

The Transfer of Prisoners in the European Union

Challenges and Prospects in the Implementation
of Framework Decision 2008/909/JHA

Editor

STEFANO MONTALDO



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Affiliations

ANA NEIRA-PENA, Assistant Lecturer in Procedural Law, University of A Coruña, A Coruña, Spain

PATRICIA FARALDO-CABANA, Full Professor of Criminal Law, University of A Coruña, A Coruña, Spain; Adjunct Professor, Queensland University of Technology, Brisbane, Australia

CRISTINA FERNÁNDEZ BESSA, Juan de la Cierva Research Fellow, University of A Coruña, A Coruña, Spain

JOSÉ A. BRANDARIZ, Associate Professor of Criminal Law, University of A Coruña, A Coruña, Spain

VALERIA FERRARIS, Assistant Professor of Sociology of Law, University of Turin, Turin, Italy

ALESSANDRO ROSANÒ, Post-doctoral Research Fellow in EU Law, University of Turin, Turin, Italy

STEFANO MONTALDO, Associate Professor of EU Law, University of Turin, Turin, Italy

ALEXANDRU DAMIAN, Researcher at the Romanian Center for European Policies, Bucharest, Romania

Implementation Strategies: Distinctive Features, Advances and Shortcomings in the Application of Framework Decision 2008/909/JHA in Italy, Romania and Spain

Cristina Fernández Bessa, Valeria Ferraris and Alexandru Damian *

Abstract: *This chapter addresses the main features of the implementation of cross-border transfer of prisoners in Italy, Romania and Spain. It aims to provide the reader with an in-depth analysis of the major strategies enacted by these Member States to ensure the full effectiveness of FD 2008/909/JHA and the difficulties of putting it into practice. Specifically, it shows the particularities regarding the transposition of the European instrument in each country, on the number of transfers effectively executed and their difficulties to ensure the full effectiveness of the FD under consideration. Based on the desk research and fieldwork developed in the RePers project this study addresses the advances in implementing the FD and identifies the shortcomings of the implementation. To conclude, this study provides useful comparative notes and a critical assessment of the main shortcomings of the solutions adopted nationally.*

Keywords: *transfer of prisoners, transposition, implementation strategies, national issues, judicial cooperation*

SUMMARY: 1. Introduction. – 2. Transposition of Framework Decision 2008/909/JHA in Italy, Romania and Spain. – 3. Advances. The Number of Prisoners Actually Transferred. – 3.1. Number of Transfers out of Number of Prisoners. – 4. Shortcomings of the Implementation of Transfer Procedures in the Different National Contexts. – 5. Conclusions.

1. Introduction

The freedom of movement and residence of European citizens within the European Union territory poses new challenges for national criminal justice

* Cristina Fernandez Bessa drafted para. 1; Valeria Ferraris drafted para. 2; Para. 3, 4 and 5 are the result of joint work. Alexandru Damian amended the parts relating to the Romanian legal order.

and prison systems which must be addressed by the Member States. The enforcement of custodial sentences or measures involving the deprivation of a citizen's liberty issued by a Member State in its own territory and the transfer of a European citizen sentenced by a national court to another Member State to serve the sentence involve strategies that go beyond ordinary practices and routines of legal practitioners, civil servants and judicial authorities. In spite of the common legal provisions of Framework Decision (FD) 2008/909/JHA, factors such as divergences in transposition, different national legal cultures, the situation of communities of EU citizens living in other Member States, and prison conditions entail very distinctive features in the implementation of this instrument and produce varied results.

This chapter addresses the main features of the implementation of cross-border transfer of prisoners in Italy, Romania and Spain. It aims to provide the reader with an in-depth analysis of the major strategies enacted by these Member States to ensure the full effectiveness of FD 2008/909/JHA and the difficulties of putting it into practice. Specifically, the chapter starts with a brief description of the transposition process of this tool into the mentioned legal frameworks. Secondly, it addresses the advances in implementing the FD, by revealing the number of prisoners who have actually been transferred from and to Italy, Spain and Romania in relation to the prison population of EU citizens. Lastly, it identifies the shortcomings of the implementation, in the opinion of practitioners and authorities who actually work on these transfer procedures. To conclude, this study provides useful comparative notes and a critical assessment of the main shortcomings of the solutions adopted nationally.

In order to do this, from a methodological point of view, a desk review of academic literature was carried out, along with an analysis of the Italian, Romanian and Spanish implementing legislations of FD 2008/909/JHA, and other relevant documents. This study was complemented by the analysis of quantitative and qualitative data concerning transfers between the Member States involved. On one hand, we obtained official statistics published in each Member State and requested any missing information through national transparency procedures or other internal procedures. On the other hand, we gathered primary data on the practical shortcomings of the implementation of the FD on prisoner transfers within the EU through an online survey and the report of two meetings organised within the scope of RePers project. The survey was delivered from July 2018 to December 2018, in Italian, Romanian and Spanish, to prosecutors, judges, lawyers, ministerial officials and scholars involved in implementing the FD. Despite some initial problems in obtaining an adequate number of answers to the survey,¹ the research team

¹ In particular, in Italy, due to the limited numbers of lawyers having expertise in the issue and the fact

ultimately received 85 completed questionnaires (30 in Spain, 32 in Romania and 23 in Italy). The low number of survey respondents in Italy was largely offset by additional activity providing further insights into the functioning of transfer procedures. Unexpectedly, following numerous requests and contacts, the researchers were officially permitted by the Head of the International Cooperation Office of the Italian Ministry of Justice to access the case files regarding transfer procedures under Framework Decision 2008/909/JHA. The results of the surveys were presented on the occasion of two workshops held in Bucharest (October 2018) and Madrid (14 March 2019) with selected practitioners, who were invited to discuss the critical points on the implementation of the FD emerging from the surveys. All these research activities provided us with comprehensive information on the distinctive features of the implementation of FD 2008/909/JHA which will be investigated in the sections below.

2. Transposition of Framework Decision 2008/909/JHA in Italy, Romania and Spain

The main characteristics of the transposition process of FD 2008/909/JHA are important for contextualising the approach and expectations of each Member State towards this instrument, and they provide valuable data for understanding its current implementation.

The timing of the transposition of the FD in Italy, Romania and Spain presents a significant variation which reveals the different policy agendas of the Member States.

This is one of the few times that Italy transposed an act relating to judicial cooperation in criminal matters prior to the deadline, in this case 5 December 2011. The Government – upon delegation by Parliament through Articles 49 and 52 of Italian Law dated 7 July 2009, no. 88 – adopted Legislative Decree dated 7 September 2010, no. 161, which implements the FD in the Italian legal system and defines the procedures for transferring sentenced persons from Italy to other Member States and vice versa.

In the aftermath of the transposition, several circular letters² issued by the Italian Ministry of Justice clarified the reasons underpinning this unexpected

that the members of the judiciary are not used to responding to online surveys. In Spain, it was also difficult to obtain answers from lawyers who were familiar with the legal procedure of prison transfers.

²For a detailed presentation of the content of the circular letters, see V. Ferraris (2019), 'L'implementazione del d.lgs. 161/2010 sul reciproco riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento', *Legislazione Penale*, 2019, Available at: <http://www.laegislazionepenale.eu/limplementazione-del-d-lgs-161-2010-sul-reciproco-riconoscimento-delle-sentenze-di-condanna-a-pena-detentiva-un-caso-di-doppio-fallimento-valeria-ferraris/>

diligence by the Italian authorities. In fact, transfers of prisoners were included in the action plan to reduce overcrowding in Italian prisons, following the well-known ECtHR *Torreggiani* judgment.³

Conversely, Spain transposed FD 2008/909/JHA in a complex legal act (Law no. 23/2014 dated 20 November 2014) on the mutual recognition of judicial decisions in criminal matters in the EU. This law is a wide-reaching legal act that regulates or modifies all legal instruments based on the principle of mutual recognition in criminal matters. Such a long delay (more than three years) is quite unusual for Spain which, in general, respects transposition deadlines. This delay was crucially conditioned by the will to simplify the dispersed regulations on mutual recognition by encompassing everything into just one law, but also by the legal – and political – debate on the consequences in Spain of foreign sentences issued in other EU jurisdictions. This controversy was triggered by the adoption of FD 2008/675/JHA regarding the decision to take account of convictions in European Union Member States during the course of new criminal proceedings, which was transposed by Spanish Law no. 7/2014, dated 12 November 2014. The issue at stake was whether prison sentences already served in France by militants of the armed organisation ETA ought to be taken into consideration to mitigate the prison sentences to be enforced for the same offences in Spain. This debate was closed by the aforementioned Law no. 7/2014 (Article 14) and the Spanish Supreme Court's rulings no. 874/2014 of 27 January 2015 and no. 50/2016 of 3 February 2016. The passing of Law no. 7/2014 paved the way for the immediate passing of Law no. 23/2014 and the transposition of FD 2008/909/JHA.

Romania transposed FD 2008/909/JHA through the Law dated 26 December 2013, no. 302, with a two-year delay. The transposition was carried out through Title VI of Law no. 302/2004, on international judicial cooperation in criminal matters, recently republished. There are two explanations for this delay. On one hand, it was partially caused by the lengthy national legislative procedure. On the other hand, only a limited number of public servants are familiar with international cooperation and they are burdened by excessive workloads.⁴ This is something of an administrative vulnerability, rather than a pattern for pushing for delayed implementation.

³ *Torreggiani and others vs. Italy*, ECHR (2013). In this decision, the Court verified that the space allocated to each applicant in their cell was three square metres and stated that, this being the case, the applicants had suffered a breach of their Article 3 rights. The court gave Italy one year in which to develop effective remedies for dealing with prison overcrowding. See also F. Favuzza, 'Torreggiani and prison overcrowding in Italy', *Human Rights Law Review*, Vol. 17, No. 1, 2017, pp. 153-173.

⁴ This comment was obtained by the Romanian researcher in the interviews with civil servants.

It seems clear that each Member State was driven by its own agenda and, as we will demonstrate in the following sections, this is certainly not the best pre-condition for building an efficient procedure based on mutual trust.

The three legal acts largely reproduce the FD,⁵ with extremely limited specificities.

The use of the same wording as the FD results, for example in Romania, in inadequate transposition rules, and in the absence of correlation with other rules on international cooperation and other national normative acts, which has led to a series of issues generating non-unitary judicial practice, some of which have already been settled by the High Court of Cassation and Justice (HCCJ).⁶

In the three Member States, the competent authorities are the Ministry of Justice and the judicial authorities. A major difference concerns the role of the central authority. The International Office of the Ministry of Justice in Romania and in Italy plays a central role; the Ministry transmits to the foreign authority the sentence and the certificate previously received from the territorial judicial authorities, handles the official correspondence, takes on a role of coordination, and acts as a reference contact.

Conversely, in Spain, the role of the Ministry of Justice is auxiliary to the judicial authorities and is limited to receiving quarterly statistical bulletins from judges and Courts, together with a list from the General Public Prosecutor containing all mutual recognition instruments issued or executed by Public Prosecutor officers during the half-year. The Prison Supervisory Court (when a convict is in prison) and the Court (when the convict has not begun to serve the sentence) is in charge of all aspects of the procedure.

Thus, in the three Member States concerned (Spain, Italy and Romania), the judicial authorities are responsible for issuing the transfer sentence; however, there are significant differences in the procedure depending on the features of the general functioning of each national judicial system and the chosen manner of transposition.

Two specificities of the Italian and Romanian legal systems can be highlighted. In Italy, the transfer can take place for any offence punished with a penalty having a term of at least three years. The Italian legislator's intention to avoid any limitation of the possibility of transferring detainees to another Member State is, therefore, quite clear. Conversely, the transfer from another Member State is possible only in relation to the offences indicated by the FD.

⁵ See S. Montaldo's introduction in this book.

⁶ See HCCJ, Formation on the interpretation of certain points of law in criminal matters, Decision no. 13/2014, Official Gazette no. 505 of 08/07/2014; Decision no. 15/2015, Official Gazette no. 455 of 24/06/2015. See also, HCCJ, Criminal Proceedings, Decision no. 253/A of 11 October 2018, www.scj.ro

Out of the three Member States, Romania is the only one that grants to the sentenced person the right to challenge the transfer decision⁷ within 10 days.⁸ In the event of appeal, the final decision is made by the High Court of Cassation and Justice.

3. Advances. The Number of Prisoners Actually Transferred

Along with the different legal cultures and rules, many sociological and economic factors (e.g. the mobility of citizens, the labour market, whether or not the country is a tourist destination, etc.) influence the features of implementation of this instrument and mainly the target groups of the transfers in each country. In this section, we reveal the advances in the implementation of the FD by analysing the available data on the transfers performed in Italy, Spain and Romania. To understand the data in context, the number of prisoners effectively transferred to others EU countries from Italy and Spain is compared with the number of EU citizens detained in Italian and Spanish prisons over recent years. With regard to Romania, as it is mainly a receiving State, the data reveal the total number of transfer procedures executed and focus on the number of Romanian nationals transferred from Italy and Spain.

In Romania and Italy, only a basic set of data is made publicly available in the Ministry of Justice's annual report. The Romanian project team was able to obtain data thanks to the national 2001 Freedom of Information Act, Law no. 544/2001, which grants access to information of public interest. The data were later updated with the assistance of the Division for International Judicial Cooperation in Criminal Matters (Ministry of Justice). In Italy, the research team requested access to the statistics of the international office and received all requested data. In Spain, a minimum set of information on prison transfers issued is published in the prison system's annual report (the so-called *Informe General de Instituciones Penitenciarias*);⁹ this information was completed by way of an information request via the transparency website. The different means of accessing data reveal why the three research teams gathered data with very varied levels of detail.

⁷ On the right to a redress mechanism, see S. Montaldo's chapter in this book.

⁸ Article 166, line 11 of Law 302/2004 (Romania).

⁹ However, as of late October 2019, the 2018 report had not been published; this chapter only reveals data on transfers from Spain until 2017.

3.1. Number of Transfers out of Number of Prisoners

Both in Italy and Spain – the issuing Member States – data on the number of prisoners divided by nationality are publicly available. This provides information on the number of transfers out of the number of EU prisoners. In Italy, the number of EU citizen detainees is rather stable. They represent almost 20% of the total amount of foreign prisoners. As the following table shows, Romanian detainees form the vast majority, representing over 76% of all EU condemned detainees and almost 15% of all foreign citizens deprived of freedom.

Table 1. – *EU condemned detainees in Italy*

Member States	2016*		2017**		2018**	
	No. of detainees	% of EU detainees	No. of detainees	% of EU detainees	No. of detainees	% of EU detainees
Romania	2720	76.94	1668	76.20	1771	78.71
Bulgaria	163	4.61	84	3.84	80	3.56
Poland	120	3.39	83	3.79	86	3.82
Croatia	91	2.57	75	3.43	64	2.84
France	78	2.21	44	2.01	53	2.36
Lithuania	50	1.41	40	1.83	27	1.20
Germany	41	1.16	34	1.55	27	1.20
Spain	66	1.87	33	1.51	23	1.02
Slovakia	25	0.71	18	0.82	12	0.53
Greece	35	0.99	16	0.73	16	0.71
Slovenia	15	0.42	16	0.73	19	0.84
Portugal	19	0.54	14	0.64	13	0.58
Hungary	25	0.71	13	0.59	12	1
The Netherlands	15	0.42	11	0.50	5	0.22
Belgium	13	0.37	9	0.41	15	0.67
Czech Republic	20	0.57	9	0.41	10	0.44
United Kingdom	13	0.37	8	0.37	9	0.40
Latvia	9	0.25	6	0.27	5	0.22
Austria	8	0.23	5	0.23	2	0.09

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Sweden	4	0.11	2	0.09	0	0.00
Denmark	2	0.06	1	0.05	0	0.00
Cyprus	0	0	0	0.00	0	0.00
Estonia	2	0.06	0	0.00	0	0.00
Finland	1	0.03	0	0.00	1	0.04
Ireland	0	0	0	0.00	0	0.00
Luxembourg	0	0	0	0.00	0	0.00
Malta	0	0	0	0.00	0	0.00
Total	3535	100	2189	100.00	2250	100

*data do include pre-trial detainees

** data do not include pre-trial detainees

Table 2 shows the number of prisoners transferred from Italy to other EU Member States under FD 2008/909/JHA. In total, around a hundred people were transferred every year. In this case, the Romanian prison population also represents the most important national group of transferred detainees, followed by that of Spain. However, compared to the number of detainees, the number of transfers constitutes less than 3%.

Table 2. – *EU nationals transferred from Italy to other EU Member States under FD 2008/909/JHA*

Member States	2016	% of total transferees	2017	% of total transferees	1st half of 2018*	% of total transferees
Romania	89	73.55	67	62.62	26	53.06
Spain	19	15.70	14	13.08	7	14.29
France	2	1.65	5	4.67	0	-
The Netherlands	1	0.83	6	5.61	3	6.12
Belgium	3	2.48	0	-	0	-
Germany	0	-	2	1.87	4	8.16
Slovenia	2	1.65	1	0.93	0	-
United Kingdom	0	-	1	0.93	2	4.08
Greece	1	0.83	3	2.80	1	2.04
Poland	0	-	2	1.87	0	-
Hungary	0	-	1	0.93	3	6.12
Croatia	2	1.65	1	0.93	0	-

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Portugal	0	-	2	1.87	1	2.04
Latvia	1	0.83	0	-	0	-
Luxembourg	1	0.83	0	-	1	2.04
Austria	0	-	0	-	1	2.04
Slovakia	0	-	1	0.93	0	-
Sweden	0	-	1	0.93	0	-
Lithuania*	0	-	0	-	0	-
Czech Republic*	0	-	0	-	0	-
Total	121	100	107	100	49	100

* Unfortunately, due to a change in the data collection system of the Italian Ministry of Justice we cannot show the data for the full year.

For Spain, as in Italy, imprisoned EU citizens represent around 20 to 25% of the total foreign prison population. Again in Spain, Romanian citizens form the majority of EU nationals detained in the prison system; however, as can be seen from the following table, despite the absolute numbers of Romanian detainees being similar in both countries, in Spain they represent around 45% of all EU imprisoned citizens, as there are other national groups which are broadly represented (such as Portugal, Bulgaria, France, Italy or the UK). Unlike Italy, in which the number of Romanian detainees is increasing, for Spain it is significantly decreasing. The major dispersion of Romanians residing both in Spain and in Italy for over ten years is one of the factors that explains the high number of Romanian citizens as opposed to other EU citizens in both countries.

Table 3. – EU citizens detained in Spain according to the different nationalities

Member State	2016		2017		2018	
	No. of detainees	% on EU detainees	No. of detainees	% on EU detainees	No. of detainees	% on EU detainees
Romania	1870	46.74	1650	44.26	1788	45.73
Portugal	379	9.47	351	9.42	315	8.06
Bulgaria	260	6.5	273	7.32	279	7.14
France	239	5.97	248	6.65	253	6.47
Italy	252	6.3	249	6.68	233	5.96
United Kingdom	185	4.62	222	5.95	237	6.06
Lithuania	168	4.2	143	3.84	139	3.55

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Poland	144	3.6	118	3.17	114	2.92
The Netherlands	138	3.45	128	3.43	146	3.73
Germany	100	2.5	99	2.66	117	2.99
Belgium	48	1.2	39	1.05	52	1.33
Croatia	37	0.92	37	0.99	34	0.87
Czech Republic	27	0.67	25	0.67	27	0.69
Hungary	24	0.6	24	0.64	17	0.43
Latvia	26	0.65	34	0.91	33	0.84
Estonia	16	0.4	12	0.32	11	0.28
Slovakia	14	0.35	11	0.3	18	0.46
Ireland	18	0.45	17	0.46	20	0.51
Greece	16	0.4	14	0.38	23	0.59
Slovenia	11	0.27	8	0.21	7	0.18
Sweden	10	0.25	3	0.08	20	0.51
Austria	5	0.12	5	0.13	5	0.13
Denmark	6	0.15	10	0.27	15	0.38
Malta	2	0.05	1	0.03	1	0.03
Finland	2	0.05	4	0.11	4	0.10
Luxembourg	3	0.07	0	0	1	0.03
Cyprus	1	0.02	3	0.08	1	0.03
Total	4001	100	3728	100	3910	100

As shown in the following table, the situation in Spain is quite similar to that of Italy, with some specific features. In 2015, the first year of application of FD 2008/909/JHA, the transfers formed about 3.2% of detained EU national citizens and it dropped to 2.4% in 2016 and to 2.7% in 2017. In 2015 the transferred detainees reached 137 units but, in the years thereafter, they did not exceed one hundred per year. In addition, as for Italy, Romania has the highest amount of transferred people. The Netherlands, despite the limited number of detainees from the Netherlands in Spanish prisons, is the second Member State by number of transferees. This is a clear indication that judicial cooperation is functioning very well between these two countries.

The other Member States in which there is a significant number of transferees are mostly neighbouring countries: respectively Spain and France for Italy; Italy and France for Spain.

Table 4. – EU nationals transferred from Spain to other Member States under FD 2008/909/JHA

Member State	2015	% of total transferees	2016	% of total transferees	2017	% of total transferees
Romania	42	30.66	26	27.08	23	23.0
The Netherlands	25	18.25	17	17.71	26	26.0
Italy	12	8.76	11	11.46	7	7.0
France	11	8.03	9	9.38	10	10.0
Portugal	11	8.03	5	5.21	8	8.0
United Kingdom	10	7.3	7	7.29	11	11.0
Bulgaria	9	6.57	4	4.17	5	5.0
Germany	7	5.11	3	3.13	4	4.0
Belgium	4	2.92	6	6.25	3	3.0
Sweden	2	1.46	0	-	1	1.0
Denmark	1	0.73	0	-	0	-
Ireland	1	0.73	1	1.04	0	-
Lithuania	1	0.73	0	-	0	-
Malta	1	0.73	0	-	0	-
Austria	0	-	1	1.04	1	1.0
Czech Republic	0	-	0	-	0	-
Estonia	0	0	1	1.04	0	-
Finland	0	0	1	1.04	0	-
Greece	0	-	0	-	1	1.0
Hungary	0	-	1	1.04	0	-
Latvia	0	-	0	-	0	-
Poland	0	-	2	2.08	0	-
Slovakia	0	-	1	-	0	-
Slovenia	0	-	0	-	0	-
Total	137	100	96	100	100	100

The data regarding the total files of transfers managed by the Romanian authorities confirmed the impressions emerging from the data of Italy and Spain: Romania is mainly an executing State. This means that, as shown in table 5, the number of passive procedures, that is, when Romania is the receiving State for the enforcement of a custodial sentence or a measure involving a depriva-

tion of liberty issued in other EU countries against Romanian citizens or residents, is significantly higher (around 90%) than the number of active procedures (less than 10%), that is when Romania asks another country to execute a sentence issued by a Romanian Court.

Table 5. – *Passive and active procedures in Romania (2014-2017)*

	2014	% of total procedures	2015	% of total procedures	2016	% of total procedures	2017	% of total procedures
Passive Procedures (Romania as receiving/ex ecuting State)	645	98.90	534	91,75	453	94.18	395	90.39
Active Procedures (Romania as issuing State)	7	1.07	48	8.25	28	5.82	42	9.61

Compared to the high amount of transfer files received by Romania, significantly fewer transfers are ultimately implemented. The data on transfers (Table 6) provided by the Romanian authorities are similar to those provided by Italy and Spain, although they do not entirely converge. This divergence may reflect the gap between the number of EU national prisoners released to be transferred and that of released inmates for whom the transfer procedure is ultimately enforced.

Table 6. – *Persons transferred to Romania, from Italy and Spain*

	2014	2015	2016	2017	2018
Persons transferred to Romania by FD 909	85	237	264	249	237
No. from Italy	34 (42)*	109 (100)	92 (89)	61 (67)	77
No. from Spain	--	-- (42)	8 (26)	22	26

* The number according to Italy and Spain is shown in brackets

As will be seen in the following section, due to the significant length of these procedures, particularly between Italy and Romania, the sentenced person may serve the full sentence before the transfer takes place. However, the case files are not always formally closed and consequently they formally count as a pending procedure even if they are de facto closed. This makes any consideration in terms of efficiency of the system almost impossible. In addition, in Spain, the interconnection with the return procedure significantly reduces the number of potential transferees,¹⁰ and makes the Spanish data difficult to compare with other countries that do not have such a large implementation of return procedures of EU nationals.

The comparison of the data on the number of successful transfer procedures between Member States entails some additional difficulties. The Member States do not collect and process data according to a common standard. In Italy, the international branch of the Ministry of Justice collects and processes the data. It has recently implemented new text analysis software which does not provide accurate time series. However, the collected data confirms that, in recent years, the level of implementation of FD 2008/909/JHA is stable, from a quantitative point of view (around 100 transfers per year issued from Italy and Spain and around 250 transfers received in Romania). This represents a significant step forward in cooperation on criminal matters at EU level. However, the number of transfers actually performed in Spain and Italy is very far from the target group that could benefit from this measure. The next section analyses the shortcomings of this limited implementation.

4. Shortcomings of the Implementation of Transfer Procedures in the Different National Contexts

FD 2008/909/JHA has undoubtedly simplified the procedure for transferring prisoners in the EU. However, as the figures show, the number of transfers completed is much lower than one would expect in relation to the prison population that could benefit from this type of measure. This section explores the possible reasons for the unsuccessful implementation of this tool.

The research carried out within the scope of the RePers project identified the most common shortcomings of the implementation of FD 2008/909/JHA in the different countries. Based on a series of exploratory interviews and the analysis of the case files regarding transfer procedures under this FD in Italy, the research team identified the following:

¹⁰ See the chapter by J.A. Brandariz Garcia in this book.

- Lack of knowledge and awareness of the FD
- Lack of/difficulty in gathering information on the prisoner's family, social and work background
- Excessive length of the procedure
- Lack of cooperation from foreign judicial authorities
- Lack of mutual trust between national authorities
- Poor quality of the activity of the judicial authorities involved (e.g. accuracy of the certificate)
- Difficulty in identifying the competent foreign authorities
- Lack of cooperation from local prison staff
- Unreliability of information provided by the prisoner
- Inadequate selection of cases actually deserving attention

Through the aforementioned online survey, we asked practitioners how problematic these issues were for the full implementation of FD 2008/909/JHA. The answers to this question provided us with insights into the individual priorities when approaching a case. The results revealed extensive concerns over the difficulties in gathering information on the prisoner's family, social and work background, followed by the excessive length of the procedure. The third most pressing criticism was the lack of cooperation from the foreign judicial authorities.¹¹ Conversely, the less important obstacles for practitioners were the unreliability of information provided by the prisoner and the inadequate selection of cases actually deserving attention.

An open question of the survey asking if there were other obstacles to the full effectiveness of the FD allowed us to validate the reliability of the proposed shortcomings and to discover unidentified problems to be further explored. Most of the answers to this question revealed that the practical obstacles to transfers were already outlined in the previous question. In other cases, this question was used to illustrate the aforementioned shortcomings with details and also to add the following problems:

- The lack of knowledge of the prison situation and the laws of the executing countries
- The critical intersection between the European Arrest Warrant (EAW) and FD 2008/909/JHA

¹¹ The differences regarding the priority of the shortcomings is very slight between the countries: in Italy, the perceived main problem was the excessive length of the procedure, followed by the difficulties in gathering information on the prisoner's social ties and the lack of mutual trust between the national authorities. For Spain, the main obstacles were the lack of knowledge and awareness of the Framework Decision and the difficulties in gathering information on the prisoner's social context, followed by the excessive length of the procedure. In Romania, the main shortcoming was also the lack of knowledge and awareness of the Framework Decision, followed by the lack of cooperation from foreign judicial authorities and, thirdly, difficulties in gathering information on the prisoner's family, social background, etc.

- Fragmentation of legal orders, decentralisation, lack of a clear distribution of powers and lack of communication between different authorities of the same countries
 - Lack of clear guidelines (to understand and to complete the certificate, to adapt the sentence, etc.)
 - Lack of involvement of the penitentiary authorities
 - Insufficient staff/excessive workload
 - Lack of consent of the detainee/refusal to execute the sentence (in Romania)
 - Overlap with other legal instruments, such as the possibility of serving probation in one's own country and deportation (in Spain)

The research identified two main areas of shortcomings: one related to national issues, i.e. the implementation of the FD in the specific Member States, the other related to cooperation issues. The two areas are connected, particularly as some of the national issues turn into obstacles to cooperation.

Several national issues were identified. The most significant were: the lack of knowledge and awareness of the FD by the different players, including the need for a precise distribution of powers; the fragmentation of legal orders; the decentralisation of the competent authorities and the lack of communication between different national authorities; the lack of knowledge of detention conditions and laws of executing countries; the limited involvement of penitentiary authorities.

These types of issue can usually be resolved with more information, training and new organisational solutions.

The most significant national issue is the lack of knowledge, which is often the primary reason for other shortcomings.¹² This lack of knowledge is not only an issue of the competent authorities at local level, but also of lawyers and detainees. Lawyers are almost always absent in the execution phase and the majority of them are not familiar with the procedure and do not support detainees in their path towards cross-border transfer. The level of knowledge of detainees is also limited. In 2014, the Italian prison administration carried out a mapping of 'transferable' detainees, also obtaining their opinion on a possible transfer. For Italy, this initiative was a way of boosting an increasing number of procedures, but the quality of information given to detainees was generally poor. However, the initial mapping helped to spread information on the existence of the possibility of being transferred to the Member State of origin.

This does not seem to be the case in Spain.

In Spain, a recent directive of the General Secretariat of Penitentiary Insti-

¹² It is worth mentioning that the lack of competence and specialization is not referred to the authorities at central level.

tutions (I-03/2019)¹³ on foreign inmates established that social workers must give to foreign detainees an information leaflet within a maximum period of 5 days from their entry to prison. This leaflet should contain all relevant information on the different possibilities available for applying for a transfer in order to continue the sentence in the country of origin. In the case of the Catalan Prison Service (the penitentiary administration in charge of executing criminal sentences in Catalonia) a 2019 notice was also issued by the Secretary of penal measures, rehabilitation and attention to victims by the Government of Catalonia (notice 2/2019)¹⁴ which states that the person able to serve the sentence in another State must be informed of this possibility. The notice also establishes the requirements for the procedure and the documentation that must be sent to the penitentiary surveillance judge (the competent authority for issuing the transfer). As these measures are relatively new, we are unable to assess their outcome in terms of greater involvement by the penitentiary authorities in the procedure.

The lack of knowledge of authorities is a mixed issue. In some countries, for instance, in Italy, it is connected to difficulties in dealing with ordinary workloads. Transfer procedures generally involve additional work for offices that are already understaffed; this certainly requires a better organisational solution.

The degree of decentralisation of the authorities¹⁵ that take relevant decisions is a further technical issue related to the implementation of the FD. In Italy, the decision is taken by the competent prosecutor at territorial level, under Article 658 or Article 665 of the Italian Criminal Procedure Code, depending on the circumstances. In Spain, the certificate could be issued by both the sentencing judges and the prison supervision judges; in practice, though, these decisions are mostly made by the latter. This means that hundreds of judicial authorities are involved in issuing the certificate, with a lack of specialisation and also an unclear attribution of responsibilities. The issue of fragmentation of competence is closely related to the fragmentation of national legal orders, which is still a hurdle making it difficult for the local courts and prosecution offices to be aware of and to become familiar with foreign legal systems, for the purposes of transfer procedures.

Moreover, the split of powers makes the issue of proper training and knowledge of the procedure crucial for guaranteeing smooth cooperation. For exam-

¹³ Its name in Spanish is '*Normas generales sobre internos extranjeros*'. Available at: http://www.institucionpenitenciaria.es/web/export/sites/default/datos/descargables/instruccionesCirculares/I_3-2019-Extranjeros.pdf

¹⁴ Its name in Catalan is: '*Circular 2/2019, sobre estrangeria als centres penitenciaris de Catalunya*'. Available at: http://justicia.gencat.cat/web/.content/home/ambits/reinsercio_i_serveis_peni/serveis_peni_tenciaris/instruccions_i_circulars/circulars/circular-2-2019.pdf

¹⁵ See A. Neira-Pena in this book.

ple, the lack of expertise at local courts level involves a huge waste of time in drafting the documentation.

For instance, in the case of multiple sentences, the Romanian authorities require the parties to submit one certificate for each sentence, for the purposes of its formal recognition, on an individual basis. The issuing authorities should then provide a summary of the certificates, aimed at clarifying the overall accumulation of punishments. It often happens that the authorities competent for issuing the certificates are not fully aware of the rules and practices of another Member State, Romania in this case, and this results in the certificates being sent back and forth between the issuing and executing States, due to incompleteness.

The involvement of prison authorities in the process could be very helpful for overcoming some of the obstacles, also due to the identified lack of knowledge. Prison officers or social workers have direct access to the prisoners or easier ways of collecting information regarding their family, work and social ties in the country of origin or in the country where the person was convicted (which is very difficult for judges or prosecutors to obtain) and they are aware of the more convenient possibilities for the social rehabilitation of detainees. Although the FD does not mention the involvement of prison authorities in transfers, at national level, this may be solved by a change in the national law, or even only in practices.

The obstacles to smooth cooperation relate to the variable mutual trust between foreign authorities and differences in the legal cultures (Nelken, 2001; Engle Merry 2010). Some Member States take a more pragmatic approach: the transfer procedure is almost entirely an administrative procedure where communications between the countries occur very easily by e-mail and the recognition of the judgment is carried out without formalities through an official letter. No right to appeal is guaranteed to the detainees. This is the case in the Netherlands. Other Member States take a more rights-based approach: the procedure is entirely judicial, the communications are more formal, the detainees are given more opportunity to oppose a transfer but the procedure is often very lengthy.

The Netherlands, as is clear from the Spanish data, adopts a very pragmatic and efficient approach which facilitates the transfer (and deportation) and which is also driven by the national policy on detention, to avoid, by any means, overcrowding.

The failure to achieve mutual trust (see, on the challenges of mutual trust, Sicurella 2018, Persak 2014) between the countries is certainly the biggest shortcoming for the implementation of any judicial cooperation measure. There may need to be a trade-off between efficiency and a rights-based approach to recognition. On one hand, a high degree of pragmatism risks resulting in a huge re-

duction of the rights of detainees while, on the other hand, a more formal approach risks resulting in a tedious procedure, which fails to achieve the aim of the transfer even in cases where the detainee clearly favours the transfer.

The differences in terms of legal cultures emerge from these different approaches, along with the predominance of the unilateral agenda of the Member States.

The cooperation between Romania and Italy is also a good example of the complex relationship between willingness to cooperate and trust. On 29 April 2015, Italy and Romania signed a Memorandum of Understanding (MoU). This MoU aims to deal with a number of problems that have surfaced over time, relating to the transfer of sentenced persons. Above all, the most important issues concern the difficulty of obtaining additional information from the issuing State, delays due to translation issues and the response times by the competent authorities of the two States, the lack of clarity of the documents sent by Italian authorities, the incomplete completion of the certificate, and difficulties related to the identification of the person to be transferred.

In other words, Italy and Romania resort to *ad hoc* bilateral cooperation mechanisms to overcome issues arising in the wake of the implementation of the FD. Quite interestingly, it seems that the MoU has not been crucial in solving the outlined issues, as a further demonstration that legal obligations do not necessarily enhance mutual cooperation. Instead, mutual trust is a process that cannot be imposed by law or by additional bilateral rules. Mutual recognition reveals that - despite the legal differences - the criminal system of the other country is reliable and aims towards the same common purpose, i.e. the social rehabilitation of the detainee.

The crisis of mutual trust emerges precisely when the Member State is guided by its own agenda and priorities, which intertwine with the purpose of the FD. In the cooperation between Italy and Romania the common problem of prison overcrowding deteriorates the mutual trust between the two Member States.

On one side, Italy pushes for the transfer of Romanian prisoners to Romania irrespective of the relations with the country with the aim of reducing overcrowding in Italy and, on the other side, bureaucratic obstacles may be put in place to avoid the transfer to Romania, which risks definitively hampering mutual trust.

Other issues relate to the costs and time needed for translating the sentence, as well as the critical intersection between the EAW and FD 909 and the overlapping between the return procedure and FD 909. All these issues have been analysed in other chapters of the book.¹⁶

¹⁶On the EAW see A. Rosanò, on deportation see J.A. Brandariz García, in this book.

5. Conclusions

This chapter has focused on the implementation of cross-border transfers of EU detainees and their functioning in practice. The rules always depend on both legal and extra-legal factors and, in the transfer of detainees, the distance between “law in the books” and “law in action” is increasingly significant.

As has been shown in this chapter, the features of the transposition process of the FD in Italy, Spain and Romania provide a better understanding of the approach towards and expectations of each Member State in relation to this European legal instrument which is very insightful for contextualising its implementation in relation to the national agendas.

According to the available data, over recent years there have been some clear advances in the implementation of transfers, in Italy and Spain as issuing countries and in Romania as executing state. However, it seems that in both Italy and Spain the number of transfers has almost reached its inherent peak, at around one hundred transfers per year. This is a very low number compared with the prison population that could, at least in theory, benefit from this procedure. Major shortcomings hamper its more extensive implementation.

Based on our fieldwork, we have identified multiple shortcomings to the implementation of the FD, which could be systematised as national issues and cooperation issues. The first relate to national adaptation to the FD as it differs according to the distribution of powers established by the transposition law, the structure and resources of the judicial system, and the commitment and awareness of the different players in prison transfers. The second kind of obstacle relates to cooperation issues, including the lack of permanent mutual trust in the foreign authorities and differences related to the legal culture of the different EU countries. These issues are translated into a set of more practical problems related to requirements concerning documentation, official communications, language obstacles, etc., all of which contribute to increasing the length of a procedure initially conceived as expedited and simplified. The critical intersection and overlapping of the FD 909 with other EU instruments, such as EAW or the return procedure, also implies a cooperation problem.

Each obstacle requires a different approach. National issues could easily be improved through training and organisational solutions at national and local level. However, cooperation shortcomings pose deeper challenges. It is a fact that there are different legal cultures in the different EU Member States, but effective cooperation in criminal matters and the creation of a European space of justice, liberty and security requires a further standardisation of legal procedures. Mutual trust needs to be strengthened with clearer mutual objectives. Mutual trust is a process that cannot be imposed by law, organisational measures or more training. It is the result of a process of mutual recognition of reliability.

The national agenda and priorities of the different countries regarding, for instance, the situation of their own prison system or the return of unwanted migrants, constitute major shortcomings for mutual trust. Besides, the unequal application of the FD, due to the different forms of transposition, institutional reasons or the amount of resources allocated to the implementation of this instrument, leads to discriminatory treatment of EU citizens in the different countries, but also within the same country. The commitment of Member States to the social rehabilitation of detainees - the main objective of their transfer - as a common purpose should become a guideline for the functioning of this instrument which could provide the necessary equal treatment of citizens and foreigners in EU prisons and mutual trust in the field of criminal cooperation.