Building Mutual Trust through Operational Cooperation in the Context of Transfers of Prisoners under the Framework Decision 2008/909/JHA: EU Patterns and Domestic Strategies Beyond Formal Implementation

Building Mutual Trust through Operational Cooperation in the Context of Transfers of Prisoners under the Framework Decision 2008/909/JHA: EU Patterns and Domestic Strategies Beyond Formal Implementation

Stefano Montaldo and Alessandro Rosanò*

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1. Introduction.

The chapter focuses on Framework Decision 2008/909/JHA (FD) on the transfer of sentenced persons in the EU and on the main challenges connected to its implementation across the EU[1].

This FD established a new approach to the transfer of prisoners among the Member States of the EU. As it is for many other EU acts concerning judicial cooperation in criminal matters, it replaced the intergovernmental footprint of a pre-existing Convention of the Council of Europe. In fact, the 1983 Convention on the Transfer of Sentenced Persons had received little attention and its limited application had proven to be unsatisfactory, mainly because of its lengthy and cumbersome formalities[2]. Therefore, FD 2008/909/JHA introduced an advanced mechanism of judicial cooperation, based on the paramount principles of mutual trust between national judicial authorities and of mutual recognition of foreign judicial decisions.

In broad terms, the procedure laid down by this instrument is centered on the golden rule of EU judicial cooperation in criminal matters, namely the duty on the part of the receiving authority to recognize and enforce the request for transfer issued abroad. As such, the mechanism obliterates the role of the political branch,

* Stefano Montaldo, Assistant Professor of EU Law, University of Turin: stefano.montaldo@unito.it; Alessandro Rosanò, Post-Doc Fellow in EU law, University of Turin: alessandro.rosano@unito.it.

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[1] Council FD 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, in OJ L 327, 5.12.2008, p. 27.

[2] J.-C. Froment, Les avatars de la Convention sur le transfèrement de détenus en Europe, in J. Ceré, ed., *Panorama européen de la prison* (Paris: L'Harmattan, 2002), p. 33.

minimizes unnecessary formalities and speeds up the procedure, mainly by imposing strict deadlines for issuing a decision on recognition. In addition, the FD reiterates two major recurring features of EU legislation in this domain: the abolition of the double criminality check in relation to a list of serious offences[3] and the provision of an exhaustive list of optional grounds for denying recognition[4].

However, notwithstanding the initial ambitions, ten years after its adoption this instrument is still stuck at the level of a promising young player showing auspicious potential for the years to come. Its practical application by the national judicial authorities is unsatisfactory[5], although it is slowly increasing on a yearly basis, at least in some Member States[6]. The unexplored potential of transfer procedures has led to a very limited body of EU and national case law and has further fed the silence of legal scholars, who have devoted little attention to this FD so far, despite its remarkable theoretical knots.

This state of the art is the outcome of several converging factors. Firstly, the implementation of the FD was belated in many Member States, most of which did not comply with the transposition deadline of December 2011[7].

Secondly, the wording of this act was the result of 3 long years of heated negotiations within the Council. The imminent entry into force of the Lisbon Treaty was actually the most effective boost to reach an agreement, with a view to adopt the proposed act before the eradication of the third pillar, thus preserving its intergovernmental nature[8]. This final rush led to inevitable compromises affecting the internal coherence[9] and the conceptual accuracy of the act. On the one hand, according to the wording of the FD, transfer procedures must be directed to favour the sentenced person's social rehabilitation[10]; on the other hand, a closer look unveils the managerial ambitions of the States, which are keen to add this procedure to the list of tools allowing for forms of control over and removal of unwanted EU migrants. The notion itself of social rehabilitation is far from clear and its elusiveness further blurs the scope and content of the duties of cooperation incumbent upon the issuing and the executing Member States.

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[3] See Art. 7.

[4] Art. 9.

[5] European Union Agency for Fundamental Rights, Criminal Detention and Alternatives: Fundamental Rights Aspects in EU Cross-Border Transfers (2016), available at https://fra.europa.eu/en/publication/2016/criminal-detention-and-alternatives-fundamental-rights-aspects-eu-cross-border (accessed 17 June 2019).

[6] Europris, Framework Decision 909 - Reports, https://www.europris.org/topics/framework-decision-909 (accessed 17 June 2019).

[7] See *infra*, para. 2.

[8] V. Mitsilegas, The Third wave of Third Pillar Law, in *European Law Review* 34 (2009), p. 523

[9] A. Martufi, Assessing the Resilience of 'Social Rehabilitation' as a Rationale for Transfer: A Commentary on the Aims of Framework Decision 2008/909/JHA, in *New Journal of European Criminal Law* 9 (2018), pp. 49-51.

[10] See Recitals 8 and 9 and Art. 3(1) of the FD.

Thirdly, FD 2008/909/JHA covers the criminal execution phase, which is one of the most delicate aspects of inter-State judicial cooperation procedures. The enforcement of a conviction is still nowadays perceived as a secret garden of the Member States, where the process of Europeanization of penal justice faces exclusive national competences. The limited room for EU intervention entails the absence of harmonization measures and a subsequent high degree of fragmentation of domestic legal orders, for instance in terms of variety of penitentiary benefits, alternatives to detention and related measures pursuing the goal of enhancing the inmate's chances of a fruitful resocialization after conviction. Moreover, it has shaped the transfer mechanisms accordingly, by leading - *inter alia* - to a prominent role of the issuing authority as to the actual post-transfer regime the prisoner will be subject to[11].

Be it as it may, at the present stage several substantive and procedural hurdles pose stumbling blocks to the full effectiveness of this FD, from both quantitative (number of transfers) and qualitative (genuine attempt to pursue social rehabilitation goals) perspectives. Beyond mere effectiveness-centered arguments, this fragmented and magmatic context urges broader reflections on the actual grip of mutual recognition mechanisms. This is even more evident in an area where elusive notions of EU law, opposing theleological priorities and complex interrelationships between the quest for coherence at the supranational level and national legal fragmentation represent a favourable breeding ground for the many facets of the dark sides of mutual trust: mutual distrust, mutual mistrust, or even just a lack of confidence on the feasibility and usefulness of judicial cooperation procedures.

In this scenario, while waiting for several national laws of implementation to be fully incorporated into the daily toolbox of the domestic judicial authorities, a closer look at the varied practice of the national judicial and governmental authorities could be a promising source of inspiration and - hopefully - solutions.

As a matter of fact, mutual trust and mutual recognition are not confined in the realm of general principles. Harmonization of national laws has traditionally constituted their complementary half, but it is not an all-encompassing explanation of the inherent nature and functioning of judicial cooperation mechanisms across the Union. Instead, their fate is also driven by the silent engine of formal and informal operational cooperation between national police and judicial authorities. A varied set of tools facilitates everyday cooperation, by easing closer contacts with involved domestic authorities and contributing to reaching the goals set forth in the acts concerning the application of mutual recognition to given categories of judicial decisions. This is particularly true in those fields where no harmonization measures have been adopted at the EU level,

[11] See *infra*, para. 4.1.

as it is for the criminal execution phase, including - for the purposes of the present analysis - the scope of application of FD 2008/909/JHA.

Building on this broader context, this chapter considers how operational cooperation can amount to becoming a powerful fuel for mutual trust and mutual recognition, in particular in relation to cross-border transfers of prisoners.

In order to do so, the analysis considers operational cooperation in broad terms, as an *ensemble* of rules and practices stemming from both EU law and national legal orders. In fact, the formal operational mechanisms established at the EU level are complemented by an extremely varied plethora of instruments and strategies developed by the domestic authorities, which contribute to the actual functioning of judicial cooperation mechanisms. The importance of this multifaceted undergrowth of measures in securing - or at least increasing - the effectiveness of EU law has been often neglected by legal scholars and calls for further attention.

To this respect, this chapter builds on the study carried out in the framework of the EU funded research project RePers - Mutual Trust and Social Rehabilitation into Practice (2017-2019). The project focuses on the tools developed in Italy, Romania and Spain with a view to overcome the obstacles that hamper the application of FD 2008/909/JHA[12]. In fact, Italy, Romania and Spain represent a promising test-bed for an assessment of the advances and shortcomings of transfer procedures, for two main reasons. Firstly, their prison systems are characterized by the highest rate of inmates who are foreign nationals of other Member States, which entails remarkable quantitative opportunities for resorting to transfer procedures. Secondly, various converging factors - in particular those referring to the difficult situation of national penitentiary systems - have led these Member States to develop advanced strategies for enhancing the application of FD 2008/909/JHA.

The chapter firstly provides an overview of the general features of the FD 2008/909/JHA and of the state of the art concerning its implementation at the national level. Secondly, the analysis considers how the specific distribution of powers and responsibilities between the issuing and the executing authorities influences the whole mechanism of judicial cooperation and triggers reactions at the national level, with a view to secure the effective application of the FD. In particular, the chapter builds on the theories which explain the structure of the EU policy and normative cycle in a multilayer context - namely the theories of Europeanization and domestication - in order to contend that the Member States' compliance with the EU pattern does not only depend on the adoption of adequate and formal implementation measures. Instead, a paramount role is played by a diversified set of measures, practices and strategies beyond the mere duty of implementation of EU secondary law and aiming at adapting domestic legal and

[12] See www.eurehabilitation.unito.it. The research consortium carried out on-line surveys, interviews to key practitioners, mutual learning meeting among selected experts and quantitative and qualitative data analysis.

institutional scenarios to the challenge of cross-border judicial cooperation. These formal and informal solutions often involve basically operational tools, which can be considered the silent (but powerful) engines of mutual trust and mutual recognition. The analysis will specifically focus on the reasons why these mechanisms are important in the domain of prisoners' transfers.
Thirdly, the chapter applies this background to selected features of the above mentioned selected case studies - namely Italy, Romania and Spain - and provides an overview of the main strategies developed by the governmental and judicial authorities to cope with the challenges raised by transfer procedures.

2. Framework Decision 2008/909/JHA and its main provisions.

The Programme of measures to implement the principle of mutual recognition of decisions in criminal matters[13] insisted on the need to re-evaluate the existing mechanisms of judicial cooperation related to final decisions on custodial sentences. The intention was to possibly replace those procedures with more advanced ones, that would lead to the application of the principle of mutual recognition to the transfer of sentenced persons between the Member States[14].
Considering these aspects of the Programme, Austria, Finland and Sweden proposed the adoption of a FD[15]. The idea was to introduce a new judicial cooperation instrument, called the European enforcement order. The issuing of an order by the authorities of a Member State would have allowed the execution of a custodial sentence or another measure limiting personal liberty in another Member State. More specifically, the proposal identified the executing Member State as any Member State of which the sentenced person was a national or where that person resided legally on a permanent basis or with which the convict had other close links. Only in the latter case, the consent of the sentenced person was mandatory for the transfer to take place, while a mere right to express the personal opinion was envisaged in all other situations.
Despite some difficulties due to the opposition expressed by Poland[16] related to the high number of Polish inmates serving their sentence in the prisons of the other Member States[17], a compromise text was eventually approved by the Council and FD 2008/909/JHA came into force on 5 December 2008.

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[13] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, in *OJ C 12, 15.1.2001, 10.*
[14] Measure no. 14 and measure no. 16.
[15] Initiative of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden with a view to adopting a Council FD on the European enforcement order and the transfer of sentenced persons between Member States of the European Union, in *OJ C 150, 21.6.2005, 1.*
[16] Council of the European Union, *Press release. 2768th Council Meeting. Justice and Home Affairs*, Brussels, 4-5 December 2006, C / 06/341, 15801/06, 11.
[17] Council of the European Union, *Press release. 2781st Council Meeting. Justice and Home Affairs*, Brussels, 15 February 2007, C / 07/16, 5922/07, 10.

Within its scope of application, the FD replaces the European Convention on the transfer of sentenced persons of 1983 and its Additional Protocol of 1997, the Convention on the International Validity of Repressive Judgments of 1970, the relevant provisions of the Convention implementing the Schengen Agreement and the Convention between the Member States of the Communities States on the Enforcement of Foreign Criminal Sentences of 1991.

On the one hand, the purpose of this act is to speed up the transfers of prisoners between EU Member States, through a judicial cooperation mechanism that does not rest on the consent of either the sentenced person or the national governments (recitals 4 and 5). On the other hand, the FD should facilitate the sentenced persons' social reintegration, by allowing them to serve part of their sentence in a State with which they have significant family, linguistic, cultural, social, economic and other links.[18] The whole mechanism should respect the fundamental rights of the sentenced person (and the constitutional rules of the Member States relating to due process, freedom of association, freedom of the press and freedom of expression in other media.[19]

For the purposes of the transfer, the final judgment is transmitted by the authorities identified as competent by the issuing State to those of the Member State of nationality of the sentenced person, or the Member State of nationality where they will be deported or any other Member State that consents to the forwarding of the judgment (Article 4, paragraph 1)[20]. The judgment is forwarded together with a certificate[21], translated into the official language or one of the official languages of the executing State, that provides all the relevant information concerning the convict and his/her opinion, the offence, the length of the sentence, the decision on the case and the issuing authority (Article 22 (1)[22]. Another distinctive aspect is that the sentenced person's consent is needed unless the judgment is forwarded to the Member State of nationality in which they live or to

[18] Recital 9, Article 3(1) and Article 4(6).

[19] Recitals 13 and 14 and Article 3(4).

[20] It is easy to see that the notion of executing State in the FD differs from the one adopted in the proposal, as the permanent legal residence and the other links are not taken into account.

[21] The certificate contains a number of information that must be provided by the issuing State to the executing State, relating, *inter alia*, to the court that issued the sentence, the date of the decision and the date on which it became final., the sentenced person, the link between them and the executing State, the offence, the sentence, and the opinion of the sentenced person.

[22] As for the languages chosen by the Member States, it should be noted that some indicated not only their official one(s), but other languages as well. This is the case of Belgium (Dutch, French, German, and English), the Czech Republic (Czech and Slovak), Finland (Finnish, Swedish, and English), Croatia (Croatian and English), Luxembourg (French, English, and German)), Malta (Maltese and English), the Netherlands (Dutch and English) and Slovenia (Slovenian and English). In this regard, see *Commission Staff Working Document Tables "State of play" and "Declarations" accompanying the document Decisions from the Commission to the European Parliament and the Council of the Member States of the Framework Decisions 2008/909 / JHA, 2008/947 / JHA and 2009/829 / JHA on the mutual recognition of judicial decisions measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervisory measures as an alternative to provisional detention*, 5 February 2014, SWD (2014) 34 final).

which they will be deported or the Member State to which he has fled or returned before the conclusion of the proceedings pending against them or following the conviction in the issuing State. In any case, the sentenced person has the right to express his / her opinion regarding the transfer and the authority of the issuing State must take this into account when deciding whether or not to transfer him/her. Furthermore, this opinion must be forwarded to the executing State (Article 6).

Article 9 provides an exhaustive list of grounds for optional refusal of recognition. For instance, the recognition and the execution may be refused where the certificate is incomplete or does not correspond to the judgment, the criteria for forwarding the judgment and the certificate to the executing Member State are not met, the enforcement of the sentence would be contrary to the principle of *ne bis in idem* or the rule on the abolition of the double criminality requirement applies.

Partial recognition and execution are allowed (Article 10) and the recognition may be postponed should the certificate be incomplete or non-correspondent to the judgment (Article 11).

The competent authority of the executing State is allowed to adapt the foreign decision with regard to the duration or nature of the sentence, in order to align them with national law. In any case, the adapted sentence cannot aggravate the sentenced passed in the issuing State (Article 8).

Exception made for the case of postponement, the decision must be recognised as soon as possible and, in any case, within ninety days from the reception of the judgment and the certificate (Article 12 (1) and (2)).

The transfer takes place no later than 30 days after the final decision on the recognition (Article 15 (1)). Should it require the transit through the territory of other Member States, their authorities must be informed and must send a notice to the issuing State regarding their intention to prosecute or detain the sentenced person for offences committed or sentences imposed in their territory (Article 16(1)(2)(3)).

As we will consider more in-depth in the next paragraph, the enforcement of the sentence is governed by the law of the executing State, including the grounds for early or conditional release (Article 17(1) and 3)).

The Member States were supposed to comply with the FD by 5 December 2011 (Article 27). In its report of 2014 regarding the state of implementation of the FD, the Commission highlighted that only five states – namely, Denmark, Finland, Italy, Luxembourg, and the United Kingdom – had transposed it in time. Other thirteen had done so when the deadline had already expired, while ten had failed to communicate their implementation measures[23]. For its part, the Commission

[23] European Commission, Report on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, 5 February 2014, COM(2014) 57 final.

highlighted a number of issues arising from the practice of the national authorities. More specifically, the European Commission complained that the sentenced person is not always informed as to the start of the transfer procedure. As a consequence, he/she cannot provide a personal opinion[24]. Furthermore, the Commission criticized the choice made by some States to expand the conditions for the adaptation the sentence, to introduce new grounds for refusal or to make some of the existing ones optional[25]. Finally, the Commission underlined that some States had not set a deadline for national courts to decide on the appeals against the transfer decision[26]. Therefore, the Commission expressed some dissatisfaction, urging the Member States to fully and consistently transpose the FD[27].

Scholars have pointed out three main criticalities, namely the lack of a definition of the concept of social reintegration, the failure to provide deadlines regarding the procedure in the issuing State and the failure to provide an obligation for the issuing State to inform the sentenced person of the conditions of detention in the executing State[28].

These concerns point at the divide between the formal aims of the FD - enhancing mutual trust and social rehabilitation - and law in action. It has been highlighted that the primary interest of the Member States is to reduce the costs related to the detention of foreigners and to get a rid of unwanted Union citizens[29].

3. Mutual trust and mutual recognition in the EU multi-layer policy cycle: from theory to practice.

Existing literature concerning EU governance has been very often concerned with the sword of Damocles hanging over the Member States, in the form of the duty to timely and properly transpose EU law in the national legal orders. From a complementary perspective, legal scholars have extensively discussed the nature, the functioning and the effectiveness of the remedies through which the EU oversees compliance with its law in the national arena, with a focus on infringement proceedings (Arts 258-260 TFEU) and of the so-called indirect use of preliminary references under Art. 267 TFEU.

In both cases, these studies have analysed the processes of EU law implementation and enforcement at the domestic level mainly from a top-down perspective, through the lenses of the conformance implementation model.

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[24] *Ibid*., 7.
[25] *Ibid*., 8-9.
[26] *Ibid*., 10.
[27] *Ibid*., 12.
[28] See I. Durnescu et al., *Obstacles and Solutions in the implementation of the FD 2008/909/JHA*, February 2016, available on http://steps2.europris.org/wp-content/uploads/2016/07/Annex-4.6.-Workstream-1-Obstacles-and-Solutions-in-the-implementation-of-the-FD-2008909JHA.pdf
[29] M. Pleić, *Challenges in Cross-border Transfer of Prisoners: EU Framework and Croatian Perspective*, in D. Duić, T. Petrašević, *EU Law in Context – Adjustment to Membership and Challenges of the Enlargement*, Osijek, 2018, 380.

According to this approach, compliance refers to the formal coherence between intended and achieved outcomes, that is to say between EU centrally steered rules and the formal measures adopted at the domestic level[30]. It follows that, from this point of view, a key-indicator for assessing a Member State's degree compliance is the degree through which the centrally decided blueprint is implemented from top to bottom. More specifically, with regard to the European Union, the conformance model is conceptualized as the EU's influence over domestic choices in a given policy area and has therefore been labeled as Europeanization of national legal orders[31].

However, the top-down analysis of the Member States' formal compliance with EU law suffers from inherent limits, since it depicts only a small piece of a multicolor twisting Rubik's Cube, where various and continuously evolving implementation and enforcement strategies converge towards the attainment of shared policy outcomes. The latest evidence of EU governance studies shows that the predominant Europeanization perspective wipes out that implementation and enforcement are acts of interpretation, where discretion and flexibility within the multilevel structure are essential factors for enhancing the Member States' performance. Indeed, the outcomes of the complex EU policy and normative cycles largely depend on the domestic authorities' reactions to centrally-steered rules.

Therefore, recent studies have analyzed the multi-layer normative cycle of the Union from the angle of a reversed research approach, namely the performance implementation model. This model aims at looking beyond formal national performances and tries to capture the complexity and the high degree of interstitial differentiation hiding behind the *prima facie* similarities of national measures of implementation of EU law[32]. These ramifications refer to the process of so-called domestication, which entails adaptations of EU footprints to the specific features of national legal orders and of the political arenas. Domestication processes often lead the domestic authorities to non-prescribed or non-recommended policy options going beyond formal compliance, thus unveiling the structural lack of knowledge on the actual patterns and practices of the Member States when transposing EU law and enforcing it.

As the first studies on selected branches of Union policies demonstrate, clearer understanding of the rationale underpinning national measures, as well as of the

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[30] E.G. HEIDBREDER, *Strategy in multilevel policy implementation: moving beyond the limited focus on compliance*, in *Journal of European Public policy*, 2017, p. 1367.

[31] J. Jans, R. de Lange, S. Prechal, R. Widdershoven (eds), Europeanisation of Public Law, 2007, Groningen: Europa Law Publishing.

[32] E. Thoman, F. Sager, Moving beyond legal compliance: Innovative approaches to EU multilevel implementation, in Journal of European Public Policy, 2017, p. 1253.

problem-solving capacity of the domestic authorities is a key-factor for ensuring the effective application of EU law.[33]

This logic is even more compelling when the exercise of criminal law enforcement powers is at stake. In fact, the division of competences between the Union and the Member States places the domestic authorities at the forefront of EU law implementation. This inevitable direct relationship is a distinctive feature of the constitutional structure of the Union, and has modeled the EU system of judicial cooperation in criminal matters accordingly. Actually, the principles of mutual trust and mutual recognition heavily rely on the Member States' reactions for securing the effective implementation and application of relevant EU secondary law. The golden and quasi-absolute duty of recognizing and executing foreign judicial decisions takes the shape of common procedures which get a rid of unnecessary formalities, in particular when compared to purely intergovernmental instruments of mutual legal assistance. From this perspective, mutual recognition - and more specifically the ensuing procedural simplification - is a key-trigger for cross-border cooperation, but faces two major challenges, namely the strict limits to EU competences and legal differentiation at the domestic level. The pressure deriving from these challenges varies greatly, basically depending on the scope of the judicial cooperation mechanism concerned and the area of criminal law or the stage of the criminal proceedings it applies to. In fact, the stricter the constrains to EU law are, the more important it is to pre-determine a proper balance between the respective responsibilities of the issuing and executing judicial authorities, thereby minimizing the risk of centrifugal forces and departures from mutual trust underlying legal fragmentation. It follows that, even within the domain of judicial cooperation in criminal matters, mutual recognition allows for a certain degree of flexibility and differentiation as to its actual functioning and implementation at the national level. Therefore, provided that the minimum common procedural denominator set forth by the Union is complied with, this inherently variable approach offers leeway to domestic authorities for establishing specific patterns for the application of EU law. The strategies and priorities of domestication can become a powerful silent engine of judicial cooperation mechanisms.

The case of FD 2008/909/JHA is particularly illustrative in this regard, as it covers the national exclusive competence on the criminal execution phase, where fragmentation of procedural and penitentiary regimes reaches its peak. The basic assumption of judicial cooperation in criminal matters across the Union is that execution of a foreign decision is entrusted to the law of the executing State, in the light of the principles of sovereignty and territoriality. However, the issuing authority usually retains certain powers, ranging from light equivalence checks to

[33] C. Knill, J. Tosun, Governance institutions and policy implementation in the European Union, in J. Richardson (ed.), Constructing A Policy-Making State? Policy Dynamics in the EU, Oxford: Oxford University Press, p. 309.

more stringent controls over the activity of the executing authority. For instance, some Framework Decisions and Directives stipulate that specific aspects of the legal order of the country of origin have to be respected even in the territory of the executing State[34]. Moreover, if the fragmentation of national legal orders blocks the execution of a foreign decision, the receiving authority will be endowed with the power to adjust that decision, in order to reconcile it with its legal order[35]. Such adaptations mitigate the automaticity of the judicial cooperation mechanisms and may incisively modify the nature and consequences of the decision concerned. Therefore, they are usually made conditional upon strict requirements, out of which the consent of the issuing State plays a prominent role.

From this point of view, the FD 2008/909/JHA implements the principle of mutual recognition through a peculiar distribution of competences between the issuing and the executing authorities. At the time of the negotiations preceding the adoption of this act, the comparative analysis of the relevant national laws highlighted a considerable variety of means to enforce sentences and of alternatives to imprisonment. The level of minimum and maximum penalties, prison regimes and prison conditions also revealed major differences. Therefore, the wording of the FD was directly influenced by the need to avoid conflicts and to build mutual trust in (almost) unexplored areas of criminal procedural law.

In comparison to other similar instruments, the issuing authority enjoys a wider margin of intervention as to the outcomes of the cooperation mechanism, in particular with regard to the forwarding of the certificate and to its withdrawal.

Firstly, this authority must be satisfied that enforcement of the sentence abroad will enhance the prisoner's chances of social rehabilitation and is entitled to exercise a power of veto to this respect.[36] Still, as it will be considered further, the actual scope of such resocialization purposes is far from clear, due to both the elusive nature of this notion and the emergence of opposing national priorities, such as the strive for decreasing the prison population and hidden ambitions of transferring to other Member States the burden of unwanted EU migrants.

The role of the issuing judicial authority is further amplified by the interpretation of the first paragraph of Art. 17 of the FD given by the Court of Justice in *Ognyanov II*[37]. This provision endows the executing authority with the primary and sole responsibility for governing the enforcement of the sentence issued abroad. Nonetheless, it is more than likely that the enforcement has already

[34] For instance, pursuant to Art. 9(3) FD 2005/214/JHA, the financial penalties issued against legal persons must be recognized and enforced even if the executing State criminal liability does not apply to such entities.

[35] FD 2009/829/JHA on the European supervision order stipulates that if the supervision measure is incompatible with the law of the executing State, "the competent authority in that Member State may adapt them in line with the types of supervision measures which apply, under the law of the executing State, to equivalent offences". In any event, the adjusted measured shall not be more severe than the original one.

[36] See Art. 4(2) and (4) of the FD.

[37] Court of Justice, judgment of 8 November 2016, case C-554/14, *Ognyanov*.

commenced in the issuing Member State before the judicial cooperation mechanism is completed, or even prior to the very first steps of the procedure in the issuing State itself. Therefore, the second paragraph urges the executing authority to deduct the deprivation of liberty already served in another Member State from the total duration of the sentence. Then, the key-question was whether this deduction should include an analysis - and the subsequent necessary substantive assessment - of both the enforcement regime of the issuing Member State and the facts occurred during the first phase of enforcement in order to quantify the post-transfer remaining period of detention. The Court considered that the FD wards off any overlap of competences: the cross-border enforcement of a sentence is the outcome of the separate but complementary efforts of the authorities involved[38]. It followed that the notion of enforcement under Art. 17 refers only to imprisonment - *id est* enforcement of the sentence - in the executing State and to the related legal regime[39]. As a consequence, in the event of a more lenient regime in the executing State, any more favourable provision cannot operate retroactively. Instead, its scope of application is strictly limited to the enforcement within the territory of that State of destination, as all remissions in sentence connected to the pre-transfer enforcement are to be considered solely by the issuing authority. Having said that, the issuing authority strikes back through Art. 17(3), of the FD, which endows it with the discretionary power to withdraw the certificate when it does not agree with the executing State's rules on early or conditional release. Again, a *de facto* power of veto.

Territoriality and the automaticity of mutual recognition are in principle preserved, but the strengthened role of the domestic authorities further contributes to trigger national strategies intended to ease the application of this FD besides formal implementation measures.

4. Mutual trust and mutual recognition through formal and informal operational cooperation: the cases of Italy, Romania and Spain

The following subparagraphs are devoted to an overall analysis of the relevant Italian, Romanian and Spanish practice concerning FD 2008/909 and to the definition of a proper conceptual framework – namely, that of organized hypocrisy. The purpose is to point out the discrepancy between law in the books

[38] In this perspective, the AG Bot underlined the need to preserve the principle of territoriality in criminal law, which he considered an inherent expression of core aspects of national sovereignty, widely recognized by all Member States. Opinion of AG Bot, *Ognyanov*, cit., paras 79-81. The Court did not rest on this argument, at least *expressis verbis*, and preferred to lay out its line of reasoning based on the wording of the FD.

[39] It is interesting to point out that the wording of Art. 17, para. 1, FD corresponds in substance to Art. 9, para. 3, of the Convention on Transfers of Sentenced Persons of the Council of Europe of 1983. With regard to the territorial competence of the authorities involved, the scheme of the FD is patterned after the Convention at issue.

and law in action between the FD and its implementation from two perspectives: the alleged automaticity of the transfer mechanism and the aims it actually pursues.

4.1. The secret garden of the execution phase. Blind trust, informed trust, agreed trust.

As outlined above, the criminal execution phase is a remarkable example of legal fragmentation. Domestic legislations widely vary on various issues, ranging from the regime for remission or reduction of sentence to the nature and length of the sentence and the alternatives to detention. In principle, these differences should not affect mutual trust and do not amount to a ground for refusing recognition of a foreign decision. As repeatedly contended by the Court of Justice, judicial cooperation must take place regardless of the features of the domestic legal regime, even in the event of significant divergences, which would lead a given criminal case to a different outcome depending on the Member State responsible for it.[40] Moreover, the means to coordinate the respective legal orders provided by the FD 2008/909/JHA itself – the adaptation of the sentence first in line – are precisely meant to overcome legal discrepancies and neutralize their implications on mutual trust and mutual recognition.

Notwithstanding this settled theoretical background, legal fragmentation poses serious practical challenges to mutual trust. The research developed so far – which is actually in line with other empirical studies carried out in this domain and with the studies developed in the aftermath of the adoption of the first EU instruments implementing the principle of mutual recognition in criminal matters –[41] has revealed that divergences between national legislations is still nowadays capable of discouraging mutual confidence. The need to build trust, by increasing knowledge on the foreign criminal and procedural law, is a recurring refrain in the interviews that we have carried out during the RePers project. To some extent, mutual trust is deemed to be inherently and necessarily connected to the achievement of a prior and adequate level of awareness of those foreign rules which matter the most in a given case. Admittedly, this raises structural concerns on the actual grip of mutual recognition mechanisms as they are in principle designed, since it unveils the perception that a lack of information amounts to imposing to the executing authorities a duty of blind trust.

This creeping uneasiness with the law in the books of mutual trust has triggered some reactions at the national level. The experience of Italy and Romania provides some interesting insights on how operational flanking measures can facilitate cooperation. These two Member States have developed a significant practice in the field of prisoners' transfers, due to very practical reasons. Actually,

[40] Court of Justice, judgment of 9 March 2006, case C-436/04, *Van Esbroeck*, para. 30.

[41] See for instance the documents available at www.europris.org, referring to a variety of relevant EU-funded projects in this domain.

statistics show that Romanian nationals represent the largest community of EU migrants in Italy. Moreover, the average rate of Romanian inmates detained in Italian prisons is more than fifteen times higher than any other EU nationality, which means that the number of potential transferees towards Romania is exceptionally high.[42] Therefore, the bilateral relationship between these two Member States is particularly advanced and often involves Italy as a sending State. The number of transfers is accordingly high, if compared to the average flows of cases across Europe.[43]

Notwithstanding the vast bilateral experience, the analysis of the case files shows that the authorities of these Member States are inclined to pull the break of uniformed trust. In both States, the Ministries of Justice are central authorities transmitting and receiving all active and passive requests for transfer. Therefore, they took up responsibility for this situation, and, at a first stage, they decided to agree on some solutions that could be easily implemented. In particular, they agreed to prepare translated versions – along with a brief explanation – of key-provisions of the respective legal orders, mainly in relation to alternatives to detention and remission and reduction of sentences, to be included in or attached to the certificates. Moreover, they provided each other translated explanations on some recurring hurdles stemming from national procedural rules, such as Italian techniques of considering accumulation of several penalties or the set of judicial remedies available at the domestic level. Surprisingly enough, these efforts to strengthen what we might call an informed trust have always been conducted through bilateral contacts between the ministerial authorities, whereas no role has been apparently played by the judicial authorities that the EU law endows with coordination tasks and operational support, namely liason magistrates. Instead, the role of the liason magistrate has proven to be extremely successful in the framework of the relationship between Italy and Spain. The on-line survey and the interviews that we carried out demonstrate that these magistrates are the main reference point for any potential obstacle or request for clarification regarding how the procedure works at the domestic level. This is probably due to the different institutional setting. According to its national law of implementation, Spain opted for a highly decentralized model of managing judicial cooperation with other Member States, minimizing the role of the national and the Catalonian governmental authorities, while Italy and Romania have reserved a key-coordination role to their central authorities.

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[42] On 30 June 2019, the Romanian inmates were 2509. The second largest EU prison population is Poland, with 150 prisoners detained in Italy. Updated statistics can be accessed at https://www.giustizia.it/giustizia/it/mg_1_14_1.page;jsessionid=cDT9PfEQJ2kH78mz8e7HN2+5?contentId=SST199188&previsiousPage=mg_1_14.

[43] On the basis of the data analysis made by the RePers research group, 324 transfers to Romania have been performed between 2015 and the first semester of 2018. In the same period, the second highest number of transfers has involved Spain, with 49 procedures.

In any event, the ever-increasing flow of cases between Italy and Romania – along with the ensuing criticalities – brought the central authorities to move a step further. In 2015, they decided to launch a round of bilateral negotiations, which eventually led them to sign an informal agreement, called memorandum of understanding between Italy and Romania on the application of FD 2008/909/JHA. This memorandum builds on a previous bilateral agreement between Italy and Romania, signed in 2005 and entered into force on 11 April 2006. That agreement was meant to facilitate intergovernmental cooperation in a pre-FD 2008/909/JHA legal scenario and followed on the concerns of a massive inflow of Romanian nationals to Italy in the aftermath of the imminent accession of Romania to the EU. In accordance with Art. 26(2) and (4) of the FD, Italy made a declaration pointing out its will to continue to apply the agreement at issue, as long as it facilitated further the procedures for the enforcement of custodial sentences. However, at the time of transposition in Romania, by law 300 of 15 November 2013, the government did not notify the intention to continue to rely on the existing bilateral agreement. This urged a reconsideration of the bilateral relationship with Italy and eventually led to the new memorandum of understanding, even though the Italian law on the execution of the bilateral treaty of 2006 is still formally in force. The legal basis for the new text is Art. 26(3) FD, which allows the Member States to conclude "bilateral or multilateral agreements or arrangements after 5 December 2008 in so far as such agreements or arrangements allow the provisions of this FD to be extended or enlarged and help to simplify or facilitate further the procedures for the enforcement of sentences". The memorandum itself was later updated in 2017, following a second round of negotiations. However, this revised version has never been formally signed by the parties, to such an extent that the Romanian authorities deem negotiations to be still pending.[44] Although it might appear a bilateral international agreement concluded in a simplified form (actually, it has been formally signed by the Ministries of Justice of the parties, but not ratified), the memorandum of understanding is deemed to provide mere soft guidance in the implementation of the FD. Basically, it is a collection of best practices and solutions which Italy and Romania agreed on to face shared and recurring challenges when dealing with transfer procedures.

Regardless of its legal nature, the memorandum of understanding is a clear example of how proper implementation of EU law - in specific cases - can trigger the problem-solving capacity of the Member States and urge initiatives which go well-beyond the formal activity of transposition. To be honest, from a purely EU law perspective the signing of this document could raise concerns, on two main grounds. Firstly, it reiterates a primarily intergovernmental approach to judicial

[44] This position was reported by the representatives of the Romanian Ministry of Justice on the occasion of a trilateral meeting among experts from Italy, Romania and Spain, held in Bucharest in October 2018, in the framework of the RePers project.

cooperation, where mutual trust is not conceived as a key-premises of the whole mechanism, rather a consequence of a prior negotiation. If we look at this document from a systemic perspective, it can amount to threatening mutual trust as a general principle of EU law, because of its centrifugal potential. In fact, if this approach was to be expanded to other areas of judicial cooperation or replicated by other Member States, we would experience a structural shift from informed trust - which is actually provided for and to a certain extent urged by EU law, as all relevant secondary legislation allow for direct contacts and exchange of information between the domestic judicial authorities involved - to agreed trust, which means conditioned and inherently limited trust.

Secondly, even though the FD provides a specific legal basis, the signing of this memorandum marks a departure from the ordinary schemes and methods of implementation of EU Directives and Framework Decisions. It fragments implementation into as many pieces as the specific cases of bilateral inter-State relationships (allegedly) deserving measures *ad hoc* are. Again, if we consider this practiced from a general point of view, it can be highly critical, as neither the Commission was involved, nor the memorandum was communicated and shared with this institution. By the means of a memorandum, the parties may introduce new conditions and constraints to mutual trust and mutual recognition or depart from the expected EU pattern, without any control. In fact, it is for the parties to establish whether the bilateral arrangement actually facilitates judicial cooperation, which does not necessarily mean that it secures the full effectiveness of the FD. In principle, from a domestic perspective, an additional condition for performing a transfer could be considered in line with Art. 26(3) FD, because it fades away the national judicial authorities' mistrust or distrust, even though it makes a transfer procedure more complicated. An illustrative example of this dynamic is the Romanian approach to the translation of the Italian judicial custodial sentences attached to the certificate. As agreed in the memorandum of understanding, the Romanian authorities always ask for a translation of such a judicial decision in its entirety, regardless of the wording of the FD. In fact, Art. 23(3) provides three limits to unnecessary translations. First, the Member State concerned must notify the Council of its will to allow its judicial authorities to seek for a translated version of the custodial sentence. Second, in any event, this translation can be requested only after consultations and in cases when the certificate is not enough to decide on the enforcement of a sentence. Lastly, the translation must be limited to the essential parts of the judicial decision at issue. Any departure from these criteria adds unnecessary formalities and burdens to mutual trust and mutual recognition, thereby raising serious concerns as to its actual compatibility with the FD and the general principles judicial cooperation is modeled upon.

As a final remark, the memorandum under consideration lacks procedural and substantive transparency. On the one hand, it is not clear how negotiations were

held, who took part in them and under which circumstances this document can be amended. On the other hand, both the Ministries of Justice involved acknowledge the existence of this memorandum, whereas the text is not publicly available. Limited hints on its content can be derived from some circular letters issued by the Italian Ministry of Justice and addressed to the national judicial authorities.[45] These circular letters are available on-line, but then again they only make indirect references to the original document. The lack of accountability can be highly critical in this domain, because a transfer impacts a prisoner (and his/her family)'s life heavily and calls for appropriate safeguards and remedies, in particular in relation to the evaluation of the prospects of social rehabilitation carried out by the authorities involved. Informality and secrecy of the overall approach to a cross-border transfers are likely to undermine individual guarantees.

4.2. The aim of the Framework Decision and the organized hypocrisy of the national legislatures and governments

Complex structures such as international organizations and States are usually assessed in light of the outcome of their action, such as a UN Security Council resolution or a law passed by a national parliament. At the same time, the social context in which these entities perform their activities is not irrelevant, as it requires those outcomes to be consistent with the political, economic, cultural interests expressed by that context. Nonetheless, the social context of reference is never uniform and, therefore, it cannot express just one relevant interest.

As a consequence, the coexistence of different and often conflicting interests decouples the organization of the above-mentioned structures. On the one hand, one can identify a formal organization, whose purpose is to keep up appearances that all the interests have been taken into account and held in adequate consideration; on the other hand, there is an informal organization, whose activity aims at achieving only the most prominent interest or limited set of interests.

This situation has been labelled organized hypocrisy. Despite what the word hypocrisy might suggest, the existing literature on the topic does not interpret it in a negative way. As a matter of fact, it is not endowed with moral connotations, rather with an empirical essence. Therefore, organized hypocrisy is not blameworthy, because it must be interpreted as the only model of organization that makes it possible for these complex structures to exist and work.

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[45] The text of the circular letters is available (in Italian) at https://www.giustizia.it/giustizia/it/mg_1_8.page?viewcat=csdc_tipologia2. For a comment see V. Ferraris, *L'implementazione del d.lgs. 161/2010 sul reciproco riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento*, in *La Legislazione Penale*, 2019, available at http://www.lalegislazionepenale.eu/limplementazione-del-d-lgs-161-2010-sul-reciproco-riconoscimento-delle-sentenze-di-condanna-a-pena-detentiva-un-caso-di-doppio-fallimento-valeria-ferraris/.

This conceptual framework has already been applied in relation to the action of the European Union and of its Member States in order to blame them for some inconsistencies in their action, which is not consistent with the reference model. For instance, the inability of the Union to fully apply its export control rules and the choice of several national governments to favour the trade of weapons with Libya, despite the actions of the regime of Muhammar Gaddafi were in clear contrast with their basic values, has been criticized for prioritizing mere economic gain.[46] Other scholars have highlighted the existing conflict between the EU's rhetoric regarding sea rescue missions and its actions, the primary aim of which is to strengthen the control over maritime borders and to combat illegal immigration.[47] More generally, concerns have been raised on the divide between the aspiration to ensure protection for migrants and the practices aimed at preventing or, in any case, making the access to the EU very difficult.[48]

This conceptual framework can be extended to judicial cooperation in criminal matters and, properly, the transfer of prisoners. Some legal scholars have underlined that FD 2008/909/JHA leaves aside the rhetoric of social reintegration and rather aims at removing unwanted subjects from the national territory or containing the costs related to the detention of foreign citizens.[49] Others have stressed that the rehabilitative function could be countered by the will of the prisoners to request the transfer in order only to get a reduction in the duration of the sentence in the executing State.[50]

The analysis of Italian, Romanian and Spanish practice seems to confirm these concerns. While the FD refers to social rehabilitation several times and the national implementing laws reflect this clear-cut approach, several factors unveil the hypocrisy underpinning the multi-layer normative cycle on prisoners' transfer. Firstly, the wording of the FD has remained *de facto* dead letter. Taking into consideration the national laws of transposition, it has not lead to the establishment of neither a tool to assess the opportunities of social reintegration, nor a mechanism to analyze the effectiveness of reintegration. Therefore, on the one hand, all the three legal orders considered fail to provide an adequate *ex ante* activity to establish if and how likely the reintegration of the detainee through its

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[46] S.T. Hansen, N. Marsh, *Normative power and organized hypocrisy: European Union member states arms export to Libya*, in *European Security*, 2015, pp. 264-286.

[47] E. Cusumano, *Migrant rescue as organized hypocrisy: EU maritime missions offshore Libya between humanitarianism and border control*, in *Cooperation and Conflict*, 2018, pp. 1-22.

[48] S. Lavenex, *"Failing Forward" Towards Which Europe? Organized Hypocrisy in the Common European Asylum System*, in *Journal of Common Market Studies*, 2018, pp. 1195-1212.

[49] See Pleić (n 29). For a detailed analysis of the procedure for cross-border transfers and the empowerment of offenders' rehabilitation see S. Montaldo, *Offenders' rehabilitation and the cross-border transfer of prisoners and persons subject to probation measures and alternative sanctions: a stress test for EU judicial cooperation in criminal matters*, in *Revista Brasileira de Direito Processual Penal*, 2019, pp. 925-960.

[50] See Dornescu et al. (n 28).

transfer might be; on the other hand, there is no way to check whether or not the purpose of reintegration has been achieved.

Secondly, many interviews confirm that the governmental authorities' main ambition is actually to use transfer procedures for alternative purposes, such as getting rid of unwanted migrants and mitigating prison overcrowding. The Italian case is striking in this regard. At the time of the expiry of the implementation deadline, Italy was under the scrutiny of the European Court of Human Rights, due to a series of applications complaining on the degrading detention conditions the prisoners were subject to in many prisons. This contributed to put pressure on the Government, which managed to transpose the FD in time. In the Italian experience, it was the first timely implementation of an act concerning judicial cooperation in criminal matters. Since then, it has remained the sole one.

In addition, the negotiations of the above-mentioned Memorandum of Understanding were urged by the Italian Ministry of Justice, due to the specific interest of increasing the number of transfers to Romania, the Member State of nationality of the largest group of EU prisoners in Italy. In the same vein, as from 2015, the Ministry of Justice launched regular screenings of the prison population, with a view to identify potential transferees. The prison administration was asked to spread a form among the detainees, to inform them of the possibility of being transferred and to collect their opinion. The problem with this initiative - which is still ongoing on a yearly basis - is that all cases where the prisoner expressed his/her (usually uniformed and vague) consent were sent to the competent prosecution office and later processed by the central authority. This unselective approach is illustrative of the governmental priorities and has caused several shortcomings. It has led to an overload of procedures, most of which have ended in nothing, because of factors such as the limited length of the sentence remaining to be served, the dissent later on expressed by the prisoner, the negative assessment of the actual chances of social rehabilitation on the part of the Romanian authorities, which often declined recognition.

Thirdly, the lack of instruments for assessing the chances of social rehabilitation particularly affects the activity of the judicial authorities involved. Their scrutiny is usually conducted on the basis of generic and not carefully verified assumptions, such as the knowledge of the language of the host State, the presence of family links, past work experiences. The analysis of the case files has shows that underestimation of the prisoner's situation is a recurring feature, to the detriment of individualization of punishment, which is meant to be a key-premises for a successful path of social rehabilitation. To some extent, this finds an explanation in the survey and the interviews, because many judicial authorities point out that they lack adequate tools and resources (ranging from time to the actual availability of evidence) either to support the prisoner's statements or to better understand his/her economic, social and family context. In particular, they complain that they can only perform a negative assessment, which means that

they can only ascertain the absence of grounds for preventing the filing of a request for transfer.[51]

These three circumstances seem to confirm the coexistence of different and conflicting interests related to the implementation and application of the FD. The purpose of transferring sentenced persons from a Member State to another should lie in the social rehabilitation of these individuals. However, at least as far as the Italian, Romanian and Spanish cases, social rehabilitation is taken only into very limited account and seems to play a role only on paper. The practice related to the FD proves that the Member States may be able to use it in order to achieve some different prevailing objectives. Considering the Italian case, one should consider how the Italian authorities have transposed and applied the FD in order to tackle the issues concerning prison overcrowding.

In the light of the organized-hypocrisy conceptual framework, the Member States' choice to implement the FD for the (different) reasons they deem to be important can be formally acceptable. From a legal (and a political) point of view, provided that the EU pattern is complied with formally, nothing could prevent them from misconceiving the rationale of the FD. However, the unclear – where not neglected – status of social rehabilitation of the sentenced persons hampers its role. Therefore, it is now regarded as a general purpose to which only limited practical outcome can be attached.

5. Concluding remarks.

FD 2008/909 has allowed the EU legislature to replace the preexisting the Convention on the transfer of sentenced persons. In the relations between the Member States of the European Union, the intergovernmental footprint of the 1983 Convention has left room to a new model based on the principle of mutual recognition of foreign decisions in criminal matters.

This change should have made to transfer convicts between the Member States easier and faster, by pursuing at the same time the social rehabilitation of the sentenced persons. However, the practice and the strategies developed by the national authorities with a view to implement this mechanism raise criticism, both from a quantitative and a qualitative points of view.

[51] Notwithstanding these structural deficiencies, operational cooperation instruments can sort out to be effective ways out of current blocks. This is confirmed by the Spanish experience. There, the judicial authorities tasked with a transfer procedure usually resort to available EU databases and to direct contacts between police forces to identify possible positive elements and evidence on the future prospects of social rehabilitation abroad. These include, for instance, searches on the ownership of registered movable or immovable properties and the prisoner's marital status. Once again, operational tools provide effective solutions to the potential flaws of general mutual recognition procedures.

While the number of transfers is slowly increasing, the domestication process of FD 2008/909 has led to some dubious policies that ensure formal compliance with the supranational obligations, but nevertheless do not seem to be consistent with the purpose of the FD and with the ambition of a quasi-automatic judicial cooperation mechanism. As demonstrated by the practice of some Member States such as Italy, the mechanism set up by the FD has triggered domestic strategies to prioritise different objectives from the one of social rehabilitation, namely to address the problem of prison overcrowding. This is not forbidden by EU law, and the conceptual framework of organized hypocrisy helps understand this phenomenon, but it raises a number of questions regarding the actual grip of mutual trust and the role that social rehabilitation may actually play when it comes to the application of the national laws of implementation. It is contended that the misconception of the objectives underpinning FD 2008/909 affects a genuine approach to the principle of mutual trust. It favours a unilateral approach to judicial this cooperation mechanism, whereby the national authorities aim at disposing of unwanted prisoners, rather than cooperating for the benefit of the individual and towards achieving a higher level of security in the Area of Freedom, Security and Justice.