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7 Overarching Analysis

7.1 Introduction

*7.1.1 **Definition of 'effectiveness and coherence'***

Starting point of the analysis of the country reports[1] is the definition of the concept of 'effective and coherent application' that is given in the preliminary explorations (see Chapter 2) as a 'working hypothesis'. This definition contains four elements (dimensions): comprehensiveness, consistency, completeness and proportionality. We refer to Chapter 2 for further context.

During the research, especially in the interviews with practitioners, it turned out that this definition was not fully applicable to the findings. Consequently, for the purpose of the overarching analysis the definition of the relevant concepts was adapted as follows.

- Coherence is defined along the four dimensions mentioned before (see Chapter 2).
- A separate definition of the concept of effectiveness is used: the suitability of an instrument of transborder cooperation to reach a specific goal.
- A definition of efficiency is added: a measure of the 'costs', in terms of money and human resources, of applying an instrument in order to reach a specific goal.[2]

There is a strong focus on the element of 'proportionality' in the country reports. Considerations of effectiveness are also highlighted. Considerations of 'efficiency' appear in the reports as well, though less frequently. Considerations of efficiency are nevertheless included in the analysis, because in the course of the research it became clear that this seems appropriate. Efficiency considerations have an impact on choices that have to be made in practice between different instruments on transborder cooperation and, therefore, can have an impact on the effectiveness and coherence of the application of these instruments.

[1] References to the country reports usually are in alphabetical order. So: Dutch report, German report, Polish report, Spanish report.
[2] Some are of the opinion that efficiency is just another aspect of proportionality (see *infra*, para 7.4 (**Pre-trial stage**', 'EAW, proportionality, financial costs', referring to *Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty*, Council document 6741/23, 1 March 2023, p. 13).

In short, the focus of the overarching analysis will be on the concepts of 'proportionality', 'effectiveness' and 'efficiency', but it will also pay some attention to the other elements (comprehensiveness, consistency and completeness) where relevant. First, some illustrations of how the concepts of 'coherence', 'effectiveness' and 'efficiency' play a role in the practice of transborder cooperation will be given (paragraph 1.2). Subsequently the structure of the overarching analysis will be explained (paragraph 1.3).

7.1.2 ***Coherence, effectiveness, efficiency: some illustrations.***

Coherence

- Comprehensiveness

  This means that all available instruments should be taken into account when making a choice which instrument to apply. Often, there is only one instrument that is applicable.[3] If the goal is to have a custodial sentence executed in another Member State, *e.g.*, the only (realistic) option is to transfer the sentence. In such a situation comprehensiveness is no issue. An illustration of a lack of comprehensiveness is a situation in which a prosecution-EAW is issued without assessing whether issuing an EIO would suffice (see also *infra*, paragraph 7.5.4.2).[4]
- Consistency

  This means that no instruments should be applied that are incompatible with an instrument that is already being applied. Inconsistent would be issuing an EAW for the purpose of executing a sentence in the issuing Member State and at the same time forwarding a judgment, together with a certificate, to the executing Member State in order to have the sentence enforced in that Member State (see also *infra*, paragraph 7.5.4.3 and paragraph 7.7.4 ('Enforcement, EAW and transfer of sentence')).[5]

[3] Dutch report, para 3.2 ('Preliminary remarks', 'Choosing between instruments and choosing between goals'); Polish report, para 3.2.
[4] Dutch report, para 2.2.(b)(ii)(aa)('The instruments separately', FD 2002/584/JHA'); Spanish report, para 2.1.2(a) and 2.3(b)(ii).
[5] Dutch report, para 3.2 ('**Routing of sentences and judicial cooperation**', '*Custodial sentences*'). Or, in a recent case at the District Court of Amsterdam, not withdrawing the execution-EAW after transferring the sentence (and the start of the execution of the sentence in the executing Member State).

- Completeness

  This means that every available instrument should be applied as long as the objective is not achieved (and insofar as its application meets the other criteria). An illustration of a lack of completeness is a situation in which the goal of interrogating a suspect is not reached because an EAW issued for this purpose is refused by the executing Member State and, subsequently, the proceedings are terminated without taking into account the option of issuing an EIO.[6] Also, putting the case on the shelf after issuing an unsuccessful EIO illustrates a lack of completeness in case issuing an EAW is still possible.[7]

- Proportionality

  Proportionality requires choosing among the available instruments the instrument that is sufficiently effective and the least intrusive. Using again the instruments of the EAW and the EIO we can illustrate a lack of proportionality. In a situation where the goal is to interrogate a suspect and where both the options of an EAW and EIO are taken into account and the EIO is considered to be sufficiently effective to reach this goal, it is not proportionate to issue an EAW (as it leads to detention where the EIO does not).[8]

Effectiveness

Issuing an ESO, that is transferring supervision measures to another Member State pending investigations, would be less effective in a case in which the suspect has a record of absconding.[9]

Efficiency

Efficiency considerations can be illustrated by the situation in which the requested person is not in the issuing Member State but (probably) in another Member State but his actual whereabouts

[6] The principle of mandatory prosecution requires applying all available instruments until the goal of realising prosecuting the suspect is reached. See German report, para 2.2 (‘**General introduction’**). The principle of mandatory prosecution is not a principle of EU law, but EU law does not preclude it.
[7] See Polish report, para 2.2.2(b)(i)(aa).
[8] Dutch report, para 2.1.1.2(b)(ii); German report, para 2.1.1.2(b)(ii), Polish report, para 2.3(b)(ii)(aa), Spanish report, para 2.2.2(b)(ii).
[9] German report, para 2.2.2(a)(ii): ‘Issuing a ESO, however, might not be as effective as detention in the issuing Member State where the defendant does not comply with the supervision measures and absconds from justice’.

are unknown. Given the absence of a EU wide register of addresses, a choice for Directive 2014/14/EU involves two steps (first a request for mutual assistance (location of the sentenced person); then, if the person concerned is found, issuing an EIO to the Member State of his residence), whereas a choice for FD 2002/584/JHA involves only one step (issuing a prosecution-EAW).[10]

7.1.3 ***Thematic analysis***

The previous chapters contain the four country reports. The structure of those country reports is based on the Annotated Index. The Annotated Index is a model, a simplified and tentative description of average criminal proceedings, from the start of the investigation into a criminal offence up to and including the enforcement of the sentence imposed for that offence. Its purpose is twofold. Its primary function is to enable the researchers to establish whether the EU and CoE instruments that are within the scope of the project, and the national instruments that implement them, are applied in an effective, efficient and coherent fashion. The secondary function of the Annotated Index is to ensure that the structure of the four country reports is uniform. Uniformity of structure should facilitate analysing the four country reports, drawing conclusions and formulating recommendations.

The research carried out pursuant to the Annotated Index has shed some light on the decision-making process. Concerning the various stages of criminal proceedings the Annotated Index sets out various specific goals – such as 'executing investigative/prosecutorial measures such as interrogating the suspect', 'ensuring the suspect's presence at trial' and 'enforcement of the sentence' – and connects those goals to the instruments that are applicable in those stages. The object is to establish which considerations play a role when the issuing authority decides, given a specific goal, which instrument to apply to achieve that goal. However, it turns out that, in practice, where multiple instruments are applicable, the basic and underlying choice is whether to investigate, prosecute or to enforce in the issuing Member State or in the executing Member

[10] Dutch report, para 5.2. The final report on the 9th round of mutual evaluations gives a similar example. In the context of the choice between issuing an execution-EAW or forwarding a FD 2008/909/JHA-certificate, it is stated that, when the whereabouts of the sentenced person are unknown, an EAW is usually issued: *Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty*, Council document 6741/23, 1 March 2023, p. 56.

State. Furthermore, the outcome of that choice is not dictated by the isolated specific goals mentioned in the Annotated Index but is made in a much broader context in which other factors also play an important role, such as the interests of the person concerned (suspect, accused person or sentenced person) and of the victim.[11] Lastly, once the issuing authority has made the basic choice for the issuing or the executing Member State, often there is nothing left to choose because only one instrument is applicable to that situation.[12]

Taking into account this *caveat* on the relationship between the Annotated Index as a 'theoretical model' and what happens in practice, the conclusion is that using the Annotated Index has yielded useful results. The observations made in the previous paragraph, in themselves, constitute an important insight which resulted from carrying out the Annotated Index. And the Annotated Index has led to country reports that are sufficiently uniform to allow an overarching analysis of possible obstacles to the effective, efficient and coherent application of the EU and CoE instruments that are within the scope of the project. The content of the country reports provides a number of themes that lend themselves naturally for identifying such obstacles and finding a solution for them. These themes are the following.

- The EU/European legal framework (paragraph 7.2).
- The national legal framework (paragraph 7.3).
- Informal arrangements (paragraph 7.4)
- Institutional arrangements (paragraph 7.5).
- Awareness/knowledge (paragraph 7.6).
- Efficiency (paragraph 7.7).
- Centralisation, concentration and specialisation (paragraph 7.8)
- Transfer of proceedings (paragraph 7.9)
- Digitalisation (paragraph 7.10)
- Anticipating the application of instruments at the sentencing stage (paragraph 7.11)
- Summoning abroad (paragraph 7.12)

[11] Dutch report, para 2.2 ('Preliminary remarks').
[12] Dutch report, para 3.2 ('Preliminary remarks', 'Choosing between instruments and choosing between goals'); Polish report, para 3.2 ('Preliminary remarks').

7.2 EU/European legal framework

7.2.1 Introduction

The country reports indicate that out of the eight EU and European[13] instruments that are in scope, two EU instruments must be discussed in this paragraph because the EU legal framework of these instruments raise serious applicability issues that can have an impact on their effective, efficient and coherent application. Both instruments are applicable at the pre-trial and trial stages. One of them is probably the most underused instrument on mutual recognition in criminal matters (the ESO; paragraph 7.2.2), and the other instrument is probably as widely used as the EAW (the EIO; paragraph 7.2.3).

Of course, the Annotated Index raises other applicability issues, such as the question whether a prosecution-EAW may be issued for the *sole* purpose of interrogating the requested person.[14] However, the discussion of those issues in the country reports shows that there are no real difficulties in interpreting the relevant EU or European provisions and, moreover, that the interpretation of those provisions is uniform, rendering it unnecessary to devote discussion to those issues. Taking the example just mentioned, the country reports by and large agree that issuing a prosecution-EAW for the *sole* purpose of interrogating the requested person is not permissible.[15]

7.2.2 ESO

[13] 'European' refers to the Council of Europe.
[14] The purpose of a prosecution-EAW is to conduct a prosecution, which, of course, can include carrying out investigative measures such as interrogating the suspect or accused person with a view of gathering evidence. The purpose of an EIO is the gathering of evidence. An EAW should not be issued for the sole purpose of interrogating the suspect or accused person, that is what the EIO is there for. If the issuing judicial authority only wants to interrogate the suspect or accused person, it therefore does not have a choice between two instruments. If the issuing judicial authority wants the transfer of the suspect or accused person in order to conduct a prosecution in the context of which it also wants to interrogate him, it does have a choice between issuing a prosecution-EAW and issuing EIO. Instead of opting for surrender right away, it can first have the suspect or accused person interrogated in the executing Member State and, subsequently, decide whether his transfer to the issuing Member State is still necessary.
[15] Dutch report, para 2.1.1.2(b)(ii); German report, para 2.1.1.2(b)(ii); Polish report, para 2.1.1.2(b)(ii); Spanish report para 2.1.2.

Precondition that detention on remand is possible or ordered?

The country reports are in agreement that FD 2009/829/JHA does not require, as a precondition for issuing an ESO, that detention on remand of the person concerned is possible, let alone that detention on remand is actually ordered.[16] As both the *travaux préparatoires* and recital (4) of the preamble to that framework decision show, FD 2009/829/JHA allows for supervision measures even where ordering detention on remand would not be possible (yet) according to the law of the issuing Member State. This aspect of FD 2009/829/JHA is not problematic in itself. It takes into account that the national laws of the Member States on the possibility of imposing supervision measures are divergent[17] and that FD 2009/829/JHA does not intend to harmonise those laws. Furthermore, it is in accordance with the stated aim of FD 2009/829/JHA to apply to 'less serious offences' as well (recital (13) of the preamble).

Issuing ESO possible if the person concerned no longer is in the issuing Member State?

Three country reports are in agreement that FD 2009/829/JHA does not provide for issuing an ESO, where the person concerned no longer is in the issuing Member State but already is in the Member State of his lawful and ordinary residence or in another Member State.[18] Both the drafting history and the wording of Article 9(1) of FD 2009/829/JHA show that the person concerned must still be in the issuing Member State and must consent to return to the Member State of his lawful and ordinary residence (or to another Member State (Article 9(2)) when the competent authority takes a decision on issuing an ESO. This is a problematic aspect of FD

[16] Dutch report, para 2.1.1.1(a) ('Application of FD 2009/829/JHA'); German report, para 2.1.1.1; Polish report, para 2.1.1; Spanish report, para 2.1.1(b), para 2.1.1.2. However, there is a difference of opinion concerning the issue whether an ESO is possible according to EU law if the person concerned is detained in the issuing Member State. See *e.g.* Spanish report, para 2.1.1.(a) ('However, we want to insist that an ESO cannot be issued if the person has already been arrested and imprisoned. Although the Council Framework Decision 2009/829/JHA does not seem to say otherwise, we also consider that it makes no sense whatsoever to issue the ESO to a person who is provisionally detained') and para 2.1.1(b) ('In general terms, we understand that in order to issue an ESO the person under investigation must not be detained'). Nothing in FD 2009/829/JHA, however, seems to preclude that the authorities of the issuing Member State order supervision measures with regard to a suspect or accused person who is in provisional detention. Such orders, in effect, suspend the provisional detention. This is in line with one of the objectives of that framework decision, which is to promote the use of non-custodial measures as an alternative to provisional detention.

[17] In the Netherlands, *e.g.*, supervision measures are only possible in the context of suspending a previously court order on detention on remand of the person concerned (Dutch report, para 2.2.1(a)(bb) ('Applicability according to Dutch law')), whereas in Poland supervision measures are possible even if detention on remand is not possible (Polish report, para 2.2.1(a)(bb)).

[18] Dutch report, para 2.1.1.2(b)(ii) ('Applicability of FD 2009/829/JHA'); German report, para 2.1.1.2(b)(ii); Polish report, para 2.1.1.2.. Of course, the *executing* Member State can only *execute* an ESO if, in the meantime, the person concerned is actually staying in the territory of that Member State.

2009/829/JHA. Because of it, FD 2009/829/JHA and FD 2002/584/JHA are not well aligned for two reasons based on proportionality. First, if an ESO could not be issued, the remaining option would be to issue an EAW and this might not be proportionate.[19] Second, if the requested person is arrested in the executing Member State on the basis of a prosecution-EAW and if the requested person is 'lawfully and ordinarily residing' in that Member State (cf. Article 9(1) of FD 2009/829/JHA), replacing the EAW with an ESO could be a less intrusive alternative to surrender, particularly in cases in which the executing judicial authority decides to suspend the detention on the basis of the EAW pending the decision on the execution of that EAW. The aim of prosecuting and trying the requested person in the issuing Member State could be achieved by imposing supervision measures and withdrawing the EAW. Of course, if the requested person fails to comply with any supervision measure, the issuing Member State could reactivate the EAW.

How would this work in practice? Once arrested on the basis of the EAW, the requested person could request the imposition of supervision measures when he is heard by the executing judicial authority. That authority could then arrange that the requested person is heard by the issuing judicial authority (on the basis of Article 18(1)(a) in combination with Article 19 of FD 2002/584/JHA). In the near future, the requested person could also be heard via videoconference (see *infra*, paragraph 7.10.2).[20] After that hearing the issuing judicial authority could decide whether to maintain the EAW or to withdraw it and issue (or have another authority issue) an ESO.

To be clear, all of this presupposes that FD 2009/829/JHA provides for issuing an ESO if the person concerned is not in the issuing Member State anymore, which – at present – it does not. This lacuna raises questions from the perspective of the dimension of proportionality: under FD 2009/829/JHA it is not possible to replace the EAW with an ESO once the person concerned is arrested in the executing Member State.

Admittedly, there are drawbacks to replacing an EAW with an ESO in the manner described above. The competent authority for issuing an ESO does not necessarily have to be the same

[19] German report, para 2.2.2(b)(ii)(bb). This is the reason why Germany unilaterally widened the scope of the ESO (see *infra*).
[20] Art. 2(3) of Directive (EU) 2023/2843 of the European Parliament and of the Council of 13 December 2023 amending Directives 2011/99/EU and 2014/41/EU of the European Parliament and of the Council, Council Directive 2003/8/EC and Council Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, as regards digitalisation of judicial cooperation, O.J. 2023, L 2843.

authority that is competent for issuing an EAW,[21] thus necessitating coordination between different authorities. The same holds true for the executing side. At the executing side the competent authority for executing an ESO also does not have to be the same authority that is competent to execute an EAW.[22] Nevertheless, besides promoting the use of a less intrusive instrument, replacing an EAW with an ESO in the manner described has another advantage. It would breathe new life into a form of judicial cooperation that seems practically moribund. In practice, Article 18(1)(a) of FD 2002/584/JHA is hardly ever applied, at least in the Netherlands.[23] Poland has not even transposed this provision as far as Poland as issuing Member State is concerned (although application *per analogiam* of the provision concerning Poland as executing Member State seems possible).[24]

Unilateral widening of the scope of the ESO?

The German report identifies an interesting issue. Although FD 2009/829/JHA does not provide for the possibility of issuing an ESO if the person concerned has already left the issuing Member State, according to the German government that framework decision does not prevent Member States from, *unilaterally*, allowing their issuing authorities to issue an ESO in such circumstances and, thus, widening the scope of the ESO. Germany[25] and Poland[26] have done so. The German and Polish approach is plausible. Nothing in FD 2009/829/JHA explicitly prohibits the Member States from affording that option to their issuing authorities. However, the obvious drawback of unilateral legislative action is that it cannot bind other Member States, as the German report recognises.[27] There is no guarantee that other Member States will enforce an ESO that falls outside of the scope of FD 2009/829/JHA. Barring an amendment to FD 2009/829/JHA, Member States could conclude bilateral or multilateral agreements or arrangements on this topic. Extending the scope of the ESO to include situations in which the person concerned no longer is in the issuing Member State would allow the objectives of FD

[21] Which is the case in the Netherlands (Dutch report, para 1.3.1(a) and (d)) and in Poland (Polish report, para 1.3.1(a) and (d)). In Spain, it can be a different judicial authority as well because issuing an EAW and an ESO can take place in different stages of Spanish criminal proceedings (*e.g.* in the pre-trial and trial stages).
[22] Again, which is the case in the Netherlands.
[23] Dutch report, para 2.3(b)(ii)(aa).
[24] Polish report, para 2.2.2(b)(ii)(aa) and para 2.3(b)(ii)(aa). See also *infra*, paragraph 7.3.3.1.
[25] German report, para 2.1.2(b)(ii).
[26] Polish report, para 2.2.1(b)(bb).
[27] German report, para 2.1.2(b)(ii)

2009/829/JHA to be extended[28] and could therefore be the subject of further regulation by Member States among themselves (see Article 26(1)(b) of FD 2009/829/JHA).

Consequences of non-compliance with supervision measures?

In the ordinary course of events, the person concerned will comply with the supervision measures imposed on him while in the executing Member State and will appear voluntarily when summoned to appear at a hearing/interrogation or at his trial in the issuing Member State. Two further problematic aspects of FD 2009/829/JHA relate to non-compliance with the supervision measures or non-appearance at a hearing/interrogation or at the trial.

The German country report points out that the mechanism under FD 2009/829/JHA in case of non-compliance is considered to be too lengthy and too complex a procedure,[29] which, of course, does not contribute to its effectiveness and efficiency. The executing authority must 'immediately' notify the issuing authority of any breach of the supervision measures (Article 19(3)). The competent authority of the issuing Member State then decides whether to issue an arrest warrant (Article 18(1)(c)).[30] The authority that is competent to issue an arrest warrant is not necessarily the issuing authority (see Article 6(3)). If it is not, the issuing authority must inform the authority that is competent to issue an arrest warrant. Only once the competent authority of the issuing Member State has issued an arrest warrant and an EAW, does the executing authority have a legal basis for arresting the person concerned. In the interim, the person concerned may have absconded. This might lead the competent authorities to prefer keeping the person concerned in detention in the issuing Member State instead of issuing an ESO.

A solution to this problem might be to combine the ESO and the EAW, as the German report suggests: to issue both the ESO and the EAW together.[31] That way it will be left to the competent

[28] In particular, the objective of ensuring the due course of justice and, in particular, that the person concerned will be available to stand trial (Art. 2(1)(a)) and the objective of promoting the use of non-custodial measures for persons who are not resident in the Member State where the proceedings are taking place (Art. 2(1)(b)).
[29] German report, para 2.2.2. See also Spanish report, para 2.3(b).
[30] Of course, an arrest warrant may also be issued in case of a failure to comply with a summons to attend any hearing or trial in the course of criminal proceedings (see recital (9) of the preamble to FD 2009/829/JHA). In that case, the authorities of the issuing Member State will *ipso facto* be aware of this.
[31] German report, para 6.

authority of the executing Member State, in the event of a breach of supervision measures, to establish whether this constitutes a risk of flight and, if so, to arrest and surrender the person concerned on the basis of the EAW. This solution presupposes that national law does not prevent issuing an ESO if the person concerned no longer is in the issuing Member State and that the authorities of the executing Member State will respect the correct order of the execution of both instruments (only if the person concerned breaches any supervision measures should the competent authority of the executing Member State execute the EAW). In other words, the execution of the EAW is conditional on a breach of supervision measures. The solution of combining the ESO and the EAW raises a number of issues. The authorities that are competent to issue and to execute EAWs and the authorities that are competent to issue and execute ESOs might not be the same, thus necessitating consultation and coordination in the issuing and/or the executing Member States. Moreover, for Member States that make issuing an ESO dependent on a prior order on remand detention, such as Germany the Netherlands, combining an ESO and an EAW would not be possible at all.[32] In the Netherlands, ordering supervision measures would mean that the national arrest warrant needed to issue an EAW would no longer be 'enforceable' (see Article 8(1)(c) of FD 2002/584/JHA) because pursuant to Dutch law supervision measures can only be imposed in the context of a decision to suspend the order on remand detention.[33]

Another solution to the problem could be to adopt a rule, either at EU level or at national level, that in the event of a breach of supervision measures the executing judicial authority may arrest and detain the person concerned provisionally pending the decision of the authorities of the issuing Member State on issuing a national arrest warrant and an EAW. This solution does not combine ESO and EAW *a priori* and, therefore, avoids the problems identified above.

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[32] One could add to these issues that employing two instruments at the same time might not be proportionate. However, since one of those instruments is only executed if the person concerned does not comply with the supervision measures and since the person concerned benefits from the ESO as long as he complies with the supervision measures this does not seem to be an argument that holds water. In any case, one could choose to apply this solution only for very serious offences or for cases where there is a high probability of non-compliance.

[33] Dutch report, para 2.2.1(a)(bb). Poland seems to follow a similar approach. As a rule, detention on remand cannot be combined with the application of preventive measures that do not involve deprivation of liberty: Polish report, para 2.2.1(a)(bb).
A variant could be to issue an EAW and only later on an ESO, while maintaining the EAW. However, as discussed earlier, a prosecution-EAW and an ESO are incompatible with one another. A prosecution-EAW requires an enforceable national arrest warrant, whereas an ESO presupposes that, where there is a national arrest warrant, the effects of that arrest warrant are suspended. Besides, the decision on the EAW has to be taken within strict time limits and once the requested person is arrested in the executing Member State those time limits start running (see Art. 17 of FD 2002/584/JHA).

The second problematic aspect of FD 2009/829/JHA concerns the applicability of the EAW-regime. Article 21(1) of FD 2009/829/JHA states that, if the competent authority of the issuing Member State has issued an arrest warrant, the person concerned will be surrendered in accordance with FD 2002/584/JHA. Pursuant to Article 2(1) of FD 2002/584/JHA a prosecution-EAW may be issued for acts that are punishable in the issuing Member State with a maximum sentence of at least twelve months. This requirement would form an obstacle to surrender, if the ESO were issued for a 'less serious offence' carrying a sentence of less than 12 months in the issuing Member State. To ensure that this does not cause problems where the person concerned does not comply with the supervision measures, Article 21(2) of FD 2009/829/JHA *derogates* from Article 2(1) of FD 2002/584/JHA by stipulating that the executing Member State may not invoke Article 2(1) of FD 2002/584/JHA to refuse to surrender the person concerned to the issuing Member State. However, Article 21(3) of FD 2009/829/JHA allows each Member State to notify the secretariat-general of the Council of the European Union that it will apply Article 2(1) of FD 2002/584/JHA in deciding on the surrender of the person concerned to the issuing Member State. According to the information on the website of the European Judicial Network fourteen Member States have made such a notification.[34] Where the executing Member State is one of those fourteen, it is clear from the outset that non-compliance with supervision measures imposed for acts that carry a maximum sentence of less than twelve months will not lead to surrender of the person concerned. Consequently, in such cases the due course of justice and, in particular, the availability of the person concerned for standing trial cannot be ensured. According to the German report, the fact that the executing Member State has made a notification might therefore dissuade the issuing authority from issuing an ESO for acts that carry a maximum sentence of less than twelve months and, instead, might urge it to issue a national arrest warrant. This would not only be contrary to the European Commission's recommendation to order pre-trial detention only for offences that carry a minimum custodial sentence of one year[35] but would also counteract the objective of FD 2009/829/JHA of enhancing the right to liberty and of promoting the use of non-custodial measures[36] as that framework decision also applies to 'less serious offences'.[37] In other words,

[34] https://www.ejn-crimjust.europa.eu/ejn/libcategories/EN/4/-1/0 (last accessed on 30 March 2025).
[35] Commission Recommendation of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, C(2002) 8987 final, p. 11 (recommendation (21)).
[36] German report, para 2.1.1.
[37] See recital (13) of the preamble. In this respect, one is reminded of the judgment in Case C-88/05, *Kretzinger*, EU:C:2007:441, para 43.

the possibility of making a notification detracts from the effectiveness of that framework decision and could lead to the disproportionate use of pre-trial detention.

Of the four Member States involved in this project only Poland has not made a notification pursuant to Article 21(3) of FD 2009/829/JHA. According to the Dutch report, the Netherlands made such a notification because the Netherlands is against using the EAW for minor offences.[38] Perhaps the – unspoken – underlying argument is that surrendering persons for acts that carry a maximum sentence of less than twelve months is not proportionate. Indeed, obviously this is the rationale of the recommendation of the European Commission not to order pre-trial detention for offences carrying a sentence of less than a year.[39] However, a counterargument could be that the specific context of surrender following non-compliance with supervision measures differs significantly from the context of 'regular' surrender. One could argue that the possibility of surrender is 'part of the bargain' of the ESO, which bargain benefits the person concerned in that he is not detained in the meantime. Issuing an ESO is based on consent by the person concerned.[40] By knowingly breaching the supervision measures, the person concerned has brought it upon himself that the less intrusive measure (the ESO), which was taken for his benefit, is replaced with a more intrusive measure (the EAW). In such circumstances, surrender would not be disproportionate, even if the acts carry a maximum sentence of less than twelve months.

7.2.3 EIO

The country reports show that there are issues with regard to two species of the EIO: EIOs for the hearing of an accused person by videoconference (Article 24) and EIOs for a temporary transfer of an accused person (Articles 22 and 23). The issues concern the scope of the applicable provisions or, in any case, the degree of clarity of those provisions.

[38] Dutch report, para 1.1(d).
[39] Commission Recommendation of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, C(2002) 8987 final, p. 11 (recommendation (21)). See also recommendation (70) on p. 17, concerning informing foreign nationals of the possibility that the execution of their pre-trial supervision measures be transferred to their country of nationality or permanent residence.
[40] See Art. 9(1)-(2) of FD 2009/829/JHA.

EIO for ensuring the presence of the accused at trial by videoconference?

The four reports are in agreement that Directive 2014/41/EU does not provide for issuing an EIO for the sole purpose of ensuring the presence of the accused person at his trial in the issuing Member State.[41] Although none of the provisions of Directive 2014/41/EU explicitly rules out issuing an EIO for that purpose, the interpretation that ensuring the presence of the accused person at his trial is outside the scope of Article 24 is based on the fact that Directive 2014/41/EU only concerns *investigative* measures in order to *obtain evidence*. Ensuring the presence at the trial, in itself, is not geared at obtaining evidence. Although it is hard to fault this logic, which, moreover, is confirmed by the judgment in the *Delda* case,[42] recent mutual evaluation reports on the EIO show that not every Member State recognises it.[43]

It is regrettable that at present EU law does not have an instrument that provides a (clear) legal basis for using a videoconference as a way to ensure the presence of the accused person at the trial and that, at the same time, addresses the security issues identified in the Spanish report.[44] Such an instrument would probably reduce the need to conduct *in absentia* trials[45] and, thereby,

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[41] Dutch report, para 2.1.2(b)(i); German report, para 2.1.2(b)(i); Polish report, para 2.1.2(b); Spanish report, para 2.1.2(b)(i). In Case C-325/24 (*Bissilli*), a referring court has asked the question whether it is possible to issue an EIO 'for the hearing by videoconference of an accused person who is in custody in the executing State during the hearing of oral argument, for the purpose of gathering evidence as part of his or her examination and with the additional aim of ensuring that he or she participates in the trial' (emphasis added).

[42] Case C-583/23, *Delda*, EU:C:2025:6, para 32.

[43] According to Latvian and Spanish law, it is permissible for an accused persons to participate in their trial via videoconference even in a cross-border situation:

- *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Latvia*, Council document 7030/1/24 REV 1, 21 May 2024, p. 7.
- *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Spain*, Council document 13641/1/24 REV 1, 8 October 2024, p. 48 (except for trials where the punishment exceeds five years of imprisonment and jury trials).

By contrast, under Austrian, Croatian, Estonian, Dutch and Polish law, this is not possible:

- *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Austria*, Council document 8494/1/24 REV 1, 21 May 2024, p. 35.
- *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on the Republic of Croatia*, Council document 16309/1/23 REV 1, 15 February 2024, p. 49.
- *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Estonia*, Council document 8475/1/24 REV 1, 21 May 2024, p. 50.
- *Evaluation report on 10th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, 5616/1/24 REV 1, 15 February 2024, p. 42.
- *Evaluation report on the 10th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on Poland*, 13516/1/24 REV 1, 2 October 2024, p. 59.

[44] Spanish report ('**MEMORANDUM AND GOOD PRACTICES**', '**BLOCK IV. IMPACT OF NEW TECHNOLOGIES AND DIGITALISATION ON JUDICIAL COOPERATION IN CRIMINAL MATTERS**'). For concrete security issues see Spanish report, para 2.1.2(b)(i).

[45] Cf. *Final report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO)*, Council document 15834/1/24 REV 1, 10 December 2024, p. 41: 'Moreover, if the accused person

would contribute to alleviate the problems with the application of the ground for refusal concerning *in absentia* trials.[46] From the point of view of proportionality, the possibility of attending the trial in the issuing Member State while the accused person is still in another Member State would constitute a measure of judicial cooperation that is less intrusive than and could be equally as effective as surrender to the issuing Member State.[47] Lastly, conducting a trial via videoconference would probably be more efficient than conducting an *in absentia* trial. In principle, after all, a sentenced person who has been convicted tried *in absentia* has a right to new trial[48] and a new trial would mean renewed effort and renewed costs on the part of the sentencing Member State. Lastly, as the Polish report points out more videoconferencing could result in a noticeable decrease of prosecution-EAWs.[49] Nevertheless, in the absence of a (clear) legal basis in Directive 2014/41/EU, the issuing authority has no other instrument than the EAW at its disposal to ensure that the accused person is present at his trial.[50]

Videoconference for ensuring the presence of the accused at trial without issuing an EIO?

Because Article 24 of Directive 2014/41/EU does not provide a (clear) legal basis for issuing an EIO for the purpose of ensuring the presence of the accused at trial via videoconference (*supra*), the question arises whether EU law precludes Member States from seeking and granting cooperation for that purpose. Since neither Directive 2014/41/EU nor Directive (EU) 2016/343 governs this kind of judicial cooperation[51] and since Article 10(9) of the EU Convention on Mutual Assistance in Criminal Matters[52] and Article 9(8) of the Second

consents, their participation in the main trial by videoconference from another Member State is a far better option than a trial *in absentia*'.

[46] See Brodersen, Glerum & Klip, *The European Arrest Warrant and In Absentia Judgments*, Maastricht Law Series 12 (Eleven, 2022), *passim*; Brodersen, Glerum & Klip, "The European arrest warrant and *in absentia* judgments: The cause of much trouble", 13 *New Journal of European Criminal Law* (2022), 7-27, *passim*.

[47] Cf. *Final report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO)*, Council document 15834/1/24 REV 1, 10 December 2024, p. 41: 'Indeed, practitioners emphasised that the execution of EIOs issued to ensure the remote participation of the accused person in the main trial from another Member State is an effective means of avoiding the disproportionate use of EAWs'.

[48] See Art. 9(4) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, O.J. 2016, L 65/1.

[49] Polish report ('**Memorandum**', para I.3).

[50] *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on the Netherlands*, Council document 5616/1/24 REV 1, 15 February 2024, p. 42.

[51] See C-760/22, *FP and Others (Trial by videoconference)*, EU:C:2024:574, para 28.

[52] This provision reads as follows: 'Member States may at their discretion also apply the provisions of this Article, where appropriate and with the agreement of their competent judicial authorities, to hearings by videoconference involving an accused person. (…)'

Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters[53] were replaced between the Member States (with the exception of Denmark and Ireland)[54] by Article 24 of Directive 2014/41/EU,[55] it would seem that Member States are free to regulate videoconferences for the purpose of ensuring the presence of the accused at trial for themselves.[56] However, *unilateral* legislative action by Member States has the drawback identified above when discussing the scope of the ESO (*supra*, paragraph 7.2.2): it cannot bind other Member States.[57] In a similar vein, the Polish report points out that a videoconference for the purpose of ensuring the presence of the accused person at trial is possible without an EIO,

[53] Strasbourg 8 November 2001, ETS No. 182. This provision reads as follows: 'Parties may at their discretion also apply the provisions of this article, where appropriate and with the agreement of their competent judicial authorities, to hearings by video conference involving the accused person or the suspect. In this case, the decision to hold the video conference, and the manner in which the video conference shall be carried out, shall be subject to agreement between the Parties concerned, in accordance with their national law and relevant international instruments. Hearings involving the accused person or the suspect shall only be carried out with his or her consent'.

[54] Ireland and Denmark are not bound by the Directive (recital (44) of the preamble in combination with Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of Freedom, Security and Justice, O.J. 2016, C 202/295; recital (45) of the preamble in combination with Protocol (No 22) on the position of Denmark, O.J. 2016, C 202/298). Consequently, in the relations between Ireland and Denmark and in the relations between Ireland or Denmark and the other Member States both Art. 10(9) and Art. 9(8) are still applicable. However, under the EU convention Denmark has made a declaration that 'it will not agree to requests for the hearing of an accused person by videoconferencing' (*Trb*. 2004, 211, p. 2) and under the Second Additional Protocol it has made a declaration that 'it does not meet requests for hearing by videoconference involving the accused person or the suspect' (accessible at https://www.coe.int/en/web/conventions/cets-number-/-abridged-title-known?module=declarations-by-treaty&numSte=182&codeNature=0; last accessed on 30 March 2025).

[55] See Art. 34(1)(c) of Directive 2014/41/EU. On the interpretation of this provision, especially the words 'replaces (…) the corresponding provisions (…)' see the opinion of AG Collins in Case C-583/23, *Delda*, EU:C:2024:863, para 32: 'That provision [Art. 34(1)] concerns only those provisions of those conventions that govern the same subject matter as that governed by Directive 2014/41'. See also the *Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order*, June 2019, pp. 2-3 and the *Note on the meaning of "corresponding provisions" and the applicable legal regime in case of delayed transposition of the EIO Directive*, p. 2. The first document contains criteria for determining whether the directive is applicable and the second contains a list of measures that are excluded from the directive's scope. Neither Art. 10(9) of EU Convention nor Art. 9(8) of the Second Additional Protocol is mentioned among those measures. Council document 14445/11, 21 September 2011 contains a list of 'Corresponding provisions in existing instruments'; Art. 10(9) and Art. 9(8) are listed as provisions corresponding to the EIO measure 'hearing by videoconference'. In conclusion: those provisions govern the same subject matter as that governed by Directive 2014/41/EU and, therefore, as 'corresponding provisions' within the meaning of Art. 34(1) of the directive, are replaced by Art 24 of the directive.
In any case, Art. 10(9) of the EU convention and Art. 9(8) of the Second Additional Protocol do not provide a clear legal basis for videoconferencing for the purpose of ensuring the presence of the accused person at trial, at least not a legal basis that is clearer than Art. 24 of Directive 2014/41/EU. Art. 24 speaks of 'hearing a suspect or accused person', Art. 10(9) of 'hearings (…) involving an accused person' and Art. 9(8) of 'hearings (…) involving the accused person or the suspect'.

[56] Dutch report, para 2.1.2(b)(i).

[57] Some Member States use videoconferencing directly, i.e. without an EIO or any intervention by the authorities of the Member State where the person concerned is present. Such practices invite the criticisms that they are not in line with Directive 2014/41/EU and that they conflict with the principle of sovereignty of the Member State where the person concerned is located: *Final report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO)*, Council document 15834/1/24 REV 1, 10 December 2024, p. 68. On sovereignty concerns see paragraph 7.4.1.

if the laws of *both* Member States provide for that form of judicial cooperation and the person concerned does not object to it. In such a case, the judicial authorities may cooperate relying on the principle of reciprocity.[58] Nevertheless, there would be no obligation to grant a request for holding a videoconference. Therefore, only EU legislative action can guarantee effective judicial cooperation in the form of videoconferencing for the purpose of ensuring the presence of the accused person at the trial. Such legislative action would contribute to the coherent application of the EIO and the EAW, since it would create a less intrusive alternative to issuing an EAW (*supra*, 'EIO for ensuring the presence of the accused at trial by videoconference?').

EIO for interrogation of the accused at trial by videoconference?

There seems to be agreement concerning the answer to the question whether an EIO may be issued for interrogating the accused person at this trial by videoconference.[59] The reports point out that the interrogation of an accused person at the trial by the trial court constitutes an investigative measure aimed at evidence gathering. The German, Polish and Spanish reports have no hesitation in drawing the conclusion that, consequently, issuing an EIO for interrogation of the accused person at trial by videoconference would be possible.[60] The report for the Netherlands agrees, but also identifies out a possible counterargument based on recital (25) of the preamble to Directive 2014/41/EU. That recital could give rise to a restrictive interpretation that excludes issuing an EIO for interrogation at the trial stage by videoconference other than for interrogation as a witness.[61] The fact that this restrictive interpretation was adopted by at least one Member State, the Netherlands, is an indication that Article 24 is not sufficiently clear about its scope.

Temporary transfer for ensuring the presence of the accused at the trial?

[58] Polish report, para 2.1.2(b).
[59] In Case C-325/24 (*Bissilli*), a referring court has asked the question whether it is possible to issue an EIO 'for the hearing by videoconference of an accused person who is in custody in the executing State during the hearing of oral argument, for the purpose of gathering evidence as part of his or her examination and with the additional aim of ensuring that he or she participates in the trial'.
[60] German report, para 2.1.2(b)(i); Polish report, para 2.1.2(b); Spanish report, para 2.3(b)(i).
[61] Dutch report, para 2.1.2(b)(i). The Dutch government adheres to this strict interpretation of the scope of Art. 24: Dutch report, para 2.3(b)(i)(aa),

The reports are in agreement that an EIO cannot be issued for a temporary transfer of a detained person solely for the purpose of ensuring his presence at the trial.[62] However, the arguments on which this conclusion is based vary. The Dutch, Polish and Spanish reports invoke the nature of the EIO: this instrument is only aimed at carrying out investigative measures for the collection of evidence. This argument is identical to the argument against EIO's for ensuring the presence of the accused at trial via videoconference (*supra*). The German report states that – as evidenced by recital (25) of the preamble to Directive 2014/41/EU – the EAW is the suitable and primary cooperation instrument for the transfer of accused persons for the purpose of prosecution. The Dutch report refers to recital (25) as well.[63]

The conclusion that Directive 2014/41/EU does not provide for a temporary transfer for ensuring the accused person's presence at the trial does not necessitate legislative action at the EU level. 'Prosecution' within the meaning of FD 2002/584/JHA includes standing trial.[64] If the competent authority of the issuing Member State wishes the transfer of the person concerned to the issuing Member State for the purpose of standing trial, the EAW is the appropriate instrument, provided that issuing an EAW is proportionate.[65] Pending the decision on the EAW, the issuing Member State could request a temporary transfer to the issuing Member State on the basis of Article 18(1)(b) of FD 2002/584/JHA.[66]

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[62] Dutch report, para 2.1.2(b)(i); German report, para 2.1.2(b)(i); Polish report, para 2.1.2(b); Spanish report, para 2.1.2(b)(i). The EIO evaluation report in Austria concurs ('(…) the temporary transfer of the person in custody can be performed using the EIO instrument only with a view to gathering evidence'): *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Austria*, Council document 8494/1/24 REV 1, 21 May 2024, p. 35.

[63] See also *Final report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO)*, Council document 15834/1/24 REV 1, 10 December 2024, p. 61: 'As clarified in recital 25 of the Directive, where a person held in custody in one Member State is to be transferred to another Member State for the purposes of prosecution, including bringing that person before a court for the purpose of standing trial, an EAW should be issued in accordance with Council Framework Decision 2002/584/JHA. Under the Directive, the sole purpose of the temporary transfer is to carry out a specific investigative measure that requires the person's presence (e.g. a hearing of the accused person or an identity parade). (…) In some cases, the execution of an EIO issued to ensure the presence of the defendant in the trial was refused because the executing authority rightly argued that the temporary surrender should have been requested under the EAW'.

[64] See recital (5) of the preamble to FD 2002/584/JHA: 'Traditional cooperation relations (…) should be replaced by a system of free movement of judicial decisions in criminal matters, covering both *pre-sentence* and final decisions (…)' (emphasis added) and Joined Cases C-508/18 & C-82/19 PPU, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456, paras 52-56.

[65] The difference between temporary transfer and surrender is that the former is only possible if the person concerned is already detained in the executing Member State, whereas the latter entails detention of a person that otherwise might be at liberty. Given this difference, it could be argued that a temporary transfer would less likely be disproportionate than an EAW.

[66] Of course, because of the thresholds of Art. 2(1) of FD 2002/584/JHA issuing an EAW and, by consequence, requesting a temporary transfer on the basis of Art. 18(1)(b) of that framework decision are not possible for minor offences (*i.e.* offences that do not carry a custodial sentence of at least twelve months), even though the right to be present at the trial also applies to such offences.

Temporary transfer for interrogation of the accused at trial?

There is less agreement on the answer to the question whether an EIO may be issued for a temporary transfer of the accused person for his interrogation at the trial. The Polish report states that this is possible, because interrogation is an investigative measure for gathering evidence, whereas the German report reiterates that the EAW is the instrument for the transfer of an accused person for the purpose of prosecution.[67] The Dutch report agrees with the Polish report that the investigative character of such a measure makes temporary transfer of he accused person possible. However, as with regard to a temporary transfer for the purpose of ensuring the accused person's presence at trial (*supra*), the Dutch report indicates that recital (25) of the preamble might be interpreted as precluding a temporary transfer for interrogation at the trial.[68] The Spanish report categorically denies that issuing an EIO for a temporary transfer for interrogating the suspect at trial is possible: that purpose is not included in those for which an EIO may be issued.[69] Although the argument that an EIO for a temporary transfer for interrogation at the trial is allowed, seems to be in line with the objective of the EIO (which, of course, is evidence gathering),[70] as with Article 24 the lack of agreement indicates that Article 22 is not sufficiently clear about its scope. In any case, recent evaluation reports on the EIO confirm the statement in the Dutch report[71] that an EIO is only seldom issued for a temporary transfer.[72]

Incidentally, the German report refers to the opinion of German practitioners and of the German Federal Ministry of Justice that a temporary transfer for the purpose of interrogating the accused person at the trial would be disproportionate because the accused person has a right to remain silent.[73] However, a counterargument could be that, since a temporary transfer to the issuing Member State is only possible if the person concerned is already detained in the executing Member State, his temporary transfer to the issuing Member State would not be

[67] German report, para 2.1.2(b)(i); Polish report, para 2.1.2(b).
[68] Dutch report, para 2.1.2(b)(i).
[69] Spanish report, para 2.3(b)(ii).
[70] Cf. Case C-583/23, *Delda*, EU:C:2025:6, para 42. The purpose of a request for interrogation 'must be to gather evidence'.
[71] Dutch report, para 2.2.2(b)(i)(aa)('Application', 'The instruments separately').
[72] *Final report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO)*, Council document 15834/1/24 REV 1, 10 December 2024, p. 60 ('(…) temporary transfer provided for in Articles 22 and 23 of the Directive has been applied in a very limited number of cases').
[73] German report, para 2.1.2(b)(i).

disproportionate in itself. To avoid pointless transfers, one could make a transfer for the purpose of interrogating the accused person at his trial dependent on his consent. If he wishes to exercise his right to remain silent, he can simply withhold his consent.[74]

7.2.4 Conclusions

Paragraph 7.2.2 illustrates that the ESO regime presents problems, both from the perspective of proportionality and from the perspective of effectiveness.

An ESO could function as a less intrusive alternative to surrender once the person concerned is arrested in the executing Member State on the basis of a prosecution-EAW. This requires that the scope of the ESO is widened – preferably at EU level, although unilateral action is not excluded – to include situations in which the person concerned no longer is present in the issuing Member State.

The ESO procedure is seen as too complex and too cumbersome by practitioners, especially where the person concerned does not comply with supervision measures. This issue could be addressed by combining an ESO with an EAW (in case the person concerned does not comply with the supervisions measures).

Lastly, the provision that allows Member States to derogate from Article 21(1) of FD 2009/829/JHA could have a discouraging effect on applying – an already underused[75] instrument as – the ESO.

Paragraph 7.2.3 shows that the EIO regime concerning videoconferences and temporary transfers raises a number of issues.

Although by no means unanimous, the dominant opinion is that Directive 2014/41/EU does not provide a (clear) legal basis for videoconferencing in order to ensure the presence of the accused

[74] Of course, interrogation via videoconference would be a more efficient way of interrogating the accused person. Cf. *Final report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO)*, Council document 15834/1/24 REV 1, 10 December 2024, p. 60 ('Practitioners pointed out that hearings by videoconference are considered to be a more practical and often more proportionate solution').
[75] The Spanish report identifies other reasons why the ESO is underused: Spanish report, para 2.2.2(b)(ii): the degree of mutual trust required is higher because an ESO involves a transfer of supervisory powers; granting control to a foreign authority is a risk for the development of the criminal proceedings; an ESO entails more work as a result of communication and consultation between the competent authorities in order to avoid interruption of the supervision.

person at this trial. This is problematic from the perspectives of effectiveness, efficiency and proportionality. Participation in the trial by way of videoconference could reduce the problems with the application of the *in absentia* ground for refusal in, *e.g.*, FD 2002/584/JHA, could reduce to conduct retrials and FD 2008/909/JHA and would, in any case, be a less intrusive alternative than surrender.[76]

Speaking more broadly, the fact that there is no unanimity on the scope of Article 24 of Directive seems to indicate that its wording is not sufficiently clear. Clarity about the intent and scope of a provision is a precondition for its effective, efficient and coherent application. Apparently, Article 24 does not make it sufficiently clear that an EIO may be issued to interrogate an accused person at his trial by way of videoconference. The same applies, *mutatis mutandis*, to the provision on temporary transfer to the issuing Member State (Article 22): apparently, at present, the wording of that provision does not convince every Member State that a temporary transfer of an accused person for interrogation at this trial is possible.

These criticisms on the scope and clarity of the provisions of Directive 2014/41/EU notwithstanding, one should not lose sight of the fact that even if the scope and wording of the provisions were to be widened and/or clarified, it would still depend on the *national* criminal procedural laws of the Member States whether their issuing authorities could apply the amended provisions. Pursuant to Article 6(1)(b) of Directive 2014/41/EU, an EIO may only be issued if 'the investigative measure(s) indicated in the EIO *could have been ordered under the same conditions in a similar domestic case*'.[77] The following are just a few examples with regard to videoconferencing to illustrate this point.

- In Germany, participation by the accused person in his trial by videoconference is not possible, *physical* presence at the trial being mandatory.[78]
- Polish national law does not allow for hearing a suspect by videoconference at the pre-trial stage of the proceedings, and only allows for videoconferencing for interrogating the accused person at the trial stage and his/her participation in the trial in specific, narrowly defined circumstances.[79] The Polish report proposes to introduce the

[76] The evaluations teams involved in the 10th round of mutual evaluations invited the European Commission the address the issue through legislation: *Final report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO)*, Council document 15834/1/24 REV 1, 10 December 2024, p. 68.
[77] Emphasis added.
[78] German report, para 2.3(b)(i)(aa) and para 6.
[79] Polish report, para 2.3(b)(i)(aa)(EIO/Conventions/videoconference).

possibility of hearing a suspect by videoconference at the pre-trial stage, to introduce a clear and broad national legal basis for interrogating the accused person at his trial, and to introduce a full opportunity to conduct the trial by videoconferencing with the participation of the accused person.[80]

- In Spain, it is not possible for the accused person to participate in his trial by videoconferencing if the sentence that can be imposed exceeds two years of imprisonment, six years if the punishment is of a different type, or if the trial is a trial by jury.[81]

7.3 National legal framework

7.3.1 Introduction

Reading the country reports, it is apparent that one issue, although by now an old chestnut, (still) needs to be addressed in this chapter: the transposition by the Member States of optional grounds for refusal as mandatory ones (paragraph 7.3.2). Apart from this common issue, the German and Polish country reports identify a number of transposition issues that are particular to those Member States but are nonetheless deserving of attention in this chapter (paragraph 7.3.3). Lastly, all the reports deal with the question whether or not the respective Member States chose to transpose the EU instruments into separate national laws or into a single national law (paragraph 7.3.4).

Not every transposition issue is addressed in this paragraph. Some issues were already dealt with in the preceding paragraph. Other issues are not problematic or not problematic anymore for the effective, efficient and coherent application of the instruments, and are therefore excluded. The Dutch and Polish declarations ex Article 28(2) of FD 2008/909/JHA on the

[80] Polish report ('**Memorandum**', paras II.2-4).
[81] Spanish report, para 5.3 (see specifically Art. 786 (1) (II) LECrim and 44 (II) Organic Act 5/1995 on the jury (Jury Law)). However, the report on the 10th round of mutual evaluations on Spain mentions a different exception ('except for trials of serious offences where the punishment exceeds five years in prison and jury trials') and refers to Art. 258 a. of the CCP. See *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Spain*, Council document 13641/1/24 REV 1, 8 October 2024, p. 48.

transitional regime of that framework decision constitute such an issue.[82] As results from the case-law of the Court of Justice, these declarations are incapable to produce legal effects because they were made *after* the adoption of FD 2008/909/JHA.[83] Pursuant to the principle of sincere cooperation (Article 4(3) TEU) it would seem that Member States that made such a declaration are bound to withdraw them.[84] The Netherlands withdrew its declaration in 2018.[85] The Polish declaration, which does not seem to have been withdrawn yet,[86] is unlikely to cause problems anymore: the declaration only applies to judgments that became final before 5 December 20*11*.

7.3.2 Incorrect transposition of grounds for refusal (optional → mandatory)

A continuous issue at the level of national law is the transposition, by the Member States, of grounds for optional refusal as grounds for mandatory refusal. Until recently, the only EU instrument in mutual recognition in criminal matters that contains grounds for mandatory refusal was FD 2002/584/JHA (Article 3).[87] Nevertheless, Germany and the Netherlands have not only transposed grounds for optional refusal contained in that framework decision as grounds for mandatory refusal but also grounds for optional refusal contained in FD 2008/909/JHA, FD 2008/947/JHA, FD 2009/829/JHA and Directive 2014/41/EU.[88]

In the context of FD 2002/584/JHA, the Court of Justice held that Member States may not transpose the grounds for optional refusal of Article 4 of that framework decision as grounds

[82] O.J. 2009, L 265/41 (declaration by the Netherlands) and O.J. 2011, L 146/21 (declaration by Poland).
[83] Case C-573/17, *Popławski II*, EU:C:2019:530, paras 44-49. FD 2008/909/JHA was adopted on 27 November 2008. See Dutch report, para 1.1(b).
[84] On this principle see, *inter alios*, Klamert, The Principle of Loyalty in EU Law, Oxford Studies in European Law (Oxford University Press, 2014); Roes, *Sincere cooperation and European integration: a study of the pluriformity of loyalty in EU law. Unietrouw en Europese integratie: een studie naar de pluriformiteit van loyaliteit in het EU-recht* (KU Leuven, 2023).
[85] O.J. 2018, L 163/19. Although a withdrawal results in the *immediate* application of the system of mutual recognition of sentences established by FD 2008/909/JHA (cf. Case C-296/08 PPU, *Santesteban Goicoechea*, EU:C:2008:457, para 78), it took almost a year to amend national law: Dutch report, para 1.1(b).
[86] Polish report, para 1.1(b).
[87] Since 27 November 2024 FD 2002/584/JHA is in the company of another instrument: Regulation (EU) 2024/3011 of the European Parliament and of the Council of 27 November 2024 on the transfer of proceedings in criminal matters, O.J. 2018, L 3011/1. Art. 12(1) of the regulation contains grounds for mandatory refusal. On this regulation see paragraph 7.9.
[88] Dutch report, para 1.1; German report, para 1.1(a)-(e). For the transposition of FD 2002/584/JHA by Poland see Wąsek-Wiaderek & Zbiciak, "The practice of Poland on the European Arrest Warrant" in Barbosa *et al.*, *European Arrest warrant. Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23 (Eleven, 2022), pp. 237-321, at 239-243.

for mandatory refusal.[89] After all, Article 4 explicitly states that the executing judicial authority 'may' refuse to execute an EAW.[90] Apart from the grammatical argument, there is the argument based on the rationale of the EAW: pursuant to the principle of mutual recognition surrender is the rule whereas refusal is intended to be the exception which should be interpreted strictly.[91] The result of transposing optional grounds for refusal as mandatory grounds for refusal is that it turns that rationale on its head by making the exception – refusal – the rule.

In the context of Article 4a of FD 2002/584/JHA, the ground for refusal concerning *in absentia* convictions, the Court of Justice pointed out that it is apparent from its wording that it provides for an optional ground for refusal. Because of the optional character of that ground for refusal, on the one hand the executing judicial authority must be able to refuse surrender of the requested person 'irrespective of whether the essence of his or her rights of the defence have been infringed' since Article 4a does not contain such a requirement.[92] On the other hand, because of that optional character, the executing judicial authority 'may', even if none of the situations mentioned in subparagraphs (a)-(d) of Article 4a(1) apply (situations in which surrendering the person concerned would not entail a breach of his defence rights), take into account other circumstances that enable it to satisfy itself that the surrender of the person concerned would not entail a breach of his defence rights and may order surrender if it establishes that no such breach of rights would occur.[93] By conferring this discretion on the executing judicial authority, the Court of Justice recognised that subparagraphs (a)-(d) do not fully codify the situations in which surrender would not breach the rights of defence of the requested person,[94] in other words recognised that even though those subparagraphs do not apply surrender does not necessarily

[89] Case C-665/20 PPU, *X (European arrest warrant – Ne bis in idem)*, C-2021:339, para 44.
[90] Case C-579/15, *Poplawski*, EU:C:2017:503, para 21. See on this judgment Glerum, "Van tweeën één: overleveren of de straf zelf tenuitvoerleggen; de facultatieve weigeringsgrond inzake executieoverlevering van eigen onderdanen en ingezetenen", (2018) SEW, 33-37.
[91] Case C-579/15, *Poplawski*, EU:C:2017:503, para 19.
[92] Joined Cases C-514/21 and C-515/21, *Minister for Justice and Equality (Lifting of the suspension)*, EU:C:2023:235, para 75. Another question is whether the executing judicial authority has discretionary power or the obligation to apply the optional ground for refusal once it has established that the trial resulting in the *in absentia* judgment has not afforded the defendant any of the procedural safeguards provided for in Art. 4a. On this question see Brodersen, Glerum & Klip, *The European Arrest Warrant and In Absentia Judgments*, Maastricht Law Series 12 (Eleven International Publishers, 2020), p. 188-190. This question is raised in Case C-95/24 (*Khuzdar*) with regard to Art. 9(1)(i) of FD 2008/909/JHA, which provision, in essence, corresponds to Art. 4a.
[93] Joined Cases C-514/21 and C-515/21, *Minister for Justice and Equality (Lifting of the suspension)*, EU:C:2023:235, paras 76-77.
[94] See Brodersen, Glerum & Klip, *The European Arrest Warrant and In Absentia Judgments*, Maastricht Law Series 12 (Eleven International Publishers, 2020), p. 46 and pp. 179-180; Brodersen, Glerum & Klip, "The European arrest warrant and *in absentia* judgments: The cause of much trouble", 13 *New Journal of European Criminal Law* (2022), 7-27, at 12-13 and 21.

entail a breach of the rights of defence.[95] In transposing Article 4a, Member States may not take away the discretion needed for the purpose of determining whether, in a given case, the rights of the defence may be regarded as having being respected.[96] In conclusion, Member States may not transpose Article 4a as a mandatory ground for refusal.[97]

To recap: Member States must not transpose the grounds for refusal of both Article 4[98] and Article 4a as mandatory grounds for refusal. The reasoning of the Court of Justice's case-law, though strictly speaking only pertaining to those provisions, is readily applicable to other mutual recognition based instruments on judicial cooperation that provide for grounds for optional refusal.[99] This seems to be the opinion of the European Commission as well. In its *Handbook on the transfer of sentenced persons and custodial sentences in the European Union*, it states that the 'grounds for refusal should be implemented as optional for the competent authority. Article 9 [of FD 2008/909/JHA] clearly states that the competent authority 'may' refuse to recognise the judgment and enforce the sentence, meaning that the competent executing authority still has a discretionary margin to assess on a case-by-case basis the appropriateness of invoking a ground for refusal'.[100] Furthermore, that opinion is shared by experts who evaluated the implementation of Directive 2014/41/EU by the Member States. Several of the evaluation reports mention that transposition of the optional grounds for refusal contained in Directive 2014/41/EU[101] as mandatory grounds for refusal is not in line with that

[95] In its case-law, the Court of Justice identified circumstances that might lead to the conclusion that surrender would not breach the requested person's rights of defence, *e.g.* 'the fact that he or she sought to avoid service of the information addressed to him or her or to avoid any contact with his or her lawyers': Joined Cases C-514/21 and C-515/21, *Minister for Justice and Equality (Lifting of the suspension)*, EU:C:2023:235, paras 78.
[96] Case C-397/22, *Generalstaatsanwaltschaft Berlin (In absentia conviction)*, EU:C:2022:1031, paras 57-64.
[97] Critical of the Court of Justice's case-law: Böse, "European Arrest Warrants and Minimum Standards for Trials *in absentia* – Blind Trust vs. Transnational Direct Effect?", 11 European Criminal Law Review (2021), 275-287. He argues that Art. 8 and 9 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, O.J. 2016, L 65/1, should limit the discretion of the executing judicial authority. See on the relation between FD 2002/584/JHA and that directive Case C-416/20 PPU, *Generalstaatsanwaltschaft Hamburg*, EU:C:2020:1042, para 46.
[98] In the same vein the opinion of some expert teams that participated in the 9th round of mutual evaluations: *Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty*, Council document 6741/23, 1 March 2023, p. 20.
[99] Two pending cases afford the Court of Justice an opportunity to explicitly apply this case-law to optional grounds for refusal in FD 2008/909/JHA: Case C-641/23 (*Dubers*) concerning Art. 9(1)(d) and Case C-447/24 (*Höldermann*) concerning Art. 9(1)(i). In the *Dubers* case AG J. Richard de la Tour is of the opinion that Member States may not transpose Art. 9(1)(d) of FD 2008/909/JHA as a mandatory ground for refusal: Case C-641/23, *Dubers*, EU:C:2025:251, para 51.
[100] *Handbook on the transfer of sentenced persons and custodial sentences in the European Union*, O.J. 2019, C-403/27.
[101] Art. 11 of Directive 2014/41/EU contains only optional grounds for refusal.

directive.[102] The final report on the evaluation of Directive 2014.41/EU recommends that Member States should ensure that all grounds for refusal are defined as optional in their transposing legislation.[103]

Of course, grounds for refusal concerning a *violation of fundamental rights* (but not *in absentia* based grounds for refusal) constitute an exception.[104] In this respect, one needs to distinguish between instruments that do not contain an explicit ground for refusal concerning fundamental rights violations (excluding *in absentia* provisions) and instruments that do contain such an explicit ground for refusal (excluding *in absentia* provisions).

The Court of Justice has interpreted instruments belonging to the first category as *requiring* the executing (judicial) authority to *refrain* from giving effect to (*nota bene*: not *refusing* to execute) a judicial decision from the issuing Member State in situations in which recognising and enforcing that decision would expose the person concerned to a real risk of a violation of Articles 4,[105] 7 and 24(2)-(3),[106] 47[107] and 49(1)[108] of the Charter. That interpretation is based on the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union, and as expressed in the instruments, in

[102] See, *e.g.*:
- *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Austria*, Council document 8494/1/24 REV 1, 21 May 2024, p. 32-33.
- *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on the Netherlands, 13190/1/22 REV 1, 15 February 2024*, p. 31.
- *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Poland*, 13516/1/24 REV 1, 2 October 2024, p. 45.
- *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Spain*, Council document 13641/1/24 REV 1, 8 October 2024, p. 40.

[103] *Final report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO)*, Council document 15834/1/24 REV 1, 10 December 2024, p. 52.

[104] See in this vein Böse, "Mandatory and optional refusal grounds in mutual recognition instruments" in M.J.J.P. Luchtman (Ed. in chief), *Of swords and shields: due process and crime control in times of globalization. Liber amicorum prof. dr. J.A.E. Vervaele* (Eleven, 2023), pp. 425-432.

[105] Joined Cases C-404/14 & C-659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198, with regard to FD 2002/584/JHA.

[106] Case C-261/22, *GN (Ground for refusal based on the best interests of the child)*, EU:C:2023:1017, with regard to FD 2002/584/JHA.

[107] Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586, with regard to FD 2002/584/JHA; Case C-819/21, *Staatsanwaltschaft Aachen*, EU:C:2023:841, with regard to FD 2008/909/JHA.

[108] Case C-202/24, *Alchaster*, EU:C:2024:649 and Case C-743/24, *Alchaster II*, EU:C:2025:230, with regard to the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, O.J. 2021, L 149/10.

combination with the provisions of the Charter.[109] The Court of Justice uses the words 'refrain from giving effect' instead of the words 'refuse to execute' because, initially, it had ruled that the grounds for refusal were limited to *those explicitly so designated and exhaustively listed in the instrument*.[110] In effect, the Court of Justice has introduced a non-statutory ground for refusal that must not be called a ground for refusal. Where the instrument does not contain an explicit ground for refusal concerning fundamental rights violations, national legislators may introduce national provisions compelling their executing (judicial) authorities to refrain from giving effect to foreign decisions but only in so far as those national provisions have the same scope as the EU obligation to respect the fundamental rights and legal principles, as interpreted by the Court of Justice.[111]

Some instruments do contain an explicit ground for refusal concerning fundamental rights violations. One such instrument is Directive 2014/41/EU. Article 11(1)(f) of that directive allows refusal 'where there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter'. It does not seem doubtful that, when the executing authority establishes such an incompatibility, it *must* refuse the execution of the EIO and, consequently, that the national legislator of the executing Member State may prescribe such a refusal. After all, Member States must not act in a way that is incompatible with their fundamental rights obligations. Nevertheless, the provision raises the question how the phrase 'incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter' is to be interpreted. A (real risk of a) violation of which fundamental rights will constitute an incompatibility with those obligations? Will each and every (real risk of a) violation of a non-absolute fundamental right suffices to establish a finding of incompatibility with the executing Member State's fundamental rights obligations?[112]

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[109] See, *e.g.*, Joined Cases C-404/14 & C-659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198, paras 83-88, with regard to Art. 1(3) of FD 2002/584/JHA and Art. 4 of the Charter.

[110] See, *e.g.*, Case C-396/11, *Radu*, EU:C:2013:39, para 37 ('(…) according to the provisions of Framework Decision 2002/584, the Member States may refuse to execute such a warrant only in the cases of mandatory non-execution provided for in Article 3 thereof and in the cases of optional non-execution listed in Articles 4 and 4a (…)') and Case C-819/21, *Staatsanwaltschaft Aachen*, EU:C:2023:841, para 20 ('(…) That authority may, in principle, refuse to give effect to such a request only on the grounds for non-recognition and non-enforcement exhaustively listed in Article 9 of Framework Decision 2008/909').

[111] Case C-158/21, *Puig Gordi and Others*, EU:C:2023:57, paras 77-78.

[112] Compare, *e.g.*, Art. 8(1)(f) and Art. 19(1)(h) of Regulation (EU) 2018/1805 of the European parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, O.J. 2018, L 303/1. Both provisions contain an optional ground for refusal and refer to 'a *manifest* breach of a *relevant* fundamental right' (emphasis added).

Ultimately it will be up to the Court of Justice to answer these questions and to determine the scope of the ground for refusal. Where the national legislator has chosen to prescribe refusal, the executing judicial authority would do well to heed that *caveat*.

Incorrect transposition of the instruments in general and transposition of optional grounds for refusal as mandatory grounds for refusal is problematic particularly from the point of view of effective and coherent application of the instruments. After all, the concept of 'effective and coherent application' of the instruments presupposes that the instruments were transposed correctly into national law.

Beyond being problematic at the conceptual level, the Dutch report shows that the issue of transposition as mandatory grounds for refusal can have a real impact in practice. Transposition of Article 9(1)(i) of FD 2008/909/JHA, the optional ground for refusal concerning *in absentia* convictions, as a mandatory ground for refusal causes problems when deciding on the recognition and enforcement of foreign *in absentia* judgments, if the person concerned explicitly does not invoke this ground for refusal and thus, in effect waives his rights of defence *a posteriori*, because he wants to serve his sentence in the Netherlands.[113] It is plausible that such mandatory grounds for refusal have an impact on the *issuing* side of judicial cooperation. If the executing Member State, *e.g.*, has transposed both the grounds for refusal concerning *in absentia* judgments contained in FD 2008/909/JHA and FD 2002/584/JHA as grounds for mandatory refusal, it has robbed its executing (judicial) authorities of the power to examine, case-by-case, whether enforcement of the sentence or surrender would not entail a breach of the rights of defence of the person concerned and, if so, to surrender him or to enforce the sentence. As a result, a refusal to enforce a foreign sentence or to surrender may well occur even when the *in absentia* conviction did not breach the rights of defence.[114] Obviously, this detracts from the effectiveness of both instruments. Following a refusal to enforce the sentence on the basis of the mandatory *in absentia* ground for refusal, issuing an execution-EAW to the same executing Member State would have no chance of success because the executing authority would have to apply the mandatory *in absentia* ground for refusal contained in the legislation

[113] Dutch report, para 3.2(a)(ee)('Custodial sentences', 'Application').
The Court of Justice will have an opportunity to rule that transposition of Art. 9(1)(i) as a mandatory ground for refusal is not allowed. In Case C-447/24 (*Höldermann*) a German referring court put this issue before the Court of Justice.
[114] For an exploration, based on the case-law of the ECtHR, of situations in which surrender for the purpose of executing an *in absentia* conviction would not breach the rights of defence see Brodersen, Glerum & Klip, *The European Arrest Warrant and In Absentia Judgments*, Maastricht Law Series 12 (Eleven International Publishing, 2020), pp. 162-169.

that transposes FD 2002/584/JHA. This would disregard the dimension of 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)'). Barring a transfer of proceedings to the executing Member State, impunity would result. But where there is already a final judgment, transferring the proceedings to the executing Member State would be inefficient (as it would duplicate the effort involved with prosecuting and bringing the person concerned to trial) and it would not be as effective as surrender to the issuing Member State or enforcement of the sentence in the executing Member State (as a renewed conviction is not guaranteed).

As far as the grounds for optional refusal of *FD 2002/584/JHA* are concerned, as a result of infringement proceedings brought by the European Commission it is likely that the Member States concerned already have amended or will amend their national laws in the near future. The German federal Ministry of Justice, *e.g.*, published a proposal for a new law on international judicial cooperation in criminal matters on 11 September 2024 (*Entwurf eines Gesetzes zur Neuregelung des Rechts der internationalen Rechtshilfe in Strafsachen*). On account of the infringement proceedings against Germany, this proposal entails, *inter alia*, turning mandatory grounds that, pursuant to FD 2002/584/JHA, should be optional into optional grounds for refusal.[115] In the Netherlands the infringement proceedings resulted in a legislative overhaul of the Law on Surrender, which entered into force on 1 October 2024 and which turned a number of mandatory grounds for refusal into optional grounds for refusal.[116]

As far as optional grounds for refusal contained in *other instruments than FD 2002/584/JHA* are concerned – with the exception of grounds for refusal concerning fundamental rights violations but not *in absentia* based grounds for refusal (see *supra*) –, it seems that, in the absence of specific case-law of the Court of Justice or specific infringement proceedings dedicated to those instruments, Member States do not yet seem to realise that 'what is sauce for the goose is sauce for the gander'.

7.3.3 Various transposition issues

[115] The proposal and a synopsis of the proposal are available at: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/2024_IRG_Reform.html (last accessed on 30 March 2025).
[116] Dutch report, para 1.1.

7.3.3.1 FD 2002/584/JHA

In discussing the coherence between the ESO and the EAW (*supra*, paragraph 7.2.2), it was mentioned that Polish law does not provide for a request, by Polish issuing authorities, to hear the requested person or to temporarily transfer him to Poland pending the decision on the execution of a Polish EAW. This lacuna means that Poland, as issuing Member State, has not ensured the full effectiveness of the EAW regime. Although the Polish report states that application *per analogiam* of the provisions concerning Poland as executing Member State is possible,[117] against the background of the duty to transpose FD 2002/584/JHA into national law and from the point of view of legal certainty, it is preferable that Poland transposes Articles 18 and 19 of FD 2002/584/JHA, as far as Poland as issuing Member State is concerned, into its national law, as the Polish report agrees.[118]

A proper national legal basis for hearing the requested person pending the execution of a prosecution-EAW – which hearing, once FD 2002/584/JHA is amended, can take place by videoconference (see *infra*, paragraph 7.10)–[119] is all the more important, because that instrument can play an important role from the perspective of proportionality: it may be assumed that in certain cases the EAW could be withdrawn after the hearing;[120] moreover, the hearing could play an important role in the relationship between the ESO and the EAW (see *supra*, paragraph 7.2.2).

7.3.3.2 FD 2008/909/JHA

The Polish report mentions that the transposition of FD 2008/909/JHA does not cover 'security (protective) measures involving deprivation of liberty, which entails a stay in a medical (psychiatric) facility'.[121] Consequently, Poland cannot forward a judgment imposing such a

[117] Polish report, para 2.3(b)(ii)(aa).
[118] Polish report ('**Memorandum**', para II. 5-6).
[119] See Art. 2(3) of Directive (EU) 2023/2843 of the European Parliament and of the Council of 13 December 2023 amending Directives 2011/99/EU and 2014/41/EU of the European Parliament and of the Council, Council Directive 2003/8/EC and Council Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, as regards digitalisation of judicial cooperation, O.J. 2023, L 2843.
[120] Polish report ('**Memorandum**', para I.3).
[121] Polish report, para 1.1(b).

measure to another Member State and, as executing Member State, Poland cannot recognise and enforce a judgment imposing such a measure from another Member State. Clearly, the scope of FD 2008/909/JHA does not only cover 'penalties' in the classical sense, but also measures which involve deprivation of liberty and are imposed as a consequence of an offence on a person who, due to mental disorder, cannot be held to be criminally responsible (or only to a diminished degree) and who presents a danger to society.

The justification for the Polish exclusion of, in short, security measures is Article 9(1)(k) of FD 2008/909/JHA, which allows refusal if 'the sentence imposed includes a measure of psychiatric or health care or another measure involving deprivation of liberty, which, notwithstanding Article 8(3), cannot be executed by the executing State in accordance with its legal or health care system'. Two other arguments are put forward. In legal literature it was argued that, in contrast to FD 2002/584/JHA, FD 2008/909/JHA does not apply to 'detention orders' (security measures imposed as a separate measure, not connected with the execution of the penalty of imprisonment). In the written reasons for the draft act to transpose FD 2008/947/JHA it was stated that security measures are imposed for an undefined period of time but that the certificate provided for in the framework decision is not suitable for the execution of such measures that have an undefined period of execution.[122]

The argument based on Article 9(1)(k) invites three counterarguments. First, Article 9(1)(k) contains an optional ground for refusal. Consequently, Member States should confer a discretionary margin on their executing authorities to assess, when it is established that the conditions for a refusal are met, on a *case-by-case basis* the appropriateness of invoking a ground for refusal (see *supra*, paragraph 7.3.2). The effect of a 'blanket' exclusion is equal to that of a mandatory ground for refusal. Second, as is apparent from the wording of Article 9(1)(k) itself, before applying this ground for refusal the competent executing authority should first examine whether it is possible to adapt the foreign measure pursuant to Article 8(3) of FD 2008/909/JHA. A 'blanket' exclusion would nullify this duty. Third, Article 9(3) of FD 2008/909/JHA requires the executing authority, before deciding not to recognise the judgment on the basis of, *inter alia*, Article 9(1)(k), to consult its counterpart in the issuing Member State. Like the duty to examine whether it is possible to adapt a foreign measure, the requirement to consult the issuing authority aims to prevent automatic refusals to recognise measures within

[122] Polish report, para 3.2 ('Person concerned is present in issuing MS', '(ee) enforcement in another MS').

the meaning of Article 9(1)(k) and, therefore, corroborates that a general exclusion of such measures is not allowed.

The other two arguments mentioned in Polish legal literature equally do not seem to support a 'blanket' exclusion of security measures.

The scope of FD 2008/909/JHA does not exclude measures involving deprivation of liberty that, under FD 2002/584/JHA, would constitute 'detention orders'. This is evidenced by the definition of 'sentence'. Pursuant to Article 1(b), a 'sentence' is 'any custodial sentence or any measure involving deprivation of liberty imposed for a limited or unlimited period of time on account of a criminal offence on the basis of criminal proceedings'. Indeed, the *Handbook* states that 'decisions imposing internment – following the establishment of the offender's full or partial criminal unaccountability due to a mental disability (see recital 20) – are included in the definition'.[123] In any case, the mere existence of Article 9(1)(k) proves that security measures are within the scope of FD 2008/909/JHA. After all, if they were not within scope Article 9(1)(k) would be redundant. Article 25 of FD 2008/909/JHA delivers further proof that measures involving deprivation of liberty that could be considered to be 'detention orders' are included in the scope of FD 2008/909/JHA. According to that provision, FD 2008/909/JHA, in principle, applies to the enforcement of a 'sentence' when Article 4(6) or Article 5(3) of FD 2002/584/JHA was applied. Section (f) of the model certificate corresponds to this provision and explicitly refers to 'detention orders'.

As to the argument that the certificate is not suited for measures that have an undefined period of execution, that may well be, but it should be recalled that the definition of a 'sentence' explicitly refers to 'any measure involving deprivation of liberty imposed for a limited *or unlimited period of time*' (Article 1(b)).[124]

The exclusion of, in short, security measures can have an impact on the effectiveness of FD 2008/909/JHA. The Dutch report notes that Poland refuses to recognise Dutch judgments imposing on Polish nationals an 'entrustment order', which is a measure within the meaning of Article (9)(1)(k). There is no other EU instrument to ensure that Poland takes over the enforcement of security measures imposed on a Polish national by another Member State. In practice, Dutch authorities are faced with two equally unappealing choices: either to continue

[123] *Handbook on the transfer of sentenced persons and custodial sentences in the European Union*, O.J. 2019, C-403/34.
[124] Emphasis added.

enforcing the 'entrustment order' in the Netherlands even though this does not contribute to enhancing the possibility of social rehabilitation of the person concerned or to try to arrange compulsory psychiatric treatment of the person concerned in Poland on the basis of civil law in combination with a conditional termination of the treatment and detention in the Netherlands.[125]

Quite recently, a solution was found for this problem.[126] Apparently, Poland is willing to take over the execution of Dutch security measures on the basis of the Convention on the Transfer of Sentenced Persons.[127] However, there are at least two problems with this solution. First of all, this solution means that the incorrect transposition by Poland of FD 2008/909/JHA is still not addressed. And second, from the perspective of the issuing Member State this solution raises questions about its legal basis. Pursuant to Article 26(1) of FD 2008/909/JHA, that framework decision replaced, *inter alia*, the Convention on the Transfer of Sentenced Persons.[128] The option to continue to apply bilateral or multilateral agreements or arrangements in force after the entry into force of FD 2008/909/JHA, provided for by Article 26(2), does not apply, since this provision refers to other agreements than those mentioned in Article 26(1) of FD 2008/909/JHA.[129]

7.3.3.3 FD 2008/947/JHA

Germany has limited the scope of its national legislation that transposes FD 2008/947/JHA to probation decisions. German law does not provide for the imposition of an alternative sanction of community service, as a separate sanction, on an adult offender. Alternative sanctions within the meaning of FD 2008/947/JHA may only be imposed on minors and because of the divergent sanctioning regimes among the Member States supervision of juvenile offenders is considered to be a matter for German courts only.[130]

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[125] Dutch report, para 3.2(a)(ee)('Measures involving deprivation of liberty: entrustment order'; 'Application'). Interview with Ministry of Justice and Security (mutual recognition of sentences).
[126] Dutch report, para 3.2(a)(ee)('Measures involving deprivation of liberty: entrustment order', '*Application*').
[127] Strasbourg 21 April 1983, ETS No. 112.
[128] *Handbook on the transfer of sentenced persons and custodial sentences in the European Union*, O.J. 2019, C-403/34. Cf. Case C-296/08 PPU, *Santesteban Goicoechea*, EU:C:2008:457, para 53 (with regard to Art. 31(1) of FD 2002/584/JHA).
[129] Cf. Case C-296/08 PPU, *Santesteban Goicoechea*, EU:C:2008:457, para 55 (with regard to Art. 31(2) of FD 2002/584/JHA).
[130] German report, para 1.1(c).

This feature of German law can cause problems for issuing Member States whose legal system provides for imposing, on adult offenders, alternative sanctions (community service) as separate sanctions, such as the Netherlands. In the past, Dutch judgments imposing on an adult offender, an alternative sanction as a separate sanction were considered to be incompatible with German law. In collaboration with the authorities of the border *Länder* a workaround was found consisting of adapting, pursuant to Article 9(1) of FD 2008/947/JHA, the sentence of community service into a conditional/suspended sentence with the condition of community service attached. Owing to the federal structure of Germany, the recognition of Dutch sentences of community service still continues to run into problems, requiring consultations between the issuing and executing authorities and causing delays. In 2021, the Higher Regional Court Hamm held that a separate alternative sanction of community service is not, in itself, incompatible with German law because German law provides for imposing community service, not as a separate sanction but rather in the context of a conditional/suspended sentence.[131] The Higher Regional Court Cologne came to a similar conclusion in the same year, without however referring to Hamm decision.[132] It is not clear whether all other German authorities follow this line of reasoning. All of this diminishes the effectiveness of FD 2008/947/JHA.

The approach taken by the Higher Regional Court Hamm to decide whether a certain sanction is incompatible with German law is a rather abstract approach and is in line with the reasoning of AG Y. Bot in the *Sut* case. That case concerned the recognition and enforcement by Belgium of a Romanian custodial sentence for an offence that according to Belgian law only carried a financial penalty. The AG opined that, even though it would not be possible under Belgian law to impose a custodial sentence for the offence at issue, this did not mean that the custodial sentence imposed in Romania was incompatible with Belgian law within the meaning of Article 8(3) of FD 2008/909/JHA. After all, the Belgian legal system does provide for the imposition of custodial sentences (*in abstracto*; *i.e.* just not for this offence).[133] The possibility to adapt a sentence when it is incompatible, by its nature, with the law of the executing Member State is an *exception* to the rule (recognition and enforcement of a sentence as it was imposed in the other Member State)[134] and, therefore, must be interpreted strictly. The abstract approach espoused by the AG and the two Higher Regional Courts commends itself to all executing

[131] Dutch report, para 3.2(a)(ee)('Alternative sanctions', 'Application').
[132] Higher Regional Court Cologne, 4 March 2021, 2 Ws 45/21.
[133] Opinion of AG Y. Bot, EU:C:2018:672, paras 90-95.
[134] Case C-554/14, *Ognyanov II*, EU:C:2016:835, para 36; case C-314/18, *SF (European arrest warrant – Guarantee of return to the executing State)*, EU:C:2020:191, para 65.

authorities, as it is in accordance with the exceptional nature of the possibility to adapt sentences and facilitates recognition and enforcement of alternative sanctions without having to adapt them.

7.3.4 Unified national legislation

This paragraph deals with the question how the Member States transposed the various instruments: in separate national laws for the different instruments, or in laws for all or for some of the instruments; and whether self-executing rules of treaties are included in the national legislation. The choices made by the Member States on these issues impact on the effective, efficient and coherent application of the instruments. In particular, they relate to efficiency (whether or not the transposed rules are easy to find for issuing authorities) and to aspects of coherence, especially consistency, comprehensiveness and proportionality.

In Germany, there is one national law that implements all the EU mutual recognition instruments (FD 2002/584/JHA, FD 2008/909/JHA, FD 2008/947/JHA, FD 2009/829/JHA and Directive 2014/41/EU). However, the transfer of proceedings is not governed by specific provisions of that national law. There was discussion whether judicial cooperation with other EU Member States should be governed by a separate law, but the prevailing opinion preferred a comprehensive statute on international cooperation in criminal matters, be it with Member States or third countries.[135] As to international treaties, their transposition into the German legal order is not necessary insofar as their provisions are self-executing. The corresponding treaty provisions take precedence over the general provisions of the national law.[136]

Poland transposed all the EU mutual recognitions instruments as part of the Code of Criminal Procedure.[137] Pursuant to Polish law, international treaties ratified by Poland become part of national law, without the need to transpose them into national law. Polish authorities can apply provision of those treaties directly, if they have a self-executing character. National statutory

[135] German report, para 1.1.
[136] German report, para 1.2.
[137] Polish report, para 1.1.

provisions do not apply, if the provision of a treaty ratified by Poland, with the consent of the Polish Parliament, provides something to the contrary.[138]

Like Germany, Spain has transposed all the EU mutual recognition instruments in one national law, thus avoiding regulatory dispersion, achieving greater specificity and agility for issuing and executing authorities, and facilitating the future incorporation of directives that may be progressively adopted on judicial cooperation.[139] International treaties ratified by Spain and officially published form part of the national legal order.[140]

Unlike the three other Member States, the Netherlands has chosen to transpose the EU mutual recognition instruments in various ways: as part of the Code of Criminal Procedure (the EIO and the ESO) or as separate laws: a law for the transfer of execution of custodial sentences and measures involving deprivation of liberty, as well as the transfer of probation decisions and alternative sentences, and a law for the EAW.[141] Unlike the German law but like the Spanish law, the separate laws only deal with judicial cooperation with other EU Member States.[142] International treaties ratified by the Netherland do not need to be transposed into national law. Provisions of such treaties can be applied by Dutch authorities, the Code of Criminal Procedure providing a framework for that application (competent authorities, procedures, conditions). Insofar as a provision of a treaty has direct effect, it prevails over national provisions once it is published.[143]

7.3.5 Conclusions

Transposing optional grounds for refusal into mandatory grounds for refusal is contrary to EU law (except where it concerns grounds for refusal concerning human rights violations that are not related to *in absentia* judgments). Against the background of the concept of 'effective and coherent application' such transposition is not only problematic from a conceptual point of view but can also lead to situations in which the dimensions of completeness and proportionality of

[138] Polish report, para 1.2.
[139] Spanish report, para 1.1.
[140] Spanish report, para 1.2.
[141] Dutch report, para 1.1.
[142] Dutch report, para 1.1(a)(b)(c).
[143] Dutch report, para 1.2.

the concept of coherent application and the concept of effective application are disregarded in practice (7.3.2).

Non-transposition by Poland of the provisions on requesting a hearing of the requested person or his temporary transfer to the issuing Member State where Poland is the issuing Member State has a negative impact on the effective and coherent application of FD 2002/584/JHA. After all, in the absence of transposition of those provisions the full range of judicial cooperation that can be afforded under that framework decision is not available. Given the duty to transpose the framework decision and the requirement of legal certainty, *per analogiam* application of the mirror provisions regarding Poland as executing Member State should only be a temporary solution (paragraph 7.3.3.1, '*FD 2002/584/JHA*'). The 'blanket' exclusion by Poland of security measures involving deprivation of liberty in a psychiatric facility is not compatible with FD 2008/909/JHA and impairs its effectiveness, forcing issuing Member States that wish to transfer such measures to use less effective options or options whose legality under the law of the issuing Member State is doubt (paragraph 7.3.3.2, '*FD 2008/909/JHA*').

The (*in concreto*) approach of (some) German authorities to consider that a foreign separate sanction of community service is incompatible with German law since German law does not know such separate sanctions, impacts on the effectiveness and efficiency of FD 2008/947/JHA. That approach requires consultations, causes delays and necessitates adaptation of such a foreign sentence whereas such an adaptation should be the exception (paragraph 7.3.3.3, 'FD 2008/947/JHA').[144]

Finally, three Member States provide for national legislation that present the transposed EU mutual recognition rules in a single instrument, thus contributing to efficiency and to aspects of coherence (notably consistency, comprehensiveness and proportionality).

In all of the four Member States, provisions of international treaties form part of the national legal order without transposition into national law, once ratified and published. This state of affairs, resulting from the national constitutional laws of each Member State, is not conducive

[144] Of course, even an *in abstracto* approach will not always yield results. In that case, the executing authority will be justified in ruling that the nature of the sanction is incompatible with the law of the executing Member State. In such cases, it may not always be possible to adapt the sanction to the punishment or measure provided for under its own law for similar offences in such a way that the domestic punishment or measure corresponds as closely as possible to the sanction imposed in the issuing Member State. The executing authority would then have no other option than to refuse to recognise the sanction.

to efficiency (the rules are not easily accessible) and coherence (the rules are fragmented, they are not presented in a consistent fashion).

7.4 Informal arrangements

7.4.1 Introduction

Some of the country reports indicate that Member States' authorities sometimes operate in a cross-border setting on the basis of informal arrangements, either arrangements with the authorities of another Member State or arrangements with the person concerned. The theme of cooperation on the basis of informal arrangements has a close link with the previous two themes (the EU and national legal frameworks). By their very nature, informal arrangements presuppose either that there is no legal framework in place or that the legal framework that is in place is ignored. In the context of this project, arrangements are therefore 'informal', when they are not based on an EU or CoE instrument that binds both Member States.

On the one hand, the use of informal arrangements in judicial cooperation can thus be an indicator that a legal framework is needed or that the existing legal framework is (perceived to be) defective. In the latter case, the practice of using informal arrangements instead of the existing legal framework that is (perceived to be) defective touches upon the completeness dimension ('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)') of the concept of 'coherent application of instruments'. Insofar as the instrument that is not used offers a less intrusive alternative, the practice of using informal arrangements is also relevant under the proportionality dimension ('choose among the available instruments the instrument that is sufficiently effective and the least intrusive') of that concept.

On the other hand, one might argue that informal arrangements can be of value on their own account and not just as a workaround caused by flaws in the legal framework, *e.g.* because using informal arrangements can be an efficient approach. Moreover, informal arrangements might offer a less intrusive alternative to using a formal instrument.

In the context of judicial cooperation in criminal matters, informal arrangements essentially raise two issues. First, the issue of sovereignty. Failing an international or European permissive rule to the contrary, Member State A may not carry out procedural acts in criminal proceedings on the territory of Member State B without the knowledge and consent of Member State B,[145] otherwise Member State A would violate Member State B's sovereignty. Each State has the exclusive right to wield public authority in its territory without having to countenance intervention in its territory by another State. With respect to sovereignty, one should distinguish between informal arrangements with the authorities of Member State B on the one hand and informal arrangements with the person concerned on the other. In the former case, the authorities of Member State A can argue that, since the authorities of Member State B entered into an arrangement, albeit informal, the sovereignty of Member State B was not infringed, or, at least, they can argue that they were justified in thinking that the sovereignty of Member State B was not infringed. In the latter case, Member State B is most probably not even aware of the arrangement between the authorities of Member State A and the person concerned.

The issue of sovereignty concerns the relationship between Member State A and Member State B. The second issue deals with the relationship between the Member States and the person concerned. Informal arrangements raise questions from the point of view of the principle of legal certainty, especially where deprivation or even restriction of liberty is concerned. This issue is closely tied to the completeness dimension of the concept of 'coherent application of instruments': using informal arrangements means that there is no legal framework or that it is ignored.

Against this background, this paragraph will deal with three informal practices. Two of those practices occur at the investigation/prosecution stage (paragraph 7.4.2) and the other practice at the enforcement stage (paragraph 7.4.3).

7.4.2 Informal practices at the investigation/prosecution stage

Interrogation on consular premises

[145] This is based on the famous *Lotus* case: *SS 'Lotus' Case (France v Turkey)* PCIJ 1927 Series A No 10, at 18-19. See, *e.g.*, Aust, *Handbook of International Law*, 2nd ed. (Cambridge University Press, 2010), p. 44; Boister, *An Introduction to Transnational Criminal Law*, second ed. (Oxford University Press, 2018), pp. 281-282.

The Polish report refers to interrogation of a Polish suspect at a Polish consulate in another Member State. As a preliminary point it should be remembered that, although consular premises enjoy inviolability,[146] the territory in which those premises are situated is nonetheless not extraterritorial, in other words is still part of the territory of the receiving State (which means that the laws of the receiving State are applicable).[147] Consequently, procedural acts carried out by the authorities of the sending State on its consular premises in the receiving State constitute cross border acts and the receiving State could view such procedural acts that were carried out without its knowledge and consent as infringements of its sovereignty.

Pursuant to Article 5(j) of the Vienna Convention on Consular Relations one of the consular functions is '(…) executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State'. The Polish report points out the practice of Polish authorities of bringing charges (a complex procedural act comprising interrogation of a suspected person as a suspect after presenting him with the decision on bringing charges and providing him with the letter of rights) to suspects who reside in another Member State and are nationals of Poland, by having them interrogated by the Polish consul at the Polish consulate in the Member State of residence. This is expressly provided for in Polish consular law.[148] Participation in the interrogation is voluntary.[149] If such interrogation is not accepted by the receiving Member State or the person concerned is not interrogated in this way for other reasons, the public prosecutor will issue an EIO.[150] The practice of interrogation on consular premises may be used as an alternative to issuing the EIO only in limited number of cases since the use of this mode of interrogation depends on many conditions (Polish citizenship of a suspected person; knowledge of his/her address abroad; his/her voluntary appearance and voluntary participation in the interrogation;

[146] Art. 31 of the Vienna Convention on consular relations, Vienna, 24 April 1963.
[147] See, *e.g.*, Aust, *Handbook of International Law*, 2nd ed. (Cambridge University Press, 2010), p. 44; Van Elst, "Rechtsmacht" in R. van Elst and E. van Sliedregt (Eds.), *Handboek Internationaal Stafrecht. Internationaal en Europees strafrecht vanuit Nederlands perspectief*, 3rd ed. (Wolters Kluwer, 2022), pp. 89-188, at 170; Zieck, "Diplomatiek en consulair recht" in Horbach, Lefeber and Ribbelink (Eds.), *Handboek Internationaal Recht*, (TMC Asser Press, 2007), pp. 276-308, at 288 (diplomatic representation) and 306 (footnote 149; consular premises).
[148] Art. 586(1) of the CCP provides that the prosecutor or the court may ask the Polish diplomatic mission or consular office to interview a person who has Polish citizenship as a defendant, witness, or expert: *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Poland*, Council document 13516/1/24 REV 1, 2 October 2024, p. 23.
[149] Polish report, para 2.2.1(b)(aa)('Application in practice').
[150] *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Poland*, Council document 13516/1/24 REV 1, 2 October 2024, p. 24.

lack of objection of the receiving Member State to execute such procedural activities by the consul).

From the point of view of legal certainty, this practice seems unobjectionable. Obviously, this practice has a basis in Polish law and Polish procedural law will apply to the interrogation. Therefore, the rights and duties of the suspect, who is a national of Poland, are accessible and foreseeable. Moreover, no coercive measures are allowed, participation in the interrogation being voluntary.

However, from the point of view of sovereignty the practice meets with criticism. The Polish report points out that at least three Member States object to this practice and do not consent to it (the Czech Republic, Denmark and Sweden).[151] Finland, Malta, Germany (the latter Member State in cases where the individual is a national of both Poland and Germany) and non-EU Member State Norway do not accept this practice as well.[152] In itself, these (Member) States are within their rights to object to the practice. After all, Article 5(j) of the Vienna Convention on Consular Relations stipulates that, in the absence of international agreements, a 'commission to take evidence' must be 'compatible with the laws and regulations of the receiving State'.

Of course, there is an instrument available that would allow the Polish authorities to interrogate or have a suspect interrogated who resides in another Member State with the knowledge and consent of that Member State, and that instrument is the EIO. That is why this Polish practice is discussed here under the heading of 'informal arrangements'. Consequently, the Polish practice may be problematic from the point of view of completeness since consular interrogation of a suspect may to some extent replace the available instrument of mutual recognition.[153] Nevertheless, one can wonder whether this observation, in itself, disqualifies the Polish practice and whether it is advisable to invoke sovereignty based objections in these circumstances. The Polish practice has developed as a less intrusive alternative to issuing an

[151] Polish report, para 2.2.1(b)(aa)('Application in practice'). In a Dutch EAW-case, it turned out that the requested person, a Polish national, was interrogated by a Polish authority, was instructed about her rights and duties as a suspect and struck a sentencing-deal with the Polish prosecutor, all at the Polish embassy in The Hague: NL:RBAMS:2021:3661. Although this is not mentioned in the judgment in the case, the Dutch public prosecutor was of the opinion that, in doing so, the Polish authorities 'went further than they were allowed to do'. That same public prosecutor objected, on the grounds of infringement of Dutch sovereignty, to a hearing by videoconference of a Dutch national in the Netherlands, which was organised by the Estonian authorities without the intervention of the Dutch authorities: NL:RBAMS:2022:64.
[152] *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Poland*, Council document 13516/1/24 REV 1, 2 October 2024, p. 23.
[153] Of course, with reference to Polish citizens, an EIO may be used as a second step, if the person concerned has not been interrogated at the consulate.

EAW.[154] From the point of view of proportionality, therefore, this practice is to be preferred. From the point of view of effectiveness, it is difficult to compare both measures having regard to the limited scope of the available data. On the one hand, the Polish report shows that executing an EIO issued for the purpose of interrogation of a suspect faces some difficulties, because foreign authorities often ignore the formalities required by Polish law in bringing a charge.[155] On the other hand, the rate of execution of such EIOs is relatively high[156] when compared to the average level of effectiveness of consular practice[157]. Lastly, from the point of view of efficiency it is undeniable that the Polish practice saves the receiving Member State the effort and costs involved in executing an EAW or an EIO (on efficiency see also paragraph 7.7). Indeed, the preference for consular legal assistance primarily stems from the desire to reduce costs.[158]

In Case C-583/23 (*Delda*), an EIO was issued for the purposes of, *inter alia*, serving an indictment on the accused person concerned and hearing the accused person so that she may make any relevant observations on the matters set out in the indictment served on her. In his opinion in this case AG Collins states that an EIO may *only* be issued for measures that concern evidence gathering. Therefore, the act of serving the indictment on a suspect is not capable of being the subject of an EIO.[159] Although the AG admits that 'it is permissible for a procedural document to be served in the context of a [EIO] if its service is part of the procedural implementation of an investigative measure aimed at gathering evidence to which that order relates and is essential for the purpose of carrying out that investigative measure',[160] he denies that this exception applies to the service of an indictment. According to the AG it does not appear that the hearing is conditional on the service of an indictment.[161] Article 5 of the EU Convention on Mutual Assistance in Criminal Matters, not Directive 2014/41/EU, applies to

[154] Polish report, para 2.2.1(b)(aa)('Application in practice').
[155] Polish report, para 2.2.1(b)(aa)('Application in practice').
[156] One interviewed practitioner mentioned the effectiveness reaching the level of 60%. See, Polish report, para 2.2.2(b)(i)(aa).
[157] Which does not exceed 38 %. Polish report 2.2.1(b)(aa)('Application in practice').
[158] *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Poland*, Council document 13516/1/24 REV 1, 2 October 2024, p. 24.
[159] C-582/23, *Delda*, EU:C:2024:863, para 34.
[160] The AG also referred to the *Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order*, June 2019, p. 20, which points to Art. 9(2) of Directive 2014/41/EU ('The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State').
[161] C-582/23, *Delda*, EU:C:2024:863, paras. 35-37.

such acts that do not concern evidence gathering.[162] Furthermore, according to the AG a hearing of the person concerned so that he may make any relevant observations on the matters set out in the indictment can *only* be the subject of an EIO if its purpose is in fact to gather evidence.[163] This interpretation could also apply to the complex procedural act of bringing charges (which comprises interrogation of a suspected person as a suspect after having presented him with the decision on bringing charges and after having provided him with the letter of rights)[164] and could therefore preclude the Polish practice of issuing an EIO for bringing charges and interrogating the suspect.

The Court of Justice, however, does not completely follow the opinion of the AG. It confirms that an EIO can only be issued for an investigative measure, *i.e.* 'to ensure that the executing Member State sends certain evidence to the issuing Member State, that evidence being identified in Article 13(4) and Article 15(1)(b) as objects, documents or data', that, consequently, serving the indictment on a suspect cannot be the subject of an EIO but falls within the scope of Article 5 of the EU Convention on Mutual Assistance in Criminal Matters, and that the purpose of a hearing of a suspect must be to gather evidence.[165] Like the AG, it accepts that there is an exception. Under Article 9(2) of Directive 2014/41/EU, the executing judicial authority is, in principle, required to comply with the *formalities and procedures expressly indicated* by the issuing authority. Unlike the AG, however, it does not rule out that this exception applies to serving the indictment. If the purpose of the hearing is to gather evidence and the EIO states *that, under the national law of the issuing Member State, the hearing of the suspect could take place only after the indictment was served*, such service could be requested by means of an EIO.[166]

Therefore, the question is whether presenting the suspect with the decision on bringing charges and providing him with the letter of rights are 'formalities and procedures' within the meaning of Article 9(2) of Directive 2014/41/EU. In other words, whether presenting the indictment and the letter of rights is necessary for the hearing to take place. If so, those formalities procedures may be requested by an EIO, if not, the only remaining option is to apply Article 5 of the EU Convention on Mutual Assistance in Criminal Matters. The Polish report concludes that,

[162] C-582/23, *Delda*, EU:C:2024:863, para 37 (with regard to service of an indictment).
[163] C-582/23, *Delda*, EU:C:2024:863, paras 39-40 (with regard to a hearing so that the person concerned can react to the indictment).
[164] Polish report, para 2.1.1.2(b)(ii) and 2.2.1(b)(aa).
[165] Case C-583/23, *Delda*, EU:C:2025:6, paras. 32, 37 and 42.
[166] Case C-583/23, *Delda*, EU:C:2025:6, para 44.

since the interrogation of a suspected person as a suspect also has the aim of gathering of evidence and since according to Polish law such an interrogation could take place only after providing a suspected person with the decision on bringing charges and the letter of rights, an EIO may be issued for bringing charges against a suspect.[167]

It is fortunate that the practice of issuing an EIO for bringing charges and interrogating the suspect is allowed. This practice was developed as a less intrusive alternative to issuing a prosecution-EAW. If this practice were to be prohibited, it could lead to an increase of prosecution-EAWs.[168] Whereas issuing an EIO can be a less intrusive alternative to issuing a prosecution-EAW (see *infra*, paragraph 7.5.4.2), the Court of Justice's ruling would not have contributed to the proportionate use of those instruments if it had completely followed the opinion of the AG.

Article 5 of the EU convention could only be used for *part of* the procedural act of bringing charges (providing a suspected person with a document containing a description of the charges together with the letter or rights) but not for the other activity of bringing charges (interrogation). Using Article 5 of the EU convention is, therefore, both less effective and less efficient. It is less effective, because the rule of Article 5 is that procedural documents are served on persons who are in the territory of another Member State by sending them directly by post.[169] Under that rule in principle there is no guarantee and no evidence that the charges were actually received by the suspect.[170] It is less efficient, because it requires using two instruments (the EIO for interrogating the suspect and the EU convention for serving the procedural documents).

A solution to the objections by other Member State against interrogations at consular premises could be that Poland tries to enter into bilateral agreements with the Member States involved that would allow Poland to continue the practice subject to, *e.g.*, a duty to notify the receiving Member State, either *a priori* or *a posteriori* (cf. Article 5(j) of the Vienna Convention on Consular Relations: 'in accordance with international agreements in force'). Of course, at the

[167] Polish report, para 2.2.1(b)(aa)('Application in practice').
[168] Polish report ('**Memorandum**', para I. 1).
[169] Procedural documents may only be sent via the authorities of the requested Member State if one of the exhaustively listed circumstances of Art. 5(2) applies. One of those circumstances is that 'the relevant procedural law of the requesting Member State requires proof of service of the document on the addressee, other than proof that can be obtained by post'. Perhaps Poland could invoke this circumstance.
[170] The German report is also critical about this aspect of Art. 5 and proposes providing a legal framework that ensures that the person concerned has actually obtained knowledge of the summons, as this would enhance cooperation: German report, para 6.

same time one must recognise that entering into several bilateral treaties with other Member States does not exactly contribute to the transparency of the legal framework.

Supervision measures without an ESO

According to the German report, German practitioners view the ESO procedure as too lengthy and too complex a procedure.[171] The report notes with apparent approval 'the informal practice that foreign police authorities assist German courts in supervising the suspect (*e.g.* by informing German courts that the suspect has complied with the instruction to report to the police of another Member State)'.[172] This statement illustrates perfectly that informal arrangements occur where the existing legal framework is seen to be defective (*supra*, paragraph 7.4.1).

This practice is not problematic from the point of view of sovereignty, since the authorities of the Member State of the suspect's residence agreed to cooperate with the German authorities.

From the point of view of legal certainty, however, the practice raises questions. Unless an ESO is issued and recognised, supervision measures imposed in one Member State have no legal effect in another Member State. Supervision measures are measures that restrict the liberty of the person concerned. Monitoring by Member States' authorities whether the person concerned complies with supervision measures equally results in restriction of the liberty of the person concerned and, therefore, interferes with his right to respect for his private life (Article 7 of the Charter of fundamental rights of the European Union, hereafter: Charter) and, if he is a citizen of the EU, with his right to move freely within the territory of the Member States (Article 45(1) of the Charter). Monitoring supervision measures by the authorities of the executing Member State therefore requires a clear, accessible and foreseeable basis in national law of that Member State. The judgment of a court in another Member State does not, in itself, provide such a legal basis. Of course, one could argue that, if the person concerned voluntarily complies with the supervision measures and voluntarily submits to monitoring, the absence of a legal basis is not a problem. But one can question whether cooperation by the person concerned is really voluntary, knowing that the court will probably revoke the supervision measures and replace them with a measure involving deprivation of liberty in case of non-compliance.

[171] German report, para 2.2.(a)(ii). See the Spanish report for similar views of Spanish practitioners: Spanish report, para 2.3(b).
[172] German report, para 6.

From the perspective of effectiveness and coherence, the German practice presents a problem under the completeness dimension, and it raises an issue from the perspective of legal certainty. On the other hand, from the perspective of effectiveness and proportionality that practice is not problematic. If the issue of legal certainty were to be addressed, the German practice would be unobjectionable. The solution to the problem could be found either within the ESO-system, *i.e.* by amending that system, or outside of that system, *i.e.* by providing an explicit legal basis for the German practice in the other Member State.

7.4.3 Informal practices at the enforcement stage

The German and Polish reports refer to informal practices concerning the enforcement of probation decisions within the meaning of FD 2008/947/JHA.

According to the German report, German courts are reluctant to transfer the enforcement of probations measures and want to retain the power to decide whether to adapt probation measures. That is the reason for the informal practice of requesting authorities of other Member States (*e.g.* their probation services) for assistance (*e.g.* by keeping in contact with the convicted person).[173]

The Polish report mentions that Polish practitioners have little experience in using FD 2008/947/JHA. As transpires from statistics referred there, this measure is usually used in no more than a dozen of cases per year. As reported by practitioners, there were a few instances in which Polish authorities did try to transfer the enforcement of a penalty of imprisonment with conditional suspension but were met with a refusal to recognise and enforce that penalty. They regard the diversity of regulations in individual Member States regarding penalties and measures as one of the causes. However, according to these practitioners there is little practical need to use FD 2008/947/JHA: 'often there is a possibility of enforcing a judgment even if the sentenced person decides to leave Poland (*e.g.* in the case of a prison sentence with conditional suspension of its execution, the obligation of the convict to report and keep in contact with the probation officer may be executed remotely)'.[174] The Polish report underlines that remote

[173] German report, para 6. The Spanish report also refers to the degree of mutual trust required for reliance on foreign authorities: Spanish report, para 2.3(b) (with regard to the ESO).
[174] Polish report, para 3.2(ee)('FD2008/947/JHA', 'Application in practice').

contact by a probation officer with a sentenced person is used in cases of a *temporary* stay of the sentenced person in another Member State. It is argued that such situations are not covered by FD 2008/947/JHA which, as a rule, is applicable to sentenced persons who have their 'lawful and ordinary' residence in another Member State (Article 5(1) FD 2008/947/JHA) and have social and family ties with this other Member State (recital (8) of the preamble of FD 2008/947/JHA).

The German practice differs from the Polish practice in that is based on assistance by authorities of the Member State of residence, whereas the Polish practice does not require any involvement of that Member State at all.

Because of the absence of any actions on the part of the authorities of the Member State where the sentenced person resides, the Polish practice in this regard does not meet with objections from the perspective of legal certainty and the sentenced person's rights. The German practice, on the other hand, is open to the same criticisms as those levelled against Germany's supervision-practice (*supra*, para 7.4.2).[175]

The intervention by authorities of the Member State of residence shields the German practice from the accusation of infringement of that Member State's sovereignty. By contrast, the Polish practice invites some remarks from the perspective of the Member State of residence's sovereignty. The passage from the Polish report cited above indicates that

remotely keeping in contact with the probation officer is seen as (part of the) enforcement of obligations imposed on a sentenced or other person concerned (in case of conditional discontinuation of the proceedings) during the probation period ('often there is a possibility of enforcing a judgment (…)'). Enforcing a judgment on the territory of another Member State without that Member State's knowledge and consent and in the absence of a permissive rule of international law is a classic example of an infringement of sovereignty of that Member State. The fact that long distance communication technology makes it possible to monitor compliance with a probation decision even if the sentenced person resides in another Member State and without any intervention on the part of the authorities of that Member State and, therefore,

[175] Unless the only condition imposed by the probation decision is the condition that a legal obligation not to commit a new criminal offence during a probation period be complied with (see Case C-2/19, *A.P. (Probation measures)*, EU:C:2020:237). In that case, the executing Member State does not have to do any monitoring (even if the ESO were applied): Klip, *European Criminal Law. An integrative approach*, 4th ed. (Intersentia, 2021), p. 552. In the absence of any (monitoring) activity by the authorities of the Member State of residence, there is no interference with the fundamental rights of the sentenced person.

without their knowledge or consent, does not mean that Member States are allowed to do so.[176] The fact that the EU adopted rules concerning the recognition and enforcement of probation decisions issued by the authorities of one Member State on the territory of another Member State would already seem to be sufficient proof to the contrary.[177]

However, the scope of these rules is limited. FD 2008/947/JHA does not apply to supervision by a probation officer of a sentenced person whose stay in another Member State is only *temporary* and who *does not have social and family ties* with this Member State. Although FD 2008/947/JHA provides for the possibility to forward the judgment and, where applicable, the probation decision to a competent authority of a Member State other than the Member State in which the sentenced person is lawfully and ordinarily residing, there are two conditions: that the latter authority has consented to such forwarding and that the sentenced person requests this (Article 5 (2) FD 2008/947/JHA). As transpires from the notifications made by Member States under Article 5(4) FD 2008/947/JHA, some Member States consent to the application of Article 5(2) FD 2008/947/JHA but impose further conditions (*e.g.* Germany applies this provision only to German nationals; Austria only 'if because of specific circumstances ties exist between the sentenced person and Austria of such intensity that it can be assumed that monitoring in Austria

[176] Compare Art. 31(1) of Directive 2014/41/EU: if no technical assistance is needed for carrying out an interception of telecommunication from the Member State where a subject of interception of telecommunication is located, the intercepting Member State must notify that interception to that Member State. The objectives of that provision are not only to guarantee the sovereignty of the notified Member State but also to protect the rights of persons affected by interception: Case C-670/22, *M.N. (EncroChat)*, EU:C:2024:372, para 124. Interestingly, prior to the judgment in the *M.N. (EncroChat)* the Dutch Supreme Court ruled that Art. 31 did *not* intend to protect the interests of person whose communications are (to be) intercepted, but was only related to the sovereignty of the Member States involved: NL:HR:2023:913, para 6.23.4.

[177] One could compare remote supervision via telecommunication of a sentenced person who is present in another Member State to hearing a suspect or accused person who is present in another Member via videoconference. In both cases, Member State A exercises his jurisdiction on the territory of Member State B (supervision, evidence gathering). One could argue that, since in both cases the authorities of Member State A remain in the territory of that Member State, the supervision or evidence gathering could be considered to have been executed in the territory of that Member State. Consequently, the consent of Member State B would not be needed, and the sovereignty of that Member State would not be infringed. However, given the technological possibilities currently available such a reasoning would render the applicable instruments obsolete. See in this vein the critical comments of experts on Estonia's practice of videoconferencing for the purpose of hearing a witness, expert or suspect who is present in another Member State without the help of that other Member State and without notification: *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Estonia*, Council document 8475/1/24 REV 1, 21 May 2024, p. 48. Indeed, the final report recommends that Member States reconsider the practice of conducting hearings of witnesses, suspects or accused persons located in another Member State by videoconference without issuing an EIO: *Final report on the tenth round of mutual evaluations on the implementation of the European Investigation Order (EIO)*, Council document 15834/1/24 REV 1, 10 December 2024, p. 92.

will help facilitate the social rehabilitation and reintegration of the sentenced person').[178] Nevertheless, even though FD 2008/947/JHA does not apply to remote supervision of sentenced persons who are only temporarily present in another Member State and who do not have social and family ties with this Member State and even though there are indications that remote supervision is a common practice of other Member States as well, the fact remains that such remote supervision takes place without the knowledge or consent of the authorities of that Member State and therefore can be considered to be a violation of the sovereignty of that Member State, albeit a rather minor violation. That being said, the authors of this chapter are aware of the difference of views on this topic.

Turning to the reasons for the informal practices, perhaps the German courts' reluctance to use FD 2008/947/JHA to transfer the enforcement of German probation decisions and their desire to remain in control is evidence of a lack of trust in other Member States' ability to supervise (and, if need be, adapt) probation decisions in an effective and proper manner or, more generally, a dissatisfaction with the legal framework for supervisions of probation decisions itself.[179] If that is the case, then the solution should focus on changing the 'mindset' of German courts or on amending the legal framework.

The Polish report shows that the limited scope of FD 2008/947/JHA is problematic. It does not cite specific grounds for refusal invoked in refusing to supervise Polish probation decisions but refers to divergent regulations in the various Member States with regard to, *inter alia*, probation decisions. Member States should, at least, recognise the various types of probation decisions mentioned in Article 4(1) of FD 2008/947/JHA, which, incidentally, include the example mentioned in the Polish report of keeping in contact with a probation officer.[180] If they do not, or if in this regard they apply grounds for refusal that do not leave any margin of discretion to their executing authorities (see *supra*, paragraph 7.3.2), then this should be addressed. In any case, the country reports show that FD 2008/947/JHA is underused. This observation and the

[178] See the notifications available at the website of the European Judicial Network, https://www.ejn-crimjust.europa.eu/ejn/libcategories/EN/4/-1/0 (last accessed on 30 March 2025).
[179] Cf. *Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty*, Council document 6741/23, 1 March 2023, p. 66: 'Effective monitoring requires great trust between the competent authorities of different Member States and therefore knowledge of other judicial systems. However, there seems to be room for improvement in this respect as some national judicial authorities prefer to keep the execution of the penalty/measure, even at a distance, under the responsibility of their national services, rather than accept cross-border supervision, as they believe this ensures more efficient monitoring of the measures'.
[180] Art. 4(1)(j): 'an obligation to cooperate with a probation officer (…)'.

observation about the scope of FD 2002/584/JHA calls for activities aimed at raising awareness of the possibilities that FD 2008/947/JHA offers and for a reconsideration of its scope.

7.4.4 Conclusions

Interrogation on consular premises

The Polish practice of interrogating Polish suspects at Polish consulates in order to bring charges to them is problematic from the perspective of completeness (to some extent it precedes the use of the available instrument, the EIO). After all, pursuant to the judgment in Case C-583/23 (*Delda*) it is possible to issue an EIO for the complex procedural act of bringing charges. Nevertheless, the practice is to be lauded from the perspective of proportionality as it was developed as a less intrusive alternative to an EAW. And the practice is efficient, as it is less costly than an EIO.

The sovereignty based objections by some Member States could perhaps be overcome by entering into bilateral arrangements with those Member States, but this comes at a cost for transparency of the legal framework.

Supervision measures without an ESO

The German practice of monitoring supervision measures by informal arrangements with (probation) authorities of other Member States is a strong indicator that the ESO system is in need of reform (see also paragraph 7.2.2). From the point of view of sovereignty that practice is not objectionable, but it does raise an issue from the point of view of legal certainty in the absence of a clear, accessible and foreseeable legal basis for monitoring supervision measures on the territory of another Member State. Moreover, the practice disregards the dimension of completeness (the available instrument, the ESO, is not used).

Informal supervision of probations decisions

Both the German and Polish informal practices can be criticised either on the grounds of sovereignty and/or on the grounds of legal certainty but at least they identify (possible) underlying issues that need to be addressed: a (possible) lack of trust in other Member States concerning supervision and adaptation of probation decisions and (possible) incorrect transposition and application of FD 2008/947/JHA by other Member States.[181]

7.5 Institutional arrangements

7.5.1 Introduction

In the footsteps of the Annotated Index the country reports address the designation, by the Member States, of the national authorities that are competent to launch a request for judicial cooperation under the various instruments.

Paragraph 7.5.2 discusses the various EU and CoE provisions on competent authorities and central authorities. Against that background, the remainder of paragraph 7.5 deals with the topic of competent authorities from two different angles.

The first angle is that of the competence to refer questions about the interpretation (or validity) of the instruments to the Court of Justice. If a Member State has chosen to designate as competent issuing authority an authority that is not a court or a judge, there is a risk of a 'referral-gap', *i.e.* the situation that the issuing authority nor any other authority of the issuing Member State is able to enlist the help of the Court of Justice when questions concerning the interpretation of an instrument are raised on which the decision whether or not to issue (or to maintain) a request for cooperation depends. Such a situation presents a danger for the 'effective, efficient and coherent application' of the instruments, because the Court of Justice cannot be asked to clarify the correct understanding (or examine the validity) of the instrument (paragraph 7.5.3).

[181] At the same time, these practices could indicate a lack of awareness or knowledge (see *infra*, paragraph 7.7).

The second angle is the choice between different instruments. If there is such a choice and a Member State has chosen to make different authorities competent with regard to those instruments, this could have a negative impact on the effective and coherent application of those instruments (paragraph 7.5.4).

7.5.2 Competent authority and central authority

7.5.2.1 Competent authority

The concept of 'effective, efficient and coherent application' of EU (mutual recognition) instruments presupposes their application by national authorities that fall within the categories of issuing authorities prescribed by those instruments, *i.e.* by competent authorities. The instruments show a broad spectrum of solutions to the issue of the designation of the competent authorities.

At the one end of this spectrum is FD 2002/584/JHA, that requires that the Member States designate 'judicial' authorities as competent authorities to issue an EAW (Article 6(1)). At the other end is FD 2008/909/JHA, that does not specify which kinds of authorities the Member States may designate as issuing authorities at all (Article 2(1)). Under that instrument it is left entirely to the Member States to decide which authorities to designate.[182]

Like FD 2008/909/JHA, FD 2008/947/JHA simply refers to the 'authority or authorities' that are competent to act under that framework decision without specifying which kinds of authorities the Member States may designate as competent authorities. Admittedly, Article 3(2) of FD 2008/947/JHA stipulates that Member States may designate 'non-judicial' authorities as authorities for taking decisions under that instrument, provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures, but the legislative history of this provision shows that it was adopted with the authorities of the *executing* Member State in mind.[183]

Like FD 2002/584/JHA, FD 2009/829/JHA refers to designating a 'judicial' authority or authorities as competent authorities to act under that framework decision (Article 6(1).

[182] *Handbook on the transfer of sentenced persons and custodial sentences in the European Union*, O.J. 2019, C 403/11.
[183] Dutch report, para 13.1(c) ('*Equivalence (Article 3(2) of FD 2008/947/JHA*').

However, as an exception to Article 6(1) and without prejudice to Article 6(3), Member States may designate non-judicial authorities as the competent authorities for taking decisions under this framework decision, provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures (Article 6(2)). Nevertheless, a decision to issue an arrest warrant (*e.g.* if the person concerned does not comply with the supervision measures) must be taken by a 'judicial authority' of the issuing Member State (Article 6(3)). These provisions are the outcome of a compromise between those Member States that felt that other authorities than judicial authorities should be able to act under the framework decision and Member States that were of the opinion that only judicial authorities should be able to act.[184]

The definition of 'issuing authority' in Article 2(c)(i) of Directive 2014/41/EU clarifies that, at least, judges, courts, investigating judges and public prosecutors competent in the case concerned are to be regarded as 'issuing authority'. Moreover, these authorities are 'judicial authorities' whose validation of the EIO is required whenever the EIO is issued by another authority than a court, judge, investigating judge or public prosecutor (Article 2(c)(ii)).

Where instruments use the qualifier 'judicial', it seems reasonable to assume that it is intended to restrict the leeway of Member States in deciding which authorities may be designated as issuing authorities. Nevertheless, looking at the authorities originally designated by the Member States under FD 2002/584/JHA as 'issuing judicial authority', one is confronted with a range of various kinds or authorities – courts, judges, Public Prosecution Services, ministries, the police –, some of whom definitely raise questions as to their 'judicial' nature. Some Member States may have been of the opinion that the concept of 'issuing judicial authority' is not an autonomous concept of EU law or that, during the negotiations on FD 2002/584/JHA, their particular notion of what constitutes a 'judicial' authority did not meet with any objections from other Member States. Only many years after the transposition of FD 2002/584/JHA did the Court of Justice rule that the concept of 'issuing judicial authority' within the meaning of FD 2002/584/JHA is an autonomous concept of EU law, which means that its definition cannot be left to the Member States.[185] Organs of the executive, such as ministries[186] and the police[187] are not included in that concept. Public Prosecution Services, insofar as they participate in the

[184] Dutch report, para 1.3.1(d)('*Equivalence (Article 6(2) of FD 2009/829/JHA*')
[185] Case C-477/16 PPU, *Kovalkovas*, EU:C:2016:861, paras 32-33.
[186] Case C-477/16 PPU, *Kovalkovas*, EU:C:2016:861, para 35.
[187] Case C-453/16 PPU, *Poltorak*, EU:C:2016:858, para 35.

administration of justice in a Member State, are included, but only if statutory rules and an institutional framework guarantee their independence vis-à-vis the executive, *i.e.* exclude any risk of being subjected to an instruction in a specific case from the executive.[188]

Where the other mutual recognition instruments use the concept 'judicial' authority it is safe to assume that this concept is an autonomous concept of EU law as well. This does not mean, however, that the interpretation of that concept under FD 2002/584/JHA also applies (fully) to the other instruments. When interpreting the concept, the Court of Justice takes into account the specificities of the instrument at issue. Thus, public prosecutors are included in the concepts 'issuing authority' and 'judicial authority' within the meaning of Directive 2014/41/EU, even if they run the risk of being subject to individual instructions by the executive.[189] The requirement of statutory rules and an institutional framework that guarantee their independence vis-à-vis the executive is not applicable, because, unlike issuing an EAW, issuing an EIO, in principle,[190] does not interfere with the right to liberty of the person concerned.[191]

The EU Convention on Mutual Assistance in Criminal Matters is only included in the project on account of its Article 5 ('Sending and service of procedural documents'). The rule of that provision is that 'each Member State' sends procedural documents intended for persons who are in the territory of another Member State to them directly by post (Article 5(1)), *i.e.* without requesting mutual legal assistance from the other Member State. There is no requirement as to the competent authority of the sending Member State. Only in the cases enumerated in Article 5(2) may procedural documents be sent non-directly, *i.e.* via the competent authorities of the requested State. In those cases, a request to this end must be made by a judicial authority with territorial competence for initiating it (Article 6(1)). The EU Convention supplements and facilitates, *inter alia*, the CoE European Convention on Mutual Assistance in Criminal Matters (Article 1(1)(a)). The CoE Convention is only applicable to 'judicial proceedings' (Article (1)). Because there was no consensus among the experts who drafted the CoE convention about the scope of the concept of 'judicial authorities', in particular about the status of public prosecutors, the Contracting Parties were allowed to define, by way of a declaration, what authorities they

[188] Joined Cases C-508/18 and C-82/19 PPU, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456, para 74.
[189] Case C-584/19, *Staatsanwaltschaft Wien (Falsified transfer orders)*, EU:C:2020:1002, para 74.
[190] Except in the specific case of the temporary transfer of persons already held in custody for the purpose of carrying out an investigative measure, but this measure is the subject of specific guarantees in Art. 22 and 23 of Directive 2014/41/EU: Case C-584/19, *Staatsanwaltschaft Wien (Falsified transfer orders)*, EU:C:2020:1002, para 73.
[191] Case C-584/19, *Staatsanwaltschaft Wien (Falsified transfer orders)*, EU:C:2020:1002, para 73.

deem judicial authorities (Article 24).[192] The EU Convention does not declare Article 24 inapplicable between EU Member States nor does it define the concept of 'judicial authority'. Given that the EU Convention 'builds' on the European Convention on Mutual Assistance in Criminal Matters, one can argue either that the concept of 'judicial authority' within the meaning of the EU Convention is not an autonomous concept of EU law and does not have a uniform meaning or, at least, that the meaning of that concept must take into account Article 24 of the CoE Convention. The four Member States involved in this project have each designated courts and public prosecutors as judicial authorities, and Germany has designated the federal Ministry of Justice and the Ministries of Justice of the *Länder* as well.[193]

The CoE European Convention on the Transfer of Proceedings in Criminal Matters does not contain any requirement as to the authority that is competent to request a transfer of proceedings. Pursuant to Article 13(1) of that convention, requests will be sent either by the Ministry of Justice of the requesting State or by the 'competent authority' of that State, unless the Contracting Parties have adopted other rules on transmission (Article 13(3)). In practice, Article 21 of the CoE European Convention on Mutual Assistance in Criminal Matters is also commonly used,[194] whether or not instead of the European Convention on the Transfer of Proceedings in Criminal Matters.

7.5.2.2 Central authority

Three of the EU mutual recognition instruments provide for designating a 'central authority': FD 2002/584/JHA, FD 2009/829/JHA and Directive 2014/41/EU. Under all of these instruments, the task of a 'central authority' is limited: it may 'assist' the competent issuing or executing authorities of its Member State (Article 7(1) of FD 2002/584/JHA; Article 7(1) of FD 2009/829/JHA; Article 7(3) of Directive 2014/41/EU). The preamble of FD 2002/584/JHA stresses that the task of a central authority should be limited to lending assistance of a 'practical

[192] *Explanatory Report to the European Convention on Mutual Assistance in Criminal Matters*, p. 3, available at the website of the Council of Europe: https://rm.coe.int/16800c92bd (last accessed on 30 March 2025).
[193] See the declarations on the website of the Council of Europe: https://www.coe.int/en/web/conventions/unknown-cets-number-/-abridged-title?module=declarations-by-treaty&numSte=030&codeNature=0 (last accessed on 30 March 2025).
[194] *Report on the Transfer of Proceedings in the European Union* (Eurojust, 2023), p. 4.

and administrative' nature.[195] It follows that Member States may not substitute a central authority for the competent judicial authorities.[196]

Only if this is necessary as a result of the organisation of their internal judicial system, may Member States make their central authorities responsible for the administrative transmission and reception of EAWs, ESOs or EIOs (Article 7(2) of FD 2002/584/JHA; Article 7(2) of FD 2009/829/JHA; Article 7(3) of Directive 2014/41/EU).

As the task of a central authority is tied to the issuing (and executing) authorities under a certain instrument, that task would seem to be limited to lending assistance *under that instrument*. This could be problematic in situations where there is a choice between different instruments, but the issuing Member State has made different authorities competent for the instruments. Nothing would seem to preclude that Member States designate one and the same central authority for all three instruments, but in the absence of coordination between different central authorities, there is a danger that decisions are taken by the competent issuing authorities that, at least, fall foul of the comprehensiveness dimension of the concept of 'coherent application' ('all available options should be taken into consideration') and of the proportionality dimension ('choose among the available instruments the instrument that is sufficiently effective and the least intrusive') and that are less effective. Coordinating between different authorities, in order to ensure that they take a decision that results in 'effective and coherent application' of the instruments does, in itself, not go beyond the limits of lending 'assistance'. To provide some sort of coordination, Member States could choose to designate the same central authority under each of the three mutual recognition instruments.

7.5.3 Competence to refer questions to the Court of Justice and effective remedy

7.5.3.1 Competence to refer questions to the Court of Justice

Effective, efficient and coherent application of EU judicial cooperation instruments presupposes a correct interpretation of the legal framework of those instruments by the competent national authorities. All Member States' authorities - whether courts, public prosecutors or organs of the executive such as ministries - are bound by the obligation to

[195] Recital (9).
[196] Case C-477/16 PPU, *Kovalkovas*, EU:C:2016:861, para 39.

interpret and apply national law in conformity with EU law to the greatest extent possible.[197] In case of doubt about the correct interpretation of an EU instrument on judicial cooperation the help of the Court of Justice may, and in some instances must,[198] be enlisted by requesting a preliminary ruling on the interpretation (or on the validity) of that instrument (Article 267 of the Treaty on the Functioning of the European Union (TFEU)).

It should be stressed here that it is possible to refer questions to the Court of Justice not only when there is doubt about the correct interpretation of EU law. Even if the interpretation is perfectly 'clair', this circumstance cannot prevent a national court from referring a question to the Court of Justice and does not render the question inadmissible,[199] unless it bears no relation to the actual facts of the main case or it is hypothetical. Consequently, when deciding whether or not to refer questions to the Court of Justice there is room for strategic considerations, especially in the field of judicial cooperation. Typical for that area of EU law is that authorities from different Member States have to cooperate with one another. If their views on the correct interpretation of the EU instrument they are carrying out do not coincide – which, in practice, happens quite often –,[200] they have no means of imposing their own view on the other authority. Except, of course, when the Court of Justice endorses that view. In that case, the authorities of all the Member States are bound by the Court of Justice's interpretation. Strategic considerations could also play a role where an authority experiences problems that are created by its national legislation that, in its view, is not in conformity with EU law but the national legislator refuses to amend that law. The national legislator perhaps could disregard the views of a national authority, but it cannot disregard the interpretation given by the Court of Justice.[201]

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[197] Case C-573/17, *Popławski II*, EU:C:2019:530, para 94.

[198] See Case C-561/19, *Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi*, EU:C:2021:799.

[199] See, *e.g.*, Case C-28/23, *NFŠ*, EU:C:2024:893, para 32. In those cases, 'where the answer to the question referred for a preliminary ruling admits of no reasonable doubt' (Art. 99 of the Rules of Procedure), the Court of Justice may rule by reasoned order. See, *e.g.*, the following cases concerning FD 2002/584/JHA: Case C-463/15 PPU, *A.*, EU:C:2015:634 and Case C-504/24 PPU, *Anacco*, EU:C:2024:779.

[200] Repeated disagreements between the Dutch executing judicial authority (the District Court of Amsterdam) and issuing judicial authorities about the scope of Art. 4a of FD 2002/584/JHA led the former authority to refer questions to the Court of Justice in at least three cases: Case C-108/16 PPU, *Dworzecki*, EU:C:2016:343; Case C-270/17 PPU, *Tupikas*, EU:C:2017:628 and Case C-271/17, *Zdziaszek*, EU:C:2017:629. Similarly, discussions about the notion of 'issuing judicial authority' led that same authority to refer preliminary questions in Case C-452/16 PPU, *Poltorak*, EU:C:2016:858, Case C-453/16 PPU, *Özçelik*, EU:C:2016:860 and Case C-477/16 PPU, *Kovalkovas*, EU:C:2016:861.

[201] See on these and other strategic considerations Krommendijk, *National Courts and Preliminary References to the Court of Justice* (Elgar, 2021), pp. 89-109. See also Klip, "Why do criminal courts refer questions for preliminary rulings to the Court of Justice?" in M.J.J.P. Luchtman (Ed. in chief), *Of swords and shields: due process and crime control in times of globalization. Liber amicorum prof. dr. J.A.E. Vervaele* (Eleven, 2023), pp. 319-338.

Differing views of the issuing and executing authorities on the interpretation of an instrument and faulty national legislation in the issuing and/or executing Member State can have a negative impact on the effective and coherent application of an instrument. Consequently, from the perspective of effective and coherent application, the ability to refer questions to the Court of Justice on an instrument is indispensable. Also, referring questions can contribute to an efficient application of instruments, because the answer to these questions prevents discussions and confusion between different Member States.

Not every national authority involved in judicial cooperation, however, is competent to refer questions to the Court of Justice: only a 'court or tribunal' of a Member State is (Article 267 TFEU). The concept of 'court or tribunal' is an autonomous concept of EU law. In determining whether the referring body is a 'court or tribunal' the Court of Justice 'takes account of a number of factors, such as, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent'.[202] Even if the referring body is a court and these factors are present, it may only refer a question 'when it is performing judicial functions'.[203]

Although the majority of preliminary rulings on EU judicial cooperation instruments concern questions arising at the *executing* side, in a number of cases the Court of Justice admitted requests by an *issuing* judicial authority aimed at establishing whether it may issue, maintain or withdraw an EAW.[204] Equally, requests by an issuing judicial authority that had decided to issue an EIO but was unsure how to fill in the EIO-form and that, following the answers given by the Court of Justice in a previous judgment, wanted to know whether it may issue an EIO at all, were answered by the Court of Justice.[205] Insofar as admissibility arguments were raised in the EAW cases, they did not concern the *status* of the referring courts as a 'court or tribunal' within the meaning of Article 267 TFEU. The AGs and the Court of Justice considered the admissibility of the questions in the context of their *relevance*. It was argued that, because the questions concerned the interpretation *of grounds for refusal* and, therefore, concerned the decision to *execute* an EAW, they were of a hypothetical nature and not relevant for the decision

[202] See, *e.g.*, Case C-235/24, *Niesker*, EU:C:2024:624, para 35.
[203] See, *e.g.*, Case C-235/24, *Niesker*, EU:C:2024:624, para 37.
[204] Case C-268/17, *AY (Arrest warrant – Witness)*, EU:C:2018:602; Case C-649/19, *Spetsializirana prokuratura (Letter of rights)*, EU:C:2021:175; Case C-203/20, *AB and Others (Revocation of an amnesty)*, EU:C:2021:1016; Case C-158/21, *Puig Gordi and Others*, EU:C:2023:57; Case C-318/24 PPU, *Breian*, EU:C:2024:658; Case C-481/23, *Sangas*, EU:C:2025:259.
[205] Case C-324/17, *Gavanozov*, EU:C:2019:892; Case C-852/19, *Gavanozov II*, EU:C:2021:902.

whether to *issue* or *maintain* the EAW. The Court of Justice rejected such arguments by holding that, since the duty to comply with fundamental rights falls primarily within the responsibility of the issuing Member State and since the issuance of an EAW may result in the arrest of the requested person, 'an issuing judicial authority must, in order to ensure observance of those rights, be able to refer questions to the Court for a preliminary ruling in order to determine whether to maintain or withdraw a European arrest warrant or whether it may issue such a warrant'.[206] In the EIO-cases, the only admissibility argument raised – and rejected – was that the EIO was issued before the expiry of the time limit to transpose Directive 2014/41/EU and before the issuing Member State had transposed that directive.[207]

One could read the Court of Justice's reasoning in the EAW-cases with regard to issuing authorities as cited above as meaning that *every* issuing judicial authority must be able to refer questions to the Court of Justice, irrespective of whether it is a 'court or tribunal' within the meaning of Article 267 TFEU. That would mean that, in EAW cases, the Court of Justice's case-law concerning the notion of 'court or tribunal' would not apply. If the Court of Justice were to adopt such a far-reaching rule, presumably it would have mentioned explicitly that it was deviating from that case-law. In any case, all the referring authorities in the EAW and EIO-cases mentioned above were *courts*. Apparently, the Court of Justice (implicitly) assumed that the referring courts, in referring questions to the Court of Justice, were acting in the performance of their judicial duties.

This raises the question whether issuing judicial authorities that are not courts are able to refer questions to the Court of Justice. The concept of 'issuing judicial authority' within the meaning of Article 6(1) of FD 2002/584/JHA is not limited to courts or judges but also comprises other authorities that participate in the administration of criminal justice in the executing Member State, such as a Public Prosecution Service,[208] provided that there are statutory rules and an institutional framework in place in the issuing Member State that can guarantee that the issuing public prosecutor is not exposed to any risk of being subject, *inter alia*, to an instruction in a specific case from the executive when deciding on issuing an EAW (see *supra*, paragraph

[206] See, *e.g.*, Case C-318/24 PPU, *Breian*, EU:C:2024:658, para 32.
[207] Case C-324/17, *Gavanozov*, EU:C:2019:892, paras 17-22. The Court of Justice rejected this argument on three grounds: at the time of the request for a preliminary ruling, the lime limit to transpose the directive had expired; during the proceedings before the Court of Justice Bulgaria had transposed the directive; and the referring court had not actually issued the EIO due to difficulties in completing the EIO-form.
[208] Joined Cases C-508/18 and C-82/19 PPU, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, EU:C:2019:456, para 51.

7.5.2.1). In other words: provided that, in EAW-matters, its independence vis-à-vis the executive is guaranteed. However, independence vis-à-vis *hierarchical* superiors *within* the Public Prosecution Service who are themselves public prosecutors is not required, given the hierarchical relationship underpinning the functioning of the Public Prosecution Service.[209]

Unlike FD 2002/584/JHA, Directive 2014/41/EU explicitly designates public prosecutors, together with judges, courts and investigating judges, as 'issuing authority' and, furthermore, designates them, together with judges, courts and investigating judges, as 'judicial authority' (Article 2(c)(i)-(ii) of Directive 2014/41/EU). Under Directive 2014/41/EU, a public prosecutor is an 'issuing authority' and a 'judicial authority', '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 European investigation order'.[210] In other words, there is no requirement of independence vis-à-vis the executive at all (see *supra*, paragraph 7.5.2.1).

The general opinion is that public prosecutors cannot refer questions to the Court of Justice.[211] This opinion is based mainly on the argument that they are a party to the criminal proceedings in which they are acting as public prosecutor. However, it is still an open question whether they can refer questions *when they are acting as issuing judicial authority*. As discussed above, one of the factors for determining whether a referring body is a 'court or tribunal' within the meaning of Article 267 TFEU is independence. According to the Court of Justice's case-law, the requirement of independence has two dimensions: not only an external dimension (independence vis-à-vis other organs of the State, such as the executive) but also an internal dimension (independence vis-à-vis the internal hierarchy).[212] That case-law also applies when determining whether a referring body is a 'court or tribunal', although the Court of Justice

[209] Joined Cases C-566/19 PPU and C-626/19 PPU, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours)*, EU:C:2019:1077, para 56.
[210] Case C-584/19, *Staatsanwaltschaft Wien (Falsified transfer orders)*, EU:C:2020:1002, para 75.
[211] Klip, *European Criminal Law. An integrative approach*, 4th ed. (Intersentia, 2021), pp. 207-208.
[212] Joined Cases C-554/21, C-622/21 and C-727/21, *Hann-Invest*, EU:C:2024:594, para 54, with reference to ECtHR, *Parlov-Tkalcic v Croatia*, ECLI:CE:ECHR:2009:1222JUD002481006, § 86 ('(…) However, judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court (…)').

introduced a distinction in this regard.[213] If the referring body is a national court, its independence is presumed (which presumption is capable of being rebutted);[214] if the referring body is not a national court the full rigour of the requirement of independence applies.[215] Given the hierarchical structure of Public Prosecution Services (*supra*), it is doubtful whether they comply with the internal dimension of the requirement of independence and consequently, whether they can constitute a 'court or tribunal' within the meaning of Article 267 TFEU, even if this circumstance does not stand in the way of their designation as 'issuing judicial authority' within the meaning of Article 6(1) of FD 2002/584/JHA.[216] The position of Public Prosecution Services under Directive 2014/41/EU is even less clear, since independence (either external or internal) is not even a condition for being designated as 'issuing judicial authority' within the meaning of that directive.[217]

The safest conclusion seems to be that an 'issuing judicial authority' within the meaning of FD 2002/584/JHA or Directive 2014/41/EU does not necessarily qualify as a 'court or tribunal' within the meaning of Article 267 TFEU. Although there is no doubt that issuing courts or judges acting in the performance of their judicial duties are competent to refer questions, not every issuing judicial authority will be competent to refer questions to the Court of Justice about those instruments. In its present state, EU law does not require Member States to only designate judicial authorities that qualify as a 'court or tribunal'.

The same conclusions would seem to apply, *a fortiori*, to issuing authorities that are competent under EU instruments that do not require the designation of *judicial* authorities or that allow the designation of non-judicial authorities under certain conditions. FD 2008/909/JHA, *e.g.*, belongs to the former category. Under that framework decision Member States have designated

[213] Case C-132/20, *Getin Noble Bank*, EU:C:2022:235, para 69.
[214] See for such a rebuttal Case C-326/23, *Prezes Urzędu Ochrony Konkurencji i Konsumentów*, EU:C:2024:940.
[215] Lenaerts and Gutiérrez-Fons, "*Epilogue. High Hopes: Autonomy and the Identity of the EU*", 8 European Papers (2023), 1495-1511, at 1502-1504.
[216] See in this vein already Glerum, *Tussen vrijheid en gebondenheid. Het Europees aanhoudingsbevel 2.0*, (Wolters Kluwer, 2022), pp. 64-67. On the divergence as to the requirement of independence between the case-law on Art. 19(1) TEU and Art. 267 TFEU on the one hand and the requirement of independence in the context of Art. 6(1) of FD 2002/584/JHA see also Martufi, "Effective Judicial Protection and the European Arrest Warrant: Navigating between Procedural Autonomy and Mutual Trust", 59 Common Market Law Review (2022), 1371-1406, at 1392-1398.
[217] In light of these conclusions, it is not necessary to discuss whether an issuing Public Prosecution Service would meet the functional criterion of whether it is performing a judicial activity. See on that topic Glerum, *Tussen vrijheid en gebondenheid. Het Europees aanhoudingsbevel 2.0*, (Wolters Kluwer, 2022), pp. 67-68. A similar issue was dealt with by the Court of Justice in Case C-66/20. When the *Procura della Republica Trento* (Italy) acts as an authority for the *execution* of an EIO, it is not called upon to rule on a dispute and cannot, therefore, be regarded as exercising a judicial function. Consequently, that authority is not a 'court or tribunal' within the meaning of Art. 267 TFEU: Case C-66/20, *Finanzamt für Steuerstrafsachen und Steuerfahndung Münster*, EU:C:2021:670, para 38.

a wide range of diverse authorities: Public Prosecution Services, courts, governmental agencies and Ministries of Justice, some of which definitely do not qualify as a 'court or tribunal'.[218] Since EU law does not require Member States to designate issuing authorities that qualify as a 'court or tribunal' under FD 2002/584/JHA and Directive 2014/41/EU, it does not require *a fortiori* the designation of issuing authorities that qualify as a 'court or tribunal' under EU instruments that do not mandate the designation of judicial authorities or allow the designation of non-judicial authorities.

All of this leaves the question whether a central authority could refer questions to the Court of Justice when its competent issuing authority is not a 'court or tribunal'. Since a central authority may only lend (practical and administrative) assistance to the issuing authority (see paragraph 7.5.2.2), even leaving aside the question whether a central authority would qualify as a 'court or tribunal', it is probably not able to refer questions to the Court of Justice anyway. Given its limited task, questions with a view of issuing, maintaining or withdrawing an EAW, an ESO or an EIO would probably be deemed hypothetical.

7.5.3.2 Effective remedy before a court

Pursuant to Article 47 of the Charter everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a 'tribunal', *i.e.* a court.[219] From the perspective of effective and coherent application of judicial cooperation instruments the availability of an effective remedy before a court is important for two reasons. Such a remedy allows the person concerned to challenge before a court the proportionality of a decision to employ a certain judicial cooperation instrument. Proportionality is one of the dimensions of the concept of 'coherent application' (see paragraph 7.1.). The second reason is that an effective remedy provides access to a court that can refer questions to the Court of Justice about the interpretation of the legal framework of the instrument chosen by the issuing authority to employ in the given case. As discussed before, effective, efficient and coherent application of judicial cooperation instruments presupposes a correct understanding of those instruments (paragraph 7.5.3.1).

[218] Polish report, para 1.3.1(b); Council document 9899/21, 17 June 2021.
[219] For recent studies see Wiliński, *Effective Legal Remedies in Criminal Justice System. European Perspective*, Ius, Lex and Res Publica. Studies in Law, Philosophy and Political Cultures Vol. 31 (Peter Lang, 2023).

EAW

Dual level of protection

The system of the EAW is based on a dual level of protection for the procedural and fundamental rights of the requested person in the issuing Member State: protection at the level of the adoption of the national judicial decision and protection at the level of the adoption of the EAW.[220]

Prosecution-EAW issued by public prosecutor

A prosecution-EAW may result in the arrest of the requested person and, therefore, infringe his right to liberty (Article 6 of the Charter).[221] Therefore, if a *prosecution*-EAW is issued by a *public prosecutor*, the requested person must be afforded effective judicial protection before being surrendered to the issuing Member State, at least at one of those two levels of protection.[222] This requirement derives from the right to an effective remedy before a court, guaranteed by Article 47 of the Charter.[223] Effective judicial protection requires a 'judicial review' of either the EAW or the national arrest warrant before the EAW is executed.[224] In this specific context the word 'judicial' has the limited meaning of 'by a court' and the word 'review' not only can denote assessing a decision (taken by another authority) but also taking the decision.[225] In principle, there is no requirement to provide for a legal remedy before a court in the issuing Member State, if either the EAW or the national arrest warrant was issued by a court, was reviewed by a court in the issuing Member State or, before surrender, can be reviewed by

[220] Case C-241/15, *Bob-Dogi*, EU:C:20116:385, para 56. See for recent overviews of case-law with further references Jimeno-Bulnes, *La orden europea de detención y entrega* (Tirant lo Blanch, 2024), pp. 137-154; Neveu, *Mandat d'arrêt européen*, Répertoire Pratique du Droit Belge. Législation, Doctrine, Jurisprudence: Droit Pénal (Larcier Intersentia, 2024), pp. 13-17.
[221] Case C-268/17, *AY (Arrest warrant – Witness)*, EU:C:2018:602, para 28.
[222] Case C-648/20 PPU, *Svishtov Regional Prosecutor's Office*, EU:C:2021:187, para 47.
[223] Case C-648/20 PPU, *Svishtov Regional Prosecutor's Office*, EU:C:2021:187, para 58.
[224] Case C-648/20 PPU, *Svishtov Regional Prosecutor's Office*, EU:C:2021:187, para 48.
[225] Cf. Case C-105/21, *Spetsializirana prokuratura (Information on the national arrest decision)*, EU:C:2022:511, para 53: '(…) in the case in the main proceedings, the national arrest warrant was issued by a court, and that the same will be true of the European arrest warrant if, as the case may be, the referring court issues such a warrant. It follows that, at each of the two levels of judicial protection of the requested person, decisions meeting, in principle, the requirements inherent in effective judicial protection will have been adopted'.

a court in that Member State. As to the scope of the judicial review, the Court of Justice's case-law seems to require that at either of the two levels, a court has reviewed or can review, before surrender, the conditions for issuing a prosecution-EAW and, in particular, whether it is proportionate.[226] There is no uniform template for affording effective judicial protection, which therefore can vary from Member State to Member State.[227]

Where the law of the issuing Member State provides for a 'judicial review' at one of the two levels when a public prosecutor issues a prosecution-EAW, there is little doubt that the court will meet the requirements for being considered as a 'court or tribunal' within the meaning of Article 267 TFEU. Furthermore, if that court is empowered to review the conditions for issuing a prosecution-EAW and, in particular, whether it is proportionate, that court would be able to refer questions to the Court of Justice about issuing, maintaining or withdrawing that EAW (see *supra*, paragraph 7.5.3.1). Both from the perspective of proportionality and the perspective of the availability of a court that is able to refer questions to the Court of Justice, this case-law does not meet with objections.[228]

Execution-EAW issued by a public prosecutor

With respect to an execution-EAW, the Court of Justice has ruled that a separate judicial remedy against a public prosecutor's decision to issue an execution-EAW is not required. The EAW is based on a judgment of conviction and the proceedings leading to that judgment must already meet the requirements of Article 47 of the Charter. Moreover, an execution-EAW is already

[226] Case C-648/20 PPU, *Svishtov Regional Prosecutor's Office*, EU:C:2021:187, paras 50-53, with reference to Joined Cases C-566/19 PPU and C-626/19 PPU, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours)*, EU:C:2019:1077 and Case C-625/19 PPU, *Openbaar Ministerie (Swedish Public Prosecutor's Office)*, EU:C:2019:1078.
[227] Joined Cases C-566/19 PPU and C-626/19 PPU, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours)*, EU:C:2019:1077, para 64.
[228] Depending on the legal order of the issuing Member State, the judicial review can take place at the level of the national arrest warrant, *e.g.* when a decision to issue such a warrant is taken by a court. The fact that the requested person for obvious reasons is not present at that time and, therefore, cannot participate in the proceedings before the court (Klip, *European Criminal Law. An integrative approach*, 4th ed. (Intersentia, 2021), p. 494), evidently does not prevent the Court of Justice from considering that such a review amounts to effective judicial protection. The Court of Justice did not follow AG Campos Sánchez-Bordona, who argued (in vain) that only judicial protection that 'takes the form of proceedings in which that person is able to intervene and participate, in exercise of his right of defence' constitute effective judicial protection and that, consequently, such proceedings 'cannot be replaced by a judicial review such as that carried out when the [national arrest warrant] is adopted': Joined Cases C-566/19 PPU and C-626/19 PPU, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours)*, EU:C:2019:1012, paras 84-85.

proportionate on account of the sentence imposed, which must consist of a custodial sentence or a detention order of at least four months (cf. Article 2(1) of FD 2002/584/JHA).[229]

From the perspective of proportionality, the case-law on execution-EAWs is open to criticism.[230] Just because the sentence imposed has a duration of at least four months does not necessarily mean that issuing an execution-EAW would be proportionate. First of all, since the requirement of a sentence of at least four months refers to the duration of the sentence as it was imposed,[231] it may well be that less than four months remain to be served. Moreover, since an execution-EAW is not necessarily issued at the moment that the sentence becomes final and enforceable, relevant circumstances may have changed. Lastly, making the four months requirement determinative for the issue of proportionality excludes taking into account the possibility of forwarding the judgment to another Member State under FD 2008/909/JHA.

From the perspective of access to a court that is able to refer questions to the Court of Justice the case-law on execution-EAWs can also be criticised. It is doubtful whether a court, in the course of the criminal proceedings leading to a sentence, is able to refer questions to the Court of Justice about the possibility and necessity of issuing an EAW should the court impose a custodial sentence. Such questions would probably be deemed hypothetical.

Other instruments: infringement of Charter-rights

Directive 2014/41/EU does not require Member States to provide additional legal remedies to those that already exist in a similar domestic case. Article 14(1) of Directive 2014/41/EU only directs them to 'ensure that legal remedies equivalent to *those available* in a similar domestic case, are applicable to the investigative measures indicated in the EIO'.[232] Nevertheless, as the *Gavanozov II* judgment shows, insofar as the investigative measures for which the EIO is issued infringe fundamental rights of the person concerned, such as the right to respect for his or her private and family life, home and communications (Article 7 of the Charter),[233] or is likely to

[229] Case C-627/19 PPU, *Openbaar Ministerie (Public Prosecutor, Brussels)*, EU:C:2019:1079, paras 34-38. In this vein also: opinion of AG Rantos, Case C-168/21, *Procureur général près la cour d'appel d'Angers*, EU:C:2022:246, para 62.
[230] See the opinion of AG M. Campos Sanchez-Bordona, Case C-627/19 PPU, *Openbaar Ministerie (Openbaar Ministerie, Brussels)*, EU:C:2019:1014, paras 28-33.
[231] *Handbook on how to issue and execute a European Arrest Warrant*, O.J. 2023, C 1270, p. 14,
[232] Case C-852/19, *Gavanozov II*, EU:C:2021:902, para 26. Klip surmises that the explicit provision on legal remedies relates to the fact the scope *ratione personae* of the EIO is much wider than the EAW (suspect, accused person, witness, third party): *European Criminal Law. An integrative approach*, 4th ed. (Intersentia, 2021), p. 561.
[233] Case C-852/19, *Gavanozov II*, EU:C:2021:902, paras 31-34.

adversely affect the person concerned, he must have a legal remedy against the EIO before a court in the issuing Member State.[234] In contrast to the EAW (see *supra*), in such cases a legal remedy before a court is required, even if the EIO itself was issued (or validated) by a court or a judge.[235]

This line of case-law readily applies to the other EU instruments that are in scope. Such a legal remedy before a court would be satisfactory both from the perspective of proportionality and the perspective of access to a court that is able to refer questions to the Court of Justice.

Other instruments: violation of other EU-rights

The scope of the right to an effective remedy before a court, guaranteed by Article 47, is not limited to violations of the Charter: that right covers violations of the 'rights and freedoms guaranteed by the law of the Union'. In this respect it is important to note that according to the Court of Justice FD 2008/909/JHA is intended to create rights for sentenced persons.[236] This may come as somewhat of a surprise, as this framework decision confers broad discretion on the competent issuing authorities whether or not to forward a judgment and the certificate to the executing Member State (see Article 4(1) ('may be forwarded').[237] Evidently, the Court of Justice refers to, *e.g.*, the sentenced person's procedural rights, such as the requirement of his consent, his opportunity to state his opinion in writing and the requirement to notify him of the decision to forward the judgment (Article 6(1)(3)(4) of FD 2008/909/JHA). If the person concerned invokes a violation of one of those rights, he must have an effective remedy before a court. Again, this line of reasoning is applicable to other EU instruments. Most of those instruments provide for rights for the person concerned, mostly of a procedural nature.[238]

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[234] Case C-852/19, *Gavanozov II*, EU:C:2021:902, paras 41 and 47.
[235] In the same vein Verrest, "Het Handvest en het strafrecht: een analyse van de jurisprudentie van het Hof", in *Waarde, werking en potentie van het EU-Grondrechtenhandvest in de Nederlandse rechtsorde. Preadviezen* (Handelingen Nederlandse Juristen-Vereniging 153e jaargang) (Wolters Kluwer, 2024), pp. 135-221, at 182.
[236] Case C-125/21, *Commission v Ireland (Transposition of Framework Decision 2008/909)*, EU:C:2021:213, para 22.
[237] Cf. Case C-129/14 PPU, *Spasic*, EU:C:2014:586, para 69, where the Court of Justice in effect says that there is no obligation to employ this framework decision.
[238] Compare, *e.g.*, Case C-303/05, *Advocaten voor de Wereld*, EU:C:2007:261, para 30 (referring to the 'minimum guarantees which must be granted to a requested or arrested person' laid down in Art. 11 to 14 of FD 2002/584/JHA. See also Case C-763/22, *Procureur de la République () and d'une demande d'extradition*, EU:C:2025:199, para 46: the requested person has the right not to be subject to a decision on precedence taken in disregard of the discretion conferred by Art. 16(3) of FD 2002/584/JHA; therefore the executing Member State must provide him with an opportunity for an effective judicial remedy.

7.5.3.3 Arrangements in the Member States

Against the background of the analysis with regard to the possibility to refer questions (paragraph 7.5.3.1) and the requirement of an effective remedy (paragraph 7.5.3.2), the questions arise which issuing authorities the Member States involved in the project have designated that are not courts or judges and whether there is an effective remedy against a decision on issuing a mutual recognition request by those authorities.

Germany

The Public Prosecution Service is the competent authority for forwarding a judgment concerning a custodial sentence or a measure involving deprivation of liberty to another Member State. It needs the authorisation by a court (the Higher Regional Court) for forwarding a judgment to another Member State, if the sentenced person is in Germany and does not consent to forwarding the judgment. There is no legal remedy if the sentenced person is not in Germany. The German report criticises this state of affairs from the point of view of the German constitution.[239]

In the context of the authorisation needed for forwarding if the sentenced person is in Germany and does not consent to forwarding, the competent court will probably qualify as a 'court or tribunal' within the meaning of Article 267 TFEU. The German legislator was of the opinion that a sentenced person who consents to forwarding the judgment to another Member State has no need for a legal remedy against the decision to forward the judgment.[240] From the perspective of proportionality that is entirely legitimate. However, it does mean that there is a 'referral-gap', *i.e.* that there is no authority that can refer questions to the Court of Justice about forwarding a judgment. After all, whereas the sentenced person who consents to forwarding the judgment has no need for a legal remedy and, *a fortiori*, no need for access to the Court of Justice in order to interpret FD 2008/909/JHA, the issuing authority, the Public Prosecution Service, might be confronted with questions concerning the interpretation of that framework decision, which it cannot put before the Court of Justice. With regard to cases in which the sentenced person is

[239] German report, para 1.3.1, referring to the constitutional right to judicial review (Art. 19(4) of the Basic Law (*Grundgesetz*)).
[240] German report, para 1.3.1.

not in Germany there is a 'referral-gap' as well. In those cases, the gap is also problematic from the point of view of proportionality.

Poland

Apart from the court, the public prosecutor is competent to issue an ESO. There is no appeal against a decision to issue an ESO, but there is an interlocutory appeal possible against the decision by the public prosecutor to impose a supervision measure.[241]

An EIO may be issued by, *inter alios*, a public prosecutor.[242] As a rule, a decision of a public prosecutor to issue an EIO is not subject to interlocutory appeal, unless the specific provision relating to the activity indicated in an EIO provides otherwise. In other words, if a specific provision relating to a given investigative measure specified in the EIO provides for the possibility of filing an interlocutory appeal to the court, such appeal may also be filed against the decision on the EIO, which constitutes a decision on carrying out the measure (for instance, an EIO concerning a search of premises is subject to an appeal to the court since a decision on a search of premises is subject to such an appeal).[243]

The court that has to decide on an interlocutory appeal against the decision to impose supervision measures will probably qualify as a 'court or tribunal' within the meaning of Article 267 TFEU. If necessary to decide the appeal, it could probably refer questions to the Court of Justice to establish whether the competent authority may issue, maintain or withdraw an ESO with regard to the supervision measures at issue.

If there is no legal remedy before a court against a decision by a public prosecutor whether or not to issue an EIO with reference to a certain investigative activity, then there is a 'referral-gap' in that respect. Such a 'referral-gap' would also be problematic from the perspective of proportionality.

Spain

[241] Polish report, 1.3.1(d).
[242] Polish report, 1.3.1(e).
[243] Polish report, 1.3.1(d).

With regard to the competent issuing authorities the Spanish report only deals with the EAW, the EIO and the ESO. For all these three instruments, the issuing authorities are judges and courts. An EIO may also be issued by a public prosecutor provided that the EIO does not limit fundamental rights.[244] The report mentions that decisions on the transmission of orders or decisions to other Member States are subject to appeal, with the exceptions of decisions issued by Public Prosecutor's Office.[245] In this respect, there might be a 'referral-gap', which also raises issues from the point of view of proportionality.

The Netherlands

Compared to the other three Member States, the Netherlands designated more authorities as issuing authorities that are not courts or judges and whose competence to refer questions to the Court of Justice is doubtful if not outright excluded. The preference seems to be for designating the Public Prosecution Service.

The Minister of Justice and Security is competent to forward a judgment concerning a custodial sentence or a measure involving deprivation of liberty to another Member State.[246] Of course, the minister himself cannot qualify as 'court or tribunal' (see *supra*, paragraph 7.5.3.1). If the sentenced person is in the Netherlands, he can appeal against the minister's decision to forward the judgment to another Member State. The Court of Appeal will carry out a full review.[247] In the context of that review that court can probably refer questions to the Court of Justice. There is no specific legal remedy against a decision not to forward a judgment and a decision to forward a judgment if the sentenced person is not in the Netherlands, but, in theory at least, the sentenced person could challenge such decisions in civil summary proceedings.[248]

The Public Prosecution Service is competent to forward judgments concerning alternative sanctions or probations decision to another Member State,[249] to forward decisions on supervision measures to another Member State[250] and, together with courts and examining

[244] Spanish report, para 1.3.1(a)(b)(c).
[245] Spanish report, para 1.3.1(d).
[246] Dutch report, para 1.3.1(b)('*Effective remedy before a court*').
[247] Dutch report, para 1.3.1(b)('*Effective remedy before a court*').
[248] Dutch report, para 1.3.1(b)('*Effective remedy before a court*').
[249] Dutch report, para 1.3.1(c).
[250] Dutch report, para 1.3.1(d).

magistrates, to issue EIOs for investigative measures, if, under Dutch law, they are competent to order similar investigative measures.[251]

There is no specific legal remedy against a decision by the Public Prosecution Service on forwarding a judgement concerning alternative sanctions or probation decisions,[252] on forwarding a decision on supervision measures[253] or on issuing an EIO.[254] From the perspective of the dimension of proportionality (*supra*, paragraph 7.5.3.2), the absence of a specific remedy against a decision to forward a judgement concerning alternative sanctions or probation decisions or to forward a decision on supervision measures does not seem problematic. The decision to forward such a judgment or to forward such a decision is taken in circumstances in which it is reasonable to assume that the person concerned will have no need for a remedy against that decision.[255] In the absence of a specific legal remedy, the person concerned can challenge a decision not to forward a judgement concerning alternative sanctions or probation decisions measures in civil summary proceedings.[256] The same applies, *mutatis mutandis*, to a decision on whether or not to issue an EIO taken by a public prosecutor.[257] As to the decision not to forward a decision on supervision measures, the Code of Criminal Procedure provides for legal remedies before a court.[258]

The scope of review in civil proceedings is limited to an assessment of the reasonableness of the decision, unless fundamental rights are at stake. In cases in which fundamental rights are at stake the civil court must follow the case-law in extradition cases and conduct a full review.[259]

From the perspective of the dimension of proportionality, the scope of review in civil proceedings might be a problem: a restrictive review of the issuing authority's decision might not do justice to that dimension.

The perspective of access to a court that is able to refer questions to the Court of Justice in civil proceedings is not disregarded. Such proceedings afford access to a court that, in all probability,

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[251] Dutch report, para 1.3.1(e).
[252] Dutch report, para 1.3.1(c)('*Effective remedy before a court*').
[253] Dutch report, para 1.3.1(d)('*Effective remedy before a court*').
[254] Dutch report, para 1.3.1(e)('*Effective remedy before a court*').
[255] Dutch report, para 1.3.1(c)('Effective remedy before a court') and para 1.3.1(d)('*Effective remedy before a court*'). According to the Dutch issuing authority sometimes Dutch nationals who reside just on the other side of the border with Germany contact the issuing authority and complain that they do not want to perform the alternative sanction in Germany but rather in the Netherlands. In such cases, the issuing authority will withdraw the certificate.
[256] Dutch report, paras 1.3.1(c)('*Effective remedy before a court*') and 1.3.1(d)('*Effective remedy before a court*').
[257] Dutch report, para 1.3.1(e)('*Effective remedy before a court*').
[258] Dutch report, para 1.3.1(e)('*Effective remedy before a court*').
[259] Dutch report, para 1.3.1(b)('*Effective remedy before a court*').

is competent to refer questions to the Court of Justice. In civil summary proceedings against a decision taken by a minister or a public prosecutor (or any other organ of the State for that matter) the State is the defendant. Both the person concerned, as plaintiff, and the issuing authority, via the State, can suggest that the court refers questions. The court may, of course, refer questions *ex officio*. The possibility of civil summary proceedings means that there is no 'referral-gap'. There is, however, a 'referral-crack'. A 'referral-crack' is not as wide as a 'referral-gap' but still constitutes a *lacuna*: the issuing authorities, either the Minister of Justice and Security or the Public Prosecution Service, cannot refer questions to the Court of Justice *themselves* or their competence to refer questions is *doubtful*, and their access to a court that can refer questions to the Court of Justice is *dependent* on action by the person concerned (*i.e.* on whether he institutes civil summary proceedings).

It should be highlighted that a 'referral-gap' or 'referral-crack' is not just a theoretical problem. Practice in the Netherlands shows that there are cases in which the competence to refer questions to the Court of Justice would be very helpful indeed. The following two examples illustrate this (one concerning FD 2008/909/JHA, the other concerning FD 2008/947/JHA).

The conformity with EU law of the refusal by Polish authorities to recognise and enforce, on the basis of FD 2008/909/JHA, Dutch measures involving deprivation of liberty for psychiatric treatment,[260] could be tested by the Dutch issuing authority by way of a preliminary reference, if only that issuing authority were a 'court or tribunal'.[261]

The competent issuing authority for FD 2008/947/JHA expressed the wish for an appeal process against decisions to refuse the recognition and enforcement of Dutch alternative sanctions or probations decision.[262] That authority is regularly confronted with refusals to recognise Dutch penalties of community service, based on Article 11(1)(j) of FD 2008/947/JHA. The root of these refusals seems to be a misunderstanding about the correct interpretation of that provision,

[260] Dutch report, para 3.2(a)(ee)('Measures involving deprivation of liberty: entrustment orders', '*Application*'). See also paragraph 7.3.3.2 ('*FD 2008/947/JHA*').
[261] The report on the Netherlands in the context of the 9th round of mutual evaluations states that 'the availability of the CJEU judicial review of the interpretation of the FD 2008/909 in the light of domestic regulations is of the utmost importance'. With regard to the Netherlands as *executing* Member State it recommends 'that the Netherlands authorities amend the present procedure or practice of the Arnhem court to let this body ask for a preliminary ruling': *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, Council document 13190/1/22, 2 December 2022, p. 93.
[262] *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, Council document 13190/1/22, 2 December 2022, p. 72.

in particular whether the 'six months' duration' refers to the duration of the substitutive custodial detention (if the sentenced person does not carry out the imposed community service order) or to the period for carrying out the community service order. If the issuing authority were a 'court or tribunal' it would not have the need for an appeal process in the executing Member State but could put before the Court of Justice whether the executing Member State's understanding of Article 11(1)(j) is correct.

It should be recalled that questions such as those mentioned in these two examples are not hypothetical: the Court of Justice's answer will help the issuing authority to decide whether to forward the judgment again despite the previous refusal (see *supra*, paragraph 7.5.3.1).

7.5.4 Choice between instruments, different authorities competent

7.5.4.1 Introduction

The instruments do not require the Member States to designate the same competent authority for different instruments (nor to designate the same central authority for those instruments that provide for designating a central authority). Nevertheless, if a Member State transposes EU instruments on mutual recognition in such a way that the effective, efficient and coherent application of those instruments is compromised, that Member State does not comply with its duty of sincere cooperation with the EU (Article 4(3) of the Treaty on the European Union). Pursuant to that duty, Member States must 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'.

If there is a choice between different instruments and a Member State has designated different competent authorities with regard to those instruments, there is a risk that the dimension of comprehensiveness ('all available options should be taken into consideration') is disregarded, unless there is some mechanism in place that provides for coordination, consultation and/or advice between those authorities and which allows all the available options to be considered. In the absence of such a mechanism, the risk that the dimension of comprehensiveness is disregarded can also constitute a risk that the dimension of proportionality is overlooked, insofar as one of the available options is sufficiently effective as but less intrusive than the other option(s). Furthermore, there is a risk that the dimension of consistency is compromised ('no

instruments should be applied that are inconsistent with an instrument already applied') if the different authorities decide to initiate mutual recognition proceedings based on their respective instruments at the same time. The Dutch report shows that this risk is certainly not imaginary.[263]

Therefore, if a Member State chooses to designate different authorities with regard to different instruments (and not to designate the same central authority for different instruments), it should provide a legal and institutional framework - for coordination, consultation and advice - that enables the national authorities to apply the instruments in an effective, efficient and coherent manner. Moreover, because according to well established case-law the duty of sincere cooperation is binding on *all* authorities of a Member State,[264] it logically follows that this duty not only 'informs the dialogue between' the issuing and executing authorities of different Member States[265] but also requires the different national authorities of one and the same Member State to work together within that framework to achieve that goal.

Against this background, this paragraph will discuss two distinct choices between instruments, one pertaining to the investigation/prosecution stage (7.5.4.2*)*, the other to the enforcement stage (7.5.4.3).

7.5.4.2 Surrender or EIO?

According to the EU legislator there is a choice between issuing an EIO for the hearing of a suspected or accused person by videoconference and issuing a prosecution-EAW.[266] Pursuant to recital (26) of Directive 2014/41/EU, with a view to the proportionate use of the EAW, 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'. As the words 'in particular' denote, a videoconference is not the only option that Directive 2014/41/EU provides for hearing a suspect or accused person who is present in the executing Member State: it is also possible to have the suspect or accused person heard by the authorities of the executing

[263] Dutch report, para 3.2 ('***Routing of sentences and judicial cooperation***', '*Custodial sentences*'), referring to Member States that issue an execution-EAW and forward a judgment concerning the same person and the same sentence concurrently. Also, not withdrawing a previously issued execution-EAW after forwarding the judgment concerning the same person and sentence is an example of inconsistency.
[264] See, *e.g.*, Case C-701/22, *MFE*, EU:C:2024:891, para 52.
[265] See, *e.g.*, Case C-318/24 PPU, Breian, EU:C:2024:658, para 93.
[266] But not for Denmark and Ireland, as these Member States are not bound by Directive 2014/41/EU (see recitals (44) and (45) of the preamble).

Member State.[267] In conclusion: broadly speaking, the alternative that should be considered is issuing an EIO for hearing the suspect or accused person, whether or not by videoconference.

Recital (26) speaks of the 'issuing authority', which is the authority competent to issue an EIO, as defined by Article 2(c) of Directive 2014/41/EU. Recital (26) does not address judicial authorities that are competent to issue an EAW within the meaning of Article 6(1) of FD 2002/584/JHA. Nevertheless, in the context of the decision on issuing a prosecution-EAW issuing judicial authorities must examine 'whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant'.[268] Part of that examination should be whether there is a sufficiently effective but less intrusive alternative to issuing an EAW.[269] According to the final report on the 9th round of mutual evaluations '[m]ost Member States, when acting as issuing Member State, consider whether, instead of issuing an EAW, it is possible to use other instruments of judicial cooperation in criminal matters which are also effective but less coercive, especially if the surrender is requested for the purpose of hearing the suspect/accused person during the investigation and not yet for his or her prosecution or for the enforcement of a custodial sentence. In this case, a European Investigation Order (EIO) for the purposes of hearing the suspect/accused via videoconference or of a temporary transfer (…) plays a key role in avoiding the misuse of the EAW in cases where less invasive options are available to ensure that an accused person located abroad will participate in criminal proceedings in the issuing Member State and detention is not absolutely necessary'.[270] However, this sweeping statement does not relieve the authors of the duty to check whether the issuing judicial authorities of the Member States involved in this project, when deciding whether to issue a prosecution-EAW, do indeed examine less intrusive alternatives such as an EIO.

The country reports show that the competence to issue a prosecution-EAW is attributed to another authority than the competence to issue an EIO for the hearing of a suspect or accused person.

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[267] Compare Art. 10(2)(c) of Directive 2014/41/EU.
[268] Joined Cases C-508/18 and C-82/19 PPU, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456, para 71.
[269] Of course, the executing Member State may refuse an EIO for the purpose of a videoconference, *e.g.* if the suspect or accused person does not consent (Art. 24(2)(a) of Directive 2014/41/EU). Where the person concerned himself blocks the less intrusive alternative, issuing a prosecution-EAW should be regarded as proportionate.
[270] *Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty*, Council document 6741/23, 1 March 2023, p. 13.

In Spain, apart from judges and courts, the public prosecutor may also issue an EIO, but the latter authority may only do so if the EIO does not restrict fundamental rights.[271] The Judges of the Investigative are competent to issue a prosecution-EAW.[272] Pursuant to Spanish law, before issuing an EIO the issuing authority must assess whether issuing an EIO would be necessary and proportionate.[273] This does not necessarily ensure comprehensiveness and proportionality if the issuing authority is not the competent authority for issuing a prosecution-EAW. Since the Spanish report repeatedly refers to and criticises the abusive use of the EAW, instead of the EIO,[274] it seems that the division of competences between the public prosecutor and the Judge of the Investigative might have an impact on comprehensiveness and proportionality.

Germany and Poland

In Germany, the Public Prosecution Service having local jurisdiction is competent to issue an EIO.[275] The court competent to issue or maintain a national arrest warrant is competent to issue a prosecution-EAW,[276] upon motion by the Public Prosecution Service.[277]

In Poland, the court before which the case is pending or, during the preparatory proceedings, the public prosecutor is competent to issue an EIO.[278] The competent regional court is competent to issue a prosecution-EAW, but at the pre-trial stage of the proceedings it does so upon motion by the public prosecutor.[279]

The German and Polish reports mention that the Public Prosecution Service is involved both with the issuing of a prosecution-EAW (as the authority that motions the competent court to issue such an EAW) and with the issuing of an EIO for hearing the suspect or accused person (as issuing authority). This raises the supposition that the choice is made within the Public Prosecution Service, resulting either in a motion to issue an EAW or in the issuance of an EIO.

[271] Spanish report, para 1.3.1(b).
[272] Spanish report, para 1.3.1(a).
[273] Art. 189(1) of Act on mutual recognition.
[274] Spanish report, *passim*.
[275] German report, para 1.3.1.
[276] German report, para 1.3.1.
[277] Hackner and Schierholt, *Internationale Rechtshilfe in Strafsachen*, 4th ed. (C.H. Beck, 2023), pp. 122-123 (para 359).
[278] Polish report, para 1.3.1(e).
[279] Polish report, para 1.3.1(a).

The German report confirms this supposition.[280] According to that report, in Germany there is no need for coordination instruments, because all instruments are available to the authority in charge of conducting the proceedings. In the pre-trial stage that authority is the public prosecutor. The public prosecutor in charge of the investigation takes the decision whether to use cooperation instruments and, if so, which instrument. At the district court level, the Public Prosecution Office usually has a department for international cooperation for advising and supporting the investigating prosecutor. The courts whose involvement are necessary, *e.g.*, for issuing an EAW, do not have special departments. As a result, 'the application and practical implementation of the EAW mainly lies in the hand of public prosecution service'.[281]

The supposition that the Public Prosecution Service makes the choice between a prosecution-EAW and an EIO for the hearing of a suspect or accused person is confirmed by the Polish report as well. In Poland there are special units dedicated to international cooperation in criminal matters at all Regional Public Prosecutor' Offices that conduct not only international cooperation with other units of their own Public Prosecutor's Office but also with that of all subordinate district prosecutor's offices. Nevertheless, the scope for coordination by the Regional Public Prosecutor's Office is limited with reference to issuing prosecution-EAWs: it is the task of the public prosecutor conducting or supervising the investigations to decide whether or not to apply for an EAW or whether to opt for issuing an EIO. Any coordination takes place at the level of the competent public prosecutor's by consultations with the head of office.[282]

So, both in Germany and in Poland (in the latter Member State: at the pre-trial stage of the proceedings) the choice between motioning for a prosecution-EAW or issuing an EIO for hearing the suspect or accused person is made by the Public Prosecution Service and in both Member States mechanisms for advice and consultation are in place within the Public Prosecution Service. There are no indications that suggest that, in general, the Public Prosecution Service does not take such a decision in an appropriate manner. Nevertheless, when a choice is made to motion the competent court to issue a prosecution-EAW that court must examine the proportionality of issuing an EAW and, therefore, must examine whether there is a less intrusive but sufficiently effective alternative (*i.e.* issuing an EIO). Previous research has

[280] German report, para 1.3.1: 'So, the investigating authority may, in principle, make the choice to either motion to issue an EAW or an EIO.'
[281] German report, para 1.3.3.
[282] Polish report, para 1.3.3 ('coordination within the public prosecutor's offices', 'Application in practice').

shown that Polish courts, when deciding on a motion to issue an EAW, tend to scrutinise the proportionality of the choice to motion for an EAW.[283] The statement in the German report that 'the application and practical implementation of the EAW mainly lies in the hands of public prosecution service' could be an indication that German courts might not be as rigorous as Polish courts when deciding whether to issue an EAW. However, the 9th round of mutual evaluations report on Germany states that now 'that it has become mandatory for a judge in cases of outgoing EAWs to affix his signature (*sic*) to a European arrest warrant, the courts, too, have been performing corresponding reviews of proportionality'.[284] With 'corresponding reviews of proportionality' the reports refers to weighing the gravity of the offence against the restriction of liberty and its consequences. As to taking into account less intrusive alternatives to surrender, such as interrogating an accused person on the basis of an EIO, the report states that '(w)hen possible, the competent prosecutor-general's offices seek to use' those less intrusive alternatives, thus again confirming that the choice between a motion to issue an EAW or issuing an EIO is made within the Public Prosecution Service.[285] The German report confirms that the choice of the Public Prosecution Service (EAW or EIO) is subject to a proportionality check by the issuing court. It states that if the court has major proportionality concerns about issuing an EAW it will not even issue a national arrest warrant (which is a precondition for issuing an EAW) and that, where possible, the issuing court will have recourse to less intrusive alternatives that are equally suitable for achieving the intended purpose.[286]

The conclusion is that:

- the fact that Poland has chosen (at the pre-trial stage) to attribute the competence to issue a prosecution-EAW to another authority than the competence to issue an EIO for the hearing of a suspect or accused person, in the end, does not necessarily have a negative impact on the dimensions of comprehensiveness and proportionality, at least insofar as Polish courts scrutinise the choice between an EAW and an EIO;
- a similar conclusion may be drawn with regard to Germany.

[283] Wąsek-Wiaderek and Zbiciak, "The Practice of Poland on the European Arrest Warrant" in Barbosa *et al.*, *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23 (Eleven, 2022), pp. 256-262.
[284] *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on Germany*, 7960/1/20 REV 1, 1 March 2021, p. 38.
[285] *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on Germany*, 7960/1/20 REV 1, 1 March 2021, p. 38.
[286] German report, paras. 1.3.1, 2.1.2(b)(ii) and 2.2.2(b)(ii)(bb).

Even though Germany's and Poland's choices in principle do not raise objections from the perspective of comprehensiveness and proportionality, there might be an issue from the perspective of 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)'. A refusal to issue a prosecution-EAW by the competent court because issuing an EIO would be more proportionate, would not necessarily result in the issuing of an EIO by the competent public prosecutor. The court itself cannot issue an EIO.

The Netherlands

In the Netherlands, public prosecutors, examining magistrates in district courts and courts may issue EIO's for interrogating a suspect or an accused person, but only an examining magistrate (or a court) may issue an EIO for interrogating a suspect or accused person *by videoconference*.[287] According to some examining magistrates, they have never received requests by public prosecutors to issue EIO's for interrogating suspects or accused persons and they have never issued such EIOs, the assumption being that public prosecutors will issue such EIOs themselves.[288] Examining magistrates in district courts may issue prosecution-EAWs but they do so only upon motion by a public prosecutor.[289]

Comparable to the German and Polish situations, in the Netherlands the public prosecutor is involved both with the issuing of an EAW (as requesting authority) and with the issuing of an EIO (either as issuing judicial authority or as requesting authority (in the case of videoconferencing)). The choice between requesting the issuing of an EAW and the issuing of an EIO is taken by the public prosecutor. International Centres for Mutual Legal Assistance (IRC) at the local and national Public Prosecutor's Offices have an advisory and coordinating role.[290]

Of course, if the public prosecutor decides to request the issuing of an EAW, the examining magistrate, as issuing judicial authority, must examine whether the conditions for issuing the EAW are met and whether, in the light of the particular circumstances of the case, it is proportionate to issue the EAW. The assessment of proportionality is focussed on checking

[287] Dutch report, para 2.2 ('**Pre-trial stage: competent authorities in the Netherlands**', 'Judicial cooperation').
[288] Dutch report, para 2.2.2(b)(i)(aa)("Interplay of the instruments')
[289] Dutch report, para 1.3.1(a).
[290] Dutch report, para 1.3.3.

whether the offence is serious enough. As to possible alternatives to issuing a prosecution-EAW, previous research indicated that examining magistrates rely on the implicit choice made by the public prosecutor. In the present project the findings are more diffuse: 'the choice between EAW and EIO is made by the public prosecutor', 'there is no real choice, given that EAWs are only issued for (very) serious offences' and 'less intrusive alternatives are taken into consideration'. In any case, the question is whether examining magistrates are in a position to take an informed decision about less intrusive alternatives should they want to do so. In practice, the request to issue an EAW will not contain any details about the possibility of employing less intrusive alternatives. The examining magistrates are only provided with an EAW form that is completed by the public prosecutor and, in prosecution-cases, with a police report stating the grounds for suspicion but not with the case-file itself. Barring *ex officio* knowledge of the case, one may wonder whether examining magistrates have enough information to make an informed assessment whether a less intrusive alternative would suffice. The decision on the request to issue an EAW is taken *ex parte* and *in camera*. Examining magistrates rarely, if ever, refuse to issue an EAW, although sometimes a request is withdrawn when the examining magistrate asks for clarification.[291]

The proceedings concerning issuing an EAW are organised in such a way that there is a risk that the public prosecutor has an influence on the outcome of a request to issue an EAW to such an extent, that the public prosecutor *de facto* determines whether an EAW is issued or not. From the perspective of the dimension of comprehensiveness such a risk is problematic: such a risk can entail that the authority that is competent to decide, the examining magistrate, does not take into account all available options. Insofar as issuing an EIO is a less intrusive and sufficiently effective alternative, the practice described is also problematic from the perspective of the dimension of proportionality: there is a risk that from among the available options the instrument that is sufficiently effective and the least intrusive might not be chosen.

Incidentally, the current division of competences between Dutch examining magistrates and public prosecutors concerning the EAW is the result of the case-law discussed in paragraph 7.5.2.1. That case-law forced a number of Member States that had designated their Public Prosecution Services as 'issuing judicial authority', among them Germany and the Netherlands, to change their national laws and/or practices.

[291] Dutch report, para 1.3.1(a).

Basically, Germany and the Netherlands had two options in order to conform to the Court of Justice's case-law. One option would be to withdraw, in general, the Minister of Justice's competence to give instructions to the Public Prosecution Service in a specific case (or to exclude EAW-cases from that competence). The other option would be to transfer the competence to issue EAWs to courts or judges. But whatever option was chosen (see *infra*), it needed to be implemented fast because, pending changes to their national law and/or practices, those Member States could not issue EAWs, thus creating a risk of impunity.[292]

Since the executive's power to give instructions to the Public Prosecution Service in specific cases might be closely linked to fundamental choices about (the executive's democratic accountability for) the organisation of law enforcement, the second option is more feasible. Moreover, the first option would not solve all problems. It would still be necessary to provide an effective remedy before a court against the public prosecutor's decision to issue a prosecution-EAW.[293] Given the urgent nature of the matter, both Germany and the Netherlands understandably chose the second option. The Dutch legislative process was very fast indeed, especially when compared with other amendments necessitated by EU case-law.[294] The Court of Justice rendered its judgment in the *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)* case on 27 May 2019.[295] The amendment to the Law of Surrender, removing the competence to issue EAWs from public prosecutors and conferring it on examining magistrates, entered into force on 13 July 2019.

The Dutch experiences illustrate the old saying 'haste makes waste'. When a competence is transferred from one authority to another and the former authority still has a role to play in the exercise of that competence by the new authority, it is always to be expected that, initially at least, the former authority, experienced and expert at the subject matter, has a definite advantage over the new authority, which is faced with an unfamiliar, probably unsolicited and moreover additional task. However, proper organisational arrangements can ensure that the new authority is able to carry out its judicial function as intended by EU case-law, notwithstanding the

[292] To illustrate, Dutch authorities issue on average about 700 EAWs each year, of which on average 250 EAWs result in an arrest and surrender: *Kamerstukken II* 2018/19, 35224, nr. 3, p. 6.
[293] Joined Cases C-508/18 & C-82/19 PPU, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456, para 75.
[294] See Dutch report, para 1.1(a).
[295] Joined Cases C-508/18 & C-82/19 PPU, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456.

knowledge and experience gap. The Polish report shows that it is possible that courts carry out their function as issuing judicial authority properly.

7.5.4.3 Surrender or transfer of the sentence?

Another situation in which there is a choice between different instruments to achieve a certain goal concerns the enforcement stage. The goal of that stage is to enforce the sentence. If a custodial sentence was imposed on a person who is present in another Member State, basically there are two instruments to reach that goal. A judicial authority of the issuing Member State could issue an EAW in order that a sentence of at least four months is executed in the issuing Member State (Article 1(1) and 2(1) of FD 2002/584/JHA). The competent authority of the issuing Member State could forward the judgment and a certificate to another Member State, provided that, *inter alia*, the issuing authority is satisfied that the enforcement of the sentence by that Member State would serve the purpose of facilitating the social rehabilitation of the sentenced person (Article 4(2) of FD 2008/909/JHA).[296]

One could argue that there is no real choice on account of the requirement of facilitating the social rehabilitation. This requirement is absent from FD 2002/584/JHA. Nevertheless, that requirement is not determinative of the choice. Granted that the principle of social rehabilitation is important, it is capable of being set aside altogether or being limited, as the case-law of the Court of Justice shows.[297] Both FD 2002/584/JHA and FD 2008/909/JHA confer a very broad discretion on the competent authority by stipulating that an EAW 'may' be issued and a judgment 'may' be forwarded when certain conditions are met. FD 2008/909/JHA does not confer on sentenced persons a right to serve a sentence in their own Member State. And none of the provisions of the ECHR confer a right on a sentenced person to be transferred to his country of origin.[298] Judging from FD 2008/909/JHA, it is unlikely that EU law offers more protection in this respect than the ECHR.[299] Consequently, even if it were established that

[296] The requirement of at least six months' remaining sentence is not a condition for forwarding a judgment, but an optional ground for refusal (Art. 9(1)(h) of FD 2008/909/JHA).
[297] Member States may decide not to transpose Art. 4(6) of FD 2002/584/JHA, the purpose of which provision is to enable the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires, or, when they do decide to transpose that provision, limit its scope: Case C-123/08, *Wolzenburg*, EU:C:2009:616, paras 58 and 62.
[298] *Serce v Romania*, ECLI:CE:ECHR:2015:0630JUD003504908, § 52-56; *Palfreeman v Bulgaria*, ECLI:CE:ECHR:2017:0516DEC005977914, § 29-37. The Spanish report mentions examples of the harm caused to sentenced persons who are unable to serve their sentences in their Member States: Spanish report, para 2.1.1.2.
[299] Cf. Art. 52(3) of the Charter.

forwarding the judgment to another Member State would facilitate the social rehabilitation of the sentenced person, the broad discretion conferred by both instruments would still allow a choice for issuing an execution-EAW instead of a choice for forwarding the judgment, *e.g.* because, given the public uproar caused by the offence, the goal of retribution would best be served by executing the sentence in the issuing Member State.

Germany and Poland

In Germany, the court that is competent for issuing or maintaining a national arrest warrant is competent to issue an execution-EAW,[300] upon motion by the Public Prosecution Service.[301] The Public Prosecution Service at the court that conducted the trial in first instance is competent to forward the judgment.[302]

The German report does not explain which authority decides whether the FD 2002/584/JHA-route or the FD 2008/909/JHA-route is taken. Presumably, the Public Prosecution Service plays a determinative role. It controls whether an execution-EAW is issued: if it does not enter a motion to issue an execution-EAW, the competent court cannot issue such an EAW. And, independently of any court, it may decide whether to forward a certificate.[303]

In Poland, the regional courts are competent to issue execution-EAWs, either *ex officio* (when the regional court adjudicated the case at first instance) or upon motion by the district court (when that court adjudicated the case at first instance). With regard to the competence to forward a judgment imposing a custodial sentence the regional courts are competent, either *ex officio* (when the regional court adjudicated the case at first instance) or upon motion by the Ministry of Justice, the sentenced person or a court or other authority of the executing Member State. If the judgment at first instance was rendered by a district court, that court can ask the regional court either to issue an execution-EAW or to forward the judgment to another Member State. The regional court is not bound by the scope of the district court's motion and, therefore, can choose between the available measures of judicial cooperation. The district court that is

[300] German report, para 1.3.1.
[301] Hackner and Schierholt, *Internationale Rechtshilfe in Strafsachen*, 4th ed. (C.H. Beck, 2023), pp. 122-123 (paras 359-360).
[302] German report, para 1.3.1. (If the sentenced person is in Germany and does not consent to the transfer of the enforcement of the sentence, prior authorisation by the Higher Regional Court is required. This situation does not concern us here.)
[303] The requirement of prior judicial authorisation does not apply here: the sentenced person is present in another Member State.

competent to execute the sentence must motion the regional court to issue an EAW if transfer of the sentence was unsuccessful. Thus, it is up to the regional court to consider proportionality issues when deciding which measure of cooperation should be requested, whether acting *ex officio* or upon motion by the district court.[304]

In both the German and the Polish situations, one authority, in effect, coordinates the issuing of an execution-EAW or the forwarding of a judgment (in Germany the Public Prosecution Service, in Poland the regional court). Presumably, that authority takes into account all the relevant factors and examines whether there is a less intrusive but sufficiently effective alternative. Nevertheless, in the German situation that authority is not the competent issuing authority for one of the measures. From the perspective of comprehensiveness and proportionality, this is problematic, unless the authority that is competent with regard to the more intrusive measure of the two (the EAW) also considers the possibility of forwarding the judgment (by the competent authority). The German report states that the decision to issue an EAW must comply with the principle of proportionality, which includes taking into account alternative measures.[305]

In any case, when the German courts take into account the less intrusive measure when deciding whether to issue an EAW, there is still one problem left. A refusal to issue an execution-EAW would not necessarily mean that the judgment is forwarded. After all, the decision on forwarding the judgment is taken by the other authority. This is problematic from the perspective of completeness ('every available instrument should be applied as long as the objective is not achieved').

The Netherlands

In the Netherlands, the examining magistrate in a district court may issue an execution-EAW upon motion of the Public Prosecution Service.[306] The Fugitive Active Search Team of the National Public Prosecutors' Office (LP-FAST) is tasked with motioning the examining magistrate in the District Court Overijssel to issue execution-EAWs. The Minister of Justice and Security is the competent authority to forward judgments imposing custodial sentences of

[304] Polish report, para 3.2 ('***Preliminary remarks***', '*Enforcement – competent authorities in Poland*').
[305] German report, paras. 2.1.1.2(b)(ii); 2.2.2(b)(ii)(bb); 3.2(b)(ii)(bb).
[306] Dutch report, para 1.3.1(a).

measures involving deprivation of liberty to another Member State.[307] The minister's power to forward judgments is exercised by IOS.[308]

In practice, there is no direct flow of judgments concerning persons who are present in another Member State to IOS, nor is there any consultation between the authority competent for coordinating the execution of sentences (CJIB on behalf of the Minister of Justice and Security) and IOS about the choice whether to issue an execution-EAW or to forward the judgment. The main flow of judgments concerning sentenced persons who are present in another Member State is directed by CJIB to LP-FAST which, acting on instructions from CJIB, motions the issuing of an execution-EAW. Cases concerning persons who are present in another Member State reach IOS in three ways: through LP-FAST (if the executing Member State refuses surrender), through the executing Member State or the sentence person himself (if they request the forwarding of the judgment).[309]

All of this means that in significant number of cases, there is no *a priori* decision whether to enforce the sentence in the Netherlands or to transfer the sentence to the Member State where the sentenced person is present. This can have a negative impact on the effective, efficient and coherent application of FD 2002/584/JHA and FD 2008/909/JHA.[310]

In some cases, two consecutive proceedings have to be followed in order to achieve to overarching goal of enforcing a sentence (and thus avoiding impunity), *viz.* proceedings under FD 2002/584/JHA and FD 2008/909/JHA. In such cases, the dimension of 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)') is taken into account, but the dimension of comprehensiveness ('all available options should be taken into consideration') is not present. The other available option is not taken into account *a priori*. Moreover, it is doubtful whether the dimension of proportionality ('choose among the available instruments the instrument that is sufficiently effective and the least intrusive') is present, since the more intrusive instrument

[307] Dutch report, para 1.3.1(b).
[308] Dutch report, para 3.2('**Enforcement: competent authorities in the Netherlands**', '*Judicial cooperation regarding the enforcement of sentences*').
[309] Dutch report, para 3.2('**Routing of sentences and judicial cooperation**', '*Custodial sentences*')
[310] Indeed, according to the final report on the 9th round of mutual evaluations, some expert teams 'underlined the need for the issuing authorities to reflect thoroughly and carefully on whether to issue an EAW or a certificate under Framework Decision 2008/909/JHA, to strike a balance between the need for enforcement of the sentence and the need to ensure the social rehabilitation of the sentenced person, and to give appropriate weight to the relevant criteria': *Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty*, Council document 6741/23, 1 March 2023, p. 57.

(an execution-EAW) was followed by a less intrusive instrument (forwarding a judgment). From the point of view of proportionality this is putting the cart before the horse. Lastly, carrying out two consecutive proceedings to achieve the result of enforcing a sentence is not appealing from the point of view of efficiency: this results in increased efforts by the authorities involved and, therefore, increased costs.

In a significant number of cases, the dimension of comprehensiveness is not present: in those cases, execution-EAWs are issued without considering whether to forward the judgment under FD 2008/909/JHA. And in those same cases and for the same reason, the dimension of proportionality is absent: forwarding the judgment under FD 2008/909/JHA is a less intrusive alternative to issuing an execution-EAW.

Consistency

Although the situation in Germany and the Netherlands causes concern from the perspective of comprehensiveness and proportionality, there are no concerns from the perspective of consistency. The legal and institutional framework in these Member States is such that the simultaneous use of inconsistent instruments is not possible. In Poland, simultaneous use of inconsistent instruments is excluded because one authority is competent for both instruments.

7.5.5 Conclusions

To ensure the effective and coherent application of the instruments by issuing (judicial) authorities, the ability to refer questions to the Court of Justice is important since effective and coherent application presupposes a correct understanding of those instruments. The designation of authorities that are not judges or courts as issuing (judicial) authorities has a negative impact on the 'effective, efficient and coherent application' insofar as they are not able to refer questions about mutual recognition proceedings to the Court of Justice. In its present state EU law does not require that Member States only designate authorities as competent issuing (judicial) authorities that qualify as 'court or tribunal' within the meaning of Article 267 TFEU. In this respect it should be noted that, at the time of the adoption of FD 2002/584/JHA, FD 2008/909/JHA, FD 2008/947/JHA and FD 2009/829/JHA, the jurisdiction of the Court of

Justice in the area of judicial cooperation in criminal matters was only optional.[311] The provisions of the instruments on competent issuing (judicial) authorities do not guarantee that the competent authorities designated by the Member States qualify as 'court or tribunal' within the meaning of Article 267 TFEU, not even where the competent authority must be a 'judicial' authority. Member States involved in the project have designated some authorities that undeniably cannot qualify as 'court or tribunal' (ministries) or whose status as 'court or tribunal' is doubtful (Public Prosecution Services).

One could argue that, although the Member States are not required to designate only issuing authorities that qualify as a 'court or tribunal', the duty of sincere cooperation does impose a – less far-reaching – duty on them to organise the issuing process in such a way that there is always access to a national authority, not necessarily an issuing authority, that qualifies as a 'court or tribunal' and that can, therefore, refer questions on the interpretation of the instrument. After all, the Member States must take 'any appropriate measure, general or particular, to ensure fulfilment of the obligations (…) or resulting from the acts of the institutions of the Union' (Article 4(3) TFEU). Against that background, in order to ensure the effectiveness of the instruments all national authorities are required to interpret, to the greatest extent possible, their national law in conformity with EU law.[312] This requires a correct understanding of EU law, which in turn requires access to the Court of Justice.

In any case, insofar as a decision on initiating mutual recognition by an issuing (judicial) authority that is not a judge or a court violates EU law, the person concerned must have an effective remedy before a court of the issuing Member State. If such a remedy is available, there is access to a court that can take into account the dimension of proportionality and that is able to refer questions to the Court of Justice. An effective remedy closes the 'referral'-gap that opens when a Member State designates another authority than a court or judge but only to a certain degree. For the authorities of the issuing Member State, access to a court that can refer questions is dependent upon action by the person concerned: for the issuing Member State to be able to request that the court refers a question, the person concerned must make use of the remedy.

Concentrating competences under different instruments, *i.e.* attributing them to one (type of) issuing authority can have a positive influence on the effective, efficient and coherent

[311] See Art. 35(2) EU.
[312] See, *e.g.*, Case C-573/17, *Popławski II*, EU:C:2019:530, para 57 in combination with para 94.

application of those instruments. There is no duty under EU law for a Member State to make the same authorities competent as issuing authorities under different instruments. Likewise, EU law does not require a Member State to designate the same central authority for different instruments. Nevertheless, if a Member States designates different issuing authorities and different central authorities, the duty of sincere cooperation obliges the Member States to transpose EU instruments on mutual recognition in such a way that the effective, efficient and coherent application of those instruments is not compromised. Mechanisms for coordination, consultation and advice should be in place to ensure that the dimensions of comprehensiveness, proportionality and consistency are not overlooked when making a choice between the instruments. The authority that is competent to decide whether the more intrusive of the instruments is to be employed should be able to take into account the possibility of employing the less intrusive one. And if that authority refuses to use the more intrusive of the instruments, the authority that is competent with regard to the less intrusive instrument should, in principle, be bound to use that instrument. Moreover, the organisational set-up should be such that there is no risk that one of the authorities is able to determine *de facto* which of the instruments will be used, whereas *de jure* that decision belongs to the other authority.

7.6 Awareness/knowledge

7.6.1 Introduction

This chapter deals with the underuse of some of the instruments and the observation that there is a lack of awareness of the existence of some of these instruments and/or a lack of knowledge how to apply them. The examples given are not exhaustive.

7.6.2 Underuse of instruments

All reports mention that there is no or little experience in using some of the instruments. The following instruments are mentioned in this regard.

- The ESO.[313]
- Temporary transfer pending the decision on the execution of an EAW (Article 18/19 FD 2002/584/JHA).[314]
- Temporary transfer on the basis of an EIO (Article 22 of Directive 2014/41/EU).[315]
- Hearing a requested person in the executing state upon the request of the issuing state (Article 18/19 FD 2002/584/JHA).[316]
- Summoning a suspect for an interrogation (EU Convention on Mutual Assistance in Criminal Matters).[317]
- Issuing an EIO for an interrogation by videoconference.[318]
- Using videoconferencing to have the accused person interrogated during the trial (by EIO or otherwise).[319]
- Using videoconferencing for the presence of the accused person at the trial.[320]
- Transfer of proceedings during the pre-trial or during the trial stage.[321]
- Transfer of probation decisions on the basis of FD 2008/947/JHA.[322]
- Serving a summons to the convicted person to commence the sentence (Article 5 of the EU Convention on Mutual Assistance).[323]

[313] Dutch report, para 2.2.2(a)(ii); German report, para 2.2.2(a)(ii), 2.2.2(b)(ii)(bb) and Chapter 6 (Memorandum); Polish report, para 2.2.1(a)(bb), 2.2.1(b)(bb), 2.2.2(a)(i)(bb), 2.2.2(b)(ii)(bb), 2.3(a)(i)(bb); Spanish report, para 2.1.1.1(a), 2.2.2(b)(ii), 2.3(b)(i);'the Cinderella of mutual recognition instruments' (Separate Memorandum, page 8).
[314] Dutch report, para 2.2.2(b)(ii)(aa) ('a blind spot'), 2.3(b)(ii)(bb); Polish report, para 2.2.2(b)(ii)(aa).
[315] Dutch report, para 2.2.2(b)(ii)(aa); German report, para 2.1.1.2(b), 2.1.2(b)(i and ii): according to the prevailing opinion in Germany an EAW should be used instead of an EIO; Polish report, para 2.2.2(b)(ii)(aa), 2.3(b)(ii).. See also *Final report on the tenth round of mutual evaluations on the implementation of the European Investigation Order (EIO)*, Council document 15834/1/24 REV 1, 10 December 2024, p. 60 ('This round of evaluations showed that the temporary transfer provided for in Articles 22 and 23 of the Directive has been applied in a very limited number of cases').
[316] Dutch report, para 2.2.2(b)(ii)(aa) ('a blind spot'), 2.3(b)(ii)(bb); Polish report, para 2.2.2(b)(ii), 2.3(b)(ii);
[317] German report, para 2.2.1(b), 2.2.2(b)(ii); 2.3(b)(ii).
[318] German report, para 2.2.2(b)(ii); Polish report, para 2.2.1(b)(aa) and 2.2.2(b)(ii) (only with reference to the pre-trial stage of the proceedings – '(…) since it is not allowed by the Polish law').
[319] German report, para 2.3(b)(ii): In general, the physical presence of the accused is required. Only where the expected sentence will not exceed imprisonment for a term of six months or a fine of 180 daily rates the option of an interrogation seems to be possible according to German law. This option however is 'hardly used'. See also German report, chapter 6 (Memorandum); Polish report, para 2.3(b)(i)(aa).
[320] Dutch report, para 2.3(b)(i)(aa); German report, para 2.3(b)(i)(aa); Polish report, para 2.3(b)(ii) ,.
[321] Dutch report, para 2.2.1(b)(aa) and 2.2.2(b)(i)(aa); German report, para 2.3(b)(i)(aa), 2.3b)(i)(bb); Polish report, para 2.3(b)(i)(aa) and 2.3(b)(i)(cc);.
[322] German report, para 3.2(a)(ee); Polish report, para 3.2(a)(ee).
[323] German report, page 3.2(a)(ee) and Memorandum Chapter 6 (**Memorandum**).

Underuse can be due to the national framework,[324] because an alternative option exists that is preferred in practice,[325] because the instrument is considered to be not sufficiently practical,[326] or because the instrument is considered to be inapplicable (Germany).[327]

7.6.3 Lack of awareness/knowledge

In some cases, the national reports mention a lack of awareness or knowledge with regard to certain instruments as a result of which the instrument is not (often) used.[328] The following instruments are mentioned in the national reports.

- The ESO.[329]
- Temporary transfer under an EIO.[330]
- Transfer of proceedings.[331]

It should not come as a surprise that, besides other causes already mentioned, a lack of awareness and/or knowledge is also at the root of the underuse of other instruments, mindful of the remark of one of the Dutch experts during a national meeting that there is a lack of awareness and knowledge *in general* with regard to judicial cooperation between Member States.

The national reports do not seem to be totally unanimous with regard to the instruments that are impacted by a lack of awareness and knowledge resulting in underuse. In other words, the instruments can differ per Member State. It seems likely though that in general more awareness

[324] E.g. Polish report, para 2.2.1(b): Polish law does not provide for interrogation of a suspect by videoconference in the course of investigations.
[325] E.g. the practice of using a bail in Poland (para 2.2.1(a)(bb)).
[326] German report, para 2.3(b)(i) with regard to using the EIO to interrogate the suspect during the trial (which is possible if the expected sentence will not exceed imprisonment for a term of six months or a fine of 180 daily rates): 'Up to now, no case has been reported where this provision has been applied, apparently because the procedure is too cumbersome'; Spanish report, para 2.2.2(b)(ii) with regard to the ESO; Polish report, para 2.3(b)(i) with regard to a temporary transfer under the EIO.
[327] German report, para 2.1.1.2.
[328] See also: *Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty*, Council document 6741/23, 1 March 2023, page 8. In line with these findings is the remark of prosecutor 7 during the national meeting of practitioners that there is in general a lack of awareness and knowledge of international cooperation and cooperation within the EU.
[329] Polish report, para 2.3(b)(i); German report, para 2.2.2(a)(ii); Spanish report, para 2.2.2(b)(ii).
[330] Polish report, para 2.2.2(b)(ii)(aa), 2.3(b)(ii).
[331] Dutch report, para 2.2.1(b)(aa).

and knowledge of the instruments that are not or not often used may in general contribute to the application of these instruments on a larger scale.[332]

It is evident that not using certain instruments that are available in a certain situation because practitioners are not aware of the applicability of these instruments may result in an incoherent and/or ineffective and/or inefficient application of the available instruments. The concept of 'effective, efficient and coherent application' presupposes awareness and knowledge of these instruments. Incidentally, underuse of the ESO on account of a lack of awareness or knowledge (or otherwise), prevents a Member State from following the European Commission's recommendation that, to 'avoid inappropriate use of pre-trial detention, Member States should make use of the widest possible range of alternative measures, such as the alternative measures mentioned in Framework Decision 2009/829/JHA (…)'.[333]

A lack of knowledge how to apply certain instruments may also lead to suboptimal choices. Especially the time and costs involved in acquiring sufficient knowledge of how to apply a certain instrument in an individual situation may tempt practitioners to take the easy way out and to decide to apply one of the old time favourites (e.g. the EAW).

7.6.4 Conclusions

It is evident that more awareness and knowledge of the applicability and application of instruments that are available in a certain situation can contribute to more coherence, efficiency and effectiveness. Available instruments are less likely to be overlooked (comprehensiveness and completeness), including less intrusive instruments (proportionality) and more effective instruments (effectiveness). Moreover, knowing how to proceed when choosing a particular instrument requires less time and money than having to find out how to proceed before being able to proceed (efficiency).

[332] Spanish separate memorandum: ignorance (page 8/9).
[333] Commission Recommendation of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, C(2002) 8987 final, p. 10 (recommendation (16)).

7.7 Efficiency

7.7.1 Efficiency: introduction and definition

All four country reports mention issues of efficiency with regard to (the application of the instruments of) transborder cooperation. Hence, efficiency is included in the overarching analysis.

What does efficiency mean in the context of *MR 2.0*? Efficiency is not part of the definition of the concept of 'effectiveness and coherence' (*supra*, paragraph 7.1.1), but efficiency considerations can have an impact on decisions and choices to be made in applying instruments of transborder cooperation. Therefore, they can impact on the effectiveness and coherence of the application of these instruments. Efficiency relates to the question how much effort it takes to reach a certain goal. As already explained in paragraph 7.1.1, efficiency is a measure of the costs, in terms of money and human resources, of applying an instrument in order to reach a specific goal.[334,335]

7.7.2 Efficiency and principles

At the very core of transborder cooperation are issues of 'justice' and 'the fight against transborder criminality'. Is there any room in dealing with these 'big' issues for considerations that relate to money and human resources?

This chapter will not delve into a fundamental discussion on the level of principles. The question at hand is not whether these considerations should play a role, but whether they do play a role in practice and to what extent the current set up poses obstacles to an efficient application of the instruments of transborder cooperation.[336]

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[334] Whereas effectiveness relates to the question whether an instrument is suitable to reach a specific goal.
[335] In the context of this project, time, that is the period between issuing a request for cooperation and achieving the goal, is more related to effectiveness. See the German report, para 2.2 (**'General introduction'**).
[336] Illustrative in this regard are two passages in the German report. 'As a matter of principle, costs should not provide sufficient reason not to have recourse to a suitable cooperation instrument', German report, para 2.2 (**'General introduction').** 'On the other hand, significant costs for translation of documents (e.g. the investigation file for the purpose of a transfer of proceedings) are considered an important factor': German report, para 2.2

7.7.3 Efficiency in practice

It does not seem likely that considerations of efficiency do not play a role at all in practice. In general resources are scarce, in any case they are not inexhaustible, and it is inevitable to prioritise because the work is plentiful. Moreover, it seems to be a legitimate approach when choosing between two equally effective and coherent instruments to choose the instrument that requires less resources. But, again, the question of legitimacy is not the concern of this chapter. What is relevant is the impact of efficiency considerations on making effective and coherent choices in transborder cooperation. Or, to put it in other words, do authorities refrain from choosing the best option from the viewpoint of effectiveness and coherence because of efficiency reasons, that is because it is cheaper and/or requires fewer human resources? Or do they choose for less efficient options because of effectiveness and, *e.g.*, proportionality?[337]

7.7.4 Efficiency: obstacles and opportunities

Introduction

After a general remark on costs and mutual recognition, efficiency issues will be dealt with according to the division, in the Annotated Index. between the investigation/prosecution stage and the enforcement stage. Within the investigation/prosecution stage, the issues in the pre-trial stage will be dealt with first and subsequently the issues in the trial stage.

('**General introduction'**). The Spanish report states: '(…) as has been recognized by practically all of the legal professionals interviewed, (…) only legality criteria operate and not "opportunity" criteria or any other type (specifically, economic costs, etc.); of course, this is mainly due to the application of the principle of legality in Spanish criminal procedure in accordance with ordinary procedural rules' (para 6. '**MEMORANDUM**, 4)).

[337] See Ouwerkerk: "All 'bout the Money? On the Division of Costs in the Context of EU Criminal Justice Cooperation and the Potential Impact on the Safeguarding of EU Defence Rights", 25 European journal of crime, criminal law and criminal justice (2017), 1-10, in which she 'attempts to demonstrate that the financial impact of EU legislation in one category—i.e. cross-border cooperation on the basis of mutual recognition—may have negative consequences for the implementation of EU legislation in another category—i.e. the safeguarding of procedural rights for suspects and accused persons'.

Efficiency issues can occur with regard to the application of an instrument as such or they can occur in a situation in which a choice has to be made between several applicable instruments or between different specific goals to be achieved by applying one or more instruments.

General remark

In principle, the executing Member State bears the costs of the application of instruments of mutual recognition, with some exceptions.[338] These costs (in terms of money and human resources) not only relate to the costs of safeguarding defence rights (esp. translation/interpreting and access to a lawyer), but also to other costs like the costs of detention, investigation and holding trial. This holds true for the EAW, the EIO, the ESO and the transfer of a sentence on the basis of FD 2008/909/JHA and FD 2008/947/JHA. With regard to the transfer of proceedings, however, there is no refund of costs which may result from the application of the convention,[339] which means that each Member State bears the costs that it incurred in the application of the convention.[340]

The provisions on costs put a heavier burden on less wealthier Member States and Member States that act relatively more often as executing Member State and may also form an obstacle to choosing the best option from the viewpoint of effectiveness and coherence, especially proportionality.

A mechanism of reimbursement of costs and/or a fund on the EU-level could contribute to a more balanced division of costs between Member States.[341]

Pre-trial stage

- EAW, proportionality and financial costs

[338] See Ouwerkerk: "All 'bout the Money? On the Division of Costs in the Context of EU Criminal Justice Cooperation and the Potential Impact on the Safeguarding of EU Defence Rights", 25 European journal of crime, criminal law and criminal justice (2017), 1-10.
[339] See Art. 20 of the European Convention on Mutual Assistance in Criminal Matters and Art. 20 of the European Convention on the Transfer of Proceedings in Criminal Matters.
[340] With regard to 'large or exceptional costs' for translation of the case-file and other relevant documents, Art. 19(2) of the regulation states that the requested Member State may submit a proposal to share the costs.
[341] See Ouwerkerk: idem. See German report, para 2.2 ('**General introduction**'): 'In practice, this issue is sometimes solved by consultations that may result in an agreement on the distribution of the relevant costs'.

The final report on the 9th round of mutual evaluations mentions that the criteria used in practice to assess proportionality can vary from Member State to Member State, the most common criteria being the seriousness of the offence, the length of time since the crime was committed, the damage caused, the interests of the victim, the expected punishment and the age and behaviour of the person concerned. However, one of the individual mutual evaluations reports emphasises 'another aspect of proportionality (…), namely that the financial costs associated with implementing an EAW are not negligible and should be proportionate to the seriousness of the offence'.[342]

- EAW, safe conduct and summoning

  The German report[343] mentions the practice of granting safe conduct in order to interrogate the accused person in Germany in cases in which the detention of the requested person resulting from an EAW issued by the German authorities is suspended by the authorities of the executing Member State pending the decision on the execution of the EAW. According to the report, after the interrogation the court revoked the (national) arrest warrant and the proceedings were closed by means of a transaction.[344]

  Granting safe conduct after issuing an EAW would be more efficient than having the EAW executed, and, besides, would be less intrusive. This could be done not only in the situation in which the detention of the requested person in the executing Member State is already suspended (as in the German example, see *supra*), but also in the situation in which the requested person is still in detention in that Member State. A safe conduct by the issuing authorities can be a reason for the executing authorities to (conditionally) release the requested person in order for him to be able to travel to the issuing Member State to be interrogated.

  Moreover, granting safe conduct *ab initio,* i.e. without first issuing an EAW, would also be a more efficient approach than issuing an EAW and having it executed, besides also being less intrusive.

[342] *Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty*, Council document 6741/23, 1 March 2023, p. 13.
[343] Para 2.2.2 b(ii)(aa) + (bb). Also, the Polish report (para 2.2.2(b)(i)) mentions a 'letter of safe conduct' (a so-called 'iron letter'), but it does in the context of issuing an EIO or summoning the suspect to appear for Polish authorities (see *infra*).
[344] It does not seem self-evident that authorities spontaneously grant a safe conduct. Probably defence counsel initiates this by contacting the authorities. At least some communication between the suspect and/or his defence counsel and the competent authorities is needed to agree on the practical arrangements to be made.

Of course, granting safe conduct (either *ab initio* or after having issued an EAW) is only an option if it is assessed to be sufficiently effective without the pressure on the person concerned of possible detention and surrender resulting from a previously issued EAW. In case there is a substantial risk of absconding, the approach will probably be deemed not be effective. Also, a pro-active approach by the person concerned and/or his defence counsel is required. In this regard, summoning the person concerned before trying to apply more intrusive instruments like the EAW could serve as a trigger for the person concerned and/or his defence counsel to apply for a safe conduct.

Looking at the country reports, this approach of granting a safe conduct instead of issuing an EAW and having it executed is not the dominant approach. The reason for this could be that issuing an EAW is deemed to be more effective, because it is more coercive and is deemed to be more efficient, because it saves time. However, a downside could be that issuing an EAW is more expensive than granting a safe conduct.

- EAW and temporary transfer (Article 18(1)(b) of FD 2002/584/JHA)

  In Germany and in Poland the option of a temporary transfer pending the decision on the execution of an EAW[345] is not transposed into national law.[346] Germany consciously did not transpose the provision on temporary transfer because according to the German understanding transferring an accused person to the issuing Member State for interrogation may only take place in the context of surrender or conditional surrender (within the meaning of Article 24(2) of FD 2002/584/JHA).

  The Dutch report refers to the option of a temporary transfer as a 'blind spot'.[347] One can assume that 'underuse' of this option is not only due to non-transposition or transposition defects, but that the costs of the transfer also have an impact on decision-making. This is corroborated by the Spanish report that refers to a practitioner who points out that a temporary transfer is expensive and the Polish report that refers to the 'high costs' of organising such a transfer.[348] In this light a videoconference in order to interrogate the requested person or an interrogation by the executing authorities seem to be the more

[345] Art. 18 and 19 of FD 2002/584/JHA
[346] German report, para 2.2.1(b)(aa), Polish report, para 2.2.2(b)(ii)(aa).
[347] Dutch report, para 2.2.2(b)(ii)(aa).
[348] Though this is mentioned in both reports in connection with the temporary transfer in the context of an EIO, this surely also holds true for a temporary transfer in the context of an EAW. Spanish report, para 2.1.2 (b)(i) and Polish report, para 2.3(b)(i)(aa).

efficient options. Incidentally, in the near future EU law will provide for interrogating the requested person by videoconference.[349]

- EIO, temporary transfer, videoconferencing, interrogation by authorities executing Member State

  EIO and temporary transfer (Article 22 of Directive 2014/41/EU)

  Temporary transfer of a suspect who is detained in the executing Member State in another case[350] seems to be an option that is not or rarely used[351] in the practice of the Member States involved in the research. What has been said about the efficiency of organising a temporary transfer connected to an EAW holds true for such a transfer in connection with an EIO as well. Interrogation by videoconference or by the authorities of the executing Member State seems to be the more efficient approach.[352]

  EIO and interrogation by videoconference or by the authorities of the executing Member State

  The Dutch report clearly reflects issues of efficiency in choosing between these two options.[353] An interrogation by the authorities of the executing Member State is more efficient if the EIO also aims at other investigative goals, i.e. hearing witnesses and gathering other evidence. In that case the interrogation will be part of the package. If the interrogation is time-consuming, especially when it takes more days, videoconferencing can be cumbersome.

- EIO, interrogation at consular premises and interrogation by authorities of the executing Member State

[349] See Art. 6(1)(a) of Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, O.J. 2023, L 2844/1 and Art. 2(3) of Directive (EU) 2023/2843 of the European Parliament and of the Council of 13 December 2023 amending Directives 2011/99/EU and 2014/41/EU of the European Parliament and of the Council, Council Directive 2003/8/EC and Council Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, as regards digitalisation of judicial cooperation, O.J. 2023, L 2843/1. Once again, there are concerns about the use of videoconferencing in criminal proceedings: see Spanish report, (para 6 (‘**MEMORANDUM**’, 4)).

[350] N.B. temporary transfer is only possible if the suspect is already detained in the executing Member State in another case than the case for which the EIO is issued (usually a domestic case).

[351] Dutch report, para 2.2.2(b)(i)(aa). Polish report, para 2.2.2(b)(i)(aa). In case of Germany, non-use is a conscious choice. Transfer of an accused person for interrogation is the exclusive province of the EAW: German report, para 2.2.1(b)(aa).

[352] See esp. Polish report, para 2.3(b)(i)(aa) and Spanish report, para 2.1.2 (b)(i).

[353] Para 2.2.1(b)(aa).

The Polish report refers to the practice of bringing charges to and interrogating Polish nationals who reside in another Member State at the Polish consulate in that Member State.[354] This practice has developed as a result of the application of the proportionality principle but is also aimed at reducing costs[355] (i.e. the costs involved in issuing an EIO).

- EIO, safe conduct and summoning

  The Polish report mentions a 'letter of safe conduct' (a so-called 'iron letter') with regard to a situation in which, on account of the attempts to execute an EIO issued with a view to bringing charges to him, the suspect becomes aware of the investigations conducted against him and asks for such an 'iron letter'.[356]

  Just summoning and, subsequently, granting safe conduct could be more efficient than issuing an EIO and having it executed (see *supra* with regard to granting a safe conduct in relation to issuing an EAW).

- EIO and EAW

  In a situation in which the whereabouts of the suspect are unknown it is not possible to issue an EIO.[357] In such a situation authorities use the EAW. Dutch practitioners deem this to be more efficient than the two step approach of first trying to locate the person concerned (by means of a request for mutual legal assistance or an alert in the Schengen Information System (SIS))[358] and then issuing an EIO.[359] Whether this one step EAW approach is really

[354] Para 2.2.1(b)(aa)('Application in practice').
[355] *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Poland*, Council document 13516/1/24 REV 1, 2 October 2024, p. 24.
[356] Para 2.2.2(b)(i).
[357] An EIO may not be issued for the sole purpose of locating a suspect or accused person. After all, an EIO may only be issued for the purpose of having an 'investigative measure' carried out, which must ensure that the issuing Member State *obtains evidence*: Case C-583/23, *Delda*, EU:C:2025:6, para 2.8. Interestingly, according to the final report on the 10th round of mutual evaluations some Member States issue EAWs and EIOs in parallel, the EIO being issued to locate the requested person: *Final report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO)*, Council document 15834/1/24 REV 1, 10 December 2024, p. 18.
[358] An alert in the SIS may be entered for the purposes of communicating the place of residence or domicile of 'persons summoned or persons sought to be summoned to appear before the judicial authorities in connection with criminal proceedings in order to account for acts for which they are being prosecuted': Art. 34(1)(b) of Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, O.J. 2018, L 312/56.
[359] Para 5.2.

more efficient, in the sense that it involves less costs in terms of money and human resources, remains to be seen. After all, in executing an EIO usually no costs of transfer are involved. Of course, if in the end, after executing the EIO, an EAW is still necessary then the calculation will be different.

- Transfer of proceedings

  The costs involved in transferring proceedings seem to be a matter of communicating vessels. Transferring proceedings in an early stage of the investigation saves costs for the issuing Member State but involves more costs for the executing Member State. In case of a transfer when the investigation is (nearly) finished it is the other way around.

  A transfer of proceedings by a Member State might be more efficient when the person concerned and/or witnesses and/or victims and/or evidence are located in another Member State. In this respect, the Dutch report mentions 'concentration of investigation/prosecution efforts' as an important consideration.[360]

  In transferring proceedings, the costs in general are for the Member State that takes over the investigation/prosecution. A transfer of proceedings involves not only costs of translation, interpreting and legal assistance,[361] but also the costs of (pre-trial) detention and the investigation/prosecution itself (prosecutors, police-officers, investigating judges, etc.). Translation costs are mentioned as an important factor in the German report and as obstacle in the Dutch report.[362]

- EAW, EIO and transfer of proceedings

  The perception of the Dutch report of Dutch practice is that a transfer of proceedings is often seen a last resort, *i.e.* in case achieving a specific goal by issuing an EAW or an EIO is not successful.[363] Equally, in Germany transfer of proceedings is an option if surrender is refused, but is usually not taken into account as an alternative *a priori* but rather as a 'second

[360] Dutch report, para 2.2 ('**Preliminary remarks**'). Cf. the criteria enumerated in Art. 2(2)(b)(e)(f)(g) of the Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters.
[361] *I.e.* the costs involved in ensuring the rights of the suspect.
[362] German report, para 2.2 ('**General introduction**') and Dutch report, para 2.2.1(b)(aa). See Art. 19 of the Regulation (EU) 2024/3011 on the transfer of proceedings in criminal matters concerning large or exceptional translation costs. See also *Report on the Transfer of Proceedings in the European Union* (Eurojust, 2023), p. 21: '(…) the financial burden of translating the entire casefile should also not be underestimated and is often a major concern when discussing the appropriateness of a transfer of proceedings'.
[363] Dutch report, para 2.2.1(b)(aa).

best' (remaining option).[364] One would expect that authorities take into consideration whether to transfer proceedings *ab initio* in case they expect an EAW or an EIO not to be successful, instead of first trying to have such an EAW or an EIO executed. Of course, at the same time one would expect that authorities do not issue EAW's and EIO's anyway, if they deem them unsuccessful beforehand, not only for reasons of efficiency but also for reasons of effectiveness.

- ESO

  The German report calls the procedure with regard to the ESO too lengthy and complex, 'in particular because the executing authority must not order the arrest of the defendant on its own motion but has to notify the issuing authority that will take that decision'.[365]

  According to the final report on the 9th round of mutual evaluations, the authorities of one Member State cited as the cause for the infrequent use of FD 2009/829/JHA that the cost of supervision measures means that their use is not justified in the case of minor offences.[366]

- ESO and 'informal practice'.

  The German report refers to a practice in which foreign police authorities (or probation services) assist German courts in supervising the suspect in another Member State.[367] From a viewpoint of efficiency, the costs involved are probably far less than the costs involved in issuing and executing an ESO.

Trial stage

- Since the trial stage is part of the investigation/prosecution, the issues mentioned under '**Pre-trial stage**' are applicable in this stage as well.

- Transfer of proceedings

  One specific issue with regard to the trial stage pops up in the German report. It highlights that none of the public prosecutors interviewed could report a single case where criminal

[364] German report, para 6.
[365] Para 2.2.2.
[366] *Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty*, Council document 6741/23, 1 March 2023, p. 68.
[367] Para 2.2.2(a)(ii).

proceedings had been transferred at the trial stage.[368] One can imagine that given the effort put into the investigation and prosecution in the pre-trial stage, prosecutors are hesitant to transfer the proceedings instead of finishing the case themselves not only for 'psychological' reasons[369] but also because it is more efficient than changing course at the last minute. But this only reflects the perspective of the issuing Member State. As remarked before, for the executing Member State taking over a case in which the investigation is completed involves less costs than taking over a case in which investigative steps still have to be taken.

Enforcement

- Transfer of sentence

  The executing Member State bears the costs of executing the sentence and the issuing Member State bears the costs of transferring the sentenced person to the executing Member State.[370] Probably, the costs of executing the sentence, especially in case of long-term detention, are higher than the costs of the transfer to the executing Member State (which is a one-time event).

- EAW and transfer of sentence

  Three issues relating to efficiency arise with regard to the relationship between the EAW and a transfer of the sentence.

  Choosing between EAW and transfer of the sentence ab initio

  The first issue is that the option of executing a sentence in another Member State is sometimes only taken into consideration *after* issuing an unsuccessful execution-EAW. One would expect that authorities take into consideration whether to transfer a sentence *ab initio*, especially if there is a reason to suspect that an EAW will not be successful, instead of first trying to have such an EAW executed. According to the Court of Justice, when examining whether issuing an EAW would be proportionate the issuing judicial authority must take

[368] Para 2.2.2(b)(ii)(aa).
[369] Dutch report, para 2.2.1(b)(aa).
[370] See Art. 24 FD 2008/909/JHA and Art. 22 FD 2008/947/JHA.

into account, *inter alia*, the prospects of execution of that EAW.[371] As to the wider issue of a choice *ab initio*, according to the final report on the 9th round of mutual evaluations some experts are of the opinion that there is a need to reflect 'thoroughly and carefully' on the choice between issuing an execution-EAW and forwarding the judgment and a FD 2008/909/JHA-certificate.[372] The Dutch report states that in practice issuing an EAW is seen as more efficient than sending a certificate on the basis of FD 2008/909/JHA. However, issuing an EAW is not effective and also not efficient if it does not lead to surrender and a certificate has subsequently to be sent in order to have the sentence executed.[373]

Even if the competent issuing authority makes a thorough and careful choice, *ab initio*, between issuing an execution-EAW and forwarding the judgment, there may always be circumstances that are relevant to that choice and that militate for forwarding the judgment but that the issuing authority simply is not aware of. *E.g.*, although the sentenced person is a national of the issuing Member State he may also have the nationality of the executing Member State or may have acquired the status of resident in that Member State. Therefore, there is a need for a corrective mechanism that allows taking into account such circumstances where the issuing authority has chosen to issue an execution-EAW.

Such a mechanism is Article 4(6) of FD 2002/584/JHA. Pursuant to this provision, the executing judicial authority may refuse to execute an execution-EAW issued against a national or resident of the executing Member State or against a person who is staying in that Member State, provided that the executing Member State undertakes to execute the sentence according to its own laws. Thus, the provision allows the executing judicial authority in a specific situation to decide that a sentence imposed in the issuing Member State *must* be enforced in the territory of the executing Member State.[374] The object of this provision is to increase the requested person's chances of reintegrating into society when the sentence imposed on him or her expires.[375] In general, the executing judicial authority is better placed than the competent authority of the issuing Member State to assess whether the chances of social reintegration of a national or resident of the executing Member State would be better

[371] Case C-158/21, *Puig Gordi and Others*, EU:C:2023:57, para 145; Case C-318/24 PPU, *Breian*, EU:C:2024:658, para 54.
[372] *Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty*, Council document 6741/23, 1 March 2023, p. 57.
[373] This topic is under discussion at the Ministry of Justice and Security of the Netherlands. Dutch report, para 3.2(b)(ee).
[374] See, *e.g.*, Case C-314/18, *SF (European arrest warrant – Guarantee of return to the executing State*), EU:C:2020:191, para 41 (emphasis added).
[375] See, *e.g.*, Case C-514/17, *Sut*, EU:C:2018:1016, para 47.

in that Member State than in the issuing Member State. Its assessment of the chances of social reintegration should, therefore, trump the previous assessment by the issuing judicial authority. If the executing Member State chose to implement Article 4(6) and if the executing judicial authority establishes that the conditions for applying that ground for refusal are met (which means, *inter alia*, that it has established that enforcement in the executing Member State would improve the chances of social reintegration), it may take into account whether the issuing Member State's interest in having the sentence executed in that Member State on account of considerations of retribution (see *supra*, paragraph 7.5.4.3) outweighs the interest in improving the chances of social reintegration. After all, Article 4(6) is a ground for optional refusal.

Giving the issuing Member State the power to effectively block the application of Article 4(6) by making that application dependent on that Member State's consent (in the form of forwarding the judgment and the certificate) – as AG J. Richard de la Tour has suggested in Case C-305/22 (*C.J. (Enforcement of a sentence further to an EAW)*) –[376], would not only make that ground for refusal ineffective,[377] but would also be inefficient (see *infra*).

> Incidentally, it would also detract from the *coherent* application of both instruments, would disregard proportionality and would also be dubious from the point of view of the duty of sincere cooperation. In this respect the opinion of AG M. Sánchez-Bordona in the *Popławski II* case is to be preferred: 'once the requirements of Article 4(6) are satisfied, a refusal by the Member State that issued the EAW to forward the judgment together with the certificate under Annex I of Framework Decision 2008/909 cannot be allowed to prevent execution of the sentence in the executing Member State'.[378] If the issuing Member State has insurmountable objections against enforcement of the sentence in the executing Member State it could withdraw the EAW as long as the enforcement of the sentence in the executing Member State has not begun. The duty to inform the issuing judicial authority 'immediately' of the decision 'on the action to be

[376] Case C-305/22, *C.J. (Enforcement of a sentence further to an EAW)*, EU:C:2024:504. After that case's referral to the Grand Chamber of the CJEU, the AG rendered another opinion in which he confirmed and reiterated his previous opinion: Case C-305/22, *C.J. (Enforcement of a sentence further to an EAW)* and Case C-595/23, *Cuprea*, EU:C:2024:1030.
[377] In the absence of consent by the issuing Member State, the executing judicial authority would have to surrender the requested person.
[378] Case C-573/17, *Popławski II*, EU:C:2018:957, para 91.

taken on the [EAW]' (Article 22 of FD 2002/584/JHA) should enable the issuing judicial authority to consider whether to withdraw the EAW or not. Withdrawing the EAW would block the executing Member State from enforcing it (cf. Article 13 of FD 2008/909/JHA which is applicable *mutatis mutandis* by virtue of Article 25 of FD 2008/909/JHA) but would not force that Member State to surrender the person concerned. If the issuing Member State does not withdraw the EAW, the principle of sincere cooperation requires it to trust that the executing judicial authority has taken a decision that gives the principle of social reintegration its due.

Refusal of surrender on the basis of Article 4(6) of FD 2002/584/JHA

The second issue of efficiency concerns taking over a sentence by refusing an execution-EAW on the basis of Article 4(6) of FD 2002/584/JHA. It seems to be more efficient if a refusal on the basis of Article 4(6) of FD 2002/584/JHA leads to the execution of the sentence in the executing Member State without the need of sending a certificate by the issuing Member State, either before or after the decision to apply Article 4(6). However, *e.g.*, Belgium and France still require a certificate in this situation.[379] If the Court of Justice were to adopt the interpretation of Article 4(6) of FD 2002/584/JHA, read together with Article 25 of FD 2008/909/JHA, that is put forward by AG J. Richard de la Tour in Case C-305/22 (see *supra*, 'EAW and transfer of sentence', '*Choosing between EAW and transfer of sentence ab initio*'),[380] the application of Article 4(6) would be very inefficient. Indeed, it would even render that provision ineffective. After having spent time on examining, *e.g.*, whether the requested person is indeed a resident of the executing Member State and whether the conditions for taking over the sentence are met (in order that the executing Member State can 'undertake' to execute that sentence in accordance with its own law), the executing judicial authority would then have to ask whether the issuing Member State is inclined to forward the judgment and a certificate. This would lead to delays. If the issuing Member State refuses to forward the judgment, all the effort spent by the executing judicial authority would be for naught (and the interest of social re-integration in the executing Member State would be disregarded).

EAW and transfer of sentence concurrently

[379] Dutch report, para 3.2(b)(ee).
[380] Case C-305/22, *C.J. (Enforcement of a sentence further to an EAW)*, EU:C:2024:508.

Finally, the third efficiency issue concerns the practice of issuing an execution-EAW and, more or less concurrently, forwarding the judgment and a certificate to the same executing Member State concerning the same sentenced person and the same conviction,[381] *e.g.* when the whereabouts of the requested person are not clear.[382] Forwarding the judgment and a certificate is only possible once it is established in which Member State the sentenced person is present.

If the object of this practice is to establish the whereabouts of the sentenced person, it raises serious efficiency issues. Issuing an execution-EAW and more or less concurrently forwarding a certificate initiate two different procedures with two different applicable regimes, possibly leading to contradictory decisions.[383] Depending on the national law of the executing Member State, this practice might engage two different competent executing authorities[384] who might even not be aware of the other's involvement. Consequently, there are a lot of drawbacks to this practice, among which generating an extra burden on the executing and issuing authorities which have to deal with two different procedures.[385] Besides, there are other, less intrusive means available such as entering a SIS alert only for location.[386] In the near future it will be possible to issue a European Preservation Order or a European Production Order to locate a sentenced person who has absconded from justice, in order to execute a custodial sentence or detention order of at least four months (that was not imposed *in absentia*).[387]

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[381] See the Dutch report, para 3.2 ('**Routing of sentences and judicial cooperation**', '*Custodial sentences*').
[382] Eurojust, *Report on Eurojust's Casework in the Field of the European Arrest Warrant* (Eurojust 2021), p. 59.
[383] See one of the examples mentioned in the Dutch report, para 3.2 ('**Routing of sentences and judicial cooperation**', '*Custodial sentences*'). The competent authority for FD 2008/909/JHA refused to enforce the Portuguese sentence, whereas the competent authority for FD 2002/584/JHA applied Art. 4(6) of FD 2002/584/JHA.
[384] As is the case in the Netherlands: the District Court of Amsterdam is the competent executing authority for FD 2002/584/JHA, whereas the Ministry of Justice and Security is the competent executing authority for FD 2008/909/JHA.
[385] Eurojust, *Report on Eurojust's Casework in the Field of the European Arrest Warrant* (Eurojust 2021), p. 59.
[386] An alert may be entered for the purposes of communicating the place of residence or domicile of persons who are to be served with a summons to report in order to serve a penalty involving a deprivation of liberty: Art. 34(1)(d) of Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, O.J. 2018, L 312/56.
[387] Pursuant to Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings, O.J. 2023, L 2023/1543. The regulation will apply from 18 August 2026 (Art. 34(2)). Denmark is not bound by this regulation.

Another object of the practice could be to allow the executing judicial authority, when deciding on the application of Article 4(6) of FD 2002/584/JHA, to assess, on the basis of the certificate, whether the executing Member State could 'undertake' to the execute the sentence in that Member State in accordance with national law implementing FD 2008/909/JHA, thereby contributing to efficiency. However, the same efficiency issues discussed above apply.

- Composite sentences

The distinct parts of composite sentences are governed by two distinct regimes (*i.e.* that of FD 2008/909/JHA and that of FD 2008/947/JHA), requiring, in principle, two distinct decisions on whether or not to forward the judgment and the certificate (possibly by two distinct issuing authorities, as is the case in the Netherlands and Poland)[388] and, if the decision is taken to forward the judgment, the completion of two distinct certificates (*i.e.* the 2008/909-certificate and the 2008/947-certificate). All of this seems to be the practice in the Netherlands.[389] In Poland, both legislation and doctrine point to distinct decisions taken by (possibly) distinct authorities, but there is no data to analyse the practical application since 'mixed penalties' are not frequently imposed.[390] Distinct proceedings by distinct authorities resulting in the forwarding of distinct certificates with regard to one and the same sentence are less efficient than combining the decision making and the completion of the forms as well as their forwarding. In this context it is important to note that the Polish report recommends unifying the competence of courts acting as issuing authorities for the purposes of FD 2008/909/JHA and FD 2008/947/JHA.[391] In any case, German case-law shows that, as far as the *executing* side is concerned, it is possible to take a decision on the transfer of the execution of a Dutch composite sentence on the basis of a 2008/909-certificate alone.[392]

[388] Dutch report, para 1.3.1(b)-(c): Minister of Justice and Security (FD 2008/909/JHA) and Public Prosecution Service (FD 2008/947/JHA); Polish report, para 3.2 ('**Preliminary remarks**', Enforcement – competent authorities in Poland'): regional courts (FD 2008/909/JHA) and courts that rendered the first instance judgment (FD 2008/947/JHA).
[389] Dutch report, para 3.2(a)(ee)('Custodial sentences', 'Application'). In Spain, the notion of composite sentences as such is unknown (although the situation mentioned in Art. 80(5) of the Spanish Criminal Code might fit that description): Spanish report, para 3. As a consequence, many Spanish practitioners answered the question whether composite sentences could be split in the negative or did not answer that question at all: Spanish report, para 3.1(b).
[390] Polish report, para 3.2 ('**Preliminary remarks**', Enforcement – competent authorities in Poland').
[391] Polish report ('**Memorandum**', para II.7).
[392] German report, para 3.1(a) and 6.

7.7.5 Efficiency: conclusions

Paragraph 7.7.4 presents whole a range of issues culled from the country reports, ranging from the investigative stage up to and including the enforcement stage, that either are dealt with explicitly under the heading of efficiency in the country reports or that, on further scrutiny, are connected with considerations of efficiency. The country reports thus confirm that considerations of efficiency do play a role in practice.

An important observation is that the current regime concerning the costs of judicial cooperation places a heavier burden on less affluent Member States and on Member States that act relatively more frequent as executing Member State. Thus, that regime can form an obstacle to the effective and coherent application of the instruments if the choice for an instrument is determined not so much by considerations of effectiveness and coherence rather by cost based considerations of efficiency.

Pursuant to paragraph 7.7.3 two categories of situations are relevant: situations in which considerations of efficiency ('less money, less effort') prevail over considerations of effectiveness and coherence and situations in which it is the other way round. In practice distinctions are not always as clear cut as paragraph 7.7.3 supposes. Just as considerations of effectiveness on the one hand and considerations of coherence on the other do not necessarily always point in the same direction, considerations of efficiency on the one hand do not necessarily coincide with considerations of effectiveness and/or coherence on the other. The example of the 'iron letter' ('**Pre-trial stage**', 'EAW, safe conduct and summoning'), *e.g.*, illustrates that considerations of efficiency can sometimes prevail over considerations of effectiveness (issuing an EAW would be more effective than granting an 'iron letter' because of the coercive nature of the EAW) but at the same time coincide with considerations of coherence (granting an 'iron letter' is less intrusive than an EAW). The example of the EAW and the transfer of sentence ('**Enforcement stage**', 'EAW and transfer of sentence') illustrates that considerations of effectiveness (issuing an execution-EAW is more effective than forwarding a certificate) sometimes prevail over considerations of efficiency (it is efficient to decide *ab initio* whether to issue an execution-EAW or to forward an certificate instead of only forwarding a certificate when the execution-EAW was not successful) and considerations of coherence (forwarding a certificate is less intrusive than issuing an execution-EAW). The example of the EIO and the EAW ('**Pre-trial stage**', 'EIO and EAW') illustrates that sometimes

considerations of efficiency (it is cheaper and takes less effort to issue a prosecution-EAW if the whereabouts of the person concerned are unknown than first trying to locate him and then issuing an EIO for the purpose of interrogating him) and effectiveness (an EAW is coercive, an EIO for the purpose of interrogation a suspect or accused person is not) go hand in hand to the detriment of coherence, especially proportionality and comprehensiveness (an EIO is less intrusive than an EAW).

7.8 Centralisation, coordination and specialisation

7.8.1 Introduction

This paragraph focusses on centralisation of the competences within the issuing Member State. For the purposes of the Overarching Analysis, the notion of 'centralisation' refers to concentrating the powers of a Member State as issuing Member State under a single authority, either for an individual instrument or for several instruments. Therefore, the notion of 'centralisation' is relevant in situations in which different authorities are competent with regard to the same instrument and different authorities are competent with regard to different instruments. The competences of the issuing Member State that may be the subject of centralisation are the competence to initiate judicial cooperation proceedings ('issuing') and/or the competence to lend practical and administrative assistance to and to conduct external communication for the issuing (judicial) authority/authorities ('central authority').[393]

There is a close link between centralisation and *coordination*, *i.e.* organising the cooperation between different authorities, in order that they can perform their tasks as issuing authority in an effective and coherent manner. One can hypothesize that, in the absence of centralisation, Member States will provide for coordination mechanism between decentralised authorities.

Next to centralisation and coordination, there is a third notion that is important for the Overarching Analysis: the notion of '*specialisation*', *i.e.* limiting the tasks of a certain authority to a certain instrument or to certain instruments on judicial cooperation. This notion is closely linked to the previous ones. Centralisation necessarily breeds specialisation. Conversely,

[393] Centralisation of executing competences is not addressed here, since the project deals with the issuing side.

however, specialisation does not inherently mean centralisation. Coordination is needed both in the absence of centralisation and when centralisation has taken place but not within one single authority. In the Overarching Analysis, only the *external* aspect of coordination is relevant, *i.e.* coordination between different authorities, not coordination within one and the same authority.

7.8.2 Centralisation

This paragraph deals with two aspects of centralisation: 1. centralisation of the competence to issue and 2. centralisation of administrative and practical assistance ('central authority').

1. Competence to issue

The Dutch report shows that in the Netherlands some centralisation of the competences to issue has taken place. Concerning FD 2002/584/JHA, the competence to issue EAWs is decentralised. The same goes for the competence to issue EIOs. By contrast, the competence to issue ESOs, the competence to transfer the enforcement of custodial sentence and measures involving deprivation of liberty, and the competence to transfer the enforcement of probation decisions and alternative sanctions is centralised. With regard to the transfer of proceedings, it depends on the legal basis for the request whether the competence to issue a request is centralised or not. If a treaty is applicable that expressly provides for direct communication between judicial authorities, that competence is decentralised, the public prosecutor having jurisdiction is competent. If such a treaty is not applicable, that competence is centralised, the Minister of Justice and Security being the competent authority.[394]

Looking at the description in the German report, one can draw the conclusion that Germany has not centralised the competence to issue. First of all, the competence to issue formally belongs to the governments of the *Länder*. In a sense, these competences are already decentralised because they are not attributed at the *federal* level. The *Länder*, in turn, have delegated their competences to issue to authorities having local jurisdiction.[395]

[394] Dutch report, para 1.3.1.
[395] German report, para 1.3.1.

Judging from the Polish report, little to no centralisation of the competences to issue has taken place. With regard to FD 2002/584/JHA, FD 2008/909/JHA, FD 2008/947/JHA, FD 2009/829/JHA, Directive 2014/41/EU and mutual legal assistance the competence to issue is not centralised.[396] Only with regard to the transfer of proceedings, the situation is different. The Minister of Justice is the competent issuing authority under the national provisions. However, a bilateral treaty may provide for direct exchange of requests between judicial authorities without the involvement of the Minister of Justice.[397]

In Spain, as far as the EAW, the ESO and the EIO are concerned, no centralisation has taken place.[398] The report mentions that in some cases central judges have competence, but this does not seem to indicate centralisation but rather specialisation (see *infra*, paragraph 7.8.4).[399]

2. Central authority

Both Germany and the Netherlands did not designate any central authority under FD 2002/584/JHA, FD 2009/829/JHA or Directive 2014/41/EU.[400]

In Poland, the Minister of Justice (the General Prosecutor) is the central authority for the EAW.[401] Poland did not designate a central authority under FD 2009/829/JHA.[402] For the EIO, the International Cooperation Office of the National Public Prosecutor's Office is the central authority but only concerning the pre-trial stage.[403]

The Spanish report mentions that the Ministry of Justice is the central authority for Spain for the EAW, the ESO and the EIO.[404] However, the Ministry only lends administrative and practical assistance to the competent issuing judicial authorities. It is not responsible for the

[396] Polish report, para 1.3.1.
[397] Polish report, para 2.2.1.
[398] Spanish report, para 1.3.2. This paragraph does not deal with the other instruments.
[399] See, *e.g.*, Spanish report, para 1.3.2(c), with regard to the ESO: 'Central Judges of the Investigative'. Para 1.3.2(b) explain that such judges are competent in case of terrorist offences or of offences whose prosecution belongs to National Court.
[400] Dutch report, para 1.3.2; German report, para 1.3.2 with regard to the EAW and the EIO. The notification by Germany of the implementation of FD 2009/829/JHA does not contain a statement regarding the designation of a central authority: Council document 12106/16, 16 September 2016.
[401] Polish report, para 1.3.2(a).
[402] Polish report, para 1.3.2(d).
[403] Polish report, para 1.3.2(e).
[404] Spanish report, para 1.3.2.

administrative transmission and reception of EAWs, ESOs and EIOs, as well as for all other official correspondence relating to these instruments.[405]

7.8.3 Coordination

According to the German report, in general German law does not provide for coordination mechanisms between different German authorities. This is so, because all cooperation instruments are available to the authority that is in charge of conducting proceedings (*i.e.* the public prosecutor at the pre-trial and enforcement stage, the court at the trial stage).[406]

In the Netherlands, there are no coordination mechanisms between different issuing (judicial) authorities. Within each court, there is a mechanism for brokering information about European law and there is a coordinating examining magistrate. With regard to examining magistrates there is a national expert group of coordinating examining magistrates, but this is only a forum for discussing legal and policy issues concerning the tasks of examining magistrates. Within the Public Prosecution Service, there are twelve International Centres for Mutual Legal Assistance. Their tasks include advising members of the Public Prosecution Service on incoming and outgoing requests for judicial cooperation, quality management and coordination (but seemingly not with authorities outside of the Public Prosecution Service).[407]

The Polish report mentions coordination mechanisms within the Public Prosecution Service and within the courts, but these coordination mechanisms do not seem to extend to coordination between different issuing authorities.[408] With regard to FD 2008/909/JHA, the report states that the Ministry of Justice supervises and coordinates the execution of penalties in Poland. To that end, the competent issuing courts are required to inform the Ministry, *inter alia*, of certificates forwarded to other Member States and the Ministry of Justice may request that the competent issuing court forward a certificate to another Member State.[409]

[405] Council document 8138/15, 23 April 2015 (EAW); Council document 8718/15, 11 May 2015 (ESO); Ref. Ares(2018)5530319, 29 October 2018 (EIO).
[406] German report, para 3.1.3. However, it should be remembered that only courts are competent to issue EAWs, even though they only do that upon motion by a public prosecutor.
[407] Dutch report, para 1.3.3.
[408] Polish report, para 1.3.3.
[409] Polish report, para 1.3.2.

Pursuant to the Spanish report, in Spain the Ministry of Justice, the Attorney General's Office and the General Council of the Judiciary have established internal networks of judicial cooperation that respond to doubts, queries or questions from the Spanish judicial authorities. Courts and public prosecutors may appeal to the General Council of the Judiciary or the Attorney General's Office for advice on mutual recognition.[410]

7.8.4 Specialisation

Insofar as the competences to issue are centralised (see *supra*, paragraph 7.8.2), there is specialisation *ipso facto* but, as stated before, specialisation can occur independent of centralisation (see *supra*, paragraph 7.8.1).

One should distinguish between (units of) authorities that have specialised knowledge of judicial cooperation but whose tasks are limited to advice, consultation, coordination and/or support and (units of) authorities that actually have competence to issue but whose competence to issue is limited to one or more instruments.

The country reports mention a number of examples of the former category of authority. The German report, *e.g.*, refers to the department for international cooperation at the Public Prosecutor's Office at the District Court, which advises and supports the investigating prosecutor.[411] And the Polish report mentions the existence of the coordinator for international cooperation and human rights in criminal matters within the jurisdiction of each regional court, whose task it is to provide information and technical assistance to judges within the jurisdiction of the regional court.[412]

The Spanish report refers to examples of the latter category of authority. In Spain, next to the regular issuing authorities, for certain kinds of offences or for certain kinds of suspects or accused persons specialised judges are the issuing authority, *e.g.* the Judge of Violence against Women in cases of gender violence[413] and the Judge of Minors in the case of measures applied to minors between the ages of 14 and 18.[414] However, this specialisation is not a specialisation

[410] Spanish report, para 1.3.3.
[411] German report, para 1.3.3.
[412] Polish report, para 1.3.3.
[413] Spanish report, para 1.3.1(b) with regard to the EIO.
[414] Spanish report, para 1.3.1(c) with regard to the ESO.

in the law and practice of judicial cooperation. The Polish report states that such a specialisation is necessary when deciding on the application of judicial cooperation instruments, but that, depending on how one applies the system of random allocation, that system can result in assigning non-specialised judges to such cases.[415]

7.8.5 Conclusion

In two Member States (the Netherlands and Poland) some centralisation of the competences to issue has taken place. As to centralisation of the competence to lend practical and administrative assistance to and conduct external communication for the issuing authorities two Member States (the Netherlands and Germany) did not designate any central authority. The other two Member States (Poland and Spain) designated central authorities, one of them only with regard to the EAW and (to a limited extent) the ESO, the other with regard to the EAW, the ESO and the EIO (but excluding communication with executing (judicial) authorities).

There do not seem to be mechanisms for coordination between issuing authorities of the same Member State, although in all of the four Member States there are authorities that can be consulted on issues concerning judicial cooperation.

Insofar as Member States centralised the competence to issue, they provided *ipso facto* for specialised authorities. However, apart from centralised issuing authorities, there do not seem to be issuing authorities specialised in judicial cooperation.

The findings in the reports with regard to centralisation, coordination and specialisation do not allow for far-reaching empirically based conclusions with regard to their impact on the effectiveness, efficiency and coherence of the application of instruments of transborder cooperation. Nevertheless, the hypothesis could be that more centralisation and/or specialisation leads to a higher quality of decision making and therefore contributes to effectiveness, efficiency and coherence. As has been noted before, coordination seems to be a way to compensate a lack of centralisation and/or specialisation and, therefore, can have a positive effect on effectiveness, efficiency and coherence.

[415] Polish report, para 1.3.3. The report mentions that in the majority of the regional courts the system is allowed to choose the judges for cases concerning European judicial cooperation in criminal matters only from among judges specialising in this field.

7.9 Transfer of proceedings

7.9.1 Legal framework

There are two Council of Europe conventions that relate to the transfer of proceedings in criminal matters:

- the European Convention on the Transfer of Proceedings in Criminal Matters[416] and

- the European Convention on Mutual Assistance in Criminal Matters,[417] whose Article 21 provides for the laying of information 'with a view to proceedings in the courts of another' State, in other words for a request that another State institutes proceedings against an individual.[418]

A narrow majority of EU Member States have not ratified the convention on the transfer of proceedings.[419] Germany and Poland, *e.g.*, have not,[420] whereas the Netherlands and Spain have.[421] For Poland, the lack of ratification is explained by the existence of bilateral treaties and national rules that provide for transfer of the proceedings. Moreover, specific provisions, in particular the provision that confers so-called subsidiary jurisdiction on the requested State as a result of the request to take over the proceedings by a State who has original jurisdiction over the offence,[422] are seen as problematic, as such provisions could lead to excessive expansion of the (repressiveness of) criminal law.[423] For Germany, the issue of jurisdiction is problematic as well. The establishment of jurisdiction merely as a result of a transfer of proceedings, as

[416] Strasbourg 15 May 1972, ETS No. 073.
[417] Strasbourg 20 April 1959, ETS No. 030. The European Convention on the Punishment of Road Traffic Offences, Strasbourg, 30 November 1964 (ETS No. 052) is not mentioned here, because it was ratified by only five Member States, none of whom are represented in this project. On this convention see Böse, *Übertragung und Übernahme der Strafverfolgung* (Nomos, 2023), pp. 19-20.
[418] *Explanatory Report to the European Convention on Mutual Assistance in Criminal Matters Strasbourg*, p. 11, available at https://rm.coe.int/16800c92bd (last accessed on 30 March 2025).
[419] According to the Treaty Office of the Council of Europe only thirteen EU Member States ratified the convention: https://www.coe.int/en/web/conventions/unknown-cets-number-/-abridged-title?module=signatures-by-treaty&treatynum=073 (last accessed on 30 March 2025).
[420] German report, para 1.2; Polish report, para 1.2(b).
[421] Dutch report, para 1.2(g); Spanish report, para 1.2.2.
[422] See Art. 2 of the convention.
[423] Polish report, para 1.2(b).

envisioned by the European Convention on the Transfer of Proceedings in Criminal Matters, would violate both the principle *nulla poena sine lege* and the right to a natural judge,[424] as guaranteed by the German constitution.[425]

By contrast to the European Convention on the Transfer of Proceedings in Criminal Matters, all Member States have ratified the European Convention on Mutual Assistance in Criminal Matters. Those Member States that are not bound by the European Convention on the Transfer of Proceedings in Criminal Matters may use Article 21 of the European Convention on Mutual Assistance in Criminal Matters as means to effect a *quasi* transfer of proceedings.

At present, Germany has no national law provisions on the transfer of proceedings.[426] The national provisions on the transfer of proceedings in Poland only apply to the transfer of proceedings against non-nationals who have committed an offence in Polish territory.[427] In all four Member States, a transfer of proceedings in itself does not entail a transfer of the person concerned, independent of extradition or surrender.

Until 27 November 2024, there was no EU instrument on the transfer of proceedings in criminal matters.[428] An attempt to adopt a framework decision on this topic[429] was thwarted in 2009 by the entry into force of the treaty of Lisbon.[430] On 27 November 2024, Regulation (EU) 2024/3011 of the European Parliament and the Council on the Transfer of Proceedings in Criminal Matters was adopted.[431] The regulation will enter into force on 7 January 2025 and will apply from 1 February 2027 (Article 36). However, the rules on communication via the decentralised IT system, on electronic seals and signatures and on the legal effect of electronic documents (Article 24)[432] will apply from the first day of the month following a period of two years from the date of entry into force of the European Commission's implementing act (Article

[424] '*Garantie des gesetzlichen Richters*' (Art. 101(1)2 of the Basic Law (*Grundgesetz*).
[425] German report, para 1.2.
[426] German report, para 1.2.
[427] Polish report, para 2.3(b)(i)(aa) and para 2.2.(b)(aa).
[428] See Klip, *European Criminal Law. An Integrative Approach*, 4th ed. (Intersentia, 2021), pp. 538-544.
[429] Draft Council Framework Decision on the transfer of proceedings in criminal matters, Council document 11119/09, 30 June 2009.
[430] See Böse, *Übertragung und Übernahme der Strafverfolgung* (Nomos, 2023), pp. 46-50.
[431] O.J. 2024, L 3011/1. On the proposal that lead to the regulation see Böse, *Übertragung und Übernahme der Stafvervolgung* (Nomos, 2023), pp. 50-54; Graat, "Een nieuwe EU-verordening voor de overdracht van strafvervolging. Een geschikte oplossing voor rechtsmachtconflicten?", Nederlands Tijdschrift voor Strafrecht (2023), 68-78.
[432] The regime of Regulation (EU) 2023/2844 (see paragraph 7.10.1 on digitalisation) concerning communication between authorities (including the transmission of forms), seals and signatures and the legal effect of electronic documents is applicable to transfers of proceedings under Regulation (EU) 2024/3011 (Art. 24 of Regulation (EU) 2024/3011). To that end, a decentralised IT system will be established (Art. 25 of Regulation (EU) 2024/3011).

36). Since the European Commission must adopt that implementing act by 8 January 2027 (Article 25(1)), those rules will apply, at the latest, on 1 February 2029.

The regulation will replace (the corresponding provisions of) both Council of Europe conventions (Article 33(1)).[433] Recital (11) of the preamble states that the regulation 'does not affect spontaneous exchanges of information regulated by other Union legal acts'. For the sake of clarity, this recital does not pertain to Article 21 of the European Convention on Mutual Assistance in Criminal Matters (which speaks of 'Information laid (…) with a view to proceedings in the courts of another Party'). That convention is not an EU legal act, but a Council of Europe treaty. Besides, Article 21 of the European Convention on Mutual Assistance in Criminal Matters is not a form of spontaneous exchanging of information but rather a form of requesting mutual assistance, as is evidenced by paragraph 2 of that provision (which refers to the 'requesting' and 'requested' States) and by the *Explanatory Report* (which states that Article 21 'enables any Contracting Party to *request* another Party to institute proceedings against an individual (…)' and that '(…) the requesting Party shall itself afford the widest measure of mutual assistance which could be *requested* of it by the requested Party (…)').[434]

7.9.2 Practice

The Annotated Index raises two applicability issues with regard to transfer of proceedings: whether a transfer of proceedings is possible at the trial stage and whether it is possible at the enforcement stage.

As to the first issue (applicability at the trial stage), the reports that gave attention to this issue agree that a transfer of proceedings that are already at the trial stage is possible under the European Convention on the Transfer of Proceedings in Criminal Matters[435] and under Article

[433] Dutch report, para 1.2(g); German report, para 1.2. See Case C-296/08 PPU, *Santesteban Goicoechea*, EU:C:2008:457, para 53 with regard to Art. 31(1) of FD 2002/584/JHA, which also speaks of replacement of 'the corresponding provisions'. Evidently, the Court of Justice interprets Art. 31(1) as stipulating a replacement *en bloc* of the previous regime by the regime of FD 2002/584/JHA. A similar interpretation of Art. 33(1) of the regulation seems plausible.
[434] *Explanatory Report to the European Convention on Mutual Assistance in Criminal Matters*, p. 11 (emphasis added), available at the website of the Council of Europe: https://rm.coe.int/16800c92bd (last accessed on 30 March 2025).
[435] Dutch report, para 2.1.2(a)(i).

21 of European Convention on Mutual Assistance in Criminal Matters.[436] As to *national* law, only the Dutch report mentions that a transfer of proceedings is not possible once the trial has commenced.[437] Both the German and Polish reports mention that, although as a matter of national law a transfer of proceedings is possible at the trial stage, in practice this does not seem to happen (see *supra*, paragraph 7.7.4 ('**Trial stage**', 'Transfer of proceedings').[438]

As to the second issue (applicability at the enforcement stage), the reports that discussed this issue agree that a transfer of proceedings at the enforcement stage is possible both under the European Convention on the Transfer of Proceedings in Criminal Matters[439] and under Article 21 of European Convention on Mutual Assistance in Criminal Matters.[440] With regard to the former convention, Article 8(2) is referred to. This provision explicitly allows a request for transfer of proceedings '[w]here the suspected person has been finally sentenced', but 'only if [the requesting State] cannot itself enforce the sentence, even by having recourse to extradition, and if the other Contracting State does not accept enforcement of a foreign judgment as a matter of principle or refuses to enforce such sentence'. In other words: such a request is only possible if other – more appropriate – methods of enforcement of the sentence are not available or have failed. As to *national* law, both the Polish and Spanish reports state that a transfer of proceedings at the enforcement stage is not possible.[441] As a transfer of proceedings at the enforcement stage would only make sense – and under Article 8(2) of the European Convention on the Transfer of Proceedings in Criminal Matters would only be allowed – if the sentence is still enforceable but it is not possible to enforce the sentence in the requesting Member State, such a transfer and the subsequent proceedings in the requested Member State would not violate the principle of *ne bis in idem* as laid down in Article 54 of the Convention implementing the Schengen Agreement (CISA).[442] After all, in such a case the 'execution condition' (*viz*. that the penalty 'has been

[436] German report, para 2.1.2(b)(i); Polish report, para 2.1.2(b)(ii).
[437] Dutch report, para 2.3(b)(i)(aa).
[438] German report, para 2.1.2(b)(i): public prosecutors who were interviewed in the course of the project could not report a single case in which proceedings were transferred at the trial stage; Polish report, para 2.3(b)(i)(aa): practitioners who were interviewed in the course of the project did not encounter transfer of proceedings at the trial stage under the European Convention on Mutual Assistance in Criminal Matters.
[439] Dutch report, para 3.2(a)(ee), Custodial sentences, *Applicability according to Dutch law*; Polish report, para 3.1(a); German report, para 2.1.2(a)(ii).
[440] German report, para 3.1(a); Polish report, para 3.1(a).
[441] Polish report, para 3.2(a)(ee): the national provisions on transfer of proceedings do not apply to the enforcement stage; Spanish report, para 3.2(b).
[442] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, O.J. 2000, L 239/19.

enforced, is actually in the process of being enforced or can no longer be enforced') would not be fulfilled. This condition is compatible with Article 50 of the Charter.[443]

Does the fact that the national provisions of the Netherlands and Poland do not provide for the possibility of a transfer of proceedings respectively at the trial stage or at the enforcement stage have an impact on the effective, efficient and coherent application of the instruments? One could argue against the efficiency of transferring the proceedings at the trial stage: transferring the proceedings at an earlier stage would be more efficient and would save resources.[444] This argument, however, focusses on efficiency solely from the perspective of the issuing Member State. From the perspective of the executing Member State, taking over the proceedings at the trial stage might be more attractive cost-wise than taking over the proceedings at an earlier stage (in which case investigative steps may still be necessary) (see *supra*, paragraph 7.7.4 ('**Trial stage**', 'Transfer of proceedings'). Transferring the proceedings at the enforcement stage certainly invites efficiency based objections. And one could add proportionality based objections. Subjecting the sentenced person to another trial for the same offence places an extra burden on him. That is why Article 8(2) of the European Convention on the Transfer of Proceedings in Criminal Matters only allows a request for transfer of proceedings at that stage as a last resort: *i.e.* if other measures to enforce the sentence are not possible or have not yielded result. Given the panoply of mutual recognition instruments currently available to enforce a sentence of deprivation or of restriction of liberty, situations in which a request for a transfer would be allowed would be rather exceptional.

In any case, it appears that there is no pressing need for the possibility to transfer proceedings at the trial stage or at the enforcement stage. None of the reports mentions instances of a transfer at those stages.[445]

One report mentions criticism about the attribution of power at the national level. The Dutch report mentions that doctrine questions the wisdom of attributing the power to issue a request for a transfer of proceedings (and to decide on such a request) to an organ of the executive, the

[443] Case C-129/14 PPU, *Spasic*, EU:C:2014:586, para 74.
[444] German report, para 2.3(i).
[445] Cf. Verrest, Lindemann, Mevis & Salverda, *The Transfer of Criminal Proceedings in the European Union. An exploration of the current practice and of possible ways for improvement, based on practitioners' views* (Eleven, 2022), p. 49, as to the scope of the – at that time still – future instrument: that instrument should allow for a transfer at every stage of the pre-trial stage and even during the trial stage.

Minister of Justice and Security, and to public prosecutors, without much control by the courts.[446]

The German report refers to the opinion of a practitioner that a transfer of proceedings is cumbersome. As a rule, the person concerned must be given an opportunity to give a statement about an intended transfer.[447] If transferring proceedings is cumbersome, that would certainly impact on the effective application of that instrument. According to Dutch law, in certain cases the person concerned must be notified of an intended transfer so that he may challenge it before a court.[448] However, this requirement is not mentioned as burdensome.

In principle, the transfer of proceedings is one of the options available in situations in which the suspect, accused person or sentenced person is present in another Member States, next to surrender and the transfer of a sentence. One might therefore expect that this option is taken into account *ab initio*. However, the national practices described in the reports suggest that transfer of proceedings is mainly seen as a second best option, an option that comes into to play when other options failed, not as an *a priori* option. The German report, *e.g.*, mentions that a transfer of proceedings will be requested if an EAW was not successful[449] or an EAW could not be issued for proportionality reasons.[450] The Polish report mentions that transfer of proceedings is not considered as an alternative to issuing an EIO or a prosecution-EAW, but that it is used mainly in connection with procedures aimed at solving conflicts of jurisdiction.[451]

7.9.3 Regulation on the transfer of proceedings in criminal matters

Because the regulation is not applicable yet and its rules have, therefore, not been tested in practice, at this stage it is only possible to make some tentative observations.

First of all, the regulation means that there is one instrument that is binding on all Member States (except of course for Denmark, which Member State has an 'opt out').[452] This represents considerable progress when compared to the current, much more fragmented state of affairs.

[446] Dutch report, para 1.3.1(h).
[447] German report, para 2.2.1(b)(aa).
[448] Dutch report, para 1.1(g), *Effective remedy before a court*.
[449] German report, para 2.3(b)(i)(aa).
[450] German report, para 2.2.2(b)(i)(bb).
[451] Polish report, para 2.2.1(b)(aa).
[452] See recital (73) of the preamble.

With regard to Denmark Member States may continue to use the European Convention on the Transfer of Proceedings in Criminal Matters.

The fact that the EU legislator chose to lay down common rules on the transfer of proceedings in a regulation, instead of in a directive, is important. Because regulations are binding in their entirety, are directly applicable in all Member States (Article 258 TFEU) and do not need transposition into national law (apart from, *e.g.*, the designation of the national authorities that will be competent under the regulation (Article 32(1)(a) of Regulation (EU) 2024/3011),[453] the usual transposition problems regarding framework decisions and directives are avoided.[454] This is a positive contribution to the effective, efficient and coherent application of the instruments (see paragraph 7.3.2). As we saw earlier, the concept 'effective, efficient and coherent application' presupposes the correct transposition of secondary EU law into national law. Even so, laying down common rules by a regulation creates its own problems. The authorities of the Member States will have to apply the provisions directly, which means that they will have to interpret them. So, instead of incorrect transposition into national law the issue with regulations might be incorrect application of EU law, based on incorrect interpretation of that law.[455] Incidentally, in this respect the issue of whether or not there is a 'referral'-gap is relevant (see paragraph 7.5 and *infra*).

Interestingly, the regulation does not seem to be based on the principle of mutual recognition. It refers to Article 82 (1), *second* subparagraph, points (b) and (d) of the TFEU as its legal basis, not to the *first* subparagraph according to which '(j)udicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions (…)'. By contrast to mutual recognition instruments, the regulation does not state that it is based on the principle of mutual recognition, neither in its preamble nor in its provisions, and the mechanism of the regulation is not based on (mutual recognition of) judicial *decisions*

[453] Indeed, in principle EU law forbids Member States to transpose a regulation into national law: see, *e.g.*, Joined cases C-539/10 P and C-550/10, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, EU:C:2012:711, para 85: '(…) the second paragraph of Article 288 TFEU, which provides that a regulation of the European Union is to be binding in its entirety and directly applicable in all Member States, which, in accordance with settled case-law, precludes in principle the Member States from adopting or maintaining national provisions in parallel'. This case-law means 'that the adoption of national legislative measures is only permitted where such measures are expressly allowed or required under the applicable regulation, interpreted in the light of its objectives': Beenakker, *The implementation of international law in the national legal order: a legislative perspective,* Meijers reeks MI-305 (Ipskamp Printing, 2018), p. 127. On regulations see further Klip, *European Criminal Law. An integrative approach*, 4th ed. (Intersentia, 2021), pp. 58-59.
[454] See for transposition issues concerning FD 2002/584/JHA Barbosa *et al*, *Improving the European Arrest Warrant* (Eleven, 2023), *passim*.
[455] Barbosa *et al*, *Improving the European Arrest Warrant* (Eleven, 2023), p. 275.

to transfer criminal proceedings to another Member State but rather on *requests* to transfer criminal proceedings.

The definitions of 'requesting authority' and 'requested authority' comprise judges, courts, investigating judges and public prosecutors (Article 2(3)(4)). One of those authorities, the public prosecutor, probably does not qualify as a 'court or tribunal' within the meaning of Article 267 TFEU (see paragraph 7.5.3.1). In that sense, there is a risk of a referral gap in both Member States, and, as we have seen, a 'referral-gap' constitutes a risk for the 'effective, efficient and coherent application of the instruments'.

The regulation provides for a legal remedy for suspects, accused persons and victims, but only against a decision to *accept* the transfer of criminal proceedings and only in the *requested* State (Article 17(1)). Since this remedy must be exercised 'before a court or tribunal in the requested State', there is no 'referral-gap' with regard the decision to accept the transfer if the requested authority is a public prosecutor. However, pursuant to the preamble the requested authority 'should have broad discretion in assessing whether the transfer of criminal proceedings is in the interest of efficient and proper administration of justice, and whether a request for transfer should be refused on any of the optional grounds for refusal set out in this regulation'.[456] This discretion limits the scope of review, as Article 17(2) states that '[i]nsofar as discretion was exercised, the review shall be limited to assessing whether the requested authority has manifestly exceeded the limits of its discretion'. From the perspective of the dimension of proportionality, such a limited scope of review is problematic.

As to a decision *not to issue* a request to transfer the proceedings and a decision to *refuse to accept* a transfer of proceedings, the regulation does not provide for a legal remedy. Where such decisions are taken by a public prosecutor this is problematic, both from the perspective of the 'referral-gap' and from the perspective of proportionality.

Incidentally, the rules on competent authorities and on legal remedies do not completely satisfy Dutch doctrinal criticisms about the national institutional set-up (see *supra*, paragraph 7.9.2). Although organs of the executive such as a Minister of Justice are excluded, Member States still have the possibility of designating public prosecutors as competent authority. Admittedly, there must be a legal remedy before a court against a decision to accept a request for transfer of proceedings, but apparently the scope of judicial review should be rather limited.

[456] Recital (48) of the preamble.

Like the European Convention on the Transfer of Proceedings in Criminal Matters and the European Convention on Mutual Assistance in Criminal Matters, the regulation seems to apply to the trial stage. There is no provision that excludes a request at the trial stage. The person against whom the criminal proceedings are conducted, is designated as the 'suspect or accused person' (see, *e.g.*, Article 6(1)), which designation is broad enough to include a person who is standing trial. The request form contained in Annex I to the regulation provides corroboration of this interpretation.[457] Point 2 ('Stage of the proceedings reached') of section D of the model request form requires the requesting authority to either tick the box 'investigation/prosecution' or the box 'trial' and to provide further details on the 'current status of the investigation/prosecution or trial'.

Speaking of the model request form, following the lead of Regulation (EU) 2018/1805[458] the regulation attributes the power to adopt delegated acts to amend the model request by updating it or making technical changes to the European Commission (Article 29). This means that the normal legislative procedure for adopting a regulation will not have to be followed to amend the model request form, thereby making such amendments easier. Practice with regard to the EAW has shown that a model form can be unclear or, that, with the developments of the CJEU's case-law, it no longer reflects the correct legal state of affairs. This can be misleading to both issuing and executing judicial authorities and can lead to requests for supplementary information, to delays and sometimes even to unjustified decisions (unjustified refusals or surrenders).[459]

[457] According to well-established case-law, an Annex to an instrument is relevant for the interpretation of the provisions to which it corresponds. See, *e.g.*, with regard to the Annex to FD 2002/584/JHA (the EAW form): *Bob-Dogi*, C-241/15, EU:C:2016:385, para 44; *X (European arrest warrant — Double criminality)*, C-717/18, EU:C:2020:142, para 29. See also the opinion of AG M. Bobek in that case, EU:C:2019:1011, para 61, with reference to further case-law.

[458] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, O.J. 2018, L 303/1.

[459] See, with regard to section (d) of the EAW model form Brodersen, Glerum & Klip, *The European Arrest Warrant and In Absentia Judgments*, Maastricht Law Series 12 (Eleven International Publishing, 2020), pp. 122-124; Brodersen, Glerum & Klip, "The European arrest warrant and *in absentia* judgments: The cause of much trouble", 13 *New Journal of European Criminal Law* (2022), 7-27, at 23-24. See with regard to the EAW model form in general Barbosa *et al*, *Improving the European Arrest Warrant*, Maastricht Law Series 27 (Eleven, 2023), pp. 58-61. One of the recommendations of the *ImprovEAW* project to the EU was to find a find a way to update the EAW form in a quick and less cumbersome way than amending FD 2002/584/JHA itself: Barbosa *et al*, *Improving the European Arrest Warrant*, Maastricht Law Series 27 (Eleven, 2023), pp. 62-63.

The regulation does not give an explicit answer to the question whether it provides for a transfer of proceedings at the enforcement stage, *i.e.* when there is a final sentence against the person concerned.

One could put forward the following arguments for the interpretation that the regulation does apply to the enforcement stage. Whereas the proposal of the European Commission[460] contained a definition of the concept of 'criminal proceedings' that excluded a transfer once there is a final sentence,[461] this definition was deleted during the negotiations. Consequently, the regulation does not contain a definition of the concept of 'criminal proceedings'. Art. 1(2) of the regulation stipulates that it applies 'in *all* cases of transfer of criminal proceedings conducted in Member States',[462] which means that transfers of proceedings at the enforcement stage are included. No explicit provision of the regulation prevents a transfer of proceedings once the sentenced person's conviction is final. A transfer of proceedings at that stage would not necessarily violate the *ne bis in idem* principle[463] and could be necessary to prevent impunity. After all, the EU instruments on mutual recognition of sentences do not fully satisfy the need to prevent impunity, since the use of those instruments is subject to conditions.[464] In other words, from the perspective of preventing impunity these instruments would not make the possibility of a transfer of proceedings redundant once there is a final sentence.

On the other hand, the following arguments could be cited to dispute the conclusion that the regulation applies at the enforcement stage. The regulation does not contain an explicit provision similar to Article 8(2) of the European Convention on the Transfer of Proceedings in Criminal Matters. Since the regulation does not contain a definition of the concept of 'criminal proceedings'[465] and does not refer to the law of the Member States concerning the meaning of that concept,[466] that concept is an autonomous concept of EU law. The fact that Article 1(2) states that the regulation applies 'in all cases of transfer of criminal proceedings conducted in

[460] COM(2023) 185 final, Brussels 5 April 2023.
[461] Recital (7) of the proposal: 'This Regulation should apply to all requests issued within the framework of criminal proceedings. Criminal proceedings is an autonomous concept of Union law interpreted by the Court of Justice of the European Union, notwithstanding the case law of the European Court of Human Rights, starting from the time when persons are informed by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of those proceedings, *to be understood as the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal*' (emphasis added).
[462] Emphasis added.
[463] Cf. Case C-129/14/PPU, *Spasic*, EU:C:2014:586, with regard to Art. 54 of the CISA and Art. 50 of the Charter.
[464] Case C-129/14/PPU, *Spasic*, EU:C:2014:586, para 69.
[465] Cf., e.g., Case C-66/08, *Kozłowski*, EU:C:2008:437, para 34.
[466] Cf., *e.g.*, Case C-164/22, *Juan*, EU:C:2023:684, para 31.

Member States' just begs the question what the autonomous meaning of that concept is. In defining that concept, one must take into account the following. According to the ordinary meaning of 'criminal proceedings',[467] which denotes proceedings that are at the investigation, prosecution or trial stage,[468] it would be strange to speak of 'criminal proceedings' that 'are being conducted' once the sentence is final. The context of the concept of 'criminal proceedings' corroborates that that the regulation only applies up to and including the trial stage but not the enforcement stage. The regulation defines the notion of 'requesting State' as the 'Member State in which criminal proceedings *are being conducted* and in which a request for the transfer of those proceedings to another Member State is issued, or which has initiated or received a request for consultations concerning a possible transfer of criminal proceedings' (Article 2(1)).[469] The subject of such a request is designated either as a 'suspect' or as an 'accused person' (see, *e.g.*, Article 6 and Article 8(2)(d)). The model request form (Annex I to the regulation) that must be used when drawing a request for the transfer of proceedings (Art. 8(1)) provides further confirmation that the regulation does not apply to the enforcement stage. Point 1(i) of section B requires the issuing authority to 'describe the *current* position of the person concerned as regards the proceedings',[470] allowing that authority only one of two descriptions: either 'suspect' or 'accused person'. Point 2 of section D requires the issuing authority to designate the 'Stage of the proceedings reached', again giving just two possibilities: either 'investigation/prosecution' or 'trial'. Point 3 of section D requires the issuing authority to state the '[n]ature and legal classification of the criminal offence(s) for which the request is made, including information *about the maximum sentence* for the relevant criminal offence(s) and the relevant legal provisions relating to penalties'.[471] Clearly, the reference to the 'maximum sentence' is a reference to the sentence that is *liable* to be imposed not the sentence that is

[467] Cf., *e.g.*, Case C-402/22, *Staatssecretaris van Justitie en Veiligheid (Particularly serious crime)*, EU:C:2023:543, para 24, concerning the interpretation of terms 'in accordance with the usual meaning in everyday language' when no provision of the instrument defines those terms.
[468] See, *e.g.*, Art. 2(1) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, O.J. 2012, L 142/1 ('This Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal'.)
[469] Emphasis added.
[470] Emphasis added.
[471] Emphasis added.

actually imposed.[472] In short, the model request form does not envisage its use once there is a final sentence.

As to the objective pursued by the regulation – 'improving the efficient and proper administration of justice within the common area of freedom, security and justice (Article 1(1)' –, according to the preamble that objective requires an assessment that 'should be carried out on a case-by-case basis in order to identify the Member State that is best placed *to prosecute the criminal offence* in question'.[473] Concerning the need to prevent impunity, it cannot be denied that the EU instruments on mutual recognition of sanctions are subject to conditions, do not cover all possible offences and sanctions and, therefore, cannot exclude each and every risk of impunity. However, even if the regulation were to extend to the enforcement stage this would still not exclude the risk of impunity either. The requested State would still need to have either original or subsidiary jurisdiction. What is more, extending the scope of the regulation to the enforcement stage raises proportionality issues (see paragraph 7.1.2) and transfers at the enforcement stage are not very efficient (see paragraph 7.1.2). Consequently, contrary to the objective of the regulation such transfers do not contribute to improving the efficient and proper administration of justice.

The authors lean to the interpretation that a transfer of proceedings is not possible at the enforcement stage. In any case, there does not seem to be a need, in practice, for the possibility of transferring the proceedings at the enforcement stage (see *supra*, paragraph 7.9.2).

Unlike both Council of Europe conventions, the regulation contains provisions about the rights of the suspect or accused person (Article 6), as well as the rights of the victim (Article 7). There is a requirement (with certain exceptions) to notify the suspect or accused person and the victim of the intention to issue a request for a transfer of proceedings and to afford them an opportunity to give their opinion on that intended request. These requirements could be seen as cumbersome (see *supra*, paragraph 7.1.2) and, therefore, as impairing the effective application of the instrument. On the other hand, from the perspective of proportionality these requirements perform an important function. They allow the person concerned to put forward (proportionality based) arguments against a request for transfer of proceedings.

[472] Cf. Case C-717/18, *X (European arrest warrant – Double criminality)*, EU:C:2020:142, paras 30-31, with regard to the EAW form.
[473] See, *e.g.*, recitals (24) and (45) (emphasis added).

One of the possible obstacles to a transfer of proceedings are the costs of translating the case-file (paragraph 7.7.4).

Although Article 18(1) of the European Convention on the Transfer of Proceedings in Criminal Matters stipulates that no translation of the documents relating to the application of the convention – *e.g.* the case-file – shall be required, Article 18(2) allows contracting parties to make a declaration that they require a translation. If the requested State made such a declaration, the requesting State must provide a translation of the documents. The costs of translation will be for the requesting State. Pursuant to Article 20 of the convention, no refund of any expenses resulting from the application of the convention is possible. As to translations when laying information within the meaning of Article 21 of the European Convention on Mutual Assistance in Criminal Matters, Article 16(1)-(2) of that convention lays down the same rules as Article 18(1)-(2) of the European Convention on the Transfer of Proceedings in Criminal Matters.[474] Equally, under the European Convention on Mutual Assistance in Criminal Matters the requested State cannot claim a refund of the expenses incurred in the execution of a request (Article 20), such as the costs of translating the information laid under Article 21(1).

Unlike the Council of Europe conventions, the regulation on the transfer of proceedings in criminal matters requires translations. Like all the other mutual recognition instruments, the regulation provides for a model form (Annex I: Request form for the transfer of criminal proceedings), which must be used when requesting a transfer of criminal proceedings. The completed request form must be translated, by the requesting State, into an official language of the requested State or in any other language accepted by that Member State (Article 8(5)).[475] The case file must likewise be accompanied by a translation (Article 11(5)). With regard to costs, the rule is that each Member State bears its own costs of transfers of criminal proceedings from the application of the regulation (Article 19(1)). Nevertheless, the regulation contains a specific provision regarding the costs of translation of the case-file (and other relevant documents). If the translation 'would entail large or exceptional costs', the requesting State may submit a proposal to share them; once such a proposal is submitted, the requesting and requested authorities must consult each other in order to reach an agreement on the sharing of the costs (Article 19(2)). The preamble explains that ideally such consultations should take place before

[474] Pursuant to Art. 21(3) of the European Convention on Mutual Assistance in Criminal Matters, Art. 16 of that convention applies to information laid under Art. 21(1).
[475] Pursuant to Art. 32(1)(d), Member States must notify the Commission which languages they accept for the request, for the submission of supporting information and for communication.

the request is issued.[476] The proposal is not binding on the requested State. If no agreement is reached before the decision to accept the transfer, the requesting authority may decide to withdraw the request or to maintain the request and bear part of the costs deemed exceptionally high.[477] Although the rules on costs are somewhat open-ended, they do seem to represent a step in the right direction when compared to the Council of Europe regime.

Like the European Convention on the Transfer of Proceedings in Criminal Matters, the regulation provides for jurisdiction for the requested State if that state does not already have original jurisdiction on the basis of its national law: 'for the purposes of this Regulation the requested State shall have jurisdiction over any criminal offence to which the national law of the requesting State is applicable' (Article 2(1)). Unlike the European Convention on the Transfer of Proceedings in Criminal Matters, however, this subsidiary jurisdiction[478] is *limited* to five situations that are exhaustively listed in Article 3(1)(a)(e).

On the one hand one could argue that this a step backwards when compared to the regime of European Convention on the Transfer of Proceedings in Criminal Matters. If the requested State does not have original jurisdiction and if none of the situations in which that State acquires subsidiary jurisdiction is present, a request for the transfer of proceedings is doomed to fail.[479] Under Article 2(1) of European Convention on the Transfer of Proceedings in Criminal Matters, the requested State will always have subsidiary jurisdiction pursuant to a request for transfer of proceedings concerning an offence to which the law of the requesting State is applicable.

On the other hand, one must recognise that the provision on subsidiary jurisdiction was a bone of contention for some Member States, who are wary of overexpansive jurisdiction (see *supra*, paragraph 7.1.2), and for those Member States was one of the reasons not to even sign the European Convention on the Transfer of Proceedings in Criminal Matters, let alone ratify it. Similarly, in 2009 the negotiations on a draft framework decision on the transfer of proceedings.[480] And anyway, in practice lack of jurisdiction is evidently not perceived as a gap

[476] Recital (61) of the preamble.
[477] Recital (61) of the preamble.
[478] *I.e.* jurisdiction that is exclusively based on the regulation. Like the European Convention on the Transfer of Proceedings in Criminal Matters, Art. 3(2) states that '[w]here jurisdiction is established by the requested State exclusively on the basis of paragraph 1, that jurisdiction shall only be exercised pursuant to a request for the transfer of criminal proceedings under this Regulation'.
[479] Art. 12(1)(g) of the regulation obliges the requested authority to refuse the transfer of proceedings in such a case.
[480] Verrest, Lindemann, Mevis & Salverda, *The Transfer of Criminal Proceedings in the European Union. An exploration of the current practice and of possible ways for improvement, based on practitioners' views* (Eleven, 2022), p. 58.

in the legal framework since many Member States nowadays tend to have a broad basis for extraterritorial jurisdiction.[481] In any case, those Member States that have not ratified that convention in the future will be able to exercise subsidiary jurisdiction in the absence of original jurisdiction, whereas under the present regime they cannot take over proceedings in such cases.

The regulation is tailored, at least partly, to function in cases in which another instrument, the EAW, was previously employed in vain. In a number of situations in which surrender was refused by the requested Member State that State has subsidiary jurisdiction (Article 3(1)(a)(b)) and a number of different situations in which the requested Member States refused surrender feature among the criteria for requesting a transfer (Article 5(2)(c)(d)). In this respect the regulation, at least partly, explicitly expresses the approach that transferring the proceedings is only a second best option which, under the current regime, seems to be prevalent.

7.9.4 Conclusions

From the perspective of coherence, the current legislative set-up of transfer of proceedings is fragmented (Council of Europe treaties, bilateral treaties, national legislation) and, therefore, problematic. The future application of the recently adopted EU instrument on transfer of proceedings will bring uniformity of rules to which all Member States are bound and, therefore will contribute to coherence and efficiency.

As the notion of 'effective, efficient and coherent application' presupposes a correct understanding of the rules, the current legislative set-up is less than satisfactory for another reason as well. Because the current rules are not part of EU law, there is no system in place to ensure that Member States interpret and apply the treaties correctly, let alone their national legislation. By contrast, the regulation is part of EU law, introduces uniform rules and, as, in principle, it does not need legislative action by the Member States, avoids the transposition issues plaguing other EU instruments. Although in practice authorities from different Member

[481] Verrest, Lindemann, Mevis & Salverda, *The Transfer of Criminal Proceedings in the European Union. An exploration of the current practice and of possible ways for improvement, based on practitioners' views* (Eleven, 2022), p. 58. The authors also refer to wide adherence to the ubiquity theory (this theory holds that the offence may be localised everywhere where one of the constituent elements occurred).

States might differ in their understanding of these rules, its uniform interpretation is ultimately in the hands of the CJEU.

Further to this, by contrast to the current regime (at least, the current regime in some Member States) the regulation does not recognise the Minister of Justice as a competent authority, only designating judges, courts, investigating judges and public prosecutors as possible competent authorities. By excluding organs of the executive, the regulation avoids a risk of a 'referral-gap' in that respect. However, by including public prosecutors the regulation creates a risk of a 'referral-gap' in both the requesting and the requested Member State. This is problematic from the point of view of effective, efficient and coherent application, because there is a risk that it is not possible to refer questions about the interpretation of the regulation to the Court of Justice. As the regulation provides for a legal remedy before a court or tribunal in the requested State, this minimises the risk of a 'referral-gap' in that Member State, but only with regard to decisions to accept a request for a transfer. Moreover, this legal remedy is problematic from the point of view of proportionality, because the scope of review is intended to be rather limited.

When compared to the current Council of Europe regime, the scope for transfer of proceedings extends, at least, over the stages of investigation, prosecution and trial. Whether a transfer of proceedings is possible at the enforcement stage is not clear. In any case, an exclusion of the enforcement stage would not be problematic from the perspective of effective, efficient and coherent application and could be applauded from the point of view of proportionality, since EU law provides for transferring the execution of (some) sentences.

Under the current regime the costs of translating the case-file can be an obstacle to transferring proceedings. From the perspective of efficiency, the regulation presents a step forward, albeit a baby step. In certain cases, there is a – non-binding – mechanism for sharing costs.

Currently for a large minority of Member States the European Convention on the Transfer of Proceedings in Criminal Matters always provides the requested Member State with subsidiary jurisdiction over the offence. By contrast, the regulation provides for subsidiary jurisdiction for the requested Member State only in a few, exhaustedly listed situations. One could see this as impairing the effectiveness, efficiency and coherence of the application of the instrument, as it rules out a transfer of proceedings where the requested Member State does not have original jurisdiction and where the regulation does not provide for subsidiary jurisdiction. On the other

hand, due to the proliferation of international treaties[482] and EU instruments[483] that require or allow States to establish (extraterritorial) jurisdiction, at present the jurisdiction of Member States is more extensive than it was at the time of the adoption of European Convention on the Transfer of Proceedings in Criminal Matters.[484] Besides, one can argue that the provisions on subsidiary jurisdiction actually contribute to the effective, efficient and coherent application for those Member States that are not bound by the European Convention on the Transfer of Proceedings in Criminal Matters and that, at present, in the absence of original jurisdiction cannot take over proceedings.

Finally, under the current regime transferring the proceedings does not seem to be regarded as an independent, *ab initio*, (less intrusive) alternative to other instruments, but rather as a fallback option if other instruments fail to achieve the desired result. This is problematic from the point of view of coherence, particularly from the point of view of comprehensiveness and proportionality. The regulation, at least in part, reinforces such an approach to the instrument, as evidenced by some of the criteria for transferring proceedings and by some of the situation in which the requested State can exercise subsidiary jurisdiction.

7.10 Digitalisation

7.10.1 Introduction: digitalisation of judicial cooperation

Two EU instruments adopted in December 2023 concern digitalisation of judicial cooperation in civil, commercial and criminal matters: Directive (EU) 2023/2843[485] and Regulation (EU)

[482] See Boister, *An Introduction to Transnational Criminal Law*, 2nd ed. (Oxford University Press, 2018), pp. 45-241.
[483] See Klip, *European Criminal Law. An integrative approach*, 4th ed. (Intersentia, 2021), pp. 258-266.
[484] Of course, there will still be cases in which a Member State lacks jurisdiction. *E.g.*, in 2021 Dutch journalist Peter R. de Vries was murdered in Amsterdam. One of the accused persons, a Polish national, was surrendered to the Netherlands by Poland for offences related to that murder. At the same time, Poland transferred proceedings against that accused person concerning possession of amphetamines in Poland. This was done on the basis of Art. 21 of the European Convention on Mutual Assistance in Criminal Matters. However, because the Netherlands does not have original jurisdiction over such an offence that is committed abroad by a non-national or non-resident and because Art. 21 does not confer subsidiary jurisdiction, the district court had to rule that the Public Prosecution Service lacked the right to institute criminal proceedings for the drugs offence (ECLI:NL:RBAMS:2024:3270).
[485] Directive (EU) 2023/2843 of the European Parliament and of the Council of 13 December 2023 amending Directives 2011/99/EU and 2014/41/EU of the European Parliament and of the Council, Council Directive 2003/8/EC and Council Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA,

2023/2844.[486] The regulation is intended to modernise and enhance judicial cooperation, whereas the directive amends certain legal acts concerning digitalisation of judicial cooperation to bring them into line with the regulation. The emphasis seems to be on improving the efficiency and effectiveness of judicial cooperation.[487] Both the regulation and the directive entered into force at the same date, 16 January 2024.[488] As usual, Denmark and Ireland, are bound neither by the regulation[489] nor by the directive.[490]

Regulation (EU) 2023/2844 establishes a uniform legal framework for the use of electronic communication – *i.e.* digital exchange of information over the internet or another electronic communication network – between competent authorities in judicial cooperation procedures in civil, commercial and criminal matters (Article 1(1)). The regulation applies to, *inter alia*, electronic communication in judicial cooperation procedures in criminal matters as provided for in Article 3 and, *inter alia*, to hearings through videoconferencing or other means of distance communication technology in judicial cooperation procedures in criminal matters as provided for in Article 6 (Article 1(2)).

Article 3(1) of the regulation stipulates that communication between competent authorities of different Member States pursuant to the legal acts concerning judicial cooperation in criminal matters listed in Annex II 'shall be carried out through a secure, efficient and reliable decentralised IT-system'. Annex II mentions, *inter alia*, the following legal acts:

- FD 2002/584/JHA;
- FD 2008/909/JHA;
- FD 2008/947/JHA;
- FD 2009/829/JHA; and

2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, as regards digitalisation of judicial cooperation, O.J. 2023, L 2843/1.

[486] Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, O.J. 2023, L 2844/1.

[487] See recital (4) of the preamble of Regulation (EU) 2023/2844 which states that this regulation 'seeks to improve the efficiency and effectiveness of judicial procedures and to facilitate access to justice by digitalising the existing communication channels, which should lead to cost and time savings, a reduction of the administrative burden, and improved resilience in force majeure circumstances for all authorities involved in cross-border judicial cooperation'.

[488] *I.e.*, the twentieth day following that of their publication in the O.J.: Art. 26(1) of the regulation and Art. 16 of the directive.

[489] Recitals (59) and (60) of the preamble of the regulation.

[490] Recitals (8) and (9) of the preamble of the directive.

- Directive 2014/41/EU.

The term 'communication' includes 'the exchange of forms' established by the legal acts listed in Annex II, therefore it includes transmitting the EAW form, and the certificates required under FD 2008/909/JHA, FD 2008/947/JHA, FD 2009/829/JHA and Directive 2014/41/EU.[491]

Pursuant to Article 6 of the regulation, if the competent authority of a Member State, in the context of proceedings under, *inter alia*:

- FD 2002/584/JHA;
- FD 2008/909/JHA;
- FD 2008/947/JHA; and
- FD 2009/829/JHA,

requests a hearing of a suspect, accused person or convicted person who is present in another Member State, the competent authority of that Member State must allow that person to participate in that hearing through videoconferencing or other distance communication technology (Article 6(1)(2)). There are, however, two conditions: the particular circumstances of the case must justify the use of that technology and the suspect, accused person or convicted person must consent to it (Article 6(2)). Such consent is surrounded by a number of safeguards (Article 6(2)). There is, however, a possibility of derogating from the requirement of seeking consent 'where participation in a hearing in person poses a serious threat to public security or public health which is shown to be genuine and present or foreseeable' (Article 6(2)).

Directive (EU) 2023/2843 contains amendments to the instruments mentioned in order to bring them in line with the regime of the regulation (Articles 2-11 of Directive (EU) 2023/2843).[492] *E.g.*, Article 3(1) amends Article 18(1)(a) of FD 2002/584/JHA in such a way that it reads:

[491] Communication by alternative means is only allowed if electronic communication through the decentralised IT system is not possible due to its disruption, the physical or technical nature of the transmitted material or *force majeure* (Art. 3(2)). Additionally, other secure and reliable and less formal means of communication – such as e-mail (recital (25) of the preamble) – may be used if use of the decentralised IT system is 'not appropriate in a given case' (Art. 3(3)), *e.g.* if direct personal communication is needed or the communication involves the handling of sensitive data: recital (25) of the preamble). However, this exception does not apply to the exchange of forms provided for by the legal acts listed in Annex II (Art. 3(4)).

[492] Doctrine discusses two possible effects of an amendment by a directive to a framework decision under Art. 9 of Protocol (No 36) on transitional provisions: only the amended provision of the framework decision acquires the legal character of a provision of a directive, or the entire framework decision is transmuted into a directive. See H. Satzger, "Legal effects of directives amending or repealing Pre-Lisbon framework decisions", (2015) *New Journal of European Criminal Law*, 528-537; F. Zeder, "Typology of pre-Lisbon acts and their legal effects according to Protocol No 36", (2015) *New Journal of European Criminal Law*, 485-493. AG E. Sharpston rejects the latter possible effect; only the individual legal character of the amended provision changes: opinion of 31 October 2019, Case C-234/18, *"AGRO in 2001"*, EU:C:2019:920, para 52.

'*Article 18*

Situation pending the decision

1. Where the European arrest warrant has been issued for the purpose of conducting a criminal prosecution, the executing judicial authority must:

(a) either agree that the requested person should be heard according to Article 19 of this Framework Decision *or via videoconferencing in accordance with Article 6 of Regulation (EU) 2023/2844*'.[493]

Pursuant to Article 6(6) of the regulation, Article 6 is 'without prejudice to other Union legal acts that provide for the use of videoconferencing or other distance communication technology in criminal matters'. In this context recital (43) of the preamble states that

'The rules laid down in this Regulation on the use of videoconferencing or other distance communication technology for hearings in judicial cooperation procedures in criminal matters should not apply to hearings through videoconferencing or other distance communication technology *for the purposes of taking evidence or of holding a trial which could result in a decision on the guilt or innocence of a suspect or an accused person*. This Regulation should be without prejudice to Directive 2014/41/EU, to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, and to Council Framework Decision 2002/465/JHA (…)'.[494]

Obtaining evidence is the province of Directive 2014/41/EU and, as discussed earlier, according to the *communis opinion* at present there is no legal basis in EU law for videoconferencing for the purpose of enabling the accused person to participate in his trial (see *supra*, paragraph 7.2.3). All of this raises the question what the *purpose* of a hearing under Article 18(1)(a) of FD 2002/584/JHA may be. One might be tempted to understand Article 6(6) in such a way, that a hearing on the basis of Article 6 in combination with Article 18(1)(a) could not be for the purpose of taking evidence, as that is governed by Directive 2014/41/EU. However, this interpretation would rob Article 18(1)(a) of all meaning, as the legislative history[495] of the

[493] Emphasis added.
[494] Emphasis added.
[495] Dutch report, para 2.3(b)(ii)(aa).

present Article 18(1)(a) shows that it was a concession to those Member States that kept pushing for a time limit of 30 days for the decision on surrender[496] and that it allows the issuing judicial authority already to hear the requested person *as a suspect or accused person*, *i.e.* with a view of evidence gathering, pending the decision on the execution of the EAW. The fact that 18(1) only relates to *prosecution*-EAWs provides corroboration: in case of an execution-EAW evidence gathering is no longer needed. The most likely interpretation of Article 6(6) of the regulation is that the particular provisions of the regulation on videoconferencing, for instance the safeguards and the exception to the requirement of consent, do not apply when a hearing via videoconferencing is conducted on the basis of Directive 2014/41/EU.

In addition to rules about communication through the decentralised IT system and videoconferencing, the regulation contains rules about electronic seals and electronic signatures (Article 7(2)) and about the legal effects of electronic documents (Article 8) in judicial cooperation procedures in criminal matters. By contrast, the rules on service of documents to natural persons via the European access point on the European e-Justice Portal (Article 4) do not apply to procedures in criminal matters.[497]

The regime concerning the application of the regulation and the transposition of the directive is convoluted, to say the least. The regulation will apply from 1 May 2025 (Article 26(1) of Regulation (EU) 2023/2844). From that date on, the European Commission must adopt implementing acts on the decentralised IT system with regard to

- FD 2002/584/JHA and Directive 2014/41/EU by 17 January 2026;
- FD 2008/909/JHA by 17 January 2027;
- FD 2008/947/JHA and FD 2009/829/JHA by 17 January 2029 (Article 10(3)(a)(b)(d) of Regulation (EU) 2023/2844).

The regime concerning transposition of Directive (EU) 2023/2843 is aligned with the ultimate dates for the European Commission's implementing acts mentioned in Article 10(3) of Regulation (EU) 2023/2844. In short, Member States must transpose the amendments to the instruments within two years after the entry into force of the European Commission's implementing act referred to in Article 10(3)(a)(b)(d) of Regulation (EU) 2023/2844) and must

[496] According to Art. 17(3) of FD 2002/584/JHA, if the requested person does not consent to surrender the final decision on surrender should, in principle, be taken within 60 days after his arrest.
[497] In the context of penalty orders, the German report suggests extending the scope of these provisions to judicial cooperation in criminal matters: para 2.2.1(a)(bb).

apply the national provisions from the first day of the month following the period of two years after the entry into force of that implementing act (Article 12 (concerning the amendments to FD 2002/584/JHA and Directive 2014/14/EU), Article 13 (concerning the amendments to FD 2008/909/JHA) and Article 15 (concerning the amendments to FD 2008/947/JHA and FD 2009/829/JHA)).

As an example of what of all of this means: the Member States must have transposed the amendments to FD 2002/584/JHA at the latest on 17 January 2028 – *i.e.* within two years of the entry into force of the corresponding implementing act, which in this case must enter into force on 17 January 2026 (Article 10(3)(a) of Regulation (EU) 2023/2844) – and must apply the national transposing provisions at the latest on 1 February 2028 – *i.e.* the first day of the month following the period of two years after the entry into force of that corresponding implementing act –. At the latest from the latter date, Member States are obliged to allow the requested person to be heard by videoconference if the issuing judicial authority requests a hearing pending the decision on the EAW and the relevant conditions are met.[498] Under EU law, there is no duty to transpose the amendments and to apply the national provisions before the dates mentioned.

The digitalisation of judicial cooperation in criminal matters pursued by the regulation and the directive, as such, has some impact on the effective, efficient and coherent application of the instruments. The rules on communication between competent authorities through a centralised IT system, the rules on electronic seals and signatures and the rules on the legal effect of electronic documents undoubtedly contribute to the efficiency of the application of the instruments.[499] However, both the regulation and the directive leave the decision-making whether or not apply an instrument and, if so, which instrument, completely unaffected. They do not contain any provisions in this regard. Moreover, neither the regulation nor the directive provides for (further) alignment of the instruments. Nevertheless, the next paragraph focusses on one innovation of the regulation and the directive that, indirectly, could play a role in contributing to the effective and coherent application of the instruments: the possibility of hearing the requested person via videoconference pending the decision on the execution of a (prosecution-)EAW (Article 18(1)(a) as amended by Directive (EU) 2023/2843). Because the regulation is not applicable yet and the Member States have not transposed the directive yet,

[498] Dutch report, para 2.3(b)(ii)(aa). In the same vein German report, para 2.2.2(b)(ii)(bb): 'Spring 2028 at the earliest'); Polish report, para 2.1.1.2(b)(ii) ('at the latest sometime in 2028').
[499] The Spanish report refers to the delays that are sometimes incurred in authenticating communication: **Memorandum**, point 4.

because the regime established by the regulation and the directive is therefore not tested in practice yet, and because there is not a lot of literature on the subject yet, the further discussion of that regime in this paragraph remains limited to the possible consequences for only one instrument, the EAW, and that instrument's possible interplay with a few other instruments.

7.10.2 EAW, videoconferencing and effective and coherent application

As discussed previously, the possibility of requesting a hearing on the basis of Article 18(1)(a) of FD 2002/584/JHA is seldom used in practice (see supra, paragraph 7.2.2). In the near future (*supra*, paragraph 7.10.1), when such a request is being caried out, it will be possible to hear the requested person by videoconference. A hearing by videoconference allows the issuing judicial authority to conduct the hearing and to interact with the requested person directly instead of relying on a hearing conducted by the executing judicial authority. Perhaps the possibility of hearing the requested person by videoconference will resuscitate Article 18(1)(a) of FD 2002/584/JHA (see paragraph 7.2.2).

In any case, that possibility could have a positive impact on the dimensions of proportionality and comprehensiveness. The Polish report expects that in certain cases after such a hearing the EAW might be withdrawn.[500] Indeed, an initial hearing of the requested person while he is still in the executing Member State pending the decision on surrender might show that there is no need for surrender anymore, or that a less intrusive alternative to surrender is available. Although, pursuant to the CJEU's case-law, it is for the issuing judicial authority to assess the proportionality of issuing EAW without subsequent review by the executing judicial authority,[501] it may well be that this authority is not aware of all relevant circumstances, particularly the personal circumstances of the requested person, which, moreover, might have changed since issuing the EAW. A hearing of the requested person by videoconference would give him the opportunity to point those circumstances out to the issuing judicial authority and to request withdrawing the EAW and, when applicable, replacing it with another instrument. Moreover, the issuing authority, of its own accord, might feel the need to use a hearing for an update to assess whether to continue the surrender procedure. Such an update serves the

[500] Polish report, para 2.1.1.2(b)(ii).
[501] Case C-281/22, *G.K. and Others (European Public Prosecutor's Office)*, EU:C:2023:1018, para 61.

interests of the requested person (with regard to proportionality) as well as the interests of the issuing Member State (with regard to effectiveness and efficiency). The German report points to the opinion of a defence counsel regarding cases in which the requested person is released on bail in the executing Member State pending the decision on surrender. In such cases, it would be less intrusive to question the requested person (*e.g.* by videoconference) and to prepare the indictment while he is still in the executing Member State than to surrender him.[502] These are precisely the situations in which the ESO could function as an alternative to surrender (see *infra*).

Further to this, the Polish report also suggests making it possible to hear the requested person by videoconference when the executing judicial authority has postponed surrender on the basis of Article 24(1) of FD 2002/584/JHA. Combined with a (clear) legal basis for videoconferencing for the purpose of participation in the trial – which is not to be found in the digitalisation instruments (see *supra*, paragraph 7.10.1) –, the expectation is that this will lead to a decrease of the number of surrenders.[503]

The Polish suggestions raise a question concerning the relationship between FD 2002/584/JHA and FD 2008/909/JHA. In its present and future wordings, the scope of Article 18(1)(a) of FD 2002/584/JHA is limited to cases in which the EAW 'has been issued for the purpose of conducting a criminal prosecution'. This is understandable, as the requested person has already been finally convicted and a hearing, therefore, could not contribute to his prosecution and trial anymore. However, as the reports show there are issues about the coherence between both framework decisions. If the issuing judicial authority has chosen to issue an execution-EAW (instead of forwarding the judgment to the executing Member State), the requested person might also want an opportunity to put forward the argument directly before the issuing judicial authority that there is a less intrusive alternative (forwarding the judgment to the executing Member State) and, also, the issuing authority might profit from an opportunity to assess whether to continue the surrender procedure. Comparable to the assessment of the proportionality of a prosecution-EAW, there may be circumstances that militate for enforcement of the sentence in the executing Member State but of which the issuing judicial authority simply is not aware. Of course, the executing judicial authority could apply Article 4(6) of FD 2002/584/JHA, but if the CJEU adopts the interpretation of AG J. Richard de la Tour that

[502] German report, para 2.2.2(b)(ii)(bb).
[503] Polish report, **Memorandum**, para I.3.

provision will be an empty shell, because its application will be entirely dependent on the issuing judicial authority (see *supra*, paragraph 7.7.4, **Enforcement**, EAW and transfer of sentence and EAW and a certificate under FD 2008/909/JHA).

There is also an issue about coherence between the EAW and the ESO. Once the requested person is arrested on the basis of a prosecution-EAW, it may turn out that he does not present a flight risk and that he is willing to comply with supervision measures while at large in the executing Member State. In such a case replacing the EAW with an ESO might be a less intrusive alternative that ensures that the requested person will be available to the prosecuting authorities in the issuing Member State and will attend the trial in that Member State (see paragraph 7.2.2). A hearing by videoconference within the meaning of Article 18(1)(a) of FD 2002/584/JHA could be the tool for the requested person to put forward the suggestion of replacing a (prosecution-) EAW with an ESO. Strictly speaking, the wording of Article 18(1)(a) of FD 2002/584/JHA does not make clear who should take the initiative for a hearing by videoconference. That provision only stipulates that the executing judicial authority has to 'agree that the requested person should be heard (…) via videoconferencing in accordance with Article 6 of Regulation (EU) 2023/2844'. As FD 2002/584/JHA is based on the principle of direct interaction between the issuing and executing judicial authorities, it seems likely that a request by the issuing judicial authority is a *conditio sine qua non* for a hearing by videoconference. Article 6(2) of the regulation provides confirmation.[504] Consequently, the requested person does not have the right to be heard by the issuing judicial authority (by videoconference or otherwise).[505] Nevertheless, the requested person could ask the executing judicial authority to suggest to the issuing judicial authority holding a hearing by videoconference, in other words could suggest that the issuing judicial authority requests such a hearing. Given the principle of sincere cooperation, which underpins the 'dialogue' between issuing and executing judicial authorities,[506] the issuing judicial authority would need to put forward cogent arguments not to follow this suggestion of its counterpart.

[504] 'Where the competent authority of a Member State requests (…) the hearing of a suspect or an accused (…) present in another Member State in proceedings under the legal acts listed in paragraph 1 of this Article, the competent authority of that other Member State (the 'requested competent authority') shall allow such persons to participate in the hearing through videoconferencing or other distance communication technology (…)'
[505] By contrast the requested person does have the right to be heard by the executing judicial authority (Art. 14 of FD 2002/584/JHA).
[506] See, *e.g.*, Case C-220/18 PPU, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, para 104.

In short, the aforementioned developments in the EU legal framework on digitalisation of cooperation might facilitate improving the coherence (especially the proportionality), effectiveness and efficiency of the application of the cooperation instruments.

7.10.3 Decision support software and artificial intelligence

Quite a different angle to the issue of digitalisation is the use of digitalised interactive systems in order to support issuing authorities in making decisions whether to apply an instrument of judicial cooperation or not and the use of artificial intelligence (AI) for this.

At first sight this issue might not seem to be relevant to improving the effectiveness, coherence, and efficiency of the application of the instruments of judicial cooperation. After all, deciding whether to use such an instrument is a matter for the competent national authorities.

But using uniform support systems throughout the Union could contribute to a more coherent, effective and efficient application of these instruments. This presupposes that the guiding principles are operationalised for use in the Member States in a uniform way and subsequently are incorporated in these support systems. The systems should also incorporate in a uniform way interactive forms like the EAW-form and certificates.[507]

Moreover, the systems could not only support issuing authorities in initiating judicial cooperation with authorities of other Member States but also in making follow-up decisions, that is making decisions during the cooperation with authorities of other Member States, *e.g.* whether to substitute an execution-EAW for a transfer of the sentence or issuing an ESO after having issued a prosecution-EAW.

Providing for further details on how to proceed in developing these systems falls outside of the scope of this project. What can be said is that a lot of work has to be done before these systems can be put in practice, such as:

- identifying choices to be made by issuing authorities;
- identifying relevant factors in making these choices and establishing their relative weight;

[507] The idea of a digitalised and interactive EAW form was already mooted in the *ImprovEAW* project: Barbosa *et al*, Improving the European Arrest Warrant, Maastricht Law Series 27 (Eleven, 2023), pp. 62-63.

- drafting ‘decision trees’;
- digitalising EAW-forms and other forms in an interactive way.

The analyses in this report and the outcomes of the research provide for useful material at least with regard to identifying choices and relevant factors and give some insight in the logic of making decisions by issuing authorities.

7.10.4 Conclusions

The emphasis of the recent instruments on digitalisation of judicial cooperation discussed in paragraph 7.10.1 seems to be on improving efficiency and effectiveness of judicial cooperation. One of the innovations introduced by Regulation (EU) 2023/2844 and Directive (EU) 2023/2843, the possibility of hearing the requested person through videoconference pending the decision on the execution of a prosecution-EAW (Article 6 of the regulation in combination with Article 2(3) of the Directive), obviously fits well with that objective. That innovation also opens up new vistas in which the possibility of hearing the requested person plays a role in improving the coherence of the application of the EAW and the ESO, especially from the point of view of proportionality and comprehensiveness.

Hearing the requested person through videoconference pending the decision on the EAW could be used to assess whether the execution of a prosecution-EAW is still necessary and could lead to a withdrawal of the EAW or to substituting the EAW with an ESO. If the legal basis for hearing the requested person through videoconference is broadened to include execution-EAWs, hearings through videoconference could also be used to improve the coherence between FD 2002/584/JHA and FD 2008/909/JHA. Moreover, if the possibility to hear the requested person through videoconference were extended to situations in which the executing judicial authority has postponed surrender, this might lead to a decrease in the number or surrenders (paragraph 7.10.2).

The recent focus on digitalisation is also an invitation to reflect on the use of uniform digital systems to support decision making. Uniform guidance through digital support systems and uniform interactive digital forms could improve the quality of decision making and improve the coherent application of the instruments, not only with regard to the decision on initiating judicial cooperation but also with regard to follow-up decisions (paragraph 7.10.3).

7.11 Anticipating the application of instruments: sentencing

7.11.1 Introduction

Chapter 4 of the Annotated Index addresses the question whether, in sentencing, courts will anticipate a future need for judicial cooperation with regard to the sentence to be imposed.

Anticipating whether judicial cooperation will be needed in the future, can lead to the imposition of sentences that can be executed, if need be by the application of one or more instruments, and to avoiding the imposition of sentences that, in spite of those instruments, cannot be executed at all or cannot be executed in the Member State that offers the best prospects of achieving the objective(s) pursued by the sentences. Anticipating means, *e.g.*, when deciding whether to impose a penalty of community service on a national or resident of another Member State examining whether it would be possible to transfer the execution of that penalty to that other Member State, before actually taking the decision about imposing the sentence.[508] Or when deciding whether to impose a measure involving deprivation of liberty on a mentally disturbed person whose treatment would benefit from executing that measure in his own Member State, assessing whether that Member State would recognise and enforce that measure.[509] Therefore, anticipating can contribute not only to the reliability, foreseeability and legal certainty of the enforcement of sentences, but also to the effective and coherent application of the instruments.

Strictly speaking, anticipating the application of instruments when sentencing, in itself, is not a matter of EU law. Although the EU has a shared competence with the Member States with regard to criminal sanctions (Article 4(2)(j) in combination with Article 83(1)-(2) TFEU), in the present state of EU law the act of sentencing itself – *i.e.* determining whether a sanction will be imposed and, if so, what sanction – does not fall within the competence of the EU law, unless, of course, for some other reason EU law applies. This would be case, *e.g.*, when the offence is

[508] Germany, *e.g.*, has difficulties with recognising the penalty of community service imposed on an adult offender (paragraph 7.3.3.3). See also Dutch report, para 3.2(a)(ee) ('Alternative sanctions', '*Application*').
[509] Poland, *e.g.*, will not recognise and enforce such a measure. See paragraph 7.3.3.2. See also the Dutch report, para 4.3.2.

harmonised at EU level (in which case the prohibition of disproportionate sentences (Article 49(3) of the Charter) applies)[510] or when the accused person is a citizen of the EU who has exercised his freedom to move and reside within the territory of the Member States (Article 21 TFEU).[511] Barring such exceptions, it is entirely a matter of national law whether a court, when sentencing, must or may anticipate a possible future need for judicial cooperation.

7.11.2 Practice

The Spanish report paints a broad picture of the difficulties concerning judicial cooperation with regard to sentences[512] and, thus, confirms that anticipating at the sentencing stage might have a positive effect on the effective and coherent application of instruments.

The German report makes clear that such an approach is not allowed by German law. It refers to concerns that, when a convicted person resides abroad, a 'sentence is either not suspended on probation or that the suspension of enforcement will not be supplemented by probation measures because a supervision of such measures will be practically impossible'. However, pursuant to case-law of the Federal Court of Justice practical problems in supervising probation measures abroad do not constitute sufficient reasons not to suspend the enforcement of a custodial sentence where the conditions for a suspension are met. If need be, German authorities must use the existing cooperation instruments for supervision such as FD 2008/947/JHA. The practical relevance of this case-law is relative, as, according to the report, German authorities do not impose conditions or instructions they cannot supervise.[513]

Like the German report, the Polish report points out that anticipating the (im)possibilities of future judicial cooperation at the sentencing stage is not allowed. Polish law gives detailed directives to courts concerning the aspects that they are obliged to take into account when sentencing. None of those directives relate to the situation that the accused person is residing abroad or has the nationality of another Member State. Accordingly, the prospect of execution of the sentence in that situation is not to be taken into account. However, a few of the interviewed practitioners mentioned that the fact that the accused person resides abroad is rarely

[510] Cf. Case C-665/21, *G. ST. T. (Proportionality of the penalty for trade mark infringement)*, EU:C:2023:791.
[511] Cf. Case C-182/15, *Petruhhin*, EU:C:2016:630.
[512] Spanish report, para 4.
[513] German report, para 4.

but sometimes taken into account when choosing the mode of execution of the penalty of restriction of liberty or when deciding on imposing a fine instead of a penalty of restriction of liberty (which is easier to enforce), usually to the advantage of the accused person.[514]

By contrast to the German and Polish reports, the Dutch report mentions that, according to case-law, the courts are free whether or not to take into account the manner in which a certain sanction will be executed. With regard to alternative sanctions, on the one hand the mere fact that the accused person resides in another Member State does not preclude the imposition of community service, given the possibilities afforded by FD 2008/947/JHA to execute such a sanction in another Member State. On the other hand, nothing prohibits the courts from taking into account whether there is a real prospect of execution of that sanction in another Member State. This is because FD 2008/947/JHA does not oblige the competent issuing authority to forward a judgment concerning a sanction of community service to another Member State and because the competent authority of the executing Member State may refuse to recognise the sanction on the basis of Article 12 of FD 2008/947/JHA, *e.g.* if the sanction does not have the required minimum duration.[515] In practice, if the court, when sentencing, is aware of the possibility that judicial cooperation might be needed with regard to the sentence to be imposed, three different approaches could be followed. These approaches range from 'none of my business',[516] through trying to take into account whether a sentence would be enforceable, to actively trying, *a priori*, to facilitate the enforcement of a sentence by shaping the sentence in such a way that its execution in another Member State is possible.[517]

Even where national law allows anticipating a future need for judicial cooperation when sentencing, it should be stressed that the hypotheses underlying the issue of anticipating – the convicted person resides in another Member State or is a national of another Member State – could result in the applicability of EU law. If, *e.g.*, the accused person is a national of another Member State who has exercised his freedom to travel within the EU, the prohibition of discrimination on the grounds of nationality (Article 18 TFEU) will apply to the issue of sentencing that person. In this respect, the Dutch report refers to EU case-law according to which a difference in treatment with regard to sanctions to the detriment of nationals of other

[514] Polish report, para 4.
[515] Dutch report, para 4.2.
[516] In the Netherlands, the Minister of Justice and Security is responsible for the execution of sentences: Dutch report, para 3.2, **Enforcement: competent authorities in the Netherlands**.
[517] Dutch report, para 4.3.

Member States is not allowed.[518] Such a difference in treatment when sentencing – *e.g.* not imposing an alternative sanction or not imposing an suspended sentence merely on account of the accused person's residence in another Member State whereas such a sanction would have been imposed on a national of the sentencing Member State for a similar offence – can only be objectively justified in the absence of EU rules on the enforcement of such sanctions. FD 2008/947/JHA provides such rules, so any negative difference in treatment would only be justified where these rules do not apply.

7.11.3 Conclusions

It is obvious that, when sentencing, anticipating problems with regard to judicial cooperation can have a positive effect on the effective, efficient and coherent application of judicial cooperation instruments. Such problems could lead to a failure to execute a sentence (which is not effective) and at the same time to a waste of financial and human resources (which is not efficient). However, when anticipating judicial cooperation problems at the sentencing stage the solution to those problems may not consist in differential treatment to the detriment of nationals of other Member States.

7.12 Summoning a suspect or accused person abroad

7.12.1 Introduction

Article 5(1) of the EU Convention on Mutual Assistance in Criminal Matters requires the authorities of the issuing Member State to send 'procedural documents', such as a summons to appear at a hearing or a trial, 'intended for persons who are in the territory of another Member State to them directly by post'. In contrast to regular mutual assistance proceedings, the issuing Member State does not have to request anything and the Member State in whose territory the suspect or accused person is present is not involved. By agreeing to Article 5(1) of the

[518] Dutch report, para 4.2, with reference to Case 29/95, *Pastoors and Trans-Cap v Belgische Staat*, EU:C:1997:28.

convention, the Member State in whose territory the suspect or accused person is present has given, in advance and in general, consent for an act that would otherwise be considered as amounting to carrying out jurisdiction in the territory of another Member State (cf. paragraph 7.4.1 on sovereignty).

Pursuant to Article 5(2), the intervention of the authorities of the Member State in whose territory the suspect or accused person is present to serve the 'procedural document' may only be requested, if

'(a) the address of the person for whom the document is intended is unknown or uncertain; or

(b) the relevant procedural law of the requesting Member State requires proof of service of the document on the addressee, other than proof that can be obtained by post; or

(c) it has not been possible to serve the document by post; or

(d) the requesting Member State has justified reasons for considering that dispatch by post will be ineffective or is inappropriate'.

Focussing on summoning an accused person to stand trial, these provisions do not impose a duty on the authorities of the issuing Member State to enlist the aid of the authorities of the Member State where the accused person has a known address.[519] Indeed, only if one of the situations enumerated in Article 5(2) applies, it is allowed to request the involvement of the authorities of the Member State in whose territory the accused person is present in serving the 'procedural document'. And Article 5(2), in itself, does not impose any obligation on the

[519] Dutch report, para 5.3.1. If the authorities do not the whereabouts of the accused person but have indications that the accused person is in the territory of another Member State, they may enter an alert in the SIS pursuant to Art. 34(1) of Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, O.J. 2018, L 312/56.
In the context of determining whether the authorities of a Member State have shown the required diligence when informing the suspect or accused person, in due time, of the trial pursuant to Art. 8(2)(a) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (O.J. 2016, L 65/1), In the context of determining whether the authorities of a Member State have shown the required diligence when informing the suspect or accused person, in due time, of the trial pursuant to Art. 8(2)(a) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (O.J. 2016, L 65/1), the Court of Justice held that a Member State must enter such an alert in order to be considered to have shown that required diligence when its authorities have information indicating that the person concerned is in another Member State: Case C-135/25 PPU, *Kachev*, EU:C:2025:366, para 56.

authorities of the issuing Member State to avail themselves of the possibility afforded by that provision, even if one of those situations applies.[520]

Apparently, the previous regime of Article 52 of the CISA was seen as too permissive. Unlike Article 5(1) of the EU convention, which *requires* sending 'procedural documents' directly by post, Article 52(1) of the CISA merely *allowed* sending 'procedural documents' directly by post (and Article 52(5) allowed requesting that 'procedural documents' were 'forwarded via the judicial authorities of the requested Contracting Party where the addressee's address is unknown or where the requesting Contracting Party requires a document to be served in person').

It is said that the power conferred by Article 52(1) of the CISA to send 'procedural documents' directly by post was used less than expected, and that Article 5 of the EU convention was intended to decrease the number of – costly and time consuming – mutual assistance requests concerning service of procedural documents pursuant to Article 52(5) of the CISA[521] and, thus, to enhance efficiency. In hindsight, one can wonder whether Article 5(1) really enhances efficiency. If a 'procedural document' is sent directly by post to another Member State, in principle there is no guarantee and, indeed, no evidence that the procedural document actually reached the accused person. In principle, according to EU common minimum rules a person who has not received the summons may be tried *in absentia* but has the right to a re-rial.[522] The costly and time consuming option of a re-trial could be avoided, if the summons was served in such a way that it is clear that it reached the person concerned. The absence of proof that the summons reached the person for whom it was intended is also problematic from the point of view of coherence with other instruments. If, *e.g.*, the suspect or accused person was sentenced *in absentia* following service abroad by post, this could raise problems when applying the *in absentia* ground for refusal in FD 2002/584/JHA, FD 2008/909/JHA and FD 2008/947/JHA. Service by post, after all, does not amount to a situation in which the person concerned 'was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial'.[523] It could well be that the time and effort spent

[520] Dutch report, para 5.3.1.
[521] Dutch report, para 5.3.1.
[522] Case C-569/20, *Spetsializirana prokuratura (Trial of an absconded accused person)*, EU:C:2022:401, paras 45-46.
[523] Case C-108/16 PPU, *Dworzecki*, EU:C:2016:346, paras 45 and 47.

by the executing Member State in (sometimes unsuccessfully) examining whether that ground for refusal may or may not be applied, negates the (initial) financial benefit for both Member States of sending procedural documents directly by post. Moreover, the time and effort required in affording, in certain cases, an absent accused person who was convicted *in absentia* a re-trial in the issuing Member State certainly makes service directly by post in those cases an inefficient instrument.

Of course, Article 5(2)(b) allows the authorities of the issuing Member State to send the 'procedural document' through the authorities of the other Member State if 'the relevant procedural law of the requesting Member State requires proof of service of the document on the addressee, other than proof that can be obtained by post'. But proof of service of the document may be desirable even if the applicable law does not *require* it.

7.12.2 Practice

Several country reports are critical about Article 5. The German report points out that it is often difficult to establish whether the summons has actually reached the suspect or accused person so that he is actually aware of the trial, and suggests that a harmonised framework for serving summonses and other procedural documents would be useful.[524] The Polish report points out that, contrary to Article 7(2) of the Council of Europe European Convention on Mutual Assistance in Criminal Matters, Article 5 does not contain a provision allowing the authorities of the issuing Member State to request that 'service shall be effected by the requested Party in the manner provided for the service of analogous documents under its own law or in a special manner consistent with such law'. As the report shows, this creates problems in situations in which Polish law requires a certain kind of service, *viz*. a double attempt to deliver the summons pursuant to Article 133 § 1 and 2 of the Polish CCP.[525] Presumably, for the same reason applying Article 5 could also be problematic when it comes to the act of bringing charges to a suspect, given the 'high formalities' required by Polish law.[526] The Dutch report mentions that if the accused person does not appear at his trial, national case-law distinguishes between the question whether the summons was served in accordance with the law and the question whether, when

[524] German report, para 2.3(a)(ii)(b)(bb).
[525] Polish report, para 2.3(b)(i)(aa), EU Convention for Mutual Assistance, Application in practice.
[526] Polish report, para 2.2.1(b)(aa), Application in practice, 2) and **Memorandum**, para I.1).

the summons was indeed served in accordance with the law, the absent accused person may be tried *in absentia*. As to the first question, case-law holds that the mere sending of a 'procedural document' pursuant to Article 5(1) directly by post amounts to a valid service of that document, even if that document was returned as undeliverable. In such a case, application of Article 5(2) is not required for the service of the document to be valid. However, as to the second question, case-law holds that Article 5(2) must be applied when the 'procedural document' was sent directly by post but was returned as undeliverable. Otherwise, the prosecution authorities did not exercise due diligence to inform the accused person of the trial, and the courts may not rely on the presumption that the accused person voluntarily waived his right to be present at the trial.[527] In those cases, it is undeniable that the 'procedural document' did not reach the person concerned. Yet, conversely where the 'procedural document' is not returned as undeliverable, the opposite – it is undeniable that the 'procedural document' did reach the person concerned – certainly is not true.

7.12.3 Conclusions

Article 5(1) is not based on the principle of mutual recognition. Also, the authorities of the Member State where the person concerned is present are not involved in serving the summons. Therefore, the principle of mutual trust does not apply. Criticisms about Article 5(1) and proposals to reform the rules about service of 'procedural documents' in another Member State cannot be countered by appealing to mutual trust.

The current set up, that is EU-legislation that is not totally satisfactory combined with different national regulations on summoning, has a negative impact on efficiency and effectiveness, because it can lead to situations in which a re-trial has to be conducted or surrender of a requested person or transfer of a sentence is refused. Also, it can negatively affect the coherence of applying instruments, because summoning an accused person to trial is a relatively non-intrusive measure that may serve as a more proportional alternative to more intrusive measures, such as issuing a prosecution-EAW.

[527] Dutch report, para 5.3.1.

Given the importance that EU law attaches to the service of the summons, both in Directive (EU) 2016/343 and in the instruments on mutual recognition, a rebalancing is needed: the rules on service of 'procedural documents' abroad should focus less on the costs of service and more on ensuring (proof) that 'procedural documents' actually reach the person for whom they are intended.

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