

## **MR2.0: some preliminary explorations<sup>1</sup>**

### **I. Introduction**

This memorandum is meant as a prelude to drafting a uniform structure for the country reports. Section II concerns the scope of the project (normative framework; relevant EU and CoE instruments; type of decisions). Sections III-VII offer preliminary explorations of some aspects concerning coherence (or lack thereof) between the instruments listed in Section II: temporal aspects (Section III), mutual exclusivity (Section IV), complementarity (Section V), competent authorities (Section VI) and central authorities (Section VII).

### **II.A Scope of the project: normative framework**

In defining the scope and the core issue at stake, the starting point is the aim of the EU call for proposals: “The aim of this call for proposals is to promote judicial cooperation in criminal matters and to contribute to the effective and coherent application of EU mutual recognition instruments in criminal matters”.<sup>2</sup>

This raises at least two questions.

- i. What do we mean by “effective and coherent”?
  - ii. Which EU mutual recognition instruments do we take into account?
- i. Effectiveness and coherence

Without getting too theoretical, we think it is wise to have some theoretical guidance on these concepts.<sup>3</sup> However, the theory should not stand in the way of the practical approach, which the project *MR 2.0* should strive for.

So, then the question is: under which conditions is the application of mutual recognition instruments in a given individual case effective and coherent?<sup>4</sup>

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<sup>1</sup> These explorations are mainly based on the text of the applicable instruments and on the case-law of the Court of Justice, not on literature.

<sup>2</sup> The importance of coherence is also recognised by the CJEU: Joined Cases 566/19 PPU & 626/19 PPU, ECLI:EU:C:2019:1077 (*Parquet général du Grand-Duché de Luxembourg and Public prosecutors in Lyon and Tours*), para. 43.

<sup>3</sup> We drew some inspiration from the way this concept is tackled in the theory of law, logic, mathematics, ...

<sup>4</sup> The project does not aim at a theoretical and abstract analysis of the (lack of) coherency on the level of EU-legislation and/or national legislation and/or EU or national policies in general. The project aims at enhancing the

We could use the following dimensions of the concept of ‘effectiveness<sup>5</sup> and coherence’.

- Comprehensiveness
  - All available options should be taken into consideration.<sup>6</sup>
- Consistency
  - No instruments should be applied that are inconsistent with an instrument already applied.
- Completeness
  - Every available instrument should be applied as long as the objective is not achieved (and in so far as its application meets the other criteria).<sup>7</sup>
- Proportionality
  - Choose among the available instruments the instrument that is sufficiently effective and the least intrusive.<sup>89</sup> It is referred here to the Report ImprovEAW, especially section 2.5.6, which deals at length with all the elements of proportionality.

In other words, to be effective and coherent in the application of mutual recognition instruments in an individual case, available instruments should not be overlooked, decisions to apply an instrument should not be contradictory, as long as there remains an option this option should be used and, finally, this has all to be done with the lowest costs (in the broad sense of the word, i.e. in terms of money, time and impact on the requested person).

So the answer to the question posed before is: the application of instruments in a given individual case<sup>10</sup> is effective and coherent if (and only if) instruments are applied in a comprehensive, consistent, complete and proportional way.

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coherency of the *application* of mutual recognition instruments in full practice, i.e. at the level of taking decisions in individual cases.

<sup>5</sup> This concept of ‘effectiveness’ is relevant on the level of taking decisions in an individual case on choosing one or more mutual recognition instruments that will be applied. Effectiveness in the sense of applying an instrument, once chosen, in the most effective way considering the costs involved and the goal to be reached falls without the scope of the project.

<sup>6</sup> There is no use talking about comprehensiveness when only one option is available.

<sup>7</sup> This dimension of course relates to the overall objective of preventing impunity.

<sup>8</sup> This dimension of course relates to the other overall objective of protecting the rights of the requested person.

<sup>9</sup> When assessing the proportionality of an available instrument, at least the following dimensions should be taken into account. Using an instrument without detention is less intrusive than using an instrument with detention (e.g., the EAW). Involvement without physical presence in the requesting MS (e.g. through video-conferencing) is less intrusive than transferring the person concerned. Involvement on the basis of voluntary arrangements is less intrusive than employing coercive measures.

<sup>10</sup> This is about coherence at an individual level (coherence in a given case). It is also important to look at coherence at a general level. The application of instruments in a given case should at least be consistent with the application of instruments in another case, but this is out of scope.

## **II.B Scope of the project: relevant EU and CoE instruments**

This research project focuses on coherence in the application of a number of EU and CoE instruments covering judicial cooperation in criminal matters, from the start of a criminal investigation right through to the enforcement of a sentence (custodial sentence/measure involving deprivation of liberty; probation decision; alternative sanction).<sup>11</sup> These instruments are:

### *EU*

- Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union<sup>12</sup> (concerning the provisions on sending and service of documents);
- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States;<sup>13</sup>
- Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union;<sup>14</sup>
- Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions;<sup>15</sup>

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<sup>11</sup> Not included in the scope of the project: financial penalties (Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *OJ L 76/16*, as amended by FD 2009/299/JHA, *OJ L 81/24*) and freezing orders and confiscation orders (Regulation 2018/1805 of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, *OJ L 303/1*)

<sup>12</sup> *OJ C 197/3*.

<sup>13</sup> *OJ L 190/1*, as amended by FD 2009/299/JHA, *OJ L 81/24*.

<sup>14</sup> *OJ L 327/27*, as amended by FD 2009/299/JHA, *OJ L 81/24*.

<sup>15</sup> *OJ L 337/102*, as amended by FD 2009/299/JHA, *OJ L 81/24*.

- Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention;<sup>16</sup>
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters;<sup>17</sup>
- Recommendation on the procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions;<sup>18</sup>

#### *CoE*

- European Convention on the Transfer of Proceedings in Criminal Matters.<sup>19</sup>

On 5 April 2023, the European Commission submitted a proposal for a regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters.<sup>20</sup> In order to ensure that the outcome of the project remains current we should include this proposal in our research.

### **II.C Scope of the project: type of decisions**

Another way of determining the scope is to look at the type of decisions that need to comply with the *effective and coherent* requirement. It seems to be implied in the research proposal to include decisions relating to, *inter alia*:

- The decision (not) to release the suspect;
- The decision to issue an EIO;
- Determining which state will “do” the case (to transfer or not to transfer);
- The decision to issue an EAW for prosecution;
- Determining which state will execute the sentence (to transfer or not to transfer);
- The decision to summon a defendant abroad;
- The decision to issue an EAW for execution.

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<sup>16</sup> OJ L 294/20, as amended by FD 2009/299/JHA, OJ L 81/24.

<sup>17</sup> OJ L 130/1.

<sup>18</sup> Brussels, 8.12.2022, C(2022) 8987 final

<sup>19</sup> Strasbourg 15 May 1972, ETS No. 73.

<sup>20</sup> COM(2023) 185 final.

### III. Temporal aspects of applicability (the stages of criminal proceedings)

In this section, the various instruments are considered from the perspective of their (non-) applicability to the different stages of a criminal case.

Taking the lead from Article 31 EU and Article 82(2)(1)(d) TFEU, as interpreted by the Court of Justice,<sup>21</sup> one can differentiate between the following stages:

- the pre-trial stage;
- the trial itself;
- the enforcement of a final judgment delivered by a criminal court in respect of a person found guilty of a criminal offence.

By their very nature, some of the instruments are applicable to only some of those stages and inapplicable to others. For instance, the instruments concerning mutual recognition of sentences only pertain to the enforcement stage. For these instruments to apply there must be a *final* decision imposing a sentence (Article 1(a) FD 2008/909/JHA; Article 2(1) FD 2008/947/JHA).<sup>22</sup> Therefore, these instruments are not applicable to the pre-trial and trial stages.

Conversely, the European supervision order (ESO) and the European Investigation Order (EIO) inherently do not apply to the enforcement of sentences. The ESO provides an alternative to provisional detention *pending trial*. The EIO aims at having a specific *investigative* measure carried out in another Member State *to obtain evidence* (Article 1(1) Directive 2014/41).

By contrast, the provisions on sending and service of documents of the EU Convention on Mutual Assistance also apply to the enforcement of sentences. That convention *supplements, inter alia*, the Additional Protocol to the European Mutual Assistance Convention.<sup>23</sup> Article 3(a) Additional Protocol declares that the European Mutual Assistance Convention also applies to ‘the service of documents concerning the enforcement of a sentence (...)’.

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<sup>21</sup> Cases 508/18 & 82/19 PPU, ECLI:EU:C:2019:456 (*OG and PI (Public Prosecutor’s Offices, Lübeck and Zwickau)*), paras. 53-56.

<sup>22</sup> Case 582/15, ECLI:EU:C:2017:37 (*Van Vemde*), para. 24.

<sup>23</sup> Strasbourg 17 March 1978, ETS No. 99. All EU Member States have ratified the Additional Protocol.

The EAW has an alternative scope: an EAW can either be issued for the purpose of conducting a criminal prosecution or for the purpose of executing a custodial sentence or detention order (Article 1(1) FD 2002/584/JHA). This instrument, therefore, can be applicable to the enforcement stage or to stages preceding the enforcement stage.

Both the EIO and the EAW are applicable prior to the enforcement stage. As we have seen, the EIO concerns *investigative* measures, whereas an EAW can be issued for conducting a criminal *prosecution*. How to demarcate ‘investigation’ on the one hand and ‘prosecution’ on the other? And how to assign the EIO and the EAW to one or more of the stages preceding the enforcement phase?

Nothing in FD 2002/584/JHA seems to limit the scope of prosecution-EAWs to cases that are trial-ready or are already pending before a court.<sup>24</sup> This is confirmed by the legal basis of that framework decision (Article 31 TEU), which refers to cooperation between judicial authorities in relation to ‘proceedings’ and the ‘enforcement of decisions’. The former concept ‘is capable of encompassing the entirety of criminal proceedings, namely the pre-trial phase, the trial itself and the enforcement of a final judgment delivered by a criminal court in respect of a person found guilty of a criminal offence’.<sup>25</sup> Recital (5) of the preamble of FD 2002/584/JHA also speaks of ‘judicial decisions in criminal matters, covering both pre-sentence and final decisions’.<sup>26</sup> Finally, recital (25) of Directive 2014/41 suggests that the concept of a ‘prosecution’ encompasses but is not limited to ‘bringing [a person] before a court for the purpose of the standing trial [sic]’.<sup>27</sup>

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<sup>24</sup> When adopting FD 2002/584/JHA, Ireland made a statement which reads as follows:

‘Ireland shall, in the implementation into domestic legislation of this Framework Decision, provide that the European Arrest Warrant shall only be executed for the purpose of bringing that person to trial or for the purpose of executing a custodial sentence or detention order.’ (Council document 14867/1/01 of 11 December 2001). However, according to the case-law of the Court of Justice such a statement, which is not reflected in the provisions of the relevant instrument, is irrelevant to the interpretation of that instrument.

<sup>25</sup> Cases 508/18 & 82/19 PPU, ECLI:EU:C:2019:456 (*OG and PI (Public Prosecutor’s Offices, Lübeck and Zwickau)*), para. 54.

<sup>26</sup> ‘The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice’.

<sup>27</sup> ‘This Directive sets out rules on carrying out, at all stages of criminal proceedings, including the trial phase, of an investigative measure, if needed with the participation of the person concerned with a view to collecting evidence. For example, an EIO may be issued for the temporary transfer of that person to the issuing State or for the carrying out of a hearing by videoconference. However, where that person is to be transferred to another Member State for the purposes of prosecution, including bringing that person before a court for the purpose of the

In a prosecution-case, the only requirement for issuing an EAW is the existence of ‘an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2’ (Art. 8(1)I FD 2002/584/JHA). This means that there must be a national arrest warrant issued by a ‘judicial authority’, such as a court or a public prosecutor but not the police.<sup>28</sup> The requirement of a national arrest warrant necessarily means that there must be evidence against the requested person of a ‘reasonable suspicion of having committed an offence’ (cf. Art. 5(1)(c) ECHR). The Court of Justice has defined the autonomous concept of a ‘[national] arrest warrant or any other enforceable judicial decision having the same effect’ as covering ‘national measures adopted by a judicial authority to search for and arrest a person who is the subject of a criminal prosecution, with a view to bringing that person before a court for the purpose of conducting the stages of the criminal proceedings’.<sup>29</sup> It has also indicated that a measure adopted by a public prosecutor ordering that the person concerned ‘be placed in detention for a maximum of 72 hours with a view to enabling that person to be brought before the court which has jurisdiction to adopt a pre-trial detention measure’ would meet that definition.<sup>30</sup>

To sum up: in order to issue a prosecution-EAW there must be evidence of a reasonable suspicion of having committed an offence, a judicial authority (not the police) must have issued an arrest warrant against the person concerned and that arrest warrant must aim at bringing that person before a court ‘for the purpose of conducting the stages of the criminal proceedings’. Although far from offering us a clear-cut definition of the concept of a ‘criminal prosecution’, these requirements do make clear that this concept excludes its applicability to the initial stages of an investigation by the police in which there is no *judicial* involvement yet. After all, the intervention of a *judicial* authority is required with the aim of bringing the person concerned before a *court*.

According to the preamble of Directive 2014/41, the EIO sets out ‘rules on carrying out, at all stages of criminal proceedings, including the trial phase, of an investigative measure, if needed with the participation of the person concerned with a view to collecting evidence’. Such measures may, e.g., consist in the temporary transfer of a person ‘for the purpose of carrying out an investigative measure with a view to gathering evidence for which the presence of that

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standing trial, a European Arrest Warrant (EAW) should be issued in accordance with Council Framework Decision 2002/584/JHA (...)

<sup>28</sup> Case 453/16 PPU, ECLI:EU:C:2016:860 (*Özçelik*), paras. 31-33.

<sup>29</sup> Case 414/20 PPU, ECLI:EU:C:2021:4 (*MM*), para. 57.

<sup>30</sup> Case 414/20 PPU, ECLI:EU:C:2021:4 (*MM*), paras. 55-56

person on the territory of the issuing State is required’ or in carrying out a hearing of a person by videoconference. However, if a transfer is to be carried out ‘for the purposes of prosecution, including bringing that person before a court for the purpose of the standing trial, a European Arrest Warrant (EAW) should be issued in accordance with Council Framework Decision 2002/584/JHA’.<sup>31</sup> This recital juxtaposes the concept of ‘investigative measures’ with the concept of ‘prosecution’. Nevertheless, these concepts do not seem to be mutually exclusive, in the sense that the concept of ‘prosecution’ does not seem to exclude that the investigation continues during the ‘prosecution’. After all, recital (26) addresses the choice between issuing an EIO and an EAW from the angle of proportionality, thereby suggesting that issuing an EAW partly with a view of carrying out investigative measures is not ruled out *a priori*: ‘With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. The issuing authority should consider, in particular, whether issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative’.

Transfer of criminal proceedings on the basis of the European Convention on Transfer of Proceedings in Criminal Matters covers all three stages of criminal proceedings. According to the Explanatory Report ‘Transfer implies that the requesting State has instituted proceedings, that the first stage of the criminal proceedings has been begun and is perhaps completed, and that the presumed perpetrator is known. It is possible that the investigations against the accused have been carried out in the requesting State and that the trial stage has already been reached, or that a judgment has been rendered but not yet enforced’.<sup>32</sup>

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<sup>31</sup> Recital (25).

<sup>32</sup> *Explanatory Report to the European Convention on the Transfer of Proceedings in Criminal Matters*, para. 27.



<b>Table 1: applicability of the instruments to the various stages of criminal proceedings.</b>	Pre-trial stage	Trial stage	Enforcement stage
EU Convention on Mutual Assistance	X	X	X
EAW	X	X	X
MR Cust.			X
MR Prob.			X
ESO	X	X	
EIO	X	X	
EC on Transfer of Proceedings	X	X	X

#### **IV. Mutual exclusivity**

Some instruments pursue objects that inherently are mutually exclusive, although these instruments are applicable to the *same* stage(s) of criminal proceedings. Take, e.g., the EAW and the ESO. Although both can be applied in the pre-trial stage, in order to issue a prosecution-EAW an *enforceable* national arrest warrant must exist (Article 8(1)(c) FD 2002/584/JHA). On the other hand, in order to issue an ESO there must be a ‘decision on supervision measures’, i.e. an ‘enforceable decision taken in the course of criminal proceedings (...) imposing on a natural person, *as an alternative to provisional detention*, one or more supervision measures’ (Article

4(a) FD 2008/829/JHA).<sup>33</sup> Consequently, the existence of an enforceable decision on supervision measures excludes the possibility of the existence of an enforceable national arrest warrant against the same person for the same offence(s) and *vice versa*.

Likewise, the ESO and the European Convention on the Transfer of Proceedings in Criminal Matters are mutually exclusive. An ESO is issued to allow a person concerned to await his trial in the *issuing* Member State while he is in freedom in another Member State (his Member State of residence). The object of the ESO, which is geared to ensuring attendance at the trial in the issuing Member State, is incompatible with a transfer of the proceedings by that Member State to another Member State.

Equally, the object of a prosecution-EAW (conducting a criminal prosecution in the issuing Member State) is incompatible with a transfer of proceedings by the issuing Member State to another Member State. Similarly, the object of an execution-EAW (enforcement of a sentence in the issuing Member State) is incompatible with the object of applying FD 2008/909/JHA (enforcement of the sentencing of the executing Member State).<sup>34</sup>

If only a final custodial sentence or detention order was imposed, FD 2008/947/JHA on probation decisions and alternative sanctions is not applicable to the mutual recognition and enforcement of that sentence or order. Conversely, if only a final probation order or alternative sanction was imposed, FD 2008/909/JHA does not apply to the mutual recognition and enforcement of those penalties.

Where instruments are mutually exclusive, decisions taken by national authorities in the ordinary course of criminal proceedings determine which instrument would be applicable when the need for judicial cooperation should arise. E.g., if a court decides that the imposition of an alternative sanction would not do justice to the seriousness of the offences and imposes a custodial sentence instead, FD 2009/909/JA will apply to its enforcement in another Member State, not FD 2008/909/JHA. The same holds true for certain pre-trial decisions. For instance,

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<sup>33</sup> Emphasis added.

<sup>34</sup> However, Article 4(6) of FD 2002/584/JHA allows the executing judicial authority to have the sentence enforced in the executing Member State where the EAW was issued against a national or resident of that Member State or against a person staying in that Member State. When Article 4(6) FD 2002/584/JHA is applied, the provisions of FD 2008/909/JHA apply *mutatis mutandis* to the enforcement of the sentence ‘Without prejudice to Framework Decision 2002/584/JHA’ and ‘to the extent they are compatible with provisions under that Framework Decision’ (Article 25 FD 2008/909/JHA).

if a court decides to order the provisional detention of a defendant instead of conditionally releasing him, FD 2008/829/JHA does not apply.

However, one can argue that the discretion conferred by national law to take such decisions is limited by EU law. Such decisions could be influenced by the circumstance that the person concerned resides in another Member State. After all, carrying out an alternative sanction or supervising conditions imposed in the context of release from provisional detention will be more difficult when the person concerned resides in another Member State. However, refraining from imposing an alternative sanction or refraining from conditional release solely on account of the person's residence in another Member State amounts to indirect discrimination on the basis of nationality. A distinction between residents and non-residents 'is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners'.<sup>35</sup> Complications concerning the enforcement of judicial decisions against persons who reside abroad can objectively justify such a distinction but only in the absence of EU rules on the enforcement of such decisions.<sup>36</sup> Since such rules exist (FD 2008/909/JHA, FD 2008/947/JHA, FD 2008/829/JHA), national authorities cannot base their decision solely on a person's non-residency when faced with a choice between imposing a custodial sentence or an alternative sanction or with a choice between provisional detention or conditional release.

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<sup>35</sup> Case 29/95, ECLI:EU:C:1997:28 (*Pastors and Trans-Cap v Belgische Staat*), para. 17.

<sup>36</sup> Case 29/95, ECLI:EU:C:1997:28 (*Pastors and Trans-Cap v Belgische Staat*), paras. 20-22.

<b>Table 2:</b> <b>mutual exclusivity</b>	EU Convention on Mutual Assistance	EAW	MR Cust.	MR Prob.	ESO	EIO	EC Transfer of proceedings
EU Convention on Mutual Assistance							
EAW			X execution		X prosecution		X
MR Cust.				X			
MR Prob.			X				
ESO		X					X
EIO							
EC Transfer of Proceedings		X			X		

## V. Complementarity

Some instruments that are applicable to the same stage(s) of criminal proceedings can be applied complementary to one another, even though they have mutually exclusive objects.

E.g., FD 2008/909/JHA and FD 2008/947/JHA can complement one another in cases in which:

- a custodial sentence was imposed consisting of an enforceable part and a suspended part
- in addition to a custodial sentence a probation decision and/or an alternative sanction was imposed.

What holds true for instruments that are applicable to the same stage(s) of criminal proceedings but have mutually exclusive objects *a fortiori* holds true for instruments that are applicable to the same stage(s) but do not have mutually exclusive objects.

E.g., a prosecution-EAW can be combined with an EIO when the person concerned is in the territory of the executing Member State and it is also necessary to gather evidence in that Member State. The same holds true for issuing an ESO and an EIO.

And complementary to issuing an EAW or an EIO, documents can be sent to or served in the executing Member State. The same holds true for issuing an ESO.

<b>Table 3 Complementarity</b>	EU Con Mutua l Assist.	EAW	MR Cust.	MR Prob.	ES O	EIO	EC Transfer of Proceedings
EU Convention of Mutual Assistance		X <sup>37</sup>			X	X	
EAW	X <sup>38</sup>					X prosecution	
MR Cust.	X			X			
MR Prob.	X		X			X	
ESO	X	X				X	
EIO	X	X prosecution			X		
EC on Transfer of Proceedings							

## VI. Competent authorities

An important aspect of the coherent application of the various instruments on judicial cooperation concerns the authorities that are competent to initiate judicial cooperation. If different national authorities are competent with regard to different instruments, this may hinder the coherent application of those instruments.

<sup>37</sup> However, sending or serving documents to the requested person could undermine the ‘certain element of surprise’ which an EAW must have ‘in particular in order to stop the person concerned from taking flight’: compare Case 396/11, ECLI:EU:C:2013:39 (*Radu*), para. 40.

<sup>38</sup> Sending or serving of documents undermines the element of surprise of an EAW.

Some instruments allocate competence to or require validation by a ‘judicial authority’ (EU Convention on Mutual Assistance, EAW, EIO).

Since the EU Convention merely supplements, *inter alia*, the CoE European Convention on Mutual Assistance in Criminal Matters (Article 1(1))<sup>39</sup> and since the EU Convention does not contain a provision on the definition of ‘judicial authority’, it seems that the regime of Article 24 European Convention determines this issue. According to that provision, a ‘Contracting Party may (...) by a declaration addressed to the Secretary General of the Council of Europe, define what authorities it will, for the purpose of the Convention, deem judicial authorities’. Consequently, under the EU Convention, there does not seem to be a uniform concept of ‘judicial authority’.

Although in EU mutual recognition law the concept of a ‘judicial authority’ encompasses courts and other authorities that participate in the administration of justice, such as public prosecutors, but excludes the police and the executive, the definition of that concept is not entirely the same in all mutual recognition instruments. Under FD 2002/584/JHA a public prosecutor can only be regarded as a ‘issuing judicial authority’ if there are statutory rules and an institutional framework capable of guaranteeing that he is not exposed to the risk of being subject to individual instructions from the executive.<sup>40</sup> Because issuing an EIO, unlike issuing an EAW, is not capable of infringing the person’s right to liberty, under Directive 2014/41 the concept of ‘judicial authority’ includes a public prosecutor, ‘regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor’s office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor’s office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a [EIO]’.<sup>41</sup>

Like FD 2002/584/JHA and Directive 2014/41/JHA, FD 2008/829/JHA (ESO) allocates the competence to issue an EIO to a ‘judicial authority or authorities’ (Art. 6(1) FD 2008/829/JHA). However, Member States may designate non-judicial authorities ‘provided that such authorities

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<sup>39</sup> Strasbourg 20 April 1959, ETS No. 30. All EU Member States have ratified this convention.

<sup>40</sup> Cases 508/18 & 82/19 PPU, ECLI:EU:C:2019:456 (*OG and PI (Public Prosecutor’s Offices, Lübeck and Zwickau)*), para. 74.

<sup>41</sup> Case 584/19, ECLI:EU:C:2020:1002 (*Staatsanwaltschaft Wien (Falsified transfer orders)*), paras. 73-75.

have competence for taking decisions of a similar nature under their national law and procedures' (Art. 6(2)).<sup>42</sup> The combined effect of those provisions seems to be that Member States must designate *judicial* authorities unless under national law non-judicial authorities take decisions of a similar nature to issuing an ESO. Art. 6(2) seems to be inspired by respect for the different legal systems and traditions of the Member States (cf. Article 67(1) TFEU) on condition of *equivalence* between proceedings under national law and under FD 2008/829/JHA.

On the other hand, FD 2008/909/JHA and FD 2008/947/JHA merely refer to an 'authority or authorities'. However, like FD 2008/829/JHA, FD 2008/947/JHA explicitly adds that Member States may designate non-judicial authorities 'provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures' (Article 3(2) FD 2008/947/JHA). What was said about the system of FD 2008/829/JHA seems to apply *mutatis mutandis* to FD 2008/947/JHA: Member States must designate *judicial* authorities unless under national law non-judicial authorities take decisions of a similar nature to initiate mutual recognition proceedings under FD 2008/947/JHA.

FD 2008/909/JHA does not contain a provision similar to those of FD 2008/947/JHA and FD 2009/829/JHA making the designation of non-judicial authorities conditional on equivalence. According to the EC's *Handbook on the transfer of sentenced persons and custodial sentences in the European Union* 'Member States are free to designate their competent authority or authorities under their national laws, both when acting as an issuing State or an executing State (Article 2). It is noteworthy that the Framework Decision does not limit the definition of 'competent authority' to a judicial authority, allowing Member States the discretion to select the competent authority deemed most appropriate to deal with the procedures under this instrument'.<sup>43</sup>

Nevertheless, one can argue that initiating mutual recognition proceedings under FD 2008/909/JHA, like issuing an execution-EAW, is capable of infringing the right to liberty of the person concerned. After all, without carrying out such proceedings a custodial sentence or detention order imposed in one Member State cannot be enforced in another Member State. With regard to the requirement of effective judicial protection against a decision to issue an EAW taken by a public prosecutor the Court of Justice distinguishes between prosecution- and

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<sup>42</sup> However, a subsequent decision to issue an arrest warrant must be taken by a judicial authority.

<sup>43</sup> OJ 2019, C 403/11.



execution-EAWs. In respect of the latter, the need for effective judicial protection is already met by the proceedings leading to the imposition of a final sentence by a court of the issuing Member State.<sup>44</sup> Nevertheless, even an execution-EAW can only be issued by a ‘judicial authority’ within the meaning of Art. 6(1) FD 2002/584/JHA, i.e. by a court or by a public prosecutor whose independence vis-à-vis the executive is guaranteed by statutory rules and an institutional framework.

From the perspective of coherence, conferring the competence to initiate mutual recognition proceedings on an ‘authority’ or on a ‘judicial authority’ that is not a court has a problematic aspect. Only a ‘court or tribunal’ can request the Court of Justice to give a preliminary ruling on the validity or the interpretation of EU instruments (Article 267(2)-(3) TFEU). If a Member State does not confer the competence to initiate mutual recognition proceedings on a court, the competent authority cannot ask the Court of Justice for help. This can hinder the coherent application of the EU instrument in question.

Nevertheless, deciding whether to initiate mutual recognition proceedings constitutes ‘implementing Union Law’ (Art. 51(1) of the Charter).<sup>45</sup> Therefore, even if the competence to initiate mutual recognition proceedings is conferred on an ‘authority’ or on a ‘judicial authority’ that is not a court, the person concerned can invoke the right to an effective remedy before a ‘tribunal’ within the meaning of Art. 47(1) of the Charter if he relies on rights or freedoms guaranteed by EU law. For instance, where FD 2008/909/JHA is concerned, the person concerned could rely on his right to liberty (Article 6 of the Charter) or on his right to respect for his private and family life (Article 7 of the Charter). In any case, according to the Court of Justice FD 2008/909/JHA itself is intended to create rights for the sentenced person<sup>46</sup> so the sentenced person could also rely on those rights.<sup>47</sup> In the context of the remedy, the competent court will be able to put preliminary questions to the Court of Justice on the validity or interpretation of the EU instrument in question.

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<sup>44</sup> Case 627/19 PPU, ECLI:EU:C:2019:1079 (*Openbaar Ministerie (Public Prosecutor, Brussels)*), paras. 33-39.

<sup>45</sup> Compare Case 203/20, ECLI:EU:C:2021:1016 (*AB and Others (Revocation of an amnesty)*), para. 52.

<sup>46</sup> Case 125/21, ECLI:EU:C:2022:213 (*Commission v Ireland (Transposition of FD 2008/909)*), para. 22.

<sup>47</sup> FD 2008/909/JHA does not impose an obligation on the issuing Member State to ensure that the sentence is actually enforced, i.e. to initiate mutual recognition proceedings under that framework decision: Case 129/14 PPU, ECLI:EU:C:2014:586 (*Spasic*), paras. 67 and 69. This means that the sentenced has no right to undergo his sentence in the executing Member State. The rights for the sentenced person that FD 2008/909/JHA intends to create are procedural rights, such as the right to *request* that the authorities of either Member State initiate mutual recognition proceedings (Article 4(5) of FD 2008/909/JHA).

A request for transfer of proceedings under the EC on the Transfer of Proceedings must be sent by the Ministry of Justice of the requesting Member State to the Ministry of Justice of the requested Member State unless there are ‘special mutual arrangements’ that allow for direct communications between the ‘authorities’ of the requesting Member State and those of the requested Member State (Article 13(1)). The EU Convention on Mutual Assistance provides for direct communications between ‘judicial authorities’ (Article 6(1)), but this convention does not supplement the EC on the Transfer of Proceedings (Article 1(1) EU Convention on Mutual Assistance).

<b>Table 4:</b> <b>competent issuing authorities</b>	Judicial	Judicial / non-judicial on condition of equivalence	Non-judicial	Ministry of Justice
EU Convention on Mutual Assistance	X <sup>48</sup>			
EAW	X			
MR Cust.			X	
MR Prob.		X		
ESO		X		
EIO	X <sup>49</sup>			
EC on Transfer of Proceedings				X

<sup>48</sup> But Member States may define the notion ‘judicial authorities’ for themselves.

<sup>49</sup> Statutory rules and an institutional framework guaranteeing independence vis-à-vis the executive not required.

## VII. Central authorities

None of the EU instruments discussed in the previous paragraphs requires Member States to allocate the competence to initiate mutual recognition proceedings to a centralised (judicial) authority. Those instruments that provide for designating one or more central authorities offer a solution for problems that might arise from decentralising that competence.

From the point of view of the coherent application of the various instruments, some sort of coordination between (judicial) authorities that are competent under the various instruments seems necessary. In this respect, the phenomenon of an overarching central authority could perform a useful coordinating function. However, those instruments that provide for designating central authorities do not require Member States to designate the same central authorities under each of those instruments and the other instruments do not even provide for designating a central authority.

The EU Convention on Mutual Assistance allows for requests to be sent by central authorities *in specific cases*. Apparently, a blanket rule requiring all requests to be sent by a central authority is not permissible (Art. 6(2)).

FD 2002/584/JHA authorises Member States to designate a central authority – or, if the legal system of a Member State so provides: one or more central authorities – whose task it is to assist the competent judicial authority (Art. 7(1)). According to the Court of Justice, the task of a central authority is limited to giving practical and administrative assistance to the competent judicial authority; Member States are not permitted to substitute the central authority for the judicial authority.<sup>50</sup>

FD 2008/909/JHA and FD 2008/947/JHA do not contain provisions on designating a central authority.

Both FD 2009/829/JHA and Directive 2014/41 contain provisions on designating a central authority that seems to be derived from FD 2002/584/JHA. These provisions state that the central authority's task is to assist the competent authority.

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<sup>50</sup> Case 452/16 PPU, ECLI:EU:C:2016:858 (*Poltorak*), para. 42; Case 804/21 PPU, ECLI:EU:C:2022:307 (*C and CD (Legal obstacles to the execution of a decision on surrender)*), para. 65.

The EC on Transfer of Proceedings in Criminal Matters does not contain a provision on central authorities, because the competent authorities are, in effect, central authorities, *viz.* the Ministers of Justice.

<b>Table 5: Possibility to designate a central authority</b>	Yes	No
EU Convention on Mutual Assistance	X (only in specific cases)	
EAW	X	
MR Cust.		X
MR Prob.		X
ESO	X	
EIO	X	
EC on Transfer of Proceedings		X



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