

## **PART V    COMPARATIVE ANALYSIS AND RECOMMENDATIONS**

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## 1. National legal frameworks transposing the analysed EU instruments

### 1.1. Mutual recognition and mutual trust in national legal orders

In a common AFSJ, it is essential to understand what happens to person after s/he has been convicted and has to serve a sentence. In particular, the identification of the Member State where s/he will serve such a sentence may have a decisive impact on her/his fundamental rights, and on her/his perspective of rehabilitation and reintegration into the society. The destiny of convicted persons in Europe, therefore, is in the hands on national authorities, and significantly depends on their approach to international cooperation. The EU legislator has provided national authorities with legal tools to ensure the transfer of prisoners, or the transfer of sentences, from one jurisdiction to another. These instruments are based on the mutual recognition principle, which in turn relies on the mutual trust between cooperating authorities. The way in which national legal systems and actors have absorbed such key EU principles, therefore, influence the functioning on judicial cooperation in that important area.

In this regard, already from a legal perspective, one can observe that the status of the principle of mutual recognition and mutual trust is different in the analysed national legal systems. In certain countries (RO) both principles are referred to in the legislation whereas in other countries (NL, IT) only mutual recognition has a legal basis. In certain countries (SE, PL) there is no official reference to either mutual recognition or mutual trust in the statutory texts, although it is mentioned in the preliminary work of the legislation implementing the FDs. By contrast, it should be mentioned that the principle of mutual trust and mutual recognition are referred to in the case law of the national courts in all the surveyed countries. In one State (PL), the constitutional court has even acknowledged the principle of mutual trust as the basis for more advanced forms of cooperation between the EU Member States, conditioned by the existence and protection of common standards of fundamental rights.

#### Empirical findings 1

##### ***Mutual trust or mutual skepticism?***

What has been legally decided – *e.g.* the fact that we trust other EU countries' national legal systems to be 'capable of providing equivalent and effective protection' of fundamental human rights – is not necessarily *felt* and *lived* by actors in the national legal systems. Mutual trust is a *legal* – and as such: constructed – reality, that may play havoc with the *actual* trust individual legal actors have in the conditions within the legal systems of other countries.

Judges in the NL (and, to a lesser extent in the IT) context have expressed doubts (and sometimes even distrust) rather than blind trust in other member states' legal systems or its particular conditions – for example concerning prison conditions in other member states being up to the national country's fundamental rights standards, or corruption playing too disruptive a role in legal procedures. Other countries, like RO, SE and PL, seem more rigid in applying mutual recognition based on mutual trust. Judges in these countries do trust other jurisdictions and will generally not (or are not willing to) verify whether fundamental rights are actually observed. They ask fewer questions about the requests and give clear priority to international cooperation running smoothly; mutual trust is thereby taken as a crucial and basic principle. Although the courts in the RO system, for example, in theory could refuse to execute an EAW, in praxis they prefer to clarify eventual inconsistencies with the issuing country, in order to respect the mutual trust principle. Although these countries, thus, show trust towards other countries, they do not always feel that trust to be mutual – the PL judges, for example commented that they felt distrust from other countries considering PL judiciary and protection of fundamental rights.

The existence of '**mutual skepticism**' in some countries causes legal actors in these countries to look for ways to address their scepticism or distrust. Thus, in the Dutch (NL)

context we see that lawyers increasingly make use of the possibility – that opened up after the *Aranyosi and Căldăraru*<sup>1</sup> case – to ask questions considering, for example, prison conditions in issuing states, therewith expressing doubts on the guaranteed respect for fundamental rights by other countries. These attempts to raise poor detention circumstances in the issuing State as an argument against surrender, however, are reported to be seldom successful (NL, SE). In SE, one respondent claimed that there is a one-sided focus on Article 3, and not enough attention for the Articles 6, 7 and 8 of ECHR as possible reasons to refuse an EAW.

Since the legal reality holds that mutual trust and mutual recognition are a fact, the threshold for proving a violation of fundamental human rights in European countries is high, and as perceived by legal actors in several countries (NL, SE, IT) may be too high. These developments can put the basic human rights of people subjected to an EAW under pressure.

For that reason (among others) IT defence lawyers plea for a better EU cooperation in this matter, and more particularly: for a network of EU defence lawyers. This could help them get the right information on, for example, prison conditions in the other State, in time. It would also help to follow-up on the defendant after he/she has been transferred, in order to check on eventual violations of his/her fundamental rights after transferal.

Although some countries' plea to commit to mutual trust and to prioritize international cooperation (RO, PL) can be underscored up to a certain point – after all, as a (RO) respondent lucidly put it, '*the existence of such a reason for refusing the execution would infringe on the logic of mutual recognition*'<sup>2</sup> (see RO report, p. 27) – we rather conclude from the empirical findings that 'blind trust', in the sense of: taking mutual trust for granted, impedes on the rights of people subjected to an EAW (as was poignantly exemplified by a judge commenting having transferred a mother with a 2-3 weeks old baby to the issuing country without further questions). On the other hand, one must also take into account that socio-economic inequalities and prejudice on certain countries' legal systems (or the conditions therein) may be at stake in some examples of skepticism.

## 1.2. Functioning of the EAW for execution

FD 2002/584/JHA was implemented in the five analysed Member States in the years following its adoption, not without facing some resistance in national parliaments due to possible conflicts with national constitutional principles concerning extradition and fair trial rights (e.g. IT). In PL, the Constitutional Court decided that the surrender procedure according to the EAW should be considered as a form of extradition and that it was necessary to amend the Constitution that prohibited the extradition of Polish nationals. RO implemented the FD since its adhesion to the EU. SE has a special regime for surrender proceedings with Denmark and Finland.

As regards the **issuing authority**, in several Member States every prosecutor is competent to issue an EAW. In SE this occurs since 2016, after an amendment adopted following the decision of the CJEU in *Poltorak*;<sup>3</sup> beforehand it was the police's task. In IT the prosecutor forwards the request to the Ministry of Justice, who takes care of the translation and the transmission to the foreign counterpart. On the other hand, the competent authority in RO is a

<sup>1</sup> Joined Cases C-404/15 and C-659/15 PPU *Aranyosi & Căldăraru*, Judgement of the Court (Grand Chamber) of 5 April 2016, , EU:C:2016:198.

<sup>2</sup> Another respondent in the same report formulated it even stronger, referring to the situation before the European Unit existed: '*alleged violations concerning infringements of fundamental rights would destroy this system, turning cooperation back in time, 10-15 years (...)*' (see RO report, p. 38).

<sup>3</sup> Case C-452/16 PPU *Openbaar Ministerie v Krzysztof Marek Poltorak*, Judgement of the Court (Fourth Chamber) of 10 November 2016, EU:C:2016:858.

judge appointed by the president of every court competent for the execution of an EAW. Also in PL a court is the competent issuing authority, while the prosecutor can file a motion to the court in order to issue an EAW. Significant differences can be noticed as regards the proportionality test: RO, PL, and IT reported that the law expressly provides for that, either in the form of a threshold (RO and IT, only in cases of more than one year of imprisonment), or of the indication that the EAW must serve the ‘interest of justice’ (PL). In PL, such a requirement is in force since 2015, and was added due to the critique concerning an excessive recourse to EAW for trivial cases.

As regards the **executing authority**, while the majority of the analysed Member States provide for a decentralised system – whereby the district or regional court decides on the execution of an EAW – in NL a central court is competent for all EAW procedures. Although the decision on whether to recognise and execute an EAW is reserved to a court, in most cases the prosecutor is in charge of a preliminary assessment (for example, to verify whether the issuing authority is a judicial authority in NL) and of the practical matters concerning the execution of the EAW.

#### Empirical findings 2

##### ***Knowledge gaps for legal actors in the national context***

In all countries there is mention of a gap of knowledge (NL, RO, IT, PL) and/or lack of experience (SE, PL) on the different relevant procedures for certain legal actors. Throughout the country, or throughout all levels of the legal system, legal actors are not equally knowledgeable or experienced in these procedures. In RO for example, most legal actors are more accustomed with the EAW rather than the recognition and transfer procedure, seemingly due to not having much experience with the latter. In PL, an informal specialization exists among judges, but since this is not an official separated position, those who deal with EAW deal also with regular cases, causing thereby an excessive workload.

This diversity in expertise carries in it a risk of less guarantees for the person subjected to such procedure that his/her rights will be duly respected, as well as less efficient judicial cooperation.

### **1.3. Functioning of Framework Decision 2008/909/JHA on the transfer of prisoners**

#### **a) From the issuing State**

All the Member States concerned by the research have granted the right to initiate or request a transfer of sentence to the convicted person. In addition, national legislation sometimes also allows for the initiation of the proceedings at the request of the executing State (IT, RO, PL). In this respect, it seems that the national legislation is not always consistent with the FD that provides that both the executing State and the convicted person may request the initiation of the proceedings (Article 4(5)). In any case, the consent of that State is necessary where the FD so requests (according to Article 4(1) c), this will be any Member State other than the State of nationality of the convicted person where that person lives or will be deported). The Minister of Justice, or a public body – other than the prosecution service or a court – supervised by the Minister, initiates proceedings in certain countries (SE, RO, NL); while in others this function belongs to a judicial authority (the prosecution service in IT and a court in PL).

The issuing authority is never obliged to transfer a prisoner. It is, in particular, interesting to note that in RO, where the request to transfer a judgment of conviction comes from the executing State, the Romanian authorities may refuse the transfer if this would not facilitate the social rehabilitation of the sentenced person. The convicted person may enjoy the right to

ask for a review of the decision concerning the transfer (or not) of a sentence (IT, SE, NL). This right to ask for review of the decision goes further than what FD 2008/909 provides.

Three types of **criteria for determining where the convicted person will be transferred** can be taken into consideration. First of all, attention is drawn to formal criteria that mainly correspond to the conditions provided for by FD 2008/909. In particular, the consent of the sentenced person is only requested where necessary. Secondly, and most importantly, all the analysed Member States pay attention to the reintegration goals pursued by a transfer of sentence. For that purpose, in addition to the general criteria applicable in any case (nationality and place of residence), several States (SE, IT) have put in place guidelines listing criteria that can be taken into account in order to decide whether a transfer will meet the rehabilitation aim of the FD. Unfortunately, there is no consistency in the criteria used for the assessment, sometimes the emphasis is on the work and family situation (IT) whereas in other countries the assessment is more detailed and involve other social aspects and the own view of the convicted person (SE). In certain countries, although there is no guideline at all in order to assess the chances of re-socialisation the competent authorities may take the opinion of the person concerned into account (NL, PL, RO).

Finally, several Member States have included **additional conditions** in their legislation. In particular, the transfer of a decision cannot happen if the remainder of the sentence is less than a few months (six months in IT and SE) or where the offence in respect of which the person was convicted involves short periods of deprivation of liberty (IT). This shows that the Member States perform some sort of proportionality check before deciding to transfer a decision of conviction. However, this control does not include the prison conditions.

The comparison shows that the opinion of the sentenced person does not seem to be always taken into account in a manner which is consistent with Article 6 FD 2008/909.

### Empirical findings 3

#### ***Consent to the transfer and (sometimes forced) ‘judicial tourism’***

In several countries in this research, the consent of the person to an eventual transfer is sometimes interfered with, in several ways. In general, consent is linked to the issues of family life and more particularly to the purpose of social reintegration. If a convicted person requests (or refuses) a transfer the question is posed whether the person has family in and true social bonds with the country (IT, PL). Family bonds being assumed to have a positive influence on reintegration, the request will more easily be granted if these bonds are there.

However, in RO a lawyer pointed out how financial reasons (namely: budget costs), rather than reintegration principles are paramount in transferring non-RO-citizens, notwithstanding their eventual refusal. Although this signal came from only one respondent in that national research (which is not surprising, as if true, it will very probably not be something one openly talks about), we believe it reflects a more general, underlying fact: that socio-economic and geo-political inequalities among EU member states, reflected in the judicial system and conditions, do impact on eventual decisions on extradition and transfer.

This seems to be true in the IT situation as well, but from another angle, and, rather, concerning the EAW proceedings. A typical case would be a foreign national, subject to an EAW, who has committed a crime in another member State, who would try to serve his/her sentence in IT. He/she would refer to his/her true bond with the country, and family members living there, as the reasons for wanting to serve the sentence in IT, although the real reason would be the fact that the judicial system and conditions are more appealing in IT than in their home country. A judge in the IT report called this **‘judicial tourism’**. According to the PL report, ‘judicial tourism’ may not only be initiated by the person subjected to transfer; as

one judge commented, the willingness of other EU member states to transfer convicted persons back to PL is mainly inspired by the wish 'to get rid of such people'. The FD 2008/2009 on transfer of convicted persons, in that case, is abused for removing 'undesired subjects' from national territory.

These reasons may explain why some countries claim (IT, RO, SE) that the eventual consent to the transfer of the person is taken into account on paper, but much less in practice, or that his/her consent matters, but is not decisive in the procedure.

The rules concerning the **principle of speciality** in FD 2008/909 proceedings vary from one country to another when acting as an issuing State. In RO, the principle of speciality is not regulated at all in the legislation, whereas in other countries the principle applies in different ways. In certain Member States the same rules as in the EAW apply (PL, SE and to some extent NL) in others (NL and IT) specific rules are established. The comparison shows that the principle does not protect the person subject to transfer proceedings in the issuing State. Most countries easily waive the principle and, except IT, do not grant that person a remedy against the decision to waive the principle. Consequently, persons subject to a transfer should rely on the principle of speciality as regulated in the executing State.

#### **b) To the executing State**

In most countries, the decision of conviction is received by the Ministry of Justice which forwards it to a judicial authority for recognition. In any case (with the exception of SE), a judicial authority is competent to decide on the recognition and possible adaptation of the sentence. The **law governing the enforcement of a sentence**, however, varies from one Member State to the other. In IT, it seems that attention is *de facto* paid to the smooth functioning of the cooperation rather than the prisoner's social rehabilitation. Nevertheless, the judicial authority takes into consideration the period of detention already carried out in the issuing State. This country in particular favors the exchange of information on the sentence with the issuing State as an alternative to non-recognition. In this country, however, the law on the adaption of the sentence is not as developed as in other countries such as the NL, PL or RO. In these countries, a comparison is made between the sentence as pronounced in the issuing State and the sentence that would have been pronounced in the executing State for a similar offence.

Nonetheless, the main rule in all the studied Member States is that the adaptation of a sentence should not aggravate the situation of the sentenced person. The aim of rehabilitation of the sentenced person, however, seems to be taken in consideration to a different extent. In the NL, for example, the judicial authorities conduct a thorough analysis of the consequences of the transfer on the position of the person. By contrast, in SE and IT, this concern plays a minor role in adaptation contexts. The comparison shows that there are divergences between the laws of the Member States concerning the conditions for adapting a sentence. The main concern of FD 2008/909 (*i.e.*, the social rehabilitation of the convicted person) seems not always clearly taken into account in the implementing legislation. It is, therefore, unclear whether the aim is effectively achieved in certain cases. It may be advisable to clarify exactly what the criteria should be to consider when a transfer actually increases the social rehabilitation of the person.

The **time limits** vary from 30 days (SE) up to 90 days (NL, IT, PL, RO) depending on whether, for example, an appeal is lodged against the decision of recognition.

When acting as an executing State, the main principle is that the person transferred cannot be prosecuted, sentenced or deprived of his/her liberty for a crime committed prior to the transfer (**speciality principle**). All Member States' legislation researched however provide

for exceptions, in particular where the issuing State has given its consent. This is in general in line with Article 18 of FD 2008/909.

#### **1.4. Functioning of FD 2008/947/JHA on probation and alternative sanctions**

Two main trends can be identified in the five analyzed countries. Some Member States are able to execute only the probation measures and alternative sanctions provided for in Article 4 of FD 2008/947/JHA (SE, IT). A slight deviation from the FD can be observed in IT, where the law refers not only to probation measures and alternative sanctions, but also to conditional release. Other Member States added more measures and sanctions, in addition to those already established in the FD (NL, PL, RO). They might consist, for example, of the obligation to provide information related to the way the person earns his/her living (RO) or to undergo electronic supervision (NL).

There are clearly distinguishable differences among the researched countries with regards to the procedure to execute and issue a judgment. First, there are three different ways to designate the competent authorities. Some countries provide for a limited role of judges, since the Public Prosecutor Office (NL) or the Prison and Probation Service (SE) are the competent authorities with regards to the issuing and execution of a judgment. On the other hand, two Member States (PL, RO) rely on the courts to issue and execute the judgments. One of the countries (IT) adopted a mixed formula, whereby public prosecutors are competent to forward a judgment immediately after it has been handed down, whereas courts decide on its execution when receiving it.

Second, there exist other differences as regards the time limit to make a decision when the countries are requested to execute a judgment. Whereas some respect the 60 days-time limits established in the FD (NL, RO) other countries (PL, IT) have divided it in two periods of 30 days each, to allow the possibility for an appeal within the timeframe provided by the FD.

Third, four studied countries (PL, SE, RO, IT) allow for the possibility to appeal the decision to issue and/or execute a judgment.

## **2. Procedural safeguards and limits to mutual recognition**

### **2.1 EAW for execution**

#### **a) Procedural safeguards**

As regards the **access to lawyer** in the executing State, normally ordinary criminal procedural rules apply to surrender proceedings. NL recently introduced the explicit indication that the right to a lawyer applies also to surrender proceedings. In some cases, the introduction of new rules has been spurred by Directive 2013/48/EU, although in most cases the necessary amendments were not considered significant since most of the standards set by the Directive were already ensured (*e.g.* IT). SE and PL consider themselves to be already compliant with the Directive, while RO has not proceeded with its implementation yet at the time of writing this research. The Italian rapporteur stressed that the most relevant consequence of Directive 2013/48/EU was the introduction of the obligation to inform the requested person about the possibility to appoint a lawyer in the issuing Member State, providing also a list of available lawyers in that country. The most relevant differences can be observed as regards the mandatory presence of the lawyer during the questioning of the requested person: for example, on the one hand, NL provides it in terms of right to appoint a lawyer and have it present, but if after a certain time (two hours) a counsel does not arrive, the prosecutor can start questioning; on the other hand, in IT the presence of the lawyer is mandatory. In PL it is mandatory only in some cases.

Traditionally, nothing is provided by national law as regards the right to a lawyer in the issuing Member States. After Directive 2013/48/EU, IT and NL have added a provision

specifying the possibility to ask for the appointment of a lawyer, who can provide information and advice to the lawyer appointed in the executing State. Furthermore, if the issuing prosecutor receives information that in the executing State the prisoner requested a lawyer, he/she will inform the requested person about this possibility to appoint a lawyer in the issuing State. PL, RO and SE do not have yet specific provisions on this aspect.

Empirical findings 4

***Information shortage among those subjected to transfer***

Notwithstanding the stipulated demand in the laws and procedures surrounding transfer that the persons subjected to such transfer should be sufficiently informed, it became clear from the national reports that there are flaws in the information provision. These can be contributed to the following:

a. Detainees' knowledge on **basic, general EU rules and procedures concerning criminal prosecution** is oftentimes limited. Even though this does not directly relate to EAWs and related instruments, it is an important observation, as lack of this basic knowledge can impact negatively on the processing of other, more specific information on EAW procedures (IT, NL, PL), as well as on the extent to which subjected persons make effective use of their right to be heard (IT);

b. **Not all legal actors have the experience and knowledge** (see empirical findings 2 above!) needed to well explain the procedures to the subjected persons (RO, NL, PL, SE, IT);

c. **Translation** of relevant documents or legal communication is generally commented to be problematic (RO, NL, SE, IT). Translations are commented to be of poor quality (due to the translation service or to general difficulties translating complex national legal aspects), or time constraints prevent interpreters to be able to timely translate them orally. Financial constraints with regard to the possibility to appoint a retained interpreter also play a role here (IT). Therefore, translations are often oral (only). In the NL case, interpreters are only present during the court case, not during consultation with the lawyer, which obstructs explaining the procedures before appearing before court. Moreover, concerns are being raised (RO, SE) on the peculiarities in each legal system, which are almost impossible to properly translate;

d. **Brochures and other relevant documents** are not always handed over (sometimes because of the lack of awareness of legal actors that such brochures exist or apply here), or are not translated in a language the person understands (NL);

e. **Time constraints** in everyday praxis cause legal actors not to be able, always, to properly explain what is going on. Actors that are knowledgeable enough to provide information may not be available in time, and the detainee may thus have to resort to legal actors who are not sufficiently informed or updated on the procedures;

f. Even if information is correctly and timely given, the **kind of information** might not be (sufficiently) understandable in terms of **wording, sort of information** (oral, on paper, language et cetera) **given, and cultural differences** therein.

Because of this fact, several interviewed detainees (NL, RO, PL) commented having received most of their information rather from fellow-detainees than from legal actors – with all due risks of having incorrect, incomplete and non-up-to-date information.

We conclude that if the 'Area of Freedom, Security and Justice' aims to be more than an empty shell to its citizens, it is of the utmost importance that information on EAW procedures is (timely) available, understandable, and embedded in an overall understanding

by the individual subjected to an EAW, of his/her legal position within this procedure – a far-stretching goal to which this research project has aimed to make a modest contribution. This conclusion will be *a fortiori* valid as regards other mutual recognition instruments that are even less known than the EAW.

In all Member States analysed, the **rights to access to documents, translation and information**, seem to be generally recognised and protected, if acting as executing states, with some remarkable differences. First of all, these differences concern the legislative technique: some countries apply general procedural rules to this procedure (PL), other have enacted new specific laws to implement Directive 2012/13/EU and Directive 2010/64/EU (IT). This holds true in particular as regards the right to translation. In this regard, although every Member State specifies that a full translation is never provided, in some cases only the ‘essential passages’ require a written translation (IT, NL), in others an oral translation suffices (SE). Information on rights (such as the right to silence) and consequences of the consent to surrender, such as the renouncement to the speciality principle and the loss of possibility to claim before a court that a refusal ground exists, seem to be generally provided by national laws, with one meaningful exception: in SE specific information about the consequences of the consent in the surrender procedure is not provided, since it is considered part of the counsel’s tasks. Acting as an issuing country, none of the countries researched regulate the access to documents, translation and the right to information for EAWs.

The **right to be heard** in the executing State seems to be provided in every Member State. Some rapporteurs stress that it is respected in several phases of the procedure, in the sense that a requested person has several opportunities to challenge the execution of the EAW. Only RO admitted that the right to be heard encounters significant limitations (since it is limited to ‘recording his/her position, to identify whether a mandatory or optional ground for non-execution exists, as well as possible objections as regards his/her identity’). Normally, the executing authority follows formalities and rules indicated by the issuing authority; this, however, does not happen without limits, since it may be done ‘as much as possible’ (NL, whose authority in that case informs the issuing authority) or unless they are considered to be in conflict with the principle of the national legal order (PL). NL underlined that the issuing authority may appoint a person to attend the questioning and ask the requested person some questions.

The national law of every Member State does not provide for the right to be heard in the issuing country. NL specifies that the issuing authority (prosecutor) may request the executing State to hear the requested person in the presence of this authority or of someone appointed by the latter.

#### **b) Grounds for refusal**

In general, the comparative research has once again exposed a renowned fact: Member States, when implementing the FD 2002/584/JHA, have often departed from the very rationale of the new cooperation instruments, particularly as regards the grounds for refusing cooperation. After all, certain features of the mutual recognition in the AFSJ create tensions with values that are deeply rooted within national legal systems. This is particularly evident when looking at the legislative process for the transposition in national law that took place in IT and PL. If in IT the main issue at stake concerned the concept of legality, with the Parliament concerned by an excess of discretion left upon the judiciary, in PL it was necessary to amend the Constitution to allow for the surrender of nationals. Despite that, the implementing law added some grounds for refusals not provided by FD, and it is striking to read that in that country there remain great differences as to the treatment reserved to nationals and non-nationals.

The primary result of the comparative survey is that every Member State provides for more **mandatory grounds for refusals** than those provided by the EU legal framework, be they added by the national legislator (NL, PL, IT, SE) or by case law (RO). In some cases, these are due to fundamental rights concerns (NL, PL, IT that still have a ground for refusal concerning political offences, and one in case the legislation of the issuing Member State does not set any maximum limit to pre-trial detention, but this is more relevant for EAWs issued for prosecution); in others, they are considered to derive from international law and to be a sort of correction of the shortcomings of the FD (*e.g.*, SE as regards the case when the requested person has to be extradited to the International Criminal Court); in others, one may contend, they are the consequence of the transposition as mandatory of grounds that were envisaged as optional by the FD (SE, IT).

Some Member States added a general ground for refusal based on the violation of fundamental rights (NL, PL, IT). It is interesting to observe some peculiarities as regards the treatment of nationals in PL, which provides for a ground for refusal in the case of a Polish requested person who is convicted for acts committed abroad and does not consent to be surrendered (in case of a lack of double criminality). On the other hand, in 2010 a ground for refusal based on nationality was censured by the Italian Constitutional Court, who found it in contrast with the basic principles underlying EU citizenship, thereby amending the law in a way that it is applicable also to citizens of other Member States who legally and effectively reside in IT. In the same country, it is worth pointing out that, in order to comply with the national approach to *lex certa*, the description of offences for which the double criminality requirement is excluded, has been transposed in a more detailed way than the list provided by the FD: this allows the executing authority to go into the details of the case, assessing whether the crimes for which surrender was asked correspond to definition given at national level.

There is a clear, striking, difference as regards the understanding of the concept of **‘optional’** in the **grounds for refusal**. On the one hand, this may be interpreted as if it were an option to transpose it or not: any Member State would be free to decide whether to transpose into national law a certain ground for refusal, and if it does so, such a ground becomes sometimes a mandatory ground for refusal (*e.g.*, SE). In the national law of these countries, therefore, there are no real optional grounds for refusals: either they are transposed as mandatory, or they are not transposed at all. Such an interpretation is justified by concerns linked to an excessive discretion of the judiciary. On the other hand, optional grounds have been transposed as referring to the optional application in practice, depending on the case-by-case assessment made by the executing authority (PL, RO).<sup>4</sup> NL and PL combined both visions, transposing some grounds as optional and the others (provided as optional in the FD) as mandatory.

### c) Fundamental rights considerations by the executing authority

This is where the most evident tensions with the concept of mutual trust between Member States arise. As said, some Member States added a general ground for refusal based on the breach of one or more fundamental rights (NL, PL, IT). Also in the countries that do not have such a general ground for refusal, it is debated whether this would implicitly derive from the application of the ECHR and the CFR. It is stressed (see *e.g.* NL) that probably only an assessment *in concreto* can be reconciled with mutual trust (concerning a specific situation involving the requested person, and not the general situation of the requesting Member State).

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<sup>4</sup> The CJEU has recently stressed that this is the correct interpretation. See Case C-579/15 *Poplawski*, Judgement of the Court (Fifth Chamber) of 29 June 2017, , EU:C:2017:503.

As regards **past violations of fundamental rights**, *in absentia* proceedings are the situations that every national rapporteurs considers as more likely to justify a refusal based on fundamental rights concerns. The approach seems to be quite similar everywhere after FD 2009/299/JHA: the judge assesses if the conviction *in absentia* has respected the conditions indicated in the EU legal framework. On the other hand, in no Member States there are cases in which the surrender has been denied due to other violations of fundamental rights occurred in the issuing country. In some Member States, this would not be legally possible (RO); in others, although in principle not excluded by the general ground for refusal based on fundamental rights (which does not distinguish between past, present, and future violations), this has not happened in practice, and is not likely to happen either (see *e.g.*, PL and NL). In SE, for example, claims on past violations of Article 6 and 7 ECHR (fair trial rights and legality principle) have always been dismissed, and when analyzed with more attention, the alleged violation has never been considered so gross to constitute a ground for refusal of the surrender. In NL it is still unclear whether the approach typical of extradition procedures also applies to surrender proceedings, or whether a past violation of Article 3 ECHR could play a role in the assessment of future potential risks of violation. It seems, in any case, difficult to prove a flagrant violation, for example, of Article 6: in principle it could happen only if the requested person were able to substantiate the allegations demonstrating the lack of available remedies in the issuing country.

In general, it seems that the **violation of procedural safeguards during surrender procedures** is never able to justify the refusal to execute an EAW. There are Member States where the general ground for refusal does not seem to be applicable to such situations (NL), and others where in principle it could happen, but it seems very unlikely because such a violation is not considered irreparable, and requesting and executing authorities can agree on solutions (PL, SE, IT). In other countries, this is not legally possible at all (RO).

As regards the **risk of future violations of fundamental rights**, in the aftermath of *Aranyosi and Caldăraru*,<sup>5</sup> national authorities have been increasingly paying attention to the conditions for refusing the execution of a EAW due to such a risk in the issuing country. If PL and RO did not report any case in which a refusal has been opposed (in RO the executing authority may, at the most, subject the execution of the EAW to the condition that the issuing country allows for the review of the penalty in the case of life sentence), the executing authorities in the other investigated countries have had several opportunities to define the procedure to assess the risk of violation. In IT, for example, *Aranyosi and Caldăraru* represents a real turning point in the domestic practices: before *Aranyosi*, the general ground for refusal based on fundamental rights concerns had been never applied, whereas in the post-*Aranyosi* a new trend has emerged, whereby the executing authorities are not satisfied by general information on prison conditions, but require clarifications as to the destiny of every requested prisoner.

SE, IT, and NL have developed, on the basis of *Aranyosi and Caldăraru*, the distinction between risk *in concreto* and risk *in abstracto*. In SE, for example, this was addressed in a recent case concluded with a refusal (upheld by the appeal court), where a four-step assessment was conducted: first, the case law of ECtHR repeatedly condemned the issuing State on account of its prison conditions; secondly, this was supported by the findings of several independent reports; third, specific information were requested on the likelihood that the requested person would have been put in a small cell with poor conditions; fourth, further information was requested to the issuing authority, but only general replies were provided instead of detailed and binding statements.

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<sup>5</sup> *Aranyosi & Căldăraru* (n 1).

Similarly, IT case law clarified the approach to potential risks of fundamental rights violations (as far as Article 3 ECHR is concerned): a request for information needs to be sent to the issuing authority; such a request must concern a specific person; in the assessment, the court can take into consideration ECtHR judgments as well as international reports, *inter alia* of Council of Europe and United Nations, and if the risk cannot be excluded, the surrender must be postponed until further information about the risk *in concreto* is provided. Only if no further information is provided in a reasonable time, the request is refused on the basis of the general ground provided in the legislation.

NL is the only report that distinguishes between the various rights at stake. A procedure similar to that developed in SE and IT is followed for potential violations of Article 3 ECHR: first, an *in abstracto* test, where the general detention conditions in the issuing State are assessed. For this purpose, the Dutch authority relies on information that must be objective, specific, and updated. Several sources of information have been used, such as reports of independent organisations, ECtHR decisions, and even decisions of foreign courts (*e.g.* a decision of a German court acknowledging a low prison conditions in Latvia). No strict hierarchy between different sources has been identified. The second step consists of an *in concreto* test, which concerns the specific situation of the requested person, both in terms of detention facilities (*i.e.* cells of at least three square meters) and conditions (ventilation, hygiene conditions etc.). In this regard, a crucial role is played by information on the prison in which the requested person will serve the sentence: if it is unclear in which prison he will be placed after the surrender, the Dutch authority may conclude that there is high chance of violation. If this twofold test leads to the identification of a real risk of violation of Article 3 ECHR, the Dutch court can postpone the decision. This is a temporary situation in which the issuing authority has the possibility to provide more information to exclude the concrete risk of danger in a reasonable time. What is ‘reasonable’ is decided on a case by case, and the Dutch court did not identify a firm threshold. In one case, after nine months the court decided to end the surrender proceedings. It is worth stressing that the Dutch case law clarified that the burden of proof lies with the requested person: she/he can use different kind of information to prove that a real risk of a flagrant violation of Article 3 ECHR exists in the issuing State. Furthermore, it is interesting to note that NL did not implement the possibility to ask the guarantee that in case of life sentence there will be the possibility to grant a pardon, so in principle this could be raised under the general ground for refusal based on fundamental rights. The competent court has often dealt with it, but this reasoning has never led to a refusal.

In NL, the approach toward potential violations of Article 6 ECHR and Article 8 ECHR seems to be less consolidated: in both cases, there are no examples of refusals. As regards Article 8 ECHR, this can be explained by the difficulties to prove its violation, since already the ECHR provides for some exceptions. As regards Article 6 ECHR, the case law elaborated a double test: first, it requires the proof of a justified suspicion of a flagrant violation of fair trial right; second, an indication that no sufficient remedy exist in the issuing State. Probably for consideration linked to mutual trust between Member States, it is difficult to prove that an effective remedy does not exist in that issuing State.

In conclusion, it can be observed that in most countries an increasing attention is now paid to the conditions to apply the general ground for refusal based on potential fundamental rights violations, especially if doubts arise as to the prison conditions in the issuing country (Article 3 ECHR). In general, however, only in a relatively small number of cases there has been an actual refusal (see *e.g.* NL and SE). IT, for example, has recently excluded such as risk with regard to prison conditions in Germany.

### 2.2. FD 2008/909

### a) Procedural safeguards

In every country, the regulation of the right to **access to a lawyer** differs according to whether the country acts as the issuing or as the executing State. As to the right in the issuing country, the right is not referred to either in RO nor in IT, whereas a lawyer is automatically assisting the person in the three other countries. In the absence of specific provisions concerning FD 2008/909, it should be mentioned that the convicted person enjoys the general rules enshrined in the national procedure, and indirectly in Directive 2013/48 on the right of access to a lawyer (for example in IT or PL). On the other hand, in the executing country the right to a lawyer is generally recognised and protected. However, this right is automatic in only two countries (IT and RO). In NL the convicted person will only have access to a lawyer if placed in custody, and in SE the person enjoys this right only if he/she objects to the transfer to Sweden.

The right to **access the document** of the proceedings is not granted uniformly. This seems to be in contrast with Article 6(4) of the FD 2008/909. In certain countries (PL, SE, NL), information should be provided to the person. However, the extent to which the right is secured varies. For example, in PL all necessary materials must be provided to the sentenced person whether PL acts as an issuing or executing country. In other situations (NL, SE), the scope of the right is limited depending on the circumstances (for example, if the person objects to the decision to transfer). In RO, the right is guaranteed in the context of the procedural criminal code. In IT, the right is not regulated, but defence lawyers should be able to obtain information since the Constitution protects this right.

The right to obtain **translated documents** is not uniformly protected, either. In countries such as PL or NL, the right to translation is generally well guaranteed either by specific rules or by the procedural criminal code. In certain countries (IT, SE) translation is aimed at facilitating the work of the judicial authority first of all so it is not clearly considered as an enforceable right. In RO, the right is only guaranteed when the country acts as executing a sentence decided in another Member State.

The degree to which a person is allowed to give his/her **opinion** in transfer proceedings diverge from one State to the other, but in general every approach can be considered as consistent with the FD. In NL and RO, the opinion is only asked when the country transfers the person, provided that this person is in the country. By contrast, in PL and SE, the right to provide one's opinion is granted either when the country is issuing or when it is executing. In IT, the right is regulated, but in practice there are reasons to doubt that judicial authorities take the opinion of the person into consideration in all circumstances.

The **right to be heard** is generally complementary to the possibility offered to the convicted person to state his/her opinion in the transfer proceedings, either when the country is issuing or when it is executing (PL, NL, IT). In addition to that, the person enjoys the guarantee of the right to be heard when he/she challenges the decision to transfer the sentence (SE, NL). In RO, in the absence of written provision guaranteeing its protection, the judiciaries nonetheless secure the right.

### b) Grounds for refusal

The exceptions to mutual recognition in the context of FD 2008/909 are implemented in various ways in the analysed Member States. In general, all the grounds for non-recognition and non-enforcement provided in FD 2008/909 have been transposed in all the countries reported. However, although FD 2008/909 only provides for optional grounds for non-recognition and non-enforcement, in the implementing national laws several grounds (with a few exceptions) oblige the competent authorities to refuse the request. In particular, in SE

and IT all grounds are mandatory non-execution grounds. However, in this country, a transfer may be granted even if a ground for refusal exists if there are special reasons for doing so having regard to the personal circumstances of the person or other circumstances. More in detail, the following list offers an overview of the transposition into national law of the grounds provided in article 9 FD 2008/909:

- Article 9(1)(a) (conditions concerning the certificate): all Member States – with the exception of PL that provides it as an optional ground for refusal – consider an incomplete certificate as a compulsory ground for non-execution of the judgment;
- Article 9(1)(b) (presence in the issuing/executing State and consent of the person): in general, the ground is compulsory in all the countries. However, in RO and PL it is unclear whether the recognition of a judgment can be refused when the person's whereabouts are neither the issuing nor the executing State;
- Article 9(1)(c) (*ne bis in idem*): all five Member States consider *ne bis in idem* as a mandatory ground for non-execution of a sentence. With the exception of RO, all Member States take into consideration sentences enforced both in their own country and sentences enforced in other States;
- Article 9(1)(d) (double criminality): in all Member States a sentence can only be recognized if it concerns an offence that is also criminalized in the executing State. Only IT provides for exception, and SE authorizes the enforcement of sentences without double criminality control only for the 32 listed crimes in Article 7 of FD 2008/909;
- Article 9(1)(e) (statute barred): this ground is mandatory except in PL;
- Article 9(1)(f) (immunity): this ground is mandatory except in PL;
- Article 9(1)(g) (criminal liability): the ground is mandatory in all the countries;
- Article 9(1)(h) (less than six months sentence left): only RO did not implement this ground. Consequently, a sentence can be transferred to this country even if less than 6 months remain to be served;
- Article 9(1)(i) (trial in absentia): in all the countries, except in PL, this article has been transposed almost at the identical and is a compulsory ground for non-execution. In PL this ground for refusal is optional;
- Article 9(1)(j) (speciality principle not applicable when consent from issuing State): this ground is neither implemented in NL nor in RO. In the other countries, except in PL, the refusal to execute is compulsory where the issuing State refuses to consent for the prosecution or enforcement of an offence committed prior to the transfer;
- Article 9(1)(k) (incompatibility with the health care system of the executing State): the ground is mandatory in all the countries;
- Article 9(1)(l) (offence committed in part or wholly within the territory of the executing State): with the exception of RO, this ground is implemented in all the countries reported. Nevertheless, it is only optional in NL and PL;
- Furthermore, in PL a specific compulsory ground for non-recognition was included in case recognition would violate human rights.

### c) Fundamental rights consideration by the executing authority

Except for PL, the countries reported do not have an explicit ground for non-recognition in case a violation of the convicted person's fundamental rights has taken place during the proceedings that led to the conviction (**past violations**). In PL, scholarly literature mentions two possible situations where a violation of fundamental rights could allow for non-recognition and enforcement of a foreign judgment: the first scenario being the violation of the right to fair trial, and the second being a judgment made in violation of the principle of non-discrimination based on sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation. In the NL, the refusal to enforce a foreign judgment does not

stem from a specific ground for non-recognition. Nevertheless, the Minister of Security and Justice enjoys the discretion to refuse such a judgment if there exists a concrete indication that a flagrant violation of fundamental rights has taken place during the proceedings which led to that judgment. The threshold to meet in this situation is very high and allegations from the convicted person would not be enough. Only in the event of the issuing State being condemned by the ECtHR for such a flagrant violation could non-recognition be considered. In general, it seems that when applying this instruments, authorities trust each other more than in surrender proceedings. It should be recalled that allegations of a violation of fundamental rights could be challenged in the State where the judgment of conviction is made. Therefore, a judgment made in violation of fundamental rights is unlikely to reach the executing country.

The national reports show that if a **violation of procedural safeguards** were to happen during the transfer proceedings, this would not have a major consequence on the recognition and enforcement of the judgment. It should also be recalled that Article 6 ECHR does not apply to the Convention on the Transfer of Sentenced Persons,<sup>6</sup> so it is unlikely that this provision would apply to the transfer proceedings in application of FD 2008/909.

Two scenarios may be imagined where a **risk of future violations** could be taken into consideration. The first scenario is very unlikely and concerns situations where this risk would take place in the country recognizing and enforcing the sentence (only PL mentioned such a possibility, but it stated that it would be very unlikely that Polish court refused the execution because of a potential violation of Article 3 ECHR in the Polish prisons). The second situation relates to the refusal to forward a judgment to a country where, for example, there would be a serious risk of violation of Article 3 ECHR. Such a risk would in particular be taken into consideration in SE, PL and NL. This scenario is different from the circumstances that may occur in the context of the EAW for the execution of a sentence. The refusal to forward a judgment is not based on the application of a ground for non-execution, since the assessment takes place in the issuing State before issuing a request to transfer a sentence to the executing State.

The legal analysis of the national reports shows that the main concern taken into consideration by the authorities willing to forward a judgment of conviction is first of all the necessity to contribute to the social rehabilitation of the convicted person in the executing State. However, there is no clear criterion as to how this condition should be taken into consideration. This means that, as the empirical findings demonstrate, it is difficult to be sure that the transfer of a prisoner really happens in order to facilitate his/her social rehabilitation. It should also be mentioned that all countries reported do not exclude the possibility to refuse a transfer where the latter would lead to a violation of Article 3 ECHR, but there is no concrete case yet.

### **2.3. FD 2008/947**

#### **a) Procedural safeguards**

The right to **access a lawyer** is not specifically regulated in most of the researched countries (NL, RO, SE, IT), hence the general rules apply, without distinction of whether the country is acting as the executing or issuing Member State. However, one can notice some differences among these Member States. In NL and SE there is no obligation to provide legal representation with regard to the application of FD 2008/947, and in the latter country it is explicitly recognised that the access to a lawyer is not a right of the sentenced person, but it is left to the discretion of the competent court. On the other hand, in RO the access to a lawyer is considered a general right in criminal law, and IT even goes a step further by stating the

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<sup>6</sup> Convention on the Transfer of Sentenced Persons of 21 March 1983, ETS No.112.

inviolable character of this right within the Italian legal order that must be respected in every stage of the legal proceedings. PL applies a mixed formula, as even though there is no specific provision regarding the right to access a lawyer as the issuing State, when it acts as the executing State a defence counsel is appointed *ex officio* for those offenders who are not in the country and are not assisted by a defence counsel.

With regard to the **right to access documents, translation and information**, the analysed Member States adopt different approaches. First, as regards the information (about the possibility to be transferred to another Member State) provided to the concerned person in the *issuing* State, only RO considers it as an obligation. The other Member States do not provide for any obligation in this sense. As *executing* states, only NL and IT provide information on it: the convict has to be informed about the decision to recognise or refuse a judgement, while in IT the general rules (concerning the notification of the date of the hearing) apply. Differences are also evident as regards the documents that must be translated. Some countries require the translation of the certificate only when they act as the executing State (NL, SE), sometimes also accepting documents translated in English (NL, SE). Other Member States have established that additional documents must be translated, such as the judgement and the person's statement about their intention to reside in the executing country (RO). PL provides that every decision and judgement that may be contested or finalise the proceedings must be translated (PL). IT does not provide for any linguistic requirement when acting as the executing State, but as an issuing State establishes an obligation to translate the judgement and the certificate into the language of the executing country. It is interesting to note that only PL grants the right to an interpreter (even if not expressly provided by the FD), which applies not only during the hearing but every time the accused needs to communicate with his/her lawyer during the proceedings.

No Member State has a specific provision on the **right to be heard**, and only SE refers to the general rules of administrative law to regulate that right. In NL there is no formal obligation to hear the sentenced person, whereas in PL the obligation only refers to those cases in which, acting as the executing State, the concerned person is deprived of liberty on the Polish territory. Regarding the issuing proceedings, there is no formal obligation to hear the sentenced person, even though he/she has the right to be present during the hearing and speak. In RO, despite the lack of specific provisions, the right to be heard when acting as the executing authority can be deduced from the obligation to provide the person's statement of their intention to reside in Romania and the fact that the Court shall rule upon the request in closed sessions, summoning the convicted person. In IT this right is limited to those situations in which, acting as the executing State, the judgement has to be forwarded to a Member State other than that where the sentenced person has his/her residence.

The **opinion of the sentenced person** regarding the transfer of a judgement is not binding in any of the Member States researched, even though in SE the affected person's view on the matter is part of the material for the final decision. It is also interesting to note that the empirical findings in NL demonstrate that if a requested person agrees with the alternative sanction, the prosecutor will automatically assume that he/she agrees with the transfer, but if he/she opposes, the transfer will not take place. Therefore, in practice, NL will only transfer a judgement if the offender has returned or wants to return to another Member State. In short, even though the consent of the requested person is not necessary to recognise the judgment, nonetheless it plays a relevant role in some of the analysed countries.

### **b) Grounds for refusal**

At the outset, one may observe that there are two possibilities regarding the requirement of double criminality. First, Member States may declare that they derogate from Article 10(1) of

the FD and, therefore, require the double criminality for all the offences. This is the choice made by NL, PL and RO. On the other hand, SE and IT apply Article 10(1) FD, even though in SE there is an exception regarding crimes committed wholly or partially on Swedish territory, for which the double criminality is required. With regards to the other grounds for refusal, even though in the FD they are only optional, the analysed Member States have implemented them in different ways. Some have made a distinction between mandatory and optional grounds (NL, PL), while others have only introduced mandatory grounds (RO, SE). Only IT has kept them optional.

It is worth pointing out that PL is the only country that has introduced a new optional ground for refusal, in the case amnesty has been granted, and a new mandatory ground for refusal, in the case the offender is not in Polish territory. On the contrary, some Member States have not included some grounds provided by the FD. This is the case of RO and SE, which do not include the grounds for refusal provided by Article 11(1)(a)(b) FD, nor 11(1)(k) in RO and 11(1)(e) in SE.<sup>7</sup> The Romanian rapporteur did not mention the lack of double criminality as a ground for refusal, but taking into account that RO made a declaration to derogate from Article 10(1) FD, it is understood as a mandatory requirement. Furthermore, SE has established an exception to its general regime of refusal: in those situations, in which a sentence shall be refused but the personal and other circumstances recommend not to do so, it can be enforced and recognised.

As for the possibility to adapt the sanction in the executing country, SE is the only country studied that did not report this possibility. The other States follow similar criteria in this regard, whereas the competent authority may differ (the prosecution service in NL, courts in PL and RO, court of appeal in IT). In all of them, when the duration of the sanction is longer than the maximum allowed in the executing State, it will be lowered to that maximum. However, only NL and RO consider the possibility of an incompatibility with the nature of the sanction, in which case it will be adjusted in a way that corresponds as much as possible to the original sanction. In any case, the adjustment cannot entail an aggravation.

Finally, NL, PL, RO and IT have made a declaration to refuse to assume responsibility over the sentenced person in specific cases. The criteria also vary among these countries. Although some have considered the situations established in Article 14(3)(a)(b) of the FD (PL), others have introduced different situations, such as the violation of the obligations by the sentenced person (NL, IT, RO), the initiation of new criminal proceedings against him/her in the issuing country when a request for transfer has been made (NL, IT) or his/her change of residence to another country (NL, IT). In RO the commission of a new offence during the probation period is also a reason to refuse responsibility.

### **c) Fundamental rights considerations by the executing authority**

Apart from the usual grounds for refusals based on fundamental rights concerns (such as the one based on the *ne bis in idem* or trials *in absentia*), none of the Member States has a specific provision on a general ground for refusal (or suspension) based on violations of fundamental rights. It is interesting to note that SE does not consider every violation of procedural safeguards as a valid ground for non-execution because of the possibility to remedy them. Regarding the **risk of future violations**, it is expressly considered as an unlikely situation by some of the rapporteurs (SE, NL). The Romanian rapporteur, however, pointed out that since the case law of the ECtHR and CJEU has direct applicability, it could be a ground for non-execution.

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<sup>7</sup> Article 11(1)(a)(b) FD 2008/947 concerns incomplete certificates and the criteria for forwarding a judgment; article 11(1)(k) FD 2008/947 concerns offences committed in part or wholly on the territory of the executing State and article 11(1)(e) FD 2008/947 relates to statute-barred offences.