

PART VI CONCLUSIONS AND RECOMMENDATIONS

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¹ Part VI has been discussed between peers during the last progress meeting of this project on the 12th of October 2017.

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The main objective of the project was to understand and evaluate how mutual recognition and mutual trust in criminal matters, especially in the context of the EAW, of FD 2008/909 on Transfer of Prisoners and of FD 2008/947 on the application of the principle of mutual recognition to judgments and probation decisions, interplays with individuals' fundamental rights. The perspective chosen in this research is citizen's oriented. It sought to assess whether the current EU policy protecting the fundamental rights of citizens in the context of mutual recognition in criminal matters implying a transfer of person, including its implementation and enforcement in the Member States, actually addresses the concerns of individuals in an AFSJ founded on the rule of law and the respect for fundamental rights. Three rights in particular have been the focus of the research: the protection against torture and degrading treatment, the right to a fair trial as implemented in the procedural directives² and the right to private and family life.

The material scope of the research has been limited to the effects of mutual recognition in post-trial situations (hence the focus on EAWs for the purpose of the execution of a sentence). The main research question answered here is how in the post-trial context, does fundamental rights respect affect mutual recognition and mutual trust in EU criminal law. In particular, the research has followed a chronological method in order to assess how fundamental right's violations impact mutual recognition. It looked at violations that:

- May have occurred in the issuing State during the proceedings that ended with the judgment of conviction and that may have an impact on the decision to recognize this judgment by the judicial authority of the executing State (**past violations**). In other words, the question posed here is whether a past violation of a fundamental right of the person subject of mutual recognition can limit the obligation of the executing State to mutually recognize. In particular, the right to have a fair trial and prohibition of degrading treatment and torture may be at issue;
- May occur in the executing State during the proceedings leading to the recognition of a judgment of conviction (**present violations**). In particular, the research will address the rights protected in Directives 2010/64, 2012/13 and 2013/48. The question posed here, is whether a violation of the Directives can limit the obligation to mutually recognize;
- May occur in the future in the State where the judgment of conviction will be carried out (**future violations**). In particular, prohibition of degrading treatment and torture, the right to a fair trial and possibly the right to family life will be at issue. The question posed here is whether a possible violation of fundamental right that an individual may encounter in the country where the judgment of conviction will be carried out can limit the obligation to mutually recognize a foreign decision.

It follows from the findings of the legal analysis complemented by the empirical research (see empirical findings 1 in Part V) conducted in this research that judicial cooperation implying a transfer of convicted persons generally functions well. Nevertheless, in certain circumstances the quasi-automaticity of mutual recognition does not always allow to take full account of individuals' fundamental rights. In the long run, this may have the effect of undermining the confidence that judicial authorities and citizens have in an AFSJ. This conclusion in particular is true in the context of the prohibition of torture and degrading treatments ensured by Article 4 CFR. The line remains unclear between mutual trust based on the presumption that all EU Member States respect fundamental rights, on the one hand, and

² Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1; Directive 2013/48/EU of the European Parliament and the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings [2013] OJ L294/1; Directive 2010/64/EU of the European Parliament and the Council of 20 October 2010 on the right to interpretation and translation [2010] OJ L281/1.

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the circumstances implying a necessary limitation of that trust in order to respect the individuals' fundamental rights, on the other hand. It is interesting to mention a certain 'polarisation' between 'mutual trusting' countries and 'mutual sceptic' countries. This 'polarisation' is illustrated by the difference in the intensity of the judicial control exercised by the executing judicial authorities and the scepticism is reflected in the amount of questions posed by the judicial authorities in a State when they have to cooperate with other Member States. Certain countries enforce mutual recognition rather rigidly in a quasi-automatic manner relying on an almost 'blind' trust towards their foreign counterparts, whereas other countries are more sceptical and elaborate on the limitations decided by the CJEU, in particular in *Aranyosi* and *Caldararu*, to sometimes refuse cooperation. In turn, the empirical research shows that certain actors in the 'mutual trusting' countries may feel irritated by the scepticism of their foreign counterparts. If some level of 'discrimination/bias' towards other Member States might be involved here and should be avoided at all price, one can also argue that, let aside valid legal arguments based on the respect for fundamental rights, assessing their recognition and respect in practice is one of the main functions of judicial authorities in societies abiding by the rule of law. Finally, it should be stressed that amongst the three fundamental rights scrutinized in this research, the most important tension happens in the context of the protection against torture and degrading treatment. This is not surprising since this right cannot be derogated and is precisely the focal point of the European and national case law until now. If the other two rights (family life and fair trial) have an important impact on the dialogue between national judicial authorities enforcing mutual recognition post-trial (in particular when it comes to assess the rehabilitation of a detainee), this impact does not go as far as to undermine mutual trust and judicial cooperation. These two fundamental rights are, of course, not neglected in the decisions to enforce mutual recognition's requests, but it is more often believed that the control in the light of these fundamental rights should happen as much as possible in the country where the violation takes place. This is actually in line with the position of both the CJEU and the ECtHR.³ It should also be mentioned that the research has not identified other rights than these three rights that would play a major role in limiting mutual trust between judicial authorities.

With regards to the rights enshrined in Directive 2010/64, Directive 2012/13 and Directive 2013/48 (the minimum harmonised procedural safeguards), the research posed the question whether a violation of one these rights either during the proceedings leading to the decision that ought to be recognised by another Member State or during the recognition phase could have an impact on mutual recognition. It does not seem that these Directives play an important role in this respect. First of all, as was explained in the introduction to this research,⁴ if any interference happens with regards to one of these rights, the applicant should seek redress in the Member State at the origin of the interference. Secondly, the threshold for refusing to recognise a foreign judicial decision because of a possible violation of a right that is not absolute, which is the case of the right to fair trial as regulated in these Directives, is very high. To date such a violation has never justified a refusal to recognise a decision.

The tensions identified above may be addressed by the following recommendations:

³ See for example Case C-211/10 *Doris Povse v Mauro Alpage*, Judgement of the Court (Third Chamber) of 1 July 2010, EU:C:2010:400; Application no 3890/11 *Sofia Povse and Doris Povse v Austria*, Judgement (First Section) of 18 June 2013, CE:ECHR:2013:0618DEC000389011, paras 80-81; Case C-168/13 PPU *Jeremy F v Premier minister*, Judgement of the Court (Second Chamber) of 30 May 2013, EU:C:2013:358, para 50; Application no 56588/07 *Stapleton v Ireland*, Judgement (Third Section) of 4 May 2010, CE:ECHR:2010:0504DEC005658807 (in this case, the ECtHR made its observation in a decision on the inadmissibility of the application).

⁴ See Part III 3.1.

1. Clarification of the features of the principle of mutual trust and its consequences;
2. Improvement of complementary requirements accompanying mutual recognition instruments;
3. Further guidance to national legislators for the transposition of the EU instruments into national law;
4. Improvement of exchange of information and cooperation between competent authorities.

1. Definition and scope of the principle of mutual trust

According to the findings of this research, the nature of the principle of mutual trust seems sometimes unclear to judicial authorities. This is not surprising since it has not been established in the legislation of the EU, but has been progressively defined in the case law of the CJEU.⁵ Judicial authorities do not always have the same understanding of the scope of this principle. As a matter of consequence, the conditions for and consequences of a limitation of that trust vary from one country to the other. These variations may be detrimental to the equality between Member States and to a uniform protection of the individuals. Therefore, a clarification of the **definition and scope of the principle of mutual trust** may be welcome in future instruments in order to enhance judicial cooperation while respecting the rights of the individuals in transnational criminal proceedings.

1.1. Mutual trust in EAW proceedings for the execution of a sentence

The test concerning a possible rebuttal of mutual trust in order to refuse the surrender of a person convicted in another Member State is defined and applied to various extents in the countries analysed. In the context of the EAW and the *Aranyosi and Caldaru* Joined Cases test, in every Member State, both law and case law have not given a firm answer to some crucial questions yet, such as: the protection of what fundamental rights can justify a refusal? What is the content of such rights: the one identified by the ECtHR or the one provided by national constitutions? Under what conditions such a rebuttal should imply the end of the surrender proceedings? What should happen if the surrender proceedings are ended?

In this respect, a clarification of the CJEU case law on mutual trust and how this principle affects mutual recognition in the field of cooperation in criminal matters may be welcome. This clarification may be necessary not only in order to avoid too big gaps in fundamental rights' protection between the national approaches, but also in order to secure the citizens' security through efficient cooperation between authorities involved in the fight against crime. Since mutual trust pervades the entire AFSJ, this clarification should be based on the various building blocks constituted by the CJEU case law that has been decided not only in the field of criminal matters, but also in other policy areas such as cooperation in civil matters and asylum law. Several points for consideration will be developed below.

1.2. Mutual trust in transfer proceedings (FD 2008/909) and transfer of probation decisions and alternative sanctions (FD 2008/947)

The nature of mutual trust in the context of proceedings based on FD 2008/909 and FD 2008/947 is slightly different from the context of the EAW. In the EAW where proceedings are arranged for the execution of a sentence, the tension concerning mutual trust occurs especially in the executing State with regards to the issuing State where the convict should be transferred to. However, in the context of transfer of sanctions involving deprivation of liberty and other alternative sanctions, a certain amount of tension also exists in the issuing State

⁵ K. Lenaerts, 'La vie après l'avis : exploring the principle of mutual (yet not blind) trust' (2017) 54(3) Common Market Law Review, 805-840.

towards the executing State. In particular, with regards to the transfer of prison sentences, if the judicial authorities where the judgment has been issued have doubts concerning the prison conditions in the executing State, a test similar to the *Aranyosi and Caldaru* Joined Cases test should apply. Obviously, by contrast to EAW proceedings where the executing authorities are bound by the principle of mutual recognition, the situation is radically different in the context of FD 2008/909 and FD 2008/947 where the issuing State has no obligation to transfer a judgment even when the executing State has requested such a transfer when, for example, the convict resides on its territory. Nevertheless, it should be stressed that the standards of protection against a violation of Article 4 CFR should equally apply in this context. A tension may then occur between the aim of social rehabilitation pursued by these FDs and the necessary respect for fundamental rights. A Member State should not transfer a prisoner to another Member State of the EU if there are substantial grounds to believe that this individual will be exposed, because of the conditions for his/her detention in the executing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 CFR, in the event of his/her transfer to that Member State. This is one of the reasons why the aim of social rehabilitation should be better monitored in the Member States (see empirical findings 3 in Part V).

2. Lack of clear and precise complementary requirements accompanying mutual recognition

Connected to the definition and scope of mutual trust, the **lack of clear and precise requirements** supporting mutual recognition is obviously a source of tension that has been identified. The lack of minimum requirements is not only caused by insufficient harmonisation, but originates also from the insufficient knowledge or implementation of existing requirements. It is sometimes (but not always) felt that harmonisation in order to enhance mutual trust and facilitate mutual recognition should be improved. Diversity between Member States is as such not a bad thing of course, it is even essential to safeguard national identities and legal systems as respectively imposed by Article 4 TEU and Article 67 TFEU. The balance between more or less harmonisation is therefore difficult to find. In certain circumstances therefore soft law instruments may be preferred to binding legislation. It seems in any case that the trigger for such harmonisation or soft law instruments would be to improve the position of the individuals in criminal proceedings. The subject of further harmonisation or soft law however is not necessarily directly relating to clarifying/identifying a minimum level of fundamental rights or procedural safeguards. Harmonisation or soft law would first of all be aiming at enhancing mutual trust and improving cooperation, then also, either directly or indirectly, at contributing to improve the position of the individuals subject of mutual recognition.

The present research has identified the following areas where requirements supporting mutual recognition could be clarified: the requirements implied by the *Aranyosi and Caldaru* Joined Cases test, the requirements for the respect of the social rehabilitation goal of the FD 2008/909 and FD 2008/947, and the assistance of a lawyer in FD 2008/909 and FD 2008/947 proceedings.

a) The Aranyosi and Caldaru Joined Cases test in EAW proceedings on the execution of a sentence

The exact conditions of the two-tier *Aranyosi and Caldaru* Joined Cases test⁶ are perceived in different manners in the countries analysed. First of all, the first tier of the test that concerns the determination of a real risk of inhuman or degrading treatment is well respected.

⁶ See Part III 3.3. a).

The European standard concerning the minimum personal space that a person should have in prison in order to avoid a violation of Article 3 ECHR applies generally. Even if certain countries rely on the more favourable threshold recommended by the Committee for the Prevention of Torture,⁷ the minimum threshold imposed by the case law of the ECtHR is respected. According to the ECtHR, when the area of a prisoner's personal space falls below three square-meters, a strong presumption arises of a violation of Article 3 ECHR.⁸ Nevertheless, this presumption can be rebutted if the authorities of this State can show that the prisoner was sufficiently compensated for the lack of space with other benefits, such as freedom of movement and activities outside of the cell, and confinement to such spaces was minor and limited in duration. It seems that the tension between Member States occurs at the moment when the authorities of the executing State seek to obtain the necessary information from the issuing State concerning these mitigating factors. This concerns the second tier of the *Aranyosi and Caldaru* Joined Cases test.

Although the procedural steps to be followed by the national authorities executing an EAW have been recently clarified in the Handbook on how to issue and execute a EAW,⁹ the concrete and precise assessment of the circumstances in the case at hand remains sometimes difficult. This is especially because judicial authorities must obtain information from their foreign counterparts. Language and other practical difficulties can make the process cumbersome and consequently affect the rights of the individuals. According to the CJEU, the issuing State is obliged to reply within a reasonable time when it is being questioned on the specific prison where the person subject to an EAW will be sent. In this respect, it could be adequate to establish a multi-lingual template with the type of supplementary information that can be requested by the executing authority and what type of information should be sent out by the issuing authority. The template would not have to be exhaustive and could allow for other information to be requested, but the document being translated into the EU official languages, this could simplify the process. According to the Handbook on how to issue and execute a EAW, in such circumstances Article 17(7) of the FD EAW applies. In other words, should a request for information concerning the prison condition in the issuing State exceed the time limit imposed by this provision, Eurojust should be informed. In addition, the role of Eurojust in the exchange of information could be enhanced. In this respect, the findings of this research would certainly concur with the outcome of the Eurojust Report of the College Thematic Discussion published on the 16th of May 2017 concerning the creation of a template containing the type of information that could be requested.¹⁰ Nevertheless, one should also bear in mind that practitioners from the prison and probation services will not be able to participate in the Eurojust network.

b) The social rehabilitation goal of the FD 2008/909 and FD 2008/947

The social rehabilitation goal of the FD 2008/909 and FD 2008/947 may well be better achieved if the EU legislation would provide clearer criteria to assess this goal. As it now stands, the concept of social rehabilitation is not defined at EU level and is therefore an open-ended concept. It should be stressed in this respect that 'the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of

⁷ See <http://hudoc.cpt.coe.int/eng> (last accessed 4th August 2017).

⁸ See for example Application no 7334/13 *Muršić v Croatia*, Judgement (Grand Chamber) of 20 October 2016, CE:ECHR:2016:1020JUD000733413.

⁹ Commission Notice of 6 October 2017, Handbook on how to issue and execute a European arrest warrant [2017] OJ C335/01.

¹⁰ Eurojust, Outcome Report of the College Thematic Discussion 'The EAW and Prison Conditions' of 16 May 2017, Doc. Num. 9197/17.

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determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU'.¹¹

Member States can find guidance in the Recitals of the FDs. Recital 9 of the Preamble of FD 2008/909 and recital 14 of FD 2008/947 concern the aim of social rehabilitation. In particular, the competent authority of the issuing State are invited to take into account elements such as the person's attachment to the executing State, whether he/she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State. In addition, Member States can take into account international standards such as The United Nations Standard Minimum Rules for the Treatment of Prisoners.¹² According to this international standard, prisoners should be allocated "to the extent possible, to prisons close to their homes or their places of social rehabilitation" (Rule 59) and they should be offered education, vocational training and work, as well as other forms of assistance that are appropriate and available, including those of a remedial, moral, spiritual, social and health- and sports-based nature. All programs should be in line with the individual treatment needs of prisoners (see Rule 4(2)).

Nevertheless, it appears that these criteria are not always taken into consideration in the decision to (or not to) transfer a convicted person to another Member State. In particular, the attention given to the opinion and sometime consent of the convicted person in transfer proceedings seems to have a different impact depending on the country researched. This certainly does not improve the citizen's confidence in the system of transfer of prison sentences. This is corroborated by the empirical research (see empirical findings 3 in Part V). In an area of free movement of persons, nationality is important, but not always the essential criterion to take into account when allocating a prisoner to a specific country. The decision to transfer a prisoner should not only take the interest of the general public, of the victim into account, but also the best interest of the prisoner with the aim to rehabilitate this person. A multi-lingual template could be imagined that contains a set of criteria, including those mentioned above. In this respect, best practices can be identified in the Swedish report where, in addition to the standards already mentioned above, such criteria include:

- The citizenship, length of domicile in different States and current residence situation;
- The type of residence permit(s) that the sentenced person has;
- Special consideration shall be given to EEA citizens and their family members with regard to the right of residence;
- Work and family situation;
- Whether the sentenced person will be deported;
- The sentenced person's language, cultural, social, economic and other links to the other Member State;
- The sentenced person's own view;
- When the sentenced person has children under 18 years of age, consideration shall be given to what is best for the children.

Such a template could be taken into consideration by the judicial authorities in combination with the opinion of the convicted person when deciding on the transfer of that person to another Member State. This could improve the position of the individual, and in

¹¹ Case C-294/16 PPU *JZ v Prokuratura Rejonowa Łódź — Śródmieście*, Judgement of the Court (Fourth Chamber) of 28 July 2016, EU:C:2016:610, para 36.

¹² The recommendation of the United Nations Office on Drugs and Crime on The United Nations Standard Minimum Rules for the Treatment of Prisoners, available at https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf (last accessed on 4th of August 2017). See also Council of Europe Recommendation, Rec(2006)2 of 11 January 2006 of the Committee of Ministers to Member States on the European Prison Rules, available at <https://rm.coe.int/16806f3d4f> (last accessed on 4th of August 2017).

particular his/her chance of social rehabilitation. Providing such non-binding minimum requirements may also facilitate mutual recognition and enhance mutual trust.

c) The assistance of a lawyer in FD 2008/909 and FD 2008/947 proceedings

The assistance of a lawyer in FD 2008/909 and FD 2008/947 proceedings is not always provided with consistence. Consequently, the protection varies from one State to the other. Where the person is detained, this might not be a problem when the detention facilities in the executing country in particular are good, but the situation may undermine the protection of the convicted person in situations where the facilities are overcrowded, for example. Because the protection is not uniform, a person subject to transfer may well find him/herself in a situation where he/she will not enjoy legal assistance. It is indeed true that the threshold of protection granted by Article 6 ECHR and Article 47 and 48 CFR does not cover post-trial situations and, consequently, does not guarantee the assistance of a lawyer at this stage. Nevertheless, it might be relevant to consider going beyond the current boundaries of these provisions and think of making the assistance of a lawyer in transfer proceedings a justifiable right throughout the EU. In this respect, the respect of the standards provided in Directive 2013/48 could be made advisable to the Member States.

d) Improve knowledge of actors

The empirical research shows a lack of specialised knowledge and awareness as regards the functioning of EU cooperation instruments in the AFSJ (see empirical findings 4 in Part V). The existence or the benefits of EU instruments are often unknown to actors involved in criminal justice. Then, when a particular instrument is used in the context of a specific case, distrust occurs following a lack of information and communication between the judicial authorities involved. The lack of information does not necessarily always concern the fundamental rights record of a specific country (see below 4.), but it may also simply concern the features of a foreign criminal justice system. It seems that the EC could develop learning activities directed towards judicial authorities involved in mutual recognition cases.¹³

3. Implementation of EU legislation

The national legislation **implementing** EU legislation is not always consistent with the latter. In particular, inconsistencies have been identified in this research. This does not necessarily mean that the EC should start an infringement proceeding against the States that have deviated from the EU standards, but further clarification in future instruments may be useful to avoid inconsistencies in the future. For example, the following inconsistencies have been shown:

- Concerning the FD EAW
 - Every Member State provides for more mandatory grounds for refusals than those provided for in the EU legal framework;
 - The distinction between optional and mandatory grounds for non-execution is not always clear, so the protection of the individuals is not equal in all the countries. A clarification of this distinction should be made in future legislation on mutual recognition.
- Concerning FD 2008/909
 - 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));

¹³ E-learning platforms such as http://steps2.eu/english/story_html5.html (last accessed 4th August 2017) are good examples.

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- 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;
- Although the FD 2008/909 only provides for non-compulsory grounds for non-recognition and non-enforcement, several grounds oblige the competent authorities to refuse the recognition

One should stress that these various gaps discovered in the national legislation are not always detrimental to the individuals' fundamental rights (for example, one could contend that an individual is may be better protected against a transfer where a ground for non-execution leaves no discretion to the executing authorities). Nevertheless, let alone the legal incompatibility with EU law and the principle of supremacy, one may contend that too much variations between the implementation is not desirable with regard to the principle of equality between the Member States and between citizens. The principle of equality being one of the foundations of the EU is also an essential conditions to the very existence of mutual trust and, therefore, should be safeguarded.¹⁴

4. Exchange of information and cooperation

It seems that one very important aspect that contributes to mutual distrust is the **lack of information concerning the situation in the cooperating Member State**. This lack of information exists towards the authorities involved in judicial cooperation and towards the individuals subject to mutual recognition. This is corroborated by the empirical research (see empirical findings 4 in Part V). A conceptual distinction exists at three levels:

- Shortcomings in the exchange of information between national enforcement authorities;
- Strengthening exchange of information between defence lawyers.

Firstly, as was already mentioned above, several multi-lingual templates establishing a list of information necessary for a smooth cooperation between foreign counterparts could improve the system of transfer of convicted persons. At this occasion, recourse to existing cooperation platform such as Eurojust and the European Judicial Network should be enhanced. Here also the role of the lawyer should be stressed. For example, as earlier mentioned in the context of the EAW for the execution of a sentence, nothing is provided by national law as regards the right to a lawyer in the issuing Member State. Such a gap does not facilitate the gathering of information either for the lawyer appointed in the executing State nor for the executing judicial authorities. Moreover, the empirical research reflects the need for enhanced consultation between foreign judicial authorities. This finding is corroborated by the recent reports issued by Eurojust on the topic.¹⁵ In the context of FD 2008/909, although the importance of the right to know about and understand proceedings is highlighted, it does not seem to be efficiently regulated and leaves gaps in the protection. The same applies to the possibility for a convicted person to give his/her opinion in the transfer proceedings. The study shows that the place of the individual in transfer proceedings is not uniform and could be improved, or at least more closely monitored by the EC.

Secondly, the lack of information exists towards the detainees subject to mutual recognition as such. The language barrier is obviously a problem that still occurs even if important improvements have been made recently. The problems due to languages differences in criminal proceedings have already been highlighted in previous studies as inherent to the EU (by contrast with the US).¹⁶ It is difficult for the detainees to understand how he/she can

¹⁴ K. Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (n 5), 805-840.

¹⁵ Eurojust, European Arrest Warrant Casework of 16 May 2017 Doc. Num. 9198/17; Eurojust, Outcome Report of the College Thematic Discussion 'The EAW and Prison Conditions' (n 10).

¹⁶ F. Ruggieri (Ed.), *Criminal Proceedings, Languages and the European Union* (Heidelberg: Springer 2014).

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exercise his/her rights in transnational proceedings, let alone the specificities of each criminal justice systems. Measures that would develop EU mechanisms in order to ensure good translation in transnational proceedings may also be welcome. It should also be stressed that if a good translation of the penal dossier is essential for the judicial authorities that have to take a decision to recognize and enforce a foreign request, it is also essential for the individual subject to the mutual recognition measure. In the context of the EAW for the execution of a sentence, except for two countries (IT and NL) nothing is provided by national law as regards the right to a lawyer in the issuing Member State. This has an impact on the transfer of information. In this respect, a good practice was identified in IT and NL where a lawyer can be appointed in the issuing State regardless of whether the EAW is issued for prosecution or execution. In this respect, it would be advisable for the Member States to adopt a similar practice and provide a broad interpretation to Directive 2013/48 concerning the right to legal counsel.¹⁷ Although, the Directive does not formally apply to post-trial issues, encouraging such a practice would enhance the protection of the individuals and facilitate mutual recognition. The same holds true for proceedings concerning FD 2008/909 and 2008/947 when the country is acting as an issuing State. In this respect, a recommendation addressed to the Member States recalling the importance of the legal assistance also at this stage of the proceedings might be advisable.

The research has shown that the role played by individuals' fundamental rights in proceedings leading to the transfer of judgments of conviction within the EU is increasing. Mutual trust between judicial authorities cannot be always presumed and it should not prevent judicial authorities to scrutinize whether these rights have been, have or will be respected in certain specific cases in another Member State. This being said, it should be remembered that the respect of fundamental rights in criminal justice is oftentimes the result of a deficient national criminal policy. For example, where a risk of violation of Article 4 CFR exists, this is not due, however, to the quality of the work accomplished by foreign judicial counterparts. Judges cannot remedy the bad prison conditions in their country. It is therefore important to mitigate the effects of mutual trust on the cooperation between judicial authorities. Where the EU has a competence for it, there are certainly measures that need to be adopted in order to better assist these authorities in the workload imposed by mutual recognition and mutual trust. Nevertheless, especially where there is national discretion to regulate criminal justice, the political authorities of the Member States must realize that the effective fight against crime necessarily calls for a global solution including a high level of individuals' fundamental rights protection.

¹⁷ Concerning the EAW, see Part III 2.2. c).