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Contents

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Special Issue

Unwanted Citizens of EU Member States and Their Forced Returns within the European Union

Witold Klaus, Agnieszka Martynowicz

Introduction: Unwanted Citizens of EU Member States and Their Forced Returns within the European Union 5

José A. Brandariz

The Removal of EU Nationals: An Unaccounted Dimension of the European Deportation Apparatus 13

Sandra Mantu, Paul Minderhoud, Carolus Grütters

Legal Approaches to 'Unwanted' EU Citizens in the Netherlands 35

Sanna Elfving, Aleksandra Marcinkowska

Imagining the Impossible? Fears of Deportation and the Barriers to Obtaining EU Settled Status in the UK 55

Agnieszka Radziwinowiczówna, Aleksandra Galasińska

'The Vile Eastern European': Ideology of Deportability in the Brexit Media Discourse 75

Witold Klaus, Justyna Włodarczyk-Madejska, Dominik Wzorek

In the Pursuit of Justice: (Ab)Use of the European Arrest Warrant in the Polish Criminal Justice System 95

Maryla Klajn

The Forced Returns of Polish Citizens: Cross-Border Transfers on the Polish–German Border in the Context of the Discretionary Powers of the Border Guards 119

Special Series

Migration Processes and Policies in Central and Eastern European Countries

Zuzanna Brunarska, Mikhail Denisenko

Russia: A 'Hidden' Migration Transition and a Winding Road towards a Mature Immigration Country? 143

Introduction: Unwanted Citizens of EU Member States and Their Forced Returns within the European Union

Witold Klaus*, Agnieszka Martynowicz**

Introduction

Governments of countries of the Global North often segregate migrants into three main groups: welcomed and accepted (mostly high-skilled specialists or those who are wealthy); ‘tolerable’ because their work is needed by the host country (skilled or unskilled workers) and unwanted. The third category is fluid and its ‘membership’ can change according to need, convenience and time; the selection is often based on the current immigration policy priorities of different states. In most cases, the third group consists of asylum-seekers, refugees and undocumented migrants (Aas 2011; Carling 2011; Kmak 2015). However, in recent years much focus has also been placed on the categorisation ‘unwanted’ as applied to people who have been othered by societies (in either the ‘host’ country or the ‘country of origin’) and are perceived as a ‘burden’ to society itself and/or to the welfare systems of various states. In the European Union, on which this Special Issue focuses, the latter categorisation and subsequent enforcement of removals within its borders often targets the Roma community (van Baar, Ivasiuc and Kreide 2019). Another targeted group consists of migrants with criminal records – those who commit a crime on the territory of the host country. As Mantu and Minderhood (in this issue) observe, ‘poverty, ethnicity and criminality are common elements on which unwantedness is constructed in public and political discourse’. It is these aspects of ‘unwantedness’ that the articles in this Special Issue consider in detail.

EU citizens exercising ‘free movement’ rights within the European Union enjoy, at least in theory, more protection from deportation or other forms of forced removal from and between EU members states¹ than third-country nationals. In practice, however, while EU Directives on freedom of movement and residence give its citizens privileges of mobility within the Union, they also – paradoxically, perhaps – expand the grounds on which exclusion can take place, as we discuss briefly below. EU citizens within the Union are subjected to the same processes of segregation as those described above and a growing number are forced to return to their countries of origin. In the UK, just to give one example, in the year

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after the Brexit referendum in June 2016, the number of removals of EU citizens increased by 20 per cent, with the overall number of EU nationals returned from the UK to their countries of origin reaching just over 5,300 in 2017 (Blinder 2017; Home Office 2017). In fact, since 2006 the UK government invested considerable resources in speeding up deportations (Kaufman 2015; Martynowicz 2016). However, this phenomenon is not limited to the UK; as Brandariz (in this issue) notes, it is widespread throughout most of the Western European countries. There, deportations and administrative removals often target citizens of the Central and Eastern European member states (see also Klajn in this issue). Even when the Covid-19 pandemic caused a complete lockdown in the spring of 2020, followed by the closure of borders within the EU, deportations and other removals did not stop and, for this purpose, the borders remained open.²

Removals are enforced regardless of the length of residence on the territory of the 'host' country. In many cases, it is enough that – at some point – the migrants have become *othered* by the host society or its government as non-belonging or 'dangerous'. Notions such as the 'abuse of [Treaty] rights' as a legal ground for expulsion under EU Directives can translate into harsh exclusionary state practices, exemplified in recent years by the UK's drive to remove hundreds of homeless EU citizens, despite the fact that many of them were economically active tax-payers and, as such, were meeting the threshold for legal residence on UK's territory (see, for example, BBC 2018). Other grounds for expulsion (such as the public policy grounds outlined in the EU Free Movement Directive³) are equally problematic in their elusive nature and are open to wide-ranging interpretations by the different EU member states. In the most recent and, perhaps, the most telling example thus far of the power of public policy over European freedom of movement, it was this exception that permitted the closure of internal borders by EU states in response to the Covid-19 pandemic (Marin 2020). Ironically, however, and as mentioned above, it has not stopped individuals being transferred across borders for the purposes of deportation.

Finally, the threat of deportation and/or removal can result from changes to the EU membership of the country of residence – a situation potentially faced by thousands of EU citizens living in the post-Brexit UK. As Marcinkowska and Elfving explain in their contribution to this issue, some residents are then placed at risk of being illegalised – deprived of their former legal residence due to administrative or legislative requirements imposed by new immigration policies. In the UK's case, EU citizens currently face such a risk as the result of the introduction (post-Brexit referendum) of an application process for leave to remain. The requirement for a new residence status applies to EU citizens regardless of the length of time in which they have lived in the country and regardless of how long they have enjoyed their prior lawful residence. While the deportation/removal and post-deportation/removal experiences of individuals sent to countries outside the EU are increasingly being documented (see, for example, De Genova and Peutz 2010; Khosravi 2018; Macías-Rojas 2016; Vathi and King 2017), less attention has been paid to EU nationals removed to other EU member states; this Special Issue therefore aims to fill the gap in our understanding of this intra-EU forced mobility.

The intra-EU deportation of European citizens fits perfectly into a broader picture of deportation processes that have been present in the Global North for a few decades now and which increasingly gain the interest of governments as well as academic researchers. These processes have been described by several scholars and are known by different terms: the 'deportation machine' (Campesi 2015; Fekete 2005), the 'deportation regime' (De Genova and Peutz 2010) or the 'deportation corridor' (Drotbohm and Hasselberg 2015) – to name just a few. One of the latest theoretical approaches in deportation studies that summarises well previous ideas while adding a theoretical rationale to them is Barak Kalir's notion of 'departheid' (Kalir 2019). The concept combines different aspects of processes present in de-

portation: the unwantedness of certain groups of immigrants, the exploitation and dehumanisation connected with several restrictions imposed on migrant mobility and the violence deeply rooted in this phenomenon – both physical and symbolic. These processes are present in law, its procedures, public institutions and in the very idea of deportation and begin at the entry to the country (and sometimes even before that moment, as borders have proliferated far beyond physical ones and far beyond Europe). Additionally, *departheid* exposes White supremacy and superiority as a pivotal element of this phenomenon, as it ‘morally rests on a fantasy that justifies or simply naturalizes a sense of entitlement among White people in relation to racialized mobile subjects’ (Kalir 2019: 27). This entitlement, accordingly, includes the power to interrupt someone’s life and expel them from the country which is not ‘theirs’.

With this in mind, one could ask how the concept of *departheid* could be used to understand and explain intra-EU deportation processes. After all, are we not talking mostly about White Europeans being removed to their ‘countries of origin’? There is substantive evidence in the contributions to this issue that the mechanisms of deportation and the administrative removal of EU citizens are applied discriminately and that they are targeted – even if not primarily, then definitely disproportionately – at citizens of the ‘new’ members states from Eastern Europe (see the data provided in the contribution to this issue by Brandariz). Many of those who are targeted are what Kalwant Bhopal (2018) defined as ‘Not White Enough’ and not easily fitting Western European (stereotyped) ideals. The notion of whiteness here is not connected to the colour of the skin; instead – like the concept of ‘race’ in general – it is a relational social construct, created and recreated within social relationships and aimed at exclusion, the maintenance of power and the reproduction of inequalities (Webster 2008). Recently, the differential ‘Whiteness’ is also an attribute attached to people of immigrant origin, no matter their ethnicity. Thus, the very concept of Whiteness is disputable as it has many shades: some (citizens of host countries) are ‘whiter’ than others – usually immigrants. Historically, the attributes of ‘less Whiteness’ were attached to particular groups – for example, the Jewish people or the Irish people in Britain or the US in the twentieth century.⁴ In particular circumstances, their presence was tolerated but perceived with suspicion (Hillyard 1993). ‘White’ migrants can enter Western countries because of their *whiteness* and, in the context of EU free movement, they are often chosen over people from other parts of the world (people of colour), as migration policy has always been highly racialised. However, this does not mean that they are treated as equals to the citizens of the ‘host’ state. While differences between the ‘host’ and ‘migrant’ groups are not necessarily visible at first sight, they are created artificially and they are still there, underlying exclusionary practices of institutionalised racism and xenophobia, now being hidden behind the seemingly neutral term of ‘culture’ (Fox, Moroşanu and Szilassy 2012; Webster 2008).

To understand how the process of differentiation of ‘cultures’ and reference to the ‘peculiarities’ of Eastern Europeans has developed we need to go back to the Enlightenment, when the notion of ‘The East’ was created in opposition to ‘The West’; it was only then that the idea of Eastern Europe was invented (Wolff 1994). This process, which began in the eighteenth century, resulted in the exclusion of Eastern Europe from the so-called cultural and civilised world; Eastern Europe was ‘orientalised’ but as ‘a close orient’ or a place in between ‘the civilisation and savages’. While historical, this concept seems to be embedded in Western societies’ minds, still very much alive and applicable to the inhabitants of (and coming from) that region. The change throughout the ages was that, while in the eighteenth and nineteenth centuries Eastern Europe was treated as a matter of Western curiosity although with a certain type of kindness, at the beginning of the twenty-first century (and especially since the consecutive

enlargements of the EU in 2004 and 2007), citizens from those countries began to be perceived as ‘invaders’ of the West. Consequently, they have been othered as people who do not belong, as uncivilised strangers who could pose a threat. As Sara Ahmed (2000: 49, emphasis in the original) pointed out,

Strangers are not simply those who are not already known in this dwelling, but those who are, in their very proximity, already recognised as not belonging, as being out of place. Hence we recognise such strangers, the ones who are distant, only when they are close by; the strangers come to be seen as figures (with linguistic and bodily integrity) when they have entered the spaces we call ‘home’.

The processes of stereotypisation and racialisation occurs throughout society and the media plays an inherent and profound role in them (Fox *et al.* 2012; Radziwinowiczówna and Galasińska in this issue). These processes – and the media within them – narrow down people’s identities and their lives as members of one group are all seen through the same lens by using ethno-national labels (Modood 2013). One of the side effects of the cultural racism rooted in public institutions is ascribing specific habits, practices or norms (usually undesirable) and contempt by society to particular group(s), thus rendering them undesirable. This is one way of othering of members of that group, differentiating them from ‘proper’, ‘healthy’, ‘civilised’ society. Court rooms and other places where legal norms are applied are not immune to such processes. Immigrants, especially from Eastern European countries, are identified not by the colour of their skin but by their ‘strange-sounding’ names and are then being labelled by common ascriptions (stereotypically) attached to the nationally or regionally defined group to which they belong (Aliverti 2018). However, even within this group (Eastern European) prejudice is not distributed equally, as some Eastern European nationals are treated with more suspicion than others, especially in the criminal justice system; as academic evidence shows, this is particularly the case with Romanian nationals (Aliverti 2018; Brouwer, van der Woude, and van der Leun 2018; Fox *et al.* 2012).

It is important to stress at this point that deportations and administrative removals are not the only reasons why EU nationals are regularly and forcibly moved across national borders. Many are transferred on foot of the European Arrest Warrant (EAW) proceedings,⁵ which remain under-researched, at least in deportation or migration studies. The EAW was created as one of the first elements of the common EU criminal justice system and was framed in the public debate as a tool for protection against terrorists or other serious criminals (Klimek 2015). There is very clear evidence, however, of an expansionist use of the EAW by certain countries since its introduction in 2002. This has led Klaus, Włodarczyk-Madejska and Wzorek (in this issue) to conclude that it is highly questionable whether it should be used as an instrument of justice. In one example, the authors point to the fact that Polish authorities (responsible for a third of all warrants issued in the EU) used to seek extraditions with respect to offences committed in Poland and targeted mostly at perpetrators of relatively minor offences – something that represents the net-widening effect of the EAW and may contribute to the perception of Polish people as ‘dangerous’ and ‘criminal’. In extreme cases, the warrants issued against Polish citizens in the UK included, for example, exceeding a credit card limit or a theft of a wheelbarrow (House of Commons 2013). Between 2004 and 2017, the Polish courts issued 38 815 EAWs (Ministry of Justice 2019; Klaus, Włodarczyk-Madejska and Wzorek in this issue), many of which were a source of anxiety and frustration for those subjected to the process (Martynowicz 2018). In the case of the deportation of EU citizens, the criminal law is deployed and used as an excuse to restrict or deprive them of their free-movement rights. As Mitsilegas (2018: 750) observes, ‘A conviction for a serious criminal offence leads to a presumption of dangerousness and a presumption of inability to integrate, which in turn limits – and ultimately negates – EU citizenship and the rights it entails’. The same broad principle, it seems, can be applied to

those moved across borders because of convictions in their ‘country of origin’, as is the case in EAW proceedings. As such, we submit that the latter should be treated as another element of the ever-growing deportation machine.

All the above-described processes raise a fundamental question for the notion of ‘community’ in the European Union: the issue of membership and of European citizenship. Certain rights are embedded in the latter and free movement on the EU territory is of the utmost importance in the exercise of EU citizenship rights. However, the freedom of movement is not absolute and the Court of Justice of the European Union (CJEU) opened the door for the intra-EU deportation of people with criminal records, depriving even long-term residents of the right to remain in their chosen country, in which they had built their lives (Kochenov and Pirker 2013). The notion of EU citizenship, as it was interpreted and shaped by the jurisprudence of the CJEU, began to be understood as being based mostly on the vague concept of ‘public security’ embedded in European Union treaties. In other words, the concrete rights of individuals (in this case a right to reside in the country) are now subordinated to the general rights of the community (in fact, what appears to be the supreme right) to be safe and secure from any, even *potential*, danger (Lemke 2014). This deprivation of rights of an individual is done on a presumption of a person’s dangerousness, based mostly on their previous deeds (crimes committed) and not on the real threat that they pose (Mancano 2018; Zedner 2010). As stated earlier in this introduction, this restriction of rights can also be the effect of not conforming to other norms (whether voluntarily or not) such as not sleeping rough.

All this leads to the creation of two distinctive categories of citizenship and of the rights connected to them – one for the law-abiding EU migrants who exercise all rights envisaged in EU law and the other, on the opposite site of the spectrum, for those who committed a crime or who, for whatever other reason, become ‘burdensome’ or non-conformist. Those in the latter category are, largely, denied their rights in the ‘host’ society regardless of how long they have lived there and how deeply their lives have been integrated into a society that many of them view as ‘home’, not as a ‘host’. This construct produces

a model of probationary citizenship where ideal types of individuals are opposed and divided by a thin line: on the one hand, the good, economically active, law-abiding citizen; on the other, the bad, unemployed, wrongdoer (Mancano 2018: 210).

The other side of the coin, entrenched in the notion of probationary citizenship, is that ‘there is no space for inclusion and “collectively dealing with the wrong”: the wrongdoers are still their (other states’) wrongdoers’ (Mancano 2018: 215). This assumes, for example, that the deportation of the person with a criminal conviction to the ‘home’ country engenders the responsibility of the ‘country of origin’ to deal with them even if any relationship between the two has not existed for years and the only link still remaining is that this person was born in this particular country.

So, the question is: Who is or should be responsible for an immigrant ‘wrongdoer’? In general, a community (defined as both people and place) has the obligation to care for its members – even the wrongdoers (Lemke 2014). Joseph Carens’ (2013) arguments regarding citizenship are applicable here. He stresses the right to be part of and to maintain membership of the community inside which a person lives. This right also extends to new members and immigrants – if someone has been a part of the community for a long time (approximately five years, in Carens’ view) – they have started to morally belong to this group (Carens 2013). This right should remain regardless of the behaviour of the member and includes the right not to be expelled from the community. This is because

[e]very political community has people who are involved in criminal activity and who create social problems. It seems only fair that a state should deal with its own problems, not try to foist them off on someplace else. (...) they are our problems, not someone else's, and we should be the ones who cope with them as we do with criminals who are citizens (Carens 2013: 105, emphasis in the original).

Unfortunately, this is not a way of understanding the 'community' that the EU leaders and CJEU judges are keen to agree upon.

The aim of this Special Issue is to consider all the challenges and practices outlined above and to analyse in depth the intra-EU forced expulsion processes while exposing the fact that these latter are not neutral in their application as they mostly target new citizens of the EU from CEE countries. We hope that the variety of perspectives represented in this issue – legal, criminological, sociological and anthropological – contribute to our understanding of intra-EU expulsion practices and their impact on those subjected to them and their families.

Notes

¹ Specifically, more stringent thresholds for removals are included in the EU Directive 2004/38 on the right of citizens of the Union and their family members to move and freely reside within the territory of EU members states (the EU Citizen's Directive).

² <https://www.theguardian.com/world/2020/may/07/home-office-charters-plane-to-deport-eu-citizens-despite-coronavirus-rules> (accessed: 28 June 2021).

³ Directive 2004/38/EC of the European Parliament and Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

⁴ This process also occurs within the host society, as the different classes separate themselves from one another, especially the upper and middle classes from the lower ones. These latter are sometimes called 'white trash' which shows perfectly a different kind of 'Whiteness', somehow less of it, that is ascribed to members of particular groups. In other words, we could say that the sense of Whiteness is connected to power and dominance in society (Webster 2008).

⁵ EU Council Framework Decision (2002/584/JHA) of 13 June 2002 on the European arrest warrant and the surrender procedure between member states.


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The Removal of EU Nationals: An Unaccounted Dimension of the European Deportation Apparatus

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In contrast to the apparently stringent EU legal regime, the deportation of EU nationals is a law enforcement device widely normalised in many European countries. Concerning deportation practices, the allegedly critical divide between EU citizens and third-country nationals does not seem to make much sense in practice for some – Eastern European – national groups. Initially, this paper explores the scope and scale of this increasingly salient component of the EU deportation system, by drawing on data supplied by national databases. Additionally, it examines why and how the deportation of EU nationals has gained traction across the European borderscape, a phenomenon that has much to do with rampant xeno-racist attitudes, widespread concerns over so-called ‘criminal aliens’ and, last but not at all least, the street-level management of poor populations and low-profile public order issues. Finally, this paper scrutinises the strength of institutional inertias in the management of enduringly subordinated – and racialised – Eastern European populations.

Keywords: deportation studies, EU citizens’ legal regime, deportation of EU nationals, EU enlargement, crimmigration

Introduction

This paper examines deportation practices¹ targeting European Union (hereinafter, EU) nationals (hereinafter, CRD deportations).² As will be seen next, these legal measures are apparently a minor component of the national deportation systems of EU and EFTA member states. EU law provisions that have been transposed into the legal orders of these European countries give them that minor role. In contrast to this apparent legal irrelevance, CRD deportations have, incidentally, made their way into public and political conversations in a number of European countries such as France (Eremenko, El Qadim and Steichen 2017), Italy (Clough Marinaro 2009), and the UK (Turnbull 2017) since the late 2000s.

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This paper aims to explore whether, to what extent and, especially, why CRD deportations have actually been gaining traction both in these jurisdictions and elsewhere across Europe. In addition, this paper scrutinises whether certain EU national groups are being particularly targeted by these deportation policies.

This exploration brings deportation studies into uncharted territory. Deportation studies are a relatively novel academic subfield (Coutin 2015). Despite its recent emergence, this field of research has gradually consolidated its specific contribution to the analysis of border control and migration law enforcement policies (see e.g. Anderson, Gibney and Paoletti 2013; De Genova and Peutz 2010; Gibney 2008; Kalir 2019). In this framework, ethnographic studies examining the dramatic consequences of deportation practices for deportees, their families and their communities (e.g. Drotbohm and Hasselberg 2015, 2018; Golash-Boza 2015; Khosravi 2018) have been particularly vital in cementing this burgeoning literature. However, CRD deportations have fallen under the radar of this markedly anthropological gaze (Könönen 2020), at least until very recently (see Vrăbiescu 2019a). Arguably, this gap is even more noteworthy in the field of border criminology (Bosworth 2016, 2017; Bosworth, Franko and Pickering 2018; Pickering, Bosworth and Franko 2015). Almost no comparative criminology analyses have been conducted on the scale and characteristics of deportation practices in various jurisdictions (although see Weber 2015). This research lacuna is further exacerbated in the case of CRD deportations, for reasons related to their legally and politically controversial nature. Thus, this paper aims to bridge a significant gap in cross-national conversations on immigration enforcement practices.

For these purposes, the paper begins by presenting the legal framework characterising CRD deportations as exceptional legal measures, as well as by describing the research methods used in this study. Next, it examines the scale of these migration law enforcement practices, by taking stock of a number of national databases, which are largely underexplored by the extant literature on deportation studies. Subsequently, in discussing the results of this exploration, the paper analyses the main drivers of the impulse of CRD deportations – not only their nexus with the growing concerns over so-called ‘criminal aliens’ but also the part they play more generally in the coercive management of unwanted EU national groups. To conclude, the article reflects on the significance of the 2000s enlargements of the EU in the field of return policies, as well as on the administrative inertias that have resulted in the handling of certain EU national groups as if they were third-country nationals (hereinafter, TCNs).

Methodological note

Three key research methods have been used to carry out this exploration. Initially, the legal perspective has been elaborated by relying on the analysis of both current legal provisions regulating CRD deportations and the corresponding case law. The results of this legal scrutiny are mainly presented in the next section, which is focused on the legal background. To explore whether these repatriation measures are exceptional not only in legal but also in empirical terms, a thorough analysis of a number of national databases has been carried out. This is the most innovative aspect of this study. In fact, the significant obstacles posed by this comparative analysis are arguably the main reason why it has not been carried out thus far. In contrast to data on forced returns targeting TCNs, no information on CRD deportations is currently published by international reports, elaborated by either EU institutions or any other supra-national body. This lacuna compels scholars to rely on data disclosed by various public institutions in some, but not all, European jurisdictions. In addition, these databases are frequently not published in English or in any other dominant European language – i.e. French or German. Thus, exploring the data presented in the next sections required locating and analysing official databases published in Dutch,

English, French, German, Greek, Italian, Norwegian and Spanish, which organise the available information following heterogeneous criteria. Finally, the analysis elaborated in the discussion and conclusion sections draws on the viewpoints of the border criminology literature examining CRD deportations and, especially, return policies focused on Eastern European nationals.

Legal framework: CRD deportations as an exceptional legal measure

The Directive 2008/115/EC of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals (hereinafter, Return Directive) cemented the critical role played by deportation orders in the governance of immigration within the EU. However, the EU features a markedly unbalanced deportation system, in which a small number of countries enforce the vast majority of removal orders, whilst many EU member states play a much less significant role in enforcing deportation policies. In fact, only 5 (the UK, Germany, Greece, France and Spain) out of the – up to February 2020 – 28 member states carried out roughly two-thirds (65 per cent) of the removals enforced in the EU from 2008 to 2019 (see Table 1).

Table 1. Deportations of TCNs enforced in the EU, 2008–2019

EU member state	Deportations (Total)	Deportations (%)	EU member state	Deportations (Total)	Deportations (%)
UK	581,705	22.2	Netherlands	113,415	4.3
Germany	347,815	13.3	Italy	71,575	2.7
Greece	337,355	12.9	Austria	70,080	2.7
France	221,380	8.5	Belgium	67,605	2.6
Spain	214,470	8.2	Others	295,100	11.3
Poland	159,310	6.1			
Sweden	138,545	5.3	TOTAL	2,618,355	100.0

Note: These deportation data show a slight correlation with the data on the number of undocumented immigrants detected from 2008 to 2019 (Eurostat: Asylum and managed migration data). Greece ranks first in this classification, followed by Germany, France, Spain and Hungary.

Source: Eurostat. Statistics on Asylum and Managed Migration (see Court of Justice of the European Union [hereinafter, CJEU] judgement in Case C-184/16 *Petrea* [2017], EU:C:2017:684).

These data only refer to the forced repatriation of TCNs, that is, non-EU citizens. Pursuant to Regulation (EC) No 862/2007 of 11 July 2007 on Community statistics on migration and international protection, Eurostat data on the enforcement of removal orders only focus on TCNs, eluding any reference to CRD return procedures. This legal statute unambiguously shows that the deportation of EU nationals has not ever been considered a crucial component of EU immigration enforcement policies. In fact, the most relevant EU law norms on repatriation measures, such as the Return Directive³ (Article 2) and the EU Commission's Return Handbook (Commission Recommendation (EU) 2017/2338 of 16 November 2017; section 1.1) are only applicable to the deportation of TCNs, not to that of EU citizens. This is unsurprising, since the meaning and goals of those return practices lie outside the realm of EU immigration policies.

From an EU law perspective, the forced return of EU nationals is understood as an exceptional limitation to the freedom-of-movement rights to which European citizens are entitled. As a manifestation of

this legal conception, this type of return procedure is regulated in the framework of the so-called Citizens' Rights Directive (Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States; Articles 14 and 27–33; hereinafter CRD). As far as EU primary law is concerned, both Article 45 of the Charter of Fundamental Rights of the EU and Article 20 of the Treaty on the Functioning of the EU (hereinafter, TFEU) set forth the right of EU citizens to freely move and reside within the Union's territory. In regulating this right, the CRD extends its prerogatives to designated EU nationals' family members.

Despite its legal nature as a fundamental right, the freedom of movement and residence is not an unconditional prerogative. On the contrary, CRD provisions allow EU member states to make the right of residence dependent on economic requirements, echoing legal conditions widely used in relation to TCNs. In fact, Articles 7 and 14 of the CRD set the legal basis for restricting this right to EU nationals who are considered both active members of the labour force and non-dependents on welfare benefits. As in any other directive, the extent of the leeway given by the CRD to Union member states is set by the corresponding national legislation. In addition, Chapter VI of the CRD regulates, as a restriction to both the right of entry and the right of residence, the deportation of EU nationals and their kin. As has been mentioned before, the exclusion of this type of forced return from the legal framework of the Return Directive is telling evidence of its exceptional character. In fact, CRD provisions contain more requirements and safeguards than the general provisions on return procedures (see Guild, Peers and Tomkin 2014; Queiroz 2018). When EU citizens are involved, deportation orders can only have standing on reasons of public policy and public security (Article 28(1) of the CRD; see Guild 2017) based on the personal conduct of an individual that 'must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' (Article 27(2) of the CRD).⁴ In addition, these deportation decisions can only be issued and enforced after having taken into account 'considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin' (Article 28(1) of the CRD).⁵ Likewise, the coercive removal of EU citizens who have the right of permanent residence can only be based 'on serious grounds' of public policy or public security (Article 28(2) of the CRD).⁶ Further, when the concerned EU citizen has either resided in the host member state for at least ten years or is underage, removal decisions can only be based on 'imperative grounds' of public security (Article 28(3) of the CRD).⁷ Moreover, these return orders 'shall comply with the principle of proportionality' (Article 27(2) of the CRD). Article 33(1) of the CRD acknowledges that these deportation orders can be part of a criminal sentence, provided that all the aforementioned requirements are met. Nonetheless, Article 27(2) of the CRD establishes that 'previous criminal convictions shall not in themselves constitute grounds for taking' such forced return measures.⁸

In sum, in line with the critical importance of freedom-of-movement rights for the EU project, CRD removals have been regulated as a minor piece of the EU deportation system. The removal of these foreign nationals cannot be based on regular migration law breaches but only on more serious motives of public policy and public security. The salience and graveness of these motives is further laid bare by the fact that the perpetration of a criminal offence is not in itself enough to warrant the issuance and enforcement of a deportation order.

Table 2. Deportations of EU citizens enforced in Spain, 2008–2018

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Deportations EU nationals	104	135	232	298	398	433	448	560	515	427	374
Deportations total	10,616	13,278	11,454	11,358	10,130	8,984	7,696	6,869	5,051	4,054	4,181
Deportation EU nationals (% enforced)	1.0	1.0	2.0	2.6	3.9	4.8	5.8	8.1	10.2	10.5	8.9
Deportation rate, EU nations*	5.1	6.6	11.3	14.4	19.2	21.4	22.8	28.9	26.7	22.3	10.3

Note: 2018 data differ from the rest of the annual estimations because they have been provided by different (and not wholly reliable) databases. Therefore, the figure for 2018 may be slightly underestimated.

Sources: Parliamentary question made by Mr. Jon Iñárritu, MP in September 2018 (on file with the author); Spanish Home Office; Annual Reports of the Spanish National Mechanism for the Prevention of Torture (see www.defensordelpueblo.es/informes/resultados-busqueda-informes/?tipo_documento=informe_mnp); Spanish National Statistics Office, Population data (see www.ine.es/dynt3/inebase/es/index.htm?padre=1894&capsel=1895). In addition, an average of 122 EU citizens were annually detained in Spanish migration detention facilities from 2013 to 2018; the majority of them (72.2 per cent) were Romanian nationals.

Table 3. Forced returns of EU nationals carried out in Germany, 2010–2019

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Forced returns EU nationals	793	–	879	994	963	899	1,024	1,115	1,177	1,296
Enforced returns %*	7,558	7,917	7,651	10,198	10,884	20,888	25,375	23,966	23,617	22,097
Forced returns Total	10.5	–	11.5	9.7	8.8	4.3	4.0	4.7	5.0	5.9
Deportation rate EU nationals	–	–	28.8	29.5	26.2	22.4	23.9	23.7	24.6	29.6

Note: Total return data presented in this paper do not take into account the so-called ‘voluntary’ return programmes which, in many – albeit not all – EU countries, play a significant role within the national deportation system. EU nationals are largely excluded from these voluntary return schemes, which are frequently focused on specific non-EU national groups. Among other countries, Sweden (Migrationsverket 2018) and Spain (Vrăbiescu 2019b) seem to be exceptions to this rule.

Sources: German Parliament (see www.proasyl.de/thema/fakten-zahlen-argumente/statistiken/); Germany; Federal Statistics Office (see www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Bevoelkerung/Migration-Integration/Publikationen/Downloads-Migration/auslaend-bevoelkerung-2010200187004.pdf?__blob=publicationFile).

Results

In marked contrast to the legal framework presented above, empirical data drawn from various official national databases illustrate that the deportation of EU nationals is far from being a marginal phenomenon. In Spain, CRD removals have been playing an increasingly salient role within the Spanish deportation apparatus (Table 2).

These official data show that although the relevance of CRD removals was negligible at the turn of the decade, they accounted for more than ten per cent of all enforced repatriations in recent years. However, deportation rates⁹ reveal that the relative scope of the Spanish system in this field is significantly narrower than those of other European countries such as France and Norway.

Unlike Spain, some EU and EFTA national administrations do not shy away from recognising this law enforcement practice. This laudable accountability standard has led a number of national statistics offices to make these return data publicly available.

Germany is one of these national cases. In Germany, CRD removals are a long-established migration control practice. Their scope is limited, though, compared with the sizeable dimension of the German deportation system. In addition, in the framework of the recent expansion of this national apparatus, its relative salience is declining. Nonetheless, on average 1,043 EU nationals were deported per year from Germany between 2012 and 2019 (see Table 3). Thus, the German Home Office has long been engaged in conducting these removal operations, many of which are carried out by land to neighbouring countries.

Geographical proximity and the surrounding countries' factor are critical as well in other national cases, such as Finland¹⁰ and Greece. Similar to other main deporting jurisdictions, CRD removals are an established law-enforcement practice in Greece. However, as illustrated by Table 4, the relevance of this type of forced repatriation within the wide-encompassing Greek deportation system is relatively negligible. In addition, against the backdrop of the so-called migration crisis and its aftermath, which severely affected Greece, the number of CRD deportations has dwindled over the last five years, in contrast to what has happened in other European jurisdictions.

Table 4. Forced returns of EU nationals carried out in Greece, 2014–2018

	2014	2015	2016	2017	2018
Forced returns EU nationals	736	434	359	318	255
Forced returns Total	20,314	14,919	15,585	14,693	10,939
Enforced returns %	3.6	2.9	2.3	2.2	2.3
Deportation rate EU nationals	382.1	218.4	173.7	155	120.8

Source: Greek Data Office (see www.data.gov.gr/en/dataset/apelaseis-mh-nomimwn-metanastwn-ana-yphkoothta); Eurostat Population Data.

Norway is an additional (EFTA) country in which CRD deportations have taken centre stage in recent years (Franko 2020). On average, 1,187 EU citizens were either voluntarily or coercively returned per year from Norway between 2013 and 2019 (see Table 5), accounting for roughly one quarter of the repatriation operations conducted by the Norwegian border control system. The relevance of this migration control practice in the Norwegian case is further stressed by the very high deportation rate of these noncitizen groups.

Table 5. Returns of EU nationals carried out in Norway, 2013–2019

	2013	2014	2015	2016	2017	2018	2019
Enforced returns EU nationals	1,268	1,389	1,531	1,425	1,157	839	702
Enforced returns. Total	5,198	5,295	6,412	6,255	4,548	3,438	2,926
Enforced returns %	24.4	26.2	23.9	22.8	25.4	24.4	24.0
Deportation rate EU nationals	–	456.8	466.6	417	331.9	237.6	195

Sources: Norwegian Directorate of Immigration (see www.udi.no/en/statistics-and-analysis/annual-reports/); Eurostat. Population data.

In countries that do not play a leading role within the European deportation system, the forced return of EU nationals is also an ordinary practice. In Belgium, on average 344 Romanian nationals were repatriated per year to their home country between 2015 and 2019 (Belgian Federal Immigration Office;¹¹ see also Maslowski 2015; Valcke 2017). Although no data on other EU national groups are provided, these removal operations alone accounted for 8.1 per cent of the coercive returns enforced over this 5-year period. The number of EU national returnees is significantly higher when so-called voluntary return (or ‘soft-deportation’; see Kalir 2017) procedures are taken into consideration; on average, 514 Romanian nationals were voluntarily repatriated from Belgium per year between 2014 and 2019 (14.6 per cent of all voluntary returns).¹²

The Dutch deportation system also enforces CRD removal orders. Between 2016 and 2019, on average some 275 EU citizens were forcefully returned from the Netherlands each year, which accounts for around 5.3 per cent of the foreign nationals removed from the country over this period.¹³ As in other Union countries, in the Netherlands EU nationals are almost exclusively repatriated under forced return schemes; in fact, the number of EU citizens repatriated in the framework of so-called voluntary return programmes is negligible.

In Italy, by contrast, CRD deportations seem to be relatively rare. The Italian National Prison Ombudsman reports inform that 39 EU nationals were deported in 2016, whilst on average 80 Romanian citizens were annually deported from 2017 to 2019.¹⁴ This narrow scale stands at odds with the outspoken stance adopted by the Italian government which, since the late 2000s, has championed a recurring political agenda aimed at deporting Eastern European EU nationals (Clough Marinaro 2009; Hepworth 2012; McMahon 2012). The relative insignificance of these deportation practices in Italy clearly resonates with the ineffectiveness characterising the operation of its national deportation model (Campesi and Fabini 2020; see also European Commission 2016).

As has been previously pointed out, Belgium, Italy and the Netherlands are not top deporting countries (see Table 1). Although the available data show that the consolidation of the deportation of EU nationals is spreading across Europe, neither Belgium nor Italy or the Netherlands have spearheaded this migration control change. In order to appraise the future prospects of this migration control phenomenon, the UK and France are surely the most salient national cases.

In Britain, this type of forced repatriation has long called public attention, incidentally sparking political debates. In line with this public relevance, the scale of this migration law enforcement device is striking. At least in absolute terms, Britain is only paralleled by France in the enforcement of these deportation orders. As can be seen in Table 6, on average 4,018 EU citizens have been annually deported from the UK over the last six years, rising from 1,317 CRD deportations carried out per year from 2008 to 2013. Interestingly, the salience of this repatriation scheme has significantly escalated over the last decade, since it rose from 3.9 per cent of all enforced return orders in 2008 to nearly 480 per cent in 2019.

Table 6. Forced returns of EU nationals carried out in the UK, 2008–2019

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Enforced returns EU nationals	676	785	973	1,297	1,815	2,358	3,158	3,848	4,905	4,914	3,783	3,498
Enforced returns. Total	17,239	15,252	14,854	15,063	14,647	13,311	14,395	13,690	12,469	12,049	3,783	3,498
Enforced returns %	3.9	5.1	6.6	8.6	12.4	17.7	21.9	28.1	39.3	40.8	40.2	47.5
Deportation rate EU nationals	38.2	41.3	47.6	55.2	75.4	91.9	120.4	128.8	153.1	135.4	98.0	95.0

Sources: UK Home Office (see <https://www.gov.uk/government/publications/immigration-statistics-year-ending-december-2019/how-many-people-are-detained-or-returned>); Eurostat Population data; UK Office for National Statistics. Population data (see www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/datasets/populationoftheunitedkingdombycountryofbirthandnationality).

Table 7. Returns of EU nationals carried out in France, 2010–2019

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Enforced returns, EU nationals	4,243	5,424	7,727	5,300	4,136	4,068	3,653	3,142	3,293	3,294
Enforced returns. Total	19,622	22,927	26,812	22,753	21,489	19,991	16,489	17,567	19,957	23,746
Enforced returns %	21.6	23.7	28.8	23.3	19.3	20.4	22.2	17.9	16.5	13.9
Deportation rate EU nationals	–	–	–	–	282.1	270.3	239.2	198.4	213.4	205.3

Sources: French Home Office (see www.immigration.interieur.gouv.fr/Info-ressources/Etudes-et-statistiques/Statistiques/Essentiel-de-l-immigration/Chiffres-cles); Eurostat Population data.

Table 8. Returns and returns of former prisoners carried out in the UK, 2009–2019

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Returns. Total*	38,052	41,968	41,482	44,310	45,489	40,179	41,879	39,626	32,551	24,728	18,782
Returns, former prisoners	5,528	5,344	4,649	4,765	4,993	5,286	5,768	6,171	6,113	5,516	5,110
Returns %	14.5	12.7	11.2	10.8	11.0	13.2	13.8	15.6	18.8	22.3	27.2
Returns, former EU national prisoners	748	931	1,143	1,653	2,120	2,956	3,361	3,970	4,093	3,772	3,489
Returns, former prisoners %	13.5	17.4	24.6	34.7	42.5	55.9	58.3	64.3	67.0	68.4	68.3

Note: *This table presents the total number of returns, including both forced returns and so-called voluntary repatriations, because an unknown number of former prisoners have been returned following 'voluntary' procedures.

Source: UK Home Office.

CRD deportations are also frequent in France. As will be analysed later, the French government launched an EU-wide debate on the normalisation of this migration law enforcement practice in the late 2000s. Since then, thousands of EU citizens (on average, 4,428 between 2010 and 2019) (see Table 7) have been repatriated from France every single year (Directorate-General for Internal Policies 2016). In the context of the so-called migration crisis that has essentially involved TCNs, though, the relevance of this legal institution has been declining in recent years. Nonetheless, in terms of deportation rates, the scope of this sub-field of the French deportation system is far wider than that of other EU member states.¹⁵ In fact, nearly 1 in every 200 EU national residents were targeted by forced return measures in France in the early 2010s – as they were in Norway in the mid-2010s.¹⁶

This analysis of the data available in some EU jurisdictions lays bare that CRD deportations, in apparent contrast to their regulation, are markedly widespread across Europe. What is more, in some jurisdictions such as Norway, France and the UK, this legal measure has come to play a very relevant role within the deportation system. This largely unaccounted-for scenario raises a number of questions as to why and how. The next section scrutinises the forces that have contributed to the generalisation of this severe restriction of freedom-of-movement rights.

Discussion: CRD deportations at the crossroads of xeno-racism waves, criminal fears and the ordinary needs of public order management

Even a superficial examination of CRD removal practices unveils one of the most distinctive traits of this sub-field of migration control policies – that is, it essentially targets Eastern European national groups (Bosworth *et al.* 2018; Franko 2020; Könönen 2020), especially Romanian citizens.¹⁷ The available data are particularly revealing of the markedly biased character of these policies. Of the EU citizens deported from Spain between 2008 and 2017, 47.0 per cent were Romanian nationals (*source*: Parliamentary question put by Mr. Jon Iñárritu, MP). Romanians and Polish nationals combined accounted for 52.2 per cent of the EU citizens removed from Germany between 2012 and 2019 (*source*: German Parliament) and for 48.6 per cent of those deported from Norway between 2013 and 2019 (*source*: Norwegian Directorate of Immigration). Romanians in Belgium and Italy are also a distant first in this ranking (*sources*: Belgian Federal Immigration Office; Italian National Prison Ombudsman). In the UK, in turn, Romanian and Polish nationals combined accounted for 52.3 per cent of the EU citizens forcefully returned between 2008 and 2019 (*source*: UK Home Office 2016, 2019; see also Evans 2017). By contrast, in Greece, Bulgarian nationals stand out above any other national group; they accounted for 70.9 per cent of the EU nationals deported between 2014 and 2018 (*source*: Greek Data Office).

In France, although some reports show that Romanians rank very highly in the enforcement of CRD removals (*source*: La Cimade;¹⁸ see also Vrăbiescu 2019a, 2021),¹⁹ no comparable data on concrete nationalities are provided by official databases. However, France is a critical case with regards to this biased operation of the deportation system. It is estimated that the French government, in implementing a migration policy that was overtly decried by EU Commission officials, removed around 20,000 Roma Bulgarian and Romanian nationals in 2009–2010 (Eremenko *et al.* 2017; Lafleur and Mescoli 2018; Parker 2012). Since then, removals of Eastern European citizens, especially Romanians, have been carried out on a daily basis (Parker and López Catalán 2014).

It is evident that, beyond some specific forces operating in concrete EU jurisdictions such as the xenophobic wave triggered by the Brexit movement in Britain (Hamenstädt and Evans 2017; Turnbull 2017),²⁰ the two enlargements of the EU carried out in 2004 and 2007, which resulted in the integration

of 10 new Eastern and Central EU member states, are what paved the way for the subsequent consolidation of CRD deportations. The available data show that EU15 nationals play an almost insignificant part in the enforcement of this migration control device. These Western European nationals accounted for 16.2 per cent of the CRD deportations carried out in the UK between 2008 and 2019, for 15.3 per cent in Germany (2012–2019), for 13.8 per cent in Norway (2013–2019) and for only 4.8 per cent in Greece (2014–2018). However, in other EU jurisdictions the percentage of deported EU15 nationals is markedly higher: 34.2 per cent in Spain (between 2008 and 2017) and some 33 per cent in the Netherlands (2016–2019).

In sum, the accession into the EU of a number of middle-income Eastern European countries resulted in a devaluation of EU citizenship rights and, more precisely, in a significant erosion of the freedom of movement and residence (Currie 2008; McMahon 2012; Shimmel 2006; see also Amelina *et al.* 2020). This unveils that the EU enlargements of the mid-2000s gave rise to both intra-EU racialisation processes and a stratification of citizenship rights, in which some passports are more valuable than others and the restrictions of the freedom of movement are dependent on nationality criteria (Hepworth 2012; Kreide 2019; Parker and López Catalán 2014). Singling out the 2000s' EU enlargements as a critical turning point in the gradual consolidation of CRD deportations should not mean, though, understanding them as a sort of unbridgeable cleavage. On the contrary, as will be developed later, a closer look to the analysed topic unveils the persistence of some bureaucratic inertias in the implementation of these law enforcement policies. In any case, the biased orientation of European deportation policies reveals that they are framed and implemented in an 'Orientalist' fashion (Said 1978; see also Franko 2020) – that is, according to a clear West/East divide.

The analysed stratification of EU citizenship rights should be related to the notion of xeno-racism (Fekete 2009). To put it bluntly, the available evidence shows that deporting states are Western EU15 jurisdictions and that the universe of deportable subjects is essentially formed of a specific type of non-citizen, those coming from Eastern European jurisdictions. However, more traditional forms of racial discrimination underlie these biased punitive strategies. As was previously pointed out, in France Roma individuals and groups are particularly targeted by removal practices. This constitutes a conspicuous manifestation of the over-criminalisation tactics deployed against these racialised populations, in a framework where poverty, welfare and even lifestyle concerns undermine their apparently protected status as EU nationals (Barker 2017; Castañeda 2014; van Baar 2018; Weber 2015). In this regard, France mirrors hard-line securitisation practices affecting Roma groups that have long been consolidated in Central and Eastern EU member states (Feischmidt, Szombati and Szuhay 2013). However, the French case is not an exception in Western Europe, either. On the contrary, the academic literature has confirmed that Roma populations are over-policed in many other EU15 and EFTA countries (De Genova 2019; Fekete 2014; van Baar, Ivasiuc and Kreide 2019) such as Germany (Çağlar and Mehling 2013; End 2019), Italy (Hepworth 2012), Norway (Franko 2020), Spain (Parker and López Catalán 2014; Vrăbiescu 2019b, 2021), and Sweden (Barker 2017, 2018). These racially biased policing strategies are having an impact on the migration enforcement field, by crucially fuelling and orienting deportation practices. Therefore, it is highly likely that the Eastern European nationals prevalently targeted by deportation measures are not 'individuals without qualities' – to freely borrow the title of Robert Musil's well-known book (1943/1996) – but racialised EU national Roma groups. Since available databases do not provide ethnic or racial data, there is still no way to unequivocally confirm this hypothesis continent-wide. However, long-standing anti-Roma sentiments appear to be a critical driver of the recent 'EU-ropeanisation' of the removal apparatus.

What has been pointed out so far, though, only provides a response to a ‘why’ question. In order to have a deeper comprehension of the migration control change under study, ‘how’ questions should also be addressed. From this how-perspective, one can ascertain that the consolidation of CRD deportations has essentially been the institutional reaction to two key political and social concerns on migration (on which, see Siegel 2019).

It is particularly evident that one of these concerns has been crime, namely criminal offences perpetrated by EU national ‘aliens’. As has been previously highlighted, the CRD regulation authorises national law enforcement agencies to hand down and enforce CRD deportation orders as part of criminal sentences (Article 33(1)). However, this provision does not actually mandate member states to punish criminal offences perpetrated by EU citizens with deportation orders (see Article 27(2) of the CRD).

Therefore, EU law provisions apparently imply that these deportation orders, being a severe limitation of the sensible freedom-of-movement rights, should be treated as a sort of *ultima ratio* measure, not as a legal instrument to be regularly used for crime prevention purposes. However, this legal device has not been immune to the crimmigration turn spreading across many jurisdictions, EU and non-EU alike, in recent years (Bowling 2013; Stumpf 2006, 2013, 2015; van der Leun and van der Woude 2013; van der Woude, van der Leun and Nijland 2014; Wonders 2017). More precisely, the consolidation of CRD removals should be understood – at least, partially – as a side-effect of one of the quintessential aspects of crimmigration policies, which is the increasing utilisation of deportation measures as a tool to curb crimes committed by so-called criminal aliens (Brandariz 2021; Spena 2017; Stumpf 2013, 2015; van der Woude *et al.* 2014; Wonders 2017).

This crimmigration turn in the field of deportation practices has had a particular impact in the UK (Bosworth 2011; Turnbull and Hasselberg 2017). In Britain, this shift was initiated in April 2006, when the UK Home Office acknowledged that, since the turn of the century, no fewer than 1,000 foreign prisoners had been released without having their eligibility for post-prison removal measures considered (Aliverti 2013; Bhui 2007; Kaufman 2013, 2015; Pakes and Holt 2017). The subsequent public scandal forced the Home Office Secretary to resign and set the conditions for the eventual passage of the *UK Borders Act 2007*, which significantly expanded the scope of the deportation system. Specifically, this statute made all foreign prisoners eligible for post-release removal, depending on a judicial decision. In addition, it made these post-custody deportation orders mandatory for foreign inmates sentenced to one year of imprisonment or more and for EU and EFTA inmates sentenced to two years of imprisonment or more (Aliverti 2013; Bosworth 2011; Gibney 2013; Kaufman and Bosworth 2013).

This legal reform, coupled with a number of organisational and logistical measures (Aliverti 2013; Bosworth 2011; Kaufman 2013, 2015; Pakes and Holt 2017; Turnbull and Hasselberg 2017) significantly heightened the relevance of crime-related removals within the British deportation apparatus. The share of this type of return, in fact, has gradually increased over the last decade (see Table 8). Still, what is more important is the striking rise in the number of deportations involving former EU national prisoners (Turnbull 2017). In recent years, these national groups have been targeted by two-thirds of all removals involving released inmates.

In sum, in line with the crimmigration turn, in a critical national case such as Britain the impulse of the repatriation of EU nationals has been driven by the political will to amplify the influence of the deportation system within the criminal justice field. In this regard, the British case is paramount but not exceptional. Among other EU jurisdictions such as Austria (where 42 per cent of the foreign nationals deported in 2018 had criminal convictions – see Heilemann 2019), the Czech Republic,²¹ Finland (Könönen 2020), Norway (Franko 2020), and Sweden (Barker 2018), Spain has followed – to a certain extent

– a similar path, in the wake of the crimmigration turn that has transformed the operation of the Spanish deportation model (Brandariz and Fernández-Bessa 2017; Fernández-Bessa 2016).

Having said that, the ‘how’ question previously posed cannot be adequately answered by merely referring to the prison-to-deportation pipeline. An additional phenomenon has also significantly contributed to the momentum gained by CRD deportation orders. Whilst the UK is the jurisdiction to be examined to grasp the crimmigration dimension of this topic, this additional dimension requires the taking into consideration of an additional critical national case – France.

In France, the impetus of CRD deportations has not been determined by collective anxieties over so-called criminal aliens. By contrast, this forced return measure has been regularly utilised for the street-level management of public order. Removal procedures in France have primarily targeted destitute – and racialised – Eastern European citizens for any sort of allegedly anti-social behaviour, including homelessness and nomadism (Parker and López Catalán 2014; Vrăbiescu 2019a, 2021). This approach to migration law enforcement devices is consistent with a negative stereotype, especially cemented in certain EU societies, that brands (Eastern) EU citizens as burdensome foreign populations who put an untenable pressure on already stressed welfare budgets (Barker 2018; see also Barbulescu and Favell 2020). In fact, the utilisation of return legal tools to cope with so-called welfare abusers has taken hold in some EU countries such as Belgium, Sweden, the UK and France (Barker 2013; Directorate-General for Internal Policies 2016; Evans 2017; Maslowski 2015; Parker and López Catalán 2014; Valcke 2017). These anti-poor policies gained particular momentum in the UK, where the Home Office used the CRD restrictions of the right of residence as a legal alibi to launch a programme aimed at detaining and deporting EU national rough sleepers (Bloom 2018; Demars 2017; UK Home Office 2016).²²

This public order-driven mobilisation of removal orders is apparently very distant from the rights-based CRD legal provisions (Articles 14 and 27-33; see, though, Parker 2012). However, it is not only social protection resources that are at stake in these cases. There is evidence that these policing practices are also being used for crime prevention purposes. These administrative return orders operate as a – cost-effective, albeit questionable – alternative to regular criminal justice procedures in cases of low-level criminal offences. In other words, when (especially Eastern) EU nationals are involved, not only anti-social behaviour but also petty crimes are dealt by the French police by channelling these individuals into removal procedures, thereby circumventing ordinary criminal justice adjudication processes (Maslowski 2015; Vrăbiescu 2019a, 2021).

Surprising as it may seem, the French case – once again – does not appear to be an exception. In Spain, interviews conducted with high-ranking police officials confirm that CRD removals are being used in a very similar way – to tackle petty crimes and misdemeanours committed by EU citizens, especially Eastern European nationals.²³

In sum, the analysis of national databases shows that CRD deportations are much more widespread and established than their irrelevance in political, public and even academic conversations might lead us to think. Their recent impetus appears to be associated in various ways with one of the most widespread concerns over ‘alien’ newcomers, i.e., criminal activities and crime prevention policies. This is the case not only in countries such as Britain, in which the expansion of CRD removals has followed the lines of the reinforcement of crime-related deportations. It is also the case in countries such as France, in which these forced return procedures have been essentially used for the ordinary, street-level management of public order, petty offences and extreme poverty-related behaviour. In addition, the downplayed and second-level status of Eastern EU nationals who were granted EU citizenship rights in the mid- to late-2000s has decisively assisted in amplifying the scale of these migration control policies.

Having said that, the French case, with its routine use of administrative removal orders for public order purposes, reveals an additional and largely unacknowledged aspect of the topic under study. After the impasse produced by the accession into the EU of 10 new Central and Eastern European member states in 2004 and 2007, bureaucratic inertias have come to prevail, by reinstating slightly modified old practices. Since the mid-2000s, general migration law provisions have no longer been available to deal with the then new EU national groups. However, as is illustrated by French policing strategies, law enforcement agencies finally ended up using CRD removal provisions in a very similar way, despite their more restrictive regulation (see also Parker 2012; Vrăbiescu 2019a, 2021). These state coercion practices have ‘migrantised’ certain EU national groups, virtually turning them – again – into TCNs (see also Barbulescu and Favell 2020; Çağlar and Mehling 2013; De Genova 2019).

From this perspective, the French government’s plan in the late 2000s to deport thousands of Roma Eastern European individuals – allegedly via ‘voluntary’ return protocols – can be read as an attempt to find an alternative solution to coercively manage these populations once regular return provisions became inapplicable (see also Çağlar and Mehling 2013). Additional data show the strength of these administrative inertias. In Britain, 1,351 Romanian nationals were deported per year between 2004 and 2006 (UK Home Office 2016, 2019). Subsequently, after they became EU citizens this number dwindled to 175 removals per year from 2007 to 2011. However, it eventually escalated again to 1,084 deportations annually enforced in the subsequent eight years.²⁴ In Spain, 2,589 Romanian nationals were deported per year between 2001 and 2006 (Fernández-Bessa 2016). Eventually, the average number of removals involving Romanian citizens abruptly plummeted to 59 per year between 2008 and 2011, before mounting again to an annual average of 234 enforced returns between 2012 and 2017, in the context of a significant downsizing of the Spanish deportation system (information provided by Mr Jon Iñárritu, MP).

These data reveal a new dimension of an already well-known migration law enforcement strategy. Frequently, detention and deportation practices are used to manage foreign national groups considered dangerous or troublesome, instead of the more demanding, lengthier and rights-based criminal adjudication procedures. This has been recurrently confirmed in the case of TCNs (Aliverti 2020; Gundhus 2020). This paper verifies that (some) EU national populations are also targeted by this kind of resource-saving crime prevention tactic. However, the extent of these strategies is still unclear, since in some countries – e.g. Italy – the scope of CRD deportations, whether related to crime or to public order, is largely insignificant.

Conclusion

Further research is needed to elucidate whether, as in the case of the UK, France, Norway and other jurisdictions, penal policies have been the main determinant of the upsizing of CRD deportation practices or whether other drivers have played the leading role in this law enforcement change, e.g. concerns over welfare budgets. Meanwhile, it can be claimed that, despite EU law provisions, the consolidation of CRD deportations does not seem destined to be a short-lived phenomenon. These removal practices are expeditious and largely automated procedures, which makes them particularly cost effective for both criminal justice and migration control agencies. In fact, manageable deportation schemes allow these agencies to bypass more resource-consuming crime prevention tactics. In addition, CRD deportations are one of the few legal tools available to EU member states’ administrations to make their national interests prevail in the framework of a multi-scalar system of migration governance such as that of the

EU (Brandariz and Fernández-Bessa 2020; Moffette 2018; Wonders 2017). Ultimately, the already long-lasting EU border's crisis (Vaughan-Williams 2017; see also De Genova 2017) does not make up the best political scenario to challenge this concerning erosion of EU citizenship rights. In the framework of that crisis, both national and supranational officials seem to have accepted that the detrimental consequences of these removal orders for the widely proclaimed freedom of movement of European nationals (Parker and López Catalán 2014) is a price worth to be paid.

Notes

¹ I use terms such as 'deportation', 'removal', 'return' and even 'repatriation' interchangeably throughout this article. This use of terminology does not mean that one should ignore the legal differences separating these measures. The analysis of those differences, though, lies beyond the scope of this article. In addition, no further specification is currently feasible, because the available national databases do not use standard categories – e.g. administrative law removals, criminal law deportations – to classify deportation practices.

² 'CRD deportations' stands for deportation measures regulated by the so-called CRD, that is, the Citizens' Rights Directive (Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states). This wording, though, is a synecdoche that is adopted for narrative purposes. From a legal perspective, not all deportation measures targeting EU and EFTA nationals are administrative law removals regulated by the CRD. Some countries have chosen to follow CRD provisions by enacting not only administrative law removal orders but also criminal law deportation orders targeting EU and EFTA citizens. Therefore, CRD deportations encompass both legal categories.

³ See, on this, the Court of Justice of the European Union [hereinafter, CJEU] judgement in Case C-184/16 *Petrea* [2017], EU:C:2017:684.

⁴ See, on this, the CJEU judgement in Case C-193/16 *E.* [2017] ECLI:EU:C:2017:542.

⁵ See the CJEU judgement in Joined Cases C-331/16 and C-366/16 *K. and H.F.* [2018] ECLI:EU:C:2018:296.

⁶ See CJEU Case C-145/09 *Tsakouridis* [2010] ECLI:EU:C:2010:708, which ruled that Article 28(2) of the CRD should be interpreted in line with the concept of 'particularly serious crime' which is referred to in Article 83 of the TFEU.

⁷ See the CJEU judgements in the following cases: Joined Cases C-316/16 and C-424/16 *B. and Vomero* [2018] ECLI:EU:C:2018:256; Case C-400/12 *M. G.* [2014] ECLI:EU:C:2014:9; and Case C-348/09 *P.I.* [2012] ECLI:EU:C:2012:300.

⁸ On this, see CJEU Case C-554/13 *Z. Zh. and I. O.* [2015] ECLI:EU:C:2015:377.

⁹ In exploring these national databases, I have used an unusual indicator, that of the deportation rate, which estimates the number of individuals (in this case, EU nationals) removed per 100,000 foreign (in this case, EU citizen) residents (see also Weber 2015). Largely inspired by a measure widely used in the prison field – that of the incarceration rate – this indicator provides valuable information on the relative impact of the corresponding deportation sub-field, by weighing its relevance in relation to the number of EU citizens residing in the given jurisdiction.

¹⁰ In Finland, 428 Estonian nationals were deported in 2015. Apparently, the number of Estonian deportees was similar in previous years (EMN National Contact Finland 2016).

¹¹ See dofi.ibz.be/sites/dvzoe/FR/Statistiques/Pages/Rapports-statistiques-de-l%270E.aspx (accessed: 27 January 2021).

¹² See www.fedasil.be/sites/default/files/content/download/files/annual_report_2019.pdf (accessed: 27 January 2021).

¹³ See data.overheid.nl/datasets?sort=score%20desc%2Csys_modified%20desc&search=immigratie&facet_group%5B0%5D=https%3A//data.overheid.nl/community/groepen/immigratie-vertrek (accessed: 28 January 2021). These data, supplied by the Repatriation and Departure Service of the Dutch Ministry of Justice and Security, are not completely accurate because they are rounded to the closest multiple of 10.

¹⁴ See www.garantenazionaleprivatiliberta.it/gnpl/it/pub_rel_par.page (accessed: 28 January 2021). These reports further indicate that, on average, 113 EU nationals were confined per year in Italian migration detention facilities between 2016 and 2019. As usual, Romanians accounted for the overwhelming majority (84.0 per cent) of these EU national detainees.

¹⁵ Austria should be added to the list of EU jurisdictions in which the removal of EU citizen is currently playing a prominent part within the deportation system. In 2018, 22 per cent of returns and 33.6 per cent of forced returns (2,272 individuals) carried in Austria involved EU nationals (Heilemann 2019). These more than 2,000 EU national deportees accounted for a deportation rate of 327.4 returned individuals per 100,000 residing EU nationals.

¹⁶ In the framework of this early 2010s impetus, France was an exception to the insignificance of 'voluntary' return programmes for the repatriation of EU citizens. From 2010 to 2012, on average 5,928 EU nationals were returned per year under these allegedly voluntary schemes. Since then, though, the impact of these programmes on EU national returnees has constantly and dramatically dwindled (on average, 93 EU citizens were voluntarily returned per year between 2013 and 2019) (*source*: French Home Office). As has been previously pointed out, Belgium is also an exception to the widespread rule according to which voluntary return programmes give preference to TCNs.

¹⁷ In 2019, the deportation rate of Romanian citizens was 1,330.0 deportees per 100,000 residents in Norway, 324.6 in Belgium, 315.2 in the UK, 85.2 in Greece (2018), 66.0 in Germany, 34.7 in Spain (2017) and 8.5 in Italy.

¹⁸ See www.lacimade.org/publication/?numpage=2&numpage=3&numpage=1 (accessed: 21 October 2019).

¹⁹ These *La Cimade* reports also reveal that 1,000–1,500 Romanians are annually detained in French migration detention facilities.

²⁰ Despite the momentum gained by anti-immigration sentiments in the framework of the Brexit process, it remains unclear whether its conclusion in February 2020 will result in a surge in the number of CRD deportations. In fact, the Brexit scenario did not prevent the British immigration enforcement system from following a downward trend that has affected the number of both deportations – which plummeted by 45.6 per cent between 2013 and 2018 (UK Home Office 2016, 2019) – and immigration detainees – who declined by 19.5 per cent from 2016 to 2019 (*source*: Global Detention Project; www.globaldetentionproject.org/countries/europe/united-kingdom#statistics-data; accessed: 4 February 2021).

²¹ In the Czech Republic, the number of Slovakian and Romanian nationals combined effectively deported following a criminal conviction was 118 in 2018 and 131 in 2017. On average, 78 Slovakian nationals were annually targeted by enforced criminal deportation orders between 2015 and 2018 (*source*: EMN Contact Point in the Czech Republic. Online: ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/reports_en; accessed: 22 October 2019).

²² In December 2017, this Home Office policy was overturned by the UK High Court (*Gunars Gureckis and others v. Secretary of State for the Home Department*. Online: www.judiciary.uk/judgments/gunars-

gureckis-and-others-v-secretary-of-state-for-the-home-department/; accessed: 29 December 2019), which ruled that it stood in contempt of EU citizenship law. It is estimated that some hundreds of EU citizens were effectively removed from the UK following these Home Office guidelines between 2015 and 2017 (Crisis 2018).

²³ Interviews conducted with two high-ranking Spanish police officials heading immigration enforcement units in February 2019 (on file with the author). I thank Esther Montero (Loyola University of Andalusia, Spain) for her invaluable help in carrying out this fieldwork.

²⁴ Between 2005 and 2009, the annual average number of deportations of nationals of the eight Eastern European nations integrated in the EU in 2004 (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia) combined was 154. In contrast, it rose to 1,497 removals per year between 2010 and 2019.

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Legal Approaches to ‘Unwanted’ EU Citizens in the Netherlands

Sandra Mantu*, Paul Minderhoud*, Carolus Grütters*

This contribution examines the legal powers that Dutch authorities have to restrict the right to free movement of mobile but ‘unwanted’ EU citizens, including measures that seek to expel and ban EU citizens from re-entering the Netherlands. The article defines ‘unwanted’ EU citizens as mobile EU citizens in respect of whom national authorities seek to take measures to restrict their right of residence, either on the grounds of their being an unreasonable burden on the Dutch social assistance system or in respect of public policy and public security. We analyse the relevant EU legal rules, their interpretation by the Court of Justice of the EU and their national implementation and application in order to show the legal constraints faced by national authorities when seeking to restrict EU mobility. This legal study is supplemented by a discussion of existing data on the number of EU citizens expelled or removed from the Netherlands. Our analysis suggests that, due to the legal protection enjoyed by mobile EU citizens against measures restricting their residence rights, the Dutch authorities encourage voluntary departure as a pragmatic solution to the presence of ‘unwanted’ EU citizens.

Keywords: EU citizenship, free movement, residence, expulsion, social rights, abuse

Introduction

EU nationals and, especially, nationals of Central and Eastern European (CEE) states are a fast-growing group of migrants in the Netherlands. Unlike non-EU migrants, EU nationals can move to another EU state with few formalities and are entitled to access the labour market on an equal footing with nationals. Moreover, as EU citizens, their right to reside is protected against national measures seeking to restrict or end their stay in a host EU state. Data on the composition of the Dutch population (CBS 2021) suggest that the increase in the number of EU citizens in the Netherlands is linked to the EU’s enlargement eastwards and the progressive opening of the Dutch labour market to CEE nationals. Yet, the 2004 and 2007 EU enlargements towards countries with poorer standards of living and pay caused debates about the desirability and effects of CEE mobility, including calls to limit it. CEE nationals are perceived as a source of cheap labour that has the potential to disrupt the Dutch labour market and undercut wages

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for national workers (Cremers 2011), as a potential burden on the Dutch welfare state due to their reliance on benefits (Kramer 2017) and as source of criminality and ‘otherness’ (Brouwer, van der Woude and van der Leun 2018).

The Netherlands is not unique in questioning the benefits of EU mobility and in conflating cheap labour with welfare tourism and criminality as markers of ‘unwanted’ EU mobility (Anderson 2012; Karstens 2020; Mantu 2018). Based on public and political discourses, poor EU citizens, criminal EU citizens or EU citizens claiming benefits can all be labelled ‘unwanted’, while legally they enjoy a fundamental right to EU mobility and the protection of EU law. In this contribution, our focus is on the legal dimension of ‘unwanted’ EU mobility in the Netherlands. As such, we examine on what grounds the Dutch authorities can restrict or deny EU residence rights and in which situations such measures can be accompanied by expulsion and exclusion from the Netherlands.

Our contribution is structured as follows. The second section presents the national context in which CEE mobility occurs and our methodological approach. The next section examines the relevant EU rules concerning the right of residence for mobile EU citizens. Then follows a discussion of the denial of EU residence rights where the EU citizen no longer meets the relevant conditions from the perspective of both EU and Dutch law and legal practice. The fifth section focuses on the restriction of EU residence rights on the grounds of public policy and public security, whereas the sixth examines the same issue in cases of abuse or fraud. Finally, the penultimate section focuses on voluntary departure as a practical alternative to dealing with unwanted EU citizens, before the last section concludes with an overall assessment of the Dutch legal response.

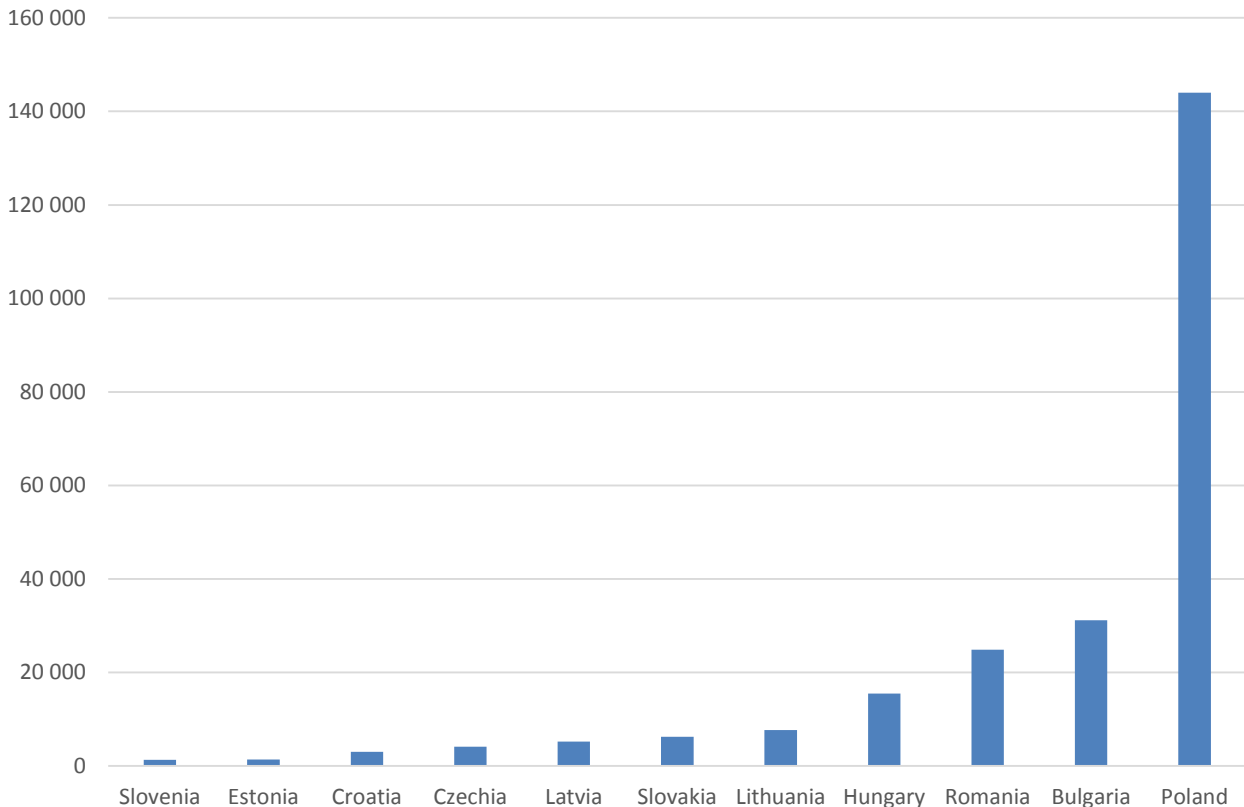
Contextual and methodological note

According to Eurostat data, the Netherlands hosts around 570,000 mobile EU citizens, of whom 43 per cent (245 000) are CEE nationals. Almost half of all CEE nationals are Polish nationals. They constitute the largest group of mobile EU citizens in the Netherlands (see Figure 1). Another 45 per cent of mobile EU citizens are made up of nationals from France, Spain, Belgium, Italy, the UK and Germany. The remaining 12 per cent consists of very small numbers of nationals from the remaining EU states. The available data reflect the number of EU citizens who are registered in the Netherlands and as such are known to the authorities. Based on the assumption that many EU citizens do not register in the Netherlands, existing numbers should be seen as a relative indication, rather than as an absolute value. For example, in 2017, it was estimated that some 90,000 Polish citizens resided unregistered in addition to the official number of 160,000 registered Polish citizens (Gijsberts, Andriessen, Nicolaas and Huijnk 2018).

In 2018, Statistics Netherlands listed work as the top reason for EU citizens moving to the Netherlands, followed by family reunion, study and other purposes (CBS 2020). The upward trend concerning EU mobility continued in 2020, with Polish nationals representing the top nationality of all incoming EU citizens (CBS 2021). EU-wide research has shown that the impact of mobile EU citizens on national welfare states is minimal (ECAS 2014; ICF/GHK 2013). For the Netherlands, the percentage of CEE nationals receiving unemployment benefits is explained by their more vulnerable position in the Dutch labour market and their concentration in sectors (agriculture, hospitality, transport, logistics, construction) where temporary contracts, job insecurity and exploitative practices are more prevalent and are used as strategies to reduce labour costs (Strockmeijer 2019). Moreover, when compared with inactive Dutch nationals, the percentage of inactive EU citizens who rely on the welfare system is lower (Strockmeijer 2019: 10). For its part, the Dutch government, through the voice of the Ministry of Social Affairs, sends mixed messages: it treats the number of EU citizens reliant on the welfare state as a problematic aspect

of free movement and one in need of close scrutiny (Asscher 2017; Kamp 2011; Koolmees, Ollongren, Knoops, van Ark and Keijzer 2019), while acknowledging that, in relative and absolute terms, this number is minimal (Asscher 2014).

Figure 1. Citizens from Central and Eastern European states registered (as residents) in the Netherlands on 1 January 2019



Source: Eurostat: EU and EFTA citizens who are usually resident in another EU/EFTA country as of 1 January (online data code: MIGR_POP9CTZ).

Although Polish nationals – fraudulently claiming Dutch social benefits, sometimes as part of large organised schemes – and Romanian skimmers make headlines in Dutch popular press, official data on EU citizens expelled or removed from the Netherlands is scarce. Moreover, there are no centralised data on the number of EU citizens whose right of residence has been terminated. Kramer (2017) has presented some fragmented data on this issue that showed an increase – from 20 in 2012 to 680 in 2016 – in the number of EU citizens whose residence was denied. We have not been able to obtain such data from the Dutch immigration authorities, ideally differentiated upon grounds for denial. The only data we have received show the number of EU citizens expelled but not the grounds upon which the expulsion measure was taken (see the section entitled ‘Filling the gap between expulsion and effective removal’).

In light of the legal focus of this contribution, by ‘unwanted EU citizens’ we understand mobile EU citizens in respect of whom national authorities seek to take measures to restrict their right of residence, either on the grounds of their being an unreasonable burden on the Dutch social assistance system or on grounds of public policy and public security. To capture the Dutch legal response to unwanted EU

citizens, we first examine the limits posed by EU law to restricting EU residence rights at the national level. To this end, we analyse EU primary (Treaty on the Functioning of the European Union – TFEU) and secondary law (Directive 2004/38) concerning the fundamental right to freedom of movement and its interpretation by the Court of Justice of the EU (CJEU). CJEU jurisprudence constitutes the other important legal source of rights for EU citizens since the Court’s interpretation of EU law is binding for national authorities. We discuss CJEU jurisprudence that clarifies the link between the EU right to reside and access to social benefits in a host state and jurisprudence that addresses Member State obligations concerning measures taken on the grounds of public policy, public security and abuse of rights.

Secondly, we analyse the implementation of EU provisions in the Dutch legal order and their application by the administration and Dutch courts. In the Netherlands, the Immigration and Naturalisation Service (IND) is the administrative body responsible for implementing the policy on foreign nationals, which includes the transposition of Directive 2004/38 into Dutch law. The relevant provisions of national law are Articles 8.7 to 8.25 of the Aliens Decree 2000 and the implementation rules found in the Implementation Guidelines of the Dutch Aliens Act (*Vreemdelingencirculaire*, (Vc) B10/2.3) and in the so-called Work Instructions (*Werkinstructies*, (WI) 2020/10). Because IND decisions can be appealed before a court of law, we also discuss Dutch jurisprudence on the denial of EU residence rights and on expulsion, supplemented by the examination of policy papers and briefs, reports, existing scholarship and general information on this issue. Finally, to explain the gap between law and practice, we discuss data on voluntary departure from the Dutch NGO *Barka* as an alternative to expulsion and exclusion orders.

EU citizens’ right to reside in another Member State based on EU law

EU citizens enjoy the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect (Article 21 TFEU). EU workers and self-employed persons’ right to move and reside freely stems from Articles 45 and 49 TFEU, respectively. The conditions for the exercise of this right are detailed in secondary legislation, the most relevant pieces of which are Directive 2004/38 – applicable to all EU citizens – and Regulation 492/2011 – applicable only to EU workers.

Directive 2004/38 applies to EU citizens and their family members – irrespective of nationality – who move to another EU state other than the state of nationality of the EU citizen. Depending on the length of residence, with three months and five years as the relevant thresholds, Directive 2004/38 provides for different residence rights, to which different conditions are attached. For residence shorter than three months, EU citizens must possess a valid ID or passport (Article 6). For residence longer than three months, Directive 2004/38 differentiates between economically active and economically inactive EU citizens (Article 7). Economically active EU citizens must meet the definition of the notions of ‘EU worker’ and, respectively, ‘self-employed’ as detailed in CJEU jurisprudence. Economically inactive EU citizens must have sufficient resources for themselves and their family members not to become a burden on the social assistance system of their host state and must possess comprehensive sickness insurance. Moreover, students must be enrolled at an educational establishment for the principal purpose of following studies. Union citizens who have resided legally and for a continuous period of five years in a host Member State have a right of permanent residence there (Article 16). Union citizens (and their family members) enjoy that right without any further conditions, thus even if they no longer have sufficient resources or comprehensive sickness insurance cover. The Court has clarified that residence under

Directive 2004/38 constitutes an autonomous notion of EU law, which is to be interpreted as legal residence that meets the requirements of Article 7.¹

Broadly speaking, Directive 2004/38 allows the host state to restrict the right to reside in three different scenarios. Firstly, where the EU citizen no longer meets the conditions attached to the exercise of the right to reside; secondly, on the grounds of public policy, public security and public health and, thirdly, in case of fraud or abuse of rights. The Directive lays down procedural safeguards (Articles 30 and 31) to be observed by the Member States in respect of all scenarios. These are meant to ensure that EU citizens are notified of any decisions taken in respect of them and that those decisions are justified and open to judicial redress procedures.

Restricting the EU right to free movement where the conditions attached to the exercise of the right of residence are not met

General rules under EU law

Based on Article 14(1) Directive 2004/38, EU citizens retain the right of residence for up to three months as long as they do not become an unreasonable burden on the host state's social assistance system. The main question here is what impact a request for social assistance has on the right to reside. Article 24(2) helps to elucidate this issue as it allows the host state to exclude EU citizens from receiving social assistance during the first three months of residence, when no conditions as to self-sufficiency are imposed. EU job-seekers can be excluded from receiving social assistance for the entire period of their job-seeking – this can last longer than three months – while students can be excluded from receiving maintenance aid for studies (study grants and student loans) prior to the acquisition of a right of permanent residence. Thus, the host state can see a request for social assistance made during the first three months of residence as placing an unreasonable burden on its system, leading to a denial of the right to reside based on Article 6. However, this provision is relevant only for economically inactive EU citizens. EU workers can rely on Article 45(2) TFEU and Article 7(2) of Regulation 492/2011 to claim equal treatment with nationals of the host state when it comes to social assistance. Likewise, EU job-seekers, based on Article 14(4)(b), enjoy a right of residence as long as they can show that they are looking for a job and have a reasonable chance of finding one.² Expulsion is equally not possible as long as job-seeking is ongoing.

The right of residence for longer than three months is retained as long as the conditions set out in Article 7 concerning worker/self-employed status or sufficient resources and comprehensive sickness insurance continue to be met (Article 14(2) Directive 2004/38). This aspect has become increasingly problematic for economically inactive EU citizens, citizens with fragmented work-life histories plagued by unemployment and those working on short-term or zero-hour contracts (FEANTSA 2019; Mantu and Minderhoud 2019; O'Brien, Spaventa and de Coninck 2016). This is the profile of a large percentage of CEE citizens working in the Netherlands. Such citizens have problems meeting the conditions attached to the status of EU worker or self-employed person, or alternatively the sufficient resource condition attached to Article 7. 'Asking for social benefits becomes a first step towards being considered an unreasonable burden' (Mantu and Minderhoud 2019: 313), leading to a denial of EU rights.

A recurring issue in CJEU jurisprudence is whether sufficient resources can be derived from social benefits paid by the host state to economically inactive citizens or job-seekers and with what consequences for the right to reside. This is explained by several factors: the ambiguous rules contained by

Directive 2004/38, including the lack of a clear definition of the notions of ‘unreasonable burden’ and ‘sufficient resources’, the trend towards restricting access to social assistance for EU citizens in several Member States and the reclassification of mixed social security benefits as social assistance (Minderhoud and Mantu 2017). The CJEU has recognised the right of the host state to end the right of residence of the person concerned but added that this should not be or become ‘the automatic consequence of relying on the social assistance system’.³

Between 2013 and 2016, five important CJEU judgments were delivered on this topic (*Brey*, *Dano*, *Alimanovic*, *Garcia-Nieto* and *Commission v UK*),⁴ which are generally interpreted as minimising the principle that there should be a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States resident there (Heindlmaier and Blauburger 2017; Verschueren 2018). These cases raise the question of whether a host state can consider an application for social assistance as an indication that the EU citizen does not fulfil the sufficient resource condition and can consider that no right to reside based on EU law exists or whether the state must perform an individual assessment before reaching such a conclusion. The Court’s responses have varied, from individual assessment is necessary in *Brey*, to no individual assessment beyond the rules expressly contained in Directive 2004/38, either because no right to reside had ever existed (*Dano*) or because, as first-time job-seekers, the applicants were excluded from social assistance (*Alimanovic* and *Garcia-Nieto*). Moreover, recent jurisprudence shows a resurgence in cases discussing whether a person meets the conditions of the definition of EU worker or self-employment and the retention of such statuses under Article 7(3) of Directive 2004/38, since these categories of EU citizens enjoy equal treatment and cannot have their right of residence denied or cannot be expelled for claiming benefits.⁵

EU citizens who have acquired a right of permanent residence can lose that right only in the situation expressly listed in Article 16(4), namely through absence from the host Member State for a period exceeding two consecutive years. Previous research has shown that several Member States are policing the acquisition of the right of permanent residence in light of its unconditional nature by checking more thoroughly the legality and continuity of residence leading to the acquisition of Article 16 rights. Such policing does not *per se* occur during the five years of initial residence; rather, as in the Netherlands, checks occur when the EU citizen claims social rights as a permanent resident entitled to full and equal treatment with nationals of the host state (Minderhoud 2018).

No EU right to reside followed by an expulsion order

Article 14 of Directive 2004/38 reflects the difference between the adoption of a decision establishing that no EU right to reside exists and the adoption of an expulsion measure or an exclusion order. Besides setting the conditions for the retention of the right to reside, Article 14 lists situations in which the host state is not allowed to adopt an expulsion measure against workers, self-employed persons and job-seekers where no public policy, public security or public health considerations are at stake. *Per a contrario*, in cases of economically inactive citizens, the host state may adopt an expulsion measure because the EU citizen or his/her family members became an unreasonable burden on the social assistance system of the host state, provided that such a measure is not automatically adopted.

Conceptually, it is possible – and not unthinkable – for a host state to adopt a measure establishing that no EU right to reside exists without adopting an expulsion measure. Belgian authorities sent many EU citizens letters asking them to leave since they did not meet the self-sufficiency condition attached to Article 7 rights. No expulsion measure was adopted against them, nor was enforcement seriously considered by the authorities (Valcke 2020). The explanation is linked with the fact that Directive

2004/38 allows the Member States to adopt an exclusion order *only* in respect of an EU citizen against whom an expulsion measure was adopted on the grounds of public policy or public security (Article 15(3)). Thus, an EU citizen who no longer meets the conditions of Article 7 can lose the right to reside and an expulsion measure can be adopted against him or her but no exclusion order can be adopted, leading to the situation where the EU citizen can re-enter the host state (this issue is currently before the CJEU in Case C-719/19). Research by Heindlmaier (2020) on state practices in Austria and France shows that national authorities are aware of the limiting power of EU law and are unwilling to waste their resources on EU citizens. Third-country nationals (TCNs) over whom national authorities retain more power and against whom entry bans can be issued are seen as a more suitable and acceptable target when it comes to justifying spending scarce resources.

Dutch legal rules and legal practice

After the implementation of Directive 2004/38 in the Dutch legislation, the Dutch Aliens Act Implementation Guidelines ((Vc) B 10/2.3) provide detailed information, in the form of a sliding scale, about when a demand on public funds – consisting of an application for social assistance in accordance with the Dutch Social Assistance Act (now called the Participation Act) – results in the termination of the EU citizen's lawful residence by the immigration authorities (IND) in line with the wording of Article 8.16(1) of the Aliens Decree. The sliding scale constitutes the Dutch attempt to implement effectively the ambiguous nature of Directive 2004/38, balancing between the condition of sufficient resources and access to social assistance benefits as long as this does not place an unreasonable burden on the Dutch social assistance system. The policy's central idea is that the longer an EU citizen is residing legally in the Netherlands, the longer s/he can ask for social assistance benefits without losing the right to reside (see Table 1). The sliding scale is relevant only for economically inactive EU citizens. EU workers cannot have their right of residence terminated for asking for supplementary benefits, while EU job-seekers have no entitlement to them.

Each application for social assistance during the first two years of residence is considered unreasonable and, in principle, will result in the termination of the residence. In this scenario, the IND will assess the appropriateness of the request while considering the following circumstances of each case: the reason for the applicant's inability to earn a living, its temporary or permanent nature, ties with the country of origin, family situation, medical situation, age, other applications for (social) services, the extent of previously paid social security contributions, the level of integration and the expectation for future social assistance needs. These circumstances refer partially to the circumstances mentioned in recital 16 of Directive 2004/38. The sliding scale reflects the fact that an application for social assistance can concern financial benefits to fully cover the EU citizen's living expenses or only to supplement insufficient resources.

Table 1. Sliding scale as of 1 January 2020

Residence	More than supplementary	Supplementary
< 2 years	Any recourse	Any recourse
> 2 years	2 months or more	3 months or more
> 3 years	4 months or more	6 months or more
> 4 years	6 months or more	9 months or more
Entire period	During subsequent years	15 months within 3 years of residence

Source: Implementation Guidelines of the Dutch Aliens Act B 10/2.3; Kramer (2017).

The Dutch government has explored the possibility of tightening the rules around social assistance to ensure that no benefits are paid out where doubts exist as to the legality of the residence. In practice, this issue can be complex: local authorities are responsible for deciding on entitlement to social assistance, while the IND decides on the legality of residence. In some cases, the municipalities decided themselves that the application for benefits led to the loss of the right to reside and therefore did not provide any social assistance. According to the Central Appeals Tribunal (the highest court in social security cases) this is incorrect.⁶ While the municipality is competent to decide on the grant of a social assistance benefit, the competent authority to decide on the legality of residence is the IND (the immigration authority). Municipalities have to assume the lawfulness of residence as long as the immigration authorities have not taken a decision on it in light of the request for social assistance. Municipalities are obliged to report to the IND the granting of social assistance benefits to EU citizens who reside between three months and five years in the Netherlands. Only from the moment when the IND decides to withdraw the right of residence can the municipality stop the social assistance benefit. Kramer's (2016) research has shown that, to decide on the lawfulness of residence, the IND often sends a letter listing 26 questions concerning the personal situation of the EU citizen, ranging from his or her place of residence, family ties, medical situation etc. to the ultimate question: 'Why do you think that you are not an unreasonable burden on the public resources and why do you think that in your case termination of your right of residence is a disproportionate measure?'.

There is little Dutch jurisprudence on this subject. This might indicate that there are not many inactive EU citizens (staying less than five years in the Netherlands), who ask for social assistance, that the IND does not often withdraw the right of residence of these citizens or that EU citizens did not appeal against such a withdrawal. After the *Dano* judgment, there were some developments of a restrictive nature though. In an unpublished court case dating from September 2015, the IND used the *Dano* reasoning regarding an inactive EU citizen who had asked for social assistance benefit but had never searched for work.⁷ According to the IND, it was current policy to consider such an EU citizen immediately as an unreasonable burden on Dutch public funds, 'even if there was only an appeal on social assistance of one day'. Another case in which the *Dano* reasoning was used is a judgment by the District Court The Hague of 18 January 2016.⁸ In this case, the Court followed the immigration authorities and ruled that the Bulgarian applicant never had a right of residence due to being unemployable and not speaking Dutch.

Dutch legal practice on the termination of residence rights followed by expulsion

In the Netherlands, Article 14(3) Directive 2004/38 stating that 'an expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State' is implemented with a different wording. Article 8.16(1) of the Dutch Aliens Decree uses the words 'termination of the right of residence' instead of the words 'an expulsion measure'. The Council of State (the highest court in migration cases) has explicitly recognised this distinction in two recent judgments, marking a radical change in the assessment of this right. According to the Council of State, in the Dutch implementation of Article 14(3) the decision on the legality of the right of residence and the expulsion measure are interwoven. This is partly caused by the fact that, in the system of the Dutch Aliens legislation, the unlawfulness of residence gives the Dutch immigration authorities the competence to expel the EU citizen. For the Council of State, the decision that there is no right of residence is therefore also an expulsion measure in the sense of Directive 2004/38. To do justice to the requirement laid down in Article 14(3) and recital 16 Directive 2004/38, a balancing

of interests is therefore needed in all cases wherein the immigration authorities decide that the right of residence of an inactive EU citizen has been terminated or had never existed.⁹

The rulings that clarified this issue concerned a Romanian and a Polish citizen, respectively, who had never had sufficient means of subsistence and who were both homeless. The Romanian had appealed for a social assistance benefit but the Polish citizen had not. Both cases are also illustrative of how the Dutch IND treats homelessness, which is not a special legal category. Homeless EU citizens fall under the regime of Article 7(1)(b) Directive 2004/38 and are treated as not or as no longer having sufficient resources. They can be expelled but they do not fall under the public order regime of Article 27 (see section entitled 'Restricting the EU right to reside'). In the above cases, the IND considered that the EU citizens had to leave the Netherlands because they had never enjoyed lawful residence based on EU law. The Council of State found premature the decision of the IND to terminate the right of residence. It stated that, even if there is no right of residence stemming from Article 7(1)(b) of Directive 2004/38 (any more), an individual assessment must always be made as to whether or not the person concerned still has lawful residence or can be expelled. The Council of State's insistence on the need for individual assessment will also impact on cases of EU citizens who have not met the residence conditions continuously but only during certain periods of time. In such cases, too, there was often no balancing of interests because the IND simply stated that there was no right of residence, notwithstanding the rules in the administrative guidelines.

While individual assessment is deemed essential by the Council of State, questions can be raised about how this will work in practice. In what situation would the balancing of interests be to the advantage of the EU citizen? The Council of State refers in this context to the CJEU judgments in *Brey*, *Vomero* and *Garcia-Nieto* but not to *Dano* and *Alimanovic*, where such a balancing of interests was expressly not considered necessary. According to a judgment of the District Court of Rotterdam, in practice the balancing of interests means motivating that the EU citizen places an unreasonable burden on the social assistance system.¹⁰ The Council of State argues that, if the balancing of interests is in favour of the EU citizen, this means that s/he cannot be expelled and is still deemed to have lawful residence in the Netherlands. The question which then arises is what the nature and basis of that lawful residence is. Van Melle and Van Houwelingen (2019) propose that these inactive EU nationals be granted a right of residence based on Article 20 or 21 TFEU since Directive 2004/38 would not apply to them. We have doubts about this construction. In our view, in the situation outlined above, the right to reside is still derived from Directive 2004/38. The EU citizen qualifies as economically inactive and the income is apparently sufficient because, despite a stated shortage of it, the EU citizen may remain with those resources. This is a plausible solution because, according to Article 8(4) Directive 2004/38, there is no fixed resource requirement in EU law. Another solution would be less logical because if, according to the IND, 'the conditions were never met', then there is no analogous right of residence based on Article 21 TFEU as in the *O.&B.* case,¹¹ nor does expulsion lead to the departure from the territory of the Union as a whole, as is required for a right of residence based on Article 20 TFEU.

Another possibility would be residence based on Article 7 of the EU Charter of Fundamental Rights by analogy with Article 8 European Convention on Human Rights ECHR (the right to private and family life) – except that this may reflect problems with the *Dano* and *Alimanovic* cases, where EU citizens were considered to fall outside the scope of the Charter, if they did not meet the conditions set out in the Directive. The legal basis upon which such EU citizens may nonetheless remain resident is relevant for the possibility to acquire permanent residence status under Directive 2004/38, which would then open the way towards full equal treatment in relation to social benefits and increased protection against expulsion. For example, although the immigration authorities are authorised to review the application of

Article 8 ECHR *ex officio* in the event of a termination of residence as a Union citizen, a successful appeal to Article 8 ECHR does not result in the person concerned having lawful residence as an EU citizen.¹²

In September 2019, the Dutch Council of State asked the CJEU to clarify the effects of an expulsion decision on the right of an EU citizen to return to that state. The case concerns a Polish national who was expelled from the Netherlands in 2018 because he did not have sufficient resources and therefore did not have legal residence under Article 7(1)(b) Directive 2004/38.¹³ The Polish citizen stayed with friends in Germany for less than four weeks and then returned to the Netherlands, where he was arrested and detained. The Council of State has to judge on the lawfulness of detention in light of Directive 2004/38 and asked the CJEU to clarify whether the decision that an EU citizen has to leave the Netherlands is complied with when the EU citizen leaves the Netherlands within the designated period. If so, does the individual have legal residence immediately upon return? Alternatively, how long should he stay outside of the Netherlands?¹⁴

Restricting the EU right to reside on the grounds of public policy, public security and public health

The EU rules

Directive 2004/38 allows the Member States to restrict the right to move and residence on grounds of public policy, public security or public health (Article 27(1)). Restrictions include the refusal to allow exit or entry, the refusal to issue/renew a residence certificate or card, expulsion as well as exclusion orders or entry bans that prevent an EU citizen from re-entering a host state. Article 27 precludes the Member States from legality conflating public policy or public security with economic concerns, for example by attempting to expel EU citizens who are claiming welfare rights or unemployed EU citizens as a matter of public policy or public security. Article 27 clearly states that ‘these grounds shall not be invoked to serve economic ends’.¹⁵ It further establishes a series of material guarantees that Member States must respect as a matter of EU law. They include the principle of proportionality, the requirement that any measure should be based on the personal conduct of the person concerned, the threat posed by the individual must be genuine and present, previous criminal convictions are to be considered insofar as they are evidence of a personal conduct constituting a present threat to public policy and the ban on general preventive measures. The Court has further clarified that the concepts of public policy and public security need to be interpreted strictly and cannot be determined unilaterally by the Member States, although they enjoy some flexibility in determining the meaning of the two terms. Public health is strictly defined in Directive 2004/38 as being linked to illnesses with epidemic potential according to the World Health Organisation or other infectious or contagious parasitic diseases if restrictive measures are applicable to a country’s own nationals as well.

The strength of the protection enjoyed by EU citizens against expulsion is linked with the length of their residence and their level of integration in the host state. Concerning the length of residence, Article 28 of Directive 2004/38 provides for increased protection against expulsion after the acquisition of permanent residence – that is, after five years of continuous and legal residence in the host EU state. Permanent resident EU citizens and their family members can only be expelled on ‘serious’ grounds of public policy and public security. Where the permanent resident EU citizen has resided for longer than 10 years in a host EU state, she can be expelled only on ‘imperative’ grounds of public security – this level of protection is reserved for EU citizens only, TCN family members are excluded. Furthermore, the rules contained in Directive 2004/38 rely on the notion of ‘integration’ to link residence and protection

from expulsion: the longer the EU citizen has resided in a host state, the better integrated s/he is, therefore the better protected against expulsion.¹⁶ The Court has defined integration as based 'not only on territorial and temporal factors but also on qualitative elements, relating to the level of integration in the host Member State'.¹⁷ The commission of crimes and the execution of prison sentences are examples of situations that negatively affect the integration of the EU citizen and have the potential to undermine the higher level of protection against expulsion that is reserved for permanent resident EU citizens.¹⁸

According to Article 32 of Directive 2004/38, the Member States can adopt an exclusion decision against an EU citizen on the grounds of public policy or public security provided that the safeguards of Article 27 are also met.¹⁹ The aim of an exclusion order is to prevent the EU citizen from re-entering the Member State that issued the order. The article does not specify whether such a decision always follows an expulsion measure. The excluded EU citizen can apply to have the measure lifted at the earliest three years after the enforcement of the order validly adopted in accordance with EU law. Recital 27 of the Directive specifies that life-long exclusion bans are prohibited.²⁰ The EU citizen must show that there has been a material change in the circumstances which justified the exclusion decision and the Member State must reach a decision within six months of the submission. In the *Petrea* case,²¹ the CJEU clarified that a Member State can adopt an expulsion order against an EU citizen who returned to that state in spite of an existing exclusion order and who was seeking to have the latter order lifted as long as the examination of the application has been finally concluded. *Petrea* blurs the difference in legal treatment between EU citizens and TCNs since it allows EU states to rely on the arrangements set out for the removal of TCNs under the Return Directive in respect of EU citizens, too.

Dutch rules on expulsion and exclusion on the grounds of public policy, public security and public health

Articles 27, 28, 30 and 32 of Directive 2004/38 are implemented in Article 8.22 of the Aliens Decree. The most relevant part states that the residence right can be withdrawn or terminated on grounds of public order or public security where the personal conduct of the alien forms a present, real and serious threat to one of the fundamental interests of society. Before reaching a decision, the authorities must consider the EU citizen's duration of residence, age, health situation, family and economic situation, social and cultural integration in the Netherlands and ties with the country of origin. An EU citizen whose right to reside has been restricted on public order or public security grounds is obliged to leave the Netherlands independently. Failure to do so can lead to forced removal by the authorities. Additionally, the EU citizen can be declared undesirable (Article 67 Dutch Alien Act). A pronouncement of undesirability is an administrative measure that aims to ban a person who is no longer allowed to stay in the Netherlands. In most cases a pronouncement of undesirability is imposed on someone who has committed a crime. Failure to comply with the obligation to leave stemming from the declaration of undesirability is a criminal offence (Article 197 Dutch Criminal Code).

To decide on the termination of the right to reside on public order or public security grounds, the immigration authorities rely on a sliding scale that is applicable to all aliens who have committed criminal offences in the Netherlands (Article 3.86 Aliens Decree). This scale takes the form of a table and is used to determine whether residence can be terminated on the basis of the conviction for a criminal offence. The table reflects the principle that aliens should enjoy greater protection against expulsion after a longer period of legal residence and must have committed a more serious public order crime to justify termination of their legal residence. While the sliding scale is meant to offer migrants and policy-makers a greater degree of legal certainty and limit the risk of arbitrary decisions, it fails to consider changes

in the alien's behaviour since the commission of the crime and thus questions the urgency of the public order threat (ACVZ 2018).

Concerning EU citizens, the sliding scale system is vulnerable to criticism in light of the principles of proportionality and effectiveness. The immigration authorities tend to skip the step of first assessing whether the benchmarks listed in Articles 27 and 28 Directive 2004/38 (personal conduct, present and sufficiently serious threat, proportionality etc.) allow for the termination of residence rights. Instead, where the EU citizen has committed a crime, they often directly apply the national system of the sliding scale to decide on the right to reside.

In practice, the legal treatment of petty criminality has raised issues. The Implementation Guidelines that are used by IND caseworkers when applying the Aliens Decree stipulate that the immigration authorities can terminate or withdraw the right to reside on grounds of petty criminality where the EU citizen habitually commits small criminal offences that, individually, could not lead to the termination or withdrawal of the right to reside (VC B 10/2.3). In such cases, the nature and number of criminal offences, as well as the damage caused to society, are relevant. EU citizens who engage in petty criminality feature regularly in the information letters through which Dutch ministers inform the Dutch parliament about the situation of EU citizens in the Netherlands. They are portrayed as a small but highly disruptive group of EU citizens over whom the Dutch authorities, including the municipalities in which such citizens are present, would prefer to have a much stronger grip in order to expel and remove them based on national, rather than EU, law.

Existing jurisprudence indicates that administrative decisions still fall short concerning the requirement of a present, real and sufficiently serious threat to a fundamental interest of the society. On 18 June 2013, the Council of State gave an important judgment on how to approach the expulsion of habitual offenders.²² In this case, the EU citizen was pronounced undesirable and therefore had to leave the country. He or she had committed a number of petty crimes which, individually, were not enough to demonstrate that his/her behaviour constituted a genuine and sufficiently serious threat to a fundamental interest of society even though, taken together, they fulfilled this condition. The Council of State declared the undesirability pronouncement in this case unjust but left enough room for the immigration authorities to decide otherwise in other situations given the circumstances of future cases. With a reference to the CJEU judgment in the *Polat* case,²³ EU citizens convicted for several petty crimes in a row can still be pronounced undesirable (and therefore expelled) but the safeguards of Article 27 Directive 2004/38 must be applied beforehand.

Fraud or abuse of rights

Article 35 of Directive 2004/38 allows the Member States to adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in case of abuse of rights or fraud, such as marriages of convenience. Any such measures must respect the procedural safeguards stemming from Articles 30 and 31 and the principle of proportionality. The latter requires EU states to consider the gravity of the abuse before terminating rights and, where less restrictive measures are possible, these should be contemplated. Based on the Court's case law, most cases where fraud or the abuse of rights have been invoked by the Member States revolve around TCN family members who enjoy derived rights of residence or entry based on the EU citizen's exercise of free movement rights.²⁴ The Member States' sensitivity around marriages of convenience as a specific form of abuse or fraud prompted the Commission to issue guidelines on this topic (COM(2014) 604 final). There has, as yet, been no case where an exercise of free movement rights coupled with a request for social assistance has been addressed as

a question of fraud or abuse of rights although, in some states, ‘welfare tourism’ has been framed as abusive (Evans 2020).

The CJEU interprets Article 35 as requiring ‘... first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it’ (*McCarthy*, para. 54). Moreover, the Court clarifies that any measure restricting rights based on Article 35 can only be justified in individual cases, no matter what the systemic concerns may be (Guild, Peers and Tomkin 2019: 310). Measures taken on Article 35 grounds could be followed by an expulsion measure as long as the principle of proportionality is also respected.

Article 8.25 of the Dutch Aliens Decree, which implements Article 35 Directive 2004/38, uses a more general wording: ‘[t]he Minister may withdraw the right of residence if the alien has submitted wrongful information or has withheld information which should have had as a consequence the refusal of entry or residence’. This provision suggests that the grounds for withdrawal of the right of residence may be used in cases that actually are not covered by Article 35 of the Directive. The policy rules on abuse of rights are set out in the Implementation Guidelines of the Aliens Act ((VC) B10/2.3). Residence permission can be withheld or withdrawn according to this section if (i) the EU citizen or his/her family member has provided incorrect information or withheld information which, if known, would have led to a refusal to grant entry or residence permission; or (ii) rights have been abused. Also listed in this enumeration is residence in another Member State as a family member of a Dutch citizen, that does not qualify as genuine and effective, the so-called *Europe route*.²⁵ Following this enumeration, the implementation guidelines give a description of what is meant by ‘artificial behaviour’ – i.e. behaviour the sole purpose of which is to obtain a right of entry or residence under EU law. Although such behaviour, strictly speaking, satisfies conditions set out in EU law, it violates the purpose of those rules. A violation of EU law is, in any case, assumed by the IND if the sole purpose of obtaining a right of residence under Directive 2004/38 is to circumvent national laws and policy rules.

There is some Dutch jurisprudence in this respect which mainly concerns marriages of convenience. Most cases are on the establishment of conflicting statements which justify the conclusion that there were serious doubts as to the nature of the marriage involved.²⁶ Usually, the Council of State refers in such cases to the 2014 European Commission’s guidelines. It also emphasises that the burden of proof is with the immigration authorities and that no systematic and random controls are allowed consistent with the CJEU in *McCarthy*, supra note 24.

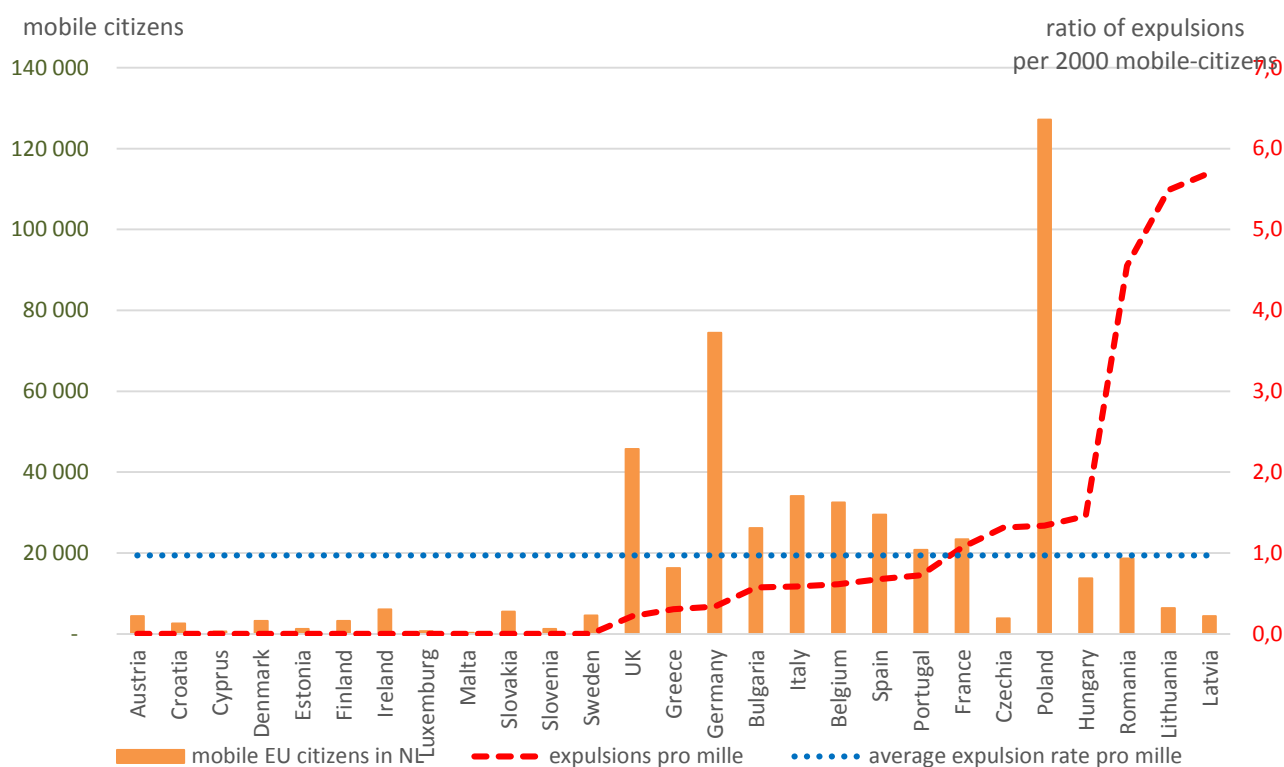
Filling the gap between expulsion and effective removal

The previous sections have shown that the power to restrict the residence rights of EU citizens or to expel or remove such persons is limited by EU law and its operation in the Dutch legal order. The number of persons who are issued with an expulsion order and declared undesirable is relatively small.

As far as the available statistics and data provided by the Dutch immigration authorities allow us to conclude (see Figure 2), between 2016 and 2019, an average of 16,000 aliens per year had to leave the Netherlands, either voluntarily or forced. Of these aliens, 16 per cent (2,500) were forced to depart. The remaining 84 per cent left unforced, meaning that 29 per cent left demonstrable and 55 per cent non-demonstrable. Of these 2,500 forced departures per year from the Netherlands, only 10 per cent refer to EU citizens. Thus, an average of 250 EU citizens have been forced to depart each year, which is only 1 out of every 2,300 registered EU citizens. Some nationalities figure more often in these statistics than

others. The ‘expulsions pro mille’ or dashed line in Figure 2 shows the average expulsion rate: 1 per 2,000 citizens per EU state. This figure shows that, in the last four years, Romanians, Lithuanians and Latvians were five times more often than average forced to leave the Netherlands. Remarkably, Polish citizens, although the largest group of EU citizens in the Netherlands (indicated by the vertical bars in the figure), have an average expulsion rate – i.e. just over 1.

Figure 2. Ratio of expulsions from the Netherlands (average between 2016 and 2019) of (non-Dutch) EU citizens who are usual resident in the Netherlands, by nationality



Source: Dutch Repatriation and Return Service, <https://data.overheid.nl/dataset/immigratie-dtenv-vertrek>.

The existing data on removed EU citizens do not necessarily support the politicised and securitised discourses that circulate within the public sphere in relation to mobile EU citizens. This reflects the higher level of protection enjoyed by EU citizens in relation to expulsion and removal when compared with non-EU foreigners, since the Dutch authorities can issue exclusion orders only on grounds of public policy and security. It is worth stressing that the relevant part of the IND work instructions concerning the application of the rights of mobile EU citizens and their family members deals mainly with the expulsion and removal of TCN family members of EU citizens; only limited space is dedicated to the removal of EU citizens as such, reflecting their stronger position.²⁷

The more limited powers enjoyed by the Dutch authorities in relation to EU citizens are seen as causing problems at the local level. To deal effectively with homeless EU citizens and petty criminals, the Dutch authorities have developed an integrated approach to EU citizens who make a nuisance of themselves in public spaces, an approach that involves the cooperation of various central and local authorities from different departments (immigration, police, public health services etc.) with a view to taking

a decision on the legality of residence of the EU citizen concerned, followed by a decision to leave the Netherlands (Kramer 2017: 24). However, not all EU citizens who are issued with a decision in fact leave and not in all cases is residence terminated. Thus, municipalities perceive as sources of nuisance those EU citizens whose rights of residence have been terminated but who do not comply with the obligation to leave the Netherlands, EU citizens who are homeless or destitute, and EU citizens who engage in petty criminality but cannot be expelled. Such persons are seen as posing a threat to the security, wellbeing and cohesion of the local community.

The general context in which this takes place is one where the Dutch government and some municipalities have minimised access to social support for EU citizens, including access to shelters for homeless EU citizens (Scholten, Engbersen, van Ostaijen and Snel 2018). Some Dutch local authorities have developed programmes to assist the voluntary return of homeless and destitute EU citizens to their states of origin as a more effective alternative to (forced) state removal, which would first require a decision terminating residence. Existing local initiatives and their relative success in removing 'unwanted' EU citizens from the street prompted the Dutch government to set up a special fund, accessible to NGOs that operate return and reintegration projects for EU citizens. This is the so-called '*subsidieregeling*',²⁸ which mimics the policy that is pursued in relation to irregular TCNs. Its focus consists of EU citizens who, although they intended to reside in the Netherlands, lack sufficient resources to fend for themselves; equally, they lack the resources to return on their own to their country of origin and will need social support when they get there.

Stichting Barka is the largest NGO working with Dutch local municipalities in assisting the voluntary return of homeless EU citizens. Initially, *Barka* focused on Polish nationals in Utrecht. Currently, it co-operates with a number of municipalities in the Netherlands (Utrecht, Rotterdam and The Hague) and has nation-wide mobile intervention teams. Its director, Magdalena Chwarścianek, estimated that there are about 3,000 homeless Polish nationals in the Netherlands. Based on its annual reports, the organisation helps more than 500 persons per year to return to their state of nationality.²⁹ About 70 per cent of them are Polish and the rest are from other CEE countries. The returns organised by *Barka* are voluntary, require the cooperation of the EU citizen concerned and include persons who have not yet lost their right to reside but whose integration in the Netherlands is deemed unsuccessful and lacking any opportunities. In our view, the organised return of a substantial number of Polish citizens could be interpreted as an explanation of why the actual expulsion ratio for Polish nationals in Figure 2 is so low, since these EU citizens return 'just before' their residence is terminated and they are expelled. There is no information available on the effectiveness of these returns or on Polish returnees going back to the Netherlands. The website of *Barka* provides anecdotal information about returnees living on 'care farms' in Poland as part of reintegration projects run by the Polish branch of *Barka*.³⁰

Conclusions

This contribution has examined Dutch legal responses to 'unwanted' EU citizens. Although CEE mobility has been politicised and securitised through its depiction as a source of crime and welfare abuse, the available data on the number of EU citizens who have been expelled show a different reality. We have identified tensions between EU law and its transposition and application at the national level caused by the repeat attempts of Dutch immigration authorities to apply as strictly as possible EU rules. At this level of the analysis, in respect of the denial of residence rights based on appeals to social assistance or on the grounds of public policy and public security, we notice a constant search for the limits of the discretion left by EU law to national authorities to the detriment of the rights of mobile EU citizens. Dutch courts have played an ambiguous role, sometimes upholding the restrictive interpretation proposed by the

immigration authorities and other times seeking to uphold the EU requirements of proportionality and effectiveness by emphasising the obligation of the administrative authorities to perform an individual assessment in all cases where the right to reside or the possibility to expel are questioned.

In our view, the much higher number of EU citizens who are helped to return voluntarily via *Barka* as opposed to expelled EU citizens suggests that EU law poses clear limits to the power of Dutch authorities to deal with ‘unwanted’ EU citizens, be they petty criminals or unemployed. To deny EU residence rights, the Dutch authorities must mobilise resources and ensure that the safeguards prescribed by EU law have been satisfied. Creating alternatives to the legal termination of residence is probably cheaper and more effective than enforcing return and has the advantage of not clogging up the administrative or the judicial systems with claims in respect of which a higher threshold than the national one has to be met. This strategic approach to EU mobility, which sees cooperation between different levels and across different branches of government and civic society, deserves further investigation as it raises complex questions about the roles of law and policy in the governance of EU mobility, issues of responsibility stemming from the exercise of EU mobility rights and the best way to ensure that the rights of EU citizens are effectively respected in practice. Our analysis shows that the higher threshold of protection applicable to EU citizens has an impact on how the national authorities engage with their mobility despite its politicised image.

Conflict of interest statement

No conflict of interest was reported by the authors.

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Notes

¹ CJEU 21 December 2011, C-424/10 and C-425/10, *Ziolkowski & Szeja*, EU:C:2011:866, para. 46.

² CJEU 15 September 2015, C-67/14, *Alimanovic*, EU:C:2015:597.

³ CJEU 20 September 2001, C-184/99, *Grzelczyk*, EU:C:2001:458, para. 43; CJEU 7 September 2004, C-456/02, *Trojani*, EU:C:2004:488, para. 3.

⁴ CJEU 19 September 2013, C-140/12, *Brey*, EU:C:2013:565; CJEU 11 November 2014, C-333/13, *Dano*, EU:C:2014:2358; CJEU 15 September 2015, C-67/14, *Alimanovic*, EU:C:2015:597; CJEU 25 February 2016, C-299/14, *Garcia-Nieto*, EU:C:2016:114; CJEU 14 June 2016, C-308/14, *Commission v. United Kingdom*, EU:C:2016:436.

⁵ CJEU 20 December 2017, C-442/16, *Gusa*, EU:C:2017:1004; CJEU 11 April 2019, C-483/17 *Tarola*, EU:C:2019:309.

⁶ Central Appeals Tribunal 18 March 2013, NL:CRVB:2013:BZ3853 and 20 January 2015, NL:CRVB:2015:57.

⁷ District Court The Hague 1 September 2015, case number AWB 15/4877.

⁸ District Court The Hague 18 January 2016, NL:RBDHA:2016:3075.

⁹ Council of State 7 November 2018, NL:RVS:2018:3584 and 3585.

¹⁰ District Court The Hague 19 April 2019, AWB 18/4352.

¹¹ CJEU 12 March 2014, C-456/12, *O&B*, EU:C:2014:135.

¹² Council of State 21 February 2019, NL:RVS:567.

¹³ Council of State 25 September 2019, NL:RVS:2019:3262.

¹⁴ Request for a preliminary ruling from the Dutch Council of State, lodged on 30 September 2019, Case C-719/19.

¹⁵ The Court has considered this issue explicitly in cases of restrictions placed on exit by the state of the migrant's own nationality with a view to securing the repayment of debts owed to the state (CJEU 17 November 2011, C-434/10 *Aladzhev*, EU:C:2011:750) or to a private entity (CJEU 4 October 2012, C-249/11, *Byankov*, EU:C:2012:608). Only in the latter case did the Court find that such a measure clearly served purely economic ends and was prohibited by EU law – see Guild *et al.* (2019: 266–267).

¹⁶ See, for example, CJEU 23 November 2010, C-145/09, *Tsakouridis*, EU:C:2010:708, para. 25.

¹⁷ CJEU 16 January 2014, C-378/12, *Onuekwere*, EU:C:2014:13, para. 24.

¹⁸ See, for example, CJEU 17 April 2018, C-316/16, *B.* and CJEU 17 April 2018, C-424/16, *Vomero*, EU:C:2018:256.

¹⁹ In CJEU 4 October 2012, C-249/11, *Byankov*, EU:C:2012:608, the Court has found that Article 32 applies also to national measures preventing the EU citizen from leaving his state of nationality.

²⁰ The rule stems from CJEU 19 January 1999, C-348/96, *Calfa*, EU:C:1999:6 and was further elaborated on in CJEU 4 October 2012, C-249/11, *Byankov*, EU:C:2012:608.

²¹ CJEU 14 September 2017, C-184/16, *Petrea*, EU:C:2017:684.

²² Council of State 18 June 2013, NL:RVS:2013:62.

²³ CJEU 4 October 2007, C-349/06, *Polat*, EU:C:2007:581.

²⁴ CJEU 19 October 2004, C-200/02, *Zhu and Chen*, EU:C:2004, 639; CJEU 25 July 2008, C-127/08, *Metock*, EU:C:2008:449; CJEU 18 December 2014, C-202/13, *McCarthy a.o.*, EU:C:2014:2450; CJEU 16 July 2015, C-218/14, *Singh*, EU:C:2015:476.

²⁵ Under this construction a Dutch citizen resides for a consecutive period of a minimum of three months with a third-country family member in another member state and claims upon return to the Netherlands a derived right of residence for the family member under Article 21 TFEU. This construction is of interest because the EU rules regarding family reunification are more liberal than the Dutch rules. See CJEU 12 March 2014, C-456/12, *O&B*, EU:C:2014:135.

²⁶ See, *inter alia*, Dutch Council of State 19 October 2017, NL:RVS:2017:2847, Dutch Council of State 20 July 2016, NL:RVS:2016:2120 and 2006.

²⁷ IND, Werkinstructies SUA, WI2018/4 Het Recht van de Europese Unie, pp. 34–35.

²⁸ Subsidiereregeling ondersteuning zelfstandig vertrek 2019, *Staatscourant* No. 71321, 19 December 2018.

²⁹ Reports are available at <https://www.barkanl.org/anbi/> (accessed: 26 June 2021). The following data are available: 2014 – 606 persons; 2015 – 698 persons; 2016 – 507 persons and 2017 – 537 persons.

³⁰ <https://www.barkanl.org/het-parool-van-dakloze-naar-boer/> (accessed: 26 June 2021).

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Imagining the Impossible? Fears of Deportation and the Barriers to Obtaining EU Settled Status in the UK

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In early 2021, over 5 million European Union (EU) citizens had applied for settled status to secure their right to continue to live, work and study in the United Kingdom (UK) after the country's withdrawal from the EU (Brexit). In 2018, the Home Office launched a Statement of Intent to implement an application process for EU citizens through its EU Settlement Scheme. In the period leading up to Brexit, the UK government assured EU migrants that their existing rights under EU law would remain essentially unchanged and that applying for settled status would be smooth, transparent and simple. However, the application process has resulted in some long-term residents failing to obtain settled status, despite providing the required information. Based on qualitative in-depth interviews with 20 EU migrants living in two major metropolitan areas in Northern England, this article discusses the significant barriers which EU citizens face in the application process. This situation particularly affects the most vulnerable EU migrants with limited English-language skills and/or low literacy levels as well as those who are digitally excluded. The study contributes to the growing body of research on the consequences of Brexit for vulnerable EU migrants in the UK, focusing specifically on Central and Eastern European migrants.

Keywords: EU Settlement Scheme, settled status, deservingness, EU migrants, homelessness

Introduction

In the first few months of 2021, 5 million people have already applied for settled status (Carey, Tanner and Gamester 2021), whereas in 2019, 3.6 million people with the nationality of a member state of the European Union (EU) were estimated to be living in the United Kingdom (UK) (ONS 2019b). Unlike other European states, the UK does not have a system of compulsory registration for residents. Therefore, no reliable statistics on the total numbers of EU migrants in the UK exist, although it is possible to estimate the annual flows of economically active EU migrants based on the National Insurance Number registrations (D'Angelo and Kofman 2018). One of the contentious issues during the negotiations preceding the

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UK's withdrawal from the EU (Brexit) was the rights of EU citizens after EU law ceased to apply to the UK in accordance with Article 50(3) of the Treaty on European Union. Concerns were raised over the post-Brexit legal status of EU citizens and the procedural mechanisms needed to secure the judicial protection of their rights after the Court of Justice of the European Union (CJEU) is no longer able to deliver preliminary rulings on EU law questions arising in proceedings before the UK courts (Smismans 2018). In order to implement such a regime in accordance with the EU–UK Withdrawal Agreement, in June 2018 the government launched a policy paper on the new registration system for EU citizens (known as the EU Settlement Scheme or EUSS) (Home Office 2018). Essentially, this system replaced the documents issued to certify permanent residence in a host member state under Article 19 of the Citizenship Directive (2004/38/EC), which gives effect to the free movement of persons under EU law. The policy paper covers a range of technical topics, outlining the eligibility criteria and advice on how to apply.

Our research evaluates the experiences of EU migrants settled in two metropolitan areas in Northern England with the EUSS. We argue that the analysis of their experiences is a way to explore the exclusionary nature of the settled status application process. Barnard, Costello and Fraser Butlin (2019) note that, for applicants who are aware of this scheme, hold one of the accepted ID documents, have a documented history, access to a smartphone meeting the specifications and the necessary IT and language skills, the application process has been relatively simple, taking as little as 15 minutes to complete. Statistics indicate that a vast majority of the UK's 1.5 million CEE migrants live in England (ONS 2019b), most of whom had applied for settled status by the end of 2019 (Home Office 2020). Additionally, smaller numbers of CEE migrants have applied for settled status in Wales, Scotland and Northern Ireland (*ibidem*). However, while the academic literature in this area is still emerging (e.g., Botteril, Bogacki, Burrell and Hörschelmann 2020; Tomlinson 2020; Tomlinson and Welsh 2020; O'Brien 2021), there is some evidence that many EU migrants are experiencing difficulties with their applications (Barnard and Costello 2021) and that, rather than having settled status, many EU migrants hold pre-settled status, which may create the risk of a significant number of individuals being left without a legal basis for remaining in the UK after the expiry of five years (Tomlinson 2020).

Our interview data reveal that not all applicants fall into the category of highly mobile, tech-savvy, professional and aware EU citizens. Although many applicants may find the process relatively easy and trouble-free, others have experienced difficulties in using the Home Office app and have been requested to provide additional evidence to support their applications. Additionally, there are still some EU citizens who are taking their time to make an application. For instance, the authors have frequently engaged in conversations with fellow EU citizens who thought that they and their family members were ineligible to apply because they had been resident in the UK for a relatively short period of time or because they did not yet have all the required paperwork such as council-tax bills. However, many of these EU migrants will risk becoming undocumented if they lose their right of residence in the UK as a result of their non-application for the EUSS.

Our research is therefore timely, topical and important because it gives voice to EU migrants through detailing their experiences; our objective is to generate knowledge that informs and influences national and local governments' policy and practice. The authors have contributed to the shaping of the settled-status application process via a migration advisory group established at the local government level and the views of this group have been communicated to the Home Office. Based on qualitative research, namely individual in-depth interviews, this article discusses the significant barriers which some EU migrants face with the EUSS, including the challenge of providing evidence of continuous residence. We use the experiences of two groups of EU migrants, (i) low-skilled migrants from Central and Eastern Europe (CEE) (referred to in this article as 'G1') and (ii) students and skilled migrants from several EU

member states (referred to as 'G2'). Out of whom G1 faced considerable barriers with the application due to their precarious immigration status. The term 'precarious' in the context of our study means the insecurity arising from having precarious immigration status and concerns regarding access to adequate support services – e.g., health-care (Rogers 2017).

Under the 'hostile environment' policy the UK has required various public and private actors, ranging from hospitals and landlords to banks and schools, to actively check that individuals have the required visas or work and residency permits (Smismans 2018: 450). Undocumented EU migrants will therefore lose all residence-based entitlements – including access to free secondary healthcare (e.g., hospital treatment) and benefits – and may be asked to reimburse payments received. Although undocumented migrants currently retain access to free primary healthcare services – e.g., consultation with a general practitioner (GP) or a nurse (Walsh 2020b) – they often also lose their jobs because their employers may be fined, their bank account may be frozen and they may be asked to leave the UK voluntarily or face deportation without the right to appeal. While the hostile environment concerns have disproportionately affected non-EU migrants and non-white British citizens, in the context of Brexit debates, much of the stigmatisation of CEE migrants has centred on seeing them essentially as 'benefit tourists' (Burrell and Schweyher 2019). Additionally, some Brexit debates have had distinctly racial and colonial overtones, exemplified by an increasing intolerance of equality and diversity (Buelتمان 2020; Burrell and Schweyher 2019; El-Enany 2020; Prabhat 2018). We refer to the notion of 'deservingness' (Monforte, Bassel and Khan 2018) as a discursively constructed concept that the government uses to justify its policy on settled status. Burrell and Schweyher (2019) note that the EUSS is accompanied by moral overtones of 'deservingness' and warnings against criminal activity. Our research therefore aims to contribute to the wider academic discussion on the inclusive/exclusive logic of citizenship (Tyler and Marciniak 2013).

EU Settlement Scheme

In order for migrants with the nationality of one of the EU member states (excluding Irish citizens), Iceland, Liechtenstein, Norway or Switzerland and their family members to continue to live, work and study in the UK after Brexit, it is essential for them to apply for settled status. The EUSS is designed to be consistent with Article 18 of the EU–UK Withdrawal Agreement, which entered into force on 1 February 2020, and which contains extensive details on the practicalities of attaining settled status, including the requirement for the relevant administrative procedures to be 'smooth, transparent and simple' and that unnecessary administrative burdens be avoided (Barnard and Leinarte 2019). Article 18 further stipulates that the application forms should be short, simple and user-friendly, applications by families should be considered together and should be free of charge or not exceed the fees imposed on British citizens. Additionally, EU citizens who have an existing permanent-residence document can simply swap this to the new status, subject to criminality and ID checks. However, what is different compared to the right of residence under the Citizenship Directive is that, while EU citizens were generally not required to prove their right to reside in the UK before the introduction of the EUSS, they must now apply for settled status (Smismans 2018). Additionally, criminality and security checks are carried out systematically under the EUSS (Barnard and Leinarte 2019). Moreover, the Withdrawal Agreement necessitates that judicial and administrative redress be available for any applicants affected by the authorities' decisions. Under Article 39 of the Withdrawal Agreement, the right of residency under settled status is permanent unless the EU citizen leaves the UK for five years.

In line with the Withdrawal Agreement the supervision and governance of EU citizens' rights remained unchanged during the transitional period up to 31 December 2020. During this period, the UK was bound by EU law and the CJEU had the competence to oversee the respect of EU law in the UK (Porchia 2019). Although, during the transitional period, EU citizens' rights and immigration rights were no longer subject to EU law, in practice the provision for these rights under EU law continued until the end of this period (*ibidem*). Under the European Union (Withdrawal Agreement) Act 2020, EU citizens who qualify for settled or pre-settled status can enjoy these rights beyond the transitional period. The difference between settled and pre-settled status is that individuals who have not yet fulfilled the requirements of five years' continuous residence in the UK by 31 December 2020 will obtain pre-settled status, a time-limited form of leave to remain, enabling them to reside for a further five years (McHale and Speakman 2020). Once qualified, they must apply for settled status. As such, settled status can be argued to mirror the protection guaranteed in Article 16 of the Citizenship Directive, according to which the right of permanent residence is acquired by EU citizens and their family members who have resided legally in the host member state for a continuous period of five years. According to Article 17 of the Withdrawal Agreement, individuals can change their status (e.g., from being a worker to being a student) in the period prior to acquiring settled status. Therefore, an applicant does not need to have been in full-time employment in the UK in order to qualify (Barnard and Leinarte 2019). This is important for our research since not all our interviewees were employed during the 5-year period of their residence. Although the only requirement for EU citizens applying for residence documentation is to be living in the UK by a certain date, subject to criminality checks (Spaventa 2020), acquiring settled status is not as simple as it may seem.

According to the UK government (2020), individuals who have secured settled or pre-settled status will be able to continue to work in the UK, access healthcare under the National Health Service (NHS) in the same way as under EU law, enrol in education or continue studying and access public funds – e.g., benefits and pensions, subject to eligibility. Since resident migrants' access in these domains is not explicitly governed by immigration legislation but by residence conditions about settlement and the place of ordinary or habitual residence, fulfilment of these conditions impacts on EU citizens' access to, for example, the NHS and post-compulsory education (Oliver 2020). Legal scholars have concluded that, depending on their immigration status, many EU citizens risk the immediate loss of all entitlements to work, healthcare and benefits – and ultimately face deportation – if they fail to secure either settled or pre-settled status (Smismans 2018). Before 1 January 2021, the residence requirement for anyone who arrived in the UK to work was three months under Article 6(1) of the Citizenship Directive, according to which 'a valid identity card or passport' is sufficient to guarantee entry. However, this is no longer sufficient, since the right to continue to work and live in the UK is no longer simply a matter of showing a passport (Portes 2016) but is dependent on the acquisition of settled or pre-settled status.

There is evidence that employers and banks have requested proof that EU citizens have applied and secured settled status even before the expiry of the deadline for applications on 30 June 2021 (Barnard *et al.* 2019; Bueltman 2020). Private and public entities' checks on the right of residence are hardly unsurprising, considering the UK government's attempts to restrict access to social advantages by amending the secondary legislation governing this area. For instance, in 2013, the government replaced various income-related benefits, including Jobseeker's Allowance, Housing Benefit, Child Tax Credit, Income Support and Working Tax Credit, with a single means-tested benefit called Universal Credit for applicants both in and out of work (Explanatory Memorandum to Universal Credit Regulations, SI 2013/376). Further, due to legislative changes introduced in 2019, the government made access to certain types of social security benefits, housing assistance and tax credits for those individuals who have

pre-settled status conditional upon their ability to demonstrate that, during their stay in the UK, they have exercised EU free-movement rights – for example, as a worker under the Treaty on the Functioning of the European Union. The new rules were introduced by the Child Benefit and Child Tax Credit (Amendment) (EU Exit) Regulations 2019 (SI 2019/867); the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (EU Exit) Regulations 2019 (SI 2019/861), and the Social Security (Income-Related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019 (SI 2019/872). Since benefit reforms have been directly linked to increases in food-bank usage, destitution and homelessness (Carvalho, Chamberlen and Lewis 2020; O'Brien 2015), there are fears that applicants who have obtained pre-settled status are likely to be vulnerable to future changes in the immigration rules (Tomlinson (2020).

Although not all individuals applying for settled status arrive in the UK with the main intention of working (Martinsen, Pons Rotger and Sampson Thierry 2019), nearly half of EU citizens migrating to the UK in 2019 were seeking or commencing permanent employment (Vargas-Silva and Walsh 2020). Under the Withdrawal Agreement, many of the rights of workers and job-seekers remained the same in the transitional period. Article 12 of the Agreement enshrines the principle of non-discrimination, prohibiting any discrimination against EU citizens and their family members on the grounds of nationality in the host state and the state of work (Barnard and Leinarte 2019). Under Article 22 of the Agreement, the family members of EU citizens, regardless of their nationality, will continue to have access to employment as recognised in Article 23 of the Citizenship Directive. Similarly, under Articles 27–29 of the Withdrawal Agreement, recognition of professional qualifications, e.g., under the Professional Qualifications Directive (2005/36/EC) will continue in the future.

Although there are no language proficiency requirements for applying for settled status, some of the reasons for the failure to apply are linked to the applicants' inability to understand the English language. The Home Office has identified individuals 'with limited English and/or low levels of literacy in their own language' as particularly vulnerable (ICIBI 2020: 25). However, language skills or low levels of literacy are not the only barriers preventing EU migrants from applying for settled status although the reasons are multifaceted. The Home Office recognises that various groups are considered vulnerable, including some elderly applicants, disabled people, individuals with physical or mental impairment, people who may be digitally or socially excluded, victims of domestic violence, modern slavery or human trafficking, those without a fixed abode (e.g., homeless people and the Roma and Traveller communities) and children under the age of 18 in foster or local authority care (2020: 50).

Therefore, there is no one easily identified, homogenous group of EU migrants who are likely to be at risk of losing their immigration status in the UK. In order to provide vulnerable EU migrants with practical support with their applications, the Home Office has funded almost 60 organisations with qualified immigration advisors across the UK (2020: 54). While it is unknown how many EU migrants require support with their applications, approximately 10 per cent of adults in the UK are non-internet users (ONS 2019a). The fact that the EUSS application process and the evidence of settled status is entirely online could be a barrier for digitally excluded applicants (Tomlinson and Welsh 2020) since applicants do not receive a physical document of their status but 'an official electronic document accessible through credentials sent via email' (Tomlinson 2020: 218).

Critical analysis of the EU Settlement Scheme

Legal scholars and practitioners have been critical of the EUSS, arguing, for instance, that the new status is inferior to the rights enjoyed under EU law (Smismans 2018). It has been further noted that the full-scale

implications of the scheme are unlikely to be evident for several years at least (Yeo 2020) and, therefore, the government may be creating problems for EU citizens down the line as a result of its hostile environment (Burrell and Schweyher 2019). Judgments of the English High Court provide illustrative examples of this hostile environment. In 2017, the court found that the government's policy of seeking to deport homeless EU citizens discriminated unlawfully against these latter because the application of the policy involved systematic verification of the right to reside in the UK, thereby violating Article 14(2) of the Citizenship Directive (Gureckis 2017). In 2019, the court held that the government's 'right to rent' scheme, which required landlords to check the immigration status of their tenants under Sections 20–37 of the Immigration Act 2014, was incompatible with Articles 8 and 14 of the European Convention on Human Rights and discriminated against EU and non-white British citizens (Joint Council for the Welfare of Immigrants 2019). In February 2020, the court held that the Home Office's attempt to apply its 'deport first, appeal later' policy to EU citizens was incompatible with Article 27 of the Citizenship Directive (Hazeef 2020). Despite Gureckis (2017), a new legislative amendment that entered into force in December 2020 has meant that, under Part 9, Section 4 of the Immigration Rules, permission to stay may be refused or cancelled for homeless individuals (Lock 2020).

The 'Windrush scandal' serves as further evidence of the intentionally illiberal interpretation of immigration laws and Home Office guidelines (Burrell and Schweyher 2019; Smismans 2018). As described in the parliamentary report on the Windrush generation (Committee of Public Accounts 2019), since 2002, some 164 Commonwealth citizens with Caribbean heritage, who had an automatic right to settle in the UK between 1948 and 1973, were wrongly detained in the UK or at the border or removed from or refused re-entry to the UK, while others were wrongly advised that they had no access to housing, welfare benefits, driving licences or bank accounts after having lived in the UK for decades. An independent report recommended that the government conduct a full review of its hostile environment (Williams 2020). However, the denial of the rights of the Windrush generation and their children relates to the government's reluctance to enact a suitable system of registration and identity cards, the excessive burden of proof requirements and significant administrative errors (Smismans 2018), despite the fact that these people were 'British subjects, from British colonies, carrying British passports' when they arrived in the UK (Hewitt and Isaac 2018: 294).

Both legal practitioners and scholars worry that EU citizens who do not meet the conditions of settled status may become unlawful residents and be at risk of detention and removal from the UK in accordance with the Immigration Acts of 2014 and 2016 (Berry 2020a; Burrell and Schweyher 2019; Ruhs and Wadsworth 2018; Yeo 2020). Smismans (2018: 446) argues that the UK government had 'considerable leeway' to implement the legal framework for EU citizens' residence rights, implying that it could have chosen to grant permanent residence status to all EU citizens, who were legally resident under EU law, without imposing additional application criteria and putting the residence status of many EU citizens at risk.

Concerns have been raised about the eligibility for settled status for EU citizens who have lived in the UK for more than five years; however, the databases of the HM Revenue and Customs and Department for Work and Pensions may not hold evidence of their residence (Tomlinson 2020). Although settled status is granted based on the length of residence, rather than on, for example, a person's earnings, the Home Office app will not be able to recognise the continuous residence of individuals who have gaps in their income (*ibidem*). These concerns are linked to the ability of applicants to work outside home due to their gender and/or age (Burrell and Schweyher 2019). In such cases it will be difficult for applicants to prove their residence in the UK either because the electronic records on the government's databases may be incomplete or cover only recent years or, due to their personal circumstances, the government

may not have any electronic records of the applicants (The 3 Million 2019). The lack of electronic records has, indeed, been one of the major problems with the EUSS because many EU citizens, who are eligible for settled status, have been granted pre-settled status (Spaventa 2020). One such person is a government employee with over 20 years' work history in the UK (Coughlan 2019). This is largely because the EUSS relies on automated checks of government agencies' databases which may not necessarily contain the information that the applicants have yet accumulated five years of continuous residence. Concerns have also been raised over the perceived discrimination in the use of the algorithm-based automatic check mechanism and the inability of some of the applicants to use the Home Office app – which was initially available only for Android smartphones – because this excluded EU citizens who used other devices or who did not have a smartphone (Tomlinson 2020). Further, Yeo (2020) notes that there have been some considerable design flaws in the EUSS – for instance, initially applicants were not requested to provide information concerning the length of their residence in the UK. There is anecdotal evidence that the design flaws have made it difficult for immigration advisers to assist EU citizens in making their applications. This is because the Home Office has constantly changed the application system, making it challenging for immigration advisers to complete the applications for vulnerable EU citizens seeking their advice. Additionally, Tomlinson (2020) notes that outright refusals are not clearly recorded and that both settled and pre-settled status decisions are considered successful applications. There is also some evidence that during the pilot phase of the EUSS, EU migrants who had applied for social benefits in the UK found it more difficult to fulfil the requirements of the EUSS than those with continuous tax records (Godin 2020).

Kostakopoulou (2018) notes that, since the EUSS is the largest UK registration programme of its kind to date, the nature of the scheme is likely to imply challenges for its implementation, particularly in terms of the effectiveness of the scheme or the inability of EU migrants to apply for settled status. According to Yeo (2020), the fundamental problem underlying the EUSS relates to the complexity of application decisions and the fact that not all eligible EU citizens will apply – some EU citizens, who currently have pre-settled status, will not necessarily apply for settled status after they become eligible. Secondly, EU citizens will be unable to apply for settled status if they leave the UK for more than six months. In practice, EU citizens whose applications are unsuccessful or who fail to submit their application on time will lose all entitlements and will be forced to leave the UK (Carey *et al.* 2021; Smismans 2018; Yeo 2020). Since the EUSS contains no 'fall-back protection' which would enable an EU citizen to stay on a temporary basis or return to the UK in cases where they fail to secure settled status, the consequences of the inability to secure the new status are more severe than the inability to obtain a permanent residence document under EU law (Smismans 2018: 450).

Additionally, scholars have voiced their concerns that many rights originating from EU membership are likely to be under threat after the end of the transitional period. Guerrina and Masselot (2018: 319) note that Brexit 'carries a substantial risk to the interests of traditionally marginal groups (including women) who have hitherto been covered by the EU legal framework'. D'Angelo and Kofman (2018) anticipate that, once the judgments of the CJEU are no longer binding on the UK, the government will restrict access to employment and welfare benefits. The consequences of Brexit are more evident in the context of EU citizens who wish to migrate to the UK from January 2021; Section 4(2) of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 removed, for example, the right for EU migrant workers to move to the UK to commence employment under EU law. Additionally, the 2020 Act could be used to make regulations which extend the immigration health surcharge, currently applied to non-EU citizens when seeking leave to enter the UK (Berry 2020b; McHale and Speakman 2020). Although workers' rights have long been at the top of the free movement hierarchy under EU law, due to

increasing labour market flexibility and job insecurity EU migrant workers are more likely to be concentrated in lower paid, less secure jobs with variable hours and are more likely to bear the brunt of labour-market fluctuations (O'Brien 2016). Additionally, many EU migrant workers in low-paid employment feel anxious about their future in the UK due to the inadequate access to decent sick pay (Rogers 2017). Moreover, UK governments have strongly resisted guaranteeing certain EU law rights – for example, equal treatment rights for agency workers and working-time limits. Signs of increased job insecurity were visible even prior to Brexit, when the Conservative government proposed so-called 'barista visas' for EU migrant workers which would secure a steady source of immigrant labour but only on the basis that these workers would be granted considerably fewer rights (*ibidem*). Additionally, some employers may take advantage of the 'deportability' (De Genova 2007) of undocumented EU migrants by offering them lower wages and inferior employment conditions (Ruhs and Wadsworth 2018: 828).

Expulsion of an EU citizen from the UK

The EU (Withdrawal Agreement) Act 2020, which implements into English law the rights of EU citizens as codified in the Withdrawal Agreement, makes provision for the deportation and the restrictions of the rights of entry to and residence of EU citizens in the UK (Berry 2020a). Section 9(1)(a) of the 2020 Act stipulates that the Minister can make such provision as s/he 'consider[s] appropriate' in order to implement restrictions on entry and residence found in Article 20(1), (3) and (4) of the Withdrawal Agreement. Although equal treatment continues to apply for EU citizens and their family members in fields such as employment, in criminal matters EU citizens will be treated differently to British citizens. Even though EU law did not offer a blanket ban on the expulsion of EU citizens or their family members, Article 27(1) of the Citizenship Directive protected them against arbitrary expulsion measures and offered heightened protection for long-term residents in the UK (Peers 2016b). However, there seems to have been significant differences between the EU's and the UK's approach to the deportation and exclusion of EU citizens from residence rights due to public order even before the end of the transition period. There is some evidence that the UK frequently sought to deport EU citizens when they were covered by the safeguards provided by the Citizenship Directive (Ryan 2017) because, in 2019, 68 per cent of individuals deported for criminal offences had the nationality of one of the EU member states (Walsh 2020a).

Under EU law a criminal conviction cannot automatically lead to expulsion but expulsion decisions must be made on an individual basis under Article 27(2) of the Citizenship Directive (Peers 2016a). However, Part 9, Paragraph 132 of the UK Immigration Rules permits the denial of applications for residence status on the grounds of prior criminal convictions or because the presence of the person in the UK is otherwise 'not conducive to the public good'. Additionally, sections 32–33 of the UK Borders Act 2007 impose an automatic deportation order on non-British citizens who have been sentenced to a period of imprisonment of a year or more or if the offence is otherwise classed as serious. This applies to all individuals who are long-term residents in the UK with indefinite leave to remain (Ryan 2017). However, the UK practice differs considerably from the protection provided by the Citizenship Directive, which guarantees against expulsions that have been designed to increase in correlation with the degree of integration of EU citizens and their family members in the host state (C-316/16 and C-424/16 *Vo-mero*, paragraph 44). Additionally, the procedural safeguards under the Directive are considerably higher than those provided by English law (Berry 2020a; Ryan 2017). It is, for instance, clear from the case law of the CJEU that, when member states consider an expulsion measure against an EU citizen, they have to consider the nature and seriousness of the offence, the duration of residence in the host

member state, the conduct of the person in the time that has passed since the commission of the offence and 'the solidity of the social, cultural and family ties with the host Member State' (C-145/09 *Tsakouridis*, paragraph 53). Further, under Article 33(1) of the Citizenship Directive, the UK practice of issuing expulsion orders as a penalty or as a legal consequence of a custodial sentence, other than in circumstances which fulfil the conditions set out in Articles 27–29 (e.g., that the person's conduct constitutes a sufficiently serious threat) was a breach of the provisions of the Directive.

Methodology

The findings outlined below represent evidence from 20 semi-structured interviews (see Bradford and Cullen 2012) conducted with EU migrants living in two major metropolitan areas in Northern England on their experiences of applying for settled status. There were 10 participants in each of the two groups: (i) low-skilled migrants from CEE, principally from Slovakia and Poland (G1), and (ii) students and skilled migrants from several EU member states (G2). We focused specifically on these two groups, firstly, the UK has a significant proportion of low-skilled migrants from CEE countries who are facing challenges with their settled status applications. This is because the conditions for residence under Articles 7 and 16 of the Citizenship Directive 'have systematically disadvantaged vulnerable workers' who are reliant on short-term, low-paid or casual work or those who do not have a continuous work history due to disability or care responsibilities (O'Brien 2021: 433. See also O'Brien 2015). In terms of G2, the UK typically attracts a number of high-skilled EU migrants seeking to enhance their career development and/or seek opportunities to study in UK universities at graduate and post-graduate levels, as well as, access to study finance in light of the increasing tuition fees (Jacqueson 2018). Three of the interviewees in G2 were Swedish nationals, including one person who had recently applied for naturalisation as a British citizen; two were from the Czech Republic, and two others were from Cyprus. Additionally, there was one Austrian, one Slovenian and one Belgian citizen in this group. Ethics approval for this study was granted by the University of Bradford. For the purpose of this article, we present a thematic analysis of our findings, followed by an inductive analysis (see Braun and Clarke 2006; Evans 2017). The emerging themes were connected to the broader academic literature on EU migrants in the UK (*ibidem*). Whereas the research participants in G2 were all fluent English-speakers, the preferred languages for communication for G1 were Slovak and Polish, therefore their interviews were conducted in their original languages by skilled bilingual interviewers. All the interviews were fully transcribed in the original language and, for the purpose of data analysis, sections of the transcripts were translated into English in cases where the original language was different. We use only the gender and the age of the participants in order to maintain their anonymity. The participants represented an appropriate spread in terms of age (18–60), gender (10 women and 10 men) and residence in the UK (between 1 and 30 years). Two of the interviewees identified as Roma. Six persons in G1 and eight in G2 had secured settled status, whereas four persons in G1 and two in G2 were eligible for pre-settled status.

The participants were recruited through social media, various venues (e.g., public libraries and shops), community organisations and other gatekeepers and through snowball sampling (see Bradford and Cullen 2012). In recruiting, efforts were made to diversify the sample. While it is difficult to assess exactly how the participants' gender in the study affected our findings, the experiences of precarity, the lack of job security and the homelessness among migrant men were prominent in our research material.

In developing this article, we adopted Sotkasiira and Gawlewicz's (2021: 24) analytical framework of 'social, economic and cultural embedding' among EU migrants living in Scotland. First, in our study we conducted a narrative analysis of all interview transcripts (see Linde 1986; Somers and Gibson

1994), focusing on how participants narrate their experiences and perceptions of Brexit and the imagined or real barriers to obtaining settled status. The second phase of the analysis involved thematic coding (see Boyatzis 1998) across the full dataset to identify patterns of particularly problematic aspects of the EUSS and UK immigration rules that impact on EU migrants and the complexities pertaining to the lack of relevant documentation to prove settled status.

Research findings

Reasons to relocate to the UK

All our interviewees initially went to the UK to study or work with positive images of the country as a welcoming, advanced economy where there would be plenty of opportunities for them to progress. Whereas the EU migrants in G2 typically went to the UK to study at university, many of the migrants in G1 went there after being promised work as painters, decorators, builders or carers. The latter were often recruited in the country of origin and their job offers included wages, accommodation and transport to and from work. Many of the migrants in G1 came from broken homes and had experienced abuse or domestic violence; some had had difficulties in the country of origin and hoped that migrating to the UK would change their lives. At the time of the research, all the interviewees in G1 were homeless or lived in insecure accommodation and therefore did not enjoy the rights of residence as qualified persons under the Citizenship Directive.

Awareness of rights linked to settled status

The interviews with the CEE migrants in G1 revealed that some applicants' awareness of their rights and eligibility to stay in the UK after Brexit was limited: 'I don't know how what this settled status is all about. I was told that I must have it otherwise I will be deported' (Male, 55); 'I don't understand why I have to have settled status after 10 years of living here. What is going to happen to me if I don't get it?' (Male, 52). Although some of the interviewees in G2 were unclear about the purpose of the EUSS, their understanding was better: 'At first, I didn't know what to expect or whether I was eligible to apply. It wasn't very clear what the settled status would provide for me' (Female, 18); 'One of the things that wasn't communicated to the public is that you can't complete the application yourself unless you have an electronic passport, not just an identity card' (Female, 27).

The majority of the interviewees were lone migrants without any family members present in the UK. Most of the CEE migrants in G1 had completed only secondary education in their countries of origin, whereas only two of them held A-level or equivalent qualifications. In G2, many had at least an undergraduate degree from a UK university or were currently completing one and were also in paid employment. However, there were significant differences in the types of work which each group was performing. Although some of the EU migrants in G2 were full-time students in part-time employment, most were in professional, full-time employment. In contrast, the jobs that the migrants in G1 performed were low-skilled and generally characterised by low pay and insecurity. These migrants typically washed cars by hand, worked in household waste and recycling centres or in painting and decorating for well below the minimum wage. They also did not have a stable place of residence and some lived in emergency accommodation offered by community organisations such as the Salvation Army.

Although most of our interviewees had been in the UK for several years, very few had previously applied for permanent residence. Only one person in G2 had applied for indefinite leave to remain, which she was granted before her country of origin joined the EU in 2004. She was therefore unsure why she had to apply for settled status. Although all individuals in G2 were able to apply using the Home Office app, even they encountered issues with their applications – such as trouble scanning their passports or the unavailability of the app on iPhones, as evidenced by these two quotes: ‘I was frustrated that the app was not compatible with my phone and I had to borrow my friend’s phone. I also had issues using the app and had to start the application all over again because it crashed’ (Female, 25); ‘The facial recognition feature was unable to identify my face because I had grown a beard during lockdown. I had to re-start the process several times before realising that I couldn’t do this because of my beard’ (Male, 60).

In contrast, none of the applicants in G1 could apply using the app because none of them had valid ID cards or passports because these had been lost or were broken. Many did not even have the basic requirements for using the app – such as mobile phones or email addresses: ‘I don’t have a phone, an email address, a national insurance number or a GP’ (Male, 51).

Due to the complexity of the application process, including the requirement of a smartphone to apply, the unavailability of physical proof of settled status and the government’s hostile environment towards homeless EU migrants, some of the interviewees in G1 were suspicious that the EUSS was enacted deliberately to trip them up. Considering that there has been frequent news coverage about EU migrants not meeting the criteria to obtain residence permits and even being deported from the UK, it is unsurprising that many EU migrants feel anxious about securing settled status (Sotkasiira and Gawlewicz 2021).

The application process for those who do not meet the basic requirements for an online application is complex for various reasons. First, the EUSS represents a significant departure from the other Home Office processes (Tomlinson 2020). In the EUSS, a caseworker only deals with the claim after the automated checks have been completed whereas, in all other cases, Home Office officials make a decision based on law and policy once a paper application and relevant evidence have been submitted (*ibidem*). Second, due to their inability to submit an online application, migrants in G1 had to rely on the help of immigration solicitors or qualified immigration advisers with their applications. Although the Home Office provides paper applications in exceptional cases, initially only solicitors and, later, also qualified immigration advisers, were able to request the application forms, which are unique to each individual and can be up to 40–50 pages long. Additionally, the request for a paper application must be justified on compelling grounds – e.g., because the applicant is unable to obtain a valid passport from their consulate. Moreover, the Home Office may or may not approve the request. For instance, a person who has lost a passport which is still valid is generally expected to acquire a new passport and subsequently complete the settled status application after obtaining it.

Status insecurity

Migrants in G1 were very worried that they would be deported and their lives were filled with constant fear. Some were trying to keep a low profile in order not to attract the attention of the authorities.

I am terrified. The police stopped me and said they would arrest me, so I said ‘I have my ID in my colleague’s car’, so they told me to report to the police station and bring my ID and proof of status (Female, 41).

Now, with this status thing I don't understand what's happening. I have lived on the streets for the last 10 years and [don't know] why the system wants me to be gone now. I haven't done anything wrong, I am just homeless (Male, 38).

One of the interviewees in G1 felt that his whole life would become meaningless if he were forced to leave the UK and return to his country of origin: 'If they deport me, then my life will be over' (Male, 41). In contrast, only few of migrants in G2 were anxious about needing to apply since most of them knew what to expect: 'The online system was good but problematic and it made me anxious. I attended an information session about applying, but that was too overwhelming. At the end, the process was far simpler' (Female, 34); 'I had seen a lot of conversations online about incorrect status being offered to applicants, so knew not to panic when the system incorrectly offered me a pre-settled status' (Female, 26); 'The process of making an online application was not easy or intuitive. Actually, it made me quite anxious and I am a relatively tech savvy person. I can't even imagine how a person who struggles either with the language or technology would cope' (Female, 29).

Applicants whose records are incomplete need to provide evidence that the Home Office will accept. This may involve providing bank statements, pay slips, utility or council tax bills, letters from a GP, a university or a school, covering the previous six years. Where the data checks result in the conclusion that the applicant does not meet the requirement for continuous residence of five years, he or she will be required to submit additional evidence for the periods where the data is lacking (Tomlinson 2020). Research participants in G2 often mentioned additional evidence relating to gaps in employment contributions:

The system initially offered me a pre-settled status despite me having lived in the UK for over nine years I think this was because I was a student and didn't work for the first few years, so I had to provide evidence of this. Otherwise, all went well, although scanning the passport took a few attempts (Female, 28).

It was a bit tricky for me to produce a document showing that I had lived in the UK since 2006, because I moved a lot and I also spent a year abroad during my studies. Additionally, I hadn't been employed long enough and continuously by one employer or paid council tax for long enough to use as a record either. However, printing out five years' worth of bank statements seemed absurd, so I downloaded and saved the statements instead but the files exceeded what could be uploaded to the application system. In the end my university was able to produce a document to certify that I had been enrolled as a PhD student for over five years (Female, 33).

The system is set to check your employment contributions first. Since I had a gap in income, I received pre-settled status even though I had resided in the UK for a period of eight years prior to applying. My residence could easily have been confirmed by looking at my education records, as I have completed two degrees in the UK (Female, 31).

Due to the complexity of the application scheme, some applicants may seek reassurances from a qualified immigration advisor that they are submitting their application correctly, especially since the application scheme, including the possibility of viewing one's status, is exclusively available online (Tomlinson and Welsh 2020). One participant in G2 noted that she almost sent her passport to the Home Office:

The app did not recognise my passport after several scanning attempts. I very nearly had to send my ID documents via mail instead, which would have been impossible as I had to travel the following day. I can't believe that a tiny glitch in the app almost prevented me from applying (Female, 29).

Additionally, no possibility to appeal against a decision of the authorities was available before February 2020, although this is now possible after the entry into force of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (SI No 61).

Vulnerabilities and support for migrants

Our findings highlight considerable future challenges for the most vulnerable EU citizens. The interviewees in G1 seemed noticeably vulnerable and we suspect that some may have been victims of human trafficking since many had no passports or ID cards. However, due to their mistrust of the authorities, they were reluctant to report their experiences to the police. Many of the interviewees in this group were pleading with the research interviewers to issue them with a letter of support in case they were stopped by the police. It also emerged that one of the interviewees was taken to the immigration detention centre on the grounds that he was homeless and he was told that he would be deported. During the course of his detention, he was offered an immigration solicitor to represent him. The solicitor found that his deportation was unlawful since being homeless was not a sufficient reason for deporting an EU citizen, as established in Gureckis (2017). Upon his release, our interviewee secured his settled status in a matter of days, found accommodation and could subsequently apply for Universal Credit benefits.

Many of our interviewees in G1 also expressed their views that the support needs of the CEE migrants across the UK were similar. Therefore, it is important that policy-makers and community groups respond to these needs and help CEE migrants to feel less vulnerable, alone and isolated. Many of the interviewees were unaware that help with their EUSS applications was available in their first language locally through the organisations funded by the Home Office. Many were also overwhelmed by the lack of reliable information in languages other than English. Some of the interviewees stated that they felt vulnerable and helpless and did not know where to ask for help:

It is important for everyone to know their rights. It is important to have information on where to go for help if anything goes wrong. When I came to the UK my English was very, very poor; it was so bad that I couldn't ask for help. There was no one who could help me (Male, 38).

Once they found out that immigration advice was available in their first language in the area, they were relieved that someone would be able to provide guidance with their applications.

Other researchers have made similar findings, for example, in terms of EU migrants' access to various services, including social assistance in host member states. Martinsen *et al.* (2019) found that EU migrants applied less frequently for benefits in the host state due to insufficient information about their rights or the appeal system. They were also worried that claiming social benefit may have an impact on their right to reside. Similarly, Dagilyte and Greenfields (2015) found that Roma migrants' knowledge about their welfare benefit entitlements in the UK, both prior to and after migration, was generally limited because the Roma had no experience of claiming welfare benefits due to the linguistic barriers, complexities concerning the relevant documentation and lack of knowledge about appeals processes.

The migrants in G1 further noted that their lack of adequate English-language skills prevented them from accessing many other public services such as health care, since some felt that they had sensitive and private

health-care needs which they did not feel comfortable discussing in the presence of friends who could otherwise have helped them with translation. Some even said that they were too scared to see a doctor, believing that the surgery may inform the Home Office that they are homeless and that they would subsequently be deported.

Other concerns of the migrants in G1 related to their experiences of low pay, a lack of opportunities and poor working conditions, especially in terms of accessing employment which would pay a decent living wage. Although previous research has found that the Roma, in particular, from the CEE in the UK may often be exploited as a result of being paid below the minimum wage in low-skilled, insecure employment (Dagilyte and Greenfields 2015; Jamroz 2018; National Roma Network 2017), these experiences are not limited to the Roma or to undocumented non-EU migrants. Many of the migrants in G1 were in insecure, low-skilled employment and found the lack of opportunities in the UK disappointing: 'I don't work, I have never worked legally ... I came here in 2008, working for £2–3 per hr, £30 per day ... I managed to survive as homeless living with friends occasionally for 11 years...' (Male, 41).

Poor well-being and mental health among homeless CEE migrants is also an issue. Periods of homelessness are linked to a greater risk of various mental and physical health problems. These often lead to the earlier experience of age-related health problems compared to the general population, including the developing of chronic medical conditions as well as experiencing stigmatisation and discrimination, being unemployed and encountering barriers in returning to the workforce (Kerman and Sylvestre 2020). During the interviews, CEE migrants in G1 talked about how the hurdles in the application system caused them problems with their mental health and well-being. Buettlman (2020) made similar findings with her research with participants who were principally from Western and Southern European member states which had joined the EU before 2004.

Although the migrants in G2 did not disclose issues with their mental well-being, some noted that applying for settled status made them feel unwelcome:

I applied for permanent residency soon after the Brexit vote in 2016. The process then was long and complicated and I needed pages and pages of evidence. It was difficult to find the right information. The whole process was very stressful and, for the first time, I was unsure whether I could even remain with my family. Having to apply made me feel that I no longer belonged to a country that I have called my home. I felt that I was forced to make choices that I had not considered before (Female, 47).

Brexit is about taking away freedom from people. Forcing EU citizens settled in the UK to apply to be able to stay in their homes and carry on with their lives, making it difficult to apply and not giving people any documentation – only a number to be used online if they need to prove their right to stay in the UK – is all part of it (Male, 60).

Conclusion

Our focus in this article has been on the difficulties encountered by EU migrants in applying for and regularising their migration status. Even those EU migrants who are in regular employment or full-time education encountered problems with their settled status applications because the government databases were unable to confirm their residence for a continuous period of five years. However, most migrants in G2 were able to provide some form of additional information to the Home Office. Strikingly, even these highly mobile migrants felt that the process had been stressful and complicated and that the lack of physical documents added to the complexity. Some also said that they no longer felt welcome in

the country which they had considered their home, often for several decades; they therefore felt alienated by Brexit.

In contrast, the interviewees in G1 faced significant barriers to making their applications. In fact, many of them were only able to apply because they had been put in contact with organisations and qualified immigration advisors who submitted paper applications on their behalf. These organisations had a central role in securing life-changing outcomes for migrants in G1 who had endured low-skilled and low-paid employment and homelessness due to the exclusion of EU migrants from certain welfare and housing benefits resulting from the government's hostile immigration policy and years of austerity.

Although the British government has assured EU migrants that the procedures for attaining settled status will be 'smooth, transparent and simple', we cannot help feeling that the EUSS has been enacted to exclude certain EU migrants as part of the hostile environment for undocumented migrants. This resonates with the arguments of Monforte *et al.* (2018: 26), according to whom citizenship is by nature 'both an instrument of inclusion into a system of rights and a boundary which is designed to fail specific groups and populations'.

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‘The Vile Eastern European’: Ideology of Deportability in the Brexit Media Discourse

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Pre-Brexit media discourse in the UK focused extensively on the end of free movement, the governance of European mobility, and its relationship with state sovereignty. This article, methodologically anchored in Critical Discourse Analysis, discusses how the potential post-Brexit deportee, namely the ‘Vile Eastern European’, is depicted by the leading pro-Leave British press. The Vile Eastern European is juxtaposed with a minority of hard-working and tax-paying migrants from the continent, as well as with unjustly deported Windrush and Commonwealth migrants. As the newspapers explain, the UK has not been able to deport the Vile Eastern European because of the EU free movement rights. The press links the UK’s inability to remove the unwanted citizens of EU countries with its lack of sovereignty, suggesting that only new immigration regulations will permit this deportation and make the UK sovereign again. The article concludes that the media discourse reproduces and co-produces the UK ideology of deportability that has been the basis for the EU Settlement Scheme and new immigration regulations.

Keywords: Brexit, discourse analysis, EU deportations, sovereignty, ideology of deportability

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AS THERESA MAY often tells us, the widespread feeling that Britain must regain control of its borders and immigration policy was a major factor in the EU referendum result.

(Daily Mail, 20/12/2018)

Introduction: Brexit and ideologies of deportability

In the times preceding the United Kingdom's exit from the European Union, British newspapers representing the pro-Leave campaign (Levy, Aslan, and Bironzo 2016) condemned the European Freedom of Movement (FoM). The press openly identified the UK's inability to protect its shores from EU 'criminals' and deport them as the country's lack of sovereignty (Mădroane 2014). This attack on the FoM regularly took the form of ridicule; the pro-Leave press nicknamed FoM 'free movement of criminals' (*Daily Mail*, 29/03/2016 and 26/06/2017, and *The Daily Telegraph*, 21/07/2017), 'free movement of down and outs' (*Daily Mail*, 15/12/2017) and even 'free movement of terrorists (sorry, citizens)' (*The Daily Telegraph*, 30/03/2016). The readers were being convinced that in order to end this 'free movement of criminals' and to deport those who were already in the UK, they should vote leave, stay firm in this decision, and vote for Tories in the 2019 general elections.

The theme of this article is the discursive construction of the ideologies of deportability by the pro-Leave press, a discourse that defines who and why should be expelled from a state. In particular, we answer four research questions. Firstly, whom the pro-Leave press considers as deserving of deportation from the UK. Secondly, the reasons given for why they should be deported. Thirdly, we are interested in solutions leading to their successful deportation proposed by the pro-Leave media and, fourthly, the purported benefits their deportation will bring for the British state.

Ideologies of deportability are examined here within Critical Discourse Analysis (CDA), whose eclectic theoretical framework focuses on three main cornerstones of discourse, ideology and power (Weiss and Wodak 2003). An interdisciplinary approach of CDA focuses predominantly on power asymmetries, with a particular attention to the role of language as a resource of power abuse, as well as the means to create or reinforce social and political inequalities. Furthermore, discourse is considered dialectically as contextualised text, which reproduces 'society and culture as well as being reproduced by them' (Fairclough and Wodak 1997: 258). This dialectic aspect is particularly important for analysis of media discourse. Situated in the public sphere, media not only serve as a message conveyer, but 'as potentially influential actors' equipped with 'ability to shape social reality by naturalising certain selected views of the world' (Zappettini 2020: 4). Thus, discourse is directly connected to power (Fairclough 1992; Foucault 1970) *inter alia* through media. Another important principle of discourse is that it is based on, and shaped by, other synchronically produced as well as past discourses disseminated and distributed within society (Fairclough 1992, 2003; Reisigl and Wodak 2001; Wodak 1996, 2001).

Our focus on pro-Leave newspapers is guided by their active role in shaping Britons' preferences in the 2016 Referendum. While radio and television broadcasts demonstrated more balanced opinions, newspapers were found to support the Leave campaign (Levy *et al.* 2016; Deacon, Harmer, Stayner and Wring 2016). Moreover, pro-Leave messages, while thematically concentrated on issues of migrants (Keaveney 2016), rhetorically deployed emotional language to frame EU membership as a restriction of British sovereignty (Buckledee 2018). In his study of the UK Independence Party discourses, Cap (2019)

shows how British sovereignty from the EU is rhetorically argued as the only solution to the immigration threat. Such argumentation leads *inter alia* to a discursive out-grouping of migrants as THEM and BAD. Thus, discourses in circulation within the public sphere in the Brexit context, not only reinforced each other intertextually through referring to the same actors, namely EU migrants, but also transferred similar arguments between them. Also, they interdiscursively tap into earlier discourses of islanders' exceptionality (see, *inter alia*, Koller, Kopf and Miglbauer 2019), and the anti-immigration rhetoric of the Conservative party (Baker, Gabrielatos, Khosravini, Krzyżanowski, McEnery and Wodak 2008: 293–295), strengthening the ideological convergence of sovereignty-cum-deportability.

This article aims to contribute to deportation studies by tapping into discursive qualities of deportability and placing it in a particular political context. Deportation scholars often see deportation and deportability as the foundation of sovereignty (De Genova 2010; Walters 2002). As we demonstrate in this article, the logic presented by the British media has been an inverted one, as the pro-Leave newspapers claim that Britain has to regain sovereignty in order to effectively deport the EU convicts. In the media narrative, the EU deportations are impossible because the United Kingdom was not a sovereign country when it remained in the EU. The research on the discursive bases of deportations, so far neglected by deportation studies, needs to become an integral part of this field of research.

This article is therefore an invitation to study the ideologies of deportability – discursive bases that underpin and legitimise a deportation regime. Ideologies of deportability define who should be excluded from a polity. They are an element of what John Agnew (2008: 177) calls border thinking, that is, a way of thinking about nation-state borders that consists of the philosophy and practices of b/ordering and othering. Discursively-created, the ideologies of deportability are a type of everyday bordering (Yuval-Davis, Wemyss, and Cassidy 2018) performed by those without immigration powers (e.g., newspaper journalists and readers). In the media discourse, the ideologies of deportability both reproduce the categories existing in immigration legislation, and create new boundaries (Wodak 2001), by defining who deserves to remain and who does not, and should therefore be expelled from the territory of a state. By deeming some non-citizens as 'deportable', the ideologies of deportability affect public opinion, which can, in turn, shape immigration policies and immigration laws. The historic moment of the Referendum, and the Brexit negotiations that followed, involved the re-thinking of the UK deportation regime and the decision of whether (and, indeed, which) EU citizens should be excluded, or become more deportable than they were under FoM.

After the announcement of the Brexit Referendum, the pro-Leave newspapers described a plethora of reasons for EU citizens' deportations, such as the anticipated post-Brexit illegalisation of EU workers, the insignificance of their labour, and policies that will prioritise the home-grown workforce. During the almost four years that preceded the date of the UK's departure from the EU, the press speculated that all EU citizens may have to leave the country following Brexit, as they were used as a bargaining chip by the negotiators to secure the best treatment for the UK citizens abroad. Media also named more specific groups, such as medical doctors, who will no longer be needed because the UK will train local medics. The pro-Leave press extensively wrote about groups that it considered as deserving to be deported, for example 'low-skilled' workers or jobless EU citizens. But there was no other group more deserving of deportation than EU convicts.

Media discourse on the deportable EU citizens draws upon the distinction between the 'good' and the 'bad' European. The 'good' migrant belongs and contributes to the fiscal and social security system without weakening it (cf. Mădroane 2014). The line between the 'good' and the 'bad' European reflects the boundaries between the citizens of the 'old' and the 'new' member states. In the ideologies of de-

portability, the distinction between the ‘good’ and the ‘bad’ migrant respectively translates into ‘deserving’ and ‘undeserving’ to remain. The ‘new Europeans’ ‘are deemed less worthy of free travel’, which ‘to a certain extent creates a hierarchy within EU citizenship’ (Brouwer, van der Woude, and van der Leun 2018: 456). For Central and Eastern Europeans, this means more frequent detention and deportations than for the citizens of the ‘old’ Member States (Radziwinowiczówna, under review).

As we argue below, the pre-Brexit ideologies of deportability were underpinned by **cultural racism** (Fox, Moroşanu and Szilassy 2012). They attribute otherness that lies at the intersection of class, gender, ethnicity and nationality. In the case of the ideology of deportability analysed in this article, the poorest men, coming from the ‘new member states’, seemingly most exotic for the British reader, were depicted as the least deserving to stay in the UK. According to Irina Mădroane (2018: 142), ‘the British conservative media “owned” the definition of the problem even before the referendum debate’ in 2016, and stigmatised the Central and Eastern Europeans before the opening of the UK labour market in 2004 and 2014 (Mădroane 2014).

Brexit media discourse attributed a wicked and immoral character to the Central and Eastern European (CEE) ‘others’. Romanians and Bulgarians – newcomers from the poorest EU member states – were the most targeted group in the Brexit discourse, as they were often compared to criminals (Balch and Balabanova 2016; Fox *et al.* 2012; Light and Young 2009; Mădroane 2018). This narrative was not surprising, as the comparison of the ‘other’ to ‘criminal’ is one of the classic ‘metaphors we discriminate by’ (El Refaie 2001: 362). The pro-Leave media were active in selecting and contextualising types of crimes that were presented, and silenced other types of crimes (e.g., committed by the natives). In so-doing, they shaped public consciousness regarding what should be seen as problems (Sacco 1995). As the 2016 Referendum drew closer, the topic of public security related to FoM became increasingly more important (Balch and Balabanova 2017: 14), and the criminal CEEs were problematised as deserving immediate deportation. We propose to speak about the representational pattern of the **‘Vile Eastern European’** constructed as the criminal coming to the UK from the ‘new member states’. While ‘Eurovillains’ (Lafleur and Mescoli 2018: 481) are Eastern Europeans problematised as ‘welfare tourists’ and threatening social security systems, the Vile Eastern European is a threat to public security and moral order with his innate criminality (Castello 2015). He is presented as an outsider who becomes ‘defined as a threat to societal values and interests’ and has the potential to produce moral panics (Cohen 2011: 1; see also Jewkes 2004).

Although the media vilification of the EU convicts was a useful strategy for the pro-Leave press, as we explain in the following section, the UK had legal powers to deport them before it left the European Union. In 2019, EU deportations made nearly half of deportations from the UK. Among 7,361 people deported under the enforced return procedure, 3,498 were EU citizens (Home Office 2020).

The legal context of deportations of EU convicts

The terms of FoM are explained in Article 7 of the Citizen’s Directive.¹ The right of residence for more than three months in another member state is not absolute, but applies to ‘qualified’ EU citizens who either (1) seek a job, (2) work (also as self-employed), (3) study, (4) have sufficient resources to be self-supporting, or (5) are family members of categories 1–4.

As a member state, the UK could deport EU citizens who exercised their right to FoM if they constituted a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’, as stipulated by the Regulation 27 of the Immigration (European Economic Area) Regulations

2016. According to the Directive, the possible grounds for deportation become more limited for EU citizens residing in the UK for a longer period of time. The UK, however, removed the sentencing threshold for the convicts considered for deportation in 2015. In practice, any EU citizen who interacted with the criminal justice system in the UK was considered for deportation with reference to the grounds of public security (de Noronha 2018; Radziwinowiczówna, under review).

Data and Method

The results presented in this article come from BRAD ('Brexit and Deportations: Towards a Comprehensive and Transnational Understanding of a New System Targeting EU Citizens'), a two-year multidisciplinary research project that studied the forced removal of EU citizens from the United Kingdom in the context of Brexit. While elsewhere we have compared the right- and left-wing media representational patterns of EU citizens (Radziwinowiczówna and Galasińska 2019), here the media discourse analysis focuses on two right-wing newspapers (Balch and Balabanova 2017): a broadsheet and a tabloid. In the UK, broadsheets, or quality press, are believed to provide more in-depth analysis of the described facts. Tabloids have bigger circulation in the UK and – as we have assumed – consequently have more influence on the society. Our analysis involves *The Daily Telegraph* (DT) as an example of quality press and the *Daily Mail* (DM) as a tabloid. Both adopted a strong pro-Leave stance before and after the Referendum (Levy *et al.* 2016). Table 1 below summarises the core information about the analysed titles.

We selected articles that concern EU citizens and the subject of deportation in DM and DT. The texts contained, on the one hand, a keyword that referred to EU citizens ('EU migrants', 'EU workers', 'EU citizens', 'EU nationals') and, on the other, a keyword referring to deportation ('deportation', 'expulsion', 'kick out', 'send home', 'go home', 'repatriate'). This combination of search terms allowed for closer examination of the linguistic associations between EU citizens and forced expulsions. We used the ProQuest database to search the articles.

The analysis covers almost four years, spanning from the announcement of the Referendum on 20 February 2016 to 31 January 2020 when Brexit occurred after two extensions. As a result of the keyword-driven selection process, we obtained 141 DT articles, and 140 DM articles. As our analysis covers a 47-month period, we were able to examine if the way the EU deportations were presented changed before the Referendum, before and during the negotiations with the EU and finally before the general elections on 12 December 2019 and in the month to Brexit.

Table 1. Newspapers included in the analysis

Coverage in the EU membership Referendum	Pro-Leave
Quality press	<i>The Daily Telegraph</i> Circulation: 363,183 (December 2018) Partisanship: Conservative Party Number of analysed articles: 141
Tabloid	<i>Daily Mail</i> Circulation: 1,181,023 (May 2019) Partisanship: Conservative Party Number of analysed articles: 140

With the use of qualitative analysis software (nVivo), we thematically coded (Ryan and Bernard 2003) the selected data set according to different reasons for deportation of EU citizens. In the period

under analysis, the press discussed the post-Brexit immigration regulations and deportation as a hotly-debated tool of the future governance of EU migration to Britain. As a consequence, the analysed articles were not only about deportations that occurred (those were very few), but about potential deportations. The latter were desired in the moment (but not possible because of the EU) and in the future, such as deportations of convicts and jobseekers.

Below we present the outcomes of the thematic analysis (Braun and Clarke 2006) of the articles that mention deportation of EU 'convicts'. By doing so, we want to reconstruct the representational pattern of the topos (Krzyżanowski and Wodak 2009) of the Vile Eastern European. The selected themes mapped their criminal charges. Once we identified the themes, we analysed how the press linked the topic of deportation of EU convicts with UK sovereignty. This CDA-driven part of the analysis aims at explaining 'how language and discourse are used to achieve social goals and [affect] social maintenance and change' (Caldas-Coulthard and Coulthard 1996: 3). We were interested in how discourse users achieved certain communicative goals, which maintained (or challenged) the social, the political, and the cultural *status quo*.

Results

The Vile Eastern European

In March 2016, the Vote Leave campaign published a list of 50 EU citizens who entered the UK in spite of criminal convictions. Forty-five of them reoffended in the UK but were not deported. The list had a long life. DM and DT covered the topic extensively from March 2016, and mentioned both the list and the enlisted in numerous articles, before and after the Referendum. In each case, the migrants' provenance was foregrounded, with 'Eastern European', 'EU' and 'Romanian' attributions frequently found in close proximity. The idea re-emerged before the general elections in December 2019, when security minister Brandon Lewis published:

... a detailed dossier highlighting 20 terrorists who would be 'free to enter the UK under Jeremy Corbyn'. The dossier also issued a list of EU nationals who either entered the country despite having criminal records and committed further offences, or who could not be deported after offending in the UK. (DM, 11/12/2019)

The Vile Eastern European is a dangerous criminal. However, the pro-Leave press draws the line between the desirable and undesirable Europeans:

Ever since the Brexit vote, there has been an argument about the future status of EU citizens currently living here. Clearly it would be absurd and unfair to expel anyone who came here legally, is working, paying taxes and making a contribution to society. (DM, 15/07/2016)

In the next paragraph, the author goes on, providing a list of undesired individuals:

But that shouldn't mean we have to continue to give houseroom to foreign undesirables, rough sleepers, welfare scroungers, gangsters, murderers, rapists, terrorists, beggars, muggers and cashpoint crooks who have set up shop here – and who at present we seem powerless to deport. Three weeks ago, Britain

voted emphatically to leave the EU, to regain the right to make our own laws and control our own borders. Our inability to manage immigration and kick out those who don't belong here was a decisive factor. (DM, 15/07/2016)

It is interesting to note how a difference between desirables and undesirables is discursively managed in the above extract. While the reader is directly informed that the desirables 'came here legally', there is no information about how the other group entered the UK. This nuanced omission suggests that, even at the entry point, undesirables might have done something illegal. A description of desirables, short and straightforward, follows a golden rule of just three elements: work, tax payments and a general contribution to society. Such persons are defined by their actions, which reinforces their usefulness for Britain and its economy. In contrast, there is a list of nine extremely negative nouns describing undesirables. A discursive strategy of criminalisation and problematisation is at play here, combined with an intensification strategy. The 1:3 ratio used to depict both groups reinforced a message of mass invasion of those who do not belong, *vis-à-vis* a relatively small group of hardworking incomers. The attribute 'foreign' is used in a similar way to draw a line between 'us' and 'them'.

These strategies are continuously used by DM two years later. Consider the following example, in which the first part echoes the argument used previously:

After Labour threw open the borders, immigration from Eastern Europe rocketed. No one is denying that the majority of those who arrived are hard-working, pay their taxes and have filled jobs the locals are either unable or unwilling to accept. But we've also been forced to accommodate thousands of itinerant beggars, pickpockets and cashpoint crooks, including the colourful, raggle-taggle gypsies, tramps and thieves who have added so much to the rich diversity of our city centres ... The courts have ruled that homeless EU migrants who were detained or deported are entitled to thousands of pounds in compensation, courtesy of the mug British taxpayer. Tomas Lusas, from Lithuania, who was arrested after being found sleeping rough in London, appealed against being sent home and was awarded £10,000 damages. As a result, the Home Office – which was so enthusiastic about sending 'home' genuine British citizens of Caribbean heritage – has abandoned all investigations into rough sleepers from the EU. (DM, 15/05/2018)

There is widespread media practice of illustrating an argument with 'a real-life case': an individual crime (Graber 1980), providing many details about the Eastern European villain and – almost every time – his personal data. In the above extract, a Lithuanian rough sleeper (case 1) exemplified the group of undesirable Eastern Europeans, who cause a lack of safety and disrupt public order on the British streets.

The above quotation touches upon the diversity of rough sleepers and people begging on the streets ('the colourful, raggle-taggle gypsies, tramps and thieves who have added so much to the rich diversity of our city centres'), however, the question of ethnicity and race is persistently silenced in the deportability discourses in the British media. It is problematic, given that the Roma have often been targeted with deportation, not only in the UK, but also in other EU countries. The issue of race is rather only slightly implied (Virdee and McGeever 2018) in the confusion between Romanian and Roma, suggesting the two are treated as the same. Given that Romanians are overrepresented as the exemplification of the Vile Eastern Europeans, it may imply that the Romanian has discursively replaced the Roma. As the above quotation shows, the colour-blind discourse speaks about the 'genuine British citizens of Caribbean heritage' instead of mentioning that it was 'Black Britons' who fell victim to the Windrush scandal

(de Noronha 2020). As the question of race has been repressed in the ideologies of deportability in the UK press, we render it a discourse of cultural racism (Vasilopoulou 2016).

Rough sleepers from the EU became the embodiment of several problems. First of all, a general number of them increased significantly after the EU enlargement in 2008. DM (02/05/2017) reported that 'almost one fifth, 17 per cent, were EU nationals. Most of the increase was outside London. While rough sleepers in the capital grew by 3 per cent, the year-on-year increase elsewhere was 21 per cent', introducing 'their charming Transylvanian culture of criminality to the streets of our cities – sleeping rough and specialising in aggressive begging, pickpocketing and cashpoint robbery' (DM, 01/03/2016).

The pro-Leave press depicted rough sleeping as a way of life fashioned not only by undesirable criminals, but also as a norm among hard working Eastern Europeans, as in a following example:

According to a source with knowledge of Home Office enforcement, many central and eastern European rough sleepers reject the chance to rent property. The source pointed to one builder earning £1,000 a month chose [sic!] to sleep rough to avoid paying £500 for accommodation and £200 for travel. From 2012, dozens of homeless people, mainly Romanians and Bulgarians, descended on the capital's Marble Arch. (DM, 23/10/2017)

We find this piece particularly interesting due to the very subtle way of 'othering' its main protagonist, the builder. He is different from 'us' not only due to his choice of rough sleeping, even though he earns wages in the construction business, which is perceived as a relatively well-paid sector, but not for this builder. In fact, what DM reveals is an example of earning below poverty wages, but this detail is conveniently omitted here for the sake of argument. Additionally, and even more noteworthy, there is a list of potential expenses of someone who works away from home. In this way, the builder is pushed to a category of those who are not from here, the 'others': CEE workers, who could be cynically exploited due to a silent agreement between interested parties.

The pro-Leave press paid little attention to the deportations of rough sleepers when they were occurring. This is one of the few examples of reporting them:

According to figures compiled by the Mayor of London, the number of rough sleepers in the city increased year-on-year from 3,017 in 2007–08 to 8,108 in 2016–17. But between April and June this year, the number sleeping rough on at least one occasion dropped by 4 per cent. It follows moves to deport about 1,000 Romanians and Poles in the past year, with some 200 leaving voluntarily and the rest removed by immigration officers. (DM, 23/10/2017)

Deportation of the rough sleepers gained pro-Leave attention only when the High Court declared them unlawful. On the day of the ruling, DT published a short article 'EU nationals can now sleep rough in UK' that read, '(a)ccording to official figures the number of Romanians sleeping rough in London rose from 496 in 2012–13 to 1,545 in 2015–16' (DT, 15/12/2017). The High Court decision was considered as a serious setback by the pro-Leave press, as in the next example:

In a major blow to Home Secretary Amber Rudd, the High Court said the policy was discriminatory and broke controversial freedom of movement rules. Two Polish men and a Latvian successfully challenged the rules after they were threatened with removal from Britain when they were found sleeping rough by police and immigration officers. The judgment means hundreds of people who arrive in Britain from

the EU and sleep in doorways or parks will be allowed to stay irrespective of whether they are thieves, beggars or have drug or alcohol problems. (DM, 15/12/2017)

DM here presents the High Court ruling mainly as a security problem. In this context, the rough-sleeping Eastern Europeans could potentially use the streets as a safe haven to hide from justice, by using the controversial FoM policy. Moreover, they can use this ruling retrospectively and claim compensation for unlawful deportations, as did Tomas from Lithuania (cf. case 1). Thus, undesirables not only symbolise lack of contribution to the British society, but at the same time they use the legal system to drain British taxpayers' pockets, which in turn makes them even more evil. The most sinister discursive manipulation is, however, just one word – 'irrespective' – which hides the truth that thieves can be deported. They also can be deported if they are not in work, but such information did not appear here for the sake of a pro-Leave argument. Nor does the argument appear that rough sleepers might be a group of unfortunate people who are not usually linked with criminal activities and, despite being at work, simply could not afford the inflated rent prices in the South of England.

DM discourse on the Vile Eastern European, who deserves but escapes deportation, is characterised by a multiplication of his crime. In the researched period there is a large number of examples of **gangsters, drug dealers, and drunk drivers**, as in the following case of a Lithuanian (case 2):

Baibokas was caught driving under the influence in 2008 and in 2012 was convicted of possession with intent to supply over 7kg of amphetamine found in a jet ski in his garage. His tribunal ruled he did not pose a 'genuine, present and sufficiently serious threat to the interests of society' and expulsion would be 'in breach of the EEA Regulations'. (DM, 7/06/2016)

An intensification strategy can be deployed not only to depict a multitude of crimes, but also by the multiplication of offenders. There are no individual offenders anymore, but members of a criminal organisation instead, as in the two following examples (case 3):

Arqr² Wazny, of Poland, was part of a gang that beat up Royal Marine Nigel Leppington, who stepped in to protect a neighbour under attack, in Dorset. (DM, 07/06/2016)

A GANG was convicted yesterday of trafficking slaves from Eastern Europe to Britain under EU freedom of movement rules The family, themselves EU migrants, paid human traffickers £200 for each of the victims who came from the Czech Republic and Slovakia. The slaves worked 12-hour shifts, loading tyres onto trucks, cleaning bricks or removing springs from mattresses for scrap metal ... Police described the Rafaels as 'a well-established Slovakian Roma organised crime group'. (DM, 12/04/2018)

As the leading pro-Leave newspaper, DM, concentrates both on crimes itself, as well as on how the Vile Eastern European abuses members of British society, be it a taxpayer, or an innocent member of the public. In the last example, however, the cynicism and cruelty of gangsters is augmented by a detailed description of the hardship of the victims, who came from the gangsters' own country. The Vile Eastern European spares no one. On the other hand, DT's coverage of the instances of violent crimes was significantly lower than DM's. The former newspaper described the crimes in less detail.

The article published in DM on 11 August 2016 titled 'Romanian **murderer** we tried to deport wins right to claim 5-figure payout' describes the case of a man targeted with deportation after his former criminal convictions of murder came to light (case 4). Claimant X is the only Vile Eastern European

whose identity was not disclosed in the media, 'because he suffers from anxiety' (DM, 11/08/2016). The newspaper identifies with the deportation regime – 'We tried to deport' – that disposes of foreign dangerous criminals, while criticising and mocking the UK justice system that gives a former murderer right to compensation, by stating: 'The claimant – who is a recovering alcoholic and has been deemed "high risk" – has also won the right to remain in the UK after his lawyers argued that deportation would breach his human rights'.

Both newspapers repetitively wrote about the murder of a schoolgirl by a Latvian citizen (case 5). Although the case happened in 2014, it was recorded extensively before the Referendum, shortly after it (30/06/2016), in September 2016, and in the following years.

POLICE are failing to carry out checks on foreign suspects who enter Britain under EU free movement rules, a coroner has warned, after an inquest found that teenager Alice Gross was 'unlawfully killed' in a sexually motivated attack. Arnis Zalkalns, who killed the 14-year-old in 2014, was allowed into Britain despite having previously served a prison sentence for murdering his wife in his native Latvia ... Zalkalns was arrested in Britain in 2009 for an alleged sexual assault but police failed to ask Latvian authorities if he had a criminal record. (DT, 08/09/2016)

This extract not only converges violent crimes with need of deportation within the Brexit context, but also concentrates on reoffending practices directed on the vulnerable members of society. Reports noted that the man murdered his wife and was only sentenced for seven years. 'I know. Maybe wife-murdering isn't considered a big deal in Latvia' (DT, 06/07/2016), ironises the author, which serves here as a reminder of 'us', who systemically protect our vulnerable, versus 'them', who bring barbaric practices to our country. This case of violence against a girl was an example of the ultimate vile character of the Eastern European. By the same token, in August 2016, DM reported on the case of a **rapist**, who abused a mentally ill 69-year-old woman (case 6).

A ROMANIAN migrant brutally raped and robbed a vulnerable pensioner just three months after arriving in Britain. Gabriel Lupu, 23, exploited the controversial EU freedom of movement laws to move to the UK to earn money for his family in Romania. He then carried out a horrific sex attack on a 69-year-old mentally ill woman after following her into a car park. Yesterday Lupu was jailed for 14 years and ordered to be deported because he posed such a danger to the public. (DM, 20/08/2016)

This powerful case strikes a depth of horror in all of us. There is a panicked sense of vulnerability, as the victim is an elderly ill woman. The paper made sure to underline not only the intersection of vulnerabilities of the victim, but also the nationality of the perpetrator, as the title of the article reads 'Romanian jailed for raping woman, 69'.

Eastern European folk devils

In addition to the above-mentioned article, between February 2016 and January 2020, DM published three articles that contained 'Romanian' in the title, all suggesting their involvement in violent crimes: 'Romanian murderer we tried to deport wins right to claim 5 Figure Payout' (11/08/2016), 'Romanian was released from jail, came to UK and raped woman 11 days later' (21/04/2017), 'Romanian thug came to UK to dodge justice... now he's got legal aid to fight extradition' (03/03/2018). Similarly, and in the same period, the DT published two articles mentioning nationality: 'Rapist can stay. Romanian beats UK

deportation order' (29/02/2016) and 'Romanian killer may win pounds 500,000 over unlawful detention' (11/08/2016).

Although Romanian citizens were the most stigmatised as 'criminals', the pro-Leave press mentions other Eastern Europeans as violent offenders. In the analysed period, DM and DT highlighted the cases of Polish and Lithuanian rough sleepers (case 1), a Polish thug, Slovakian human traffickers (case 3), a Lithuanian drug dealer (case 2), a Hungarian rapist, a Latvian murderer (case 4). Another example of the overrepresentation of the Eastern Europeans among the EU convicts deserving deportation was the already-mentioned dossier of 50 EU convicts. The analysed titles have never published the complete list, but whenever DM mentioned it, the majority of the convicts were from the 'new' member states (6 out of 10 in DM on 07/06/2016, 2 out of 4 on 04/10/2016, 5 out of 6 on 26/06/2017). DT (08/09/2016) also made this observation:

All are bringing new pressures that simply did not exist even 10 years ago. As the retiring Old Bailey judge Tim Pontius tells this newspaper today, the criminal justice system is becoming clogged up with trials of Eastern European criminals. 'It is commonplace in the court list to see more Polish names, Romanian names, Albanian names, Russian names', he says.

The pro-Leave press portrayed the Central and Eastern Europeans as having an innate criminality, which makes them suitable as folk devils, the centre of a moral panic. Only one case of the listed Eastern Europeans was a woman – a Pole who kicked her husband to death. All the remaining Vile Eastern Europeans were male, often offended against the British people and targeted minors or the elderly. Subject to intra-European orientalisation, the citizens of the 'new' member states are portrayed as violent barbarians. Their countries of origin are depicted as semi-civilised (Mădroane 2018), because they refuse to share data about their citizens' criminal records, or do not even have an adequate data base. Furthermore, these far-away countries do not share the same value with 'us', as they did not prosecute the former convicts seriously enough, as it was in case of wife-murderer Zalkalns (case 4).

The Vile Eastern European in the UK ideologies of deportability

In his analysis of the modern-day folk devils, Stanley Cohen wrote about the *Daily Mail's* campaign of vilification of asylum seekers that it is 'too deliberate and ugly to be seen as a mere moral panic' (2011: xxiii). Similarly, in the context of our research, the negative representational pattern of Eastern Europeans has a political agenda. Below we reconstruct how the pro-Leave discourse moved from the problem of individual crimes to the topic of the UK sovereignty.

Deportation of the Vile Eastern European is the only available solution to restore the public security endangered by his presence in the UK. This is the most salient principle of the British ideologies of deportability.

Tory MP Philip Davies expressed concern about the 'lax' checks on criminal databases, adding: 'Migrants who commit crimes here should be deported unless there are extenuating circumstances. The Government seems to be taking the view that unless it is a very serious crime, they are okay to stay, which is the wrong way round'. (DM, 22/06/2018)

In order to support the ideology of deportability of all convicts, regardless of the severity of the charges, DM cites an expert, a Tory Member of Parliament and a frequent source of pro-Leave and pro-deportation statements in this newspaper.

To support an argument for deportations of EU offenders, both newspapers widely utilised the economisation strategy. It resonates well with the already-presented reports on compensation for Eastern Europeans, who claimed damages for deportations (case 1), detentions (case 4), and allegedly wrong convictions. All paid, of course, from a taxpayer's purse.

Despite committing the most horrendous offences, including murder, rape and child sex attacks, the foreigners are still clogging up our prisons. (DM, 04/06/2016)

In the above extract, depicting the foreign prisoners as 'clogging up prisons' dehumanises them. Therefore, the convicts are 'the first ones to be deported' because otherwise it is 'us' – 'the British taxpayers' – who sponsor the high costs of their imprisonment. This, again, is backed up with a Tory Member of Parliament's opinion, who would like to take the matter into her own hands and 'pack the bags' of the foreign offenders:

Tory MP Anne Main, a leading Leave campaigner, said: 'The fact that so many foreign criminals are in our jails at the expense of the British taxpayer is frankly outrageous. I'd like to pack their bags and send them home'. (DM, 04/06/2016)

However, as the two newspapers explain, the deportation of foreign convicts is impossible because of the laws and institutions of the European Union, which are claimed to hinder all the attempts to remove the unwanted EU citizens from the British territory. In the article published two days after the Referendum, DM wrote:

EXISTING EU law does make provision for the deportation of citizens of other EU states, but the country doing the deporting must prove there is a threat to security. (DM, 25/06/2016)

This is one of the rare instances where the limits of FoM are explained. However, the Leave campaign is not satisfied with the conditionality of deportation, as the objective is to make it automatic for all convicts.

Aside from the EU Freedom of Movement and the Court of Justice of the European Union, another supranational institution criticised by the pro-Leave media is the European Court of Human Rights:

The Eastern European beggars and pickpockets littering the streets of our cities, for instance, or the assorted criminals we can't deport because of the European yuman rites [sic!] racket? The Remoaners [sic!] don't want to talk about them, naturally. (DM, 03/03/2017)

DM author Richard Littlejohn frequently mocks human rights as 'yuman rites'. The way the 'human rights' are mocked aims at ridiculing them and – by making a reference to native Americans' customs – aiming at representing them as 'uncivilised'. The columnist also complains that Britain has found itself in the 'European yuman rites racket' and urgently needs to be taken out of it as soon as possible. The 'racket' is quickly taking the country in the wrong direction, which is a metaphor for an uncontrolled and unplanned losing of state sovereignty.

The narrative evolving from individual crimes that become public issues, and security problems that cannot be resolved with expulsion, inevitably brings the journalists to a conclusion that the United Kingdom is **not a sovereign country**. DM and DT negatively represent the European Union, as it prevents the deportation of the vile Europeans and exposes the British society to deadly danger. Michael Stables, quoted as an expert (former HM Revenue and Customs worker and independent borough councillor), said in an interview titled 'I think the Queen would vote to restore the sovereignty of her country':

Do you believe we can control our border within the EU? No – we don't even have the right to deport criminals who are EU nationals. (DT, 10/06/2016)

A vote to remain is a vote to affirm the European Court of Justice's ultimate authority over whether we can remove persons whose presence in the UK is not conducive to the public good – in this and other respects we do not control our borders. (DM, 30/05/2016)

This narrative exposing the UK's dependence appeared in both newspapers in the whole analysed period, but was particularly intensive before the Referendum (especially in June 2016). According to the pro-Leave press, upon **Brexit and ending the FoM**, Britain would be able to deny entry to former convicts (the press was silent on how the UK authorities will get a better access to EU citizens' criminal records than when the UK was part of the Union) and to **deport** offenders:

The Out campaigners say Brexit would also enable a change in the law to allow criminals and extremists to be deported to the EU, adding: 'We will be able to remove those who abuse our hospitality'. (DM, 01/06/2016)

This ideology of deportability narrative persisted after the Referendum, as the press and quoted politicians repeated that 'anyone considered undesirable will be deported':

LEAVING the EU means taking back control of our laws, money and borders. (DM, 19/06/2017)

[Brexit Secretary David Davis] *said EU citizens will have to undergo criminal record checks when they apply for 'settled status' that will allow them to remain in Britain for life and promised to deport anyone who is considered undesirable. After Brexit, the Home Secretary will only have to prove that removing EU citizens would be 'conducive to the public good' in order to deport them rather than proving that they are a serious threat to the 'fundamental interests' of society as the current EU directives require.* (DT, 21/07/2017)

UK officials say EU citizens given permanent settled status in Britain must not become a 'privileged caste' who enjoy better rights than UK or other foreign nationals. (DT, 08/11/2017)

DT, more focused on policies than its tabloid counterpart, explains the change in policies that the pro-Leave press expects from Brexit: from deportation of individuals who are a threat to the 'fundamental interests' of the British society to deportation 'conducive to the public good' (a lower threshold). For DM, Brexit means simply 'taking back control of our laws, money and borders', and the last component consists of re-constructing UK ideologies of deportability that do not favour 'a privileged caste'.

In the analysed articles, deportation is the ultimate goal, and not a means to regain the national sovereignty, as the political theory explains (Schmitt 1985; De Genova 2010). It is so, because, as framed in the British media discourse, there are two deportation-related actors that endanger UK state sovereignty – unwanted non-citizens and supranational institutions that prevent their deportation. As the Vile Eastern European has potential for creating moral panic, it is his deportation that appears as the ultimate goal.

In July 2017, the pro-Leave press heavily complained when the EU crossed out the possibility of systematic checks of overseas criminal records of EU Settlement Scheme³ applicants during the Brexit negotiations:

B(russels) is trying to block the UK from carrying out criminal checks on millions of EU citizens hoping to stay here after Brexit. The bloc's negotiators want to exert control over the UK's post-Brexit immigration system by trying to ban the simple checks as part of any deal. Britain has insisted that the 3.2 million EU citizens who live in the UK should be tested when applying for 'settled status'. The EU, however, has insisted this would represent a 'systematic' breach of rights and checks should only be used where there is suspicion of a criminal history. (DM, 21/07/2017)

After the Referendum, EU deportations continued to be politicised in order to mobilise the Conservative electorate. In an article 'Labour border plan is UK security risk' (11/12/2019) DT claimed that the Labour party wanted to introduce a lax immigration policy. DM and DT misrepresented the Labour Party as faithful allies of the FoM and other EU institutions that limit UK sovereignty.

Unjust deportations

The media campaign, contextualised in Brexit and its aftermath, partially coincided with the 2018 Windrush Generation scandal. The latter affair involved planned, and in many cases executed, deportations of people from Caribbean countries, who came to the UK between 1948 and 1973 as British subjects. The Pro-Leave press compared the Windrush Generation targeted with deportation with EU citizens. In case 1, discussed earlier, the Lithuanian who won damages for unlawful deportation is compared by DM with 'genuine British citizens of Caribbean heritage', who were unfairly deported. A juxtaposition of 'arrested' rough sleepers and 'genuine' citizens implied the bogus status of the former within provisions of a citizenship: one is a genuine, the other one is an imposter. Here, we do not witness sympathy for equal victims of the deportation regime, but a contrast between an embodiment of a bogus citizen and a legitimate one. The same topic is picked up by DT, where Trevor Phillips explained the unequal treatment of the Windrush generation and EU citizens:

To add current insult to historic injury, the naturalisation process would have cost £1,200 for people who are more 'natural' Brits than millions of EU citizens who will get a free pass to stay in Britain post-Brexit. (DT, 17/04/2018)

The boundary of political justice and of whom to include or exclude from the imagined community is drawn, as there are groups who do not deserve deportation (Windrush Generation), and groups who do. The argument of injustice continued, as pro-Leave outlets investigated more instances of questionable deportations. In August 2016, DM described a case of an Australian family facing deportation due to not meeting visa requirements. Again, this nice Australian family is compared to EU criminals:

'This family, who have a great deal to offer Scotland and their local community, are being thrown out, while we are keeping many immigrants convicted of heinous offences', [Scottish MEP David Coburn, leader of UKIP in Scotland] said. 'The sooner we end freedom of movement for EU citizens, the sooner we can have the fair and compassionate immigration system that would keep this family in Scotland and protect our country from foreign criminals'. Mrs Brain had taken a place at the University of the Highlands and Islands studying Scottish history and archaeology, with her family listed as dependants on her student visa. Mr Brain had been working full-time as a receptionist in a legal office, while their seven-year-old son was schooled entirely in Gaelic. (DM, 02/08/2016)

The tabloid provides a long list of contributions the Brain family brings to the UK society. There are elements of the family story that are worthy of further attention. Firstly, they reside in Scotland, which demonstrates the greatness of the UK in terms of territory and political unity. Secondly, both the mother and the son are engaged in learning, which is a very desired activity. This point is even more salient when it is revealed that the mother studies in a higher education institution, celebrating the rich and ancient culture of the United Kingdom. Similarly, her son learns the Gaelic language, which is incredibly unique for foreigners (especially children!), and probably also quite unique even among native Scots due to, *inter alia*, its difficulties. Yet the language itself is very culturally connected to Scottish identity. Therefore, the Brain family are not only aptly named (smart and therefore living up to their name), but also 'super belonging'. Finally, the family legal predicaments are highlighted, as their visa forms were properly filled in and the husband's place of work is associated with legal professions. On the other hand, and in contrast to the said family, the text synonymises 'EU citizens' with 'immigrants convicted of heinous offences' and 'foreign criminals'. Note that the plural form of the latter presupposes the magnitude of the problem, and at the same time singles out a victimised, unique family, who stands no chance against the tide of criminals. A rhetorical question, which an attentive reader might ask, 'Who prohibits the UK from introducing a good policy of how to treat third country nationals?', is not even considered by DM journalists, which in turn reinforces the false comparison between the two groups even further. Comparable stories are often reported by the pro-Leave newspapers. Imperial political geographies unify them, as the examples consider cases from the Commonwealth and/or from a former British Empire. It is as if a cultural boundary between who belongs to 'us' and who is the 'other', has been frozen in the time of an imagined community of the colonised world.

Conclusions

Pro-Leave media discourse has created a utilitarian proposal of immigration governance that would replace the Freedom of Movement. It has both represented and underpinned the immigration legislation that involves the European Union Settlement Scheme (Morgan and Radziwinowiczówna 2020) and future points-based immigration system (Radziwinowiczówna 2020). This article has focused on one element of this utilitarian proposal: the ideologies of deportability. On the one hand, the right-wing daily newspapers re-produced the ideologies of deportability prioritised by the pro-Leave politicians (as when they wrote about the dossier of 50 EU convicts published by the Brexiteers). On the other, they actively produced it, by choosing the topic of deportations and the topos of the Vile Eastern European, and by contrasting it with the unjust deportations of the non-EU citizens and the Windrush generation. Echoing the Leave camp, *The Daily Mail* and *The Daily Telegraph* opposed mass deportations of EU residents in the UK and advocated for a streamlined regularisation of individuals who follow the golden rule of being in work, paying into fiscal and social security systems, and generally contributing to the

society. In the UK media discourse, the good migrants deserve to stay, and the culturally racialised bad migrants from the 'new' member states, such as the jobless, rough sleepers, 'welfare tourists' and – most importantly – the Vile Eastern Europeans, deserve to be deported.

The orientalised figure of the Vile Eastern European builds upon class inequalities and cultural diversity in the European Union. This representational pattern is a consequence of the vilification of the poverty of the citizens from the 'new' member states. This topos is orientalised as violent. The countries of origin of the Vile Eastern Europeans, in turn, are orientalised as not civilised enough, as they punish felons with short prison times and do not share their citizens' criminal record with other member states. By creating the image of the Vile Eastern European, highlighting his atrocious crimes and silencing the convictions of the natives, the British media not only created a demand for strict immigration regulations, border controls and deportations, but also built new prejudice and ethnic boundaries. The Referendum was followed by the hate crimes that targeted the Eastern Europeans that need to be interpreted in the context of the above analysis (Rzepnikowska 2019).

Recent changes in the UK immigration regulations have proven how powerful the ideologies of deportability are. The groups they targeted are currently the most prone to soon become undocumented or deported. As all the applicants to EUSS must declare any past criminal convictions, EU citizens with a serious criminal record abstain from applying. The rough sleepers, another protagonist of the above-analysed media discourse, may soon become subjects of mass removals, as under the new immigration rules rough sleeping has become the basis for deportation regardless of immigration status. These examples confirm that the ideologies of deportability set the stage for the UK deportation regime targeting the EU nationals before its legal components were created. The study of ideologies of deportability should, therefore, be an integral part of research of any given deportation regime.

Notes

¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

² This individual's name (Artur) was consistently misspelled by the British press.

³ In the EU Settlement Scheme (EUSS) the EU citizens apply for the new digital status in order to continue living and working in the UK after the end of the transition period. Successful applicants get either 'settled' (Indefinite Leave to Remain or Indefinite Leave to Enter for those who apply from overseas) or 'pre-settled status' (Limited Leave to Remain or Limited Leave to Enter).

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In the Pursuit of Justice: (Ab)Use of the European Arrest Warrant in the Polish Criminal Justice System

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Poland is the leading country in pursuing its own citizens under the European Arrest Warrant (EAW), with the number of EAWs issued between 2005 and 2013 representing one third of the warrants issued by all EU countries (although some serious inconsistencies between Polish and Eurostat statistical data can be observed). The data show that Poland overuses this instrument by issuing EAWs in minor cases, sometimes even for petty crimes. However, even though this phenomenon is so widespread, it has attracted very little academic interest thus far. This paper fills that gap. The authors scrutinise the topic against its legal, theoretical and statistical backdrop. Based on their findings, a theoretical perspective is drawn up to consider what the term 'justice' actually means and which activities of the criminal justice system could be called 'just' and which go beyond this term. The main question to answer is: Should every crime be pursued (even a petty one) and every person face punishment – even after years have passed and a successful and law-abiding life has been building in another country? Or should some restrictions be introduced to the law to prevent the abuse of justice?

Keywords: European Arrest Warrant, deportation, criminal justice, membership

Introduction

The attitude of societies and states to crime and punishment changes over time and space. Definitions of what constitutes a crime and what punishments should be handed out for particular crimes are constantly redefined. Even the concept of punishment and what should be considered as such evolves (Black 2011). The attitudes change along with changes in developing societies and political systems. For centuries, banishment was the most acute and severe punishment – excluding the offender from the society.

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If such an individual fled a particular country, nobody would be normally go looking for them or demand extradition from the country to which they went. It was not until the eighteenth century that international cooperation with regards to fighting crime began to emerge, initially concentrating on prosecuting political and religious 'criminals'. The rules for transferring 'common criminals' between countries were formulated at the turn of the nineteenth and twentieth centuries, when extradition was no longer treated as an instrument with which to exercise political power but rather as a tool of the justice system. At first, international law provisions regulating extradition focused mainly on the perpetrators of the most serious crimes – i.e. war crimes or crimes against humanity (Wierzbicki 1992). Only after international institutions developed and tighter international cooperation was established in the second half of the twentieth century were the foundations for cooperation between countries on criminal cases laid down, with the mutual surrender of wanted criminals as one of its elements.

The trend is by no means one way only. In the twentieth century, we saw cases motivated by opposite intentions – not only were escaped criminals not pursued by governments of the countries from which they had fled but, in several instances, their 'export' to other countries was actively supported by some governments. Such occurrences took place in 1980 in Cuba, where Fidel Castro's regime released several thousand serious criminals from prison and allowed them to leave the country (together with over 100,000 dissidents). The communist government in Poland took a leaf out of Castro's book and, between 1982 and 1988, allowed several hundred offenders (released from prison for this specific reason) to go abroad, accompanying several thousand opposition activists forced to emigrate – often also released from prison or internment in order to facilitate the departure (Stola 2012: 315–319).

The most developed international cooperation and an attempt at harmonising criminal justice systems is evident in the European Union (Szwarc-Kuczer 2011). One of the first acts of judicial cooperation between EU member states was the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member states (2002/584/JHA – hereinafter referred to as the Framework Decision). The aim of the Decision was the continuation of the development of judicial cooperation between EU member states with respect to criminal law. In order to promote it, the Decision introduced innovative solutions – namely the European Arrest Warrant (EAW), which replaced the existing regulations on extradition based on other international law provisions.

Compared to the traditional model of extradition, the important feature introduced by the EAW is the stripping-of-surrender procedure of its political element – i.e. the possibility of politicians interfering in decisions pertaining to the prosecution or surrender of a given person. It is the result of transferring this competence exclusively to courts. The procedure itself was also simplified to a great extent. However, surrender under the EAW is conditional since the issuing country does not abdicate its jurisdiction over the surrendered individual, as is the case with classic extradition (cf. West, C-192/12 PPU).

The Framework Decision allows for independent decisions by member states on how it will be implemented – decisions only limited by the obligation to realise the goal of the Decision. The practice of applying the EAW has demonstrated, however, that some countries, including Poland, use the EAW contrary to the assumptions of the system, requesting the extradition of not only 'serious criminals' but also of fairly minor offenders (Böse 2015: 143), frequently many years after the trial. Poland is the leading country in pursuing its own citizens under the EAW and, between 2005 and 2013, issued one third of all issued warrants in the EU (although some serious inconsistencies between Polish and Eurostat statistical data can be observed). The data show that Poland overuses this instrument by issuing EAW in minor cases, sometimes even for petty crimes, yet in spite of the phenomenon being so widespread, it has attracted little academic interest – until now.

The aim of this paper is to consider what the term ‘justice’ means and which activities of the criminal justice system could be called ‘just’ and which go beyond this term (especially in a frame of the EAW system). The main question to answer is: Should every crime be pursued (even a petty one) and every person face punishment – even after years have passed and a successful and law-abiding life has been built in another country? Maybe some restrictions should be introduced to the law to prevent the abuse of justice. Another question we raise is whether EU regulations and domestic law should allow juridical authorities to decide not to transfer a person in the case of minor offences. Is the surrender of a person wanted for minor offences in contravention with the original intention behind the establishment of the EAW and does it violate the idea of justice?

In this paper we attempt to answer these questions. We start with the presentation of legal provisions on the EU level and our understanding of them, using mostly the literature and explanations provided by the Court of Justice of the EU (CJEU) in its judgments. Here we focus our attention on the most important elements of the EAW procedure: principles of mutual trust and mutual recognition, followed by problems of potential infringement of fundamental rights and checks of proportionality in the procedure of issuing and executing an EAW. Then we briefly explain Poland’s implementation of the Framework Decision. The most important element for us is the practical application of these provisions, though, especially in Poland. We discuss it against the backdrop of other member states using statistical data – from Eurostat and the Polish Ministry of Justice. They are complemented by the main findings from empirical research that has been conducted in Poland so far in that area. This allows us to see a real person and sometimes the real harm behind laws and numbers and to further problematise them. The topic on which we mainly focus in the next chapter is the examination of the effectiveness of the EAW procedure *vis-à-vis* the protection of human rights. This is followed by a theoretical investigation into the sense of membership, justice and punishment. We present this in the reverse order to that usually presented in academic papers because, in our opinion, the theoretical reflection towards the end of this analysis brings even more in-depth understanding and discussion of the practical application of the EAW.

The legal framework of the EAW and its fundamental principles

The aim of establishing the Framework Decision 2002/584/JHA was to streamline procedures to do with persons who try to escape responsibility for crimes committed by fleeing to another EU member state. The Decision accounts for two such cases:

- the surrender of persons who have been ordered to serve a custodial sentence but who failed to do so, having fled from justice to the territory of another member state and
- the surrender of persons suspected of having committed an offence, who are being prosecuted for offences which are punishable by a custodial sentence for a minimum period of 12 months.

In order for the surrender of the above persons to take place, the rule of double criminality must be obeyed – i.e. the act for which the person was sentenced or is suspected of having committed must be criminalised both in the issuing and the executing member state (Löber 2017: 42). The rule does not apply to offences listed in Art. 2 Para. 2 of the Decision (such as, for instance, the trafficking in human beings, narcotics or weapons and murder, rape, corruption, money laundering etc.). The reason behind the move was the desire to tighten cooperation *vis-à-vis* prosecuting international crime, including terrorism and particularly serious crimes. Abandoning the verification of the double criminality of the act in these cases significantly speeds up the transferring procedure (Löber 2017: 39–41).

Principles of mutual recognition and mutual trust

For member states to be able to cooperate within the EAW framework, it is crucial that they follow two principles: the principle of mutual recognition (of judgements) and mutual trust (Hofmański, Górski, Sakowicz and Szumiło-Kulczycka 2008: 27; Królak, Działuk and Michalczyk 2006: 400). The consequence of their adoption is the assumption that member states are in principle obliged to execute EAWs issued by other member states. The rules are closely linked – mutual trust is a condition for mutual recognition.

The rule of mutual trust requires that individual member states not only accept others' legal orders but also the validity of judgements issued by domestic courts (Hofmański *et al.* 2008: 27; Klimek 2015: 19). It presumes that the authorities of one member state would trust that the decision made by the judicial authority of another member state is legal (Aranyosi and Căldăraru, C-404/V5 and C-659/15, para. 79; Lanigan, C-237/15 PPU, para. 36). Hence, the refusal to execute an EAW is technically only possible within the boundaries set by the provision of the Framework Decision (Klimek 2015: 69; Schallmoser 2014: 159) while the CJEU deemed the remaining exceptions as unacceptable as a matter of principle (albeit with several caveats, as discussed below) (Aranyosi and Căldăraru, para. 80; Lanigan, para. 36). The implementation of the Framework Decision in various member states has revealed, however, that unconditional compliance with the principle of mutual recognition engenders considerable challenges, especially when it concerns the protection of fundamental rights (Böse 2015: 136).

To guarantee an appropriate level of protection of fundamental rights, the Framework Decision requires that an EAW be issued by a judicial authority. However, 'implementation of the principle of mutual recognition means that each national judicial authority should *ipso facto* recognise requests for the surrender of a person made by the judicial authority of another member state with a minimum of formalities'.¹ This raises the question of which institution should be recognised as a 'judicial authority'. Initially that term encompassed every authority in the system of a member state that had the competence to issue an EAW – i.e. it applied not only to courts but also to prosecution services. The problem is that, in some countries, the prosecution services are treated as a part of the Executive. This leads to complications when the competence of issuing EAWs is exercised by an authority that does not have the hallmarks of independence and impartiality (Thomas 2013: 586). Recently, the CJEU have stated that, because issuing an EAW undermines the right to liberty of a person, it requires effective juridical protection on at least one of two levels: the issuing of the EAW or its execution (Bob-Dogi, C-241/15, para. 56). This means that the issuing judicial authority must be capable of exercising its responsibilities objectively. In some cases, as with the German Prosecution Services, the prosecution, being a part of the Executive, is specified as an 'external', non-juridical power in criminal procedure. The problem here lies in the perceived potential influence of politicians on that authority and their ability to issue instructions with the effect of limiting the impartiality and independence of the public prosecutor's office (OG and PL, joint cases C-508/18 and C-82/19 PPU, para. 76). In this case, the Prosecution Service is, as the CJEU stated, not able to exercise its responsibility objectively. So, it cannot be treated as a 'juridical authority' and, as a consequence, cannot have competence to issue an EAW, because of the lack of an appropriate level of human rights protection.

To sum up, mutual recognition requires not only respect for material fundamental rights but also that proceedings should guarantee the effective control of its compliance with human rights. In one of its recent judgements, the CJEU further specified that 'the public prosecutor of a member state who, although he or she participates in the administration of justice, may receive in exercising his or her de-

cision-making power an instruction in a specific case from the executive, does not constitute an “executing judicial authority” within the meaning of those provisions’ (Openbaar Ministerie, C-510/19, para. 70; see also OG and PL, joint cases C-508/18 and C-82/19 PPU, para. 90).

The principle of mutual recognition allows for judgements made in one member state to be accepted in the legal order of another. Hence, the authority that issues the warrant is obliged to indicate an existing judgement, which will be enforced once the person has been surrendered as a result of the EAW (e.g. a conviction or a pre-trial detention order). Then the judicial authority in charge of executing the EAW undertakes to trust that the judgment was issued lawfully and issues a decision to implement the EAW and eventually surrender the person to the member state that is seeking the extradition. As the CJEU stated, both principles – mutual trust and mutual recognition – are the foundations for an area without internal borders created as the European area of freedom, security, and justice (ML, C-220/18 PPU, para. 49; LM, C-216/18 para. 36).

The rule of mutual trust relies on the assumption that every member state’s law (both in statute and in practice) guarantees an equivalent and equally effective protection of the fundamental rights of accused and convicted persons, which will be manifested, among other things, in the possibility to appeal against the decision of the court by questioning the legality of the legal proceedings behind the decision to issue the EAW (Böse 2015: 136; Melloni, C-399/11, para. 63 and 50; Dorobantu, C-128/18, para. 79; Marguery 2016: 945; Mitsilegas 2016: 24). Moreover, the principle of mutual trust prohibits the verification of compliance with the EU law for every judicial decision issued by member states that shall be executed by another. Such procedure could only be accepted in very exceptional cases (Rizcallah 2019: 38).

The scope of the rule of mutual trust is broad and covers, at one end of the spectrum, the vertical relations between the state and the citizen and, at the other, the functioning of legal systems, the organisation of the country’s authorities and the implementation of the rule of law, as well as trust in the efficiency of the implementation of the specific legal measures to which an individual is entitled and which ensure effective legal protection (Statkiewicz 2014: 36–37). In other words, trust should refer to the appropriate axiological and legal law-making process, as well as its execution in every EU state (Hofmański *et al.* 2008: 27; Marguery 2016: 946–947). What this means is that trust includes not only the fact that their law meets the formal standards of upholding the rule of law in a democratic country but also that its legislators will respect the basic principles guiding the observance of fundamental rights.

Moreover, EU states trust one another that their law is exercised in an appropriate manner and ensures an equal level of respect for and protection of fundamental rights (LM C-216/18 PPU para. 35; Hofmański *et al.* 2008: 27). Thus, the guarantor of judicial cooperation with regard to criminal cases is predicated on the assumption that every member state guarantees respect for individual rights, in accordance with standards adopted at the EU level, as well as trust that all member states abide by EU legislation and ensure its effective execution (Aranyosi and Căldăraru, para. 78). The trust is not only limited to issues pertaining strictly to cooperation when executing decisions issued by other countries – it also assumes that the EAW will not be abused by member states in order to realise goals for which the instrument was not intended and which would be in contravention of EU legislation and the principle of subsidiarity outlined in Art. 5 of the Treaty on the Functioning of the European Union.

Protection of fundamental rights

An important problem that came to light when implementing the EAW in individual member states was the issue of ensuring the fundamental rights and freedoms of individuals. Traditionally, it has been recognised that the lack of a guarantee of respect for the rights of a prosecuted person is an obstacle to extradition. However, the content of the Framework Decision does not imply the need to examine this prerequisite under the EAW, as any control of the level of protection of fundamental rights would call into question the mutual trust of the member states (Hofmański *et al.* 2008: 160–164; Marguery 2016: 949).² However, the question arises as to whether the suspicion of a violation of fundamental rights could (or perhaps should) justify the non-execution of the EAW and when such control should be carried out / exerted.

Analysing the CJEU's case law, Jan Löber considered that the judicial authorities executing the EAW were not able to examine the premises that go beyond what is explicitly stated in the content of the Framework Decision and cannot refuse the execution of the EAW (Löber 2017: 155–156; see also Schallmoser 2014: 136). However, it seems that, in the light of recent CJEU judgments, this approach has lost its relevance. The Court referred to this issue in the joined cases of Aranyosi and Căldăraru. The proceeding's main goal was to check whether it was permissible to execute an EAW and surrender a person when there were serious doubts about the prison conditions in the member state issuing the EAW, which may lead to violations of the rights and freedoms of the surrendered person. The CJEU pointed out that, although mutual trust between member states is one of the main principles of the Framework Decision, it is the duty of the state executing the EAW to examine whether the existing grounds that might justify the suspension of the warrant are real, specific and based on verified data (Aranyosi and Căldăraru, para. 94) as well as objective, reliable, specific and properly updated evidence (*ibidem*, para. 104). In principle, however, these circumstances may only lead to the EAW being postponed, not abandoned (*ibidem*, para. 98).

In other words, although the provisions of the Framework Decision do not explicitly provide for a refusal to enforce an EAW due to a violation of fundamental rights (although they were included as grounds for the refusal to surrender in recitals 10 and 13 of the Decision's preamble), in specific cases the CJEU allowed the refusal to execute a warrant in the event of a real and immediate danger of violation of fundamental rights, in particular the possibility of violating the freedom from cruel, inhuman or degrading treatment or punishment (para. 104 *in fine*). As fundamental and absolute human rights, they can in no way be overruled (Marguery 2016: 953). Thus, the CJEU paved the way to extending the catalogue of reasons for refusing to execute an EAW by other, exceptional situations not explicitly defined in the content of the Framework Decision. However, they must result from the principles of EU law. The reason why the CJEU allowed this exception may also be the fact that the offences behind the issuing of the EAW in both cases were fairly trivial (Ouwkerk 2018: 106) while the possible violation concerned such a fundamental right as the protection from inhuman treatment in detention. The literature also acknowledges that, in failing to provide for the possibility of refusing to execute the EAW in the event of a threat of violation of individual rights, the European legislator has, in fact, outsourced the protection of fundamental rights from the European to the national level (Schallmoser 2014: 149).

To conclude, the judicial authority in charge of the application of this measure should weigh up whether the use of the EAW is justified, not only normatively but also axiologically, also taking into account the reasons for the Framework Decision and the general principles underlying EU law, such as the Charter of Fundamental Rights of the European Union. Therefore, subsequent judgments confirming this jurisprudence of the CJEU are not difficult to imagine – for example, in cases where the offence in

question is relatively insignificant, many years have passed since the conviction and the offender is well integrated into another EU member state. Under such circumstances it would be worth considering whether the surrender under the EAW does not violate the offender's right to privacy and respect for their family life (Schallmoser 2014).³

Checks of proportionality and the level of seriousness of the offences

The proportionality check is the most often understood as an additional rationale that should be verified when issuing an EAW. It is used to determine whether the circumstances of the case justify compliance with the threshold conditions for issuing the warrant and should ensure that this instrument will not be abused by member states. The purpose of the check is therefore to build trust among member states' competent authorities and to contribute to a more efficient functioning of the EAW (EC 2017: 15).

According to the European Commission (EC), the elements verified as part of the check should include the likelihood of an actual deprivation of liberty after the surrender to the issuing member State and the interests of victims of the crime (EC 2017: 14–15). Libor Klimek (2015) states that, among the circumstances that should be considered by the state issuing the EAW, the seriousness of the offence should also be taken into account and should be analysed against the consequences that the execution of the EAW will have on the person subjected to it. The judicial authority should also consider the possibility of using measures with less interference in the rights and freedoms and less negative impact on the surrendered person (Klimek 2015: 134). The EC's recommendations treat proportionality much in the same way. It noticed the problem of abuse of EAW in the cases of petty crimes – which admittedly fall within the scope of the application of the EAW specified by Art. 2, para. 1 of the Framework Decision – but their weight, the length of the custodial sentence or what remained of it, as well as the possibility of using alternative measures should be considered by the judicial authority before issuing the EAW (EC 2011: 7–8). However, these recommendations are not binding. Thus, the use of the proportionality check is only recommended and not strictly required by the Framework Decision's standards (Carrera, Guild and Hernanz 2013: 18). John Thomas (2013: 587) underlined that issuing an EAW in minor cases or with respect to offences committed many years ago could lead to questioning of the very idea of mutual recognition and mutual trust principles, which are fundamental to judicial cooperation in criminal matters, especially in EAW cases.

The above considerations pertain to the EAW at its issuing stage, not during its execution. However, it seems that, in some cases, the proportionality check should indeed also be performed while the EAW is being executed. The executing authority should, in particular, take into account the seriousness of the offence (the type of act and the circumstances in which it was being committed) and relate it to the standards guaranteed by EU law for the protection of the rights and freedoms of the individual (Ouwerkerk 2018: 108). This was precisely the case for German courts which refused to execute warrants issued against persons prosecuted for acts which, in Germany, were punished with a fine only (Böse 2015: 143–144). The Advocate General, Eleanor Sharpston, in her opinion in case Radu (C-396/11), underlined that detention under provisions of Article 5(1) of the Convention cannot be arbitrary and must be carried out in good faith. In other words, it must fulfil the proportionality test (AG 2012 Opinion in Radu, para. 62).

The use of EAWs to prosecute petty offences exposes member states to high costs on the one hand (economic argument) while, on the other, obliterating the original idea behind the establishment of the EAW – i.e. the prosecution of highly dangerous crimes, especially terrorism (axiological argument). There is also a problem of whether the use of EAWs for less-serious offences is proportionate in relation

to the scale of interference in the individual's fundamental rights (pro-liberty argument) (Carrera, Guild and Hernanz 2013: 16; Schallmoser 2014: 137). This problem is particularly evident in the case of prosecution in order to execute short custodial sentences when, instead, it would be desirable to use other measures provided for by EU law (EC 2017, 15). In any case, accounting for the seriousness of the act when assessing the violation of individual rights has already been sanctioned by CJEU case law (Ouwerkerk 2018: 109). This problem has also been seen and then solved in a more recent EU instrument of international cooperation in criminal justice processes – the European Investigation Order or EIO.⁴ The EU legislator *expressis verbis* stated that an EIO should not be used in minor cases as it would be inadequate. The issuing authority is obliged to assess at the moment of issuing the order if the evidence is necessary and proportionate (para. 11 of the EIO directive's preamble).

Implementation of the EAW in Polish law

For many years, Polish courts have resorted to the EAW to seek offenders in profoundly trivial cases. Teresa Gardocka (2011: 33, 40) believes that, from a legal point of view, using the EAW in every case was not a mistake by the courts, since the original Polish regulations of the Criminal Procedure Code (CPC) imposed on them the obligation to use this measure whenever possible. In addition, a large number of cases that could potentially be subject to EAW provisions resulted from the fact that, in practice in Poland, it is relatively easy to receive a custodial sentence of four months – the minimum threshold at which an EAW may be requested (House of Commons 2013: 8).

The *status quo* was additionally due to the principle of legalism adopted in Poland, which demands that almost every offence should be prosecuted by public authorities (police or prosecutor). This also applies to the obligation to use the EAW in pre-trial proceedings (although not in executive proceedings in the case of the execution of a custodial sentence). Naturally, such a solution was uneconomical and unreasonable, especially when considering the mere cost of police convoys shouldered by the issuing state in order to bring in such individuals (Gardocka 2011: 38). In the light of these facts and taking into account the costs, the above provisions⁵ were amended in 2013, limiting the obligation to use the EAW for minor offences (Janicz 2018; Świecki 2019).

Current Polish regulations on the issuing of the EAW emphasise two elements. First, the use of the EAW is not mandatory but optional – the court may or may not issue a warrant (Art. 607a CPC). In addition, this warrant can only be issued if it is in the interest of justice (Art. 607b CPC). At the stage of assessing the interest of justice, the court should consider the following criteria: the seriousness of the offence, the possibility of detaining the suspect and the probable penalty that may be imposed on the person, ensuring effective protection of society and regard for the interests of the victims of the crime. Finally, the court should assess whether the use of the EAW is justified in a given case (Świecki 2019) and whether other measures provided for by the European law (EC 2017: 15–16) can be applied. In some cases, it seems more advisable to request that the offender serve a custodial sentence in the country where they currently reside, and their prospects of social rehabilitation are greater (EC 2017: 16–17). In other words, it should be assumed that the above provisions are to implement the principle of proportionality set out in the Framework Decision (Janicz 2018).

Polish regulations also provide for an obligatory refusal to execute an EAW if it could lead to a violation of human rights and freedoms (Article 607p § 1 point 5 CPC). While, until recently, this solution may have raised some doubts as to its compliance with EU law, the more recent CJEU case law, as already

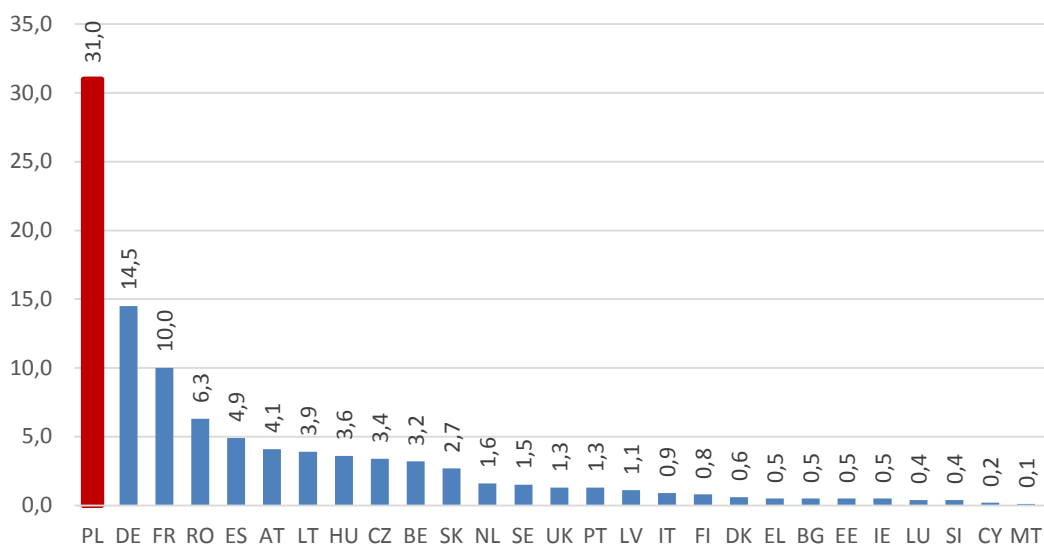
mentioned, recognises the unique possibility of refusing to implement an EAW on such grounds, although it should be interpreted narrowly and in accordance with the current case law of both domestic courts and the CJEU (Świecki 2019).

Practice of the EAW by Polish authorities

According to European statistical data, Poland was the leader with respect to the number of EAWs issued between the years 2005 and 2013. During this period, all member states of the European Union issued a total of 99,841 warrants, with varied activity by individual countries in this regard. The number of EAWs issued in different years also fluctuated considerably between 7,100 and 15,200. The analysis of statistical data reveals two trends – a twofold increase in EAWs issued by EU member states between 2005 and 2009 and a systematic decline after 2010. Over the period 2005–2013, over half of all EAWs were issued by three countries only – Poland, Germany and France (cf. Figure 1). However, while the number of warrants issued by France and Germany stood at 10,000 and 14,500, respectively, Poland issued 31,000 warrants, which constituted 31 per cent of all the EAWs issued in that period in the EU. In other countries, the number of warrants issued was far below the 10,000 threshold (EC 2019; EP 2014).

Analysis of the practice of using EAWs in subsequent years allows a certain change to be observed. For example, in 2017, EU member states issued a total of 17,491 warrants. Although, as in previous years, these warrants were the most often issued by Poland and Germany, the share of both countries was similar – it stood at 13.9 and 14.9 per cent, respectively. This means that the significant disparities between them, still visible in the years 2005–2013, had levelled out. Moreover, Germany overtook Poland in the number of EAWs issued (EC 2019).⁶

Figure 1. EAWs issued by EU member states between 2005–2013 (in thousands)

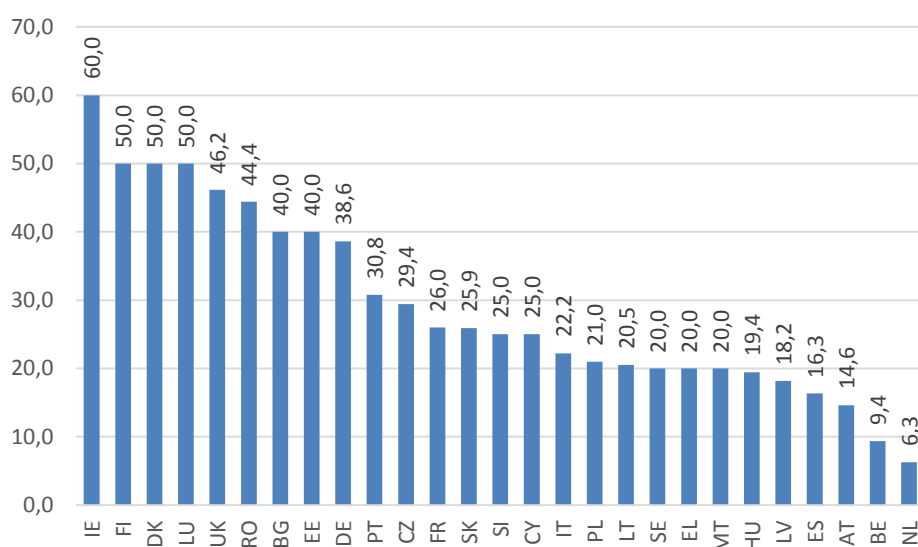


Source: Own calculations based on the data (EP 2014).

The practice of countries executing EAWs varies. Statistical data show that, by far, the issuing of a warrant does not always end with the successful surrender of the requested person. In the years 2005–2013, the EAW across the entire EU was only effective in 26.3 per cent of cases (cf. Figure 2). However, these

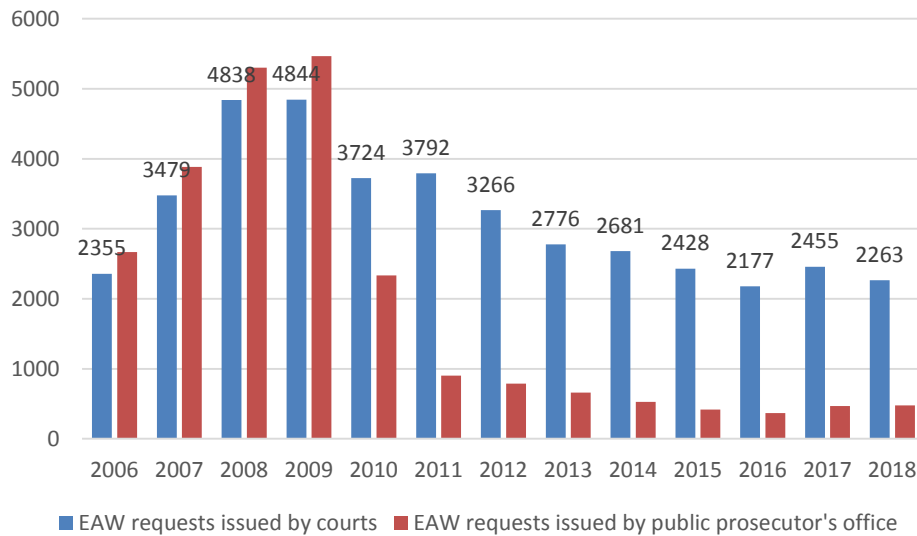
numbers increased significantly, to reach 38 per cent by 2017. In the case of Poland, these indicators reached the values of 21 and 56 per cent respectively. Against the background of all countries in the years 2005–2013, Germany achieved the highest effectiveness – 39 per cent (which, in 2017, reached 47 per cent). The territorial proximity of the member states to which German authorities primarily issued EAWs may have played a part in this phenomenon – more than half of them were directed to neighbouring countries. It can be assumed that common national borders also facilitate cooperation with regard to the implementation of EAWs (Carrera, Guild and Hernanz 2013: 14). It is also worth noting that France – the third country in terms of the number of EAWs issued in the years 2005–2013 – achieved an effectiveness similar to that of Poland, i.e. 26 per cent. High EAW implementation was visible in the countries that issued the least number of warrants in 2005–2013 – such as Ireland (60 per cent efficiency), Finland (50 per cent), Denmark (50 per cent) and Luxembourg (50 per cent).

Figure 2. Efficiency of EAWs issued by EU member states between 2005–2013 (per cent)



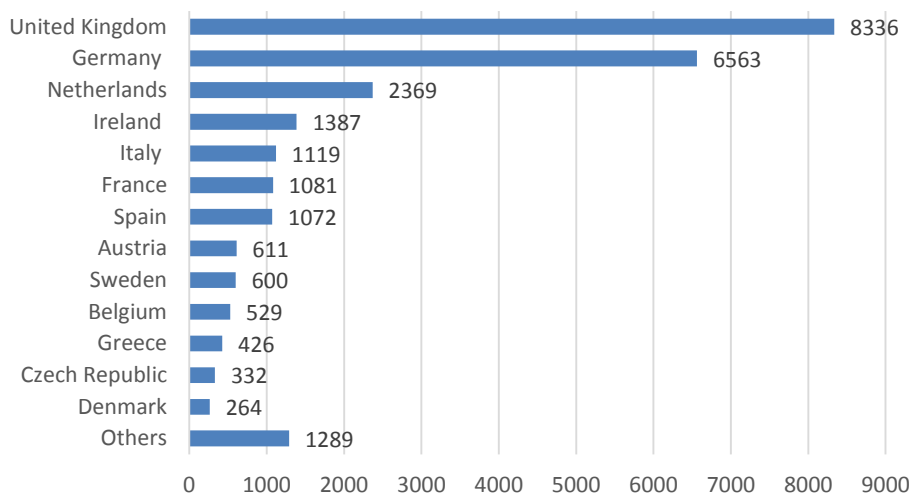
Source: Own calculations based on the data (EP 2014).

Since the data at the EU level are incomplete, those collected by the Polish Ministry of Justice for the years 2006–2018 were also analysed (MoJ 2019). Based on the results, at least two hypotheses can be proposed. First, the change in the number of EAWs issued in Poland is in line with the European trend. The number had been increasing until 2009, after which it was followed by a decrease in the years 2010–2014 and a further and current stabilisation at the level of 2,000 to 2,500 warrants per year (see Figure 3). Secondly, the number of requests for an EAW from prosecutors decreased significantly. This may have resulted from changes in Polish law introduced in 2010 regarding the authority permitted to submit a request for a warrant. The prosecutor's request is only necessary at the pre-trial phase while, during a trial and in post-trial phases only, the court may issue a warrant *ex officio* or at the request of another court (Perkowska and Jurgielewicz 2014: 86). The changes in the regulations were the result of the mounting criticism that Poland faced from other EU countries, as well as the tightening cooperation between lawyers from various countries on the functioning of the EAW (HFHR 2018: 17, Jacyna 2018: 37–38). In addition, the system for collecting statistical data on the EAW had changed (Gardocka 2011: 13).

Figure 3. EAWs issued by Poland to EU member states between 2006 and 2018

Source: Own calculations based on data (MoJ 2019).

As for the member states to which Poland directed warrants, it comes as little surprise that these were primarily countries where Poles migrate the most (Gardocka 2011: 14). The data from Statistics Poland (CSO) shows that since Poland's accession to the EU over a million of Poles (and over 2 million since 2018) stay in other EU countries for more than three months during a year (of whom over 80 per cent live abroad for at least a year) (CSO 2018). The UK and Germany are the most popular migration destinations (Okólski and Salt 2014; Garapich, Grabowska, and Jaźwińska 2018) – in 2017, 793,000 Poles lived in the former, and 703,000 in the latter. The Netherlands (120,000), Ireland (112,000) and Italy (92,000) (CSO 2018) occupied the next positions on the list. These countries were the most frequent recipients of EAWs issued by Poland in the years 2004–2017. More than half of all warrants issued were sent to the United Kingdom⁷ (31.6 per cent) and Germany (24.6 per cent), followed by the Netherlands, Ireland and Italy (see Figure 4).

Figure 4. Member states which received EAWs from Poland between 2004 and 2017

Source: Own calculations based on data (MoJ 2019).

As mentioned, the success rate of EAWs was measured by the number of people who were surrendered to Poland. For warrants issued by Polish courts in the years 2004 to 2017, this figure stood at 66.5 per cent, although there were significant differences between countries (e.g. 79.6 per cent for the UK, 67.1 for Germany and 56.8 for the Netherlands). Additionally, the analysis of statistical data shows that the percentage of executed warrants increased from year to year – from just a few per cent to over 90 per cent. This increase in effectiveness translated into the number of people who were incarcerated in Polish prisons as a result of EAWs issued against them (1,692 such individuals in November 2019). Their number is steadily growing – if we compare just the years 2018 and 2019, the population recorded an increase of 217 people (CZSW 2018, 2019).

Although the EAW execution rate was highest for the UK, Poland also received the most refusals from British courts, mainly due to the fact that the number of warrants addressed to the UK was the highest. The reasons for refusals were varied and included violation of the principle of proportionality, an insufficient procedure for the protection of the health of the offender and poor-quality opinions from court experts in criminal proceedings (HFHR 2018: 33). It is also worth recalling that, in March 2018, the reason for the refusal to surrender a requested person to Poland, as indicated by the Irish High Court, was the court's concerns regarding the independence of the Polish judiciary.⁸ In the opinion of the Helsinki Foundation for Human Rights (HFHR), poor conditions in Polish prisons – such as overcrowding, a lack of access to adequate medical care or the treatment of prisoners with disabilities – may in the future be a reason for refusal by other member states to surrender following warrants issued by Poland (HFHR 2018: 36–49). The effectiveness of the EAW should also be evaluated taking into account the time that passes between the issue of the EAW and the surrender of the person – which takes 11 months on average (HFHR 2018: 29).

Worthy of a reminder, too, is the fact that Poland receives EAWs from other EU states. Between 2004 and 2017, there were 3,680 such warrants (i.e. nearly five times fewer than Poland issued to other countries). In 2,709 cases (or 73.6 per cent), the Polish courts accepted the warrant and agreed to transfer the requested person. During this period, most EAWs came from Germany (2,125 – more than half), followed by Austria (203), Italy (138) and the UK (124) (HFHR 2018:18–19).

Effectiveness versus human rights

As a legal instrument, the EAW is rarely a subject of empirical research, especially in criminology. Only two studies have been carried out thus far in Poland. The first, in 2011, by the Institute of Justice, included an examination of court files in which Polish judicial authorities issued EAWs – 198 cases from 2008 and 105 from 2011 were covered (Gardocka 2011). The second study was conducted by the Helsinki Foundation for Human Rights and covered 42 court cases in which the EAW was issued in the period 2012–2016. The results and conclusions of both of these studies are convergent.

People requested by Poland via the EAW are mainly men with Polish citizenship (93 per cent of offenders) who committed crimes against property (Gardocka 2011: 30; HFHR 2018: 23). The offenders are sought primarily at the stage of post-trial proceedings – in approximately 70 per cent of cases the EAW is issued to execute a custodial sentence (Gardocka 2011: 25; HFHR 2018: 24).

A significant problem is that the EAW allows countries to seek transfers related to old offences – in some cases they were related to acts committed back in the 1990s (in the most extreme case in 1993). Hence, the average time between committing a crime and surrender under the EAW was extremely long, amounting to some nine years (and, in one of the examined cases, 19 years). A certain justification for this considerably long period spanning the act and the execution of the EAW may be the long waiting

time for the judgment issued in Poland to become final. In cases examined by the HFHR, the average time from a person committing the act to the issue of the judgment by the court of first instance was 97 months – i.e. approximately eight years (a maximum of 267 months) (HFHR 2018: 26–29). On the other hand, as the statistics of the Ministry of Justice show, the average duration of criminal court proceedings is 7.7 months for regional courts and 3.3 months for district courts (MoJ 2017: 23–24).⁹

All things considered, the average time between issuing the warrant and surrendering the offender to Poland was only 11 months, which shows a quite high efficiency in prosecuting offenders using the EAW (HFHR 2018: 26–29). This may be the result of the practice of law enforcement agents in countries of residence that target citizens from CEE countries. This is the case for the Netherlands, for example, where Poles, Bulgarians and Romanians are subject to much more extensive surveillance by law enforcement agents – because of prejudice and the biased belief of the law enforcement that they are more heavily involved in criminal activities, representatives of CEE nationalities are significantly more often stopped and searched by police officers. The practice could be dubbed as both national and class/economic profiling at the same time, as the targeted individuals from CEE are considerably poorer than nationals of the ‘old’ EU countries (Brouwer, van der Woude and van der Leun 2018). Hence, there may be a much higher probability that persons with EAWs issued against them will be quickly identified abroad.

The long time that passes between a crime having taken place and the execution of an EAW raises many problems. During this period, people’s lives change, often significantly. As a result, the reasons for punishment applied to a given person should be reconsidered, as they could have already been largely achieved. Important life decisions are also made as time passes, such as those related to travelling abroad and settling down in another country. Mobility and moving to other places often lead to people learning too late or even never learning at all about the next stages of the criminal proceedings that are being conducted against them – they no longer have an address in Poland and their families do not always notify them about letters from court. This causes serious problems, including convictions *in absentia*, when the accused persons cannot defend their case in court (Fair Trials 2018: 16; InAbsentiaEAW, n.d.). It is also noteworthy that Polish regulations do not anticipate or allow for correspondence with a person residing abroad. Thus, a person who lives permanently in another EU country will not receive court letters to their foreign home address, unless they appoint a representative in Poland to whom can be delivered letters from the court, a fact about which most people do not know, while some may have trouble finding such a trustworthy individual. The lack of a Polish address does not, however, stop the judicial machine, which continues to grind, exercising the legal presumption of delivery of correspondence (HFHR 2018: 25–26). Therefore, for some people, their arrest on the basis of an EAW for the purpose of serving a sentence may come as a big surprise.

After emigrating abroad, many people lose touch with or sever ties with Poland – if they ever had them in the first place, that is. The latter situation occurred in one of the cases examined by the HFHR, when the offender was sent to Poland from France 19 years after committing a crime, under the EAW request. During his entire life he had spent only a few years in Poland where, as a teenager, he committed several burglaries. For most of his life, however, he lived in France, alongside his entire family and friends (HFHR 2018: 27). A similar picture emerges from Agnieszka Martynowicz’s (2018) research with Poles imprisoned in Northern Ireland. The people she surveyed, who were to be sent back as part of the EAW, emphasised their relationship with Northern Ireland, not Poland, a relationship which had been years in the making. For them and their families, it was the UK that had become the new homeland. One respondent declared, for instance, that he had not been to Poland for nine years. Hence, sending such people to Poland within the EAW causes them to break family ties. Another crucial problem pointed

out by those at risk of extradition under the EAW was the threat to the general well-being of their family caused by their imprisonment and the consequent loss of a livelihood. This obviously resulted in a significant deterioration in the finances of the said family, including its impact on the children. In such circumstances many of the respondents focused all their efforts on trying to convince the British court to refuse the implementation of the EAW due to their (and their families') long and stable relationship with the new state (the UK, of which Northern Ireland is a part) and settling in the new community. Uprooting them from this environment in such an abrupt manner constituted, in their opinion, a violation of their right to a private and family life (Martynowicz 2018: 281–282).

The above problems become even more pronounced when we realise which category of people are requested by Poland through the EAW and the crimes of which they are accused of or sentenced for. It will transpire that we are not dealing with serious criminals but mainly with people who committed minor offences. In 80 per cent of the cases examined by the HFHR, the criminal court imposed a sentence not exceeding two years, including cases where the sentence was accompanied by the conditional suspension of its execution (HFHR 2018: 23). Teresa Gardocka's earlier research shows similar conclusions – 80 per cent of the cases in which the EAW was issued concerned crimes against property (such as theft and fraud¹⁰), the non-payment of child support, crimes against transportation safety, crimes against documents (most probably forging or altering documents) or crimes related to drugs – mainly the possession of a small amount of drugs often by people addicted to them (Gardocka 2011: 23–24, 28). EAWs were also used to prosecute people who, for example, stole a crate of beer and, although they admittedly used violence to commit the crime, it was only pushing a store employee in order to get hold of the crate. Other offences were that the accused stole 850 PLN (190 euros) from an open apartment, broke into a car with the intention to take the things from inside but failed to do so, as there was nothing to take, used a fake car registration certificate, smoked marijuana, rode a bicycle under the influence of alcohol or stole 10 pens worth 700 PLN (155 euros) or a mobile phone (Gardocka 2011: 34–39; HFHR 2018: 28–32). Such examples could be multiplied *ad infinitum*. It is clear that the huge costs associated with implementing the EAW, such as the transport of people or the translation of documents, may not always be proportionate to the 'interests of justice' which they are supposed to serve (Perkowska and Jurgielewicz 2014).

The most serious offenders constitute only a small percentage of all those requested under the EAW. Unfortunately, this is not only specific to Poland but applies to many countries (Fair Trials 2018: 10–11). In 2012 and 2013, warrants issued in all the European Union countries covered only 25 rapes, 24 murders and 11 kidnappings (EP 2014). In 2017, out of nearly 18,000 warrants in total, only 241 were issued to perpetrators of terrorist offences (EC 2019). In Poland in 2008, only five warrants concerned serious crimes against a person, including a murder. In 2011, these numbers changed very slightly to include seven crimes against a person and four killings (Gardocka 2011: 24, 28). These data raise the question of whether the goal set for the EAW as a legal instrument has been achieved. Should provisions developed almost two decades ago not be modified in view of these findings?

The EAW and the sense of membership, justice and just punishment

Having discussed both the legal background and the Polish practice of applying the EAW, this section will focus on the more fundamental issue of the goals of the criminal justice system in general (at both national and EU levels).

Thinking about the EU as a community and trying to embed the criminal justice system into it as a common instrument, we should start from the standpoint that ‘community is realised by shared obligations and duties’ (Lemke 2014: 73). This should also encompass common and shared responsibility for individuals who break the law – regardless of whether it happened in the country of origin or in the country of residence. Community is understood here on at least two levels. The first is the European level which, within the EU, creates a community of states and their societies. It assumes therefore the obligation and duty of states (governments) to help and support each other, which could lead to a country taking over the responsibility for prosecuting and punishing an individual who commits a crime. This arrangement works both ways – it enables the surrender of a person who committed a crime and is trying to flee from justice to the country which then requests their presence before the court of justice or that they serve their time in prison (here the EAW serves as a perfect tool). However, it should also work the other way around – to ensure that justice is delivered with the guarantee, nevertheless, that the procedure is right and just and should be performed in the country of residence. Especially in the case of a person who was convicted and should serve some time in prison. Transferring them to the country of origin could be unjust if they have spent a significant amount of time in the country of current residence, have built their life there (including family ties) and developed connections with the local community.¹¹

Here we come to the second meaning of the term ‘community’ – realised on a more local level – as a relationship between members of a certain group who live on the same territory and as obligations towards those members by their government irrespective of whether they have formal citizenship of the country or not. They are thus *de facto* citizens (Thym 2014) who hold ‘social membership’ – to use the term coined by Joseph Carens (2013). This membership works both ways – individuals/members should benefit the community but, at the same time, should be entitled to the protection of that community, even if they committed a crime, as these ties are for better or for worse and the community cannot excuse itself from its obligations toward a member.

Nonetheless, the question of when an individual becomes a member and under what circumstances still stands. According to Carens (2013: 104, 165), the only condition should be the length of residence and no other factors should be taken into account in this matter. The length that Carens considers appropriate is five years of residence in a particular country. In the jurisprudence of the ECtHR, the bar was set higher, however. In the judgement of *Üner v. the Netherlands*, the Court indicated that a person’s mere presence in the country is not enough and the applicant should prove ‘the solidity of [his/her] social, cultural and family ties with the host country’ (ECtHR 2006, para. 58). Only meeting these criteria (though not yet specifically defined in the ECtHR’s jurisprudence) allows a person not to be deported from the country of residence, even if they committed a serious crime (like manslaughter in the case of *Üner*).

On the other hand, we could find theories that take the opposite approach. The very idea of exclusion from the community is a pivotal element of Günter Jakobs’ theory of ‘enemy criminal law’ (Díez 2008) or ‘enemy penology’ (Krasmann 2007), as the German term *Feindstrafrecht* is translated into English. For Jakobs, any person who has committed a crime, especially a serious one, or if the person is a persistent offender, then he or she is no longer a member of the community. By breaking the law, they have broken the Rousseauian idea of social contract and therefore, as with non-members, no rights or protection apply to that individual. In other words, the community no longer has any obligations towards that person. In addition, the community has the right to protect itself from such an individual and therefore can apply procedures and take actions that would be unacceptable if the accused were still considered as a member. The essence of Jakobs’ theory is to create a legal outcast, a banned man [*sic*], who can

be sacrificed (Agamben 1998) in the name of security and the protection of the community. One form of such protection is expulsion.

In his theory, Jakobs writes about citizens who can be deprived of their rights. However, when we think of immigrants, we generally refer to non-members (disregarding briefly Carens' humanitarian idea of social membership) – non-citizens who never had any rights in the first place, so do not need to be stripped of them (Stumpf 2006; Weber and McCulloch 2018). In this context, it is worth mentioning that, when we discuss the EAW, we are mostly talking about EU nationals. They hold 'European citizenship' so their rights and general position in other member states are much higher compared to if they were merely a 'regular immigrant'. So, on a scale created by Tomas Hammar, these individuals are somewhere between the denizen and the citizen (Hammar 2003). This is yet another argument for increasing the level of protection against their forced removal under any circumstances from the country of residence (even using the EAW as an instrument), which should be reflected in the law.

The other no less important question when assessing the practical implementation of the EAW is how it serves as an instrument intended to deliver justice. Justice is a very broad concept that is difficult to define and has different meanings for almost everyone. In his influential book, *A Theory of Justice*, John Rawls (2005) proposed to understand justice as fairness. He built his theory on the concept of social contract. According to him, justice is embedded in the idea of equality among members and assumes mutual obligations and duties between all members. This theory is very idealistic (or even utopian) and assumes that, in an ideal society of equality and fairness, the reasons behind crimes will disappear, rendering the punishment obsolete. Because '[c]riminality does not surface in a well ordered regime', Rawls wagers that citizens governed by relatively just institutions will acquire a 'corresponding sense of justice' (Honig 1993: 110). Yet he accepts some forms of punishment for criminal behaviour in exceptional cases, where immoral individuals break the rules of the ideal community. David Miller (1991) shares a similar understanding of justice. In his theory, justice is built on three pillars: needs, equality and just deserts. The latter term means that individuals should be rewarded based only on their own activities and what they deserve and that this reward should be suited to them (Miller 1991). Even though the author focuses on rewards only, this concept could be applied to punishment accordingly. The idea of proportionality is contained here, although it is not mentioned explicitly. So, against this backdrop, built especially on the combination of the principles of proportionality and equality, we can try to understand what 'just punishment' means.

In the very sense of punishment is embedded the idea of pain (Walzer 1983: 269). This pain differs and depends on:

- the type of punishment; while the biggest academic furor is attributed to a description of the most severe form of punishment and pain that is caused, i.e. by imprisonment (see Crewe 2009; Sykes 1958), non-custodial punishments also bring pain, yet of different nature (Durnescu 2011) and
- the personal perception of a perpetrator who was punished: their individual life experiences, moral values or understanding of what the punishment is and what its purpose is (van Ginneken and Hayes 2017).

To deliver justice (or just punishment) to an individual, a judge should take all of these aspects into consideration and measure the appropriate proportion of pain needed to ensure that he or she got what they deserved. The grounds for that measurement are mostly based on the seriousness of the crime committed and the personal characteristics of the perpetrator. It is in line with the sense of justice discussed above. Not only should the judge count the direct effects of punishment and the direct pain it causes but should consider the oblique pains as well, those indirectly 'intended pains arising from either

the general consequences of conviction or punishment, or the specific known circumstances of the penal subject' (Hayes 2018: 251).

This rule should be applied not only to the sentencing process during the trial but also to every intervention that is undertaken by the criminal justice system towards a convicted individual, including issuing EAWs and surrendering the person subject of this request. In this sense and in our opinion every judicial authority should check whether any action taken within the frame of an EAW puts an unjust amount of pain on an individual. If it does, it should be stopped or mitigated by other solutions. Otherwise, the fundamental rights of the person would be under threat. The consequences, to that person, of his or her surrender to the EAW should be therefore understood as a form of specific oblique pains that need to be investigated by the judge (especially the one deciding on the transfer to the country that issued a warrant) based on the individual characteristic of the transferee, the crimes they committed and their level of integration in the country of residence.

Nevertheless, the idea of justice presumes that it is delivered not only to the individual guilty of wrongdoing but also to the society. This means that members of the community should not be left under the impression that someone managed to flee from justice without facing any consequences or that the consequences were inappropriate or too lenient. Another quite important element of justice is deterring others from breaking the rules (Walzer 1983: 269) while, at the same time, preventing a perpetrator from continuing their criminal activities (Zimring and Hawkins 1973). Taking into consideration both these aspects and the problems presented above on the additional and severe pain of transferring a person under the EAW, a reformed system should be proposed which would allow at least some people requested by the EAW to serve their sentences in the country of residence.

Conclusions

In this paper we are not calling for the abolishment of the whole system of EAWs. Rather, in our opinion, several amendments should be introduced to reform it. The main focus should be put on an increase of the individualisation of this process. At both stages – especially where an EAW is issued by one member state but executed by another (which usually implies an agreement to transfer a particular person to the issuing country) – the character of the crime committed and of the person to be transferred should be taken into consideration. The former mostly by the judicial authority issuing the warrant and the latter by the one that executes it. We are perfectly aware that the very idea of EAWs is rooted in the automation of this process in order to speed up and simplify it as far as possible. However, in practice we see that this mechanism is too simplistic and leads to violations of human rights. From this aspect alone it should be corrected.¹²

Our idea of introducing an element of individualisation, especially at the issuing stage, derives from the notion of membership. This is why we argue that, in the process of assessing an individual, the time they spent in the country of residence must be considered, especially their ties with the country and its society. If the person is well integrated and has developed social connections, they should be treated as a member of this society (Carens 2013); this is why they should not be expelled to another country (incorrectly and misleadingly called the 'home' country – which, for a number of people, is not home anymore) in order to serve their time in prison there. The imprisonment of this person should be possible in the country of residence (which has *de facto* become the home country). The possibility of the executing judiciary authority being able to change the sentence should also be introduced. Even if only in exceptional cases, this should be possible when a long period of time has passed between the date of committing the crime and the date when a person was arrested under the EAW. These new instruments

could serve to mitigate the pain of punishment, which should be proportionate to the crime committed (Hayes 2018).

In a situation where a person is pursued by an EAW and facing criminal charges, they could be transferred for a limited period of time in order to complete the criminal process but, afterwards, they should be entitled to claim the right to serve the sentence in the country of residence. The other possibility in this case is to use other legal instruments of mutual cooperation in the criminal justice system between member states to prosecute or to sentence a person (EC 2017: 15–16).

The new system should seek a balance between the two faces of justice and two of its values. On the one hand, it should protect and prohibit practices of escaping justice by fleeing to another country. At the same time, nevertheless, it should not bring additional and unjust pain to people who have successfully rebuilt their lives in a new country and have lived crime-free for several years. Not only is the question of unfair pain pertinent here but also that of the purpose of the punishment (which perhaps has already been achieved); both questions should be asked and answered by the judicial authorities.

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Notes

¹ Explanatory Memorandum on the Council Framework Decision on the European arrest warrant and the surrender procedures between the member states (Official Journal 332 E, 27/11/2001 P. 0305–0319).

² Nevertheless some legislation (including Polish) provides for the possibility of refusing to surrender a person because of the fear that their rights and freedoms will be disregarded in the country issuing the EAW. The countries concluded that the replacement of traditional extradition with the new European institution must not lead to a lowering of the level of protection of individual rights (Hofmański *et al.* 2008: 78–80).

³ The question remains, what should a member state do with a person who cannot be surrendered under the EAW? Should it carry out the sentence imposed on them according to the member state’s penitentiary system or should it judge the suspect independently? The CJEU will probably have to answer these questions soon (Marguery 2016: 956).

⁴ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

⁵ Act of 27 September 2013 amending the act – Code of Criminal Procedure and some other acts (Journal of Laws, item 1247, as amended). The regulations came into force on 1 July 2015.

⁶ These data sum up the numbers provided in the responses that were received by the EC from each member state. However, it should be mentioned that these countries were not obliged to send the data, hence they were sometimes presented in a selective manner – e.g. only for particular years. Therefore, its analysis should be approached with some reservations. Legislative changes may also have been introduced in individual countries which may have affected data recording. The data on the number of warrants issued in preparatory proceedings were established for 18 countries. At this stage there were definitely fewer warrants issued (2,960) of which France issued nearly a quarter (EC 2019).

⁷ After the Brexit has been finally completed no new warrants are sent to the UK and those issued previously and not yet implemented are suspended – as it was predicted by some academics (Bárd 2018; Światłowski and Nita-Światłowska 2017).

⁸ Minister for Justice and Equality v Celmer, [2018] IEHC 119. Online: <http://www.courts.ie/Judgments.nsf/0/578DD3A9A33247A38025824F0057E747> (accessed: 5 May 2021).

⁹ This is the period from the date of registration of the case by the court (so exclude the prosecuting stage of the criminal proceeding) to the date of issue of the judgment by the court of the first instance (so not a final judgment as it is still open to appeal). There were shorter (up to three months) and longer proceedings (even over eight years) but the average length was calculated for all criminal cases. To compare, the disposition time (which is a measure of the time needed to resolve a case) for all criminal cases in Poland in 2016 was 95 days (CEPEJ 2018: 19; Klimczak 2020: 229).

¹⁰ For example, theft and fraud in 2012/2013 accounted for almost half of all arrests in the UK under the EAW (EP 2014).

¹¹ See also the understanding of the principle of European solidarity presented by the Advocate General Eleonor Sharpston (although in a slightly different case on sharing responsibility for the relocation of asylum-seekers). She stated '[s]olidarity is the lifeblood of the European project. Through their participation in that project and their citizenship of European Union, member states and their nationals have obligations as well as benefits, duties as well as rights' (AG 2019, para. 253).

¹² Bearing in mind, however, that it should not reflect traditional extradition processes which, due to their length, are also very painful for people subjected to them (Światłowski and Nita-Światłowska 2017).

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The Forced Returns of Polish Citizens: Cross-Border Transfers on the Polish–German Border in the Context of the Discretionary Powers of the Border Guards

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The Schengen area tends to be commonly misconstrued in the public perception as being ‘border-free’, defined by the unrestrained mobility of people, goods and capital. In reality the so-called ‘internal borders’ are still marked by a fervour of activities, conducted by the various national state agencies created for the purpose of territorial protection. Identity and migration checks – which often strikingly resemble pre-Schengen border checks – special crime-prevention tasks and transnational operations of police-type forces, detention and the unrelenting transfers of asylum-seekers and forced returns of illegalised migrants (also of EU nationals) are only a few among the many responsibilities of the various border-guard formations. This paper, based on data from fieldwork with the street-level Polish Border Guards working in the Intra-Schengen border region on the Polish–German border, analyses the impact of different levels of institutional discretion: official, local and individual, with a particular focus on the officers’ behaviour and decision-making and on the role of discretion within the policy implementation of a specific procedure. Analysing the phenomenon of the forced returns (deportations) of EU nationals within the Schengen area, this paper exposes the nature of the little-known practice of cross-border transfers. It focuses on the phenomenon of a forced return of Polish citizens from Germany, specifically on the micro-level moment of transfer of custody between the German Federal Police (Bundespolizei) into the hands of the Polish Border Guards (Straż Graniczna) on the Polish–German border, looking at the procedural variations and the decision-making of the officers, especially in the context of its street-level echelon and its practical contribution to the concept of deportability.

Keywords: Poland, Germany, intra-Schengen, deportation, forced returns, cross-border transfers, removal of EU nationals, Border Guard, discretion, decision-making, deportability

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Introduction

Since the significant expansion of the free movement area in Europe in the last two decades, the European privilege of unrestricted travel for citizens of the EU member states, within its specified European borders, could seem somewhat of a given. This perception of the 'European identity' facilitating the unencumbered rights to reside freely anywhere within the EU is, however, quite misleading (Checkel and Katzenstein 2009). In particular, the Schengen area was prevalently misconstrued in the public perception as being 'border-free', defined by the unrestrained mobility of people, goods and capital and rarely considered as the stage for many (if any) bordering procedures (Bigo and Guild 2005; Dostál 2018). In fact, the so-called 'internal borders' are still marked by a fervour of activities conducted by the various national state agencies created for the purpose of territorial protection. Identity and migration checks, which often strikingly resemble pre-Schengen border checks, special crime-prevention tasks, the transnational operations of police-type forces, detention, the unrelenting transfers of asylum-seekers and the forced returns of illegalised migrants (also of EU nationals), are only a few among the many responsibilities of the various border-guard formations (Brouwer, van der Woude and van der Leun 2018; Dekkers, van der Woude and Koulis 2019; van der Woude 2019). Dependent on the procedural implementation of the officers of these formations, there is a significant degree of variability in how these activities actually take place, often reflecting the institutional and individual decision-making and use of the discretionary space of the agencies and officers involved.

Deportation, also referred to as expulsion or forced return¹, is the specific procedure at the centre of this paper, serving as an illustration in the discussion of the larger topic of migration and border control. Deportation is, in many ways, a procedure consistent with the framework of 'crimmigration' – a merger of criminal and migration law or, in a broader sense, the legal and social criminalisation of migration (Franko 2019; Klaus 2020; Stumpf 2006; van der Woude and van Berlo 2015). A violent and traumatic event for those experiencing it (Golash-Boza and Navarro 2018a; Hasselberg 2016), deportations can take many forms. The media and academics alike have exposed situations in which groups of restrained asylum-seekers are harassed onto planes by border-patrol agents in a violent process of relocating them against their will to remote and politically volatile places (Ellerman 2009; Fekete 2005; Schuster and Majidi 2013). In other cases, deportations function under the guise of 'readmission procedures' or even the more benevolent-sounding 'voluntary returns', still often involving governmental institutions as well as NGOs to facilitate the removal of unwanted migrants (Kalir 2017; Kalir 2019; Kalir and Wissink 2016). While, for the general population of people legally living and residing within 'Fortress Europe' (Follis 2012; van Avermaet 2009), this particular type of harmful legal repercussion appears to target only the outsiders who, in some way, deserve it – not 'us' Europeans. In reality, over the last decade there has been a noticeable increase in the number of detentions and subsequent deportations of EU nationals within Europe (Bessa and Garcia 2018; Parmar 2011; Ugelvik and Damsa 2018; Vrăbiescu 2019, 2020). This paper adds to the research on intra-Schengen border practices and deportations specifically by analysing the intra-Schengen cross-border transfer of EU nationals, and specifically the street-level implementation of an intra-Schengen return order of Polish citizens from Germany to the Polish side of the border. The procedure is not yet a well-discussed topic, even though it occurs regularly and constitutes an important part of border-state agents' duties. The specific case study of Polish citizens being transferred on the Polish–German border looks at the last stage of the forced return procedure, illustrating how the process varies widely depending on the time, place and person conducting it, thus raising questions about the role and impact of discretion on the process at the institutional, local and street levels (Ellerman 2006; Gundhus 2017). While examining the intra-Schengen cross-border

transfer as a form of deportation, this article offers a close-up analysis of a specific stage of the forced return in order to expand our general awareness of the deportation of EU citizens within Europe and asks what the described variations in the procedure imply about the discretionary powers of the Border Guard institution and its officers. Furthermore, the paper aims to contribute to the broader scholarly debate on the street-level discretion of state agents and on policy implementation in general (Musheno and Maynard-Moody 2015; van der Woude, Barker and van der Leun 2017) and its practical role in the concept of deportability (De Genova 2002).

The paper opens with a brief overview of developments in deportation studies before presenting current research on the intersection of the topics of deportation and discretion. Following this is a section outlining the legal and procedural context necessary to define cross-border transfers, subsequently offering an overview of the specific Polish–German case study. Next, the paper presents a two-part methodology, focusing firstly on data collection and secondly on the nature and process of its analysis. The results and analysis are then shared, describing the procedural variations and different levels of discretion as illustrated by the case of the intra-Schengen cross-border transfer. This part is divided into three sections, initially looking at forces impacting on the process at the macro level which are beyond the control at street level and represent the ‘official discretion’, before reflecting on the local as well as the informal organisational norms and expectations (or ‘institutional discretion’). Lastly it focuses on the micro-level decision-making showcasing the different degrees of individual discretion and personal affect which guide the officers’ behaviour (‘individual discretion’). The final part of the paper discusses the theoretical implications of the findings, with special attention paid to the multi-layered punitive nature of forced returns (Golash-Boza and Navarro 2018a; Hasselberg 2016) and the concepts of the implementation gap and ‘deportability’ (De Genova 2002; Leyro and Stageman 2018). The article closes with reflections on the nature of discretion through the prism of responsibility and suggestions for further research.

Deportation studies: origins, developments, ‘deportability’

Following the terrorist attacks on the World Trade Center in 2001 and in the aftermath of changes in migration and anti-terrorist policy in many countries, the deportation rates in the twenty-first century have correspondingly skyrocketed on all continents (Kalir 2014; Kanstroom 2007). In the nearly two decades since, much has been written about the topic of deportation and its growing use, giving rise to a body of scholarship now popularly referred to as ‘deportation studies’ (Coutin 2015). Looking for a clear explanation for the trends in growing migration and population control at the national level, some suggested that it is a reaction to states ‘losing control’ in the new era of economic and information globalisation (Bigo 2002; Sassen 1996). The last decade has seen a distinct exacerbation of these trends. Various individual nation states continue to intensify their fight for sole authority over their territory and population, with frequent uses of deportation to assert that authority (De Genova 2018; De Giorgi 2010).² Exposing high costs for the state when implementing the policy, especially in a context of low enforceability or effectiveness (Camarota 2017; Patler and Golash-Boza 2017), researchers suggest various ways in which deportation is utilised by the state: symbolically, legally, economically and socially (Anderson 2010; De Genova 2013). Often it is not even the deportation itself but, rather, the threat of it, combined with a wide implementation gap in deportation procedures, which is the most problematic. De Genova (2002; 2018) puts forward the idea of the ‘deportability’ of large population groups being an actual goal of deportation policy – with the implementation gap serving as a tool to achieve it. Meanwhile, Kalir (2014) describes a fully implementable deportation policy as ‘a state fantasy’, propagated

in order to gain political support: while the nationalistic propaganda validates deportation as a migration tool necessary to achieve an ideal and pure nation, in reality no state can (or wants to) fully prevent irregular migration.

The spectacle of deportation, often dramatised and mediatised, also serves the purpose of creating fear and permeating a feeling of precariousness among the illegalised populations (De Genova 2018). This 'deportability' can have very clear financial benefits for the 'host' country: some more stable and better economically developed states, such as the UK, the USA or Australia, stand to directly benefit from creating large groups of vulnerable, exploitable workers (Cornelius, Tsuda, Martin and Hollifield 2004). The 'gap' between the numbers of 'deportable' and 'deported' is thus suggested to be an intentional and successful method of labour and population control. Cornelius *et al.* (2004) point to the 'revolving doors' approach, via which states are able to gain a cheap, replaceable labour pool, forcing many illegalised migrants to accept abhorrent working conditions and a constant fear of deportation and dispossession. This accompanies the regrettable yet progressing social trend of populist 'othering', the proliferating socio-cultural demonisation of migrants – now also frequently politicised in order to scapegoat groups within a society (Aas 2014; Aas and Bosworth 2013). The phenomenon of the merging of criminal and migration law, known as 'crimmigration' (Stumpf 2006), is additionally impacting on the fairness of migration policy and the treatment of migrants (Franko 2019; van der Woude, Leun and Nijland 2014). Directly visible in the topic of deportation, it is essentially an administrative procedure, yet one implemented with growing saliency and the force expected when dealing with violent criminal offenders (Hong 2017). There is an undeniable interconnectedness between all these trends and developments, showing how the 'crimmigrant other' (Aas 2011; Franko 2019), the 'illegal immigrant' (Aas and Bosworth 2013; Bosworth and Kaufman 2011) or the 'deportizen' (Klaus 2019) are in fact legal, political and social layers of discrimination against the same group of people. The recent work of van der Woude (forthcoming) explicitly situates the phenomenon of 'deportability' and the growing deportation gap in the context of intra-Schengen migration, showing the clear link to the progressive labour exploitation of certain national groups who find themselves in the precarious situation described above.

The impact of deportation studies is undeniable, yet there are certain methodological challenges inherent to researching it. Some valuable and relevant studies, which rely on qualitative data, are clearly problematised by the difficult nature of access (Kalir, Achermann and Rosset 2019), forcing researchers to often describe their findings based on a small sample pool, very specific to their own positionality (Dörrenbächer 2017; Fassin 2011, 2015). Because of this specific subjectivity of the data, rarely have there been systematic or replicable ethnographic studies of forced returns, especially ones representing state agents. On the other hand, much of the scholarly work on deportation relies on large datasets, often published by state agencies (Camarota 2017; Weber 2015). Data like these are nigh-on impossible to check for accuracy and, while quantitative and large data analyses are excellent in revealing correlations, at times they can also hide crucial aspects of what is being evaluated.³

Deportation research is frequently conducted with a focus on the external borders of the EU, the USA or, more generally, the Global North (Ellerman 2009; Pratt 2010; Schuster and Majidi 2013). However, such works do not always fully reflect the diverse forms in which forced returns can take place, especially within the EU or the Schengen area itself. Some new studies show a steady development of the deportation trends of EU citizens within the EU and point to the specific groups or populations, such as the Roma, whose mobility within the Schengen area becomes restricted (Korvensyrjä, Osa and Feliziani 2017; Vrăbiescu 2021; Yılmaz and De Genova 2018). However, since the phenomenon of internal EU and Schengen deportations has only recently begun to catch the attention of researchers, the main topic of

this article, the intra-Schengen cross-border transfers of EU citizens, has not yet been thoroughly discussed in the scholarly literature.

Discretionary spaces at various levels of implementing the deportation policy

Any policy lies in the hands of the street-level officer who implements it exhibiting a 'substantial discretion in the execution of their work' (Lipsky 2010: 3), while also being the 'face' of policy that the public sees as representative of the government. Generally revolving around the core concept of choice (Dworkin 2013), discretion can be defined in a broader sense, reflecting its many levels, as the 'freedom, power, authority, decision or leeway of an official, organization or individual to decide, discern or determine to make a judgment, choice or decision, about alternative courses of action or inaction' (Gelsthorpe and Padfield 2003: 3). Motomura (2015) and Maynard-Moody and Musheno's (2012) work on discretion systematically analyses the topic from a multi-scalar perspective that combines empirical and qualitative data on the street-level implementation of policy in the hands of various police-type agencies with a more theoretical socio-legal analysis of laws and policies, pointing to the multiple layers of the variety of organisations involved as well as the different levels within any specific institution that all play a different role when discussing discretion. This multi-layered comprehensive approach fits well with recent work on discretion by van der Woude (2017), who makes argument for discretion necessarily being studied in an interdisciplinary nuanced manner, as well as with that of Zacka (2017) and van de Walle and Raaphorst (2019) in their empirical work on complexities of the front-line implementation of state policy.

Academic works discussing the topic of discretion in the context of deportations further reflect the above-mentioned multi-layered nature of discretion, pointing to the interpretive space existing at the prosecutorial, judicial and various organisational levels (macro, mezo and micro) within the implementing policing institutions. Most of the work on discretion and deportation can be found in more normative legal scholarship, focusing on the letter of the law, prosecutorial powers or large-scale economics (Camarota 2017; Pedroza 2019; Wadhia 2015). There is also some research that combines a multi-scalar and an interdisciplinary approach, utilising large statistical datasets together with ethnographically driven qualitative studies and looking into the decision-making by state agents in the context of deportation and the impact of institutions as well as individual identity at micro-level decision-making (Ellerman 2009; Hiemstra 2016; Kalir 2018; Neuman 2005). The exciting new work of scholars such as Borrelli (2019), Brouwer (2020), Dekkers *et al.* (2019), Fabini (2017; 2019), Korvensyrjä, Osa and Jassey (2019) or Vrăbiescu (2020) combines a focus on discretion and on various border practices, including deportation, explicitly using qualitative data collected in recent years during fieldwork on the internal borders of the EU, with the specific emphasis on the national case studies of the Netherlands, Italy, Germany, France and Romania. Their research, all of which focuses on the street-level state agents who implement the migration (including deportation) policy in different national and/or organisational contexts, inevitably points to the complexity and nationally driven specificities of how the procedures play out in the different EU member states. All the academics mentioned above point out, moreover, that the intersection of deportation – or more-general border protection practices – and street-level discretion at the hands of state agents needs to be researched further, considering the various national, legal, social, political and geographical factors.

It should be noted that Poland and its borders present an especially interesting case for deportation studies: the country operates as the 'Eastern outpost' for the EU and the Schengen area, having both

external and internal Schengen (and EU) borders. Poland recently shifted from being a source of emigration to a country more of transit and destination, marked with some interesting new migration and border-control trends (Coniglio and Brzozowski 2018; Goździak 2014; Klaus 2017a; Lesińska, Okólski, Slany and Solga 2014; Szulecka 2016; White, Grabowska, Kaczmarczyk and Slany 2018). Enjoying the cooperation of various national, local and international agencies that, together, make for an intricate and multi-layered social, economic and political instrument of border protection, politically Poland aims for the status of the state with 'the most secure borders' (Fomina and Kucharczyk 2018; Klaus 2017b; Kocan 2014; Mazurek and Barwiński 2009; Szulecka 2019).

This paper uses the case study of Poland in the context of deportation, analysing the implementation of the intra-Schengen cross-border transfers of Polish citizens from Germany as a case study of the procedure for deporting EU citizens within the EU. The study fits into the disciplinary framework outlined by the earlier-mentioned deportation scholars, looking at the transfer procedure in the nationally specific context of the official, organisational and individual discretion and decision-making of the Border Guards on the Polish–German border.

The following section presents the legal and institutional framework of the procedure, within which the discretionary decisions are made when it comes to its implementation.

The cross-border transfers of Polish citizens in the specific context of the Polish–German border

The intra-Schengen cross-border transfer: the legal framework

This paper proposes a definition of the intra-Schengen cross-border transfer of EU nationals as the street-level implementation of a forced return (deportation) under the framework of an 'order to return to the country of origin', as applied by an EU member state towards a citizen of another EU member state. The term is taken straight from the fieldwork conducted with Polish Border Guards and German Federal Police officers, as used by both agencies. The existing legal framework provides only some guidance in the case of these intra-Schengen cross-border transfers, even though dealing with deportations and the ensuing re-entry bans are routine for many German law firms run by Polish lawyers, offering services to individuals who find themselves affected by the procedure (Matthies 2019; Pazur 2019). These professional services help Poles to navigate German administrative law in situations such as facing a forced return order, checking one's status in the internal German federal policing system AZR (*Ausländerzentralregister*) and the Schengen Information System (SIS) before entering the country, or contesting a re-entry ban (Cooperative Project 'Welcome' 2019; Gęborek 2013; Matthies 2019; Pazur 2019). A sentence for a crime committed by a foreigner in Germany does not necessarily result in deportation but the criteria are not at all transparent (Pazur 2019). The provisions of German law for EU citizens from 30 July 2004 (*Gesetz über die allgemeine Freizügigkeit von Unionsbürgern; Freizügigkeitsgesetz/EU – FreizügG/EU*) state that an EU citizen can be expelled or removed from German territory if his or her presence constitutes a threat to public safety or national security or poses a health risk – which, in fact, does not always mean committing a crime. The law is a pretty direct transposition of the EU Directive (Nr. L 229 S. 35 – *Freizügigkeitsgesetz/EU – FreizügG/EU*). It does not, however, specify what exactly that would entail and which crimes present the specific threat. Curiously, the data show that a significant number of Poles are unaware that they are present on the SIS or AZR and thus their apprehension and subsequent deportation are a huge surprise. Additionally, based on empirical data and a review of the available legal information, it appears common that the administrative measure – the re-entry ban – is decided on by

a German court in the absence of the individual in question. This often happens after the individual has already been returned to Poland and thus is often not aware for how long or under what conditions the restrictions apply to them (Gęborek 2013; Pazur 2019).

There is little consistency between such cases as far as the severity of a crime committed that led to deportation and/or a re-entry ban is concerned, nor how a person can proceed in order to have his or her record expunged. In this context, the intra-Schengen cross-border transfer serves as an act of removal of an undesirable migrant – deemed a dangerous criminal or otherwise a threat – from the host state back to the country of origin. By definition a deportation or a forced return (Anderson *et al.* 2011; Walters 2002), it carries multi-layered social, legal and economic implications for those in the procedure, as discussed in depth later in the paper. Furthermore, even though it is applied as a common administrative procedure, in reality the intra-Schengen cross-border transfer of EU nationals blurs the boundaries between criminal law as seen in the initial offence and sentencing, migration control with the deployment of the deportation procedure and an administrative measure in the form of a re-entry ban. This illustrates the earlier mentioned phenomenon of ‘crimmigration’.

It is important to note that the entire implementation of the order to return a Polish citizen from Germany is guided by several different legal acts and directives. These are the EU’s conditions for its citizens’ residence, the Schengen Borders Code, various bi-lateral agreements between Germany and Poland – and specifically between the two state agencies of the German Federal Police (*Bundespolizei*) and the Polish Border Guard (*Straż Graniczna*) – as well as the national German and Polish laws, acts and policies outlining the rules and conduct for the residence and stay of EU member-state citizens, border protection laws and the specific duties of the aforementioned agencies (*Freizügigkeitsgesetz/EU – FreizügG/EU, Poland’s Border Protection Act of 1990 and the Border Guard Act of 1990*). However, the deportation procedure itself it never explicitly specified and, as such, exists in a somewhat grey zone and undefined space between all of these laws and policies, exposing a wide margin of discretion at its various implementation levels.

The process of deportation of Polish citizens from Germany

For this article the deportation in the form of an intra-Schengen cross-border transfer is illustrated specifically by the forced return of Polish citizens from Germany, while also serving as an example of the wider framework within which such transfers can be observed within the EU. This specific transfer of custody takes place between the state agencies of the two neighbouring EU member states of Germany and Poland and excludes all of transfers under the Dublin III regulations, focusing explicitly on the occurrences of Polish citizens who were transferred into the hands of Polish Border Guards by the German Federal Police (*Bundespolizei*) on the Polish–German border.

What triggers the process of the intra-Schengen cross-border transfer of Polish nationals from Germany? Initially, a crime is committed⁴ within the German state by a Polish citizen. As the perpetrator is apprehended, tried and sentenced for the crime committed, he or she enters the criminal justice system of the host state. Once the sentence is served, however, the person released is not necessarily free to reclaim his or her freedom. Depending on the type of crime committed, in addition to other legally undefined factors that can deem a person to be ‘undesirable’ or a threat, he or she can be put in the custody of the German Federal Police agency in charge of removing unwanted individuals from the state territory. In the case of Polish citizens, the German Federal Police transfers them into the hands of the Polish

Border Guard at a specified official location near the Polish–German border. After bureaucratic completion of the cross-border transfer process by the Polish Border Guard, a person's legal status must be confirmed by the Polish Police before they can be released.

After receiving the response from the Police, the individual in the transfer process faces two options: if he or she has any arrest warrants in Poland, they will be transferred yet again, this time into the hands of the Polish Police and/or Correctional Officers – in some cases faced with an order to personally appear at a specific police station for further instruction (depending on the data collected). In the second option, when an individual does not need to serve a prison sentence, he or she is released. However, upon release some individuals have 24 hours to register at their local police command; failing to do so results in administrative punishment and the further potential criminalisation of the individual. Given the just-released person often does not have either money, transportation or a way to contact friends or family, combined with the fact that he or she might need to cover hundreds of miles to arrive at the required place, the person will probably fail to do so and will end up with a criminal record again.

Methodology of data collection and analysis: identifying discretionary practices in the field

Data collection: fieldwork on the Polish–German Border

In the research on which this article is based the discretion available to and utilised by border officials is studied in the context within which it can be exercised. This paper uses the specific example of the intra-Schengen cross-border transfer of EU nationals (Polish citizens on the Polish–German border) and considers the legal, political, social, cultural, economic, institutional and individual components that connect variations in policy implementation with discretion at the organisational and the individual level. The empirical data were collected during fieldwork conducted with the Polish Border Guard (*Straż Graniczna*) working on intra-Schengen border protection. The fieldwork took place from July to December 2018, following the positive response of the Chief General of the Polish Border Guard to our request. The contract between all the main interested parties enabled a continued, ethnographic-style study of the street-level Polish Border Guards at the intra-Schengen borders to be carried out. The research was conducted in four locations, including the command and three outposts located directly on or in the very near vicinity of the Polish–German border. Our access allowed us mostly to participate (and carry out participant observation) in patrols and also facilitated observations of and interviews with various groups, units and departments of the Polish Border Guard agency, as well as frequent interactions and both official and unofficial interviews with other Polish agencies, such as the Police or the Customs Agency (*KAS*). The research resulted in 900 hours of active observation in the field, as well as 426 semi-open surveys measuring discretion at the street level among the border patrol officers. In addition we held over 50 informal interviews, 12 structured interviews, more than 20 informal focus groups and an overview of various internal agency documents.

In full disclosure, forced returns were not at any point either a major or an exclusive focus of the fieldwork, which mostly concentrated on the street-level patrols at the intra-Schengen borders and the officers' duties. However, the topic of transfers and forced returns resurfaced in various forms throughout the time spent in the field, being discussed in documents and present in statistics, interviews, and any procedures observed, becoming a focal point during the time spent at a location designed specifically to handle the intra-Schengen border transfers on a regular basis. The data specific to that procedure only were collected at two outposts (out of the total of four fieldwork locations), involving

approximate 50+ hours of observations and both formal and informal interviews with a total of 12 Border Guards, as well as three observations of and one informal interview with individuals who themselves were being transferred. Occasional additional references to the procedure throughout the fieldwork also served to build up our knowledge and awareness of the topic. All the data were collected in Polish and translated by the author. Sharing of the raw data in order to assure external translation was not possible due to the confidential nature of the information collected, as well as the formal agreement between the Border Guard institution and the researcher.

Data analysis: qualitative content and thematic analysis

For this paper, all data relevant to the procedure of the intra-Schengen forced-return transfer of EU nationals were extracted and analysed in the conceptual framework of discretion and street-level policy implementation. All the data used for this article have been analysed through a qualitative approach, which means that there is no one clear tactic that can produce a formula or an algorithm for its analysis. However, since all of the methods utilised for this study yield raw results adaptable to the print/textual word, the most natural approach was a systematic qualitative content and thematic analysis (Vaismoradi, Turunen and Bondas 2013). Worried that, in many cases, 'qualitative content analysis is insufficiently delineated in international literature' (Assarroudi, Heshmati Nabavi, Armat, Ebadi and Vaismoradi 2018: 42), I have chosen here a systematic content analysis that allows both deductive and inductive analysis – that is, a combination of a text- or data-driven and a concept-driven method – an abductive or complementary approach (Armat, Assarroudi, Rad, Sharifi and Heydari 2018; Graneheim, Lindgren and Lundman 2017; Schreier 2012). Following other scholars who successfully incorporated ethnographic research into a systematic criminological study (Sausdal 2018; Vigh and Sausdal 2014), a combination of analytical schemes was used, additionally utilising the later stages of the '16-step method for directed content analysis', as outlined by Assarroudi *et al.* (2018). All data were converted into text format and then coded, initially in a grounded theory manner and then again embedding specific concepts linked to the themes of circumstances, setting, participants, status, background, communication, behaviour, opinions and stereotypes.⁵ In the initial, grounded-theory and more inductive stage, coding was done with a focus on the discretionary decision-making and variations in the procedure of the intra-Schengen cross-border transfer of EU nationals. For the second stage of the analysis, three groups of codes were designed, each driven by one of the following themes: conditions, interactions and perceptions. In this way, the data were analysed gradually, building from straight-from-text, back-and-forth concepts to more abstract ones, revealing relations and dependencies between and across the themes, as described below.

Variations in procedure: whose discretion matters?

This section begins by comparing the variation present in the procedure due to macro-level structural and institutional limitations at the two outposts (1 and 2) at which the procedure was observed – representing the 'official' discretionary space. The second part reflects on the formal and informal norms at each of the outposts, created at the local organisational (mezo) level (institutional discretion), while the third part looks more closely at the micro-level uses of discretion by street-level agents and their individual decision-making, often dictated by their personal preferences and perceptions (individual discretion).

The information outlined in the sections below comes directly from the data collected during fieldwork, including the observation of and interviews with Border Guards, the observation of German Federal Police officers and of the individuals in the transfer procedure (Polish citizens under orders to return to Poland from Germany).

The official institutional discretion at the level of the Border Guard organisation/headquarters

Several factors that shape the procedure of the intra-Schengen cross-border transfer of EU nationals are beyond the influence of individual street-level Border Guards and represent decisions made at the macro organisational level or Border Guard headquarters – or even within the Ministry of Internal Affairs and Administration. Notably, the specific outpost, its architecture and facilities and the surrounding geography in which the procedure takes place all play a significant role when discussing the details of intra-Schengen cross-border transfers. The decisions behind these structural choices are clearly among the factors established at the highest political and institutional echelon, illustrating the varying interpretation of international and national official rules and regulations when it comes to the procedures involved in border control – such as the Schengen Borders Code (EU Regulation 2016/399 of the European Parliament – [Eur-lex.europa.eu](http://eur-lex.europa.eu)), the Border Guard Act of 1990, amended and unified in 2020 (Dz.U. 1990 Nr78 poz. 462 – Sejm.gov.pl) and the Border Protection Act of 1990 (Dz.U. 1990 Nr78 poz. 461 – Sejm.gov.pl).

The two outposts included in this study reveal a wide degree of variance in the interpretation and application of the Schengen Borders Code stipulation in Article 24, which states that all traffic obstacles and border-crossing structures must be removed from the border and cannot pose any restriction on free movement or impose unsafe conditions. According to the Border Guard Act and the Border Protection Act of 1990, the facilities and structures must ensure the appropriate conditions for all procedures – such as interrogation, holding, personal searches etc. However, the comparison between the two outposts reveals how differently these rules are translated into the real conditions that each of the two places offered.

At Outpost 1, even though the Border Guards Outpost Headquarters compound was located within the limits of a Polish city in the border region, the two agencies involved – the Polish Border Guard and the German Federal Police – collaborated to establish a separate place where all cross-border transfers could take place, including readmissions and returns under Dublin III regulations. The place was referred to by Polish agents as the ‘Transfer Point’ (or *Punkt Przekazań*, which was the official name of the structure). The building itself was located almost exactly on the Polish–German border although just slightly on the German side and within the city centre. It was quite easy to find, reach and access by car or on foot.

In a stark contrast, Outpost 2 presented a very different reality due to the simple fact that the structures occupied a former border crossing exactly on the border and right in the middle of a busy highway, without direct access for anyone except for authorised personnel, who can approach it by car. In a noticeable difference to Outpost A, there was very little information passed from the German Federal Police to Border Guards related to upcoming transfers; on several occasions, patrol cars had to return to the Outpost Headquarters in order to ‘process’ an unplanned cross-border transfer or pause the ‘processing’ of an apprehended individual in order to ‘receive a transfer’. While waiting to be processed, for most of the duration of the procedure and, afterwards, while waiting for clearance from the police, the detainee was kept in a holding cell. There were instances when getting a response from the police took

two or even three days, which meant that a person in the transfer procedure could be kept in the holding cell of the outpost for several days.

Additional differences were very prominent when it came to the holding cells – or space used as such. At Outpost 1, the ‘Transfer Point’ building was well adapted to holding multiple detainees in a separate area away from those individuals who had already proved to have an outstanding warrant in the Schengen Information System (SIS, revealing infractions of the individual in the use of Schengen visas or the crossing of intra-Schengen borders) or EUROPOL (international European police system listing individuals with international criminal records) and/or be dangerous, as well as separate quarters for families with children – the latter with more comfortable beds, a crib, a playroom and a bathroom behind a divider, thus providing a degree of privacy. Overall, the holding cells fulfilled general European/international norms for such spaces, guaranteeing the physical conditions of sufficient privacy, light and space. Conditions in the holding cells at Outpost 2 were one of its most problematic aspects, since the compound did not include appropriate holding cells. Instead, large interrogation rooms were repurposed to hold detainees, prisoners or other apprehended individuals such as families with children. The rooms were quite large and in the sub-basement, with only a minute amount of natural light coming through the small, barred windows. With one wall being almost entirely covered by a two-way mirror, the only items within the cell were a small foldable bed and a toilet behind a semi-private divider. Additionally, the room was badly ventilated and without temperature control, often making it either very cold or very hot and humid, with a noticeable smell of mildew and sewage.

These structural differences exist due to the macro decisions of the institution. Border Guards have no impact on the choice of either the location of their post or the specifics of where the structure is or how it is designed. The obvious infractions of the Schengen Border Code in the case of Outpost 2 were clearly made at the highest echelons of the organisation, reflecting the decisions directly linked to the political level (according to the respondents, this was due to budget constraints faced at internal Schengen borders as Poland entered the agreement in 2008/2009). These differences, however, impacted remarkably on the manner in which the cross-border transfer procedure was implemented, both in the way in which individuals undergoing the procedure were held and the way in which they were released. For example, Outpost 2 often required Border Guards to unofficially offer the additional transfer of the released individual to a safe location which it would not be possible to reach on foot, while Outpost 1 easily facilitated a safe departure from the facility regardless of the individual’s transportation possibilities (whether they had a car or money for a bus ticket etc.).

(In)formal norms at the local outpost and unit level – discretion within the team expectations

Generally, the procedural conduct of Border Guards is dictated by the Border Guard Act of 1990, amended and unified in 2020 (Dz.U. 1990 Nr78 poz. 462 – Sejm.gov.pl). While the Act provides a general outline of the rules, rights and obligations that govern what falls within an officer’s duties, most of the procedures – such as the border check, the conducting of a personal search, the placement of a person into holding, the use of primary or secondary enforcement measures and the confiscation of goods or documents etc. – allow for a wide margin of personal decision-making based on the officer’s evaluation of the situation. In other words, an officer’s personal assessment of the level of threat and what he or she deems an appropriate response, allows for a lesser homogeneity in procedural implementations. However, as observed during fieldwork, the set of strong informal norms permeating the organisation, especially when visible at the local level of a specific outpost or even a unit within it, to a large extent creates the framework of behaviour for the officers.

The norms and expectations of conduct at the two outposts varied greatly and can be especially well illustrated by the interactions of officers with individuals in the transfer procedure. At Outpost 1 these interactions were quite limited and purposefully minimalised, while the culture of Outpost 2 encouraged the creation of longer or more in-depth encounters between the Border Guard and the transferee. At Outpost 1's 'Transfer Point', all transfer procedures were scheduled and as such expected, which allowed the officers to familiarise themselves with the details contained in the procedure, limiting the time the detainees would need to spend in holding and speeding up either their release or their subsequent transfer into the hands of police officers. The quarters shared with the German Federal Police and the close cooperation with the agency further set the standards of speed and efficiency, traits often attributed to their German colleagues by their Polish counterparts, who did not want to fall short in their perceived professionalism (based on the data collected on fieldwork). Additionally the geo-location of the Transfer Point itself entirely relieved the officers of any feeling of responsibility in catering to those released on their departure from the Point, since access to various forms of transportation or communication could be achieved with ease. Because Outpost 1 was less 'successful' in catching illegalised migrants or improper border-crossings, many of that location's statistics relied on the transfer procedures, making them both more significant in number and much more streamlined when compared to those of Outpost 2.

As far as the transfer procedures were concerned, Outpost 2 operated in a much less organised manner. The majority of the transfers observed were not scheduled or at least appeared to surprise the officers working the patrol shift. Since Outpost 2 was a 'busier' location than Outpost 1 as far as the number of smuggling or other illegal cross-border activities were concerned, the Border Guards usually perceived the need to return to the post and accept the custody transfer from the German Federal Police officers as a nuisance and a hindrance to their preferred patrol activities. Because of the specific difficult location (mentioned earlier) in the middle of a busy highway, the unofficial rule for releasing a transferred individual involved dropping him or her off at a safe location, either in the city or at a petrol station or a bus station nearby. While not outlined in any official or legal capacity, this rule was observed throughout all my fieldwork and often described as a juxtaposition to a cautionary tale of an instance when the rule was not followed. This was shared by the specific Border Guard involved in the event who, at this specific time, decided not to follow the unofficial rules and refused to offer the individual in the transfer procedure a ride to a safe location:

I will never forget that one time. This guy, he was being released. And he is asking me, can I give him a ride to a gas station or a bus stop. (...) I remember, I said, 'I'm not a taxi service' and let him walk away. Later, it was already dark, I was coming back from a mobile patrol and I saw him... That guy, he got hit by a truck. He tried to walk along the highway (...). He died, of course. I still remember seeing his blood, his body on the side of the street... It is really awful to now live with that (BG2f6).

The tragedy clearly has its roots in the specific location of the compound yet, at the same time, it illustrates the location-specific need for the norm of extending the additional transportation service to the released individuals awaiting transfer. In this case, the individual preference of an officer to behave a certain way was bound by both structural limitations as well as the organisational culture of the outpost, which is itself connected to the specific location and the architecture, also reflecting the type of cross-border migration flows and potential crimes in that region. The situation described above is a dramatic example of a state agent's decision, even though initially dictated by constructional limitations and ultimately costing someone their life.

Interestingly, one aspect treated consistently in a similar manner at each of the outposts was the officers' preference to patrol the direction of the traffic going towards Poland. As multiple Border Guards (BG1b; BG1e; BG2a; BG2e; BG2f) observed: 'My job is to protect the Polish border, not the German one'. They would often use the description of their duties in the Border Guard Act of 1990 to justify this, even though the accession of Poland into the Schengen Agreement clearly stipulated the importance of protecting the internal border equally, in both directions, in the context of perceived risks and existing dangers. However, in the majority of cases fueled by resentment and the oft-perceived discrimination of Poles by their Western neighbours (McGinnity and Gijssberts 2015, 2018; Rzepnikowska 2019; Sobczyński 2009), individual Border Guards resented having to fulfill an obligation which they perceived not to be in line with national Polish interests. The sentiment was made abundantly clear on many occasions when bluntly defying the Commander's, the Unit Director's or the shift supervisor's direct order to split the patrol time so that the officers watch both traffic directions equally. This was especially obvious when officers accidentally intercepting Poles entering Germany (for example when doing ID checks at petrol stations) revealed that the individual they had stopped, who was clearly on the way to Germany, was actually about to violate a re-entry ban. Indeed, what the collected data revealed is that the Polish-German border is characterised by an inability – and a lack of willingness – to procedurally guarantee full implementation of the German re-entry ban. The triangulation of risk analysis profiles, preferences and perceptions of controlling the 'exit' vs 'entry' traffic by street-level Border Guards and the actual occurrences of identity checks conducted near the border, reveal a significant permeability of the border for Polish and German citizens, especially in the 'exit' direction (leaving Poland and entering Germany). As indicated by the Border Guards, without a systematic and full border control and with the continuous understaffing and lack of resources of the agencies responsible for intra-Schengen border protection, Polish individuals with a re-entry ban can easily slip through the surveillance and find themselves back on German soil.⁷ The deportations are initially enforced but the re-entry ban is not, which implies a certain bottleneck; what follows is a visible implementation gap. This finding strongly connects with the concept of deportability (De Genova 2002) and the potential for labour exploitation (Cornelius *et al.* 2004; Sumption and Fernandez Reino 2018).

Individual discretion and the impact of street-level Border Guards' personal preferences

There have been many situations in which the choice of the street-level Border Guard made the procedure take on a certain shape since, as mentioned in the previous section, the legal stipulations of the Border Guard Act of 1990 are open enough to facilitate a large margin of discretion in their implementation. On numerous occasions it was clear that the manner in which a certain procedure was realised was largely dictated by the Border Guard's personal preferences and individual inclinations, views and beliefs.

At times the degree to which the individual street-level Border Guard's personal decision could impact on the treatment of a detainee was remarkable, pointing to the problematic nature of their wide discretionary powers. For example, some Border Guards purposefully made the holding conditions harder by either putting multiple detainees together in a single-occupancy room or allowing them to smoke cigarettes continuously without permitting them to open the windows. A few Border Guards found it amusing to restrict access to personal food or drinks or use of the toilet. While, in a couple of cases, street-level officers immediately reacted to the detained individual's health issues, transporting them to hospital and administering appropriate medication, others chose to ignore requests for attention, judging them untrustworthy and the symptoms 'fake'. One memorable instance involved a young

female Border Guard, who was bothered by the symptoms of illness exhibited by one of the detained individuals, while the second Border Guard present, an older male and the patrol supervisor, crudely made fun of her 'softness' saying: '(...) you women are so stupid. They [detainees] are clearly lying, just trying to manipulate you' (BG2c).

Another visible difference in how officers approached the transferred individuals was seen in the context of personal belongings. According to some respondents, many Poles who go through the transfer procedure have belongings confiscated by the German Police – bikes, phones, laptops or tablets. If their owners fail to provide proof of purchase, the objects confiscated end up being commandeered by the Regional German Police at the moment of the initial arrest. Additionally, it is a standard operation to require the foreigner to cover the administrative costs of the deportation procedure (Bleiker 2019; Co-operative Project 'Welcome' 2019). Based on data and legal provisions, it proved impossible to determine the exact amount or its limit, with respondents pointing to values varying between €50 and €850. When hearing detainees' stories, the Border Guards either ignored them entirely as fabrications or showed quite far-reaching understanding and sympathy.

The following is a comment from an individual in transfer, after his goods were confiscated. He was facing an order to check into a police station at the place of his residence, at the far northern end of the Polish–German border. His statement relates a great degree of helplessness which also feeds into the previously mentioned pool of Poles deciding to violate the re-entry ban to Germany:

What am I supposed to do now? They took my bike, my phone, and my money. I can't even call a friend to ask for help. I literally have nothing, and what, am I supposed to walk to my town? It's 300 kilometers! Am I supposed to do it on foot? (...) So I kind of have to break the law now. Either hitchhike, or steal... ['Or just turn round and go back to Germany, huh?'] was the half-joking response of one of the Border Guards] (NBG2a).

Several Border Guards saw such events as congruent with their own belief in the exploitation that many Poles experience at the hands of the German police. As one Border Guard told me after a detainee claimed to have had all of his possessions seized:

This makes me so angry. It's not like it doesn't happen all the time! This poor guy, they arrested him, ok, but he already served [his time]. Why do they have to treat him like this? It's because he is Polish, you know. They hate us. I've seen this before (BG2e).

Many officers' behaviour was directly linked to the perception they had (or had not) of the detainee being compassion-worthy and reliable, based on their looks, age, gender, background and criminal record and other undisclosed personal indicators. The extent to which they would choose to communicate with the individual was also reliant on that factor, in turn facilitating discretion at the procedural end to either ease or multiply the discomfort of the transferee. Generally, the officers would either choose to humanise and find personable aspects of the detained individual – in turn being more understanding towards them and benevolent when conducting the procedure – or remain reserve and limit empathy by not recognising any shared values, which often resulted in harsher treatment of the person in question.

The data reveal certain age- and gender-related trends in the behaviour of the Border Guards. Older male officers, in particular, often showed a significant degree of empathy with the transferred former

prisoners, judging their experiences to be the proof of a vindictive and specifically anti-Polish discrimination by German state agents. In two cases, officers gave the released individuals a small amount of money 'for food or a bus ticket home', finding their experiences believable and thus expressing a genuine desire to help. In a similar spirit, some younger male Border Guards were amused, if not impressed, by stories of Poles arrested in Germany for assault on a German national – usually an altercation that took place in a bar, under the influence of a significant amount of alcohol ('You stuck it to that German (...), didn't you!' – BG2e). On the other hand, the female officers showed little tolerance of, if not outright contempt towards, individuals charged with multiple assaults. The street-level officers who themselves were mothers perceived detainees with arrest warrants for unpaid alimony and child support as generally less truthful. The perceived lack of trustworthiness would frequently translate into very limited interactions between the detainee and the Border Guard, showing how a personal situation, gender, age and ideology can strongly impact on their attitudes and consequently their conduct towards detainees during the intra-Schengen cross-border transfer. This confirms the findings of other scholars researching street-level discretion, who conclude that the (social) identity of the individual border agent, as well as all different aspects of their field of decision-making, together affect the officer's discretionary behaviour (Brouwer *et al.* 2018; van der Woude 2019).

Discussion

As shown above, there are many ways to practice the procedure of cross-border transfer, depending on the various geographical, institutional, local and individual factors. It is important to keep in mind that the process of intra-Schengen cross-border transfers described is anything but easy; in its most proper and benevolent form it still involves the individual being handcuffed and transported as a prisoner into the hands of another agency, where each one goes through a physical (body) search as well as an in-depth examination of his or her personal belongings. In reality what is hiding under the benevolent title of a 'transfer' is actually a procedure that frequently involves physical and emotional violence, uprooting and a multi-layered dispossession (Golash-Boza and Navarro 2018b). While the deportation procedure itself can be quite traumatic, especially considering the significant loss of personal possessions, it is in fact the re-entry ban to Germany which many find to be the most severe aspect of their punishment, taking its toll on all aspects of their lives. The existing legal framework establishes the minimum ban at six months; however, in many cases it is much longer – for some, even permanent (Gęborek 2013; Pazur 2019). The combination of data, supported by the available legal advice on and academic analysis of cases of 'failed' migration⁸ and the returns of formerly emigrating Poles, shows that the subjects in question are often Polish citizens who emigrated many years ago – some as early as the 1990s – and have established work, family and social ties within Germany (Babakova 2018; Lesińska and Okólski 2013). For them, being suddenly 'returned' to a place where their opportunities have proved to be greatly limited, also means facing the trauma of separation from the family and community which they have to leave behind (Brzozowski 2011; Czerniejewska and Goździak 2014). Socio-legal scholars have argued that this multi-level punishment transgresses the proportionality rule, as its severity greatly exceeds the gravity of the initial crime committed (Hong 2017; Stumpf 2009).

Implications of the findings in the context of deportability

Based on the data collected during my fieldwork, it is obviously quite easy for Poles to cross the Polish-German border without being stopped and controlled. Many individuals with a re-entry ban to Germany

attempt (and succeed) in violating it as, in their eyes, it is absolutely worth the risk. When back in Germany such individuals do their best to stay out of the criminal justice system, which allows them to function again within their community, even though in a much more precarious state. What is generated via this inability to fully implement the re-entry ban is precisely the creation of a legally and socially vulnerable migrant Polish population, forced to exist in the 'grey zone' of the host German society (Hasselberg 2016; Leyro and Stageman 2018). It is important to put this in the context of Polish citizens constituting a large migrant population in Germany and having usually emigrated specifically for work opportunities, often as low-skilled labourers⁹ (Fanning, Kloc-Nowak and Lesińska 2020; Lesińska and Okólski 2013). The deportability of a large number of working-class migrants is here facilitated by, whether intended or not, the lack of any institutional infrastructure through which to fully implement deportation orders and their additional ramification (re-entry ban). This finding fits in with the syndrome of 'revolving doors' (see Cornelius *et al.* 2004) and the facilitation of the precarious legal state of migrant groups within host states, ensuring their dispensability via deportability (De Genova 2018). Even though it is the street-level agents who are physically present and responsible for protecting the border regions, much of the described legal and institutional bottlenecks of implementation fall within the realms of policy-makers and the highest echelons of institutions, where the decisions are actually made concerning how many agents – and with what priorities and available tools – are deployed in the various regions.

What is quite significant and to an extent ironic is the decision by many Border Guards to not apprehend or stop Polish citizens attempting to enter Germany despite being subject to a re-entry ban; this actually inadvertently contributed to the influx of the precarious and vulnerable population of deportable Polish citizens in Germany – an effect that in fact serves for the benefit of the German state while, on many levels, hurting those Poles who find themselves in that position (Cornelius *et al.* 2004; De Genova 2018).

Conclusion

It is easy to potentially perceive that it is the street-level bureaucrat whose individual decision provides the most discretionary space when it comes to variations in procedural implementation. However, on closer inspection of the situation, using the intra-Schengen cross-border transfer of Polish citizens from Germany as a case study, there are indeed multiple levels of discretionary space at which various types of important and impactful decisions are being made – from structural, institutional, local and informal to purely personal and individual decisions. Even when allowing for the individual Border Guard's discretion, what remains is still a staggering range of variation in the execution of the procedure. We can conclude that, due to significant inconsistencies between the different posts, based on the available structures, staffing and tools at the disposal of the officers, as well as the different character of each of the outposts, a procedure must take on different shapes and forms when executed. Without taking away the importance of proper conduct at the street level, much of the variation in the implementation of the cross-border transfer lies with the participating agency at the strategic (outpost, divisional command) and operational (headquarters), rather than at the tactical or 'street' level. Individual Border Guards have no agency over where they are stationed. They also have no impact on the tools they are given to work with or the conditions and type of holding cells they have to use. Despite the dramatic example in which one individual officer's decision resulted in a person's tragic death, the true culprit or the unsafe location of the outpost where the procedure took place are clearly beyond the control of anyone within the organisation except those at the Border Guard Headquarters, as it would require a change in the

outpost location or a much greater degree of homogenisation of internal procedures than is currently the case. Additionally, the data show that the internal institutional pressure for high performance indicators is very salient among lower-level Border Guards and this pressure to 'succeed', for the agency, often translates into which types of action and procedure street-level Border Guards will choose to focus on, thus directly impacting on their discretionary decision-making.

Arguably, and as seen in earlier examples, more compassion on the part of street-level officers could improve the treatment of individuals in the procedure overall (Bender and Arrocha 2017). Still, as these authors suggest, it would also require a change in the wider organisational culture, formative to agents' decision-making. At this point, however, this kind of change would demand a shift in responsibility reaching far beyond the official duties of street-level Border Guards. Such a shift would be a problematic exacerbation of the state's inclination to re-distribute accountability from the top (Ministry of Internal Affairs and Administration; Office for Foreigners; Border Guards Headquarters) to the lowest micro level. It additionally reinforces the stereotypical view of the larger-than-actual degree of power and decision-making among Border Guards at the street level. By focusing on these individuals, the higher echelons of the agency manage to relinquish much of their own responsibility for the implementation gap and the variation in procedural execution. The combination of this shift in responsibility with a discourse exaggerating street-level powers facilitates an easy individual scapegoating in cases when things go wrong – something that, according to Border Guard interviewees, already happens frequently. This presents an interesting topic for future study.

Additionally, seeing a distinct procedural and administrative discretion on the part of German institutions and state agents such as AZR, the courts involved in migration proceedings and Federal as well as regional German Police officers, research conducted on the German side of the border would greatly contribute to a fuller picture of the procedure in the context of state-agent discretion.

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Notes

¹ The actual term used to describe the procedure often stems from the legal framework and the accepted societal discourse. While a 'deportation', an 'expulsion' or a 'forced return' denote the same contemporary practice, in certain countries such as Poland, the word 'deportation' has a very specific and negative meaning, linked to the history of forced relocations during WWII and under the USSR

regime. In other cases, 'expulsion' is similarly used as a euphemism to avoid the pejorative connotation of the word 'deportation'.

² There have been arguments proving that deportation is simply a continuation of the historical rights of any nation state to control its own population and territory, as deportation serves as the act of ultimate demarcation between the rights of a citizen vs those of a non-citizen (Anderson, Gibney and Paoletti 2011; Gibney and Hansen 2003). Walters (2002: 287) analyses the use of deportation as 'a practice of citizenship', concluding that deportation is an unavoidable and logical consequence of the 'modern regime of citizenship'. After all, legal or permanent residence and, at times, even citizenship, still do not guarantee immunity from expulsion, making all migrants 'eternal guests' of the state (Kanstroom 2007).

³ For example, in recent years Poland has had a very high percentage of implemented forced-return orders (Polish Border Guards Statistics, *Statystyki SG*. <https://www.strazgraniczna.pl/granica/statystyki-sg/>; Office for Foreigners Statistics, <https://udsc.gov.pl/statystyki/>). How is this achieved? A review of internal agency documents in combination with interviews with Border Guards reveals that the forced-return order is usually given to a foreigner (usually Ukrainian) as he or she is already leaving Poland. Since, at certain Polish borders, exiting the country is as heavily controlled as entry, a border agent who finds anyone who has exceeded the legally permitted stay (even by a single day) issues an already fulfilled forced-return order, scoring another 'success' for the agency.

⁴ A crime committed is the most common trigger, even though on some occasions a person can be deemed 'undesirable' by the German state based on a significant administrative infraction or other undefined threatening behaviour.

⁵ Since the data collected during fieldwork are restricted for viewing by the research team exclusively, as stipulated by the contract between myself and the Border Guard organisation, some of the specific in-vivo codes of the first stage of analysis cannot be disclosed; however, I can be contacted to share some of the more detailed steps taken during the analysis (m.e.klajn@law.leidenuniv.nl).

⁶ In order to protect the confidentiality of all of the respondents, the individual Border Guards who served as sources for the quotes or other information presented in the article are referred to as 'BG' and numbers 1 or 2 to indicate the outpost location, further differentiated by the letters a–f, randomly assigned to each separate individual. The three civilian respondents will be referred to as 'NBG' (not Border Guard), number 2 since all of them were encountered at the second location, and letters a–c for individual differentiation.

⁷ Some of the detained individuals have in fact been found to be in violation of the re-entry ban. In several cases where Border Guards stopped individuals with a ban as they were exiting Poland, they would only give a verbal warning: 'You know you will be breaking the law, if you go back [to Germany]. If they catch you, you'll have to pay a fee and they will deport you'. Asked why they did not stop the individual from entering Germany, they frequently answered: 'I'm not here to protect Germany and its borders'. These are often repeated phrases used by a multitude of our Border Guard respondents, including many individuals beyond the 12 officers cited exclusively for the study of intra-Schengen cross-border transfers in this article.

⁸ While appearing as a strongly arbitrary judgment, 'failed' migration is usually defined as the return to Poland of migrants who were unable to establish themselves financially, professionally or socially in the intended country of destination and, while initially their mobility was motivated by a potentially better status than the one available to them in Poland, in the end they failed to achieve it and return to the home country with the realisation that, in the end, their country of origin presents a better opportunity than that not found elsewhere.

⁹ Central Statistical Office of Poland. Główny Urząd Statystyczny (<https://stat.gov.pl/>).

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— Special Series —

Russia: A ‘Hidden’ Migration Transition and a Winding Road towards a Mature Immigration Country?

Zuzanna Brunarska*, Mikhail Denisenko**

The article offers a new perspective on contemporary and past migration processes in the post-Soviet area by testing the usefulness of the concept of a migration cycle for the Russian case. By adopting the longue durée approach, we attempt to assess the advancement of Russia's migration cycle, arguing at the same time that it constitutes an interesting, yet not an obvious case with which to test the utility of the concept. We postulate that, in tracking Russia's migration trajectories in pre-1991 times, it is important to account for both the flows between Russia as the-then state entity (i.e. the Tsarist Empire, later the Soviet Union) and foreign countries and the flows between Russia as the core of the empire and its eastern and southern peripheries. Our analyses show that while – taking into account statistical considerations – Russia has undoubtedly already undergone the migration transition, it has not yet reached the stage of a mature immigration country. We also contend that migration transition for Russia occurred internally – within the-then state borders – and revealed itself with its transformation from a Soviet republic into a federative state.

Keywords: Russia, migration cycle, migration transition, immigration country

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Introduction

Empirical observation of long-term trends in international migration across different countries has led to the formulation of the concept of a *migration cycle*, which assumes the existence of a specific path which a country follows along with its economic and demographic development (Okólski 2012a). The concept provides a useful conceptual framework through which to trace (and potentially predict) trajectories developing with respect to emigration and immigration. It describes the sequence of stages through which a national migration regime passes as a reaction to the ongoing changes to the country's economy, population and labour market.

To date the concept has been employed in a range of geographical contexts. It has appeared in the migration literature in relation to the processes taking place in Western and Southern Europe (for an overview, see Okólski 2012a). Indirectly, through its key element – migration transition – it has also been adopted for the sake of the description and interpretation of processes occurring in East and South-East Asia (see, e.g., Fields 1994; Findlay, Jones and Davidson 1998; Pang 1994). Whilst it has been applied to the Central European context (see e.g. Górny 2017; Górny and Kaczmarczyk 2020; Incaltarau and Simionov 2017; Okólski 2012a), there have not yet been (m)any attempts to employ it to study migration processes in the Eastern European (or, more broadly, post-Soviet) area. In particular, to the best of our knowledge, there have been no studies attempting to test its relevance for the Russian case. This paper aims to fill this research gap. It also contributes to the current literature in that it offers a new perspective on contemporary and past migration processes in Russia, allowing the formulation of some conclusions with regard to their unique or, on the contrary, universal character.

The main objective of the paper is thus to test the usefulness of the concept of a migration cycle in framing the migration processes in which Russia has been involved and, should it prove useful, to assess the advancement of Russia's migration cycle. In other words, the main research questions which we attempt to answer are as follows:

- Can the migration processes that had occurred on the historical territory of Russia and have been taking place in contemporary Russia be framed within the concept of a migration cycle?
- If yes, at which stage of the cycle should Russia be considered currently?
- How has the specificity of the Russian historical demographic, economic and political development influenced and modified the course of the cycle?

Russia constitutes an interesting, yet not an obvious case through which to test the utility of the concept of a migration cycle. First, statehood in the Russian case initially took the form of a Tsarist Empire, then became the Soviet Union and finally the Russian Federation, territorially constituting only part of the former empires. The concept of a migration cycle does not easily lend itself to application to such a volatile context. Significant boundary changes make tracking the migration trajectories a challenge and raise an important question as regards the very definition of 'external' migration – that is, whether, when looking at historical migration trends, one should analyse migration exchange between the-then or the currently existing states. Second, Russia constitutes a special case as, for many decades, international migration to and from its territory was heavily restricted. Third, observation of long-term migration trends in the Russian case is hindered by the frequent amendments to the system of statistical data collection.

To address the above research questions, we adopt a *longue durée* approach. In tracking Russia's external migration trajectories in the pre-1991 period, one may follow two alternative approaches. One may focus solely on international migration (i.e., migration in- and outflows external to the Russian Empire – later the USSR) or concentrate on Russia in its current borders and account for both international

and internal (relative to the Russian Empire/USSR) migration flows. The latter would also include centrifugal flows from Central Russia to the east in pre-Soviet times and inter-republican intra-USSR flows in the Soviet period atop of international migration flows in a classic sense. Importantly, the earlier centrifugal movements, formally considered as internal flows within a single country, explain the later, for example, the 1990s' centripetal movements from the former 'colonies' to the centre of the former empire (Iontsev and Ivakhniouk 2002; see also Brunarska 2013). The adoption of the first approach, without accounting for the fact that the 'new', post-1991 international flows have not appeared out of nowhere but were a continuation of the former pre-1991 internal flows,¹ would not allow an observation of an evolutionary process. This would lead to a distorted picture, with a rapid increase in international flows after 1991 being merely a statistical artefact (Okólski 2012b). For that reason, we argue that one should not disregard the external non-international flows before 1991. Therefore, we adopt the second approach and attempt to track the migration trajectories of Russia, defined in terms of its current borders (hence, whenever 'Russia' is mentioned, we mean Russia in its current borders, unless stated otherwise). By seeking to reconstruct Russia's migration patterns over recent decades, we intend to determine how the observed trajectories diverge from the theory-based course of the process. Atop of analysing the available migration statistics, we take a broader look at the evolution of the country's migration regime – and also consider its migration and integration policies, as well as public opinion towards immigration, as important markers of advancement of its migration cycle.

The remainder of the paper is structured as follows. The next section briefly describes the main assumptions of the concept of a migration cycle. We then seek to determine Russia's degree of advancement on its migration cycle based on available statistical data. First, we present the historical background of pre-1991 migrations. This is followed by a section presenting the post-1991 migration trends and aiming to assess the maturity of the Russian migration cycle based on the state of its migration policy and public opinion on immigration. The last section concludes.

The concept of a migration cycle

Having observed that 'younger' immigration countries in Europe (such as Ireland, Spain, Italy and Portugal) followed similar trajectories in terms of their emigration-immigration patterns to those which the 'old' immigration countries (e.g. Germany, the Netherlands and the UK) had done 2–3 decades earlier, a collective of researchers collaborating within the IDEA project developed the conceptual approach based on the notion of a migration cycle (Okólski 2012a). Within this approach, a migration cycle is seen as a 'systematisation of stages in the change in country migration status, where the fundamental and constitutive process of the cycle comes to be the migration transition' (Okólski 2012b: 13) 'from immature to mature immigration country' (Okólski 2012c: 23).

As noted by Okólski (2012b), the idea of looking at long-term migration trends through the lens of the migration cycle was by no means new. The twentieth-century scientific literature offered several alternative notions to capture the idea of a sequence of changing mobility patterns – apart from a *migration cycle* (see, e.g., Dassetto 1990; Fielding 1993; Thomas 1954), for instance, a *migration curve* (Akerman 1976) or an *emigration life cycle* (Hatton and Williamson 1994, 2009). Akin to these approaches is that offered by so-called transition theories, looking for the long-term trends in development and migration patterns. They were pioneered by Zelinsky's (1971) seminal work, drawing a link between demographic transition and mobility transition as society undergoes the process of modernisation. Transitional models, assuming that, along with development, emigration follows an inverted U-shaped pattern, were later developed in the Western context, among others by Chesnais (1986), de

Haas (2010) and Skeldon (2012). They have also been applied in the context of the newly industrialising economies of Asia – i.e. Singapore, Hong Kong, South Korea and Taiwan – which have undergone a rapid transition from labour exporters to labour importers as a result of the export-led economic growth based on labour-intensive production (see Fields 1994; Findlay *et al.* 1998; Pang 1994).

The concept of a migration cycle adopted for this paper follows the approach of Fassman and his collaborators (Fassman 2009; Fassmann and Reeger 2008, 2012; Fassmann, Musil and Gruber 2014) and rests on the idea that a country adapts to new circumstances by developing certain mechanisms to accommodate the changing demographic and economic conditions (Fassmann and Reeger 2012). It may thus be understood as a learning process, in which both the society and the country's legal system adapt (with a certain time lag)² to new or evolving migration situation (Fassmann *et al.* 2014). The concept assumes a general shift from an emigration to an immigration country, during which the country's migration patterns and society are supposed to undergo specific phases (Fassmann and Reeger 2008). While the authors admit that the concept does not presuppose that each country passes through exactly the same cycle, with the same number of phases and a predefined final closure, they do propose a general model which allows the assessment of a country's position on the migration cycle's 'recentness/maturity scale' (2008: 5). The model may thus be treated as a standard against which it is possible to identify the distinctive characteristics of migration in different countries. It includes the four distinct phases of a migration cycle: 1) the *preliminary stage*, at the beginning of which emigration dominates over immigration but in the course of which the gap between them is getting systematically narrower; 2) the *take-off stage*, in which immigration begins to dominate over emigration (due to the growing economy and/or shrinking workforce); 3) the *stagnation stage*, which involves migration control mechanisms; 4) the *mature stage*, in which public opinion comes to terms with immigration as a necessary supplement to the local labour force (Fassmann and Reeger 2008). While, in newer works, Fassmann and his colleagues (2009, 2012, 2014) distinguish three consecutive stages (labelled as the *starting/initial/pre-transition/preliminary stage*, the *intermediate or transition stage* and the *adaptation or post-transformation stage*), their sequence and characteristics are largely the same. The general idea is that the initial stage means stability in the form of a negative or zero migration balance. Following a transition stage/s, which may be seen as (a) disturbance(s), the system regains stability, this time denoted by a positive migration balance at the adaptation/mature stage. As regards the public sphere, the first stage is defined by the existence of rules regulating emigration, while the question of immigration is absent from both the legislative realm and the public discourse. The transition stage, in turn, sees often sharp disputes on immigration and involves first regulations – targeted mostly at the labour market. Finally, the mature stage brings public consensus on immigration and integration policies. This resembles Das-setto's (1990 as cited by Arango 2012) conceptualisation of a migration cycle, in which each stage is characterised by the dominant immigrant actors. The first is supposed to be dominated by the inflow of 'socially marginalised foreign workers', the second by the arrival of family members of those 'pioneer' migrants and the third by the integration processes of long-term residents.

All in all, there are certain features of the system (the migration regime) that may be treated as manifestations of the mature phase of a migration cycle. These include the stability of migration flows, with a positive migration balance and a migration policy and public opinion that accept immigration. According to Fassman and Reeger (2012), the notion of an *immigration country* may be operationalised in at least two different ways – based on self-perception by the political elites and the general public viewing immigration as an intrinsic part of the nation-building process, and based on statistical considerations

(where it is defined by a substantial and systematic immigration surplus). At the mature stage of a migration cycle, these two approaches are actually likely to go together, when the long-term immigration reality becomes an inherent and accepted feature of the social system.

While a clear-cut distinction between emigration and immigration countries, understood in terms of countries that are either the sole source of emigration or only the centres of attraction for immigration, has been criticised (see e.g. Pratsinakis, Hatziprokopiou and King 2017), the concept of a migration cycle does not rest on such a distinction. It allows the coexistence of various types of flows and focuses on the net prevalence of one over the other over the majority of years in a given period (Fassmann and Reeger 2012). In other words, it does not presuppose that net immigration countries that have attained the mature stage of a migration cycle cannot record high levels of emigration at the same time. This is especially true since, as argued by de Haas (2010), highly developed societies are generally more mobile and may simultaneously note high volumes of immigration and emigration (though the former is supposed to prevail at the more advanced stages of the cycle). Arango (2012: 46) argues that a decisive criterion should be the 'societal impact of receiving or hosting significant numbers of immigrants' rather than net migration in a given year.

Historical, pre-1991 migration trends

As mentioned in the introduction, while tracking the early stages of Russia's migration cycle in the pre-1991 era, we will discuss two types of external flows – the truly international ones between Russia as a then state entity (i.e. the Tsarist Empire, later the Soviet Union) and foreign countries and external but not international flows between Russia as the core of the Russian Empire or later as the Russian Soviet Federative Socialist Republic (RSFSR) and the state's eastern and southern peripheries. In the short overview below, we focus on long-lasting migration trends, trying to capture the processes driven by long-term demographic or economic factors rather than short-term political 'disturbances'. Hence, we devote relatively little attention to the flows caused directly by extraordinary events, such as wars, especially as they are difficult to measure in a reliable way.

Migrations in the Eurasian space: from centrifugal to centripetal flows

Russian territorial expansion to the east and south started in the second quarter of the sixteenth century (Lyubavskiy 1996). It was accompanied by outward migration although the outflows were relatively moderate until the second half of the nineteenth century. Up to this point, the Russian population in Central Asia was relatively small (see Table A1 in the Appendix), since most of these territories became part of the empire only in the second half of the nineteenth century. Northern parts of present-day Kazakhstan constituted an exception, as peasants from European Russia had been settling there from the end of eighteenth century (cf. Table A1). Russian (and other European peoples) were also more numerous in the South Caucasus (Table A2 in the Appendix), most of which was annexed by the empire in the first quarter of the nineteenth century. Most Russians lived in cities and formed a substantial part of the local elite (local administration, industrial and railway workers, doctors and teachers). Among the main triggers of the upsurge in the outflows from the Russian core to the eastern and southern periphery at the end of nineteenth century were, first, the liberation of the serfs in 1861 along with the launch of the peasant resettlement programme in 1880s, the culmination of which was Stolypin's agrarian reform (Moiseenko 2015). The second trigger was the opening of the Siberian railroad in 1897 (Obolenskiy-Osinskiy 1928) and the third was the state's desire to strengthen its borders and to exploit its natural resources

such as fur, wood, gold, iron and cotton (Abashin, Arapov and Bekmakhanova 2008; Dameshek and Remnev 2007; Rybakovskiy 1990). While migration outflow from European Russia to the remote, sparsely populated peripheries of the empire may be perceived in terms of land conquest and the strengthening of the state's power over the colonised territories, out-migration was also crucial in light of the over-population of rural areas in European Russia. This resulted from a high natural increase among peasants, which could not be offset by the progressive industrialisation and urbanisation (Remnev and Suvorova 2010). Resettlement in Asian Russia, although sizeable (estimated at over 7 million people between 1801 and 1914, with 30 per cent of the inflow falling on the period after the liberation of the serfs and before the opening of the Siberian railway and 60 per cent after that date Obolensky-Ossinsky 1928), neither succeeded in solving the agrarian crisis in European Russia nor in stopping out-migration abroad (Moiseenko 2013, 2015; see next section).

After the break caused by the First World War and the Civil War, the resettlement of peasants from the lowland areas of European Russia, Ukraine and Belarus behind the Urals regained its momentum.³ The state's takeover of control over the initially relatively spontaneous flows contributed to their intensification under Soviet rule. Overall, between the population censuses of 1926 and 1939, the population of Siberia and the Far East increased from 12.3 million to almost 16.7 million – i.e. by 35 per cent, compared to a 14 per cent increase in the case of European RSFSR (including the Urals) and 17 per cent for the entire USSR (calculations based on Goskomstat of Russia 1998).

The 1920s and 1930s saw a large migration outflow from the European area of the USSR to Central Asia. This was a part of the Soviet government's plan of transforming the Central Asian populations (from 'feudalism to socialism'), which involved not only the question of economic development but also actions pertaining to the issues of literacy, the status of women and local government (Karakhanov 1983). To accomplish the plan, qualified specialists (engineers, workers, teachers and doctors) were sent from the centre of the country to support the newly established industrial enterprises and local administration. As a result, the number of non-indigenous people, primarily ethnic Russians and other Slavs, increased in the Central Asian and South Caucasian republics (Tables A1 and A2 in the Appendix).⁴

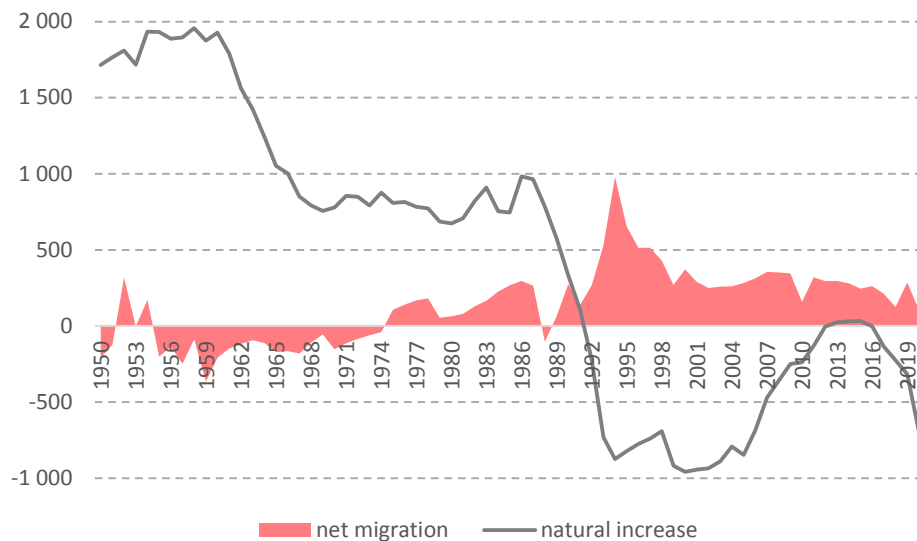
Two factors: the industrialisation of Russia – which stimulated demand for additional labour – and the sending of prisoners from all over the empire to Russia's eastern and northern regions (including victims of *dekulakisation*) resulted in eastward and southward migration flows from central Russia being accompanied by positive net migration with other republics in the period preceding the Second World War (Andreev, Darskiy and Khar'kova 1998). Eastward and northward flows intensified during the war, due to the evacuation of enterprises from the west of Russia and efforts to boost national industry (Rybakovskiy 2008). The flows directed at Siberia and Central Asia during the war were also reinforced by the deportations of entire ethnic groups that took place between 1941 and 1944 (see Kreindler 1986).

Most of the post-Second World War intra-USSR inter-republican flows were directed outside the RSFSR. Out-migration to the USSR peripheries was encouraged by communist party appeals and often institutionalised – for example, taking the form of university graduate assignments. The post-war period saw a continuation of the development programme directed at Central Asia. Qualified workers from Russia, Ukraine and Belarus who resettled in the Central Asian republics in accordance with policies from the 1950s and 1960s were attracted by career prospects, the warm climate, low food prices and the perspective of obtaining housing. Many went to Kazakhstan under the Virgin Lands campaign. New-comers also headed for the newly developing industry-based urban areas in localities where the local rural population was not yet ready to move to cities (Zayonchkovskaya 1999).

According to population censuses and official migration statistics, in the second half of the 1950s and until the end of the 1960s, Russia noted a negative migration balance not only with Central Asian but also with Ukrainian, Moldovan and Baltic republics (Khorev and Moiseenko 1974). Out-migration from Russia was reinforced by the low standard of living in the Russian countryside, from which most migrants originated (Zayonchkovskaya 1993).

The mid-1970s saw a reversal of the earlier centrifugal trends, manifesting itself with a growing share of the south-to-north migration in Russia's overall migration exchange with the other USSR republics. Given the dominance of inter-republican intra-USSR flows in the overall external migration exchange of the RSFSR, this is also true for Russia's total migration balance (see Figure 1).

Figure 1. Natural increase and net migration in Russia (the RSFSR and later the Russian Federation) from 1950 to 2019 (annual data, thousands)



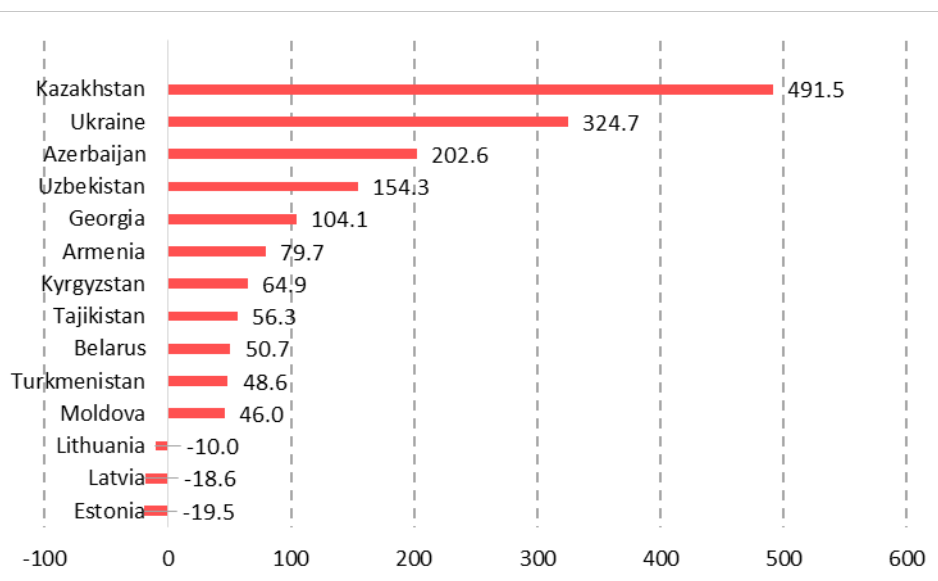
Note: The scale of permanent net migration for the RSFSR (i.e. until 1989) was estimated with the use of a demographic balance equation based on data on the total population derived from population censuses and the total number of births and deaths registered in the intercensal period. For the period between the 1989 and 2010 censuses, we used the annual registration-based net migration data adjusted by Rosstat for population census data (the difference between net migration figures based on the total population change and natural change between the censuses and net migration data obtained from registration statistics which gets distributed by the years of the inter-census period). The post-2010 figures are based on the current registration data. Starting from 2011, the statistics on long-term migration also include, apart from registration and deregistration by place of permanent residence, registration by place of stay for a period of at least nine months. Importantly, a person is considered deregistered automatically after expiration of the permitted period of stay, regardless of whether they have left the country or not.

Source: based on Goskomstat of Russia (1998); Rosstat (2021a, b).

This retreat from the periphery tends to be explained by the redirection of capital investments from Central Asia to the RSFSR (or from southern to northern USSR when considered in broader terms, Rowland 1988). The gradual reversal of the trend had in fact already started at the end of 1960s with an outflow of the Russian population from the South Caucasus republics, Georgia and Azerbaijan (Table A2 in the Appendix). It tends to be explained by the ongoing replacement of Russian qualified staff with the local, increasingly more highly educated workforce and by the growing mobility of the local rural popu-

lation (Zayonchkovskaya 1999). The 1970s saw the beginning of a positive migration balance with Kazakhstan and Kyrgyzstan; the remaining Central Asian republics, Ukraine and Moldova then followed. In the 1980s, overall, Russia noted a negative migration balance only with the Baltic republics. On the whole, Russia gained 1.6 million people in the 1980s in exchange with the other republics, mostly with Kazakhstan and Ukraine (Figure 2).

Figure 2. Migration balance of Russia (the RSFSR) with the remaining Soviet republics from 1980 to 1989 (thousands)



Note: Current registration data.

Source: Goskomstat of Russia (unpublished data).

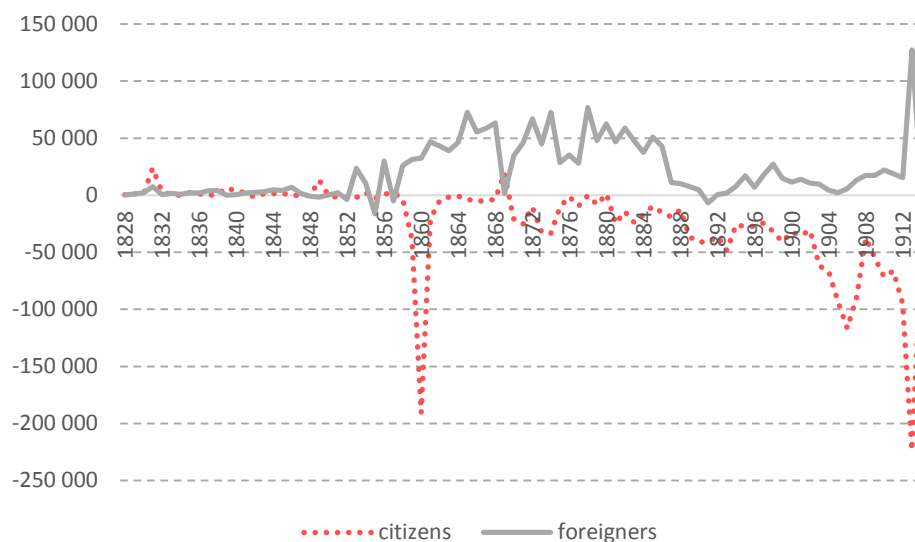
The key driving force for these south-to-north flows was the demographic factor – a high natural increase in Central Asia and the South Caucasus leading to surplus labour and the over-population of rural areas, which initially caused the out-migration of the Russian-speaking population (mostly ethnic Russians and other Slavs). However, the growing tensions in the labour markets of the republics coupled with rapid population growth brought the exodus of the indigenous peoples from Central Asia and the South Caucasus to Russia, which is reflected in their growing number according to the subsequent population censuses (Table A3 in the Appendix). These were mainly people with vocational and higher education, in particular those who received it in Russia. Migration inflow from Central Asia and the South Caucasus to Russia at the end of the Soviet Union and in the first post-Soviet years has additionally been motivated by the ethnic and civil conflicts and wars (in Armenia, Azerbaijan, Georgia, Tajikistan and Moldova). These initially ethnically and politically motivated flows later transformed into the labour migration of members of these states' titular nations to Russia.

Migration exchange with the rest of the world: stifled potential

Up to the middle of the nineteenth century, the international migration exchange of Russia (the Tsarist Empire) was of low volume (Figure 3). However, it increased along with the expansion of international contacts and the development of means of transport and communication. Due to the shortage of the

human resources needed for the development of its vast territories, the Russian authorities viewed foreigners as skilled workers and a source of know-how. This positive attitude towards immigration was accompanied by a negative stance towards the emigration of Russian citizens, apart from those representing certain ethnic and religious groups (see later in the paper). Overall, the state's migration policy was aimed at keeping the population in the country (Lohr 2012; see also Moiseenko 2019 on the evolution of citizenship policies in the Russian state).

Figure 3. The balance of movement of citizens and foreigners in the Russian Empire from 1828 to 1914 (number of persons)



Note: Numbers based on statistics on border crossing.

Source: Based on Willcox (1929).

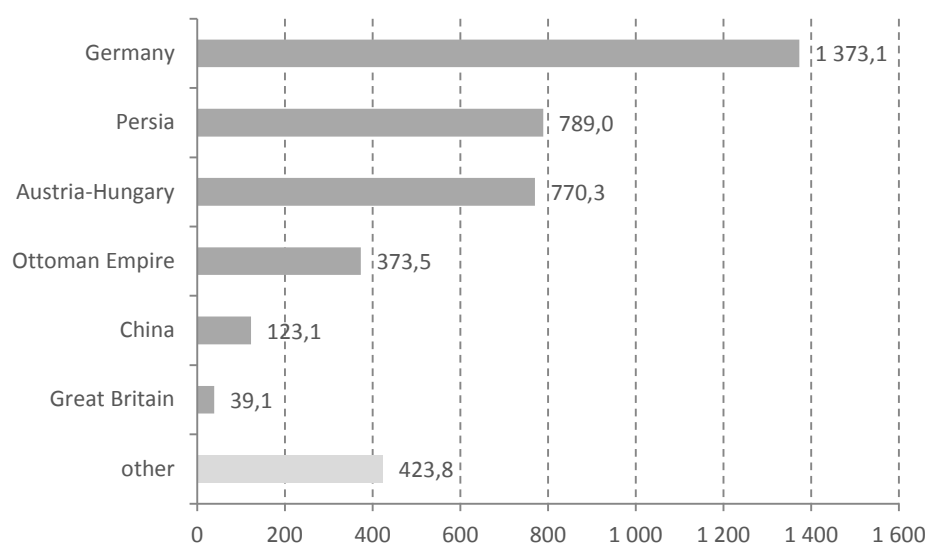
Attracting foreigners to Russia has had a long history. Although the country saw relatively few of them in the sixteenth and seventeenth centuries, foreigners made a great contribution to the development of the army, trade, new technologies and architecture. The large-scale inflow of foreigners started with Peter the Great's policy to attract foreign specialists, scientists and businessmen with the country's comprehensive modernisation in view. Territorial gains required further contingents of people to develop uninhabited territories, especially those in the South on the Black Sea which were annexed by the Russian state as a result of the war with Turkey. Catherine the Great invited about 100,000 colonists, of whom almost 40,000 (from various German lands) settled in the Lower Volga region and the rest (from Austria and the Ottoman Empire) in the Novorossiysk province. The second significant wave of agrarian immigration took place in the first half of the nineteenth century, with more than 70,000 German colonists and 130,000 Greeks, Bulgarians, Armenians and others from the Ottoman Empire and Austria arriving in the south of Russia (Kabuzan 1996).

The post-reform era, which began with the abolition of serfdom in 1861, brought about an increase in both internal and external migration in the Russian Empire. On the one hand, the problem of land scarcity and poverty became more acute in the context of accelerating demographic growth. On the other hand, development of capitalism in Russia and abroad led to an increased demand for labour both

in cities and in underdeveloped territories. Thus, a new stage of mobility transition was opening up in Russia, which manifested itself in the intensification and expansion of the geography of internal and external movements.

In the post-reform era, the influx of foreigners to the Russian Empire increased markedly (Figure 3). According to estimates based on statistics on border crossings,⁵ from 1828 to 1915, the net inflow of foreigners to the Russian Empire amounted to almost 4.2 million, 94 per cent of which occurred after 1861. During this period, the Russian government granted privileges to foreigners in the hope of attracting them to participate in the processes of modernisation and industrialisation. Thus, the country's immigration policy aimed to serve its economic development. At the turn of the nineteenth and twentieth centuries, foreigners accounted for a third of all technical specialists working in the Russian industry and 10 per cent of administrative staff (Lohr 2012). Border-crossing statistics show that most of the immigrants came from Germany, Persia and Austria-Hungary (Figure 4).

Figure 4. Net migration of foreigners in the Russian Empire between 1861 and 1915 by origin (thousands)



Note: Numbers based on statistics on border crossings.

Source: Based on Kabuzan (1996: 307).

As regards the individual emigration of Russian citizens, this was a rare phenomenon until the mid-nineteenth century. Similarly as in the case of internal eastward flows, the emancipation reform of 1861 constituted a turning point and became a key migration trigger for the first wave of mass emigration from Russia. This emigration wave was mainly economic in nature and, as discussed above, was accompanied by sizable outflows from European Russia eastwards. It involved peasants emigrating abroad, mainly from Western Russia (including the present-day territories of Ukraine, Moldova and Belarus), either permanently (Obolenskiy-Osinskiy 1928) or undertaking temporary labour migration, e.g. in Germany or Denmark (Tudoryanu 1986). Despite its economic motivation, this wave to a large extent involved emigration flows based on an ethnic principle (e.g. the emigration of Jews as a response to the introduction of a series of discriminatory laws). In the early 1860s, a significant outflow from the Russian Empire was caused by the emigration of mountaineers from the Caucasus and Crimean Tatars to

Turkey (Kabuzan 1996), as well as by the outflow triggered by the Polish uprising of 1863. In the 1870s, the abolition of tax incentives and the introduction of military service caused an outflow of German Mennonite colonists to North and South America (Schmidt 1959). Individual migration gained momentum in the 1880s when the restrictions on the emigration of the non-Orthodox population were relaxed. If we rely on border-crossing statistics, this first sizable emigration wave of the turn of the nineteenth and twentieth centuries was estimated at almost 4.5 million for 1860–1915 (in contrast to 33,000 for 1828–1859). At the same time, between 1860 and 1915, the net inflow of foreigners to the Russian Empire (over 3.9 million) compensated for almost 90 per cent of the outflow of Russians from the empire, giving a negative international migration balance of about half a million people. Should the eastward outflows from the territory of European Russia also be considered, the total negative external migration balance would amount to around 6 million people in the period from the Great Reform to the beginning of the First World War (calculations based on Obolenskiy-Osinskiy 1928).

Pre-revolutionary Russian legislation prohibited the acquisition of foreign citizenship by Russian citizens. Those who violated this prohibition were deprived of property and considered exiles. The period of stay abroad was limited to five years. The authorities pursued a selective emigration policy, seeking to retain the Orthodox population and allowing the departure of members of politically ‘problematic’ groups (Jews, Mennonite Germans, Russian Old Believers, Poles, etc.). Under these restrictions, many Russian citizens travelled abroad illegally. Most of the emigrants went to the West, primarily to the United States. As summarised by Obolenskiy-Ossinsky (1928), until the twentieth century, outward migration from the core of the Russian Empire to the East exceeded the net outflow of Russians from the empire to the West, while the early twentieth century saw the equalisation of the two out-migration flows. Given the selective emigration policy, most of emigrants were not ethnic Russians – the share of ethnic Russians (including Great Russians, Ukrainians and Belarusians) among newcomers to the United States and Canada between 1899 and 1913 (2.54 million in total) amounted only to 10 per cent, while Jews constituted 40 per cent, Poles 27 per cent, Lithuanians 9 per cent, Finns 8 per cent and Germans 5 per cent (Obolenskiy-Osinskiy 1928). The situation changed after the 1905 revolution. The liberalisation of the departure rules was accompanied by an increase in the share of ethnic Russians in the emigration flow.

The second wave of emigration, which is variously estimated at 1.5–3 million people (Denisenko 2013; Polyan 2005), followed the October Revolution of 1917, the First World War and the Russian Civil War of 1918–1921 and, unlike the previous wave, was mainly of a political nature. This is commonly referred to as the ‘White emigration’, as it involved those who opposed the Bolsheviks – mostly the supporters of the monarchy, aristocrats and the intelligentsia. In contrast to the first wave, which included mainly individuals of non-Russian ethnicity, the second one was mostly composed of ethnic Russians (Iontsev 2014). Although noticeably weaker than in the pre-war years, economic emigration continued until the late 1920s, when Stalin closed the Soviet borders (Moiseenko 2017). In terms of immigration, many political and labour migrants returned to Russia during the revolution (more than 100,000 people from the United States alone – Davis 1922). Several thousand enthusiasts of the left-wing ideology from Europe and the United States organised communes in Siberia and the Far East and worked on construction sites of socialism (Platunov 1976). Until the mid-1930s, the state still found the attraction of foreigners useful for the modernisation of the country. According to official data, in mid-1932, there were over 9,000 foreign specialists and almost 11,000 foreign workers, as well as their 18,000 family members, in the USSR (Kas’yanenko 1972).

The third wave of mass emigration followed the Second World War and consisted mainly of individuals who were forced to move outside of the USSR. According to the Soviet archives, the number of people involved was approximately 620,000 (Zemskov 1991). Opportunities for legal emigration from the Soviet Union were limited – an exit visa was required and an attempt to acquire one was viewed as a treasure.

Despite strict restrictions placed on emigration across the entire period of the Cold War, the total migration outflow from the USSR between 1950 and 1986 was estimated at almost 450,000 (Heitman 1987). According to German data, almost 100,000 people arrived in Germany from the USSR in this period (BVA 2020). According to American statistics, 78,000 people arrived in the United States from the USSR between 1951 and 1986 (INS 1988).⁶ Many famous artists, athletes and scientists fled to the West during their visits abroad for sporting competitions, scientific conferences or tourist trips, despite strict political control. Overall, as in the late nineteenth century, emigration was mainly of an ethnic nature. In the 1970s, under strong pressure from Western countries (Israel, West Germany and France), the Soviet state opened the emigration window for Jews, Germans and Armenians as part of family reunification and repatriation (Heitman 1988). Jewish emigration from the USSR amounted to about 290,000 between 1970 and 1988 (Tolts 2020). The majority of them (over 164,000) went to Israel, the rest mainly to the US. As regards immigration to Russia from abroad in this period, it was not numerous and mainly included communists who fled persecution in their countries of origin (e.g. Greece, Chile, Turkey) and the temporary stays of students and workers.

Gorbachev's restructuring of the foreign and domestic policy in the 1987–1991 period involved changing the attitude of the state towards the international contacts of Soviet citizens, including trips abroad. Migration outflows increased considerably, reaching around 1.3 million emigrants from the USSR from 1987 to 1991, including 343,000 from the RSFSR (Table A4 in the Appendix). Emigration still had a strong ethnic component, with most of the emigrants going to Germany and Israel (Goskomstat SSSR 1990).

International migration in post-Soviet Russia

The year 1991 brought the final dismantling of the Iron Curtain, which unleashed the migration potential accumulated during Soviet times. The post-Soviet period may be divided into three phases, which differed with regard to the three dimensions of the ongoing migration processes: (1) the main migration triggers; (2) the form of migration (permanent or temporary) and (3) migration policy and the accompanying institutions.

The first phase, lasting from 1992 to 2002, noted a high migration increase, amounting to over 5 million people (our calculations based on adjusted Rosstat data). Importantly, this happened together with a relatively high emigration from the Russian Federation – almost 1 million emigrants went to 'far-abroad' countries (non-former-USSR countries), according to official data and 1.5 million according to estimates based on foreign sources. Of these, 95 per cent went to three countries: Germany, Israel and the United States. Thus, the population of Russia had increased by more than 6 million people at the expense of the former Soviet republics. Migration growth was particularly strong in 1994, reaching almost 1 million people (cf. Figure 1). Almost half of the increase in the decade 1992–2002 was provided by Kazakhstan and Uzbekistan (Table 1). The net inflow, nevertheless, was dominated by ethnic Russians and other Russian-speaking groups (Table A5 in the Appendix).

Migration flows in the early post-Soviet period (their geography, volume and composition) were largely determined by political events. The outflow of the Russian-speaking population from the post-Soviet

republics was reinforced by a growing nationalism, which accompanied the construction of the new independent states. This led to pressure exerted on Russian-speakers in the form of restrictions on civil and political rights, on the use of the Russian language and on their being moved away of the sphere of managerial and intellectual work, as well as entrepreneurship (Zayonchkovskaya 2005). The outflow was also accelerated by a series of armed conflicts in the 1990s: in Nagorno-Karabakh, Abkhazia, South Ossetia, Transnistria and Tajikistan. The migration flows to Russia after the collapse of the USSR were also reinforced by the return of several hundred thousand Soviet military personnel (including family members).

Table 1. Net migration of Russia with the former Soviet republics (thousands)

Country	1992–2002	2003–2013	2014–2019	1992–2019
Armenia	206	240	120	566
Azerbaijan	286	148	68	501
Belarus	-28	27	39	38
Georgia	344	77	23	445
Kazakhstan	1,560	331	211	2,102
Kyrgyzstan	277	220	80	576
Moldova	88	136	72	296
Tajikistan	308	197	172	678
Turkmenista	120	44	19	183
Ukraine	436	303	486	1,226
Uzbekistan	616	447	84	1,146
Baltic States	211	16	5	232

Note: Numbers based on current registration data. Due to the 2010 changes to the registration system, they should not be compared longitudinally.

Source: Based on EMISS (2021).

In the 1990s, with the permeability of borders and the continued operation of USSR passports, it was difficult to draw a clear line between temporary labour migration and migration for permanent residence, as well as between the regular and the irregular employment of immigrants from the former Soviet republics. Since Russia was the first to apply the ‘shock therapy’ in its transition to a market economy in 1992, at some point it ceased to be attractive for economic migrants. This contributed to a net outflow of the indigenous peoples of Central Asia from Russia in the early 1990s (Table A5 in the Appendix). With the deepening crisis in the other CIS (Commonwealth of Independent States) countries and with Russia moving forward on the reform path (and later with the rising oil prices), its economic attractiveness as a potential migration destination began to grow. Rapid development of the service sector – which was heavily underdeveloped under the Soviet Union – and of private business and the emergence of foreign capital accompanied by the shortage in the local workforce, all increased the demand for foreign labour. As a result, labour migration to Russia started to flourish in the late 1990s. At the beginning of the 2000s, the number of foreign workers from CIS countries in Russia was estimated at 3 million people (IOM 2002; Krasinets, Kubishin and Tyuryukanova 2000), of which almost 90 per cent were not covered by the official statistics.

The mass population movements in the post-Soviet space in the first decade after the USSR collapse were facilitated by the agreement on visa-free movement on the territory of the Commonwealth of In-

dependent States, which was concluded in 1992 and in force until 2000 (though visa-free travel continued under bilateral and multilateral treaties). The-then legislation in the field of migration in Russia concerned refugees and internally displaced persons. The laws regulating the situation of foreign workers in the country and access to Russian citizenship did not correspond to the changes in the migration situation (e.g. the procedures for obtaining citizenship by those who were not USSR citizens were not clearly defined). In the context of a very severe economic and social crisis, public attitudes towards international migrants remained rather negative. Anti-immigrant sentiments were even aimed at Russian-speaking refugees.

The second phase in the post-Soviet migration processes started with the adoption of new laws that replaced the old Soviet legislation and underpinned the Russian migration regime.⁷ In comparison to the previous phase, Russia's net migration decreased – it amounted to 3.3 million people between 2003 and 2013 (Rosstat 2019). The decline in net migration from CIS countries was influenced by a depletion in the Russian-speaking population who were willing to move to Russia who were then resident in Central Asia and the South Caucasus (Tables A1–A2 in the Appendix). At the same time, this phase saw an increase in the share of titular nations of these countries among permanent migrants. The outflow to 'far-abroad' countries decreased due to the reduction of the Jewish and German populations and the abolition of privileges that were previously granted to immigrants from the (former) Soviet Union in the West (refugee status, programmes for scientists, etc.).

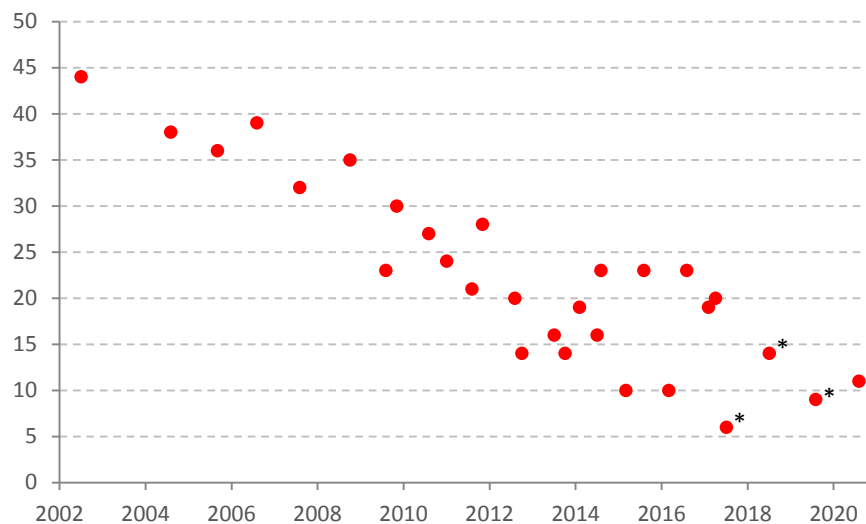
The most striking feature of this phase was the rapid increase in the number of foreign workers in Russia, leading to its transformation into one of the largest centres of labour migration (see Table A6 and Figure A1 in the Appendix for official figures). This was due to a strong economic growth (GDP growth exceeding 8 per cent in 2006 and 2007 according to the World Bank 2021) which, along with the shift of native workers from industry and agriculture to services and the concomitant shortage of a workforce in the former sectors, caused an increase in demand for foreign labour. According to expert estimates, the number of foreign workers in 2008 might have amounted to 5–6 million people (Zayonchkovskaya and Tyuryukanova 2010) and, in 2014, to over 8 million (Chudinovskikh and Denisenko 2020). Unlike in the 1990s, their inflow was dominated by residents of the Central Asian states. The high demand for labour brought a liberalisation of the Russian legislation concerning labour migration, which additionally contributed to the growth in the number of foreign workers, especially those who were officially registered. This included the 2006 simplification of access to work permits for citizens of CIS countries (hindered later in 2007 by the introduction of quotas for work permits, however) and the 2010 opening of additional migration channels (that were not subject to quotas) for certain categories of foreign worker (e.g. highly qualified specialists and those employed in households).

The high demand for foreign labour in the 2000s was triggered not only by economic factors, especially since the country experienced a severe economic crisis in 2008–2009. It was also fuelled by the demographic factor. Since 2007, the working-age population has been on a steady decline in Russia. It used to decrease by almost 1 million people annually between 2013 and 2018 (own calculations based on EMISS 2021). Its shrinkage was accompanied by a growing level of education of the local workforce, which led to labour shortages in the secondary labour market (among low-skilled and manual workers). This shortfall was compensated mainly by Central Asian workers, for whom remittances sent from Russia became the main means of alleviating household poverty and high unemployment back home.

Despite the potential benefits of the migration inflow in mitigating the consequences of the deepening demographic crisis and filling labour-market shortages, immigration consistently sparked concerns among the receiving population. A look at recent public-opinion data suggests that the twenty-first cen-

tury has noted further a deterioration of attitudes towards immigration.⁸ Figure 5 presents the dynamics of pro-immigration attitudes in Russia according to subsequent Levada polls. It shows that the share of respondents who, while responding to the question on a desired immigration policy, answered that the government should not set any administrative barriers and should attempt to use immigration for the benefit of Russia, noted a considerable decrease between 2002 and 2020.

Figure 5. Pro-immigration attitudes in Russia, 2002–2020 (desirable policy towards immigrants – per cent answers: ‘not to set any administrative barriers and use immigration for the benefit of Russia’)



Note: Labels on the horizontal axis mark the beginning of a given year; * The set of available answers ('attempt to limit the inflow'; 'not to set any administrative barriers and attempt to use immigration for the benefit of Russia'; 'hard to say') was extended with the answer 'I do not care'.

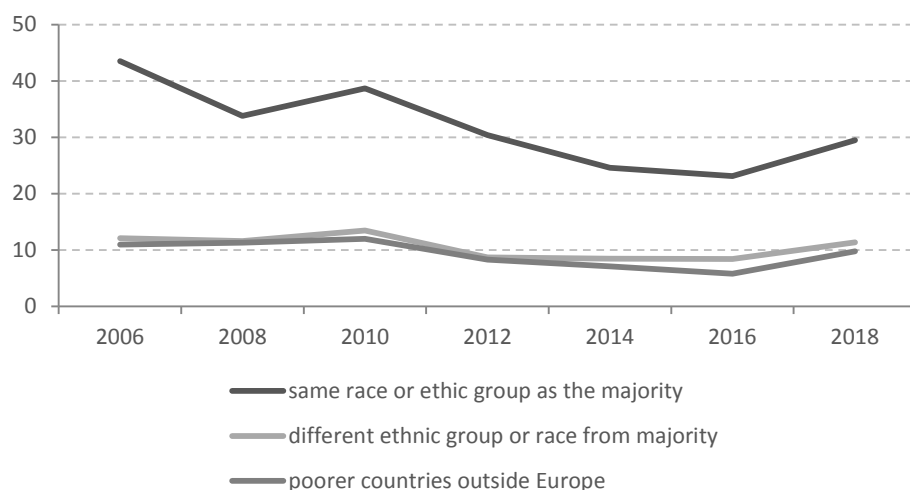
Source: subsequent editions (2011–2017) of *Obshchestvennoe mnenie*. Moscow: Yuri Levada Analytical Center; *Monitoring ksenofobskikh nastroyeniy, iyul' 2018 goda* (2018); Levada-Center (2020).

The European Social Survey (ESS) data also suggest a drop in pro-immigration attitudes in twenty-first-century Russia. It seems, nevertheless, to have concerned immigrants of the same race/ethnic group as the majority of Russia's population, while attitudes towards the inflow of immigrants of different race/ethnic groups and from poorer countries outside Europe tended to remain at the similar level in 2006–2018 (see Figure 6).

Attitudes towards immigration in Russia over recent decades have been strongly politically driven, with the authorities, Russian nationalists and other social forces strategically fostering anti-immigrant sentiment for their own political gains (Laruelle 2010; Markowitz and Peshkova 2016; Shlapentokh 2007). Consequently, public opinion on immigration tended to become more polarised each time the question of immigration moved higher up on the political agenda (*Monitoring ksenofobskikh nastroyeniy, iyul' 2018 goda* 2018). Overall, the state of public opinion toward immigration in contemporary Russia seems to be indicative of the transition stage of the migration cycle, with no signs, however, of heading towards a greater acceptance of immigration (and thus towards the mature stage of the cycle). Importantly, however, employers were in favour of liberalising the rules for admitting migrant workers. They were supported by the country's leadership, which approved the relatively liberal concept of the

state migration policy in 2012. In particular, this policy allowed for the opening of immigration programmes like the Canadian one and the provision of additional labour-migration channels for non-CIS citizens. At this stage, the status of the Migration Service was raised: it became an independent agency, accountable to the RF president.

Figure 6. Pro-immigration attitudes in Russia, 2006–2018 (per cent answers: ‘allow many to come and live in Russia’)



Source: European Social Survey, ESS, rounds 3–9 (2020).

The third phase began in the mid-2010s. It coincided with the beginning of the conflict in Ukraine and the new economic crisis that followed and was accompanied by new amendments to the migration legislation, which facilitated access to the Russian labour market by citizens of CIS countries. Despite the crisis, no significant reduction in the demand for foreign workers was recorded (which may partly be due to an increased demand for foreign labour at the construction sites of facilities for the World Cup 2018) – according to official statistics, the number of documented temporary labour migrants in Russia increased from 4 to 5.5 million between 2014 and 2019 (MDM 2021).⁹ Despite the inflow of refugees from Ukraine, permanent net migration has slightly decreased (it amounted to 235,000 annually on average in the period 2014–2019 compared to 294,000 in 2003–2013). Emigration to non-CIS countries, in turn, has not changed fundamentally. Importantly, the new 2018 concept of the state migration policy, contrary to the previous 2012 one, did not envisage attracting migrants from the ‘far-abroad’ countries.

The growing presence of culturally more distant immigrants and the declining incomes and growth of poverty contributed to a further proliferation of anti-immigrant sentiments. According to Levada surveys, in 2019 and 2020, more than 70 per cent of the population supported the restrictive policy towards labour migration, compared to 58 per cent in 2017 (Levada-Center 2020). As regards migration policy, since 2015, citizens of CIS countries do not need to apply for a work permit – they must buy a ‘patent’ instead. Moreover, after the establishment of the Eurasian Economic Union, a single labour market is being formed on the territory of Russia, Armenia, Belarus, Kazakhstan and Kyrgyzstan: citizens of the latter four countries do not need to hold any additional documents to undertake work in Russia. At the same time, in the newly adopted concept of state migration policy, the programmes of permanent migration are limited to the repatriation of compatriots. The pro-immigration policy aimed at attracting

labour migrants is limited to CIS countries and the permissible length of stay for labour migrants remains short (one year with the possibility of extension for another year). There are no integration programmes targeted at labour migrants, despite the fact that many newcomers of younger generations from Central Asia are poorly educated and often have a poor command of the Russian language. The compulsory test in the Russian language, the history of Russia and the Russian legislation introduced in 2015 proved to be a purely formal procedure. The status of the migration service has been downgraded – it once again became one of the divisions of the Ministry of Internal Affairs.

Conclusion

International economic migration to and from Russia (the Russian Empire) had only started to gain momentum at the beginning of the twentieth century when it was stifled by the outbreak of the First World War. Since the late 1920s, the Soviet Union was effectively closed to the emigration of Soviet citizens and the immigration of foreigners. After the surge at the end of the Second World War, the annual flows, with a few exceptions, were small in volume. At the same time, intense migration exchange took place between Russia (the RSFSR) and the eastern and southern peripheries of the Soviet Union. As discussed above, for most of the twentieth century, Russia noted a negative migration balance with the east and south of the empire. The picture of internal migration changed in the mid-1970s when, according to official data, Russia – for the first time in many years – noted a population growth due to migration. Intensified immigration happened along with the slowdown in demographic growth due to dropping fertility levels, accompanied by a demographic explosion and growing education levels among the indigenous population in Central Asia and parts of the Caucasus. Since then, Russia has noted a positive migration balance with the rest of the (post-)Soviet world, attracting immigrants from the region with vacancies and higher salaries (with the exception of *likhie devyanostye* – tumultuous 1990s). Gorbachev's reforms and the final dismantling of the Iron Curtain led to the release of an emigration potential accumulated in the preceding decades. Despite this intensified post-1991 migration outflow from Russia, its net migration remained positive due to the positive migration balance with the rest of the post-Soviet area. The Russian case exemplifies how political factors may influence the course of the process of migration transition, showing at the same time that, despite the disturbing operation of the former, the latter is largely driven by macro-scale demographic and economic processes.

The concept of a migration cycle allows a certain degree of flexibility and thus may also be used to frame processes deviating from the model sequence of phases proposed by the authors of the concept. In the case of Russia, despite the difficulties related to boundary changes, mobility restrictions and changes to the system of statistical data collection, the concept proved to provide a useful lens through which migration processes ongoing on the territory of Russia may be examined. Taking into account statistical considerations, viewing stability in terms of a consistently positive migration balance as a decisive criterion in defining a country's place on a migration cycle, Russia has already undergone a migration transition. It may be argued that, by the time of the collapse of the Soviet Union, Russia had already entered the second – intermediate or transition – stage of the migration cycle, when immigration steadily exceeds emigration. The specificity of the Russian case lies in the fact that one also has to reach out to formerly internal flows, in order to be able to explain later international flows and identify the moment when migration transition took place. We argue that the USSR collapse should not be considered as a pivot point on which Russia moved to the next stage in its migration cycle nor was this political event a key trigger for the change in the migration situation in Eurasia. Although it was accompanied by intensified migration flows of political and ethnic nature in the early post-Soviet years, the

actual shift in direction of flows has preceded the political events of the turn of 1980s and 1990s. We contend that, although initially invisible at the level of international migration, the transition seemingly took place in mid-1975 but completed (or revealed) itself in 1992 with the transformation of Russia from a Soviet republic into a federative state and the final opening of international borders accompanying the demise of the USSR. Thus, it may be stated that the migration transition for Russia occurred internally – within the borders of the then single state entity – and hence had a ‘hidden’ nature.

While Russia has undoubtedly already undergone the migration transition, our analyses clearly show that it has not yet reached the stage of a mature immigration country. The need to accept immigration as a necessary supplement to the local workforce has thus far been acknowledged only by a number of experts and a small share of the country’s population. Its political elites and the general public are still far from recognising immigration (of non-Russians/non-Russian-speakers) as an intrinsic part of the nation-building process. Thus, the self-perception criterion for naming a country a mature immigration country is not yet met in Russia. While the country has seen several regulations targeted at immigrants, they mostly concern the labour market or are directed at specific subcategories of immigrants (compatriots), while a true integration policy is still missing. Russia’s labour market has a dual character, with most immigrants employed in the secondary labour market, which is characteristic of the early post-transition (or take-off) phase of a migration cycle (Fassmann and Reeger 2008), when no proper integration policies are in place. This is also testified to by the predominantly temporary character of migration exchange with other post-Soviet states nowadays, with temporary stays for many being the first step to permanent migration.

We acknowledge that, when thinking about the migration cycle, one should disregard the current economic or political situation (as this may turn out to be a temporary fluctuation in the end) and try to view the migration situation through a long-term perspective, looking for more structural (demographic/economic/social etc.) factors and processes. Nevertheless, the current state of affairs in Russia indicates that it is not only far from reaching the mature stage of a migration cycle but may even be moving away from it. In times of economic crisis, immigrants are more likely to be seen as competitors for scarce resources. Restrictive migration policy coupled with the anti-immigrant sentiments of the public may, in turn, lead to a decreasing migration inflow, with all the resulting economic and demographic consequences. This direction is also substantiated by the fact that some of Russia’s traditional migration partners (Ukraine, Moldova, Georgia and Belarus) have been gradually reorienting themselves towards alternative receiving states (see Brunarska 2013; Brunarska, Nestorowicz and Markowski 2014; Denisenko, Strozza and Light 2020).


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Notes

¹ As Codagnone (1998: 39) aptly put it, 'Some of the migration flows characterising Russia in the 1990s are better considered newly relevant rather than genuinely new'.

² Fassman and Reeger (2008) point to the existence of a legislation gap concerning migration and integration issues – that is, a time lag between the new migration reality and the reaction of the political system. At the same time, they admit that, in some countries, the shift may follow a strategic decision to open up to foreign workforces by introducing active recruitment policies.

³ This wave of state-supported peasant migrations ended in 1929 with the beginning of forced socialist modernisation (industrialisation, the collectivisation of agriculture and the cultural revolution). It resumed in the late 1930s (Platunov 1976).

⁴ In the case of Kazakhstan, this growth was caused not only by the influx of immigrants from Russia but also by losses to the Kazakh population as a result of the early 1930s' famine – excess deaths and the emigration of nomads to China (Abylkhozhin, Kozybaev and Tatimov 1989).

⁵ These statistics were collected by the Ministry of Trade and Industry (Obolensky-Ossinsky 1928).

⁶ The number of immigrants of USSR origin was, however, much higher as the US statistics captured immigrant flows by country of previous residence, whilst many emigrants from the USSR undertook transit migration through third countries – e.g. Italy or Austria.

⁷ These included, among others, the Law on the Legal Status of Foreign Citizens (of 25 July 2002), the Law on Citizenship (of 31 July 2002) and the Decree of the President of the Russian Federation, *On the Implementation of the State Programme to Facilitate the Voluntary Resettlement of Compatriots Living Abroad to the Russian Federation* (dated 22 June 2006).

⁸ It should be borne in mind, however, that, during this period, the composition of migrants changed greatly in favour of people of Asian origin.

⁹ Atop of this, the Federal Migration Service estimated the number of irregular temporary labour migrants in Russia in 2015 at about 1.5 million people (RIA Novosti 2016).

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Appendix

Table A1. Ethnic Russians in the (former) Soviet republics of Central Asia according to subsequent population censuses

	1897	1926	1939	1959	1970	1979	1989	1999/2002	2009/2010
Total population (thousands)									
Total	636.5	1,723	3,857	6,214	8,509	9,313	9,520		
Kazakhstan	539	1,280	2,459	3,974	5,500	5,991	6,228	4,481	3,794
Kyrgyzstan		116	303	624	856	912	917	603	420
Tajikistan		6	135	263	344	395	388	68	35
Turkmenistan		75	233	263	313	349	334	-	-
Uzbekistan		247	727	1,091	1,496	1,666	1,653	-	-
Urban population (thousands)									
Total	179.4	605	1,937	4,093	6,317	7,317	7,720		
Kazakhstan	117	284	987	2,343	3,808	4,427	4,823	3,448	2,763
Kyrgyzstan		45	134	360	564	625	641	395	274
Tajikistan		4	93	228	323	372	365	64	33
Turkmenistan		64	207	248	299	337	323	-	-
Uzbekistan		208	515	913	1,322	1,556	1,568	-	-
Total population (per cent)									
Kazakhstan	10.5	19.7	40.0	42.7	42.8	40.8	37.8	29.9.0	23.7
Total other republics	2.1	5.9	13.4	16.4	15.1	13.0	10.1		
Kyrgyzstan		11.7	20.8	30.2	29.2	25.9	21.5	12.5	7.8
Tajikistan		0.7	9.1	13.3	11.9	10.4	7.6	1.1	0.5
Turkmenistan		7.5	18.6	17.3	14.5	12.6	9.5	-	-
Uzbekistan		5.2	11.6	13.5	12.5	10.8	8.3	-	-
Urban population (per cent)									
Kazakhstan	56.4	52.6	57.7	57.6	58.6	56.4	51.3	40.8	31.9
Total other republics	9.2	23.3	39.8	36.7	33.1	28.2	22.4		
Kyrgyzstan		37.2	49.8	51.8	51.4	46.4	39.5	23.5	15.0
Tajikistan		9.9	37.2	35.3	30.0	28.3	22.0	3.9	1.6
Turkmenistan		46.7	49.8	35.4	29.0	25.7	20.3	-	-
Uzbekistan		19.2	35.5	33.4	30.3	24.8	19.5	-	-
Rural population (per cent)									
Kazakhstan	8.6	16.7	33.1	31.1	26.6	22.9	19.9	15.8	14.0
Total other republics	0.9	2.0	5.6	5.5	4.0	2.8	2.0		
Kyrgyzstan		8.2	14.2	19.2	15.9	13.2	10.5	7.9	5.5
Tajikistan		0.2	3.4	2.6	1.2	0.9	0.7	0.2	0.1
Turkmenistan		1.3	3.0	1.8	1.2	0.8	0.5	-	-
Uzbekistan		1.0	4.4	3.3	2.3	1.2	0.7	-	-

Note: In the case of the 1897 census, population structure by mother tongue was used to approximate population structure by ethnicity.

Source: Based on Demoscope-weekly (2021). *Perepisi naseleniya Rossiyskoy Imperii, SSSR, 15 novykh nezavisimyykh gosudarstv*. Online: <http://www.demoscope.ru/weekly/ssp/census.php?cy=0> (accessed: 15 February 2021); BNS (1999). *1999 Population Census*. The Bureau of National Statistics of the Agency for Strategic Planning and Reforms of the Republic of Kazakhstan. Online: <https://stat.gov.kz/census/national/1999> (accessed: 15 February 2021); BNS (2009). *2009 Population Census*. The Bureau of National Statistics of the Agency for Strategic Planning and Reforms of the Republic of Kazakhstan. Online: <https://stat.gov.kz/census/national/2009> (accessed: 15 February 2021); NSC (2021). *Statistical Census*. National Statistical Committee of the Kyrgyz Republic. Online: <http://www.stat.kg/en/statisticheskije-perepisi/> (accessed: 1 March 2021); Tajstat (2012). *Perepis' naseleniya i zhilishchnogo fonda Respubliki Tadzhikistan 2010*. Volume III. Natsional'nyy sostav, vladenie yazykami i grazhdanstvo naseleniya Respubliki Tadzhikistan. Dushanbe: Agency on Statistics under the President of the Republic of Tajikistan.

Table A2. Ethnic Russians in the (former) Soviet republics of the South Caucasus according to subsequent population censuses

	1897	1926	1939	1959	1970	1979	1989	Around 2000	Around 2010
Total population (thousands)									
Total	199.3	336.2	888.5	965.6	972.9	917.2	785.0	224.0	157.7
Armenia	13.2	19.5	51.5	56.5	66.1	70.3	51.6	14.7	11.9
Azerbaijan	87.8	220.5	528.3	501.3	510.1	475.3	392.3	141.7	119.3
Georgia	98.4	96.1	308.7	407.9	396.7	371.6	341.2	67.7	26.5
Urban population (thousands)									
Total	113.8	250.4	634.5	802.0	851.1	820.6	710.9	205.0	145.7
Armenia	7.8	4.8	25.5	40.1	52.5	58.1	43.9	10.5	8.1
Azerbaijan	43.6	175.2	413.1	439.3	470.2	447.0	372.5	134.7	115.1
Georgia	62.4	70.4	196.0	322.6	328.4	315.5	294.5	59.8	22.5
Total population (per cent)									
Total	4.3	5.7	11.1	10.2	7.9	6.5	5.0	1.4	1.0
Armenia	1.6	2.2	4.0	3.2	2.7	2.3	1.6	0.5	0.4
Azerbaijan	5.1	9.5	16.5	13.6	10.0	7.9	5.6	1.8	1.3
Georgia	4.7	3.6	8.7	10.1	8.5	7.4	6.3	1.5	0.7
Urban population (per cent)									
Total	16.9	17.6	24.5	18.4	13.5	10.7	7.9	2.4	1.7
Armenia	8.4	2.9	6.9	4.5	3.5	2.9	2.0	0.5	0.4
Azerbaijan	16.8	26.6	35.7	24.9	18.3	14.1	9.8	3.3	2.4
Georgia	19.4	11.8	18.4	18.8	14.7	12.4	9.8	2.6	1.1
Rural population (per cent)									
Total	2.2	1.9	4.7	3.2	2.0	1.5	1.1	0.3	0.2
Armenia	0.7	2.1	2.8	1.9	1.3	1.2	0.7	0.4	0.3
Azerbaijan	3.1	2.7	5.6	3.2	1.6	1.0	0.6	0.2	0.1
Georgia	2.0	1.2	4.6	3.7	2.8	2.3	1.9	0.4	0.2

Note: In the case of the 1897 census, population structure by mother tongue was used to approximate population structure by ethnicity.

Source: Based on Demoscope-weekly (2021). *Perepisi naseleniya Rossiyskoy Imperii, SSSR, 15 novykh nezavisimyykh gosudarstv*. Online: <http://www.demoscope.ru/weekly/ssp/census.php?cy=0> (accessed: 15 February 2021); ArmStat (2021a). *Population Census 2001*. Online: <https://www.armstat.am/en/?nid=22> (accessed: 1 March 2021); ArmStat (2021b). *Population Census 2011*. Online: <https://www.armstat.am/en/?nid=21> (accessed: 1 March 2021); AzStat (2021). *Population of Azerbaijan*. Statistical Committee of the Republic of Azerbaijan: Baku; Geostat (2021a). *Population Census 2002 Results*. Online: <http://census.ge/en/2002-results> (accessed: 1 March 2021); Geostat (2021b). *2014 General Population Census Results*. Online: <http://census.ge/en/results/census1> (accessed: 1 March 2021).

Table A3. Titular nations of Central Asian and South Caucasian republics in Russia according to subsequent population censuses

A) Population (thousands)								
Ethnicity	1926*	1939	1959	1970	1979	1989	2002	2010
Armenians	194.5	218.2	256.0	298.7	364.6	532.4	1,130.5	1,182.4
Azerbaijanis	24.3	43.1	70.9	95.7	152.4	335.9	621.8	603.1
Georgians	20.8	44.1	57.6	69.0	89.4	130.7	197.9	157.8
Kazakhs	136.5	356.6	382.4	477.8	518.1	635.9	654.0	647.7
Kyrgyz people	0.3	6.3	4.7	9.1	15.0	41.7	31.8	103.4
Tajiks	0.1	3.3	7.0	14.1	17.9	38.2	120.1	200.3
Turkmens	7.9	12.9	11.6	20.0	23.0	39.7	33.1	36.9
Uzbeks	0.9	16.3	29.5	61.6	72.4	126.9	122.9	289.9
B) Population growth (per cent)								
	1926–1939	1939–1959	1959–1970	1970–1979	1979–1989	1989–2002	2002–2010	
Armenians	12	17	17	22	46	112	5	
Azerbaijanis	77	65	35	59	120	85	-3	
Georgians	112	31	20	30	46	51	-20	
Kazakhs	161	7	25	8	23	3	-1	
Kyrgyz people	2,023	-26	94	65	178	-24	225	
Tajiks	6,313	111	101	27	114	214	67	
Turkmens	65	-10	72	15	73	-17	12	
Uzbeks	1,627	81	109	18	75	-3	136	

Note: Excluding the Kazakh Autonomous Socialist Soviet Republic and the Kyrgyz Autonomous Socialist Soviet Republic.

Source: Based on Demoscope-weekly. (2021). *Perepisi naseleniya Rossiyskoy Imperii, SSSR, 15 novykh nezavisimyykh gosudarstv*. Online: <http://www.demoscope.ru/weekly/ssp/census.php?cy=0> (accessed: 15 February 2021); Rosstat (2021). *Population censuses 2002 and 2010*. Online: https://rosstat.gov.ru/vpn_popul (accessed: 1 March 2021).

Table A4. Departures for permanent residence abroad by Soviet republics (thousands)

Republics	1980	1985	1987	1988	1989	1990	1991
Total USSR	36.4	6.1	39.1	108.2	235.0	452.3	443.1
Armenia	5.4	0.1	5.9	15.6	12.2	5.2	7.7
Azerbaijan	1.0	0.1	0.3	0.5	3.0	12.1	8.2
Belarus	3.4	0.2	0.8	3.2	14.6	34.1	25.4
Estonia	0.5	0.1	0.8	1.6	1.6	0.9	-
Georgia	0.9	0.1	0.7	0.9	3.4	6.4	4.0
Kazakhstan	2.5	0.3	7.1	23.6	52.9	92.3	78.3
Kyrgyzstan	1.0	0.1	1.4	10.6	16.8	18.0	15.1
Lithuania	1.1	0.2	0.7	0.7	1.8	3.6	-
Latvia	1.4	0.2	0.5	1.1	3.1	4.9	-
Moldova	3.9	0.1	1.8	2.2	7.5	21.0	21.8
Russia	7.0	2.9	9.7	20.7	47.5	103.6	161.9
Tajikistan	0.9	0.1	1.7	6.0	10.5	12.5	8.4
Turkmenistan	0.0	0.0	0.0	0.1	0.1	0.3	0.4
Ukraine	6.7	1.5	6.6	17.7	50.0	95.4	85.3
Uzbekistan	0.7	0.1	1.1	3.6	10.1	41.9	26.6

Note: Based on the number of permits to depart for permanent residence abroad issued by the Ministry of Internal Affairs.

Source: Based on Goskomstat SSSR (1990). *Narodnoe khozyaystvo SSSR. Statisticheskiy ezhegodnik* 1988, 1989, 1990. Moscow: Finansy i statistika; Statcommittee of the CIS (2011). *20 Years of the Commonwealth of Independent States 1991–2010: Statistical Abstract*. Moscow: Interstate Statistical Committee of Commonwealth of Independent States.

Table A5. Russia's net migration with the former Soviet republics by ethnic group, 1989–2007 (thousands)

Ethnicity	1989–1993	1994–1998	1999–2002	2003–2007
Total	1,464.1	2,761.7	698.6	668.9
Russians	1,158.7	1,751.6	408.0	299.2
Belarusians	5.6	25.4	-1.1	3.4
Ukrainians	-32.1	256.2	60.6	46.8
Moldovans	-5.8	12.0	5.2	8.0
Azeris	-1.7	70.3	20.3	21.3
Armenians	127.5	184.5	46.4	50.9
Georgians	0.8	38.4	9.4	4.3
Kazakhs	-27.6	19.4	3.8	-8.4
Kyrgyz people	-7.1	1.9	1.5	11.7
Tajiks	2.0	23.3	9.0	13.9
Turkmens	-4.6	3.0	0.8	1.4
Uzbeks	-8.1	16.9	7.9	18.6
Latvians	-0.7	1.3	0.2	0.2
Lithuanians	-2.6	1.1	0.4	0.2
Estonians	0.2	0.9	0.1	0.1
Others			75.0	73.8
Not specified	259.5	355.5	50.9	123.7

Note: Numbers based on current registration data. 2007 was the last year when information on the ethnicity of migrants was collected in the current registration of arrivals and departures. Hence, after 2007 no statistics on migration by ethnicity are available (having been replaced by data on migration by citizenship).

Source: Based on Zayonchkovskaya (2005). *Migratsionnyy krizis i migratsionnyy vzryv v Rossii v 1980-e i 1990-e gody*, in: P. Polyan, O. Glezer (eds), *Rossiya i ee regiony v XX veke: territoriya – rasselenie – migratsii*, pp. 383–412. Moscow: OGI; Rosstat (2000–2008). *Chislennost' i migratsiya naseleniya Rossiyskoy Federatsii*. Moscow: Rosstat.

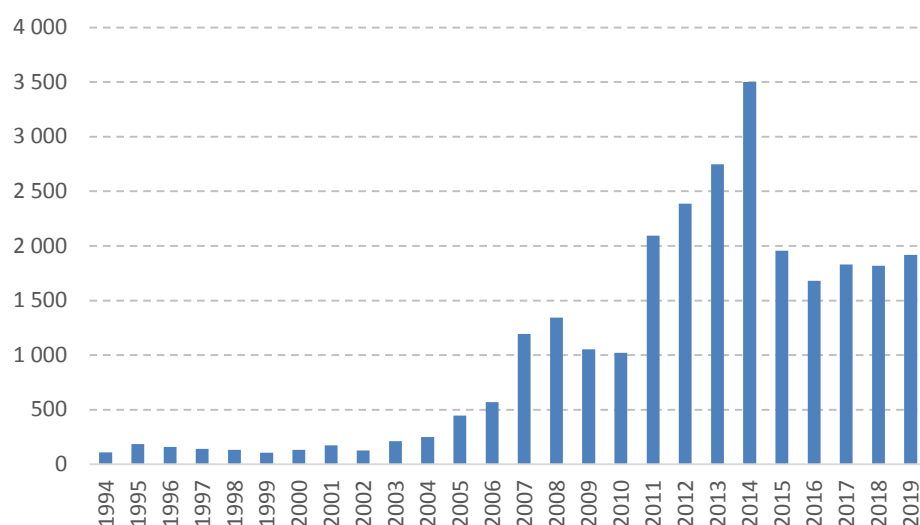
Table A6. The number of foreigners registered for the first time at a place of temporary residence in Russia with declared purpose ‘work’ (thousands)

Countries	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Total	1,671.9	1,964.8	2,596.9	3,169.1	4,045.2	4,517.5	4,284.2	4,854	5,047.8	5,478.2
Azerbaijan	48.7	62.3	81.1	107.6	161.5	199.2	199.2	201.6	186.2	194.9
Armenia	52.3	62.3	87.9	123.2	194.7	264.1	209.9	232.2	207.9	210.5
Belarus	41.9	54.5	68.4	75.7	86.2	86.5	97.7	124.6	134.7	163.4
Kazakhstan	20.9	20.5	34.1	53.4	58.7	70.1	71.6	88.2	111.5	136.2
Kyrgyzstan	150.2	199.3	225.2	288.6	371.7	512.4	361.9	376.9	352	453.7
Moldova	63.1	67.7	85.9	140.5	271.5	305.5	242	227	177.5	174.2
Tajikistan	260.5	326.1	441.7	562	697	795.5	837.7	936.8	1,018.5	1,179.4
Uzbekistan	431.6	639.5	991.7	1,156.2	1,252	1,331.6	1,433.6	1,822.9	2,007.4	2,107.3
Ukraine	155.8	163	195	245.9	510.4	587.4	504.1	503.3	460.6	435.5
Other countries	446.9	369.6	385.9	416	441.5	314.3	364.2	326.4	341.3	393.6

Note: Until 2014, data on the number of issued documents enabling foreigners to work in Russia (work permits and patents) constituted the main point of reference when tracking the magnitude of labour migration in Russia. Since 2014, only migrants who declared ‘work’ as their purpose of stay at registration are allowed to undertake work in Russia. Besides, since 2015, various categories of foreigner have been exempted from the obligation to possess a work permit or a patent. Therefore, data on the number of foreigners registered at the place of temporary residence with the declared purpose of ‘work’ have gained in significance.

Source: For 2016–2019: Main Directorate for Migration, Ministry of Internal Affairs; for 2010–2015: unpublished data of the Federal Migration Service.

Figure A1. The number of issued documents enabling foreigners to work in Russia (all types of work permit plus patents), 1994–2019 (thousands)



Note: Until 2014, data on the number of issued documents enabling foreigners to work in Russia (work permits and patents) constituted the main point of reference when tracking the magnitude of labour migration in Russia. Since 2014, only migrants who declared 'work' as their purpose of stay at registration are allowed to undertake work in Russia. Besides, since 2015, various categories of foreigner have been exempted from the obligation to possess a work permit or a patent. Therefore, data on the number of foreigners registered at the place of temporary residence with the declared purpose of 'work' have gained in significance.

Source: Unpublished data of the Federal Migration Service and the Main Directorate for Migration, Ministry of Internal Affairs.