ROMANIA

Dr. Prof. Dacian C. Dragos
Dr. Bogdana Neamţu
Dr. Streteanu Florin
Ioana Paula Curt

Overview Respondents in the Empirical Part of the Research

	Function	Years of experience
R1	Judge	9
R2	Judge	3
R3	Judge	12
R4	Judge	9
R5	Judge	7
R6	Prosecutor	18
R7	Prosecutor	9
R8	Prosecutor	7
R9	Prosecutor	9
R10	Lawyer	5
R11	Lawyer	16
R12	Lawyer	4
R13	Lawyer	10
R14	Detainee	-

1. Meaning and scope of the fundamental rights subject to this study in the national legal order

Regarding the position of the fundamental rights subject to this study in the Romanian legal system, it is important to note, first of all, that each right is expressly guaranteed in the Romanian Constitution, more precisely in Article 21, Article 22 and Article 26. The practical consequence of the constitutional character of these rights is that any legal norm potentially contravening the rights in question can be declared unconstitutional by the Romanian Constitutional Court and become inapplicable. There are a few mechanisms which can be employed to petition the Constitutional Court to this end, among which the plea of unconstitutionality regarding laws applicable in a specific case. This type of plea can be invoked by the parties or by the national courts and will be settled by the Constitutional Court. Other potentially unconstitutional legal norms, hierarchically inferior to laws, can be declared unconstitutional by ordinary courts at the request of the parties. The downside of these remedies consists in the fact that they can only address the abstract unconstitutionality of legal norms. *Practices* violating the fundamental rights in question (for example, overcrowding in prisons) often remain undealt with, as courts and other judicial organs concentrate on the abstract constitutionality of legal norms and not on the realities of their implementation[1].

Secondly, in 1994, Romania has ratified the ECHR, which protects the three rights in question. According to Article 20 of the Romanian Constitution, constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to, including the ECHR. Also, the same Article stipulates that where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions. It

[1] For instance, regarding the prison overcrowding complaints filed by the detainees, the national courts refuse to establish the infringement of their fundamental rights. See - as examples - Sentence 2208 / 16.11.2015 issued by Iași Court, available at <www.jurisprudenta.com/jurisprudenta/speta-b43vkbc/>, accessed 10 July 2017, Sentence 135 / 20.01.2015 issued by Bucharest's 5th District Court, available at <http://legeaz.net/spete-penal-judecatoria-sectorul-5-bucuresti-2015/plangere-conform-art-56-din-20-01-2015-e2b>, accessed 10 July 2017.

can be inferred from these provisions that the constitutional rights mentioned in the Romanian Constitution must be interpreted in the light of the ECHR and that any legal norm contrary to the ECHR can be set aside by the national courts.

Ideally, the meaning and scope of the fundamental rights in question in the Romanian legal system should be heavily influenced by the case law of the ECtHR, as this international court is the only legitimate interpreter of the ECHR. However, in practice, even if the Constitutional Court frequently quotes the case law of the European Court in its judgments, ordinary courts are more reluctant to do the same[2]. Judges are not accustomed to give precedence to a higher international law and set aside national law, even though the Constitution allows it, as they still cling to a strict interpretation of the principle of separation of powers. This deficiency leads to numerous human rights violations, which result in judgments of the ECtHR against Romania finding violations of the ECHR. Accordingly, Romanians consider applications lodged at the EctHR to be the most effective remedy for the human rights violations they suffer.

From the perspective of a lawyer (R11), *"the exercise of refering to rulings of EctHR and ECJ is purely formal, meant to enshrine internal validity and not necessarily influence the decision. In some judgments, I have observed that the same judge, on identical judicial issues, referenced one European practice at a certain moment, and the same one in the nearby future – but reaching the opposite solution."*

All the interviewed specialists believe that within judgments, reference is often being made to the ECHtR's jurisprudence, but the reference is mainly formal.

Thirdly, the fundamental rights in question are guaranteed in infra-constitutional laws, as we will show in the next sections.

1.1. Protection against torture and degrading treatment

a) Status and content of the protection against torture and degrading treatment based on Romanian legislation and case-law

Protection against torture and degrading treatment is expressly provided for in Article 22 of the Romanian Constitution. This Article stipulates that the right to life, as well as the right to physical and mental integrity of the person is guaranteed. This right is an absolute one[3]. Also, the second paragraph of the same Article provides that no one may be subjected to torture or to any kind of inhuman or degrading punishment or treatment.

In the specific context of enforcement of sentences, *Legea nr. 254/2013 privind executarea pedepselor și a măsurilor privative de libertate dispuse de organele judiciare în cursul procesului penal* (*Law no. 254/2013 on the enforcement of sentences and of measures involving deprivation of liberty ordered by the judicial bodies during criminal proceedings*, hereinafter *Law on the enforcement of sentences*) reiterates the same prohibition of torture and inhuman or degrading treatment. The same law provides for a general judicial remedy available for the detainees. According to Article 9 of the *Law on the enforcement of sentences*, a special judge is appointed to supervise the execution of sentences in prisons. Any detainee can complain to the said judge in case of violation of his or her rights. The judge can request information or documents from the administration of the detention site and perform spot checks in order to verify the complaints. The judge's decisions are binding.

Other national legal provisions concerning the subject in question are contained in Article 48, Article 52, Article 56, Article 71 and Article 72 of *Law on the enforcement of sentences*. Firstly, Article 48 deals with prison overcrowding. According to this norm, the

[2] See Radu Chiriță, *Convenția europeană a drepturilor omului – Comentarii și explicații* (2nd edn, CH Beck 2008) 42.
[3] ibid 95.

National Administration of Penitentiaries takes all the necessary measures in order to increase progressively the number of individual accommodation establishments. The rearrangement of the existing establishments and the construction of new establishments are made taking into account international recommendations, especially those which come from The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. In case of prison overcrowding, the director of that penitentiary has the obligation to inform the general director of the National Administration of Penitentiaries about this aspect in order to transfer the detainees to other penitentiaries. The general director of the National Administration of Penitentiaries decides whether transfer is necessary or not. He also specifies the penitentiaries the detainees are transferred to.

Prison overcrowding in Romania is a systemic problem, proved by the numerous judgments against Romania pronounced by the ECtHR on the basis of Article 3 of the ECHR, out of which the most relevant one was *Iacov Stanciu v Romania*[4], issued in 2012. Recently, this *status quo* led to the ECtHR deciding to apply the pilot judgment procedure in the case *Rezmiveş and others v Romania*[5], finding that the "applicant's situation was part of a general problem originating in a structural dysfunction specific to the Romanian prison system". The Romanian Government has six months, from the date on which the judgment becomes final (25.07.2017), to come up with measures to reduce overcrowding and improve detention conditions.

In this respect, some progress has been made. For example, in order to deal with prison overcrowding, the Ministry of Justice has drawn up a bill[6] concerning conditional release, which has not yet entered into force. According to these national legal provisions, in terms of conditional release, the judge will take into account the detention conditions too. As a compensatory measure, a detainee who wasn't guaranteed appropriate and sufficient space in prison is considered to have executed 33 days of detention instead of 30 days. The evaluation of space is made by using a special algorithm. A proper detention space means more than 3 square meters for personal use, per detainee. As an exception, it is provided that the days in which detainees are hospitalised, in transit or transferred to other prisons are not taken into account. This compensatory measure will not be applicable to those who had benefited from financial remedies on the basis of a final judgement of a national court or of the ECtHR.

Another solution to the problem of prison overcrowding consists of the alternatives to detention. In the sentencing phase, the courts have four different non-custodial solutions that can be ordered against the defendant, namely: waiving enforcement of the penalty, postponing service of the penalty, suspending service of a sentence under supervision and the criminal fine.

b) The protection against torture and degrading treatment and its relevance in judicial cooperation in criminal matters

The role of the competent authorities

In the specific context of execution of sentences, the *Law on the enforcement of sentences* provides for a general judicial remedy available for the detainees. We have to remark, however, that this internal procedure becomes applicable only after the actual incarceration,

[4] Application no 35972/05 *Iacov Stanciu v Romania*, Judgment (3rd Section) of 24 July 2012, CE:ECHR:2012:0724JUD003597205.

[5] Application no 61467/12, 39516/13, 48231/13 and 68191/13 *Rezmiveş and others v Romania,* Judgment (4th Section) of 25 April 2017, CE:ECHR:2017:0425JUD006146712.

[6] Proiect de lege pentru modificarea și completarea Legii nr. 254/2013 privind executarea pedepselor și a măsurilor privative de libertate dispuse de organele judiciare în cursul procesului penal, available at <www.just.ro/proiectul-de-lege-de-modificare-si-completare-a-legii-nr-2542013-privind-executarea-pedepselor-si-a-masurilor-privative-de-libertate-dispuse-de-organele-judiciare-in-cursul-procesului-penal/> accessed 15 May 2017.

and it does not concern the transfer procedures. According to the Law, a special judge is appointed to supervise the execution of sentences in prisons. Any detainee can complain to the said judge in case of violation of his or her fundamental rights, according to Article 56. The judge shall solve the complaint, by a reasoned conclusion, finally allowing it (and at the same time ordering that the measure taken by the administration of the penitentiary be annulled or changed or compels the administration of the penitentiary to take the legal measures required), rejecting it, or noting its withdrawal. The sentenced person and the administration of the penitentiary may challenge the conclusion of the judge in charge of the supervision of deprivation of liberty at the court of first instance in whose district the penitentiary is located. According to the *Codul de procedură penală (*the Criminal Procedure Code, hereinafter CPP), the challenge shall be adjudicated in a decision that shall not be subject to any legal remedy, whereas one of the following solutions may be issued: it may be dismissed or sustained.

Except for a few provisions dealing with a possible situation of infringing the right to protection against degrading treatment (which are to be discussed further in the analysis), *Legea nr. 302/2004 privind cooperarea judiciară internaţională în materie penală* (*Law no. 302/2004 on international judicial cooperation in criminal matters*, hereinafter *Law CJIMP*) does not provide specific provisions on the relevance of the right in discussion in these proceedings, at least when they involve other EU member states. In addition, up to this moment, there is no national case law on the matter.

We should also mention the fact that the competent authority to review the allegation of breach is the *national court* invested with the judicial cooperation procedure (*Law CJIMP*, Articles 85, 88, 103, 107, 154).

With regard to the execution of an EAW, Article 97 paragraph 1 point b of *Law CJIMP* provides that if the offence on the basis of which the EAW has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant *may be subject* to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, or the possibility of conditional release, after 20 years, or for the application of measures of clemency". Although the wording of the legal provision leads to the conclusion that Romanian national courts have the possibility of subjecting the execution of the warrant to such conditions, Romanian legal literature interprets the article as imposing an *obligation* on behalf of the national court, to execute the warrant only upon the fulfilment of the requirements mentioned; in case of failure to meet the conditions imposed, the execution must be refused[7]. The reason for interpreting the article in this manner rests in the absolute prohibition of torture and inhuman treatment, life imprisonment without any possibility of conditional release being considered by the ECtHR a form of inhuman treatment[8].

In the transfer of prisoners' procedure, the national court will also have to analyse whether or not, upon enforcing the decision rendered in the issuing state, Romania itself would be infringing its obligation to protect individuals under its jurisdiction against torture and inhuman treatment. In this respect, it must be mentioned that pursuant to Article 151 paragraph 1 point e of *Law CJIMP*, the enforcement of the foreign judgement must be refused whenever the sentence imposed consists in a measure of psychiatric or health care, which cannot be executed by Romania in accordance with the legal or health care system. The execution would, in this particular case, be refused on account of the right to protection against torture and degrading treatment. Romanian legal literature emphasises, however, that this ground for non-execution cannot be invoked whenever it is proved that Romania's health

[7] See Florin Streteanu, Daniel Nițu, *Drept penal. Partea Generală* (Universul Juridic 2014) 231.
[8] ibid.

care infrastructure is less developed than the one existing in the issuing state, but only in exceptional circumstances[9].

Criteria for review

In matters of judicial cooperation, the Romanian legislation or case law does not allow for a general ground for refusal or suspension based on fundamental rights.

Despite this fact, such type of general ground for refusal exists in the Romanian legislation regarding the matter of extradition. This general ground can be found in Article 21 paragraph 1 of *Law CJIMP*, which provides a mandatory ground for non-execution of a extradition request, consisting in the fact that the right to a fair trial was not respected.

There are no special legal provisions on the period of time during which the requested person or other interested person is expected to invoke and prove the foreseeable future infringement, in the issuing state, of the right to protection against torture and inhuman treatment. Therefore, the general procedural rules shall be applicable – the interested person may prove his allegation any time before a final decision on the surrender has been reached (Articles 376-387, 389, 395 of the CPP). If a decision to execute the EAW has been made, the person to be surrendered can still claim the risk of being subjected to torture and inhuman treatment in the issuing state, but only on account of facts or circumstances which were unknown when the case was settled and which prove that the ruling issued in the case is not grounded. In this case, the risk shall be claimed by filing a motion for the revision of the ruling (Article 453 paragraph 1 point a CPP). There is no express time frame to file the motion (Article 457 paragraph 1 point a CPP); however, since the revision of the ruling shall be effective only as long as the person requested is under the control of Romanian authorities, it is to be assumed that the motion can only be filed before the requested person is surrendered to the issuing state.

1.2. Fair trial

a) Status and content of the right to fair trial based on national legislation and case-law

National sources

The right to a fair trial is one of the most extensive human rights. The aim of the right is to ensure the proper administration of justice[10]. As a minimum, the right to fair trial includes the following fair trial rights in civil and criminal proceedings:

- the right to be heard by a competent, independent and impartial court;
- the right to a public hearing;
- the right to be heard within a reasonable time;
- the right to counsel;
- the right to interpretation[11].

In our country, the right to a fair trial is guaranteed by Article 21 of the Romanian Constitution. This Article stipulates that all parties shall be entitled to a fair trial within a reasonable time. At the same time, Article 6 of the ECHR is directly applicable in the national legal order. The Constitutional Court of Romania frequently makes reference to the case law of the ECtHR in its judgments, especially when it is called to examine the constitutionality of various provisions from the CPP. The said Code contains all the general guarantees of a fair trial, created in the case law of the ECtHR. However, their implementation in practice is often defective, especially when it comes to the right to access the criminal investigation file and the right to equality of arms. In addition, although criminal courts are required to give

[9] ibid 211.
[10] See Norel Neagu, *Jurisprudența Curții de Justiție a Uniunii Europene și influența acesteia asupra dreptului penal național* (CH Beck 2014) 320-346.
[11] Chiriță (n 2) 194-212.

precedence to the case law of the ECtHR in case of contradictions with national legislation or national practices, they seldom do it. This aspect is proved by the numerous judgments against Romania pronounced by the ECtHR on the basis of Article 6 of the ECHR.

European sources

The procedural safeguards enshrined in the Directives are, to a certain degree, provided in the general provisions of the CPP, while others, namely those specifically related to mutual cooperation in criminal matters in the AFSJ, are regulated in another legislative piece. In this context, it is worth stating that *Law CJIMP* is considered *lex specialis* when compared to the general provisions of the CPP. As such, when the special provisions are silent in a certain area, the provisions of the Code apply as *lex generalis.*

As a general conclusion, the rights contained in the Directives are enshrined in a number of provisions that seen globally satisfy the implementation requirements. However, we would like to give particular emphasis to certain aspects regarding the implementation.

In what concerns the implementation of Article 5 of **Directive 2012/13**, the legislative piece that regulates the EAW, namely *Law CJIMP* has no specific provisions to lay down that persons who are arrested for the purpose of the execution of an EAW are provided promptly with an appropriate Letter of Rights. However, the general provisions of the CPP – which impose such a Letter whenever a person is arrested – are applicable. In this respect, even without being expressly provided by *Law CJIMP*, the Romanian authorities have drafted a Letter of Rights, according to the indicative model set out in the Directive, which is handed to the person arrested for the purpose of execution of an EAW.

Moreover, turning our attention to **Directive 2012/13**, regarding the right to challenge the refusal to appoint or the quality of the interpretation, there is no specific provision in the national legal framework. However, even though there is no express provision, the refusal to appoint an interpreter or the lack of quality of the set interpretation can be challenged by means of relative nullity, if the defendant or suspected suffers harm, respectively, if the right to exercise his defense was crippled.

As a final note with regard to **Directive 2013/48**, some issues can be stressed regarding the temporary derogations under Article 5 (3). Article 8 of the Directive imposes on Member States that if any temporary derogation under Article 5 (3) is present, it shall (a) be proportionate and not go beyond what is necessary; (b) be strictly limited in time; (c) not be based exclusively on the type or the seriousness of the alleged offence; and (d) not prejudice the overall fairness of the proceedings. As well, these derogations, according to the provision, must be decided on a case by case basis, either by a judicial authority or by another competent authority on the condition that the decision can be submitted to judicial review. When analyzing the implementation in national law, the relevant provision is Article 210 paragraph 6 of the CPP, that deal with short term detention, and it only states that *exceptionally, for well-grounded reasons, such information may be delayed for maximum 4 hours*. Unfortunately, the prosecutor's decision cannot be submitted to judicial review, so in this regard, the Directive was only partially implemented.

b) The protection of the right to fair trial

The role of the competent authorities

Law CJIMP does not provide specific provisions on the relevance of the right in discussion in these proceedings, at least when they involve other EU member states. However, as an optional ground for non-execution, Article 98 of *Law CJIMP* states that the execution of the EAW can be refused in the situation in which the convicted person did not show up in person at trial, unless the issuing judicial authority informs that in accordance with the legislation of the issuing State, there is an exception from the rule of personal presence. Article 92 of the said law regulates the incident procedure for this type of situations. It is

clearly stated that the person subject to this situation must be assured that he or she has the right to challenge the decision given in his or her absence or the right to have a retrial. In the absence of these guarantees, in our opinion, the execution of the EAW is in breach of Article 6 of the ECHR.

We should also mention the fact that the competent authority to review the allegation of breach is the *national court* invested with the judicial cooperation procedure.

Criteria for review

As we have previously stated, the Romanian legislation or case-law does not provide for a general ground for refusal or suspension based on fundamental rights.

1.3. Family life

a) Status and content of the right to family life based on National legislation and case-law (including the concept of family)

The right to family life is guaranteed by Article 26 of the Romanian Constitution, which stipulates that public authorities shall respect and protect the intimate, family and private life. The right to family life is also expressly provided for in the Civil Code, where the concept of family is linked to that of marriage between a man and a woman.

Article 277 of the Civil Code explicitly prohibits same-sex marriages and stipulates that same-sex marriages concluded abroad, either by Romanian citizens or foreign citizens, are not recognized in Romania. Also, opposite-sex or same-sex civil partnerships concluded abroad, either by Romanian citizens or foreign citizens, are not recognized in Romania. A plea of unconstitutionality has been recently raised regarding these provisions, as the Constitution does not explicitly mention that marriage must be concluded between a man and a woman, but the Constitutional Court hasn't yet ruled on it, after several postponements.

However, in the context of the rights of detainees during the execution of their sentences, the *Law on the enforcement of sentences* operates with a wider concept of family, which includes cohabitants and other persons that have strong affective relationships with the detainees. This type of approach is in complete accordance with the ECHR.

Some relevant legal provisions are to be found in Article 63, Article 65, Article 66, Article 68, Article 69, Article 99 and Article 171 of *Law on the enforcement of sentences*. They apply for convicted persons, but with some exceptions, they are applicable, *mutatis mutandis*, to pre-trial detainees.

Article 63 deals with the right to petition and the right to correspond with the family. It is stated that these rights are guaranteed by the law. With the aim of preventing the receival of drugs, toxic substances, explosives and other forbidden objects, the envelopes are opened without being read, in the presence of the detainee. The correspondence and responses to petitions are confidential and, as a rule, cannot be retained. The law provides the limits and conditions in which such measures can be taken. As an exception to the rule, the correspondence and responses to petitions can be retained and, afterwards, given to the entitled person if there are any serious leads relating to the commission of offences.

Article 65 deals with the right to telephone conversations. Detainees have the right to communicate by using public telephones that are available to them in penitentiaries. Conversations are confidential. The expenses of using such telephones are to be borne by the ones using them. The number and duration of telephone conversations are expressly provided for in the Regulation.

Article 66 refers to the right to online communication. Some categories of detainees can communicate with their family or with other people online. The categories of detainees, the number, the duration and the way of communication are expressly provided for in the Regulation.

Article 68 deals with the right to receive visits and the right to be informed of special family situations. Detainees have the right to receive visits in the specific spaces, which are established for this purpose, under visual surveillance guaranteed by the administration of the penitentiary personnel. Visitors are checked before entering the penitentiary. The duration, periodicity and organization of visits are expressly provided for in the Regulation. Detainees have the right to receive confidential visits from their counselor whenever they want. Furthermore, detainees are immediately informed of any serious illness or death of their spouse, cohabitant or close relative.

Article 69 refers to the right to conjugal visits. Detainees can receive conjugal visits under the following conditions:

a) the sentence is final and the sentenced person is deprived of liberty;
b) [12]
c) the detainee is married with the visitor[13] or they have a similar relationship to the one existing between spouses[14];
d) in the past 3 months, before the request, the detainee hasn′t received the permission to exit the penitentiary;
e) in the past 6 months, the detainee hasn′t been disciplinary punished or in case of a punishment, the penalty was raised;
f) the detainee actively participates in educational programs, in psychological assistance programs, in social assistance or works.

Married detainees can only receive conjugal visits from their spouses. In order to receive conjugal visits, the detainee and his partner are required to prove that they have a similar relationship to the one existing between spouses.

The proof of the partnership consists in their affidavit, authenticated by a notary. The penitentiary director can also approve conjugal visits between detainees. The number, the periodicity and the procedure of the conjugal visits are expressly provided for in the regulation.

Article 99 deals with permissions given to detainees to temporary exit the penitentiary. This type of permissions are given, under the conditions specified in Article 98, in the following situations:

a) when the detainee′s presence is needed in order to get a job after liberation;
b) when the detainee has to take an exam;
c) in order to support the detainee′s family relationship[15];
d) the preparation of the detainee′s social reintegration;
e) when the detainee has to participate to his/her spouse′s / child′s / parents′ / brother′s / sister′s or grandparents′ funerals.

The request to be permitted to temporary exit the penitentiary will contain the specification of the place where the detainee is going to be, the itinerary and the detainee′s financial resources during the permission.

Article 171 deals with the permission given to detainees to temporary leave the penitentiary for humanitarian reasons. This type of permission may be given to detainees in order to participate in the funerals of a member of his family or of a close friend, to solve a social or a medical problem, to give support to his family or in case of disaster.

[12] It was declared unconstitutional by the Constitutional Court of Romania.
[13] The marriage must be proved with the help of a legalized copy of the marriage certificate.
[14] This aspect is very important because of the link existing between it and the concept of family. From here, we can draw the conclusion that unofficialized relationships can be included in the concept of family. Also, see Radu Chiriță, *Dreptul la viață privată și de familie* (Hamangiu 2013) 85-89.
[15] This aspect is related to Article 8 of the ECHR.

All these legal provisions are particularly related to family life. The legislator has taken into account detainees′ need to keep in touch with their families and to participate to some important events related to family life. However, some justified restrictions still exist.

b) The protection of the right to family life

The role of the competent authorities

The right to family life is a relative right, not an absolute one. As long as the limits of the exercise of the right in question are legitimate, necessary and proportional with the scope, there is no violation of the right to family life. The aim of the national courts – the competent authorities to take a decision regarding this matter in the transfer procedures – is to find an adequate balance between the two values and not to worsen the detainee′s situation.

In the specific context of execution of sentences, *Law on the enforcement of sentences* provides for a general judicial remedy available for the detainees. We have to remark, however, that this internal procedure becomes applicable only after the incarceration, and it does not concern the actual transfer. According to the Law, a special judge is appointed to supervise the execution of sentences in prisons. Any detainee can complain to the said judge in case of violation of his or her fundamental rights, according to Article 56. The judge shall solve the complaint, by a reasoned conclusion, finally allowing it (and at the same time ordering that the measure taken by the administration of the penitentiary be annulled or changed or compels the administration of the penitentiary to take the legal measures required), rejecting it, or noting its withdrawal. The sentenced person and the administration of the penitentiary may challenge the conclusion of the judge in charge of the supervision of deprivation of liberty at the court of first instance in whose district the penitentiary is located. According to the CPP, the challenge shall be adjudicated in a decision that shall not be subject to any legal remedy, whereas one of the following solutions may be issued: it may be dismissed or sustained.

Criteria for review

In our national legislation, the rights that the individual concretely has under the protection of family life include: the right to correspond with his or her family, the right to telephone conversations, the right to online communication, the right to receive visits, the right to be informed of special family situations, the right to conjugal visits, temporary permissions to exit the penitentiary, the right to temporary leave the penitentiary for humanitarian reasons etc. We find it redundant to describe again these rights as long as a detailed analysis was carried out in the previous section.

The presence of a lawful and genuine marriage is sufficient to trigger the protection of Article 8 for all those involved: children, therefore, will be considered part of such relationship from the moment of their birth. Whilst sufficient, a valid marriage is not necessary for family life to exist: the relationship between a mother and her child attracts the protection of the ECHR regardless of her marital status.

In the case of married couples, there is a presumption of the existence of family life. On the contrary, in the case of cohabitants, the presumption does not exist. They have to prove the existence of a permanent cohabitation in order to benefit from the rights granted to family members. However, a limit has been set – same-sex relationships are not included in the concept of family life. Other limits are set by the legislator in order to protect other important values, such as public interest, public safety, individual protection, the prevailing interest of the child, the administration of justice etc. In any case, should a situation fall foul of the notion of "family life", it might very well enjoy the protection of Article 8 of the ECHR under the angle of "private life".

The presence of a biological link between a child and a parent will not *ipso facto* constitute family life. Similarly, the absence of blood ties will not automatically preclude a relationship from falling within the concept of family. Elements of the test carried out by our national courts include: the effectiveness of the marriage, the duration of cohabitation in the case of unmarried couples, the relationship between individuals other than marriage[16], the dependence existing between individuals etc.

As a rule, in terms of evidence, the applicable principle is *affirmanti incumbit probatio* (he who alleges something must prove that allegation). An exception to this rule consists of the situation of the married couples.

Finally, with regard to the right of being detained near the family, Article 45 of *Law on the enforcement of sentences* provides some guidelines. Paragraph one of the Article stipulates that after the determination of the temporary execution regime, the transfer of detainees to other penitentiaries is ordered by the penitentiary director in accordance with the penitentiaries profiles. The rule is that the penitentiary to which the detainee is transferred is the closest to their place of residence.

2. National legal framework implementing the obligation of mutual recognition in the EAW, FD 2008/909 and FD 2008/947

The *sedes materiae* in what concerns all three institutions is *Law CJIMP*. This legislative piece represents the most important national legal instrument in terms of mutual recognition and mutual trust. Whilst the EAW is applicable in Romania since the adherence to the EU (the 1st of January, 2007), FD 2008/909 and FD 2008/947 were both implemented through Law no. 300/2013, which entered into force on 25th of December 2013, and modified and completed *Law CJIMP*.

The legal framework is fairly clear in what concerns the competences of the judicial bodies in executing an EAW, even since 2007. Prosecutors (R6 and R7) show that *"with reference to the issuing of an EAW in order to execute a sentence, the role of the prosecutor became unessential, since before we were obliged to solicit a warrant from a judge, with reference to an established sentence. Now, the judge can adopt the mandate ex officio and the burden was transferred to the executing judicial bodies."*

2.1. The status of the principle of mutual recognition and mutual trust in the national legal order

A high level of mutual trust and cooperation between countries made the simplification of the surrender procedure between EU countries possible. Judging by our national legal provisions, European judicial cooperation implies *inter alia* faster and simpler surrender procedures. The principle of mutual recognition and mutual trust is expressly guaranteed by the provisions of the *Law CJIMP* and is also recognized in the judicial literature[17]. According to Article 84 paragraph 2 of the said law, the EAW is executed on the basis of mutual recognition and trust, the cornerstone of judicial cooperation. Moreover, according to Article 150, in matters of recognition and enforcement of the judgments regarding custodial sentences or measures involving deprivation of liberty, the judgments passed by courts of other Member States of the EU are recognized and enforced in Romania on the basis of mutual trust. Also, in matters of mutual recognition of probation measures and alternative sanctions, Article 170[19] provides that the final judgments of courts from other Member States of the EU are recognized and enforced in Romania on the basis of mutual

[16] For example, parents, grandparents, uncles etc.

[17] See Alexandru Boroi (coord.), Ion Rusu, Minodora-Ioana Rusu, *Tratat de Cooperare judiciară internațională în materie penală* (CH Beck 2016) 29.

trust. Having this in mind, we can see that the Romanian legislator pays a particular attention to the terminology. It appears that attention is paid to the relationship between mutual recognition and mutual trust and the relationship between mutual recognition and harmonization.[18]

2.2. The functioning of the EAW for the purpose of executing a custodial sentence or detention order

The EAW is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. Judging by this definition, it is clear that the procedure is a judiciary one.

Issuing authority

In Romania, the law courts have been designated as issuing judicial authorities. According to Article 88 paragraph 3 of *Law CJIMP*, when Romania is the issuing State and the EAW is issued for the purpose of executing a custodial sentence or detention order, the competent authority is the judge appointed by the president of the executional court. The EAW may be issued by the Romanian authorities under the conditions provided by Article 88 paragraph 1 of *Law CJIMP*:

- The person is located on the territory of another Member State;
- The imprisonment conviction is valid;
- According to the Romanian law, the enforcement of the sentence is not statute-barred[19];
- Amnesty of the crime or the pardon of penalty did not occur;
- The object of the detention order consists of a conviction to one year of imprisonment or more;
- In the case of the custodial sentence, the duration of the measure must be of at least 6 months;

As it may be seen, the conditions in which Romanian authorities may issue an EAW are more severe than the ones provided by the FD.

Executing authority

According to our national legal provisions (Article 85 of *Law CJIMP*), the competent authorities to execute the EAW are the Courts of Appeal. The Romanian authorities competent to receive the EAW shall be the Ministry of Justice and the prosecutor's offices attached to the courts of appeal under whose jurisdiction the requested person was located. If the location of the requested person is not known, the EAW shall be sent to the Prosecutor's Office attached to the Court of Appeals of Bucharest. The offences for which the EAW may be executed are divided into two categories. Therefore, the authorities have to check whether the crime is included in the list provided by Article 96 paragraph 1 of *Law CJIMP*. Regarding the listed crimes, if they are punishable in the issuing State by a custodial sentence or a measure involving deprivation of liberty for a maximum period of at least three years, they shall give rise to recognition of the judgment without verification of the double criminality. For offences other than those covered by paragraph 1, the executing State will subject the execution of the EAW to the condition that the judgment relates to acts which also constitute an offence under the Romanian law, whatever its constituent elements or however it is

[18] Christine Janssens, *The Principle of Mutual Recognitionin EU Law* (Oxford University Press 2013) 1.

[19] A court decided regarding this matter that, taking into account the fact that the enforcement of the sentence is statute-barred, the issuance of an EAW is not possible. See Ruling of 10.01.2007 of the Court of Vaslui, in Ioana Cristina Morar, Mariana Zainea, *Cooperare judiciară în materie penală. Culegere de practică judiciară* (CH Beck 2008) 285-286.

described. When deciding whether to execute the EAW or not, the authorities have to take into account the grounds for non-execution. Also, when deciding to execute the EAW, the Romanian authorities have the possibility to request further guarantees, according to Article 97 of *Law CJIMP*.

According to most of the respondents of the interview, the EAW is more familiar to the judges as an instrument, when compared to the transfer procedure. Some lawyers stated that there are courts which are not yet accustomed to the transfer procedures, as opposed to the EAW.

2.3. FD 2008/909 transfer of prisoners

a) Forwarding judgments imposing sentence and transfer of convicted persons (issuing state)

The competent Romanian authority for forwarding the certificate and the judgment to another Member State of the EU is the Ministry of Justice. Moreover, according to Article 142 of the *Law CJIMP*, regarding the competence of the Romanian judicial authorities, whenever Romania is the issuing State, and the sentenced person is in the territory of another Member State of the EU, competence to request the latter State to adopt a preventive measure and to recognize and enforce the Romanian decision shall lie with the executing court.

Regarding the criteria for forwarding a judgment and a certificate to another Member State, when the sentenced person is in the issuing state, according to Article 166 of *Law CJIMP*, a judgment will be forwarded if the convicted person:

- Is a national of the executing State and lives in its territory; or
- Is a national of the executing State, does not live in its territory, but will be expulsed in that territory; or
- Does not fall under any of the instances referred to in points a) and b), but they want to be transferred to the executing State.

However, the request to initiate the procedure described in paragraph 1 of Article 166 shall not entail the obligation to deliver to the executing State the court decision and the certificate, when:

a) Following the consultations, it is assessed, either by the executing State, or by the competent Romanian authorities, that the execution of sentence in the executing State would not achieve the purpose of facilitating the social rehabilitation and reintegration of the sentenced person into society; or

b) Until the procedure initiation date, the sentenced person failed to pay the criminal fine, judicial fine, legal expenses incurred by the State, costs payable to the parties and civil indemnification; or

c) The sentenced person has to serve less than 6 months imprisonment or could be released on parole prior to the full execution of the sentence in the following 6 months; or

d) The court decision is not final or the sentenced person submitted extraordinary legal remedy against it; or

e) The sentenced person is investigated in another criminal case; or

f) The person has been sentenced for severe offences which had a deeply unfavourable impact on the public opinion in Romania; or

g) The maximum period of the sentence provisioned by the law of the issuing State is lower than the maximum limit laid down in the Romanian criminal law.

In what concerns the consultation with the executing State, Article 165 states that the Ministry of Justice, shall consult with the competent authorities of the executing State whenever necessary. Consultation may take place irrespective whether the initiation of the procedure to deliver the court decision and the certificate was requested by the sentenced person or by the executing State. Consultation is mandatory in the case provisioned by the

categories which fall under points b) and c), shown above. If, following the consultations and the approval issued by the competent authority of the executing State, it is ascertained that the execution of the sentence in the executing State would not achieve the purpose of facilitating social rehabilitation and reintegration of the person into society, the Ministry of Justice, through its relevant department, shall communicate its decision to the sentenced person and, as the case may be, the executing court or the court having jurisdiction over the detention facility.

Regarding the consultations involved when forwarding a judgment, prosecutors (R9) believe that ”*A whole documentation process is under way, as per the one transmitted by the Ministry of Justice. There are discussions even with regard the statute of limitations and early parole. So, they are done at the level of the Ministry of Justice.”* Judges (R4), on the other hand, consider that ”*the consultations should exist between the courts and not through the Ministries of Justice – it is a waste of time.”*

When the sentenced person is in the executing State, according to Article 169 of the *Law CJIMP*, recognition and execution of a court decision rendered by a Romanian court may be requested of another Member State of the EU:

a) Without the consent of the sentenced person and irrespective of the opinion of the executing State, if the sentenced person has the citizenship of the executing state and:
   (i) Their domicile or permanent residence is in the executing State, including if the sentenced person returned or took refuge to that domicile or to that residence, following the criminal proceedings pending in Romania or because of the court decision ruled in Romania; or
   (ii) They have been expulsed to the executing State, after having served another custodial sentence or measure involving deprivation of liberty, in reliance upon an expulsion decision or an interdiction to residence;
b) Subject to the consent of the sentenced person and only if the executing State issued a statement in this respect, if they do not have the citizenship of the executing State, but has had continuous and legal residence in the territory of that State for at least 5 years and does not forfeit, following the conviction, the right of permanent residence; or
c) Subject to the consent of the sentenced person and of the executing State when, although the provisions in sub-paragraphs a) and b) do not apply, they have a very close connection with the executing State, and execution of the court decision in that State is likely to facilitate the rehabilitation and social reintegration of the sentenced person.

Regarding the initiative of the procedure of forwarding the sentence to another EU Member State, some of the specialists (R1, R3, R6, R8, R9, R13) show that in most cases, the initiative belongs to the issuing Member State. As an advocate (R10) claimed: *”I had one case of this sort, when the initiative came from the convicted person.”* Again, as a judge (R2) explained, it is seen that ”*probably in half the cases, the procedure is realized at the initiative of the convicted person. However, everyone [meant here all convicted persons] is informed, since the state where the execution starts is interested to proceed to the transfer, to cut some costs.”* Convicted individuals (R14), on the other hand, have a different perspective: ”*I have found out about the possibility to transfer from Spain to Romania from other convicts and from the Consular Representative of Romania in Spain, which, by means of a representative, came to the penitentiary at my request.”*

To conclude, this legal piece is very important due to the fact that about 11.000 of Romanians are executing sentences in other Member States[20].

Right to initiate the proceedings for transfer and the scope of application of FD 2008/909 on transfer of prisoners

Regarding the right to initiate the proceedings, any person sentenced in Romania may request directly or by means of the delegated judge for the execution of custodial sentences, appointed for the prison where the person is detained, the initiation of the procedure, according to Article 166 of the *Law CJIMP*. Moreover, Article 169 provides that the issuing state may also request the recognition and execution of a court decision rendered by a Romanian court.

Criteria for determining where the convicted person will be transferred and the factors taken into consideration when deciding about the transfer

In most cases, the persons will be transferred in their State of nationality. An exception to this rule is found in Article 166 paragraph 2 of *Law CJIMP*, which provides that, if the sentenced person has the nationality of two Member States of the EU, and also when he lives in the territory of a State other than the one whose national he has, he shall specify in the request to which of the two States he wishes to be transferred. The court's decision and the certificate shall be delivered to only one executing State, and only once. As we can see, the person′s opinion is a decisive factor when deciding about the transfer[21]. Other than that, the Romanian legislation does not specifically provide any criteria used in order to decide whether the executing state will be the most suited place for the convicted person social reintegration.

Even though the law does not expressly provide it, having family in the executing state seems to be the most important factor when deciding the transfer, according to all the respondents.

However, in our opinion, another factor, which should be taken into account when deciding about the transfer, is the result of the consultation with the competent authority of the executing State.

Regarding the **factors that are the most important in deciding about forwarding the judgment**, all interviewed specialists (R1-R13) show that having family in the executing Member State is the most important factor. This reason becomes apparent even when simply looking at the preamble of the FD, the scope of transfer being the reintegration in society and family. A prosecutor (R7) shows that ”*in most cases, the existence of consent or lack of is irrelevant, since when transfer is being discussed, if the ties are in Romania, the family is in Romania and from our background checks the reintegration will be better realized in Romania. Moreover, when an expulsion order exists, there is no more room to discuss about consent. It is clear that the convicted person must execute the sentence where he or she was expulsed and as a rule, that country is the state where he or she resides.”* An advocate (R10) on the other hand, remarks that ”*the underlying rationale is to cut costs. As such, for non-citizens, states prefer to transfer on the umbrella of reintegration, when the real one is simply budget based.”*

In what concerns the **burden of proof**, an interviewed prosecutor (R9) considers that ”*the burden of proof in this instance is incumbent to the prosecutor, since he has, ab initio,*

[20] See Cristian Ioan Roman, 'Recunoașterea hotărârilor penale în vederea executării lor în Uniunea Europeană. Probleme practice' (2015) 3 Caiete de Drept Penal 117.
[21] See Oana Theodora Șofâlcă, 'Transferarea persoanelor condamnate' (2013) 4 Caiete de Drept Penal 43, 46.

obligations to verify the existence of the factors – as per the provisions of Law no. 302/2004 on international judicial cooperation in criminal matters. Furthermore, the obligations to investigate are not limited to proving that the convict is residing in Romania. We make a request to the police, through the service of criminal investigations, in which we instruct them to verify if the person in question has family in Romania, how long were they away, and so on. The other investigative measures are beard by judges, who can ask for more information." Another prosecutor (R8) emphasized that *"the burden of proof should be incumbent on the person who invokes or asks for something. But, at the same, we do check the validity of the information provided. We check it, since we have access to databases. If a person says that he or she has five children, we will check if these children exist and if they are his or her. Also, if parents are invoked, sick or old, we will check this aspect as well. The enquiry is relatively easy to do, with the help of the police."* When turning to the other actors involved, respectively judges, some (R4, R5) state that "*if the convict solicits the transfer, normally, the burden of proof is beard by him or her, but there is no consistent investigative request. If a Romanian citizen is condemned in another country, it is regularly sufficient to prove that family exists in Romania. Furthermore, the consent is proved through the declaration of consent or the lack of."* Another judge (R4), on the same point, stated that "*I have ordered a social investigation to find out if ties exist in relation to the executing state and I have refused the transfer request."*

Principle of speciality

There are no provisions in the national legal framework regarding the principle of speciality when Romania is the issuing state.

b) The obligation to recognize foreign judgments and execute the sentence (executing state)

The competent authority to receive the judgments and certificates issued by the other EU Member States is the Ministry of Justice. According to our national legislation, when Romania is the executing State, the competent authorities to recognize and enforce the sentences or other measures involving deprivation of liberty are the courts of appeal within whose jurisdiction the sentenced person lives or is permanently resident. According to Article 154 paragraph 2 of the said law, the court (one judge) takes a decision, in the council room, without summoning the sentenced person. The participation of the prosecutor is compulsory. The object of the procedure consists in the verification of the legal conditions. If the conditions are met, the sentence transmitted by the issuing State is enforced.

According to our respondents, the procedure is almost automatic when it comes to recognizing and enforcing a sentence regarding a Romanian citizen. The courts seldom refuse to execute the sentence, and that usually happens when the Romanian citizen, apart from his citizenship, has no connections whatsoever with Romania in the moment of the potential recognition.

In the case in which a person was sentenced for comitting several crimes, the verification of the conditions is made for each one of the crimes. When the conditions are met only for some of the crimes, the court can decide to partially recognize the sentence. In this situation, before pronouncing a decision, the court consults the issuing State. The last one has to communicate whether it agrees with a partial recognition and whether it withdraws the certificate or not. If the issuing State withdraws the certificate before the court gives a final sentence, the judge will reject the request as unsustained. The court examines the foreign

sentence, checks the file and, on the basis of its analysis, pronounces one of the following solutions:

- Orders the execution of the sentence pronounced by the court of the issuing state in Romania;
- In the situation in which the nature or duration of the penalty ordered by the foreign court does not correspond with the ones provided for in our national legislation for similar crimes, the Romanian court adapts the penalty;
- Gives a sentence by which it orders the rejection of the solicitation to enforce the sentence given by the issuing state.

In order to pronounce one of the listed solutions, the court may consult the competent authority of the issuing state. However, this procedure must not extend the duration of 30, respectively 60 days mentioned before.

According to Article 8 of the FD as implemented in Article 155 of the *Law CJIMP*, the Romanian courts shall recognise and execute the court decision delivered by the issuing State, provided that the following conditions are met:

a) The decision is final and enforceable;
b) The offence for which the sentence was imposed would have amounted, if committed in Romanian territory, an offence and its author would have been held accountable. If the sentence was imposed for more than one offence, the conditions shall be examined for each and every offence;
c) The sentenced person is a Romanian national;
d) The sentenced person agrees to serve the sentence in Romania. The agreement thereof is not necessary when the sentenced person is a Romanian national and they reside in Romanian territory or, although not residing in Romanian territory, they shall be expulsed to Romania. If necessary, considering the age or the physical or mental health of the sentenced person, agreement may be expressed by their representative;
e) None of the reasons for non-recognition and non-execution applies.

Moreover, the court decision delivered by the issuing State may also be recognised and executed when the sentenced person is not a Romanian national, but lives in Romania and has had continuous and legal residence in Romanian territory for a period of at least 5 years and shall not lose the right of permanent residence in Romania. Agreement by the sentenced person is mandatory.

Article 11 of the FD refers to the postponement of recognition of the judgment. Some similar legal provisions are to be found in Article 152 point f) of *Law CJIMP*.

Law governing enforcement and adaptation of the sentence

Regarding the law governing enforcement and adaptation of the sentence, according to Article 144 of *Law CJIMP*, whenever Romania is the executing State, the execution of a custodial sentence or measure involving deprivation of liberty imposed by a decision, recognised by the Romanian court, shall be governed by the Romanian law. The length of the custodial period served in the issuing State shall be calculated from the overall length of the custodial sentence or measure involving deprivation of liberty which has to be served in Romania. Amnesty or pardon may be granted both by Romania, and by the issuing State. We have to state however that the first three paragraphs of Article 17 of the said FD were implemented in the Romanian legislation in exactly the same manner in Article 144 and Article 152 point k), 164 point d) of the *Law CJIMP*. On the other hand, unfortunately, paragraph 4 of Article 17 of the FD was not implemented in the Romanian legislation, which led to the existence of important inconsistencies in the legal praxis, regarding the matter at

hand. Also, regarding the adaptation of the sentence, the general rule is to be found in Article 154 paragraph 6 of *Law CJIMP* which states that if the nature or length of the sentence imposed by the foreign court does not comply with the nature or length of the sentence provisioned by the Romanian penal law for similar offences, it shall adapt, through the judgment, the sentence imposed by the court of the issuing State. In this hypothesis, Article 154 paragraph 8 and 9 of the said Law become applicable. The court of law shall adjust the sentence imposed by the decision delivered by the issuing State, whenever:

a) The nature thereof does not comply, in terms of name or status, with the sentences governed by the Romanian penal law;
b) Its length exceeds, as the case may be, the maximum special limit of the sentence provisioned by the Romanian penal law for the same offence or the maximum general limit for imprisonment as provisioned by the Romanian penal law or when the length of the resulting penalty imposed in the case of concurrence of offences exceeds the total length of the sentences applicable for concurrent offences or the maximum general limit of imprisonment admitted by the Romanian penal law. The court of law adjusting the sentence imposed by the court of the issuing State shall consist in reducing the sentence down to the maximum limit admitted by the Romanian penal law for similar offences.

As such, the sentence ruled by the Romanian court shall comply, insomuch as practicably possible, in terms of nature or length, with that applied by the issuing State and shall not aggravate the situation of the sentenced person. However, the sentence imposed in the issuing State may not be converted into financial penalty.

Time limits for the decision to recognize

According to Article 154 of *Law CJIMP*, the president of the court or the appointed judge fixes the date of the hearing which cannot be longer than 10 days from the registration of the case. The procedure cannot be longer than 30 days from the registration of the case. If it involves a procedure for requesting the consent of the issuing State the period can extend up to 60 days. The court′s decision is written within 10 days from the day it was given. In addition to this, the court must communicate it to the sentenced person. This decision can be challenged by the sentenced person and by the prosecutor within 10 days. The file will be sent to the appeal court within 3 days. The appeal will be judged within 10 days, in the council room, without the person′s summoning. We must mention that the total duration of the procedure may be longer than the initial 30 or 60 days period, for up to 90 days in total, as the time limits provided by the law for the challenge procedure are not included in this initial period.

Principle of speciality

The principle of speciality is to be found in Article 157 of *Law CJIMP*. According to it, as a rule, the person transferred to Romania from another Member State of the EU may not be subject to criminal investigation or serve another custodial sentence, for an offence committed prior to their transfer, except for the one for which they were transferred[22].

This rule shall not be applied in the following cases:

a) The sentenced person agreed to be transferred to Romania; or
b) The sentenced person expressly waived the right to benefit from the application of the specialty rule in relation to offences committed prior to transfer to Romania. In the case of the sentenced person transferred to Romania, the prosecutor conducting or supervising the criminal prosecution or the court of law shall hear

[22] See Libor Klimek, *European Arrest Warrant* (Springer 2015) 83-84.

the sentenced person, in the presence of their chosen counsel or of an attorney appointed ex officio. The statement shall be recorded in writing and shall be signed by the sentenced person, by the attorney, by the criminal prosecution officer or by the president of the panel of judges and by the court clerk, as well as by an interpreter, when the statement was given through an interpreter. The statement waiving the specialty rule shall be irrevocable; or

c) The sentenced person did not leave the Romanian territory within 45 days after they were permanently released, although they could or were allowed to leave the Romanian territory or, although they left Romania in this period of time, subsequently returned, of their own free will, or was legally brought back, from a third State; or
d) The offence is not punishable under the Romanian law by a custodial sentence or measure involving deprivation of liberty or criminal investigations do not result in the enforcement of a measure restricting personal liberty; or
e) The sentenced person could be compelled to serve a sentence or a measure not involving deprivation of liberty, in particular a financial penalty or an equivalent measure, even if the penalty or measure may entail a restriction upon personal liberty; or
f) In any other cases than the ones contemplated in sub-paragraphs a) - e), when the issuing State agrees that the person is subject to criminal investigation or punished for an offence committed prior to its transfer.

2.4. FD 2008/947

a) Scope of application

According to our national legal provisions, this institution shall apply in the relationship with Member States of the EU in the field of recognition of court decisions and probation decisions with a view to the supervision of probation measures and alternative sanctions, for the purpose of their execution in the EU. At the same time, it shall also apply in relation to other States with which a bilateral or multilateral agreement was concluded in the field.

b) The procedure

Romania has strictly implemented the provisions of the FD 2008/947 into the national legislation. Firstly, the competence is established by Article 170[18] of *Law CJIMP*. According to this legal provision, whenever Romania is the executing State, the recognition falls under the competence of the district court having jurisdiction over the person's residence. The competence to supervise the way in which the person respects the imposed measures is given to the probation service. Whenever Romania is the issuing State, settlement of the request for execution in another Member State of the EU in relation to a court decision ruled by a Romanian court, when the sentenced person will execute the sentence or is currently serving the sentence, shall fall under the competence of the court having ruled in first instance the court decision whose recognition is being requested. When the decision was ruled by the High Court of Cassation and Justice, competence shall lie with Bucharest District Court.

According to Article 170[19] of *Law CJIMP*, final court decisions imposing probation measures or alternative sanctions ruled by the courts of other Member States of the EU shall be recognised and executed in Romania, provided that the following conditions are met:

a) the court decision ordained the suspension in the execution of the sentence on parole, postponement in enforcing the sentence, conditional release or an alternative sanction;
b) probation measures or the alternative sanction imposed by a foreign court decision have a correspondent in the Romanian law and are compatible with it;

c) the offence for which the sanction was imposed would have amounted, if committed in Romanian territory, to an offence. If the sentence was imposed for several offences, the conditions shall be checked for each and every offence;
d) the sentenced person is in the issuing State and wishes to return or to establish in Romania or is already located in Romania and:
   (i) they hold Romanian citizenship and reside or will reside in Romania; or
   (ii) do not hold Romanian citizenship, however, they either enjoy residence right or the right to stay in Romanian territory in accordance with the law, or are one of the members of the family of a Romanian national or of a person enjoying residence right or the right to stay in Romanian territory, or prove that they will conduct a lucrative business, go to school or professional training in Romanian territory.

Nonetheless, if the probation measures are determined by means of a probation decision issued in reliance upon a foreign court decision, both the court decision, and the probation decision shall be subject to recognition. According to Article 170^{20} of the said law, Romania is prepared to supervise the following probation measures or alternative sanctions:

a) the obligation for the sentenced person to inform a specific authority of any change of residence or working place;
b) the obligation not to enter certain localities, places or defined areas in Romania or in the executing State;
c) an obligation containing limitations on leaving the territory of the executing State;
d) instructions relating to behaviour, residence, education and training, leisure activities, or containing limitations on or modalities of carrying out a professional activity;
e) an obligation to report at specified times to a specific authority;
f) an obligation to avoid contact with specific persons;
g) an obligation to avoid contact with specific objects, which have been used or are likely to be used by the sentenced person with a view to committing a criminal offence;
h) an obligation to compensate financially for the prejudice caused by the offence and/or an obligation to provide proof of compliance with such an obligation;
i) an obligation to carry out community service;
j) an obligation to cooperate with a probation officer or with a representative of a social service having responsibilities in respect of sentenced persons;
k) an obligation to undergo therapeutic treatment or treatment for addiction;
l) an obligation to communicate information related to the way the person earns his or her living.

Regarding the adaptation of the probation measures or alternative sanctions, Article 170^{28} of the said law provides some guidelines. If the nature or duration of the relevant probation measure or alternative sanction, or the duration of the probation period, are incompatible with the Romanian law, the courts may adapt them in line with the nature and duration of the probation measures and alternative sanctions, or duration of the probation period, established by our national law for the equivalent offences. The adapted probation measure, alternative sanction or duration of the probation period shall correspond as far as possible to the one established by the issuing State. When the probation measure, the alternative sanction or the probation period has been adapted because its duration exceeds the maximum duration provided for under the law of Romania, the duration of the adapted probation measure, alternative sanction or probation period shall not be below the maximum duration provided for equivalent offences under the law of Romania. The adapted probation measure, alternative sanction or probation period shall not be more severe or longer than the probation measure, alternative sanction or probation period which was originally set. The grounds for refusing recognition and supervision are to be found in Article 170^{21} of *Law*

CJIMP. All the grounds provided in Article 170^{21} are mandatory. So, the term 'may' in Article 11 of the FD was interpreted in the Romanian legal system as a general legal basis to provide mandatory grounds for refusing recognition and supervision.

These grounds are the following:

a) When the person was convicted for the same offenses in Romania and the sentence is final. Although, if the foreign judgment has been given for other offenses, the court may order the partial recognition of it, if the other conditions are accomplished;

b) When the person has been convicted in another Member State for the same offenses, and the foreign judgment in this state has been previously recognized and enforced in Romania;

c) When there is immunity under the Romanian Law, which makes it impossible to enforce the sentence;

d) When the penalty was imposed on a person who, due to his or her age is not criminally liable under the Romanian criminal law;

e) When the penalty is a measure of psychiatric or health assistance that can not be enforced in Romania or, where applicable, provides for medical or therapeutic benefits that can not be supervised in Romania, in accordance with the national legal or healthcare system;

f) When according to the Romanian criminal law, the enforcement of the sentence is statute-barred;

g) When the convicted person did not appear in person at trial, unless the issuing State informs that in accordance with its legislation:

(i) The person has been faithfully acknowledged, in time, by summons in writing delivered personally or upon receipt by telephone, fax, e-mail or any other similar ways, about the day, month, year and place of the hearing and the legal consequences in case of default; or

(ii) The person having knowledge of the day, month, year and place of the hearing, mandated his chosen lawyer or the one appointed ex officio to represent him and that legal representation before the court was effectively assured by the lawyer; or

(iii) After being personally served the sentence and being faithfully acknowledged that the decision is subject to appeal, during which the competent court may examine the judgment under appeal including on the basis of new evidence and that, following the resolution of the appeal, the judgment that he/she may attend in person, the sentence can be broken, the convicted person either expressly waived the appeal or did not declared it within the period prescribed by the law;

h) When the length of the term of surveillance or the duration of the probation measures or of the alternative sanctions or the time remaining until their expiration are less than 6 months or 60 hours in case of community service work.

The Romanian law does not specifically provide that the consent of the person concerned to the execution of the probation measure in another Member State is indispensable to issue the transfer decision and to recognize it, but it provides, in Article 170^{19} paragraph 2 point d) of the *Law CJIMP*, that a general condition of recognition is that the convicted person is located in the issuing State and wishes to return or settle down in Romania or is already situated in Romania, and:

(i) He or she has Romanian citizenship and lives or will live in Romania; or

(ii) He or she does not have Romanian citizenship, but either has a right of residence or of staying in Romania under the Romanian law conditions or is a family member of a Romanian citizen or of a person having the right of residence or staying in Romania or brings proofs that he or she will carry a gainful activity, education or training in Romania.

Last but not least, Romania has made a declaration according to Article 14 paragraph 3 of the FD, that, as an executing State, in cases when, after a judgment or a probation

decision is recognized, the convicted person fails to comply with the supervision measures or the alternative sanction, or commits a new offence during the probation period, if the foreign decision referred to conditional release or an alternative sanction, without expressly mentioning the custodial sentence which is to be imposed in this case, Romania will not assume jurisdiction and the issuing state will be given the competence to revoke the sanction. With regard to the time limits, Article 170^{26} of the said law states that our national authorities shall decide as soon as possible, and within 60 days from the reception of the judgment and, where applicable, the probation decision together with the certificate. Our national authorities shall immediately inform the competent authority of the issuing State of the decision made, by any means that leaves a written record. In exceptional circumstances, when the authorities are not able to comply with the time limit provided for in paragraph 1, they shall immediately inform the competent authority of the issuing State by any means, giving the reasons for the delay and indicating the estimated time needed for the final decision to be made.

According to our national legislation, the law of the executing State shall govern the supervision and application of probation measures and alternative sanctions. In addition to this, where and whenever it is felt appropriate, the competent authorities of the issuing State and of the executing State may consult each other in order to facilitate the application of the principle of mutual recognition to judgments and probation decisions.

The procedure for forwarding a judgment and, where applicable, a probation decision given by a Romanian authority is established by Article 170^{35} to Article 170^{44} of *Law CJIMP*. To resume, when Romania is the issuing State, the judge appointed with the execution forwards a judgment and, where applicable, probation decision to another Member State.

A prosecutor (R7) stated that there is no case-law on this FD in Romania. Moreover *"I must admit that cases of this sort are a mystery for me. I know of this Framework Decision, but that is it. We hope that we will apply it soon, especially in procedures that involve the postponement of a sentence, which are many, and thus, we would have no obstacle in their execution."*

c) Relation to other measures

According to Article 23 of FD 2008/947, Member States may continue to apply bilateral or multilateral agreements or arrangements in force after 6 December 2008, in so far as they allow the objectives of this FD to be extended or enlarged and help to simplify or facilitate further the procedures for the supervision of probation measures and alternative sanctions. The relevant national legal provision is to be found in Article 170^{17}. It states that the provisions regarding supervision of probation measures and alternative sanctions, found in *Law CJIMP* shall also apply in relation to other States with which a bilateral or multilateral agreement was concluded in the field.

3. Limitations on mutual recognition provided in the EAW, FD 2008/909 and FD 2008/947 as implemented in the National legal order

3.1 EAW for the purpose of executing a custodial sentence or detention order

a) Safeguards for the requested (convicted) person

Access to lawyer

Article 83 point c of the CPP states that during the course of a criminal proceeding, the defendants have the right choose a counsel and, if they cannot afford one, in cases of mandatory legal assistance, the right to have a court appointed counsel. In the EAW procedures, the access to a lawyer is specifically provided when Romania is the executing Member State. The right to legal assistance is enshrined in *Law CJIMP*, in Article 104 paragraph 2, which states that *the arrested person has the right to be assisted by a chosen defender or by one appointed by the court.* The right to access a lawyer is guaranteed at any

point of the proceedings. In the situations in which Romania is the issuing Member State, the Romanian legislation does not specifically provide any kind of right to access a lawyer.

As a general conclusion derived from his praxis, a lawyer (R11) states "*I would say that the safeguards for the requested person are present and respected, but primarily as a formal notice, rather than an efficient instrument in ensuring the right to defence."*
To the question if the convicted person has the right to access a lawyer, all the specialists answered *yes.* For instance, a lawyer (R13) shows that *"The right to an attorney is guaranteed, since the accusation is made. He can come with his chosen representative is he so wishes. All discussions are initiated only if the chosen or ex officio lawyer is present."* In what concerns the quality and efficiency of the legal aid offered, members of the Public Ministry (R7) have stated that "*the situation is improving since the beginning."* Some judges (R2) believe that "*lawyers do not have the required knowledge, they confuse extradition procedures with EAW procedures."* Attorneys (R12) have a nuanced position, stating "*the quality and efficiency is determined on a case by case basis. If it is a case of ex officio representation, the quality is poor, in some cases, extremely poor. Most of the cases are so. Maybe it would be recommended that the National Bar Union of Romania should train specialists in this area."*

Access to documents, translation and the right to information

Regarding the right to interpretation and translation, Article 104 paragraph 3 of *Law CJIMP* provides that *the arrested persons on the basis of EAW who does not understand or does not speak the Romanian language, has the right to an interpreter, free of charge, ensured by the judicial body.*

In what concerns the right to information, according to Article 104 paragraph 1 of *Law CJIMP, the arrested person has the right to be informed about the content of the EAW* from the very moment when he or she is arrested.

Regarding the access to documents, this right is enshrined for the entirety of the procedure, according to the general provisions of the Article 94 of the CPP.

Concerning the right to information, lawyers (R11) believe that "*the short time period and the lack of knowledge on comparative law leads to decisions made by persons of interest with no real knowledge."*
When asked about translations, as a prosecutor (R7), the answer was that "*the quality of translations is sometimes problematic. The reason is that there is a lack of academic and judicial English. Sometimes, for us, as prosecutors, it is easier to translate than it is for a translator. As such, the quality is not the best, but it could be overlooked, since the misinterpretation, regularly, does not pose importance."* Another prosecutor (R6) emphasized that "*every person that arrives in front of me with an EAW received the written translated note regarding his right and he informs himself from over there."*
Judges (R1) believe that "*the main problem with translations relate to the time frame, especially in holiday seasons and during the weekend. Moreover, courses should be organized for legal English."*
As a final note (R11), advocates consider that "*without a multilingual dictionary that can give nuances to concepts, translations cannot include the subtleties that are present in each legal system when dealing with such concepts."*
Regarding the information that is provided to convicted persons, for a judge (R4), "*within the EAW, there is a letter of rights which must be signed in front of a judge, based on the model annexed to the Directive and further refined with some information with regard to the*

principle of speciality."

Right to be heard

The requested person for the enforcement of an EAW issued for the execution of a sentence has the right to be heard in Romania. This right stems from *Law CJIMP*, which states, in Article 103 paragraph 7 that *if the requested person does not consent to his surrender to the issuing judicial authority, the procedure for executing the EAW continues with the hearing of the requested person, which is limited to recording its position, to identify whether a mandatory or optional non-execution ground is incident, as well as possible objections of the person regarding his or her identity.*

Also, according to Article 103 paragraph 10 of *Law CJIMP*, *in all cases, the custody measure for surrender may be taken only after hearing the requested person in the presence of a lawyer.*

A general finding of the empirical research shows that the right to be heard is effective only when it comes to the identity of the requested person or the existence of a ground of refusal. Other than that, taking into account the specificity of the EAW procedure, the right at hand is not as extensive as in the common procedures.

b) Grounds for non-execution of an EAW for the purpose of executing a custodial sentence or detention order

When deciding whether to execute or not the EAW, the authorities have to take into account the grounds for non-executing.

Mandatory ('shall refuse')

According to Article 98 paragraph 1 of *Law CJIMP*, the mandatory grounds for non-execution in our legal system consist of the following:

a) When, according to the available information, it appears that there is a final judgment for the same acts given by a judge of a Member State, other than the issuer, under the condition that, in case of conviction, the sentence has been served or is at the time in being served, or the enforcement of the sentence is statute-barred, the penalty was pardoned, the crime was amnestied or there is another reason that prevents execution under the law of the sentencing State;

b) When the crime that the EAW is based on is covered by amnesty in Romania, if the Romanian authorities, according to the Romanian legal provisions, have the jurisdiction to prosecute the crime in question;

c) When, in accordance with the Romanian legal provisions, the person subject to an EAW is not criminally liable due to his age for the facts underlying the warrant.

Apart from these grounds provided by law, the legal literature[23] shows that in the case law there are some more mandatory implicit grounds for refusal. These are treated as veritable refusal grounds, taking into account that the court deciding upon the EAW has only three possible solutions: execution, postponement and refusal. The request to execute an EAW cannot be declared inadmissible according to the Romanian procedure. As such, the court shall refuse the execution of an EAW when:

- the conditions of issuing an EAW are not met (for instance, the penalty does not meet the requirements set in the FD);

[23] See Ioana Cristina Morar, *Cooperarea judiciară internațională în materie penală* (Hamangiu 2014) 67.

- the requested person is not currently in the executing state;
- the requested person in the EAW is not the same as the person the issuing state is looking for;
- the EAW is revoked by the issuing state.

Optional ('may refuse')

According to Article 98 par. 2 of Law no. 302/2004 on international judicial cooperation in criminal matters, the optional grounds for non-execution in our legal system consist of the following:

a) when the committed offence requires double criminality and this condition is not met[24];

However, in relation to taxes or duties, customs and exchange, the execution of the EAW shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules regarding taxes, duties and customs and exchange regulations as the law of the issuing Member State.

b) When the person subject of the EAW is being prosecuted in the executing Member State for the same act the EAW is based on;
c) When the EAW has been issued for the purpose of executing a custodial sentence or a security measure of deprivation of liberty and the requested person is a Romanian citizen or lives in Romania and has an uninterrupted legal residence in Romania for a period of at least 5 years and he or she refuses to serve the sentence or security measure in the issuing Member State;
d) When, according to the available information, it appears that there is a final judgment, for the same acts, given by a judge of a state which is not member of the EU, under the condition that, in case of conviction, the sentence has been served or is at the time in being served, or the enforcement of the sentence is statute-barred, the penalty was pardoned or the crime was amnestied according to the legal provisions of the sentencing State;
e) When the EAW relates to offenses which, according to the Romanian legal provisions, were committed on the territory of Romania;
f) When the EAW includes crimes that have been committed outside the territory of the issuing State and the Romanian law does not allow prosecution of those acts when they were committed outside the Romanian territory;
g) When, according to the Romanian legislation, the prescription of the criminal liability intervened or the enforcement of the sentence was statute-barred, if the crimes were to be judged by the Romanian authorities;
h) When a Romanian judicial authority has decided either to waive prosecution or to pronounce a dismissal solution for the crime underlying the EAW or has given a final judgment against the person mentioned in the EAW for the same acts, which prevents further proceedings;
i) When the convicted person did not show up in person at the trial, unless the issuing judicial authority informs that, in accordance with the legislation of the issuing State, there is an exception from the rule of personal presence[25].

[24] It has been shown in the legal literature that this ground is also applicable for the listed offences, if the penalty provided by the law is less than 3 years inprisonement. See Streteanu, Nițu (n 7) 226.

[25] This non-execution ground is not incident in the situation in which the person was summoned personally or informed via a representative competent according to the national law of the issuing State of the time and place of the proceedings which resulted in the judgment being rendered *in absentia*, or in the situation in which the person has indicated to a competent authority that he or she does not contest the case.

Regarding the interpretation of the term 'optional' in Article 4 of the FD, the Romanian judicial authorities have implemented all the grounds for optional non-execution of the EAW set by the FD.

Magistrates believe that there are several main grounds for refusal in the praxis. R3 states: "*As a first main reason, the solicited person requests that the judgement be recognized and the sentence be executed in Romania, when the EAW has been issued for executing a custodial sentence or a security measure involving deprivation of liberty, whether the requested person is a Romanian citizen or lives in Romania and has an uninterrupted legal residence in Romania for a period of at least 5 years and he or she refuses to serve the sentence or security measure in the issuing Member State. The second reason is that the solicited person is not present in Romania."*

When deciding whether to execute the EAW or not, the Romanian authorities have the possibility to solicit further guarantees. According to Article 97 paragraph 1 point a) of *Law CJIMP*, if the EAW has been issued for the purpose of executing a custodial sentence or a security measure of deprivation of liberty imposed by a decision rendered *in absentia*, if the person concerned was not summoned or informed in any other way about the date and place of the hearing which led to the decision rendered *in absentia*, the surrender of the requested person will be granted only if the issuing judicial authority guarantees that the person subject to an EAW has the opportunity to obtain a retrial in the issuing Member State, in his presence. Furthermore, according to Article 97 paragraph 1 point b) of the said law, if the offense under which the state issued the EAW is punishable by life imprisonment or by a measure involving deprivation of liberty for life, the law of the issuing Member State must guarantee a way in which the person can solicit the review of the penalty or security measure applied. Other solutions may consist of conditional release (parole) after effectively serving 20 years in prison or of the application of some measures of clemency.

It becomes clear, from all the conducted interviews, that the Romanian courts are inclined to execute all the EAWs if one of the mandatory refusal grounds is not applicable.

As an example, a judge (R5) stated that "*Romania is a model in this regard. The reason is that it does not regularly refuse to execute the EAWs."* Another judge (R3) – with 3 years of experience in the field – said that he never refused to execute an EAW and will not do so in the future, except for the case when the issuing authority retracts it. He stated that "*I even sent a mother with a recently born baby (2-3 weeks) in Spain. I didn't postpone the execution, as it didn't concern me. She could have left the child with a relative while she was taking care of her criminal affairs in Spain.*" A prosecutor (R7) affirms, "*we never had issues in executing EAWs – that is how we were taught, that in relation with other states we should do all that we can in order to collaborate efficiently and fairly, that we should cooperate. If fundamental rights infringement is not a concern and the formal and substantive requirements are met, the EAWs are executed."*

c) What role do (possible) fundamental rights violations have in the decision to issue or execute an EAW?

In addition to the grounds for non-execution provided for in FD 2002/584, in matters of EAW, the Romanian legislation or case law does not allow for a general ground for refusal or suspension based on fundamental rights. Most probably, the Romanian legislator has taken into account the level of harmonization existing between European countries and considered that a general ground for refusal or suspension based on fundamental rights is not needed.

In practice, as a general rule, only the grounds of refusal or postponement provided by the national legal framework seem to be taken into account. Almost all the interviewees stated

that they do not know any example of a refusal of the execution of an EAW due to violations of fundamental rights. In this regard, a prosecutor (R6) stated ”*no Member State can question the correct application of EU law in another country, so such cases should not exist”.*

With concern to the creation in the national legal framework of a ground for refusal for the execution of an EAW on the basis of a breach of a specific right in another MS, the opinions of the interviewed specialists vary. The majority believes that it would be useful. With concern to the creation of a ground for refusal for the execution of an EAW / transfer on the basis of a breach of fundamental rights (in general) in another MS, the majority stated that a general ground for refusal of executing an EAW / transfer order in light of fundamental rights breaches in another MS would be too general.

For a judge (R3), ”*this ground for refusal should be organized as optional.”* According to a lawyer (R12), ”*such a ground could prove useful especially with regard to the right to a fair trial.”* Another judge (R5) believes that such a ground for refusal *”should not exist. The reason is that the ECHR is already applicable, so it would have no sense.”* Another lawyer (R11) considers that ”*as a citizen, you feel more protected by your own state if such a ground for refusal would exist. At the same time, it is true that the existence of such a reason for refusing the execution would infringe on the logic of mutual recognition.”*
In what concerns prosecutors (R6), some believe that ”*such a ground for refusal should not exist, since the system of international cooperation in criminal matters on the basis of the EAW is constructed on the principle of mutual recognition. As such, alleged violations concerning infringements of fundamental rights would destroy this system, turning cooperation back in time, 10-15 years, creating safe havens for criminals and so on.”*
Another judge (R2) presented the issue *as ‘being a disaster’. ”The problem, in my view is that our legal frameworks needs to be clear. If such a ground would exist, the floodgates would be open and every judge could decide on a case by case basis, with no predictability. So it’s a no, with a capital N. Us magistrates, do not refuse the execution of an EAW unless exceptional circumstances are present. Our own feelings regarding the fairness of a different legal system should not weigh in the decision that we make, when executing an EAW.”*

Past violations

The Romanian legal system provides for the possibility of non-execution of an EAW because a violation of a specific fundamental right has occurred in the issuing country. According to Article 97 paragraph 1 point a) of *Law CJIMP*, if the EAW has been issued for the purpose of executing a custodial sentence or a security measure of deprivation of liberty imposed by a decision rendered *in absentia*, if the person concerned was not summoned or informed in any other way about the date and place of the hearing which led to the decision rendered *in absentia*, the surrender of the requested person will be granted only if the issuing judicial authority guarantees that the person subject to an EAW has the opportunity to obtain a retrial in the issuing Member State in his presence, as provided by the FD.

So, in this case, the Romanian legislation pays a particular attention to the violation of the fundamental right of having a fair trial, which stems from Article 6 of the ECHR. Regarding our national case law, there are some (singular) court decisions[26] in which the execution of an EAW was refused, because of the past violations of the right to fair trial.

[26] See Sentence 79/2013 issued by Cluj Court of Appeal, unpublished. The Court invoked the breach of article 6 of the ECHR, consisting in the fact that the Spanish judicial authorities seemed to not respect the right to a fair trial of the requested person. One of the arguments for this ruling points out the fact that the Spanish authorities stated that the requested person shall be subject to a penalty of 11 years imprisonment, despite the fact that she was never heard in front of the judge during the trial in Spain, which was still ongoing, and so the presumption of innocence was infringed.

However, they exceed the scope of our research due to the fact that they do not concern EAWs issued for execution of custodial sentences.

When it comes to the trust of the Romanian authorities in the past protection of fundamental rights in other member states, we cannot draw a general conclusion from the empirical research, as the opinions vary.

For a judge (R4), the answer to the question whether doubts exist with concern to the protection of fundamental rights is 'yes'. "The Hungarian authorities used to issue EAWs without a national arrest warrant and the Spanish authorities used to issue EAWs based on a simple peremptory writ. I do lose faith in such situations." Some prosecutors (R7-R9) have stated that "no, I do not have doubts in this regard, especially since Member States are parties to the ECHR and they have obliged themselves to respect human rights." In one case, the prosecutor (R6) stated the following: "since I am a specialist in EU law, I always think about the political criteria of Copenhagen. As such, when new states join the EU, it is assumed that they have been checked on whether fundamental rights are respected. From this point of view, I never had doubts, since I know that every Member State is a party to the ECHR. In general, I cannot have presumptions, prejudices and doubts. The sole situations where such doubts exist are those in which I felt that fundamental rights were infringed. As an example, a couple of years ago, in Spain, several EAWs were issued, which in fact were simply disguised peremptory writs." When lawyers were asked, some answers (R10, R13) were that "I do have doubts, especially concerning the justice system in Hungary."

Violations of procedural safeguards

In our national legislation, there is no specific general ground for non-executing an EAW or suspension of its execution due to a violation of procedural safeguards in the course of the EAW proceedings.

Risk of future violations

Unfortunately, the national legislator was not very concerned to provide solutions to prevent future violations of the fundamental rights. The only relevant legal provision in terms of future violation risks is to be found in Article 97 paragraph 1 point b) of *Law CJIMP*. Our legal system provides for the possibility of subjecting execution of the EAW to the condition that a person convicted with life sentence may ask for a review of the penalty, as provided by the FD. According to the text, if the offense under which the EAW is issued is punishable by life imprisonment or a measure involving deprivation of liberty for life, the law of the issuing Member State must provide for the review of the penalty or security measure applied or release on parole after serving 20 years of his sentence or detention order, or the application of measures of clemency. As far as we know, in the situations in which Romania is the executing Member State there are no examples of refusal or suspension of an EAW due to prison conditions in the issuing country. Anyway, prison overcrowding and pure prison conditions are systemic problems in our country. Probably, this is one of the reasons for Romania not refusing or suspending the execution of an EAW due to prison conditions in the issuing state.

The participants interviewed (R1-R13) could not provide examples of refusal or suspension of an EAW due to the prison conditions in the issuing country. It thus results that courts in Romania do not consider this situation, even after the decision of the CJEU in the Căldăraru case.

The Romanian national legal system does not provide for the possibility to refuse the execution of an EAW because the requested person's fundamental rights might be violated by the issuing state after he is surrendered.

3.2. FD 2008/909

a) Safeguards for the convicted person

Access to lawyer

In Romania, in the transfer proceedings, the convicted person has the right to access a lawyer. In contrast to the special provision included in the *Law CJIMP* that guarantees the right to access a lawyer in the EAW proceedings, in the case of transfer proceedings, we consider that this right stems from the general grounds provided for in the CPP, in Article 89 to 92. These general grounds address only to the situation when Romania receives a judgment given in another Member State.

One interviewed prosecutor (R7) stated, "*in what concerns the right to access to a lawyer, Law. no. 302/2004 does not give a clear solution. The practice was divergent, some courts considering that a lawyer should be made available, while others, the opposite. The Supreme Court decided the issue and stated that access to a lawyer needs to be provided. If a lawyer is not chosen by the defendant, it is a case of mandatory legal representation and a counsel will be appointed."* When asked about this issue, a convicted person (R14) responded, "*in the transfer procedures from Spain, I had a lawyer in Romania, paid by my family. He lied to me, being specialized in civil cases. I was told that the days I worked in Spain would be recognized when deciding my request for parole. After the transfer, I found out that this is not the case and I must execute two more years when compared to the time I would have had to serve in Spain."* Faced with the same question, a judge (R1) unequivocally stated, "*access to a lawyer must be granted."*

Regarding the quality of the legal aid offered in Romania in the transfer proceedings, as a judge (R5), "*I believe that magistrates certainly have enough knowledge in the area. Concerning attorneys, from my own experience, I can say that only 30% know such aspects of the legal system. However, even with limited knowledge, they make due."* As an advocate (R12)*, "I believe that legal assistance is just formal. At the same time, much you cannot do, given the legal framework."*

Access to documents, translation and the right to information and opinion of the convicted person to the transfer

In what concerns the access to documents, translation and the right to information, there are no specific legal provisions. According to Article 154 paragraph 2 of *Law CJIMP*, during the judicial proceedings, *the court takes a decision, in the council room, without summoning the sentenced person.* However, the CPP is applicable as *lex generalis.* This means that the convicted person will enjoy the right to have acces to the file according to Article 94 of the CPP and will also have the right to obtain a translation, according to Article 83.

Regarding the opinion of the convicted person to the transfer, as we have shown before, the sentenced person has to agree to serve the sentence in Romania. The agreement thereof is not necessary when the sentenced person is a Romanian national and they reside in Romanian territory or, although not residing in Romanian territory, they shall be expulsed to Romania.

Regarding the right to information, as a convicted individual (R14), "*I felt poorly informed both by the contracted counsel and by the consular representatives. If I knew the conditions of detention in Romania and the moment when I would be eligible for parole, I would not have agreed to the transfer."* Regarding the translation, as a prosecutor (R8), "*I must say that the*

translators and interpreters that we work with are proficient, but in other states, in some cases, the translations are done as if only google translate was used."
As a prosecutor (R9), "*I must say that in case of transfer, the Ministry translates the documents. The translated documents are the certificate, the notification and the judgement, in a short version. This is a problem, since in some situations, we need the judgement in extenso, in order to calculate the sentence and if the recognition is only partial in nature. In what concerns the quality, a problem does exist because the concepts used need to be precise. This is valid especially when a dismissal or another form of applying the sentence is decided. There are situations when translations were redone by our experts, so that all the relevant aspects become clear."* Another prosecutor (R7) considered that *"the Member States that transposed the Framework Decision believing that the Certificate will have all the required information within, can consider that it is sufficient to send only a short version of the judgment. At the same time, the judges concerned with the execution of the EAW can ask for more information, but this would endanger the passing of the 30 days' deadline."*
As a judge (R5), "*I must say that problems have occurred in many instances, especially right after 2007. Now, things are better, mainly because translators have learned a few new tricks."* Another judge (R4) stated, "*all documents are translated in Romanian. We would like to have official languages in the proceedings, but I believe that more time needs to pass in order to achieve this level of harmonization."*

Right to be heard

Unfortunately, in matters of transfer, the Romanian legislation does not provide for a particular right for the convicted person to be heard before the transfer takes place. According to Article 154 paragraph 2 of *Law CJIMP*, during the judicial proceedings, *the court takes a decision, in the council room, without summoning the sentenced person.*

This provision also implies an exception, which is activated if the person is in Romania. According to Article 160 paragraph 2 of *Law CJIMP*, *the court takes a decision, in the council room, summoning the convicted person.* As it can be seen, the right to be heard is not specifically provided, only the right to be present in the proceedings. However, the Romanian courts interpret this Article as also enclosing the right to be heard.

When asked about the possibility of being heard after filing a request if present in the executing country, a prosecutor (R7) responded, "*Law no. 302/2004 on international judicial cooperation in criminal matters provides that judicial authorities are obliged to inform the person concerned about the time and date of the hearing, but it does not impose that the actual hearing must take place. However, the person must be informed of the procedure."*

b) Consent of the executing state

According to Article 169 of *Law CJIMP*, **the consent of the executing state is not required** if the sentenced person has the citizenship of the executing state and:

(i) their domicile or permanent residence is in the executing State, including if the sentenced person returned or took refuge to that domicile or to that residence, following the criminal proceedings pending in Romania or because of the court decision ruled in Romania; or
(ii) they have been expulsed to the executing State, after having served another custodial sentence or measure involving deprivation of liberty, in reliance upon an expulsion decision or an interdiction to residence;

On the other hand, the recognition and execution of a court decision rendered by a Romanian court may be requested of another Member State of the EU, **subject to the consent of the**

executing state, if the sentenced person do not have the citizenship of the executing State, but has had continuous and legal residence in the territory of that State for at least 5 years and does not forfeit, following the conviction, the right of permanent residence; or , they have a very close connection with the executing State, and execution of the court decision in that State is likely to facilitate their rehabilitation and social reintegration.

c) Interplay with the FD EAW

According to Article 98 paragraph 3 of *Law CJIMP*, when the EAW has been issued for the purpose of executing a custodial sentence or a security measure of deprivation of liberty and the requested person is a Romanian citizen or lives in Romania and has an uninterrupted legal residence in Romania for a period of at least 5 years and he or she refuses to serve the sentence or security measure in the issuing Member State, the executing Romanian judicial authority shall request the issuing judicial authority to deliver a certified copy of the sentencing decision, as well as any other necessary information, informing the issuing judicial authority in relation to the purpose for which such documents are requested. The foreign penal decision shall be recognized, incidentally, by the court of law before which the procedure for executing the EAW is pending. This means that the rules implementing FD 2008/909 become applicable when the ground for optional non-execution based on Article 4(6) of the FD 2002/584 is activated.

d) Exceptions to mutual recognition (situations when the executing state may refuse to accept the transfer of a convicted person)

Article 151 of *Law CJIMP* provides for the grounds for refusal. The Romanian legislator did not provide an exception to mutual recognition when the certificate is incomplete or inappropriate, as provided by Article 9 (1) a) of the FD. However, in our opinion, this will be considered by the courts as a mandatory implicit ground for refusal[27]. In what concerns the manner in which Article 9 (1) b) of the FD was transposed, the relevant legal provisions are to be found in Article 166 of *Law CJIMP*. As such, any person sentenced in Romania may request directly or by means of the delegated judge for the execution of custodial sentences, appointed for the prison where the person is detained, the initiation of the procedure for delivery to the executing State of the Romanian court decision and of the certificate, if subject to one of the following instances:

a) they are nationals of the executing State and live in its territory; or
b) they are nationals of the executing State, do not live in its territory, but will be expulsed in that territory; or
c) they do not fall under any of the instances referred to in sub-paragraphs a) and b), but they want to be transferred to the executing State.

Moreover, if the sentenced person has citizenship of two Member States of the EU, and also when they live in the territory of a State other than the one whose national they are, they shall specify in the request to which of the two States they wish to be transferred. The court decision and the certificate shall be delivered to only one executing State, and only once. From these provisions we can conclude that the person must either be in the issuing or executing state before a judgment can be forwarded. We must also mention that the ground provided by Article 9 (1) l. was not implemented in the national law.

The mandatory grounds for non-recognition and non-enforcement in the national law are the following:

[27] There is no case law or literature regarding this aspect, but we conclude that this is the only solution. See *mutatis mutandis* the discussion regarding the implicit grounds for refusal of an EAW.

a) When person has been sentenced for the same offenses in Romania and the sentence is final. Although, if the foreign judgment has been given for other offenses too, the court may order the partial recognition of it, if the other conditions are accomplished;

b) When the person has been convicted in another Member State for the same offenses, and the foreign judgment in this state has been previously recognized and enforced in Romania;

c) When there is immunity under the Romanian Law, which makes it impossible to enforce the sentence;

d) When the penalty was imposed on a person who is not criminally liable under the Romanian criminal law;

e) When the penalty is a measure of psychiatric or health assistance that can not be enforced in Romania or, where applicable, provides for medical or therapeutic benefits that can not be supervised in Romania, in accordance with the national legal or healthcare system;

f) When according to the Romanian criminal law, the enforcement of the sentence is statute-barred;

g) When the convicted person did not appear in person at trial, unless the issuing State informs that in accordance with its legislation:

(i) The person has been faithfully acknowledged, in time, by summons in writing delivered personally or upon receipt by telephone, fax, e-mail or any other similar ways, about the day, month, year and place of the hearing and the legal consequences in case of default; or

(ii) The person having knowledge of the day, month, year and place of the hearing, mandated his chosen lawyer or the one appointed *ex officio* to represent him and that legal representation before the court was effectively assured by the lawyer; or

(iii) After being personally served the sentence and being faithfully acknowledged that the decision is subject to appeal, during which the competent court may examine the judgment under appeal including on the basis of new evidence and that, following the resolution of the appeal, judgment that he or she may attend in person, the sentence can be broken, the convicted person either expressly waived the appeal or did not declared it within the period prescribed by the law.

Also, taking into account all the circumstances of the case and after consulting the competent authority of the issuing State, the court may refuse (optional grounds) to recognize and enforce the judgment transmitted by the issuing State if:

a) The person is prosecuted in Romania for the same offense for which he was convicted abroad. Although, if the foreign judgment has been given for other offenses, the court may order the partial recognition of it, if the other conditions are accomplished;

b) The issuing State has refused an application sent by the Romanian authorities under Article 158 par. (1) of *Law CJIMP* [this refers to the principle of speciality as a refusal ground, as Article 158 references Article 157 of the same legislative piece]

Regarding the double incrimination issue, Romania has made a declaration, notified to the General Secretariat of the Council, that it will not apply Article 7 paragraph 1. As such, Article 155 of the *Law CJIMP* only provides a general rule of existence of double criminality, in order to recognize and enforce a foreign judgment, without setting any exceptions.

e) What role do (possible) fundamental rights violations have in the in the FD 2008/909?

Besides the grounds for non-recognition and non-enforcement, the Romanian legislation or case law does not allow for a general ground for refusal or suspension based on fundamental rights.

All the interviewed specialists (R1-R13) stated that they did not encounter situations in which refusal of transfer became apparent in light of fundamental rights violations. A prosecutor (R6) for example, stated that ”*the Romanian Supreme Court has transmitted through numerous judgements that the decisions pronounced abroad, as per the criminal policy of Romania, should be recognized unconditionally, if the sentence is to be served in Romania.”*

Past violations

There is no specific legal provision in *Law CJIMP* concerning this matter of fact.

Violations of procedural safeguards

Romania does not provide for the possibility of non-recognition and non-enforcement of a judgment or suspension in matters of transfer. There is no special legal provision to indicate how the issue of procedural safeguard is addressed whether a violation is occurring in the issuing or in the executing Member State.

In our opinion, in this case, the general provisions of the CPP will be applicable.

Risk of future violations

The Romanian legal system does not provide for the possibility of non-recognition and non-enforcement if there is a concrete risk that a violation of fundamental rights may occur in the issuing country. An important aspect, which should be taken into account, is whether the executing state will be the most suited place for the convicted person social reintegration and rehabilitation. In our opinion, the right to family life could represent a guideline for the competent authorities.

3.3. FD 2008/947

a) Safeguards of the convicted person

Access to lawyer

According to the Romanian legislation, a legal obligation to provide legal representation to the person during the proceedings involving mutual recognition of judgments and probation decisions does not exist. Even if we cannot talk about such obligations, this fact is a basic right provided for the sentenced person according to the general grounds that exist for legal representation in the Romanian criminal law, especially those existing in the CPP.

Access to documents, translation and the right to information

In order to inform the sentenced person on issues relating to the application of the FD, the court shall rule upon the request in closed session, summoning the convicted person and the probation service. In all cases, as a general rule, at the request of the sentenced person, the recognition of the judgment may be required to a Member State other than that in which the sentenced person is lawfully and ordinarily resident if the conditions set out are accomplished and the executing State has agreed to take over, on its territory, the enforcement of the probation measures imposed by the Romanian court. In order to establish the link with the executing State in which the sentenced person is seeking enforcement of probation measures set out in its task, the executing court or the probation service may require the person convicted, ex officio or based on the application of the executing State, a submission of supporting documents. In conclusion, there is an obligation to provide to the concerned person the information on the possibility to be transferred to the Member State in which the sentenced person is lawfully and ordinarily residing.

In order to recognize and enforce the judgment, the competent authority of the issuing State transmits the court in whose jurisdiction the person lives or will live the following documents, translated into Romanian:

a) A specific certificate completed according to the model shown in Annex. 9 of *Law CJIMP*;

b) The rule of court by which probation measures or alternative sanctions were established;

c) The probation decision by which probation measures were established, when they exist;

d) The person's statement of its intention to return or settle down in Romania in the next 30 days from the date of the statement, if the sentenced person is located in the issuing State;

e) Any other documents filed by the person with the authority of the issuing State.

Right to be heard

As we previously stated, in order to ensure that the consent of the sentenced person is given, to recognize and enforce the judgment, the competent authority of the issuing State must send to the court in whose jurisdiction the person lives or will live the person's statement of its intention to return or settle down in Romania in the next 30 days from the date of the statement, if the sentenced person is located in the issuing State, statement that must be translated into Romanian language. After the transmission of this statement, the presiding judge of the court shall fix the date for examining the application for admission. In order to inform the sentenced person on issues relating to the application of the FD, the court shall rule upon the request in closed session, summoning the convicted person and the probation service. Judging by these legal provisions, it is clear that the convicted person has the right to be heard by the court before a decision is made.

b) Double incrimination, exceptions to mutual recognition and other limitations concerning the decision to recognize

Romania made use of the possibility granted by Article 10 paragraph 3, therefore the recognition of the judgment or probation decision is always subject to a double criminality check. The grounds for refusing recognition and supervision are to be found in Article 170^{21} of *Law CJIMP*. All the grounds provided in Article 170^{21} of *Law CJIMP* are mandatory. So, the term ‘may’ in Article 11 of the FD was interpreted in the Romanian legal system as a general legal basis to provide mandatory grounds for refusing recognition and supervision. These grounds are the following:

a) When the person was convicted for the same offenses in Romania and the sentence is final. Although, if the foreign judgment has been given for other offenses, the court may order the partial recognition of it, if the other conditions are accomplished;

b) When the person has been convicted in another Member State for the same offenses, and the foreign judgment in this state has been previously recognized and enforced in Romania;

c) When there is immunity under the Romanian Law, which makes it impossible to enforce the sentence;

d) When the penalty was imposed on a person who, due to his or her age is not criminally liable under the Romanian criminal law;

e) When the penalty is a measure of psychiatric or health assistance that cannot be enforced in Romania or, where applicable, provides for medical or therapeutic benefits that cannot be supervised in Romania, in accordance with the national legal or healthcare system;

f) When according to the Romanian criminal law, the enforcement of the sentence is statute-barred;

g) When the convicted person did not appear in person at trial, unless the issuing State informs that in accordance with its legislation:

(i) The person has been faithfully acknowledged, in time, by summons in writing delivered personally or upon receipt by telephone, fax, e-mail or any other similar ways, about the day, month, year and place of the hearing and the legal consequences in case of default; or

(ii) The person having knowledge of the day, month, year and place of the hearing, mandated his chosen lawyer or the one appointed ex officio to represent him and that legal representation before the court was effectively assured by the lawyer; or

(iii) After being personally served the sentence and being faithfully acknowledged that the decision is subject to appeal, during which the competent court may examine the judgment under appeal including on the basis of new evidence and that, following the resolution of the appeal, the judgment that he/she may attend in person, the sentence can be broken, the convicted person either expressly waived the appeal or did not declared it within the period prescribed by the law;

h) When the length of the term of surveillance or the duration of the probation measures or of the alternative sanctions or the time remaining until their expiration are less than 6 months or 60 hours in case of community service work.

The Romanian law does not specifically provide that the consent by itself of the person concerned to the execution of the probation measure in another Member State is indispensable to issue the transfer decision and to recognize it, but it provides, in Article 170^19 paragraph 2 point d) of the *Law CJIMP*, that a general condition of recognition is that the convicted person is in the issuing State and wishes to return or settle down in Romania or is already situated in Romania, and:

(i) He/She has Romanian citizenship and lives or will live in Romania; or

(ii) He/She does not have Romanian citizenship, but either has a right of residence or of staying in Romania under the Romanian law conditions or is a family member of a Romanian citizen or of a person having the right of residence or staying in Romania or brings proofs that he/she will carry a gainful activity, education or training in Romania.

Where the probation measure, the alternative sanction or the probation period has been adapted because its duration exceeds the maximum duration provided for under the law of the executing State, the duration of the adapted probation measure, alternative sanction or probation period shall not be below the maximum duration provided for equivalent offences under the law of the executing State. The adapted probation measure, alternative sanction or probation period shall not be more severe or longer than the probation measure, alternative sanction or probation period which was originally imposed.

c) What role do (possible) fundamental rights violations have in the FD 2008/947?

The Romanian legislation or case law does not allow for a general ground for refusal or suspension based on fundamental rights.

Past violations

The Romanian legal system provides for the possibility of refusing recognition and enforcement because of violation of fundamental rights has occurred in the issuing country. According to Article 170^{21} point g) of *Law CJIMP*, a judgment given in another Member State of the EU will not be enforced if the convicted person did not appear personally in court (there are some legal exceptions from this provision, though). So, in this case, the Romanian legislation pays a particular attention to the violation of the fundamental right of having a fair

trial, which stems from Article 6 of the ECHR. Regarding other fundamental rights, there is no specific legal provision.

Violations of procedural safeguards

There is no special legal provision to indicate how the issue of procedural safeguard is addressed whether a violation is occurring in the issuing or in the executing Member State. In our opinion, in this case, the general provisions of the CPP will be applicable.

Risk of future violations

The Romanian legislation does not provide a specific provision for this matter of fact. It appears that the national legislator was not very concerned to provide solutions to prevent future violations of the fundamental rights. However, one of the grounds for refusing recognition and supervision consists of the situation when the judgment or, where applicable, the probation decision provides for medical/therapeutic treatment which Romania is unable to supervise in view of its legal or health-care system. If we were to interpret this ground in a teleological way, we could say that its purpose is to prevent the future violation of the right to health. This type of situation was interpreted by the ECtHR as a degrading treatment.

Other further empirical findings

A first empirical finding that is not necessarily linked to the scope of the research concerns the fair treatment in Romanian prisons. A Romanian convicted person, serving a 12 years sentence in Spain, was transferred in a Romanian prison at the request of an attorney hired by his family. Having seen both the detention conditions in Spain and Romania, he deeply regrets his decision, which he considers was an uninformed one in what concerns the quality of his life, which dramatically dropped in the Romanian prison system.

A Romanian convicted person (R14) admitted that ”*in Romania, in all requests made in the penitentiary, (even a request for buying food), the offence committed must be mentioned. As such, in my case, the deed is a delicate one, which puts me in a position of inferiority. I consider that a change needs to be made.”*

Some other empirical findings can be linked to the necessity of reviewing the legal framework in what concerns the translation, in order to speed up the procedures.

A prosecutor (R6) admitted that: ”*an old critique of mine refers to the moment of the translation of the EAW. I consider that the legal framework needs to be changed, so that when an EAW is issued, a translation must be done in the language of the state which the person is a citizen of. Of course, specialists within the EU say that this is impossible, since the person may be caught on the territory of another Member State. What is forgotten though, is that the probability of that person to speak the language of the State of citizenship is immense, 99%. In the case of Portugal, for example, where there are 0% minorities, you know ab initio that you will need this translation, regardless of where the person will be caught. As such, I believe that such a step would not provoke extraordinary expenses and it would reduce the length of the execution of the EAW.”*

Last but not least, we discovered that some factors that are not supposed to be relevant when deciding to make a reference for a preliminary ruling at the ECJ are taken into account by some judges. For instance, a respondent (R2) admitted that they are ”*reluctant to make a reference for a preliminary ruling at the ECJ if the person concerned is arrested, since the procedure must be suspended.”*

In sum: how legal reality relates to the empirical conclusions

A first observation regards mutual recognition and mutual trust. This principle is expressly guaranteed by the provisions of the *Law CJIMP* and is also recognized in the judicial literature – closely followed by the praxis. We can even conclude that the Romanian courts show a "blind trust" in regard to the judgments of other EU Member States. It becomes clear, from all the conducted interviews, that the Romanian courts are inclined to execute all EAWs if one of the mandatory refusal grounds is not applicable. For instance, a judge said that he never refused to execute an EAW and will not do so in the future, except for the case when the issuing authority retracts it. With regard to FD 2008/909, a respondent showed that the procedure is almost automatic when it comes to reconizing and enforcing a sentence regarding a Romanian citizen. In what concerns FD 2008/947, the interviewees said that, up until this point, there is no case-law whatsoever, but they hope that this will change soon.

Secondly, in matters of judicial cooperation, the Romanian legislation does not allow for a general ground for refusal or suspension based on fundamental rights. The national legal framework is fairly close – in what concerns the grounds for refusal – to the ones provided in the three FDs. Empirical research shows that only the grounds of refusal or postponement provided by the national legislation are taken into account by the courts. This is probably the reason for the lack of case-law on the matter at hand. The participants interviewed could not provide examples of refusal or suspension of an EAW due to violation of fundamental rights. Moreover, a prosecutor stated that "no member State can question the correct application of EU law in another member State, so such cases should not exist". This seems to be the general mindset of all the Romanian legal actors.

In what concerns the safeguards of the convicted person, the legal analysis shows that the national legal framework is aligned to the relevant EU provisions. However, according to the empirical research, there are some issues in praxis, when applying the national legal provisions. For instance, when it comes to acces to a lawyer, even if it this right is provided *in abstracto* by the law, *in concreto* some lawyers do not have the required knowledge, they confuse extradition procedures with EAW procedures. More so if it is a case of *ex officio* representation, when the quality is poor in most of the cases. A general finding of the empirical research shows that the right to be heard is effective only when it comes to the identity of the requested person or the existence of a ground of refusal. Another issue that became apparent through the empirical research is the quality of translations, which finally affects the right to information, alongside the short time period and the lack of knowledge on EU and comparative law of the legal actors, leading to decisions made by persons of interest with no real knowledge.