentioned in the previous endnote, this is a four-year estimation.
11 The German administration provided data on transfer and other rendition practices carried out in Germany in a parliamentary answer released in July 2018 (see dserver.bundestag.de/btd/19/035/1903596.pdf; accessed 10 January 2022). Although this official report recognises that no specific FD 909 data are available, the total number of cases is relatively low (217.7 cases per year when Germany is an issuing state and 93.9 cases per year when Germany is an executing state from 2010 to 2016) and decreased

over time. More precise data are available with regard to North Rhine-Westphalia. This pivotal German state averaged 68.5 outgoing transfers and 18.5 incoming transfers in 2016–2017 (Hofmann and Nelen 2020; Nelen and Hofmann 2019).

12 These averages are somewhat underestimated, because they do not count transfers between Scandinavian jurisdictions, which are regulated by a regional agreement rather than by FD 909.

13 The Netherlands averaged 154 FD 909 cases as an executing state from 2012 to 2017, although it is estimated that only 40–60 per cent of these transfers are finally enforced. The number of outgoing cases is significantly lower (30.8 cases per year from 2012 to 2017) (Nauta, van Aalst and Özgül 2018; see also Hofmann and Nelen 2020; Nelen and Hofmann 2019).

14 The UK is not taking part anymore in any of the three analysed instruments of mutual cooperation since January 2021.

15 These numbers are slightly underestimated, because SPACE I data did not include Belgian and Scottish data in 2018. Since then, the gap is even wider because SPACE I reports have not provided German data on EU national prisoners in recent years.

16 Nelen and Hofmann (2019; see also Hofmann and Nelen 2020) report that the German state of North Rhine-Westphalen received 19 FD 947 requests and issued only 1 FD 947 request from 2015 to mid-2018.

17 The number of outgoing FD 947 requests was above 100 cases in 2016 and 2017, but no data on actually enforced transfers are available. Regarding incoming requests, they were 17 in 2016 and 27 in 2017, but it is again unclear how many of these cases led to transfer enforcement (Nauta, van Aalst and Özgül 2018; see also Hofmann and Nelen 2020; Nelen and Hofmann 2019).

18 Official communications inform that 26 EU Member States had already transposed FD 947 and FD 829 provisions by mid-2021. Whether or not the remaining Member State, Malta, had also transposed these EU legislative acts was then unclear (Council of the EU 2021a, 2021b).

19 Evidently, this description of the impulse of deportation practices targeting EU nationals as a 'success story' is metaphorical. The severe harm caused by these border control practices to the individual rights, living conditions and life prospects of EU nationals prevent this phenomenon from being seriously considered as a 'success' in the field of law enforcement.

20 This is actually an underestimation because the Belgian Federal Immigration Office only provides data on the five EU national groups most affected by CRD deportations. On the impact of crime-based deportation orders on the increasing traction garnered by CRD deportations in Finland see Könönen 2020.

21 On this, see CJEU Case C-554/13 *Z. Zh. and I. O*. [2015] ECLI:EU:C:2015:377.

22 Instrumentalism considerations are deeply embedded in the impetus recently given to CRD deportations. National deportation regimes are particularly focused on enforcing removals to neighbouring countries. Two top deporting countries, such as Mexico and the United States, are evidence of this specialisation of deportation practices (Campos-Delgado 2021; Golash-Boza 2018; Gómez Cervantes and Menjívar 2018). This instrumental arrangement seems to be playing a part also in the case of both intra-EU deportations (Brandariz 2021a) and – at least in certain European countries – criminal justice transfers (Hofmann and Nelen 2020).

23 This willingness to defend the national legal order was particularly conspicuous in one of the mutual learning activities, when one of the judicial participants vividly advocated the decision of his national Supreme Court in issuing an EAW against a top politician, when that EAW request had been just overturned by a high court of another EU Member State.

Some government officials participating in these mutual learning activities, in turn, were particularly disinclined to question the arrangements adopted by their national administration in the field of FD transfer procedures.

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