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Delegations will find attached the above-mentioned report, drafted at the request of the Commission by ICF and Spark Legal & Policy Consulting.

The report is also available online.

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European Commission

Exploratory study on possible lisbonisation of ex-third pillar acquis in the area of mutual recognition in criminal matters

(JUST/2022/PR/JCOO/CRIM/0142)

Final Report

Written by ICF and Spark Legal & Policy Consulting

ICF

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Exploratory study on possible lisbonisation of ex-third pillar acquis in the area of mutual recognition in criminal matters

Final Report

Directorate-General for Justice and Consumers
Criminal Procedural Law Unit

2026

www.parlament.gv.at

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Glossary of terms

Digitalisation of justice – an ongoing European Union (EU)-level initiative to modernise cross-border judicial cooperation by providing for facilitating the use of new digital tools for electronic communication in such procedures.

Double criminality principle – in the context of cross-border cooperation at EU level, this principle can be defined as the condition whereby the underlying offence, which is the subject of the cooperation, is classified as a criminal offence in both the requesting State (issuing State) and in the requested State (executing State).

Framework Decision (FD) – an EU-level legal act/instrument used exclusively in the area of police and judicial cooperation on criminal matters, adopted between 1999 (Treaty of Amsterdam) and 2008 (Treaty of Lisbon). Although legally binding, FDs were not directly applicable, i.e. Member States were free to choose the 'form and method' for achieving the objectives set out in the framework decision on facilitating cooperation in justice and home affairs.

Judicial cooperation on criminal matters at EU level – based on the principle of mutual recognition of judgments and judicial decision, judicial cooperation on criminal matters includes procedure that allows cooperation among Member States authorities in cross-border cases in several areas.

Lisbonisation of EU law – refers to the changes in EU policy and law - making on police and judicial cooperation on criminal matters resulting from the Treaty of Lisbon (2009). Judicial cooperation on criminal matters shifted from intergovernmental cooperation (the third pillar) to ordinary EU policy-making, providing role and power to all principal EU bodies. 'Lisbonisation' also refers to the legislative process whereby framework decisions in the field of criminal law are (re)enacted as ordinary legal acts (directives, regulations) through the ordinary legislative procedure (Article 288 TFEU)[2].

Mutual recognition in criminal matters – cooperation on criminal matters 'shall be based on the principle of mutual recognition of judgments and judicial decisions' (Article 82(1) of the Treaty on the Functioning of the European Union, TFEU). Member States should recognise judicial decisions and execute requests for judicial cooperation based on mutual confidence that their national legal systems can provide equivalent and effective protection of fundamental rights.

Transposition of FDs – the process of incorporating the rights and obligations contained in EU legal instruments, herewith FDs, into the national law of EU Member States. Following the five-year transitional period after the entry into force of the Treaty of Lisbon, enshrined in Protocol No. 36 to the EU Treaties and applicable to legislative measures dealing with police and judicial cooperation on criminal matters and adopted before the Treaty's entry into force, the European Commission has been given the power to take action if a Member State fails to transpose EU legislation and/or fails to notify the Commission of the measures it has taken. In the event of non-transposition

or partial transposition, the Commission may initiate formal infringement proceedings and, if necessary, refer the matter to the CJEU.

Third pillar – The third pillar of the EU (Justice and Home Affairs, JHA) focuses on cooperation in law enforcement, immigration and judicial matters between EU Member States. This policy field was characterised by intergovernmental decision-making while it was in force between 1993 and 2008. The third pillar as such was abolished by the Treaty of Lisbon, with the policy areas became part of the EU policy and law-making procedure.

List of abbreviations

AFSJ	Area of freedom, security and justice
BRG	Better Regulation Guidelines
CBE	Cross-border exchange
CEP	Confederation of European Probation
CFR	European Union Charter of Fundamental Rights
CISA	Convention Implementing the Schengen Agreement
CJEU	Court of Justice of the European Union
Digitalisation Directive	Directive (EU) 2023/2843 amending Directives 2011/99/EU and 2014/41/EU, Council Directive 2003/8/EC and Council Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, as regards digitalisation of judicial cooperation
Digitalisation Regulation	Regulation 2023/2844 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
EAW	European arrest warrant
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECRIS	European Criminal Records Information Systems
ECtHR	European Court of Human Rights
EDP	European delegated prosecutor
EIO	European Investigation Order
EJN	European Judicial Network
ELI	European Law Institute
EPPO	European Public Prosecutors' Office
EPRS	European Parliamentary Research Service
EU	European Union

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TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom

1. Introduction to the study

This final report is submitted as part of the 'Exploratory study on the possible lisbonisation of the ex-third pillar acquis in the area of mutual recognition in criminal matters'. The study was commissioned by the European Commission's Directorate-General for Justice and Consumers (DG JUST) and undertaken by ICF SA in December 2023.

1.1. Objectives and scope of the study

The purpose of the study was to conduct an integrated assessment of mutual recognition of criminal decisions and cross-border cooperation on criminal matters by:

1. Assessing the **transposition and implementation of seven existing framework decisions (FDs)** considering current jurisprudence, current practices, and key problems (Task 1);
2. Exploring the **potential need for and feasibility of further European Union (EU) level action** in this area, with particular attention to the possibility of new legislative initiatives (Task 2).

ICF partnered with Spark Legal & Policy Consulting for parts of the research to provide a robust assessment based on the best available data at Member State and EU level. The data collection and analysis were governed by the methodological requirements of the Better Regulation Guidelines (BRGs). The key elements related to the scope of the study are set out below.

Table 1 - Key elements of study scope

Element	Scope of Evaluation
Geographical coverage	27 EU Member States
Areas of law covered	▪ EU law relevant to the mutual recognition of criminal decisions and cross-border cooperation in criminal matters ▪ Relevant national laws and implementing measures
Core Legal Instruments	▪ Framework Decision 2002/584/JHA on the European Arrest Warrant (FD EAW)[1] ▪ Framework Decision 2008/909/JHA on Transfer of Prisoners (FD TOP)[2]

[1] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584.

[2] Council Framework Decisions 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008F0909.

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Element	Scope of Evaluation
	▪ Framework Decision 2008/947/JHA on Probation and Alternative Sanctions (FD PAS)[3] ▪ Framework Decision 2009/829/JHA on Supervision (FD ESO)[4] ▪ Framework Decision 2005/214/JHA on Financial Penalties (FD Financial Penalties)[5] ▪ Framework Decision 2008/675/JHA on Previous Convictions (FD Previous Convictions)[6] ▪ Framework Decision 2009/948/JHA on Conflicts of Jurisdiction (FD Conflicts of Jurisdiction)[7]
Additional legal instruments	▪ Previous EU legislation 'lisbonising' other FDs, such as Regulation (EU) 2018/1805 on freezing and confiscation orders ▪ EU and international agreements in the area of cooperation on criminal law
Stakeholders to be consulted	A separate annex presents the overview of the stakeholders consulted through online survey/interviews/workshops)

1.2. Historical background and key concepts

This section presents the historical background to the FDs and the lisbonisation process. It expands on the concept of mutual recognition and its application through these FDs, then highlights practical challenges in the implementation of those FDs.

1.2.1. Historical background

Judicial cooperation was enshrined in Article 220 of the Treaty of Rome (1957) establishing the European Economic Community, essentially in matters of civil law for the protection of persons and businesses; no provision was made for cooperation on criminal matters. While early discussions and cooperation on criminal matters dates from the 1970s, the establishment of border checks by creating 'an area without internal frontiers' in 1992 called for new measures to be drawn up in the fields of security and justice.

The Maastricht Treaty establishing the European Union was signed in February 1992. The Treaty on European Union (TEU) institutionalised justice and home affairs (JHA)

[3] Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, https://eur-lex.europa.eu/eli/dec_framw/2008/947/oj.

[4] Council Framework Decision 2009/829/JHA of 23 October 2009 on supervision measures as an alternative to provisional detention, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009F0829.

[5] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32005F0214.

[6] Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008F0675.

[7] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009F0948.

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cooperation at the level of European integration as the third pillar of the EU, incorporating judicial and police proceedings in its competences as 'matters of mutual interest'. JHA included cooperation on asylum, immigration, judicial cooperation on civil and criminal matters, and police cooperation. The third pillar was characterised by intergovernmental cooperation, as these were highly delicate matters involving national sovereignty. The European Commission was 'fully associated' but did not have the exclusive 'right to propose legislation' to the Council (as it does for policy areas of the European Community system, the first pillar), so Member States could also put forward proposals. Decisions required unanimous agreement from all Member States, and the European Parliament's role was limited to give an opinion on certain acts. The main form of legal acts were common positions, joint actions and international conventions at Community level. The Court of Justice of the European Union (CJEU) had no power for proceedings for failure to act.

With the entry into force of the Amsterdam Treaty in 1997, some elements of the third pillar (visa policy, asylum, immigration, judicial cooperation on civil matters) were transferred to the first pillar. The third pillar remained restricted to police and judicial cooperation on criminal matters. The area of freedom, security and justice (AFSJ) was established, irrespective of the institutional structure to which it belonged (first or third pillar). For judicial cooperation on criminal matters, provisions were laid down for the adoption of common elements in Member States' legislation on organised crime, terrorism and drug trafficking. The legislative decision-making procedure on police and criminal matters was no longer strictly intergovernmental: the Council continued to act by unanimity, but the Commission secured the right of initiative, equal to that of Member States, and it was obligatory for the Council to consult Parliament before adopting a legislative act, and to give Parliament the necessary time to deliver its opinion.

The Amsterdam Treaty created a new legal instrument in the areas of police and judicial cooperation, based on its Article 34. FDs are legally binding, although not directly applicable, without direct effect, and still subject to the intergovernmental decision-making process. The legal nature of FDs was reinforced by the CJEU landmark ruling in Case C-105/03 *Pupino*[8]: FDs 'shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect'. They are unlike directives in this respect, which the CJEU had previously recognised as having direct effect under certain conditions[9].

FDs were similar to directives as they were binding on Member States in respect of the result to be achieved. They were legal instruments resulting from intergovernmental cooperation, i.e. they required a unanimous decision in the Council, the CJEU had limited jurisdiction over them, and the Commission could not initiate infringement procedures against Member States. The CJEU recognised, however, that national courts had to interpret transposing national legislation 'so far as possible, in the light of

[8] Judgment of the Court (Grand Chamber) of 16 June 2005, *Pupino*, C-105/03, ECLI:EU:C:2005:386, para. 34.

[9] Judgment of 5 February 1963, Van Gend & Loos, Case 26/62, ECLI:EU:C:1963:1; Judgment of 4 December 1974, Van Duyn v Home Office, Case 41/74, ECLI:EU:C:1974:133.

the wording and purpose of the Framework Decision'[10]. Under the third pillar, 33 FDs were adopted between 1993-2009. The Tampere European Council[11] in October 1999 was a landmark event for the JHA pillar. The Council set out a comprehensive agenda to develop an AFSJ within the EU and the Tampere Conclusions[12] emphasised that 'enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights'. They also indicated that the principle of mutual recognition 'should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union. The principle should apply both to judgments and to other decisions of judicial authorities.'

FDs are based on the principle of mutual recognition, meaning that judicial decisions adopted by the competent authorities in one Member State need to be recognised and executed by another Member State, on request, without any further formalities. The principle is underlined by mutual trust that each national legal system can provide equivalent and effective protection of fundamental rights[13]. This principle balances the need to improve judicial cooperation in criminal matters with Member States' scepticism of deep EU harmonisation of criminal law[14] (see Point 1.2.2.).

Other (limited) adjustments to the development of AFSJ were made by the Treaty of Nice (2001), the Hague Programme, and the Stockholm Programme. The Treaty of Nice[15] incorporated the European Union Agency for Criminal Justice Cooperation (Eurojust), an instrument of judicial cooperation in criminal matters, effectively increasing the number of cases handled by Eurojust. In November 2004, the European Council adopted a new five-year action plan, the Hague Programme[16]. On 10 and 11 December 2009, the European Council adopted the multiannual (2010-2014) Stockholm Programme[17], which focused on the interests and needs of citizens and other people to whom the EU has a responsibility.

The latest EU-level intergovernmental agreement, the Lisbon Treaty, which came into force in December 2009, abolished the pillar structures and integrated (ex)third pillar

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[10] Judgment of the Court (Grand Chamber) of 16 June 2005, *Pupino*, C-105/03, ECLI:EU:C:2005:386, para. 61.

[11] Tampere European Council 15 and 16 October 1999: Presidency conclusions, https://www.europarl.europa.eu/summits/tam_en.htm.

[12] The programme of measures to implement the principle of mutual recognition of criminal decisions envisaged in the Tampere European Council conclusions and adopted by the Council on 30 November 2000,OJ C 12 E, 15.1.2001, p. 10 (Tampere Conclusions).

[13] Judgment of the Court of Justice of 5 April 2016, C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198, para 77.

[14] Mitsilegas, V., *EU Criminal Law* (1st ed.), Hart Publishing, 2022, p. 116.

[15] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (2001). Eurojust was established by Council Decision 2002/187/JHA of 28 February, OJ L 63, 6.3.2002, pp. 1 (it has since been replaced).

[16] Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, OJC 198 of 12.8.2005; Communication from the Commission on the Hague Programme: ten priorities for the next five years, COM(2005) 184 final of 10.5.2005; Partnership for European Renewal in the field of Freedom, Security and Justice, OJ C 236 of 24.9.2005; The Commission issued evaluation and implementation reports on the programme the following year.

[17] The Stockholm Programme: An open and secure Europe serving and protecting citizens, OJ C 115/8 of 4.5.2010.

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areas into the EU's broader legal framework (legal personality for the Union), thus generalising the Community method in the AFSJ.[18] Legislative proposals are now adopted under the ordinary legislative procedure (OLP) (Article 294 of the Treaty on the Functioning of the European Union (TFEU)): the Council acts by a qualified majority, and the European Parliament, as co-legislator, delivers its opinion via the co-decision procedure. The CJEU may now give preliminary rulings, without restriction, on all aspects of the AFSJ. Following the five-year transitional period from the entry into force of the Lisbon Treaty (i.e. from 1 December 2014), acts in AFJS adopted under the previous Treaty (FDs) can also be the subject of such proceedings (Protocol No 36).[19] The Commission may bring proceedings for failure to fulfil an obligation against Member States that do not comply with provisions concerning the AFSJ, an important new power in monitoring the application of legislation.

Article 3(2) of the TEU sets out the EU's key objectives in the AFSJ, with Title V of the TFEU, Articles 67-89, devoted to the AFSJ. In addition to the general provisions, Title V contains a specific chapter on judicial cooperation in criminal matters (Articles 82-83). The Lisbon Treaty formally recognises the European Council's preeminent role of '[defining] the strategic guidelines for legislative and operational planning within the area of freedom, security and justice' (Article 68 of the TFEU).

Other articles of the Treaty are inextricably linked to the creation of an AFSJ, such as: Article 6 of the TEU on the EU Charter of Fundamental Rights (CFR); and Article 16 of the TFEU on the protection of personal data. The Council of Europe's European Convention (1950) for the Protection of Human Rights and Fundamental Freedoms (ECHR) is also highly relevant, with all Member States signatories and the EU set to accede in its own right[20].

Following the coming into force of the Lisbon Treaty, FDs can no longer be enacted by the EU, which now adopts directives and regulations in the area of criminal justice. Protocol No. 36 of the Lisbon Treaty contains important provisions on the legal effects of FDs in force.

- Article 9 of Protocol No. 36 ensures that the legal effects of acts adopted under the TEU before the Lisbon Treaty came into force are preserved until those acts are repealed, annulled, or amended. This provision was introduced to **ensure legal continuity of EU law**.
- Article 10 of Protocol No. 36 sets out transitional measures specifying that the powers of the Commission under Article 258 of the TFEU would not apply and that the powers of the CJEU under Title VI of the TEU would remain unchanged until the transitional measure ceased to have effect, five years after the entry into force of the Lisbon Treaty.

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[18] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, 17.12.2007, p. 1), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2007:306:TOC.

[19] Protocol No. 36 on transitional provisions; Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7.6.2016, pp. 322-326.

[20] Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005), Rome, 4.XI.1950. Available at: https://www.echr.coe.int/documents/d/echr/Convention_ENG.

Two of the Protocols[21] attached to the Treaty provide a **flexibility mechanism** that allows the concerned countries to integrate into the EU acquis of AFSJ at different levels: Protocol No. 21[22] applying an 'opt-out/opt-in' for Ireland, and Protocol No. 22[23] applying an 'opt-out' for Denmark.

Initially, Protocol No. 21 also applied to the United Kingdom (UK), which continued to be the case until the UK withdrew from the EU in 2020. Today, Ireland has a flexible 'opt-out/opt-in' from JHA measures and can choose to participate in legal acts on a case-by-case basis[24]. At the time of the negotiation of Protocol No. 21, Ireland made Declaration No. 56, stating that it would participate in JHA measures to the maximum extent possible, particularly in police cooperation. Ireland has chosen to use the provisions of the protocol to reintegrate or opt in the JHA acquis to a considerable degree[25].

Protocol No. 22 is a complete opt-out[26], which does not provide for any corresponding opt-in mechanism. It exempts Denmark from participating in the policy, which means that Denmark does not have the right to vote on these issues in the Council and that acts adopted in this area are not binding on Denmark, with the exception of certain areas that are managed on an intergovernmental basis[27]. Under the Treaty of Lisbon, Denmark may at any time change its total opt-out to the case-by-case opt-in model that applies to Ireland, nevertheless the 2015 referendum on this matter rejected the ending of the opt-out in the area of JHA.

1.2.2. Principle of mutual recognition

EU Member States' cooperation on criminal matters is based on the principle of mutual recognition of judicial decisions, first referred to in the 1999 Tampere Conclusions, which considered it 'the cornerstone of judicial cooperation in criminal matters'. The

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[21] Protocol No. 21 and Protocol No. 22 replaced and expanded an older 'opt-in' protocol with similar provisions that was introduced by the Treaty of Amsterdam (1 May 1999).

[22] Protocol No. 21 on the position of the UK and Ireland in respect of the AFSJ; Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7.6.2016, p. 295.

[23] Protocol No. 22 on the position of Denmark, Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7.6.2016, p. 298.

[24] 'From Ireland's perspective, the Protocol has served and continues to serve two overarching policy functions. These are to help maintain the Common Travel Area (CTA) with the UK; and to protect key features of Ireland's distinctive common law legal system and attendant criminal trial procedures' (Government of Ireland, *Review of Ireland's Protocol on the area of freedom, security and justice*, 2024, https://assets.gov.ie/static/documents/PROTOCOL_21_Review_of_Irelands_Protocol_on_the_area_of_freedom_security_and_justice_20.pdf).

[25] In line with Declaration No. 56, Ireland carries out regular reviews of the operation of the protocol's arrangements, including whether to maintain or withdraw from the protocol.

[26] In June 1992, the Danish people voted 'no' in a referendum on the approval of the Maastricht Treaty. As a result, Denmark negotiated four opt-outs, one on cooperation on JHA, in the so-called Edinburgh Agreement.

[27] Exceptions to this opt-out: Denmark has entered into parallel agreements on civil matters and into special agreements with the European Union Agency for Law Enforcement Cooperation (Europol), Eurojust and the European Public Prosecutor's Office (EPPO), enabling it to participate in intergovernmental cooperation on police matters and criminal law. Denmark participates fully in Schengen cooperation and visa policy cooperation.

principle 'is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of fundamental rights'[28]. Accordingly, EU Member States must recognise judgments and execute requests for judicial cooperation adopted by the competent authorities of other Member States without any further formalities.

The introduction of the principle of mutual recognition in criminal law can be seen as 'a balancing act between, on the one hand, the need to address concerns with regards to the slow pace of improvement of judicial cooperation in criminal matters in the post EU-Maastricht, and, on the other hand, the need to reassure Member States sceptical of further EU harmonisation in criminal matters, in particular at a time (the late 1990s) when ambitious proposals for criminal law uniformity in the EU such as the *corpus iuris* had emerged'[29].

The adoption of a detailed programme of measures in 2001 as the follow-up to the Tampere Conclusions[30] and subsequent legislative actions aimed to implement mutual recognition in criminal matters. The programme identifies several parameters determining the effectiveness of mutual recognition applicable in both substantive criminal law and cross-border cooperation on criminal matters:

- Whether the envisaged measure is of general application or limited to specific offences;
- Whether fulfilment of the double criminality requirement as a condition for recognition is maintained or dropped;
- Mechanisms for safeguarding the rights of third parties, victims, and suspects;
- Definition of minimum common standards necessary to facilitate application of the principle of mutual recognition;
- Whether enforcement of the decision is direct or indirect, and the definition and scope of a validation procedure, if any;
- Determination and extent of grounds for refusing recognition, where those grounds are the sovereignty or other essential interests of the requested State or relate to legality;
- Whether States have liability arrangements in the event of acquittal.

The Treaty of Lisbon indicates that the 'Union shall constitute an area of freedom, security and justice' (Article 67(1) of the TFEU) and 'shall endeavour to ensure a high level of security (…) through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws', (Article 67(3) of the TFEU) thus giving priority to the principle of mutual recognition over positive harmonisation of criminal law[31]. As such, harmonisation of criminal procedural law remains limited, in principle, to three specific areas (admissibility of evidence, rights of

[28] Judgment of the Court of Justice of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, C-404/15 and C-659/15, ECLI:EU:C:2016:198, para 77.

[29] Mitsilegas, V., *EU Criminal Law* (1st ed.), Hart Publishing, 2022, p. 116.

[30] Tampere Conclusions, 2001.

[31] Schroeder, W., 'Limits to European harmonisation of criminal law', *Eucrim*, Vol. 2, 2020, pp. 144-148.

individuals in criminal proceedings, rights of victims of crime) and may only take place 'to the extent necessary to facilitate mutual recognition of judgments and police and judicial cooperation with a cross-border dimension [....] establish minimum rules' (Article 82(2) of the TFEU).

1.2.3. Application of mutual recognition through the FDs

This section presents seven FDs based on the principle of mutual recognition, followed by an overview of how this principle is understood in the context of these instruments, in light of CJEU jurisprudence.

Framework Decision 2002/584/JHA on the European Arrest Warrant (FD EAW) introduced a new extradition process based on the principle of mutual recognition of judicial decisions designed to expedite the extradition process that previously relied on bilateral and multilateral conventions[32]. The EU also adopted a series of complementary FDs to address the detention of EU citizens in other Member States, aiming to reduce the pre-trial detention of non-residents and facilitate rehabilitation of prisoners in a cross-border context[33]. This package of 'detention acquis' includes Framework Decisions 2008/909/JHA on transfer of prisoners (FD TOP), Framework Decision 2008/947/JHA on transfer of probation measures (FD PAS), and Framework Decision 2009/829/JHA on transfer of supervision measures (FD ESO); all amended in 2009 by an FD to account for *in absentia* proceedings[34].

Framework Decision 2005/214/JHA[35] (FD Financial Penalties) applies the principle of mutual recognition to financial penalties in cross-border contexts.

Framework Decision 2008/675/JHA (FD Previous Convictions) and Framework Decision 2009/948/JHA (FD Conflicts of Jurisdiction) account for mutual recognition during procedures. FD Previous Convictions[36]. aims to ensure that judicial authorities properly account for convictions issued in another Member Sate involving the same

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[32] European Parliamentary Research Service (EPRS), *European arrest warrant Framework for analysis and preliminary findings on its implementation*, Publications Office of the European Union, Luxembourg, 2020, https://op.europa.eu/en/publication-detail/-/publication/f31ca4c9-5914-11ea-8b81-01aa75ed71a1/language-en at 1.

[33] European Commission, *Report from the Commission on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention*, COM(2014) 57 final, p. 5, https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52014DC0057.

[34] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, https://eur-lex.europa.eu/eli/dec_framw/2009/299/oj/eng.

[35] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, https://eur-lex.europa.eu/eli/dec_framw/2005/214/oj/eng.

[36] European Commission, *Report from the Commission on the implementation by the Member States of Framework Decision 2008/675/JHA of 24 July 2008 on taking into account of convictions in the Member States of the European Union in the course of new criminal proceedings*, COM (2014) 312 final.

person but different facts FD Conflicts of Jurisdiction[37] aims to prevent parallel criminal proceedings in different Member States.

The CJEU has examined how the principle of mutual recognition applies in the FDs on several occasions. Early decisions included consideration of whether the FD as an instrument was the proper legislative tool for EU action in the area of mutual recognition in criminal matters. Case C-303/05 *Advocaten voor de Wereld VZW*[38] argued that FD EAW should have been adopted by a convention, not a FD, under Article 34(2)(b) of the TEU. The CJEU upheld the Council's discretion in choosing the legal instrument[39]. It highlighted that FDs and conventions have the same legal basis and pass through the same procedure[40] and noted that the choice of an FD was compatible with the principles of subsidiarity and proportionality. The CJEU also held that it was not appropriate to call into question the selection of an FD as the appropriate legal instrument because the Member States and institutions are bound to ensure effectiveness of community law and the legal instrument was selected because of the ineffectiveness of previous conventions[41].

Case C-396/11 *Radu*[42] explored the extent to which fundamental rights protections may override the principle of mutual recognition and its underlying assumption of equivalency of treatment. The Constanța Court of Appeal referred questions to the CJEU on the legal status of fundamental rights under EU law and whether a European Arrest Warrant (EAW) could be refused on fundamental rights grounds. Advocate General (AG) Sharpston addressed fundamental rights on three levels: their status under EU law, their role in mutual recognition in criminal matters, and the possibility of refusing an EAW on these grounds[43]. She contended that CFR rights are part of EU primary law and ECHR rights are general principles of EU law. She emphasised that fundamental rights considerations are implicit in the FD EAW and that the presumption of compliance with fundamental rights by Member States is rebuttable. The CJEU, however, did not follow AG Sharpston's Opinion and ruled that mutual recognition could not be refused on fundamental rights grounds in this case. It underscored the effectiveness of the EAW system and the high degree of trust between Member States. The CJEU further ruled that judicial authorities in the executing State are bound to have regard to the fundamental rights set out in the ECHR and CFR, but that not all breaches of fundamental rights could justify refusal of an EAW and that such refusal could occur only in exceptional circumstances. For example, a past infringement of rights that are capable of remedy cannot justify a refusal.

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[37] European Commission, *Report from the Commission on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceeding*, COM(2014) 313 final.

[38] Judgment of the Court (Grand Chamber) of 3 May 2007, *Advocaten voor de Wereld VZW* v *Leden van de Ministerraad*, Case C-303/05, ECLI:EU:C:2007:261.

[39] Ibid., para. 52-68.

[40] Ibid., para. 58

[41] Ibid., para. 64, 67.

[42] Judgment of the Court (Grand Chamber), 29 January 2013, *Radu*, Case C-396/11, ECLI:EU:C:2013:39.

[43] Opinion of Advocate General Sharpston of 18 October 2012, Case C-396/11 *Radu*, ECLI:EU:C:2012:648.

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In Case C-399/11 *Melloni*[44], the CJEU ruled that EU secondary law, specifically the FD EAW, takes precedence over national constitutional law, even if the latter provides a higher level of fundamental rights protection. It emphasised that allowing national standards to override EU law would undermine the principle of the primacy of EU law. The CJEU's decision in Melloni highlighted the importance of mutual trust between Member States, asserting that mutual recognition of judicial decisions should be upheld even at the expense of extensive scrutiny of fundamental rights[45]. The CJEU found that the right to a fair trial and the right to an effective judicial remedy, as outlined in the CFR, were compatible with the FD EAW.

In Opinion 2/13[46], on the accession of the EU to the ECHR, the CJEU reiterated the arguments related to mutual trust. It affirmed that the essential characteristics of EU law have led to a structured network of principles, rules, and mutually interdependent legal relations linking the EU and its Member States, and the Member States with each other, which is part of the process of creating an ever-closer union among the peoples of Europe (as per Article 1 of the TEU)[47]. This legal structure is based on the premise that each Member State shares a set of common values on which the EU is founded (Article 2 of the TEU), which implies the existence of mutual trust between the Member States that these values will be recognised and thus that the EU law implementing them will be respected (para 168).

The section above presents key CJEU cases whose rulings have had a significant impact on the FDs at stake. Section 1.2.5. presents further CJEU rulings and other developments relating to mutual recognition and mutual trust that have taken place since 2014. Annex 4 provides a comprehensive overview of CJEU case law for each FD.

1.2.4. Process of lisbonisation

The lisbonisation of FDs can be defined as the process of **recasting former third pillar instruments as legal acts under one of the instruments provided in the Lisbon Treaty** (e.g. directives, regulations)[48].

Declaration 50 of the Treaty of Lisbon[49] invites EU institutions to seek to adopt legal acts amending or replacing the acts referred to in Article (10)1 of the said Protocol, 'in appropriate cases and as far as possible within the five-year period'. In other words, it invites them to transform former third pillar acts into new EU acts within a short

[44] Judgment of the Court (Grand Chamber) of 26 February 2013, *Stefano Melloni v Ministerio Fiscal*, C-399/11, ECLI:EU:C:2013:107, para. 38.

[45] Mitsilegas, V., *EU Criminal Law* (1st ed.), Hart Publishing, 2022, pp. 212-213.

[46] Opinion of the Court (Full Court) of 18 December 2014. Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties, Case Opinion 2/13. ECLI:EU:C:2014:2454.

[47] TFEU, Article 1, para 167.

[48] Csonka, P. and Landwehr, O., '10 Years after Lisbon – How "Lisbonised" is the Substantive Criminal Law in the EU?', *EUcrim*, Vol. 4, 2019, pp. 261-267, p. 261.

[49] 50. Declaration concerning Article 10 of the Protocol on transitional provisions.

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timeframe. The 2010 Stockholm Programme[50] calls on the European Commission to submit a related timetable. Currently, 18 of 33 FDs have been lisbonised, primarily in substantive criminal law, and no instrument in criminal law cooperation – the subject area of this Study - has been lisbonised. Fifteen FDs, including the seven described here, have not been repealed, annulled, or amended, and remain in force.

Several challenges have been identified in relation to the process of lisbonisation. Among others, Member States have a strong interest in maintaining national sovereignty over criminal matters. Barriers to mutual trust between Member States, including concerns over fundamental rights, hamper cooperation under existing FDs and block attempts to further lisbonise (see Section 3.1 in Part B).

1.2.5. Challenges affecting implementation and lisbonisation of the FDs

The difficulties encountered in implementing the different FDs were identified on the basis of a literature review, desk research for the 189 Country fiches accompanying this report, the Commission's implementation reports and various European Council review reports. The findings of the national research (see Section 3) explore these issues in greater depth and provide detailed information in the challenges associated with transposing specific articles of the FDs in each Member State.

Principles of mutual trust and mutual recognition

The last decade has seen growing issues with the respect of fundamental rights in several Member States, with other Member States now less inclined to consider other legal systems as compatible with their standards. In response, CJEU case-law has insisted that mutual trust does not require unconditional reliance and that limitations can be set in exceptional circumstances[51]. According to the landmark Aranyosi judgment[52], mutual recognition can be set aside if there are concrete reasons to believe that a person's fundamental rights would be violated. Academic commentary summarises this approach by stating that mutual trust does not mean blind trust[53]. Tension between the underlying assumption of mutual trust and mutual recognition and the practical realities of increasing concern over fundamental rights protections

[50] Council of the European Union, *The Stockholm Programme: An open and secure Europe serving and protecting citizens*, 5713/10, Brussels, 3 March 2010, p. 12.

[51] Opinion of the Court of Justice of 18 December 2014, *Avis 2/13*, EU:C:2014:2454, para. 191.

[52] Judgment of the Court of Justice of 5 April 2016, C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, pp. 78-80.

[53] Lenaerts, K., 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust', *Common Market Law Review*, Vol. 54, 2017, p. 805; Prechal, S., 'Mutual Trust before the Court of Justice of the European Union', *European Papers*, Vol. 2, Issue 1, 2017, pp. 75-92.

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has resulted in CJEU cases concerning multiple FDs, including FD EAW[54], FD TOP[55], FD PAS, FD ESO[56], and, to an extent, FD Financial Penalties[57].

Compliance with the CFR, particularly the right to a fair trial and right of defence

Doubts as to whether fair trial and due process guarantees as outlined in the CFR are respected are identified as particular sticking points for national authorities in non-recognition of judicial decisions, for example on FD EAW[58] and FD Previous

[54] Judgment of the Court (Grand Chamber) of 3 May 2007, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, Case C-303/05, ECLI:EU:C:2007:261; Judgment of the Court (Fourth Chamber) of 10 November 2016, *Openbaar Ministerie v Krzysztof Marek Poltorak*, C-452/16, ECLI:EU:C:2016:858; Judgment of the Court (Fourth Chamber) of 10 November 2016, *Openbaar Ministerie v Ruslanas Kovalkovas*, C-477/16, ECLI:EU:C:2016:861; Judgment of the Court of Justice of 25 July 2018, *AY*, C-268/17, ECLI:EU:C:2018:602; Judgment of the Court (Grand Chamber) of 25 July 2018, *PPU*, C-216/18, ECLI:EU:C:2018:586; Judgment of the Court of Justice of 25 July 2018, *ML*, C-220/18, ECLI:EU:C:2018:589; Judgment of the Court (Grand Chamber) of 27 May 2019, *Minister for Justice and Equality v OG and PI*, C-508/18, ECLI:EU:C:2019:456; Judgment of the Court (Grand Chamber) of 27 May 2019, *Minister for Justice and Equality v PF*, C-509/18, ECLI:EU:C:2019:457; Judgment of the Court of Justice of 6 December 2018, *IK*, C-551/18, ECLI:EU:C:2018:991C-551/18; Judgment of the Court (Second Chamber) of 9 October 2019, *NJ*, C-489/19, ECLI:EU:C:2019:849; Judgment of the Court (Grand Chamber) of 24 November 2020, *Criminal proceedings against AZ*, C-510/19, ECLI:EU:C:2020:953; Judgment of the Court (First Chamber) of 12 December 2019, *JR and YC*, C-566/19, ECLI:EU:C:2019:1077; Judgment of the Court (First Chamber) of 12 December 2019, *XD*, C-625/19, ECLI:EU:C:2019:1078; Judgment of the Court (First Chamber) of 12 December 2019, *ZB*, C-627/19, ECLI:EU:C:2019:1079; Judgment of the Court (Grand Chamber) of 17 December 2020, *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'emission)*, C-354/20 and C-412/20, ECLI:EU:C:2020:1033, para. 37; Judgment of the Court of Justice of 31 January 2023, *Puig Gordi and Others*, C-158/21, ECLI:EU:C:2023:57; Order of the Court of Justice of 12 July 2022, *WO and JL*, C-480/21, ECLI:EU:C:2022:592; Judgment of the Court of Justice of 23 March 2023, *Minister for Justice and Equality (Levee du sursis)*, C-514/21 and C-515/21, ECLI:EU:C:2023:235; C-562/21, C-563/21, Judgment - 18/04/2023, *E. D. L. (Motif de refus fondé sur la maladie)*, C-699/21, ECLI:EU:C:2023:295; C-804/21, Judgment of the Court (First Chamber) of 21 September 2023, *Juan*, C-164/22, ECLI:EU:C:2023:684; Judgment - 21/12/2023, *GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)*, C-261/22, ECLI:EU:C:2023:1017; Judgment of the Court of Justice of 8 December 2022, *CJ*, C-492/22, ECLI:EU:C:2022:964.

[55] Judgment of the Court of Justice of 11 January 2017, *Joszef Grundza*, C-289/15, ECLI:EU:C:2017:4.

[56] Council of the EU, *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 of 1 March 2023, 2023, pp. 64-65, 67-68.

[57] Judgment of the Court of Justice of 4 March 2020, *Centraal Justitieel Incassobureau, Ministerie van Veiligheid en Justitie (CJIB) v ZP*, C-183/18, ECLI:EU:C:2020:153.

[58] Judgment of the Court (Grand Chamber) of 6 September 2016, *Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra*, C-182/15, ECLI:EU:C:2016:630; Judgment of the Court (Grand Chamber) of 16 July 2015, *PPU*, C-237/15, ECLI:EU:C:2015:474; Judgment of the Court of Justice of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, C-404/15 and C-659/15, ECLI:EU:C:2016:198; Judgment of the Court of Justice of 28 July 2016, *JZ v Prokuratura Rejonowa Łódź – Śródmieście*, C-294/16, ECLI:EU:C:2016:610; Judgment of the Court of Justice of 15 October 2019, *Dumitru-Tudor Dorobantu*, C-128/18, ECLI:EU:C:2019:857; C-216/18, Judgment of the Court of Justice of 25 July 2018, *ML*, C-220/18, ECLI:EU:C:2018:589; C-492/18, C-649/19, C-206/20, Judgment of the Court (Grand Chamber) of 17 December 2020, *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'emission)*, C-354/20 and C-412/20, ECLI:EU:C:2020:1033, para. 37; Judgment of the Court of Justice of 17 December 2020, *TR v Generalstaatsanwaltschaft Hamburg*, C-416/20, ECLI:EU:C:2020:1042; C-648/20, C-105/21, Judgment of the Court of Justice of 31 January 2023, *Puig Gordi and Others*, C-158/21, ECLI:EU:C:2023:57; Judgment of the Court of Justice of 14 July 2022, *Procureur général près la cour d'appel d'Angers*, C-168/21, ECLI:EU:C:2022:558; C-428/21, C-429/21, Order of the Court of Justice of 12 July 2022, *WO and JL*, C-480/21, ECLI:EU:C:2022:592; Judgment of the Court of Justice of 23 March 2023, *Minister for Justice and Equality (Levee du sursis)*, C-514/21 and C-515/21, ECLI:EU:C:2023:235; C-562/21, C-563/21, Judgment - 18/04/2023, *E. D. L. (Motif de*

Convictions[59]. A study by the European Law Institute (ELI) [60] also identified fundamental rights concerns in relation to FD Conflicts of Jurisdiction due to a lack of binding criteria determining jurisdiction (relying instead on Eurojust guidelines) or the lack of an enforcement mechanism for the results of consultations under the FD.

Grounds for mandatory and optional refusal of recognition or execution

As part of the EU legal framework governing cross-border cooperation on criminal matters, national authorities are required to recognise and to execute judicial decisions issued by the competent authorities of another Member State, and may refuse only under limited exceptional circumstances.

The potential grounds for refusal vary for each FD. Other than for procedural reasons, the executing State may refuse to recognise and enforce a judgment if:

- the *ne bis in idem* principle is not respected in ongoing or concluded proceedings on the same act;
- the age limit of criminal liability is not met by the person concerned;
- specific psychiatric or healthcare measures cannot be catered for in the executing State.

refus fondé sur la maladie), C-699/21, ECLI:EU:C:2023:295; Judgment of the Court (Grand Chamber) of 6 June 2023, *OG*, C-700/21, ECLI:EU:C:2023:444; Judgment - 21/12/2023, *GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)*, C-261/22, ECLI:EU:C:2023:1017; Judgment of the Court of Justice of 8 December 2022, *CJ*, C-492/22, ECLI:EU:C:2022:964; Council of the EU, *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 of 1 March 2023, 2023, p. 34; Council of the European Union, *The European arrest warrant and extradition procedures – current challenges and the way forward*, 2020/C 419/09.

[59] Judgment of the Court (First Chamber) of 21 September 2023, *Juan*, C-164/22, ECLI:EU:C:2023:684.

[60] European Law Institute (ELI), *Draft Legislative Proposal for the Prevention and Resolution of Conflicts of Jurisdiction in Criminal Matters in the European Union*, 2017, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_Prevention_and_Resolution_of_Conflicts_of_Jurisdiction_in_Criminal_Matters_in_the_European_Union.pdf.

Some particular grounds have been identified as presenting implementation challenges and national courts have frequently referred questions for preliminary rulings to the CJEU in relation to FD EAW[61], FD TOP[62], and FD Financial Penalties[63].

Double criminality and coordination between different penal systems

The 'dual criminality' requirement (i.e. that the criminal offence is punishable in both contracting States) is lifted for the large majority of offences (e.g. list of 32 offences in FD EAW, FD TOP and 39 in FD Financial Penalties). Nevertheless, in several FDs, the double criminality condition, under which the executing authority may refuse recognition/execution if the act on which the judicial decision is based does not

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[61] Judgment of the Court (First Chamber) of 28 September 2006, *Gasparini and Others*, C-467/04, ECLI:EU:C:2006:610; Judgment of the Court (Second Chamber) of 18 July 2007, *Kretzinger*, C-288/05, ECLI:EU:C:2007:441; Judgment of the Court of Justice of 17 July 2008, *Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozłowski*, C-66/08, ECLI:EU:C:2008:437; Judgment of the Court of Justice of 6 October 2009, *Dominic Wolzenburg*, C-123/08, ECLI:EU:C:2009:616; Judgment of the Court (Grand Chamber) of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683; Judgment of the Court (Fourth Chamber) of 21 October 2010, *I.B.*, C-306/09, ECLI:EU:C:2010:626; Judgment of the Court of Justice of 5 September 2012, *João Pedro Lopes Da Silva Jorge*, C-42/11, ECLI:EU:C:2012:517; Judgment of the Court (Grand Chamber), 29 January 2013, *Radu*, Case C-396/11, ECLI:EU:C:2013:39; Judgment of the Court (Grand Chamber) of 26 February 2013, *Stefano Melloni v Ministerio Fiscal*, C-399/11, ECLI:EU:C:2013:107, para. 38; Judgment of the Court of Justice of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, C-404/15 and C-659/15, ECLI:EU:C:2016:198; Order of the Court of Justice of 25 September 2015, *Openbaar Ministerie v. A.*, C-463/15, ECLI:EU:C:2015:634; Judgment of the Court of Justice of 29 June 2017, *Daniel Adam Popławski*, C-579/15, ECLI:EU:C:2017:503; Judgment of the Court of Justice of 24 May 2016, *Paweł Dworzecki*, C-108/16, ECLI:EU:C:2016:346; Judgment of the Court (Grand Chamber) of 23 January 2018, *Dawid Piotrowski*, C-367/16, ECLI:EU:C:2018:27; Judgment of the Court of Justice of 25 July 2018, *AY*, C-268/17, ECLI:EU:C:2018:602; Judgment of the Court of Justice of 10 August 2017, *Openbaar Ministerie v Tadas Tupikas*, C-270/17, ECLI:EU:C:2017:628; Judgment of the Court of Justice of 10 August 2017, *Sławomir Andrzej Zdziaszek*, C-271/17, ECLI:EU:C:2017:629; Judgment of 13 December 2018, *Sut*, C-514/17, ECLI:EU:C:2018:1016; Judgment of the Court of Justice of 22 December 2017, *Samet Ardi*, C-571/17, ECLI:EU:C:2017:1026; C-573/17; Judgment of the Court of Justice of 15 October 2019, *Dumitru-Tudor Dorobantu*, C-128/18, ECLI:EU:C:2019:857; Judgment of the Court (First Chamber) of 19 September 2018, *Minister for Justice and Equality v RO*, C-327/18, ECLI:EU:C:2018:733; Judgment of the Court of Justice of 17 March 2021, *JR*, C-488/19, ECLI:EU:C:2021:206; Judgment of the Court of Justice of 16 December 2021, *Criminal proceedings against AB and others*, C-203/20, ECLI:EU:C:2021:1016; Judgment of the Court of Justice of 17 December 2020, *TR v Generalstaatsanwaltschaft Hamburg*, C-416/20, ECLI:EU:C:2020:1042; Judgment of the Court (Fifth Chamber) of 29 April 2021, *PPU*, C-665/20, ECLI:EU:C:2021:339; Judgment of the Court of Justice of 14 July 2022, *Procureur général près la cour d'appel d'Angers*, C-168/21, ECLI:EU:C:2022:558; Judgment - 18/04/2023, *E. D. L. (Motif de refus fondé sur la maladie)*, C-699/21, ECLI:EU:C:2023:295; Judgment of the Court (Grand Chamber) of 6 June 2023, *OG*, C-700/21, ECLI:EU:C:2023:444; Judgment of 4 September 2025, *C.J.*, C-305/22: EU:C:2025:665; Judgment - 21/12/2023, *Generalstaatsanwaltschaft Berlin (Condamnation par défaut)*, C-396/22, ECLI:EU:C:2023:1029; Judgment - 21/12/2023 - Generalstaatsanwaltschaft Berlin (Condamnation par défaut), C-397/22, ECLI:EU:C:2023:1030; Judgment - 21/12/2023, *Generalstaatsanwaltschaft Berlin (Condamnation par défaut)*, C-398/22, ECLI:EU:C:2023:1031; European Commission: Directorate-General for Justice and Consumers, *Report from the Commission to the European Parliament ad the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM/2020/270, Brussels, 2020, p. 6, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52020DC0270&qid=1760106285748.

[62] Judgment of the Court (First Chamber) of 21 September 2023, *Juan*, C-164/22, ECLI:EU:C:2023:684.

[63] Judgment of the Court (First Chamber) of 5 December 2019, *Centraal Justitieel Incassobureau*, C-671/18, ECLI:EU:C:2019:1054; Judgment of the Court (First Chamber) of 6 October 2021, *D.P.*, C-338/20, ECLI:EU:C:2021:805.

constitute an offence under its law, is considered grounds for optional non-execution/recognition.

Furthermore, while the different national criminal systems are respected, the definitions used in the FDs often do not seem precise enough to ensure smooth cooperation between countries. In several cases, national authorities referred questions for preliminary ruling to the CJEU to request interpretation of certain definitions and concepts provided in the FD, such as the concept of judicial authority (FD TOP)[64] or the notion of competent authority (FD PAS)[65]. The CJEU also provided guidance on the main concepts of FD EAW, FD Previous Convictions, and FD Financial Penalties, including elements such as the concept of final judgment, alternative sanction or suspended sentence or financial penalty, and the scope of the FD.

Interaction with other EU instruments and international agreements

In a number of cases, particularly those concerning FD EAW, national courts raised doubts about the interaction of certain provisions of the FD with other EU instruments and international agreements[66]. Several questions were raised about the status of Ireland in the context of the application of FD TOP[67], or Directive 2006/126/EC on driving licences[68] in connection with FD PAS[69]. These judgments are indicative of challenges arising between application of these FDs and the broader EU legal framework.

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[64] Judgment of the Court of Justice of 11 March 2020, C-314/18, *SF*, ECLI:EU:C:2020:191; Judgment of the Court of Justice of 9 November 2023, *Staatsanwaltschaft Aachen*, C-819/21, ECLI:EU:C:2023:841.

[65] Judgment of the Court of Justice of 26 March 2020, C-2/19, *A.P.* Request for a preliminary ruling from the *Riigikohus*. ECLI:EU:C:2020:237.

[66] Judgment of the Court (First Chamber) of 28 September 2006, *Gasparini and Others*, C-467/04, ECLI:EU:C:2006:610; Judgment of the Court (Second Chamber) of 18 July 2007, *Kretzinger*, C-288/05, ECLI:EU:C:2007:441; Judgment of the Court (Third Chamber) of 12 August 2008, *Goicoechea*, C-296/08, ECLI:EU:C:2008:457**;** Judgment of the Court (Grand Chamber) of 6 September 2016, *Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra*, C-182/15, ECLI:EU:C:2016:630; Judgment of the Court (Grand Chamber) of 10 April 2018, *Romano Pisciotti v Bundesrepublik Deutschland*, C-191/16, ECLI:EU:C:2018:222; Judgment of the Court (Grand Chamber) of 13 November 2018, *Denis Raugevicius*, C-247/17, ECLI:EU:C:2018:898; Judgment of the Court (First Chamber) of 19 September 2018, *Minister for Justice and Equality v RO*, C-327/18, ECLI:EU:C:2018:733; Judgment of the Court (Grand Chamber) of 17 December 2020, *Proceedings relating to the extradition of BY*, C-398/19, ECLI:EU:C:2020:1032; Judgment of the Court (Grand Chamber) of 2 April 2020, *Ruska Federacija v I.N.*, C-897/19, ECLI:EU:C:2020:262; Judgment of the Court of Justice of 16 December 2021, *Criminal proceedings against AB and others*, C-203/20, ECLI:EU:C:2021:1016; Judgment of the Court (Grand Chamber) of 16 November 2021, *SN and SD*, C-479/21, ECLI:EU:C:2021:929; Order of the Vice-President of the Court of 24 May 2022, *Carles Puigdemont i Casamajó and Others v European Parliament*, C-629/21, ECLI:EU:C:2022:413; Judgment of the Court of Justice of 9 November 2023, *Staatsanwaltschaft Aachen*, C-819/21, ECLI:EU:C:2023:841; Council of the European Union, *The European arrest warrant and extradition procedures – current challenges and the way forward*, 2020/C 419/09.

[67] Judgment of the General Court (Third Chamber, Extended Composition) of 28 May 2020, *Liam Campbell v European Commission*, T-701/18, ECLI:EU:T:2020:224.

[68] Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (Recast), OJ L 403, 30.12.2006, pp. 18–60.

[69] Judgment of the Court (Third Chamber) of 6 October 2022, *HV*, C-266/21, ECLI:EU:C:2022:754.

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Contextual application and efficacy of the FDs

Some challenges identified relate to the situations in which these FDs apply and their relative effectiveness in those circumstances. In relation to FD EAW, issues have been raised concerning the procedure relating to consent, as well as the timeframe for the execution of the EAW, with the fragmentation of Member States' approaches presenting a potential challenge[70]. For FD TOP, national courts referred preliminary questions on the procedure for recognition of the judgment by the executing State[71], the nature and scope of the obligations of the executing authorities,[72] the consequences for the issuing State of the recognition of the judgment by the executing State in terms of competence on the supervision of the measures imposed[73], and the possibility by both the issuing and the executing State to grant amnesty or pardon or to review the judgment[74].

The 9th round of mutual evaluations by the European Council indicates that application of FD PAS and FD ESO remains low[75]. In both cases, the duration of probation periods is considered too short for many decisions on recognition or pre-trial detention to be taken. The FD PAS is held up by delays due to inefficient communication between national authorities, while the FD ESO is complicated by Member State authorities' reluctance to let the accused person leave the country when their presence will be needed for criminal procedures, as well as the perception that the process of applying the FD complicates and lengthens the pre-trial investigation process.

These issues represent general challenges with contextual factors and the practical realities of application of these FDs.

Inadequate transposition

Transposition was already identified as a challenge prior to this study. In its various implementation reports on the different FDs, the Commission had identified issues relating to the incorrect or absent transposition of FDs by the Member States. For instance, the 2020 Commission implementation report on FD EAW found that

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[70] European Commission: Directorate-General for Justice and Consumers, *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM/2020/270, Brussels, 2020, pp. 21-22, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52020DC0270&qid=1760106285748.

[71] Judgment of the Court of Justice of 11 March 2020, C-314/18, *SF*, ECLI:EU:C:2020:191; Judgment of the Court of Justice of 9 November 2023, *Staatsanwaltschaft Aachen*, C-819/21, ECLI:EU:C:2023:841; Judgment of the Court of Justice of 15 April 2021, *AV*, C-221/19, ECLI:EU:C:2021:278; Judgment of the Court of Justice of 9 November 2023, *Staatsanwaltschaft Aachen*, C-819/21, ECLI:EU:C:2023:841.

[72] Judgment of the Court of Justice of 8 November 2016, *Atanas Ognyanov*, C-554/14, ECLI:EU:C:2016:835; Judgment of the Court of Justice of 15 April 2021, *AV*, C-221/19, ECLI:EU:C:2021:278.

[73] Judgment of the Court of Justice of 11 January 2017, *Joszef Grundza*, C-289/15, ECLI:EU:C:2017:4.

[74] Judgment of the Court of Justice of 15 April 2021, *AV*, C-221/19, ECLI:EU:C:2021:278.

[75] Council of the EU, *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 of 1 March 2023, 2023, pp. 64-65.

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implementation of the FD remained unsatisfactory[76]. In 2022, it launched infringement actions against all Member States for failure to correctly transpose FD EAW or to adopt the necessary measures to comply with the FD. Some of the cases are still ongoing.

A 2014 report on FD Previous Convictions indicated that some Member States had failed to formally transpose the FD's definition of a conviction, creating a potential variance in the scope of application of the FD[77].

Transposition of FD Conflicts of Jurisdiction proceeded slowly, with many Member States transposing the FD late. According to Eurojust, transposition often did not sufficiently make use of the referral tool enabling it to facilitate a decision on jurisdiction.[78]

Section 2 presents this study's comprehensive desk research into national transposition of each FD and identification of ongoing fragmentation of national transposition.

Policy and legal developments in cross-border cooperation on criminal matters to be considered

Any future EU action, including also the lisbonisation of the FDs, must consider the policy and legislative developments in judicial cooperation on criminal matters that have occurred since the FDs were adopted over 20 years ago.

Analysis of CJEU caselaw (see Annex 3) shows that Member States frequently face implementation challenges related to more than one FD. Member States are obliged to align their national law with the findings of developing caselaw, allowing practitioners to handle cases in accordance with legal standards. Keeping up with the ever-increasing body of caselaw presents a significant burden and challenges to Member States and practitioners. The evolving CJEU jurisprudence should be carefully reflected in any future EU law.

The Commission recently launched significant work towards the digitalisation of justice systems, including Regulation (EU) 2023/2844 (Digitalisation Regulation)[79] digitalising

[76] European Commission: Directorate-General for Justice and Consumers, *Report from the Commission to the European Parliament ad the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM/2020/270, Brussels, 2020, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52020DC0270&qid=1760106285748.

[77] European Commission, Report from the commission on the implementation by the Member States of Framework Decision 208/675/JHA of 24 July 2008 on taking into account of convictions in the Member States of the European Union in the course of new criminal proceedings, COM/2014/312, Brussels 2014, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0312&qid=1689671258017.

[78] Eurojust, *Written Recommendations on Jurisdiction: Follow-up at the National Level*, 2021, https://www.eurojust.europa.eu/publication/eurojust-written-recommendations-jurisdiction-follow-up-national-level.

[79] 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, *OJ L, 2023/2844.*

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the cooperation procedure under all but one of the FDs described here (FD Previous Convictions). The digitalised communication will affect implementation of the FDs and should also form part of any future EU level action.

In response to ongoing global developments and the needs of Member States, new EU instruments have been adopted to enhance cross-border cooperation in criminal matters. These new mechanisms and tools, such as Directive (EU) 2023/1544 (European Investigative Order (EIO) Directive)[80] and Regulation (EU) 2023/1543 on access to e-evidence[81] may influence the cooperation mechanisms under the FDs.

Ireland and Denmark have a special status regarding participation in the AFSJ, as they can opt-out and/or opt-in of any new measures adopted. Ireland retains the option to opt-in to a new measure, whereas Denmark opts-out automatically. The current FDs apply in full to Denmark and Ireland, but any new legal instruments may not. Lisbonisation of the FDs could thus create a situation where Denmark and Ireland remain bound by otherwise defunct instruments, while a separate, updated legal framework applies to the other Member States. If not dealt with, inconsistency could threaten the uniform applicability of EU law.

[80] Directive (EU) 2023/1544 of the European Parliament and of the Council of 12 July 2023 laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings *OJ L 191*.

[81] 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, OJ L 191.

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2. Part A - Assessment of transposition and implementation of ex-third pillar

Part A presents the findings on the national transposition and implementation of the FDs covered by this Study. For each FD, it provides an introduction summarising the findings, the opportunities and barriers to applying each instrument, and an overview of the status of transposition highlighting the main problematic issues per FD.

The description of opportunities and obstacles is based on an analysis of literature, in particular the European Commission's Evaluation Reports on the FD at stake, as well as other sources such as commissioned studies. It also considers the interaction of the FDs with other pieces of legislation and the results of the analysis of relevant CJEU c (the full case law analysis is available in Annex 3).

The main conclusions of the work carried out in Part A are the following:

- For all FDs, transposition challenges include issues with grounds for refusal.
- Transposition of some provisions across the FDs identified uncertainty among Member States as to whether certain provisions are mandatory and, in some cases, how those provisions should be transposed.
- Enforcement goals cause tensions with fundamental rights (e.g. FD EAW, FD TOP). These goals also challenge Member States' legitimacy (e.g. FD Conflicts of Jurisdiction).
- From a quantitative point of view, some instruments are successful (e.g. number of EAW processed under the FD EAW), while others present uneven results (e.g. lack of application of FD ESO).
- Some of the FDs are closely linked, suggesting unification potential (e.g. FD EAW, FD TOP, FD PAS, FD ESO). This is further explored in Part B of the report (Section 3 onwards).
- Third pillar pre-Lisbon instruments should be considered in the wider context of interrelated EU criminal matter directives and regulations adopted after the Lisbon Treaty (e.g. EAW and EIO, FD Previous Convictions and the European Criminal Records Information System (ECRIS), FD Financial Penalties and Directive (EU) 2015/413 on cross-border exchange of information (CBE Directive)[82]).

The analyses of the transposition and implementation of the various FDs consider the national transposition measures adopted up to the end of November 2024 for FD EAW and up to July 2025 for the other FDs.

[82] Directive (EU) 2015/413 of the European Parliament and of the Council of 11 March 2015 facilitating cross-border exchange of information on road safety-related traffic offences.

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2.1. European Arrest Warrant (EAW) - Council Framework Decision 2002/584/JHA of 13 June 2002

The next section presents the findings for FD EAW, showing a **rather positive transposition**. This is also likely the result of the infringement proceedings launched by the European Commission from 2020, which led to amendments to the national legislation to align with FD requirements. However, **some provisions still show fragmented or missing transposition** across several Member States (e.g. provisions on the mandatory and optional grounds for non-execution, provisions on the situation pending the decision on EAW). The analysis of the vast CJEU jurisprudence reveals that case-law has provided essential clarification and guidance, but **challenges persist** in how Member States have adapted to the indications provided by the CJEU.

2.1.1. Opportunities and barriers to the arrest and surrender of a requested person by another Member State

The Commission's first evaluation report of the FD in 2006 acknowledged an initial delay but confirmed that the EAW was mostly operational[83]. The 2007 report noted delays and constitutional issues in [redacted][84]. The FD was then updated to include changes from two 2009 FDs: FD on decisions rendered *in absentia*, and FD TOP. Following the entry in force of the Lisbon Treaty, three evaluation reports (third implementation report[85], fourth round of mutual evaluations[86], European Parliament motion with recommendations[87]) pointed to possible improvements, as presented in the table below.

[83] European Commission, *Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2006) 8 final, Brussels, 24.1.2006.

[84] European Commission, *Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2007) 407 final, Brussels, 2007, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52007DC0407.

[85] European Commission, *Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2011) 175 final, Brussels, 2011, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011DC0175.

[86] Council of the European Union, Follow-up to the evaluation reports on the fourth round of mutual evaluations: Practical application of the European arrest warrant and the relevant surrender procedures between Member States, Document No. 15815/11.

[87] Motion for a European Parliament Resolution with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)).

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Table 2 - Issues identified: EU institution reports, 2011-2013

Issue raised	Report		
	Third implementation report	Fourth round of mutual evaluations	European Parliament motion with recommendations
No entitlement to legal representation in the issuing State during surrender proceedings	X		
Poor detention conditions in some Member States	X		
Lengthy pre-trial detention for surrendered persons	X		
Non-uniform application of a proportionality check by issuing states	X		X
Requests for surrender for relatively minor offences	X		
Problems with time limits to be complied with or clearly established		X	
Grounds for non-execution not in line with the FD		X	
Poor distinction between extradition and surrender procedures		X	
Limited coercive powers to ensure surrender		X	
Problems when waiving the speciality rule before the judicial authority		X	
Problem when distinguishing consent to surrender from automatic waiving of the speciality rule		X	
No accessory surrender		X	
Lack of procedure for validating mutual recognition measures in the issuing State			X
Lack of standardised consultation procedure for executing judicial decisions			X
Issues with mandatory refusal ground based on Article 6 of the TEU and the CFR			X
Issues with the right to an effective legal remedy			X
Poor definition of crimes where the EAW should apply			X

Some of these concerns were addressed by three directives: Directive 2010/64/EU mandating Member States to provide interpretation and guaranteeing the right to translation during EAW proceedings[88], Directive 2012/13/EU establishing the right to

[88] Articles 2(7) and 3 of Directive 2010/64/EU; European Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings*, COM/2018/857 final.

information in writing[89], and Directive 2013/48/EU guaranteeing the right of access to a lawyer in the Member State issuing a EAW[90].

Recent years have seen more than 13,000 EAWs issued each year in the EU[91]. This has led the rapporteur of the European Parliament to consider that the 'EAW system, based on available statistics, is a success and existing limited problems do not put this into question'[92].

Table 3 - EAW usage statistics 2018-2022

Year	Total EAWs Issued	EAWs for prosecution	EAWs for execution	Total arrests	Initiated surrender proceedings	Effective surrenders
2022	13,335	3,893	9 442	7,346	8,098	5,125
2021	14,789	-	-	7,262	7,737	5,144
2020	15,938	-	-	6,152	7,143	-
2019	20,226	-	-	-	-	
2018	17,471	-	-	-	-	

Recent reports, such as the 9th round of mutual evaluations, 2020 Commission report on implementation, European Parliament motion with recommendations and the 2020 compliance assessment report[94] all point out recurring problems with the FD, as presented in the table below.

Table 4 - Issues identified: EU institution reports, 2019-2023

Issues raised	Report			
	9th round	*Commission report 2020*	*European Parliament motion 2020*	*Compliance assessment of FD's transposition*
Proportionality principle	X		X	

[89] Directive 2012/13/EU, Article 5; Commission Implementing Regulation (EU).../... on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council and amending Commission Regulation (EU) No 601/2012, C/2018/8588 final.

[90] Directive 2013/48/EU, Articles 10(4) and 5; Council Implementing Regulation (EU) 2019/560 of 8 April 2019 implementing Regulation (EU) No 359/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Iran, *OJ L 98, 9.4.2019, pp. 1–12.*

[91] European Commission, Statistics on the practical operation of the European arrest warrant – 2022, SWD(2024) 137 final.

[92] Motion for a European Parliament Resolution on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)); European Parliament Resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)).

[93] Motion for a European Parliament Resolution on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)).

[94] Overall report on the transposition of Framework Decision 2002/584/JHA,2019 (unpublished).

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Issues raised	Report			
	9th round	*Commission report 2020*	*European Parliament motion 2020*	*Compliance assessment of FD's transposition*
Judgments in absentia (optional refusal for judgments rendered in absentia; criteria vary across Member States)	X		X	
Grounds for refusal (some Member States make optional grounds mandatory; restricted surrender of nationals/residents; inconsistencies)	X	X	X	X
Double criminality (common non-execution ground due to insufficient information)	X		X	
Ne bis in idem principle (low denial rate of EAWs; issues with assessing 'same acts')	X			
Detention conditions (significant impact on EAW proceedings; additional information often requested)	X		X	
Time limit and timeframe and procedures for the decision to execute the EAW (Articles 15(1), 17, 23)	X	X	X	X
Translation issues (Some Member States accept EAWs only in their official language; translation challenges during provisional arrest)	X			
Implementation of procedural safeguards in EAW proceedings			X	X
Dual legal representation in both executing and issuing states			X	
Training			X	
Specific rule of law issues			X	
Execution of custodial sentences			X	
Absence of a comprehensive data system for reliable statistics on EAWs			X	

To date, the CJEU has rendered over 100 cases on the FD EAW. Of these, this study focuses on 44 judgments that provide relevant and substantive clarifications on the interpretation of certain provisions of FD EAW (see detail in Annex 3.1).

2.1.2. Overview of national transposition

FD EAW sets down the **procedures applicable in the Member States for the recognition and execution of request for surrender of persons** so that a criminal prosecution can be conducted or the person can be placed in custody or detention[95].

[95] European Commission, *More effective extradition procedures: European arrest warrant*, 2020, https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex:32002F0584.

The desk research at national level covered several problematic provisions identified with DG JUST: Articles 1(1); 1(2); 1(3); 2(1); 2(2); 2(4); 3(2); 4(1)-(7); 4a; 5; 10(5); 11; 13; 15(1); 17; 18; 19; 20; 23(1)-(5); 27; 28. The desk research covers national legislation in force as of 30 November 2024.

Table 5 - Problematic articles in FD EAW

Topic	FD EAW article(s)
Definitions and scope	1(1-3), 2(1-2, 4)
Grounds for refusal and guarantees	3(2), 4(1-7), 4a, 5
Consent and rights of the requested person	11, 13
Procedure and time limits	10(5), 15(1), 17, 18, 19
Privileges and Immunities	20
Prosecution for other offences and subsequent surrender	27, 28

Desk research at national level shows that the status of transposition is variable. Some provisions were completely transposed, with others fragmented or not transposed.

Table 6 presents the categorisation of the provisions with problematic transposition.

Table 6 - FD EAW: Overview of transposition status

Status of transposition	Problematic provisions
Positive	1(1); 2(1); 4(2); 4a(2); 10(5); 11; 13; 17; 23(1)-(5); 27; 28(1); 28(4)
Fragmented or missing	1(2); 1(3); 2(2); 2(4); 3(2); 4(1); 4(3)-(7); 4a(1); 4a(3); 5(2)-(3); 15(1); 17; 18; 19; 20; 28(2)-(3)

The following sub-sections will focus on the specific articles identified as having a fragmented or missing transposition.

Article 1: Definition of the EAW and obligation to execute it

Article 1 of the FD EAW sets out the definition of an EAW (Article 1(1)) and the obligation for Member States to execute it based on mutual recognition and in accordance with the provisions of the FD itself (Article 1(2)), while respecting fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU (Article 1(3)).

Generally, this provision does not raise specific transposition concerns. Several Member States ( ) transposed it completely and in a conforming manner. Others, however, failed to transpose certain components correctly.

The majority of issues revolve around Article 1(2). National experts identified conformity issues in . The most common

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issues relate to the incorrect transposition of the provisions on the grounds for non-execution of the EAW and the provision, in national law, of additional grounds for non-execution not foreseen in the FD EAW.

The provision of Article 1(3), on respect of fundamental rights as enshrined in Article 6 of the TEU, raises fewer concerns. Where issues are identified (,), they mainly relate to the lack of an express reference to Article 6 of the TEU. However, there is extensive case-law on the respect of fundamental rights in the context of EAW proceedings. Differences in application of this body of case-law may lead to fragmented transposition of the fundamental rights provisions of the FD (see Annex 3.1 and Annex 4 Case Study 2).

Article 2: Scope of the EAW

Article 2 sets out the scope of FD EAW by identifying the offences that may trigger the issuing of an EAW (Article 2(1)). It lists 32 categories of offences that shall give rise to surrender pursuant to the EAW without verification of the double criminality of the act (Article 2(2)). Surrender may be subject to double criminality for other categories of offences (Article 2(4)).

Article 2 does not present transposition issues generally, with the vast majority of Member States transposing its provisions in an almost literal manner.

Among the limited issues identified in some Member States ( ), the national transposing measures provide, in certain situations, a verification of double criminality even for the offences listed in Article 2(2).

Another issue concerns Article 2(4), in connection with Article 4(1), which provides for the ground for optional non-execution in case of lack of double criminality. The latter provision is sometimes transposed incorrectly, as the national measures fail to transpose the exception to the double criminality check for cases relating to taxes or duties, customs and exchange (e.g. [96]). This lack of correct transposition may result in the execution of an EAW refused on double criminality grounds in cases where the differences between the law of the issuing State and executing State should not lead to non-execution of the EAW (e.g. taxes or duties, customs and exchange).

Article 3: Grounds for mandatory non-execution of the EAW

Article 3 sets out the cases where non-execution of an EAW by the executing judicial authority is mandatory. Article 3(2) clarifies that an EAW shall not be executed, in accordance with the *ne bis in idem* principle, where the requested person has been finally judged by a Member State in respect of the same acts and has served, or is currently serving, the relevant sentence (or such sentence may no longer be executed). The requirement that the **relevant sentence** has been **enforced** or is currently being

[96] For , see the additional information in the section on Article 4: Grounds for optional non-execution of the EAW.

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enforced (or may no longer be enforced) is a **key feature** of the ground for mandatory non-execution laid down in Article 3(2), as it distinguishes it from the similar ground for optional non-execution in Article 4(3).

This provision is transposed in a complete and conforming manner across the Member States, with limited cases of incorrect transposition (e.g. [redacted]), where the national legislation fails to explicitly transpose the enforcement requirement.

Other conformity issues with Article 3(2) are in relation to the notion of 'same acts'. The CJEU has issued judgments (e.g. Case C-261/09, *Mantello*[97]; Case C-164/22, *Juan*[98]) clarifying that to establish the existence of the 'same acts' it is not necessary to take account of the legal qualification of the offences in question. The [redacted] national framework (and case-law) is stricter than the FD EAW in that it requires consideration of both the legal and the factual qualification of the behaviour in question for acts to be considered as being the 'same'. The [redacted] Irish legislation does not refer to the notion of 'same acts', but, rather, to the concept of 'an offence consisting of an act or omission that constitutes an offence in respect of which a final judgment has been given'. This wording raises concerns about conformity, as it appears capable of leading to a broader interpretation than the notion of 'same acts', as clarified by the case-law of the CJEU.

Article 4: Grounds for optional non-execution of the EAW

Article 4 sets out the cases where execution of an EAW may be refused, on an optional basis, by the executing judicial authority. The following circumstances amount to grounds for optional non-execution of an EAW:

- Lack of double criminality (Article 4(1));
- Ongoing prosecution in the executing State for the same acts (Article 4(2));
- Decision of the judicial authorities of the executing State not to prosecute or to halt proceedings for the same offence, or final judgment in respect of the same acts, which prevents further proceedings (Article 4(3));
- Criminal prosecution or punishment being statute-barred according to the law of the executing State, where the acts fall within its jurisdiction (Article 4(4));
- Final judgment issued in a third State in respect of the same acts, provided that the requested person has served or is currently serving the relevant sentence, or such sentence may no longer be executed (Article 4(5));
- The requested person staying in the executing State, or being a national or resident of the executing State, if that State undertakes to execute the sentence or detention order in accordance with its domestic law (Article 4(6)) – this optional ground for refusal relates to EAWs issued for the purposes of execution of a custodial sentence or detention order;

[97] Judgment of the Court (Grand Chamber) of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683.

[98] Judgment of the Court (First Chamber) of 21 September 2023, *Juan*, C-164/22, ECLI:EU:C:2023:684.

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- The EAW relating to offences that are regarded by the law of the executing State as having been committed in whole or in part in its territory (Article 4(7)(a));
- The EAW relates to offences committed outside the territory of the issuing State, if the law of the executing State does not allow prosecution for the same offences when committed outside its territory (Article 4(7)(b)).

Transposition of this provision was not uniform. In some Member States (e.g. [redacted]), national transposition generally conforms with the FD EAW or presents limited transposition or conformity issues.

For a larger number of Member States, the transposition of Article 4 presents more widespread completeness and conformity issues. One widespread conformity issue that encompasses all sub-provisions of Article 4 is that some Member States transposed the grounds for optional non-execution of Article 4 as grounds for mandatory non-execution, thus not providing the executing judicial authorities with the discretion to assess, case-by-case, whether such grounds for non-execution should be applied. This is not in line with the wording of Article 4 of the FD EAW nor with the case-law of the CJEU (e.g. Case C-665/20 PPU, *X*[99]), which clarified that where a Member State transposes a ground for optional non-execution into its domestic law it shall grant a margin of discretion to the judicial authority to determine whether or not refusal of execution is appropriate.

Article 4(1) is not transposed in [redacted], and other Member States have transposed it with conformity issues. For example, [redacted] failed to transpose the exception under which the EAW shall not be refused on the ground that the law of the executing State does not impose the same kind or type of rules on taxes or duties or customs or exchange regulations[100]. This discrepancy is likely to lead to the non-execution of EAWs in those Member States in cases where FD EAW does not provide for the possibility of refusing execution. Other Member States (e.g. [redacted]) transposed all components of Article 4(1), but the relevant national measures provide that the lack of double criminality amounts to a ground for mandatory non-execution, instead of a ground for optional non-execution of the EAW.

Article 4(2) does not raise specific concerns, although several Member States (partially) transposed it as a ground for mandatory non-execution (e.g. [redacted]).

[99] Judgment of the Court (Fifth Chamber) of 29 April 2021, *PPU*, C-665/20, ECLI:EU:C:2021:339.

[100] [redacted]: the transposing legislation does not itself provide for an exception for cases concerning taxes or duties, customs and exchange. However, this issue is addressed in the relevant Government Bill, which clarifies that the provision of national legislation shall not be interpreted so as to prohibit surrender on the basis that [redacted] law does not impose the same kind of tax or duty, or that it does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing State. Although this document is not binding, government bills are highly influential in the interpretation of [redacted] law.

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Looking at Article 4(3), it appears that some Member States transposed this ground for non-execution of the EAW (or part of it) as mandatory rather than optional (e.g. [redacted]). In [redacted], the situations where the executing judicial authority decides not to prosecute or to halt proceedings are correctly transposed as grounds for optional non-execution, whereas the situation where a final judgment is passed upon the requested person in a Member State is transposed as a ground for mandatory non-execution. In other cases, the completeness and conformity of the national transposing measures are affected by the fact that not all elements of the provisions are accurately reflected in national legislation (e.g. [redacted]). [redacted] did not transpose this article into national legislation.

Article 4(4) does not pose widespread problems, except for its transposition as a ground for mandatory non-execution in some Member States (e.g. [redacted]).

National desk research indicated improvements in the transposition of Article 4(5) by certain Member States whose national measures were previously assessed as non-compliant ([redacted]). However, transposition in other Member States still presents issues of completeness or conformity. For example, [redacted] transposed this provision as mandatory rather than optional, and the transposing measure in [redacted] does not expressly cover the situation where the sentence is 'currently being served', thus failing to fully encompass the scope of the provision.

Article 4(6) presents similar transposition issues. While some Member States (e.g. [redacted][101], [redacted]) have amended their national legal systems to enhance compliance with FD EAW, others present notable issues. For example, [redacted], [redacted] (partially) transposed this provision as a ground for mandatory non-execution of an EAW instead of a ground for optional non-execution.

Several conformity issues are evident in the transposition of the personal scope of Article 4(6), which encompasses persons 'staying in', 'nationals' and 'residents' of the executing State. Recent case-law of the CJEU (e.g. Case C-700/21, *OG*[102]) clarified that Article 4(6), read in conjunction with the principle of equality before the law, enshrined in Article 20 of the CFR, must be interpreted as precluding a law of a Member State transposing Article 4(6) from excluding, absolutely and automatically, any third-country national staying or residing in the territory of that Member State from benefiting from the ground for optional non-execution of a EAW laid down in that provision, without the executing judicial authority being able to assess the connections that the third-country national has with that Member State. Many Member States did not codify the CJEU findings in their national laws, or failed to duly cover the scope of application of the ground for optional non-execution of Article 4(6) by encompassing persons that stay in, are nationals or residents of the executing State, including third-country nationals.

[101] The [redacted] country fiche for FD EAW is dated December 2024 and the amended legislation did not enter into force until January 2025, thus Article 4(6) appears as non-conforming in the fiche.

[102] Judgment of the Court (Grand Chamber) of 6 June 2023, *OG*, C-700/21, ECLI:EU:C:2023:444.

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For example, in [redacted], the national measures transposing Article 4(6) apply only to nationals of these Member States or EU nationals residing in these Member States, thus not covering third-country nationals. In [redacted] and [redacted], the national measures cover citizens and residents of these Member States but fail to explicitly cover nationals from other Member States or third-country nationals 'staying in' their territory. The national measures in [redacted] only cover nationals residing in the territory of [redacted], failing to cover [redacted] nationals who are not residing in [redacted], [redacted] residents who are not [redacted] nationals, and other persons who are staying in [redacted] (irrespective of their nationality). [redacted] transposed this provision by introducing a differentiated regime, which is not provided for in FD EAW. According to the [redacted] transposing measure, the execution of the EAW shall be refused if it concerns [redacted] citizens, or persons who have been granted asylum in [redacted] unless they consent to the surrender; conversely, the execution may be refused if it concerns a person who is a [redacted] resident or who is permanently staying in [redacted].

In [redacted], the national transposing measures fail to specify that non-execution of the EAW is subject to the condition that the executing State undertakes to execute the sentence or detention order in accordance with its domestic law. They also add the condition that the requested person does not consent to their surrender, which is not foreseen in Article 4(6).

The transposition status of Article 4(7) is not uniform. Many Member States transposed this provision correctly (e.g. [redacted]), while others present issues. For example, some Member States (e.g. [redacted]) (partially) transposed this provision as a ground for mandatory non-execution. In [redacted], the relevant transposing measures add the additional requirement that the act is not punishable under [redacted] law, which is not provided for in FD EAW.

Article 4a: Decisions following a trial in absentia

Article 4a sets out one additional ground for optional non-execution of an EAW – cases where the decision imposing a custodial sentence, or a detention order was issued in a trial *in absentia*. This ground for optional non-execution shall not be triggered if the EAW provides for specific guarantees of the requested person's right to defence, detailed in Article 4a(1)(a)-(d).

Article 4a provides for further guarantees for requested persons who were not served with the decision imposing a custodial sentence or a detention order, such as the right to request a copy of the judgment before being surrendered (Article 4(a)(2)) and, if a retrial or appeal has been requested, the right to have their detention reviewed pending the finalisation of such retrial or appeal (Article 4a(3)).

Analysis of the national transposition of Article 4a(1) highlights some areas of concern. In [redacted], while this provision is generally transposed in a complete manner, it is given as a mandatory ground for refusal, affecting overall conformity of the national measures.

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Article 4a(3) presents particular problems because no transposition is identified in [redacted].

Article 5: Guarantees to be given by the issuing State in particular cases

According to Article 5, Member States may opt to make the execution of an EAW conditional on the provision of specific guarantees in particular cases.

For an EAW based on an offence punishable by a custodial life sentence or a lifetime detention order, the executing State may opt to make the surrender subject to the condition that the issuing State has provisions for the possible review of the penalty or measure imposed, or for the possible application of clemency measures (Article 5(2)).

If an EAW is issued for the prosecution of a national or resident of the executing State, the latter may make the surrender subject to the condition that the person, after being heard, is returned to the executing State to serve the relevant custodial sentence or detention order (Article 5(3)).

National desk research did not identify significant issues with Article 5(2). Several Member States (e.g. [redacted]) decided not to transpose this optional provision, with no impact on the conformity of the national legal systems with FD EAW.

National desk research identified recurring issues with Article 5(3) across many Member States. Frequently, the national transposing measures lay down differences in the application of this guarantee between nationals of the executing State and persons residing in the executing State, which amount to unjustified discrimination based on the nationality of the requested person. In [redacted], the return of the requested person to the [redacted] is an obligatory condition for surrender, in [redacted], residents are subject to additional conditions to benefit from the guarantee, in [redacted], the guarantee applies automatically to [redacted] citizens and only optionally to non-[redacted] residents,, and in [redacted], the national measures only cover [redacted] citizens and asylum recipients, but not non-[redacted] residents.

Article 10: Detailed procedures for transmitting an EAW

Analysis of the provision revealed no transposition issues in any Member State.

Article 11: Rights of a requested person

Analysis of the provision revealed no transposition issues in any Member State.

Article 13: Consent to surrender

Analysis of the provision revealed no transposition issues in any Member State.

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Article 15: Surrender decision

Article 15 states that the executing judicial authority must decide on the surrender of the requested person within the time limits and conditions defined in FD EAW (Article 15(1)).

Assessment of the conformity of the national transposition measures with Article 15(1) is carried out in connection with the assessment of Article 17 of FD EAW, which sets out the time limits and procedures for the decision to execute the EAW. Failure to meet the time limits provided by Article 17 would automatically result in the failure to comply, in practice, with the obligation laid down in Article 15(1), although Member States may have formally transposed the latter.

National desk research identified specific issues with Article 15(1) in several Member States (e.g. [redacted]), as a consequence of the failure to correctly transpose the strict time limits provided by Article 17 of FD EAW.

Article 17: Time limits and procedures for the decision to execute the EAW

Article 17 deals with the rules on time limits and procedures for the decision to execute the EAW. An EAW should be handled quickly and executed as a matter of urgency (Article 17(1)). If the requested person agrees to surrender, the executing judicial authority must make a final decision on the EAW within 10 days after consent is given (Article 17(2)). If the requested person does not consent, the executing judicial authority has up to 60 days from the arrest to make a final decision on the EAW, according to Article 17(3). If the EAW cannot be executed within the 10-day or 60-day periods, the executing judicial authority must inform the issuing authority immediately, explaining the reasons for the delay. The execution period can be extended by an additional 30 days in such cases (Article 17(4)). Until a final decision is made, the executing judicial authority must ensure that all necessary conditions for the effective surrender of the requested person remain in place (Article 17(5)). If the executing judicial authority refuses to execute the EAW, it must provide reasons for that refusal (Article 17(6)). Article 17(7) states that in exceptional circumstances where the executing State cannot meet the specified time limits, it must inform Eurojust, explaining the reasons for the delay.

The CJEU stressed the binding nature of the time limits set out in Article 17 of FD EAW by clarifying that Member States are not precluded from providing for the possibility of appeal procedures with suspensive effect, as long as the final decision on the execution of the EAW is adopted within the time limits of Article 17 (e.g. Case C-168/13 PPU, *Jeremy F*[103]).

National desk research identified serious issues in relation to paragraphs 2 and 3 of Article 17, laying down the time limits for the final decision on the execution of the EAW where the requested person consents or does not consent, respectively, to their surrender. In [redacted], national law does not provide for a specific time limit for

[103] Judgment of the Court (Second Chamber) of 30 May 2013, *PPU, Jeremy F,* C-168/13, ECLI:EU:C:2013:358.

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the final decision on execution of the EAW where the requested person consents to surrender. Belgian law provides for the same time limit to be applicable regardless of whether or not the requested person consented to the surrender, which is not in line with the provision of Article 17(2) FD EAW.

Some Member States' national measures provide for longer time limits than those provided in Article 17(3) of FD EAW for situations where the requested person exhausts all means of appeal against the first instance decision (e.g.), or do not ensure that in all cases the EAW procedure would comply with the time limits provided (e.g.). Desk research identified further elements that raise conformity concerns in respect of the time limits set by Article 17(3). In , the national measures provide for the possibility of suspension of the time limits, at the request of the requested person or their counsel, with no guarantee that the overall 60-day time limit stipulated by Article 17(3) should be met, thus not aligning with the provision of FD EAW and with the case law of the CJEU. In , the 60-day time limit starts from the arrest or from the first examination of the requested person. In cases where the first examination of the requested person takes place after their arrest, the final decision on the execution of the EAW may therefore be taken more than 60 days after the arrest.

Articles 17(4)-17(7) show relatively uniform and positive transposition levels throughout the EU. Issues include not transposing Articles 17(4) and 17(6).

Some Member States fail to expressly provide that where the time limits laid down in Article 17(2) and 17(3) are not met, they may be extended by a further 30 days (e.g.), as required by Article 17(4). In some cases, the correct transposition of Article 17(5) is affected by the material conditions necessary for effective surrender, which shall remained fulfilled waiting for the final decision on the EAW (e.g.).

Article 18: Situation pending the decision

Article 18 outlines the procedures applicable pending a decision where the EAW is issued for conducting a criminal prosecution. The executing judicial authority must either agree to hear the requested person (Article 19) or agree to their temporary transfer (Article 18(1)(a)-(b)). The conditions and duration of the temporary transfer are determined by mutual agreement between the issuing and executing judicial authorities (Article 18(2)). During the temporary transfer, the person must be able to return to the executing State for hearings related to the surrender procedure (Article 18(3)).

did not transpose Article 18(1) in full, excluding some of its sub-provisions. Other Member States (e.g.) only transposed the provision on the hearing of the requested person (Article 18(1)(a)) and not the provision on the temporary transfer of the requested person (Article 18(1)(b)). Often, the national measures identified to deal with the temporary transfer of the requested person instead transpose the temporary surrender under Article 24 of FD EAW. In and , both Articles 18(1)(a) and (b) are transposed, but the national law does

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not make it clear that the executing judicial authority shall be entitled to agree to either of the two options. This raises issues of conformity, as Article 18 requires that the executing judicial authority be given the discretion to either agree to the hearing or agree to the temporary transfer. By not transposing one of the two possibilities, the national transposing measures deprive the executing judicial authority of such discretion. In other cases (e.g. [redacted]), the national law, while allowing the executing judicial authority to agree to both the hearing and the temporary transfer of the requested person, does not expressly set out an obligation to agree to at least one of the options, thus not complying with the obligation set out in Article 18(1).

[redacted] failed to transpose all elements and conditions of Article 18 correctly, such as the requirement that the conditions and duration of the temporary transfer are determined by mutual agreement between the issuing and executing judicial authorities (Article 18(2)) or that the requested person subject to temporary transfer shall be able to return to the executing State to attend hearings as part of the surrender procedure (Article 18(3)).

Article 19: Hearing the person pending the decision

Article 19 deals with the conditions and requirements for hearing the requested person pending the decision on the EAW, ensures that the requested person's rights are respected, and guarantees that the hearing adheres to the legal processes of both Member States. It ensures that the requested person is heard by a judicial authority, with assistance from another designated person as per the requesting Member State's law (Article 19(1)). The hearing must comply with the executing State's law and conditions mutually agreed by the issuing and executing judicial authorities (Article 19(2)). The executing judicial authority can appoint another judicial authority within its Member State to participate in the hearing to ensure the proper application of this provision and its conditions (Article 19(3)).

Transposition of Article 19 is incomplete in some Member States (e.g. [redacted]), where the national provision does not mention that the person designated to assist the requested person should be designated in accordance with the law of the requesting Member State, implying that it would be designated following the laws of the executing State. In [redacted], national law omits that the hearing should be subject to the law of the executing State. In [redacted], the transposing legislation does not clearly transpose the requirements of the hearing of the person as laid down in Article 19(1) and (2).

Article 19(3) is an optional provision ('may' clause), which the majority of Member States opted not to transpose.

Article 20: Privileges and immunities

Article 20 addresses the cases where the requested person enjoys a privilege or immunity. The time limits for surrender laid down in Article 17 shall not run until the executing judicial authority is informed that the privilege or immunity has been waived (Article 20(1) first subparagraph). The executing State must ensure that the conditions for effective surrender are met once the immunity is lifted (Article 20(1) second

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subparagraph). If the power to waive the immunity lies within the executing State, the executing judicial authority shall request the waiver, while if it lies with another State or an international organisation, the issuing judicial authority must make the relevant request (Article 20(2)).

Article 20 is generally transposed by the Member States, with limited instances of non-transposition (e.g. [redacted]). The correct transposition of Article 20 is important to avoid legal challenges and delays in surrender by ensuring that the privileges and immunities afforded to some individuals can be waived where necessary.

Issues of incorrect transposition were identified in some Member States. [redacted] incorrectly transposed Article 20 by not referring to the lifting of privileges or immunities. In [redacted], no specific provisions addressing privileges could be identified, as the scope of the national law only covers immunity. [redacted] does not regulate the fulfilment of the necessary conditions for surrender once the person no longer enjoys privileges or immunities.

Transposition of Article 20(2) is often partially conforming. [redacted] does not transpose the requirement for an executing judicial authority to request to waive the privilege or immunity without delay. In [redacted], the national transposing law does not oblige the judicial authorities to request to waive a privilege or immunity, nor would it be the judicial authority that would make such a request, but, rather, law enforcement.

In [redacted], for example, judicial authorities are not required to request to waive the privilege or immunity if it is within the issuing judicial authority and the power to waive the privilege or immunity remains with the authority of another State or international organisation.

Article 23: Time limits for surrender of the person

Analysis of the provision revealed no transposition issues in any Member State.

Article 27: Possible prosecution for other offences

Analysis of the provision revealed no transposition issues in any Member State.

Article 28: Surrender or subsequent extradition

Article 28 governs the rules on the subsequent surrender or extradition of a person who has been surrendered under an EAW. It specifies the cases where consent to subsequent surrender to a Member State other than the executing State is presumed (Article 28(1)), the cases where subsequent surrender may take place without the consent of the executing State (Article 28(2)), and the rules under which the executing State may express consent (Article 28(3)). As far as third States are concerned, subsequent extradition to a third State of a person surrendered pursuant to an EAW is not possible without the consent of the Member State that surrendered the person (Article 27(4)).

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In some Member States (e.g. [redacted]), the whole provision, including its subparagraphs, was not transposed into national law. Those Member States who failed to transpose the provision risk failing to protect the rights through the 'speciality principle'[104] of those individuals who have surrendered under the EAW.

Article 28(1) is an optional clause, which most Member States did not transpose.

In some Member States, the transposition of Article 28(2) is missing or has extensive gaps. In three cases, surrender may take place without the consent of the executing State. [redacted] experienced difficulties in transposing the case provided for in Article 28(2)(c). In particular, failing to fully transpose that the requested person may be prosecuted for other offences if they are not protected by the 'speciality rule' under certain conditions, as outlined in Article 27(3)(a), (e), (f), and (g).

Multiple Member States failed to refer to certain subparagraphs of Article 27(3) required for the adequate transposition of Article 28(2)(c). [redacted] did not transpose the references to Article 27(3)(a) and (e) and [redacted] did not transpose the references to Article 27(3)(g). [redacted] did not transpose any of these references. Not transposing the conditions in Article 27(3)(a), (e), (f), and (g) may create legal uncertainty in situations where a person who no longer has protection under the 'speciality rule' can be re-surrendered without the consent of the executing State. Needing to gain consent from the executing State where not required under the FD EAW may cause delays in the process of re-surrender.

Some Member States incorrectly transposed elements of Article 28(3). [redacted] only transposed Article 28(3)(c) regarding the time limits but did not transpose the other subparagraphs. [redacted] only transposed Articles 28(3)(a) and (c). A failure to transpose Article 28(3) creates a risk of a lack of clear procedure, and thus legal uncertainty, for obtaining the consent of an executing State for the surrender and subsequent extradition of a person.

2.2. Transfer of prisoners (TOP) - Council Framework Decision 2008/909/JHA of 27 November 2008

The picture that emerges from the in-depth analysis of the Member States' laws shows **fragmented or missing transposition of key provisions,** such as the criteria for forwarding a judgment and certificate to another Member State, recognition of the judgment and enforcement of the sentence, and the grounds for non-recognition and non-enforcement. Analysis of CJEU jurisprudence reveals that while the number of judgments issued in respect of FD TOP is quite small, **Member States are sometimes required to consider the abundant case-law on FD EAW to correctly interpret some related provisions of FD TOP.**

[104] The 'speciality rule' means that the individual can only be prosecuted or extradited for the offence(s) they were surrendered for unless the executing State consents to any further extradition or prosecution for other offences.

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2.2.1. Opportunities and barriers to TOP between Member States

FD TOP applies the principle of mutual recognition to criminal judgments involving custodial sentences or liberty deprivation for enforcement in the EU. It sets out rules for a Member State to recognise and enforce a sentence, promoting the social rehabilitation of the convicted person. This applies whether the person is in the issuing or executing State, regardless of custody status. If residing in the executing State, they may be detained while awaiting sentence enforcement. FD TOP was amended by FD 2009/299/JHA to handle judgments rendered *in absentia.*

Historically, as all EU Member States are also members of the Council of Europe (CoE), in the absence of EU legislation on a given matter of criminal law cooperation, EU Member States should make use of existing CoE instruments. The 1983 CoE convention on the transfer of sentenced persons[105], even after its 1997 amendment by the first Protocol[106], was largely ignored for cooperation between EU Member States due to its complex and lengthy procedures[107]. Once enacted, FD TOP clarified that sentence enforcement is based on recognising judgments from another Member State. It established the enhanced social rehabilitation of the sentenced person as the underlying principle for cooperation, and it provided specific rules for cases where the EAW allows sentences to be served in the convicted person's country of citizenship, residence, or stay. FD TOP replaced the use of, the CoE convention as from 5 December 2011[108].

Statistics on the overall use of FD TOP are not readily available; the 9th round of mutual evaluation sought to collect data on usage, but its final report indicated that such data are only available in certain Member States[109]. Data from other sources[110] are similarly limited, and indicate success is uneven, with only zero to five new cases per year under FD TOP in [redacted] had 159 TOP procedures per year (2015-2019 period) as an issuing State, and 57 per year as an executing State. [redacted] had 46 transfers as and issuing State, and nine as an executing State. [redacted] had 982 transfers as an executing State and only nine per year as issuing State for the period 2014-2019. The situation of transfer from [redacted], as the issuing State, to [redacted], as the executing State, was unusual in that

[105] Council of Europe, Convention on the Transfer of Sentenced Persons (ETS No. 112), Strasbourg, 21.III.1983, https://rm.coe.int/1680079529.

[106] Council of Europe, Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167), Strasbourg, 18.XII.1997, https://rm.coe.int/168007f2c9.

[107] Ferraris, V., 'Enhancing social rehabilitation or finding a back door to reduce prison overcrowding? The failed implementation of FD 909 in Italy', In: *Forced Mobility of EU Citizens* (1st ed.), Routledge, 2023.

[108] Article 4, Recital 12 of FD TOP; Bargis, M., 'Personal Freedom and Surrender', In: Kostoris, R.E. (Ed.), *Handbook of European Criminal Procedure*, Springer, 2018, pp. 297-349, https://doi.org/10.1007/978-3-319-72462-1.

[109] Council of the EU, *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 of 1 March 2023, 2023, p. 90.

[110] Brandariz, J.A., 'Foiled transnational justice? An exploration of the failures of EU judicial cooperation procedures', In: Brandariz J.A., Klaus W., Martynowicz A. (Eds.), *Forced Mobility of EU Citizens: Transnational Criminal Justice Instruments and the Management of «Unwanted» EU Nationals*, Routledge, 2023, pp. 15-34.

between 2014 and 2018, 150-500 new TOP procedures were opened by [redacted] authorities every year to transfer prisoners to [redacted], confirming inconsistencies in the application of FD TOP across the EU.

The 2014 Commission report overseeing the transposition of FD TOP emphasised the importance of properly transposing the provision allowing transfer without the consent of the sentenced person (Article 6).[111] It noted that implementing legislation should specify transfer without consent only in three limited circumstances and include provisions considering the opinion of the sentenced person and ensuring notification of that person[112]. However, it observed that these provisions were not always explicitly included in national legislations.

A 2016 report by the European Union Agency for Fundamental Rights (FRA)[113] provided a detailed analysis of the consent requirements for sentenced persons (Articles 4 and 6, FD TOP), depending on whether the issuing State planned to transfer the person to the state of nationality in which they lived, or to the state of nationality where they did not live but to which they will be deported after having served their sentence, or to the state to which the person has fled or otherwise returned. The report noted 'considerable divergence' between Member States in obtaining that consent, an observation confirmed here.

The 9th round of mutual evaluations points out that the 'interest in social rehabilitation [of the sentenced person] needs to be balanced with the justice system's interest in effectively enforcing the sentence within one Member State'[114].

Academics believe that the legislator may have overlooked the actual objective of reintegration[115], as the instrument allows cooperation in relation to the transfer of prisoners based on minimum formality and pro-forma documents, abolishes the verification of dual criminality for a list of 32 offences, introduces limited and only optional grounds for refusal, and removes the need for consent of the sentenced person. Some claim that the instrument appears contrary to rehabilitation theories[116], and to have seemingly been designed 'with the interests of the state firmly in mind', i.e. using the FD TOP procedure to reduce the prison population by nearly automatically transferring EU nationals to their home country[117].

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[111] European Commission. Report from the Commission on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention. COM(2014) 57 final. Brussels, 2014 at 7.

[112] Ibid.

[113] European Union Agency for Fundamental Rights (FRA), *Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers*, 2016.

[114] Council of the EU, *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 of 1 March 2023, 2023.

[115] Mitsilegas, V., *EU Criminal Law* (1st ed.), Hart Publishing, 2022.

[116] De Wree, E., Vander Beken, T. and Vermeulen, G., 'The transfer of sentenced persons in Europe: Much ado about reintegration', *Punishment & Society*, Vol. 11, Issue 1, 2009, pp. 111-128, https://doi.org/10.1177/1462474508098135.

[117] Mitsilegas, V., *EU Criminal Law* (1st ed.), Hart Publishing, 2022.

2.2.2. Overview of national transposition

For FD TOP, the national desk research covered several challenging provisions, as agreed with DG JUST: **Articles 4; 6; 8; 9; 12; 17; 25.**

Desk research showed that transposition in the Member States is variable, with some provisions transposed and implemented and others fragmented or not transposed.

Table 7 presents the categorisation of the problematic provisions based on their transposition.

Table 7 - FD TOP: Overview of transposition status

Status of transposition	Problematic provisions
Positive	4(7); 6(1), (2), (5); 8(4); 9(1)(i); 17(2).
Fragmented or missing	4(1), (2), (3), (4), (5), (6); 6(3), (4); 8(1), (2), (3); 9(1), (1)(a)-(h), (i), (k), (2), (3); 17(1), (3), (4); 25.

Article 4: Criteria for forwarding a judgment and certificate to another Member State

Article 4 sets out the conditions and the criteria under which a judgment, together with the certificate (standard form in Annex I to the FD TOP), may be forwarded to another Member State.

Article 4(1) provides that if the sentenced person is in the issuing State or the executing State and has given consent where required, the judgment and certificate may be forwarded to: (a) the Member States of which the sentenced person is a national or in which they live; (b) the Member State of nationality where the sentenced person will be deported after release of the enforcement of the sentence; (c) any other Member State that consents to the forwarding of the judgment and certificate.

Transposition of this provision is inconsistent across the Member States. [redacted], [redacted] have no issues. However, [redacted] have transposed Article 4(1) as mandatory, leaving no discretion to the issuing or executing State on whether to forward the judgment and certificate. [redacted] has not properly cross-referenced Article 6 and does not address the exceptions under which consent would not be needed by the sentenced person for the judgment to be forwarded. [redacted] did not fully transpose all categories of Member States to which the judgment and certificate may be forwarded, omitting subparagraph (c). In [redacted], some details are not expressly and clearly covered in the national measures: for example, the notion of the Member State where the sentenced person 'lives' is transposed as the 'habitual place of residence or stay' and thus does not include elements such as family, social and professional ties (Recital 17 of the FD TOP). In addition, the national measures do not clarify that when the sentenced person

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is a [redacted] national not living in [redacted], and they would be deported to [redacted] once released from the enforcement of the sentence, that deportation shall be on the basis of an expulsion or deportation order included in the judgment or other measures consequential to the judgment. [redacted]'s transposition only refers to situations in which [redacted] would act as the issuing State and fails to mention that it could also act as the executing State. It also only specifies that the person's consent must be provided in writing, without any reference to the certificate.

[redacted] transposing measures overlook the certificate, focusing only on forwarding the judgment. Conversely, [redacted]'s national measures transposing Annex I (which gives the standard form for the certificate) fail to incorporate the amendments by FD 2009/299/JHA to enhance procedural rights and mutual recognition of decisions rendered *in absentia*.

Article 4(2) sets out that the forwarding of the judgment and the certificate may take place where enforcement of the sentence by the executing State would serve the purpose of facilitating the sentenced person's social rehabilitation.

Transposition varies by Member State. [redacted], [redacted] have no issue. In [redacted], the national transposition fails to provide discretion and makes this provision mandatory. Problems often arise from the lack of reference to consultations between the issuing and executing States' authorities (e.g. [redacted]). Other issues relate to the transposition of 'social rehabilitation'. For instance, [redacted]'s law refers to the 'educational and preventive purposes of the penalty', not fully covering social rehabilitation. The [redacted]' law refers to 'social reintegration' but omits further circumstances outlined in Recital 9 to FD TOP. [redacted] provides an exemption for [redacted] nationals from the check of social rehabilitation, which is not foreseen by FD TOP.

Article 4(3) clarifies that consultation may take place between the competent authorities of the issuing and executing States, and shall take place, in the case of Article 4(1)(c), before the forwarding of the judgment and certificate. In such cases, the executing State's competent authority shall promptly inform the issuing State of its decision.

This provision is incompletely transposed in some Member States (e.g. [redacted], [redacted]) and partially transposed in others (e.g. [redacted]). Often, it is not foreseen that the executing State shall promptly inform the issuing State of its consent decision (e.g. [redacted], [redacted]). In [redacted], the national transposition fails to make this a discretionary provision and instead makes it mandatory. In [redacted], the law does not specify that the competent authorities may consult 'by any appropriate means'. In [redacted], prompt information is only provided for a negative decision, contrary to FD TOP. Other issues arise from the failure to transpose mandatory consultations in the cases referred to in Article 4(1)(c) (e.g. [redacted]).

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Article 4(4) concerns the reasoned opinion that may be presented by the executing State that enforcement of the sentence would facilitate social rehabilitation of the sentenced person. Transposition is missing or incomplete in several Member States (e.g.). Recurring issues include the mandatory (instead of optional) provision of a reasoned opinion (e.g.), lack of transposition of the requirement to present the reasoned opinion 'without delay' after the transmission of the judgment without consultation (e.g.), and lack of transposition of the requirement for the issuing State's authority to consider that opinion (e.g.).

Article 4(5) allows the issuing State to request, on its own initiative, forwarding of the judgment and certificate, and allows the sentenced person to request the initiation of such forwarding. This provision is not transposed in some Member States, such as and is only partially transposed in others (e.g. ,). Issues include incorrect transposition of the executing State's request for the forwarding of the judgment and certificate (e.g.). In some Member States, it is not clear that the sentenced person may issue their request to forward the judgment and certificate to both the issuing and the executing State's competent authorities (e.g.).

Article 4(6) mandates that Member States establish measures on whether to consent to forward the judgment and certificate in cases under Article 4(1)(c). The transposition of this provision is missing in several Member States (e.g.) and partial in others (e.g.), with no measures specified beyond consultation with the transposing Member State.

Article 6: Opinion and notification of the sentenced person

Article 6 deals with the sentenced person's opinion on the forwarding of the judgment and certificate, as well as the notification by the competent authority of the issuing State to the sentenced person after deciding to forward the judgment and the certificate. has failed to transpose Articles 6(1) and (2), as its national law only covers situations where authorities act as executing, and not issuing, authorities.

Article 6(3) specifies that if the sentenced person is in the issuing State, they shall be given the opportunity to express their opinion orally or in writing. This opinion shall be taken into account when deciding to forward the judgment and certificate, of which shall be forwarded to the executing State.

Transposition of this provision varies between the Member States. have fully transposed, while others present various issues. failed to transpose the mandatory requirement that the sentenced person shall be given an

opportunity to state their opinion and only specifies that 'when' an opinion is stated, an oral or written record shall be taken. [redacted] did not transpose the provision, and others have only partially transposed it, as they are missing certain elements. For example, some countries do not ensure that legal representatives can give an opinion for those unable to do so due to age or health (e.g. [redacted]), or do not cover forwarding the person's opinion in writing to the executing State (e.g. [redacted]), and do not consider the opinion when deciding to forward the judgment and certificate (e.g. [redacted]).

Pursuant to **Article 6(4),** the sentenced person shall be notified of the decision to forward the judgment and certificate through the use of a standard form (provided in Annex II to FD TOP).

Several Member States (e.g. [redacted]) have issues with this transposition. Common problems include not specifying that the notifications should be in a language that the sentenced person understands (e.g. [redacted]), not transposing that the executing State should handle notifications when the sentenced person is there at the time of the decision (e.g. [redacted]), or not mentioning that when the sentenced person is in the executing State, the form should be sent to the executing State, which should inform the sentenced person accordingly (e.g. [redacted]).

Article 8: Recognition of the judgment and enforcement of the sentence

Article 8 sets out the rules governing the recognition of the forwarded judgment and enforcement of the sentence by the executing State.

Article 8(1) stipulates that the executing State shall recognise judgments forwarded in accordance with the relevant provisions of the FD TOP and take all necessary measures for the enforcement of the sentence, unless it invokes a ground for non-recognition and non-execution.

[redacted] have successfully transposed this provision. However, [redacted] make no cross-reference to Articles 4 and 5, as stipulated in Article 8(1), and [redacted] do not make any reference to taking 'all the necessary measures for the enforcement of the sentence unless it decides to invoke one of the grounds for non-recognition and non-enforcement provided for in Article 9'. [redacted] did not transpose this provision, and others refer only to enforcing the judgment and not to mandatorily recognising it (e.g. [redacted]). [redacted] do not set a deadline for enforcement measures or set a long deadline, contrary to FD TOP's requirement for prompt action. [redacted] does not mention that necessary measures for enforcement shall be taken 'forthwith'.

Article 8(3) stipulates that it may be adapted to a punishment or measure that is as close as possible to the sentence imposed in the issuing State.

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Several Member States did not correctly transpose the requirement against converting the sentence into a financial penalty (e.g.),or ensuring that the adapted sentence closely matches the original sentence from the issuing State (e.g.). transposed 'similar criminal offence' as 'same criminal offence' which may lead to a narrower application than intended by FD TOP.

Article 9: Grounds for non-recognition and non-enforcement

Article 9 sets out the grounds that can be invoked by the executing State to refuse recognition and enforcement of the sentence. This provision created extensive transposition issues, with the notable exception of Article 9(1)(i), introduced by Framework Decision 2009/299/JHA of 26 February 2009 and dealing with cases where the person did not appear in person at the trial resulting in the decision, which has a positive degree of implementation across the Member States.

Before outlining the specific grounds for non-recognition and non-enforcement, **Article 9(1)** clarifies that the invocation of such grounds is an option, rather than an obligation, for the executing State's competent authority.

Transposition of this provision as an option for the executing State's authorities is problematic in many Member States. Some see all grounds for non-recognition and non-enforcement as mandatory (e.g.). Others make only some grounds optional and still make other grounds mandatory.

Table 8 - 1 Article 9(1) subparagraphs transposed as mandatory grounds by Member States

Country	Article 9(1) subparagraphs considered as mandatory grounds
	a-g, k
	a-d, g
	f, i, j, k
	a-g, i, k, l
	a, c-h
	b-d, g, h, k
	a-g, i, k
	b-d, g, k
	a-g, i, k, l
	a-e, g, i-k
	a-c, e-l

Some Member States, such as , provide additional mandatory grounds for non-recognition and non-enforcement, which are not foreseen in FD TOP.

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These include situations in which the sentenced person was not personally served with the decision but will be after being surrendered, as well as being informed of their right to a retrial or appeal, where they can re-examine the case, and potentially overturn the original decision, or the sentenced person is notified of the timeframe within which they must request this retrial or appeal, as specified in the EAW ( ). They also include ongoing criminal proceedings in the executing State for the same acts underlying the judgment of the issuing State, and the judgment does not bar conducting criminal proceedings (e.g.), or, in case of violation of fundamental human rights and freedoms, discrimination due to sex, race, religion, ethnic origin, nationality, language, political conviction or sexual orientation (e.g.).

Article 9(1)(a) provides that recognition and execution of the judgment may be refused if the certificate is incomplete or manifestly does not correspond to the judgment and has not been completed or corrected within a reasonable deadline.

Some Member States lack clear national law for timely correction or completion of certificates, which is essential to avoid non-recognition and non-enforcement (e.g.). The national transposing laws of have issues with incompleteness of the certificate and the manifest non-correspondence of the certificate to the judgment, respectively.

Article 9(1)(b) provides that recognition and execution of the judgment may be refused if the criteria for forwarding a judgment and a certificate, as provided in Article 4(1), are not met. This provision lacks explicit transposition in some Member States (e.g.). 's transposition refers to 'same offences' as opposed to 'same acts', which does not accurately reflect the principle of *ne bis in idem.*

Article 9(1)(c) provides that recognition and execution of the judgment may be refused if the enforcement of the sentence would be contrary to the *ne bis in idem* principle.

Estonia did not transpose this provision. Some countries, such as and , tie the *ne bis in idem* principle to both the material facts and the legal classification of those facts. This seems inconsistent with CJEU case-law[118], which maintains that legal qualification of the offences is not necessary to determine 'same acts'.

Article 9(1)(d) provides that recognition and execution of the judgment may be refused if, in cases where the double criminality check applies, the judgment relates to acts that would not constitute an offence under the law of the executing State, with an exception for taxes or duties, customs and exchange.

This provision was not transposed in some Member States (e.g.). Others, such as , did not transpose that refusal to grant an application also relates to acts that would not constitute an offence under the law of the same State. Some Member States

[118] Judgment of the Court (Grand Chamber) of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683; Judgment of the Court (First Chamber) of 21 September 2023, *Juan*, C-164/22, ECLI:EU:C:2023:684.

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failed to transpose the exception concerning taxes or duties, customs and exchange (e.g.).

Article 9(1)(e) provides that recognition and execution of the judgment may be refused if the enforcement of the sentence is statute-barred under the law of the executing State. Some Member States have made this provision a mandatory ground for non-recognition and non-enforcement (e.g.). Others did not transpose this provision (e.g.). **Article 9(1)(f)** provides that recognition and execution of the judgment may be refused if the law of the executing State provides for immunity that makes the enforcement of the sentence impossible. The main recurring issue is that this provision was transposed as a ground for mandatory non-recognition and non-enforcement in some Member States (e.g.). Other Member States did not transpose this provision (e.g.).

Article 9(1)(g) provides that recognition and execution of the judgment may be refused if the person concerned by the sentence cannot be considered criminally liable due to their age, according to the law of the executing State. Some countries have made this provision a mandatory ground for non-recognition and non-enforcement (e.g. ,).

Article 9(1)(h) provides that recognition and execution of the judgment may be refused if there remain less than six months of the sentence to be served at the time the judgment is received by the executing State. This provision is transposed as a ground for mandatory non-recognition and non-enforcement in some Member States (e.g.).

Article 9(1)(j) provides that recognition and execution of the judgment may be refused if the issuing State does not consent to the prosecution, sentencing or deprivation of liberty of the person concerned for an offence committed prior to the transfer, other than that for which the person was transferred.

Some Member States failed to transpose this provision (e.g.). did not fully transpose it, omitting elements such as the requirement for the executing State to request consent before a decision is taken pursuant to Article 12(1), or that the request for consent made by the executing State relates to the person concerned being prosecuted, sentenced or otherwise deprived of their liberty in the executing State for an offence committed prior to the transfer, other than that for which the person was transferred.

Article 9(1)(k) provides that recognition and execution of the judgment may be refused if the sentence imposed includes a measure of psychiatric or health care or deprivation of liberty that cannot be executed in accordance with the executing State's legal or healthcare system.

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Some Member States failed to transpose this provision. Some have failed to transpose 'psychiatric or health care' and only refer to 'deprivation of liberty' (e.g.) and others fail to include all measures of psychiatric or health care or other measures involving deprivation of liberty (e.g.).

Article 9(1)(l) provides that recognition and execution of the judgment may be refused if the judgment relates to criminal offences regarded by the law of the executing State as having been committed, wholly or for a major or essential part, within its territory or equivalent place.

Some Member States did not transpose the provision (e.g.). Others transposed the provision incorrectly, stating that offences shall be regarded as having been committed wholly or partly within that territory (e.g.).

In relation to the situation described in Article 9(1)(l), **Article 9(2)** stipulates that decisions shall be taken by the executing State's competent authority in exceptional circumstances and on a case-by-case basis, with regard to the specific circumstances of the case and, in particular, to whether a major or essential part of the conduct in question has taken place in the issuing State.

This provision lacks transposition in several Member States (e.g.). Some countries omitted the requirement for the executing State's authority to make decisions in exceptional circumstances (e.g.). Transposition in does not consider whether a major or essential part of the conduct has taken place in the issuing State.

Article 9(3) stipulates that in the cases referred to in Articles 9(1)(a)-(c), (i), (k) and (l), consultations shall take place between the competent authorities of the executing State and the issuing State before the former decides not to recognise the judgment and enforce the sentence.

Several issues are evident with this provision's transposition across the Member States. did not transpose it, while and have general measures that fail to mandate consultation between the competent authorities in Article 9(3) cases. The transposition is incomplete in , where not all cases referenced in Article 9(3) are backed with mandatory consultations between the competent authorities. For example, no mandatory consultations are foreseen for the cases under Article 9(1)(a), (b), (c) and (i), under Article 9(1)(b) in , or for the cases under Article 9(1)(b), (c), (i), (k) and (l) in . Some countries, such as , omitted the requirement for the executing State's authority to request the issuing State's authority to supply any additional information ( ) and to do it without delay ( ). Finally, failed to transpose that requesting any necessary additional information should be done 'by any appropriate means'.

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Article 12: Decision on the enforcement of the sentence and time limits

Article 12 provides the timeline under which the executing State's competent authority shall take the decision on the enforcement of the sentence.

Pursuant to **Article 12(1),** the executing State's competent authority is to decide as quickly as possible and shall inform the issuing State of the decision and whether it decided to adapt the sentence.

Several Member States (e.g. [redacted]) have excluded the requirement that the decision should be taken as quickly as possible by the executing State's competent authority. This is partially mitigated in [redacted] by judicial practices that ensure swift recognition and enforcement of sentences. Other Member States (e.g. [redacted]) have failed to transpose the cross-reference to Articles 8(2) and (3) or omitted the requirement of the executing State to inform the issuing State (e.g. [redacted]).

Article 12(2) stipulates that the final decision on the recognition of the judgment and enforcement of the sentence shall be taken within 90 days of receipt of the judgment and certificate, unless a ground for postponement exists.

National measures often lack clarity on the 90-day deadline to take the final decision on judgment recognition and sentence enforcement. This leads to ambiguity (e.g. [redacted]). In other cases, despite a literal transposition of Article 12(2), the deadline applies to the first instance decision, which could be further subject to appeals (e.g. [redacted]). In other cases, the national transposing legislation does not refer to postponement grounds under Articles 11 and 23(3) (e.g. [redacted]) or does not respect the 90-day deadline and adds additional time (e.g. [redacted]).

Where it is not practicable for the executing State's competent authority to comply with the set time limits in exceptional cases, **Article 12(3)** provides that it shall inform the competent authority of the issuing State without delay, giving the reasons for the delay and the estimated time for the final decision to be taken.

Some Member States (e.g. [redacted]) failed to transpose this provision into national law. Others did not specify that it shall refer to situations where it is not 'practicable' for the competent authority of the executing State to comply with the 90-day deadline but generally referred to the impossibility of complying with it (e.g. [redacted]). Some Member States (e.g. [redacted], [redacted]) did not fully transpose all Article 12(3) requirements, including the mandate for the executing State's authority to inform the issuing State's authority 'by any means'. Others did not transpose the criterion of informing the competent authority in the issuing State 'without delay' (e.g. [redacted]),

Article 17: Law governing enforcement

Article 17 identifies the law governing the enforcement of the sentence. According to **Article 17(1)**, enforcement shall be governed by the law of the executing State, and

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the authorities of the executing State shall be competent to decide on the procedures for enforcement and determine the relevant measures relating to enforcement.

Some Member States did not explicitly transpose the provision that the executing State's authorities decide on enforcement procedures and measures relating to enforcement (e.g. [redacted]). However, these issues might be considered mitigated, as these elements generally fall within the notion of enforcement of a sentence, which is governed by the law of the executing State.

Article 17(3) stipulates that the competent authority of the executing State shall, upon request, inform the competent authority of the issuing State of the applicable provisions on possible early or conditional release. The issuing State may agree to the application of such provisions or withdraw the certificate.

This provision is not transposed in some cases (e.g. [redacted]) or is partially transposed (e.g. [redacted]).

Pursuant to **Article 17(4)**, Member States have the possibility to provide that any decision on early or conditional release may take account of those provisions of national law indicated by the issuing State under which the person is entitled to early or conditional release at a specified point in time.

This provision sets out an option for Member States and most opted not to transpose it.

Article 25: Enforcement of sentences following an EAW

Article 25 deals with the relationship between FD TOP and FD EAW. This provision clarifies that the provisions of FD TOP shall apply, *mutatis mutandis*, and to the extent they are compatible with the provisions of FD EAW, to the enforcement of sentences in cases where a Member State undertakes to enforce a sentence in cases referred to in Article 4(6) of FD EAW (i.e. where the requested person is staying in, or is a national or resident of the executing State, and the latter undertakes to execute the sentence or detention order in accordance with its national law), or where a Member State has imposed the condition referenced in Article 5(3) of FD EAW, that the person has to be returned to serve the sentence in the Member State concerned.

This provision lacks transposition in several Member States (e.g. [redacted]). Some Member States only partially implement it by applying FD TOP in the cases referenced in Article 4(6) of FD EAW, but not those in Article 5(3) of the FD EAW (e.g. Hungary), or by not applying FD TOP in relation to Article 4(6) and Article 5(3) of FD EAW (e.g. [redacted]).

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2.3. Probation and alternative sanctions (PAS) - Council Framework Decision 2008/947/JHA of 27 November 2008

The transposition status of this FD **varies across the Member States**. While provisions on the types of probation measures and alternative sanctions are transposed consistently, **issues of fragmented or missing transposition were identified** in relation to **forwarding a judgment** and, where applicable, a **probation decision** and the adaptation of probation measures or alternative sanctions.

Issues are also identified with incorrect transposition of the **grounds for refusing recognition and supervision** (as mandatory instead of optional). Analysis of the (very scarce) CJEU jurisprudence on the matter highlights the low level of application of this FD in the Member States.

2.3.1. Opportunities and barriers to addressing widespread imprisonment of EU citizens in other Member States

At the initiative of [redacted] in 2007, FD PAS was adopted in 2008[119] to address the widespread phenomenon of EU citizens being prosecuted or convicted in other Member States. Given the EU's principle of freedom of movement and the reality of frequent travel and migration, each year many EU citizens face criminal proceedings in EU Member State in which they do not reside[120]. In the context of prison overcrowding, FD PAS provides a framework for addressing foreign detention while considering public interest (safety and security), the social and practical benefits for accused or convicted persons, and the interests of Member State interest (in reducing prison population).

The proper application of probation or sanction measures under FD PAS procedure also contributes to protecting victims and the public.

Along with other EU instruments, including FD TOP and FD ESO, it focuses on reintegration based on enhanced social rehabilitation of the sentenced person, allowing them to return more easily to public life following completion of their sentence. Incarceration abroad poses a particular challenge to successful social rehabilitation, as it separates individuals from their place of residence, family, services and

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119 [redacted]. Initiative with a view to adopting a Council Framework Decision (2007/.../JHA) on the recognition and supervision of suspended sentences, alternative sanctions and conditional sentences. Brussels: Council of the European Union, 2007, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2007.147.01.0001.01.ENG&toc=OJ%3AC%3A2007%3A147%3ATOC.

120 European Commission, *Report from the Commission on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention*, COM/2014/057 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0057.

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connection to society. This challenge is heightened when there are major cultural differences between the places of detention and residence[121].

EU citizens suspected of a crime abroad often face imprisonment due to the fear that they will escape trial if non-custodial measures are used and typically making them ineligible for probation while awaiting trial[122]. Despite some acts warranting probation, increasing numbers of EU citizens are imprisoned in other Member States due to the practical and legal barriers to coordinating probation across borders[123]. Although FD PAS seeks to mitigate this by offering convicted persons the opportunity to return to their home country under probation or alternative sanctions, where they will have a better opportunity for social rehabilitation, this study shows it is not used by practitioners to its full benefit.

FD PAS aims for consistent application of the probation measures after transfer, aligning with the sentencing court's intentions[124]. To that end, FD PAS allows transfer of a decision between Member States, regardless of whether the same sanction would apply in the executing State for the same offence (Art. 8(1)). FD PAS encourages the use of non-custodial measures based on a reasonable expectation – as part principle of mutual recognition - that the country of residence will properly supervise the probation measure or alternative sanction.

The European Commission's 2014 evaluation report found that 14 Member States had not notified transposition of the FD and only preliminary assessment of implementation was possible given the low rate of implementation and lack of practical experience. The report identified initial challenges such as improper transposition of grounds for refusal and difficulties with time limits. These continue to present a challenge, as many Member States have applied these requirements incompletely or non-conformingly.

The 9th round of mutual evaluations revealed low use of FD PAS and FD ESO[125]. Infrequent use of these FDs depended less on problems with the transposition or a lack of clarity with the requirements and more on key practical challenges such as low awareness. It recommended additional training and production of additional handbooks and practical guides. The lack of awareness with the procedures of other Member States might undermine mutual trust[126]. Furthermore, this lack of awareness

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[121] De Wree, E., Vander Beken, T. and Vermeulen, G., 'The transfer of sentenced persons in Europe: Much ado about reintegration', *Punishment & Society*, Vol. 11, Issue 1, 2009, pp. 111-128, https://doi.org/10.1177/1462474508098135.

[122] Morgenstern, C., 'European initiatives for harmonisation and minimum standards in the field of community sanctions and measures', *European Journal of Probation*, Vol. 2, 2009, pp. 128-141, https://www.researchgate.net/publication/270672386_European_Initiatives_for_Harmonisation_and_Minimum_Standards_in_the_Field_of_Community_Sanctions_and_Measures.

[123] McNally, G., 'Implementation of the Framework Decision on the transfer of Probation Measures between States in the European Union', *EuroVista*, Vol. 2, 2023, pp. 70-77, https://www.researchgate.net/publication/367298232_Implementation_of_the_Framework_Decision_on_the_transfer_of_Probation_Measures_between_States_in_the_European_Union.

[124] Ibid.

[125] Council of the EU, *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 of 1 March 2023, 2023, p. 62.

[126] Morgenstern, C., 'European initiatives for harmonisation and minimum standards in the field of community sanctions and measures', *European Journal of Probation*, Vol. 2, 2009, pp. 128-141,

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and the difference in national systems may have a negative impact on mutual trust, potentially driving Member States reluctance to entrust another Member State with probation measures or alternative sanctions[127].

The peer evaluation also identifies several procedural challenges: FD PAS's applicability is limited to few cases to which these instruments apply, as there as few cases dealing with supervision or probation and including a relevant cross-border element.[128] Furthermore, the process for applying FD PAS is relatively complex and lengthy, meaning that many practitioners opt not to make use of it.[129] This issue was also identified by the [redacted] Probation Service[130], which noted that the final requirements of FD PAS reflect multiple compromises and the application of this flexible legal instrument accounting for divergent national laws can become overly complex. The variety of probation measures across borders presents further challenges. While a prison sentence may be relatively easy to recognise, probation and alternative sanctions require additional attention and resources to implement. The relevant supervision measures may not even exist in the executing State.

The 9th round of mutual evaluations reported that practical challenges such as awareness, lack of mutual trust, and complexity of the process presented potentially greater barriers to proper implementation than transposition issues. However, the national-level review of transposition in the present study identifies multiple persistent issues, e.g. transposition of definitions, time limits, the criteria for forwarding judgments, and the process for adapting judgments. There may also be issues with consent, which, in practice, is not always clear or officially verified[131]. Grounds for refusal was also identified in the 9th round peer review and in the literature[132] as requiring clarification at national and EU level. More specifically, the current debate as part of CJEU proceedings on FD EAW and FD TOP about the extent to which fundamental rights can function as a ground for non-recognition similarly requires clarification for FD PAS.

https://www.researchgate.net/publication/270672386_European_Initiatives_for_Harmonisation_and_Minimum_Standards_in_the_Field_of_Community_Sanctions_and_Measures.

[127] Council of the EU, *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 of 1 March 2023, 2023, p. 64.

[128] Council of the EU, *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 of 1 March 2023, 2023, p. 63.

[129] Ibid.

[130] McNally, G. and Burke, I., 'Implementation of the framework decision on the transfer of probation measures between States in the European Union', *EuroVista*, Vol. 2, Issue 2, 2012, pp. 70-77.

[131] Ibid.

[132] Martufi, A. and van Noorloos, M., 'Transfer of probationers under EU law: Rehabilitation and the question of legitimacy in the Netherlands', *European Journal of Probation*, Vol. 16, Issue 1, 2024, pp. 3-25.

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2.3.2. Overview of national transposition

For FD PAS, the desk research covered several problematic provisions agreed with DG JUST: Articles 2, 4, 5, 9, 11, 12, and 14.

The desk research found that the transposition is variable, with some provisions positively transposed and others fragmented or not transposed.

Table 9 outlines the categorisation of the problematic provisions based on transposition.

Table 9 - FD PAS: Overview of transposition status

Status of transposition	Problematic provisions
Positive	2(1)(a), (b), (c), (d), (4), (5), (5)(b), (8), (9); 4(1), (a)-(k); 5(2), (3); 9(2), (3); 11(1)(b), 11(1)(c).
Fragmented or missing	2(1), (2), (3), (5)(a), (6), (7); 5(1); 9(4); 11(1).

The following sub-sections focus on those articles identified as having a fragmented or poor transposition.

Article 2: Definitions

Article 2 of FD PAS outlines various definitions.

The provision has been transposed in an incomplete or non-conforming manner in several Member States ([redacted]). The [redacted] transpositions omit key elements, such as reference to a judgment meaning a 'final decision' ([redacted]), to a 'court order' ([redacted]) or to the sentenced person having committed a criminal offence ([redacted]). Other Member States use national terminologies and definitions that do not accurately reflect the wording of the FD PAS (e.g. [redacted]). In [redacted], the national provision refers to an 'enforceable decision' rather than a 'final decision', and these two terms are not equivalent under [redacted] law. The [redacted] national provision uses [redacted] terms that do not correctly reflect the content of Article 2(1) and have different meanings in [redacted] law than the definitions stipulated in FD PAS. These challenges may result from the difficulty in translating provisions from English to the native language, as well as varied definitions and interpretations of the term 'judgment' according to each national legal framework. In [redacted], some of the definitions are not explicitly transposed, but, rather, covered by general provisions.

In [redacted], the difficulty arises from the national transposing legislation not requiring a declaration of guilt of a criminal offence and only referring to a final decision order issued in criminal proceedings.

Article 2(2) defines 'suspended sentence' and **Article 2(3)** defines 'conditional sentence' for the purpose of FD PAS.

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Difficulties were identified for both articles, including their failure to include all relevant elements in the transposing law and problems with the meaning of the individual terms included within the broader definitions. In [redacted], no national provision specifically defines a suspended sentence. In [redacted], national transposition only includes parts of the definition of 'suspended sentence' and the other elements relate to the definition of conditional sentence. [redacted], did not transpose the definition of 'suspended sentence' into national law and instead describes the legal effects. As a part of that description, [redacted] national law refers to custodial sentences and not to 'other measures involving deprivation of liberty'. In [redacted], the issue regards use of the term 'security measure' instead of 'measure'. A 'security measure' here is a special kind of sanction in the [redacted] Penal Code that aims to protect society against further dangers that may arise from special categories of offenders. However, in cases where [redacted] is the executing State, other legal frameworks could misinterpret this special type of sanction due to a lack of equivalent in their national law. [redacted] law contains no reference to the fact that a conviction must be either a custodial sentence or a measure involving deprivation of liberty. It also fails to provide information specifying whether the probation decision can be included in the conviction judgment itself or in a separate probation decision. In Ireland, 'probation measures' in Article 2(7) are not clearly defined and 'conditional sentence' is not transposed. Finally, [redacted]'s national transposing measure does not give a definition of 'suspended sentence'. Although a similar definition can be found in [redacted]'s Criminal Code, there is no explicit mention of a probation measure and thus not all requirements of the definition are transposed.

Article 2(5)(a) defines one of the types of judgment – granting of a conditional release – that may form the basis of a 'probation decision' by the competent authority of the issuing State. Difficulties stem from the incorrect transposition of the subsequent Article 2(6) defining 'conditional release'. **Article 2(6)** was also found to have difficulties in transposition, as the national transposing law does not fully grasp terminologies included within the definitions and does not include all relevant elements of FD PAS.

[redacted] experienced issues when transposing Articles 2(5)(a) and (6). [redacted]'s national law contains the option that early release may stem from national law, while [redacted]'s law does not. However, as [redacted] law always requires a final act issued by a competent authority, the scope of the definition of 'conditional release' may be substantially narrowed and may not take into account the particulars of other legal orders. The [redacted] national law refers to an 'enforceable decision' as opposed to the 'final decision', which could lead to misunderstandings with respect to whether the decision must be finally enforceable. It also uses 'security measures' instead of 'measures', which could lead to misinterpretation in cases where [redacted] is the executing State. In [redacted], [redacted], incorrect transposition of Article 2(6) would have a knock-on effect on conformity for Article 2(5)(a).

Article 2(7) defines 'probation measures' for the purposes of FD PAS.

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The principal difficulty with this particular provision stems from failure to properly transpose previous definitions. For example, [redacted], all transposed Article 2(7) incorrectly, due to the lack of full transposition of the definition of 'conditional release' under Article 2(6). Other Member States did not transpose this provision (e.g. [redacted]).

Article 5: Criteria for forwarding a judgment and, where applicable, a probation decision

Article 5 outlines the criteria for forwarding a judgment, and where applicable, a probation decision. The national research identified particular difficulties with Article 5(1).

Article 5(1) outlines that 'the competent authority of the issuing state may forward a judgment or a probation decision to the competent authority of the Member State in which the sentenced person is lawfully and ordinarily residing, in cases where the sentenced person has returned or wants to return to that State.' Issues arise in relation to the phrase 'lawfully and ordinarily residing' (e.g. [redacted]) and whether the person 'has returned or wants to return' to the executing State (e.g. [redacted]). In some cases, the transposition outlined the provision in mandatory terms, whereas Article 5(1) of FD PAS suggests that the competent authority shall retain discretion when forwarding the judgment or probation decision (e.g. [redacted]). [redacted] transposed 'lawfully *or* ordinarily residing' as 'lives or permanently resides', i.e. the wording is different, and the conditions are alternative rather than cumulative. [redacted] impose no requirement for the residence to be 'lawful', and in [redacted], the conditions are transposed as alternative – 'lawfully *or* ordinarily residing' – rather than cumulative, and the law refers to 'domiciliation' rather than 'residing', with 'domiciliation' interpreted by the Supreme Court of Cassation to be the 'current address' registration of the person concerned. The [redacted] authorities must forward the judgment if the criteria of Article 5(1) are met, rather than simply having the option to do so. Similarly, [redacted] transposes the condition of 'lawfully and ordinarily residing' as 'domiciled or ordinarily residing'. It is thus transposed as alternative (use of the word 'or') and it remains unclear whether 'domiciled' can be interpreted as having the same meaning as 'lawfully'. [redacted] and [redacted] national law provide no definition for 'ordinarily residing'. In [redacted], the sentenced person has to 'consent' to the forwarding, which does not necessarily equate to wanting the judgment to be forwarded. These issues may raise concerns that the sentenced person will be sent back against their will.

Article 9: Adaptation of the probation measures of alternative sanctions

Article 9 of FD PAS outlines the possibilities for the Member States to adapt probation measures or alternative sanctions. Particular issues were identified with the transposition of Articles 9(1) and 9(4).

Article 9(1) authorises adaptation of the sanction/probation measures only when the nature or duration of the relevant probation measures or alternative sanctions is incompatible with the law of the executing State. Many Member States transposed this provision incompletely and/or in a non-conforming manner.

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The most common issue is that many Member States made this provision mandatory rather than discretionary (e.g.). The transposition does not allow the competent authorities any discretion to alter probation measures, alternative sanctions or duration of the probation period. National law in obliges the competent authority to adapt probation measures or alternative sanctions and does not grant discretion. National law in does not grant discretion and requires the judge responsible for enforcing sentences to replace probation measures or alternative sanctions with the nearest measures that could have been legally pronounced by a court for the same facts, where the nature of an alternative sentence or a probation measure does not correspond to the measures provided by legislation. provide no discretion to the competent authority by requiring that where the nature of the obligation imposed on the sentenced person is incompatible with national law, the court or public prosecution service must adapt the obligation. fails to transpose part of the provision by omitting that the adapted probation measure, alternative sanction or duration of the probation period shall correspond as far as possible to that imposed in the issuing State. The transposing law in stipulates that if the type of penalty or measure or the manner of execution of the obligations imposed is not present in the legal code, the court shall determine a penalty, measure or obligation pursuant to the law.

Article 9(4) outlines the manner in which the competent authority may withdraw the certificate referred to in Article 6(1).

Incomplete or non-conforming transposition of certain parts of the provision was identified in several Member States. Most commonly, Member States incompletely transposed the provision that '[...] the decision shall be taken and communicated as soon as possible [...]'. provide that the decision must be taken and communicated within 10 days of receipt of the information, but do not include the phrase 'as soon as possible'. Some Member States incorrectly cross-reference Article 18(5) by referencing national law allegedly transposing Article 18(5), which does not exist in the Member State (e.g.). Other Member States did not transpose this provision into national law (e.g.) and still others omitted the timeframe of 10 days upon the receipt of information (e.g.).

Article 11: Grounds for refusing recognition and supervision

Article 11 provides the grounds for the competent authorities of the executing State to refuse to recognise a judgment or probation decision and assume responsibility for supervising the probation measures or alternative sanctions in various circumstances.

Particular problems with transposition and implementation were identified with Articles 11(1), 11(1)(a), 11(1)(d), 11(1)(i), 11(1)(k), 11(2), 11(3) and 11(4).

Article 11(1) outlines that the competent authority of the executing State may refuse recognition and supervision. It then lists specific grounds for refusal in several sub-articles.

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The FD PAS provides that these grounds are optional, but many Member States (e.g. [redacted] transposed them as mandatory. The [redacted] transposition makes the grounds of Article 11(1) mandatory, except Article 11(1)(k), where no national provision could be identified. [redacted] law also creates two additional grounds for refusal of recognition of a judgment, i.e. cases in which the sentenced person has been granted an amnesty or pardon in [redacted] or in the issuing State; and on the ground of objective indications that the decision has been taken in violation of fundamental rights or principles within the meaning of Article 6 of the TEU. In [redacted], grounds for refusal are made mandatory when applying Articles 11(1)(b)-(g), and (i). In [redacted], the competent authority is granted no discretion when applying Article 11(1)(a), (b), (c), (d) and (g). In [redacted] this is also the case for Article 11(1)(e) and (f). The national transposing laws in [redacted] do not provide the judge with any margin of discretion when applying Article 11. Where a ground applies, the judge has no choice but to refuse the execution of the judgment or probation decision. [redacted] law creates an additional ground for refusal of recognition of a judgment or probation decision if the sentenced person has not returned and does not wish to return to the other State. The inclusion of this wording as a ground for refusal instead of a criterion for transfer as per Article 5(1) affects the correct transposition. Irish law also transposes Articles 11(1)(b), (c), (d), (g), (h), (j) as mandatory, instead of optional grounds for refusal. In [redacted] the law provides no discretion, and refusal is obligatory under Article 11(1). In [redacted], the competent authority has no margin of discretion for refusing the grounds listed in Article 11(1)(a)-(i) and 11(3). The same applies in [redacted], where mandatory grounds are imposed in Articles 11(1)(a), (c), (d), (e), (g) and (h) ([redacted]) and Articles 11(1), (a)-(c), (e)-(j) ([redacted]), thus the competent authority has no discretion. In [redacted], the refusal of recognition and supervision is mandatory in cases where the sentenced person does not stay in [redacted], unless there are grounds to believe they will return.

Article 11(1)(a) provides that the competent authority of the executing State may refuse recognition and supervision if the certificate referenced in Article 6(1) is incomplete or manifestly does not correspond to the judgment or probation decision and has not been completed or corrected within a reasonable period.

The transposing legislation is fragmented, with several Member States adding additional criteria (e.g. [redacted]). [redacted] applies an additional criterion that allows a judge to refuse recognition when the decision is not delivered with the request. [redacted] provides that a request shall not be complied with where the certificate provided manifestly does not correspond to the judgment. [redacted] requires translation of the certificate into [redacted] or [redacted], and [redacted] requires its translation into [redacted].

Many Member States, including [redacted], did not correctly transpose the Article 11(1)(a) requirement to complete or correct any deficiencies within a reasonable period Others, such as [redacted], transposed the setting

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of a deadline within a reasonable period, but this is not within the discretion of the competent authority, as mandated by the FD PAS. **Article 11(1)(d)** provides that the competent authority of the executing State may refuse recognition and supervision if the judgment relates to acts that would not constitute an offence under the law of the executing State, except for crimes regarding taxes or duties, customs and exchange. Some Member States (e.g. [redacted]) failed to transpose the exception for taxes or duties, customs and exchange. Others (e.g. [redacted]) do not cross-reference Article 10(3) and instead cross-references Article 9(1), which is not part of Article 11(1)(d) of the FD PAS.

Article 11(1)(i) provides that the competent authority of the executing State may refuse recognition and supervision if the probation measure or alternative sanction provides for medical/therapeutic treatment which, notwithstanding Article 9, the executing State is unable to supervise. Some Member States, including [redacted], failed to transpose the cross-reference to Article 9, and, accordingly, the possibility for the adaptation of probation measures or alternative sanctions.

Article 11(1)(k) provides that the competent authority of the executing State may refuse recognition and supervision if the probation measure or alternative sanction relates to criminal offences which under the law of the executing State are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory.

Some Member States did not transpose this provision into national legislation (e.g. [redacted]). Others (e.g. [redacted]) do not fully reflect this provision in their national transposing legislation. In [redacted], the national provisions refer to offences committed 'for a major part' instead of 'for a major or essential part' of the territories. [redacted] transposed 'major or essential part' as 'wholly or in part' ([redacted]), 'wholly or partly' ([redacted]) and 'in part' ([redacted]). The [redacted] provision refers only to the territory of the [redacted], omitting 'a place equivalent' to that territory. In [redacted], the national transposing provision does not exclude if only a minor part of the criminal offence has been committed on the territory of [redacted]. In [redacted], the transposed provision lacks the requirement that the offence be committed 'wholly or for a major or essential part within its territory', affecting conformity.

Article 11(2) provides that a decision to refuse recognition and supervision under Article 11(1)(k) shall only be taken in exceptional circumstances and on a case-by-case basis, having regard to the specific circumstances of the case, and in particular to whether a major or essential part of the conduct in question has taken place in the issuing State.

Many Member States, including [redacted] did not transpose the

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provision. Some (e.g. [redacted]) fail to include the cross-reference to Article 11(1)(k) and others exclude key elements of the provision. For example, [redacted] failed to transpose 'a place equivalent to its territory'. [redacted] omits 'essential part' when referring to the conduct in question taking place in the issuing State. [redacted] transposed 'major or essential part' as 'only part', and [redacted] transposed it as 'wholly or partly'. The laws in [redacted] make no reference to the fact that the decision should only be taken in 'exceptional circumstances' or on a 'case-by-case basis' (e.g. [redacted]).

Where grounds to refuse recognition and supervision under Article 11(2) paragraphs 1(a), (b), (c), (h), (i), (j) and (k) apply, **Article 11(3)** requires the competent authorities to communicate with the competent authority of the issuing State before deciding to refuse recognition and supervision. The competent authority of the executing State shall communicate, by appropriate means, with the competent authority of the issuing State, and shall, as necessary, ask it to supply all additional information required without delay.

Several Member States did not fully transpose this provision, including [redacted], [redacted]. [redacted] and Ireland give national authorities discretion to provide all additional information without delay, i.e. the provision is optional, where FD PAS stipulates that it should be mandatory.

[redacted] did not transpose Article 11(1)(k) and cannot cross-reference this article under Article 11(3). [redacted] does not make any reference to the consultation obligation with respect to Article 11(1)(b), (c), (i) and (j). [redacted] only transposed the communication requirement for certain grounds to refuse recognition and supervision. [redacted] makes no provision for Article 11(1)(j), [redacted] makes no provision for Article 11(1)(j) or (k), and [redacted] makes no provision for Article 11(1)(h) and (j).

National law in [redacted] makes no reference to supplying all additional information 'without delay' and does not set any specific parameters that could convey equivalent effect. The transposing legislation in [redacted] only requires notification and does not require consultation before the decision is made (except in cases where the request is incomplete).

Malta did not transpose this provision into national law.

Article 11(4) provides that the competent authority of the executing State may, in agreement with the competent authority of the issuing State, decide to supervise the probation measures or alternative sanctions imposed in the judgment and the probation decision forwarded to it, without assuming responsibility for any of the decisions referenced in Article 14(1)(a), (b) and (c). Article 11(4) refers to all grounds for refusal referenced in Article 11(1), particularly Article 11(1)(d) and (k). Some Member States partially transposed this measure, as they do not cross-reference

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Article 11(1)(k) due to lack of transposition. Other Member States did not transpose this provision, including [redacted].

Article 12: Time limit

Article 12 provides the time limits for the competent authority of the executing State to decide whether to recognise the judgment or probation decision and assume responsibility for supervising the probation measures or alternative sanctions, as well as to inform the competent authority of the issuing State of that decision.

Particular issues were identified with the transposition of Articles 12(1) and (2).

Article 12(1) stipulates the competent authority of the executing State shall decide as soon as possible, and within 60 days of receipt of the judgment and probation decision, together with the certificate referred to in Article 6(1), whether or not to recognise the judgment or probation decision and assume responsibility for supervising the probation measures or alternative sanctions. It shall immediately inform the competent authority of the issuing State of its decision in written form. **Article 12(2)** provides that, in exceptional circumstances, when it is not possible for the competent authority of the executing State to comply with the time limit in Article 12(1), it shall immediately inform the competent authority of the issuing State by any means, giving the reasons for delay and indicating the estimated time needed for the final decision to be taken.

Many Member States failed to fully transpose and implement the requirements of Article 12(1). Several, including [redacted], failed to transpose the requirement for the competent authority of the executing State to decide 'as soon as possible' and to 'immediately inform the competent authority' (e.g. [redacted]). Other Member States introduced additional time periods excluded from the 60-day limit, affecting conformity. In [redacted], for example, the time to acquire a translation of the decision is not included in the 60-day time-period. Several Member States did not transpose the need to inform the competent authority of the issuing State 'by any means possible', including [redacted] or in a manner that 'leaves a written record' ([redacted]). [redacted] failed to transpose that the competent authority shall 'assume responsibility for supervising the probation measures or alternative sanctions'.

Many Member States failed to fully transpose Article 12(2). National laws in [redacted] lack a reference or definition of 'exceptional circumstances'. This gap may result in a delay in informing the competent authority of the issuing State. National transposing legislation in [redacted] does not provide that the deadline may only be postponed under exceptional circumstances. Another common issue (e.g. [redacted]) is the lack of reference to the need to 'immediately inform' the competent authority of the issuing State of the exceptional circumstances preventing the timely informing of the decision of the executing State,

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and to do so 'by any means' ([redacted]). Some Member States did not transpose this provision (e.g. [redacted]).

2.4. European Supervision Order (ESO) - Council Framework Decision 2009/829/JHA of 23 October 2009

The **level of transposition** of FD ESO **varies considerably from one Member State to another**. While several provisions have been transposed positively, important aspects such as the grounds for non-recognition and the provisions clarifying subsequent decision-making competence after a decision on supervision measures are fragmented. FD ESO is **applied infrequently in practice** in the Member States.

2.4.1. Opportunities and barriers to addressing unnecessary pre-trial detention of EU citizens in other Member States

FD ESO provides an alternative to pre-trial detention for persons suspected of having committed offences, residing in one Member State but subject to criminal proceedings in another Member State. They are supervised by the authorities in their country of residence whilst awaiting trial. Like FD PAS, FD ESO seeks to address the large number of EU nationals imprisoned in other Member States by providing an alternative to potentially unnecessary detention.

Recent statistics show that approximately 100,000 people (one-sixth of all prisoners) are held in pre-trial detention in the EU[133]. This number includes a significant percentage of foreign EU citizens, who represent 6.8% of the prison population of each Member State[134].

The FD ESO proposal emphasised that pre-trial detention should be an exceptional measure and advocated for extensive use of non-custodial supervision measures in line with the ECHR[135]. The final FD ESO text (Recital 3) reflects this purpose, stating that the measures should aim to enhance the right to liberty and the presumption of innocence. EU citizens suspected of a crime in another Member State often face pre-trial detention due to perceived flight risk and lack of local ties[136]. This practice contradicts the European Court of Human Rights' (ECtHR) principle that lacking a local

[133] Fair Trials International, 'Pre-trial detention: It's time for EU action to end excessive use', Brief, 2020, https://www.cep-probation.org/wp-content/uploads/2020/10/20190731_PTD_Brief_IP_V07_JUSTICIA.pdf.

[134] Tudera, E. and Ruiz, C., 'The underutilisation of the European Supervision Order: Framework Decision 2009/829/JHA as just a scrap of paper', *European Law Review*, Vol. 3, 2021, pp. 306-324, https://repositorio.uloyola.es/bitstream/handle/20.500.12412/5134/Tudela_2021_46_ELRev_Issue_3_Offprint.pdf?sequence=1&isAllowed=y.

[135] Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union {SEC(2006)1079} {SEC(2006)1080}, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006PC0468.

[136] Ibid.

fixed residence does not make a person a flight risk[137].This practice by the judiciary led, in general, to an overrepresentation of foreign nationals in pre-trial detention populations[138]. Pre-trial detention can result in serious harm to the accused's social contacts, including ties with their family and friends, and can cause them to lose their employment or other economic opportunities. Pre-trial detention also presents significant costs to authorities in Member States, where using alternative measures would ease prison management.

The Commission's 2014 FD ESO implementation report[139] noted that national courts often detain EU citizens due to a lack of trust in other Member States' ability to prevent the accused from absconding or to enforce protective measures. Large prison populations in EU Member States, including many EU citizens awaiting trial in detention abroad, creates a tension that FD ESO aims to address. Proper use of this instrument can reinforce critical fundamental rights, such as the presumption of innocence, the right to liberty, equality before the law, and the right to non-discrimination on the basis of nationality or residence[140].

In 2014, many Member States had yet to transpose FD ESO into national law. This changed after the European Commission gained powers to bring infringement proceedings at the end of 2014[141]. The 9th round of mutual evaluations in 2023 identified very low usage rates of FD ESO. Like FD PAS, the evaluation found that low use depended less on transposition challenges and more on low awareness, lack of training, and lack of experience using FD ESO. Lack of training is often cited by academics[142]. Some commentators note that the delay and reluctance of some

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[137] Suloaja v. Estonia App. no. 55939/00 (15 February 2005), paragraph 64; Fair Trials International, *A Guide to The European Supervision Order*, 2012, https://www.ecba.org/extdocserv/projects/eso/ESO_GUIDEfinal_FTI.pdf.

[138] Martufi, A. and Peristeridou, C., 'Pre-trial detention and EU law: Collecting fragments of harmonisation within the existing legal framework', *European Papers*, Vol. 5, Issue 3, 2020, pp. 1477-1492, https://www.europeanpapers.eu/en/europeanforum/pretrial-detention-eu-law-collecting-fragments-harmonisation.

[139] European Commission, *Report from the Commission on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention*, COM/2014/057 final, EUR-Lex - 52014DC0057 - EN - EUR-Lex (europa.eu); Fair Trials, *A Guide to The European Supervision Order*, 2012, https://www.ecba.org/extdocserv/projects/eso/ESO_GUIDEfinal_FTI.pdf.

[140] Neira-Pena, A., 'The reasons behind the failure of the European Supervision Order: The defeat of liberty versus security', *European Papers*, Vol. 5, Issue 3, 2020, pp. 1493-1509, https://www.europeanpapers.eu/es/europeanforum/reasons-behind-failure-european-supervision-order-defeat-liberty-versus-security.

[141] Ryan, A., 'The interplay between the European Supervision Order and the European Arrest Warrant: An untapped potential waiting to be harvested', *European Papers*, Vol. 5, Issue 3, 2020, pp. 1531-1542, https://www.europeanpapers.eu/en/europeanforum/interplay-between-european-supervision-order-european-arrest-warrant.

[142] Tudera, E. and Ruiz, C., 'The underutilisation of the European Supervision Order: Framework Decision 2009/829/JHA as just a scrap of paper', *European Law Review*, Vol. 3, 2021, pp. 306-324, https://repositorio.uloyola.es/bitstream/handle/20.500.12412/5134/Tudela_2021_46_ELRev_Issue_3_Offprint.pdf?sequence=1&isAllowed=y; Neira-Pena, A., 'The reasons behind the failure of the European Supervision Order: The defeat of liberty versus security', *European Papers*, Vol. 5, Issue 3, 2020, pp. 1493-1509, https://www.europeanpapers.eu/es/europeanforum/reasons-behind-failure-european-supervision-order-defeat-liberty-versus-security.

substantial role to victims. They are largely uninvolved in the process, may not oppose issuance or recognition, and are not notified of decisions relating to the procedure[149]. While critics here refer specifically to FD ESO, the same can be said for FD PAS which contains similar provisions and similarly does not include victims in the process.

Some observers see FD ESO as a potential solution to resolve points of tension in the application of FD EAW. For example, concerns about lengthy pre-trial detention and inhuman and degrading treatment in prisons abroad have led to refusal to execute EAWs. In these circumstances the FD ESO could be a useful means of alleviating the concerns of executing States regarding harmful treatment during the EAW process, helping to ensure that the requested person can be surrendered and made available for trial[150].

2.4.2. Overview of national transposition

For FD ESO, desk research covered several problematic provisions agreed with DG JUST: Articles 8(1), 9, 12, 13, 15, 18, and 21.

Desk research found that the status of transposition is variable, with some provisions being positively transposed and others fragmented or not transposed.

Table 10 outlines the categorisation of the problematic provisions based on transposition.

Table 10 - FD ESO: Overview of transposition status

Status of transposition	Problematic provisions of FD ESO
Positive	8(1) 9(2) 9(4) 12(1) 12(4) 13(1) 13(3); 15(1)(c), (e), (g), (h); 15(2); 21(3); 21(4).
Fragmented or missing	9(1); 12(2)-12(3); 15(1); 15(1)(a), (b), (d), (f); 15(3); 18(1)-18(5); 21(1); 21(2).

The following sub-sections will focus on the specific articles identified as having a fragmented or missing transposition.

Article 9: Criteria relating to the Member State to which the decision on supervision measures may be forwarded

[149] Neira-Pena, A., 'The reasons behind the failure of the European Supervision Order: The defeat of liberty versus security', *European Papers*, Vol. 5, Issue 3, 2020, pp. 1493-1509, https://www.europeanpapers.eu/es/europeanforum/reasons-behind-failure-european-supervision-order-defeat-liberty-versus-security.

[150] Ryan, A., 'The interplay between the European Supervision Order and the European Arrest Warrant: An untapped potential waiting to be harvested', *European Papers*, Vol. 5, Issue 3, 2020, pp. 1531-1542, https://www.europeanpapers.eu/en/europeanforum/interplay-between-european-supervision-order-european-arrest-warrant.

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Article 9 sets out the criteria to be followed by the competent authority of the issuing State to forward a decision on supervision measures to the competent authority of another Member State. According to **Article 9(1)**, such decision may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing if the person, having been informed about the measure, consents to return to that State.

Issues with this provision revolve around the notion of the State in which the person is lawfully and ordinarily residing, which is transposed incorrectly in some Member States. [redacted]'s transposition does not mention that the decision should be forwarded to the competent authority in the Member State in which the sentenced person is 'lawfully and ordinarily residing. [redacted] also makes this provision mandatory, rather than discretionary. In [redacted], national law refers to the State where the person has resided for a long time or permanently. [redacted] refers to the notion of actual place of residence, which is to be understood as covering the person's ordinary place of residence, but not necessarily their lawful place of residence.

Different types of discrepancies with the text of Article 9(1) can also be identified. In [redacted], for example, the national measure does not make it clear that the decision may be forwarded to the competent authority of the State in which the person is residing but simply stipulates that it may be forwarded to that Member State.

Article 12: Decision in the executing State

Article 12 sets out the procedure to be followed by the competent authority of the executing State after receipt of the decision on supervision measures and certificate to recognise such decision.

According to **Article 12(2)**, if a legal remedy is introduced against the decision referenced in Article 12(1), the standard time limit for the executing State's competent authority to recognise the forwarded decision on supervision measures (i.e. 20 working days) shall be extended by another 20 working days.

Member States interpreted the first part of the provision differently, which led to different choices in transposition. Some Member States transposed it by extending the time limit for recognition in cases where a legal remedy is introduced against the decision taken by the executing State's competent authority on whether or not to recognise the decision on supervision measures issued in the issuing State (e.g. [redacted]). [redacted] used a similar interpretation and opted not to allow for the introduction of legal remedies against the recognition decision. Other Member States transposed this provision by extending the time limit for recognition in cases where a legal remedy is introduced against the decision on supervision measures issued in the issuing State (e.g. [redacted], [redacted]).

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The 20 working days deadline extension provided for in Article 12(2) was not correctly transposed in some Member States (e.g.).

Article 12(3) provides that where in exceptional circumstances it is not possible for the executing State's competent authority to comply with the time limits set out in Article 12, it shall immediately inform the issuing State's competent authority, with reasons for the delay and an indication of when the final decision is expected to be taken.

A recurring issue is that some Member States (e.g.) failed to transpose the requirement that non-compliance with the time limits should be limited to exceptional circumstances. only stipulates the obligation to inform the issuing State of a complaint, rather than transposing the obligation of the authority to inform the issuing State if, due to exceptional circumstances, it cannot comply with the time limits. This affects conformity, as it does not reflect Article 12(3) of FD ESO. Spain does not include the possibility of the application of Article 12(3) in cases where an appeal is lodged and the relevant time limit cannot be respected for exceptional circumstances.

Article 15: Grounds for non-recognition

Article 15 sets out the grounds that can be invoked by the competent authority in the executing State to refuse to recognise the decision on supervision measures.

Pursuant to **Article 15(1),** the grounds listed in the subparagraphs of this provision are grounds for optional non-recognition, leaving a margin of discretion to the executing State's competent authority on whether or not to resort to them.

Several Member States transposed this provision correctly by phrasing the grounds for non-recognition as optional (e.g.). Some Member States, however, transposed some of the grounds for non-recognition as mandatory. transposed the grounds for non-recognition set out in Article 15(1)(a)-(g) as mandatory, Ireland did the same for the grounds in Article 15(1)(c), for the grounds in Article 15(1)(d), and for the grounds in Article 15(a)-(c), (e)-(h). , transposed all of the grounds for non-recognition as mandatory.

Of the different grounds for non-recognition listed in Article 15(1), those set out in subparagraphs (a), (b), (d) and (f) present issues across the Member States. The ground listed in subparagraph (c), on non-recognition for contravention to the *ne bis in idem* principle, and subparagraph (e), on non-recognition due to criminal prosecution being statute-barred, do not present particular or recurring issues, other than being transposed as a ground for mandatory non-recognition in some Member States (e.g.). The same holds true for Article 15(1)(g), on the impossibility to hold the person criminally responsible due to their age. Article 15(1)(h), on the situation where the executing

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State's competent authority would, in case of breach of the supervision measure, have to refuse to surrender the person concerned in accordance with FD EAW, does not raise specific problems across Member States. [redacted] transposed this ground for non-recognition as optional, despite having transposed all other grounds as mandatory.

Article 15(1)(a) provides that recognition of the decision on supervision measures may be refused if the certificate is incomplete or obviously does not correspond to the decision and has not been completed or corrected within a reasonable period set by the executing State's competent authority.

This provision was transposed partially by some Member States. In [redacted], the national law does not specify that non-correspondence of the certificate to the decision shall be 'obvious'. In [redacted], the national law does not leave full discretion to the competent authority of the executing State to set a reasonable period for completion or correction of the certificate but instead sets out that this shall be 15 days ([redacted]) or between 30 and 60 days ([redacted]).

Article 15(1)(b) provides that recognition of the decision on supervision measures may be refused if the criteria laid down in Articles 9(1), 9(2) and 10(4) are not met. Some Member States (e.g. [redacted]), in incorrectly transposing the provisions cross-referenced by Article 15(1)(b), created repercussions for the correct transposition of the ground for non-recognition itself. Others did not transpose this provision (e.g. [redacted]).

Article 15(1)(d) provides that recognition of the decision on supervision measures may be refused if, in cases where the double criminality check applies, the decision relates to an act that would not constitute an offence under the law of the executing State, with an exception in relation to tax, customs and currency matters.

The national transposition of this provision sometimes fails to cover the exception to the grounds for non-recognition in relation to tax, customs and currency matters (e.g. [redacted]). Other issues stem from the provisions cross-referenced by Article 15(1)(d) (e.g. Ireland does not make any cross-references to Article 14(3), 14(4), and 14(1) of FD ESO; [redacted] makes no cross-reference to the declaration under Article 14(4) or the cases referenced in Article 14(1) of FD ESO). Some Member States did not transpose this article (e.g. [redacted], [redacted]). [redacted] transposed it as a mandatory ground for refusal.

Article 15(1)(f) provides that recognition of the decision on supervision measures may be refused if the law of the executing State provides for immunity, making the monitoring of the supervision measures impossible. Some Member States deviated slightly from the wording provided in FD ESO. [redacted] does not specify that the immunity shall make it impossible to monitor the supervision measures. [redacted] refers to the immunity making it impossible to execute the decision imposing a coercive measure. [redacted] transposed it as a mandatory ground for refusal.

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Article 15(3) is linked to the ground for non-recognition laid down in Article 15(1)(h). Pursuant to this provision, where the executing State's competent authority is of the opinion that Article 15(1)(h) could be invoked to refuse recognition but is nevertheless willing to recognise the decision, it shall inform the issuing State. In that case, the issuing State's competent authority may decide to withdraw the certificate or, if it does not withdraw the certificate, the executing State's competent authority may recognise the decision, on the understanding that the person concerned might not be surrendered on the basis of an EAW.

This provision was not always transposed (e.g. [redacted]) or was transposed through general provisions that allow consultations between the authorities of the executing and issuing State, but do not provide for the details included in this provision of FD ESO (e.g. [redacted], [redacted]). In other cases, while the provision is generally transposed, national transposition can be considered partial, as important elements are missing. [redacted] does not explicitly provide that the reasons for the possible refusal shall be transmitted to the issuing authority. [redacted] omits the inclusion of the requirement to inform the competent authority in the issuing State that the person might not be surrendered on the basis of an EAW and the withdrawal of the certificate for this reason is not foreseen by the issuing State. [redacted] fail to specify that the information provided by the executing State's competent authority to the issuing State's competent authority should include the reasons for the possible refusal.

Article 18: Competence to take all subsequent decisions and governing law

Article 18 identifies the authority competent to take subsequent decisions after a decision on supervision measures.

Pursuant to **Article 18(1)**, the competent authority in the issuing State shall have jurisdiction on all subsequent decisions relating to a decision on supervision measures, including notably (a) renewal, review and withdrawal of the decision on supervision measures; (b) modification of the supervision measures; and (c) issuing an arrest warrant or other enforceable judicial decision with the same effect.

The national transposition is sometimes missing (e.g. [redacted], [redacted]) or follows a different structure, as in Bulgaria, which does not identify the competence on the issuing State's competent authority in respect of subsequent decisions, but, rather, sets out an obligation on that authority to inform the executing State's competent authority of specific circumstances concerning the supervision measures. This does not necessarily translate into a conformity problem, as the competence of the issuing State's authority in relation to subsequent decision appears to be the (implicit) result of the interpretation of the provisions of the national frameworks. Conversely, in [redacted], the national transposing measure identifies a 'definite' list of subsequent decision when acting as the issuing State, rather than in relation to 'all decisions'.

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In other cases, the national transposing measures follow the same structure of Article 18(1), but omit certain elements, such as reference to the fact that this provision shall be without prejudice to Article 3 (e.g. [redacted]). [redacted] refers to the protection of public order and the guarantee of internal security, thus failing to cover the notion of protection of victims.

Some discrepancies were noted between the wording of Article 18(1) and the national transposing measures with respect to the examples of subsequent decisions on supervision measures mentioned in subparagraphs (a), (b) and (c). The national measures do not always provide for a breakdown of possible examples, but, rather, for a general clause that encompasses all changes in the supervision measures (e.g. the [redacted]). Specific transposition is missing in relation to subparagraph (a) (e.g. [redacted]) and (c) (e.g. [redacted]). However, the national research found that this would often be mitigated by the applicability of the national frameworks transposing the FD EAW or because 'renewal, review and withdrawal' are covered by other general notions, such as 'extension of the duration' or 'discontinuing' of the supervision measures, to which the national measures refer (e.g. [redacted]).

Article 18(2) complements Article 18(1) and clarifies that the law of the issuing State shall apply to decisions taken pursuant to paragraph 1.

This provision was not always transposed by the Member States (e.g. [redacted]), although identification of the law of the issuing State as the law governing the decision can be inferred from the measures transposing Article 18(1) and FD ESO in general (e.g. [redacted]). [redacted] transposed this provision incorrectly and the national law states that once the executing State has taken over supervision, further measures shall be governed by the law of the executing State as opposed to the issuing State.

Article 18(3) provides that, where it is required by national law, the competent authority in the executing State may use the recognition procedure set out in FD ESO to give effect in its national system to decisions on the renewal, review and withdrawal of the decision on supervision measures or on the modification of the supervision measures. In such cases, the recognition shall not lead to a new examination of the grounds for non-recognition set out in Article 15.

The requirement not to examine the grounds for non-recognition presents certain problems. In [redacted], the national measure generally transposed this requirement with an exception, as the ground for non-recognition set out in Article 15(1)(h) still seems applicable. In [redacted], the national provision stating that the grounds for refusal should not be examined relates only to the decisions of the issuing State's competent authority to maintain or extend a supervision measure, and omit the decisions on the modification of the supervision measures. The national transposing provision in [redacted] does not precisely reflect the content of Article 18(3) of the FD

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PAS. The transposing provisions in [redacted] omit the stipulation that recognition shall not lead to a new examination of the grounds of non-recognition.

Article 18(3) was not transposed in some Member States (e.g. [redacted]). Even though this provision gives Member States the discretion to require the use of the recognition procedure, the national research in some cases found that the lack of explicit transposition of the requirement that the recognition shall not lead to a new examination of the grounds for non-recognition may raise issues of conformity (e.g. [redacted]).

According to **Article 18(4)**, where the issuing State's competent authority has modified the supervision measures, the competent authority in the executing State may either (a) adapt the modified measures, in application of Article 13, in cases where the nature of the modified supervision measures is incompatible with its national law; or (b) refuse to monitor the modified supervision measures, if they do not fall within the types of measures referenced in Articles 8(1) and 8(2).

In some cases, this provision was not transposed at all (e.g. [redacted]), was transposed so as to lack some, or both, of its subparagraphs (e.g. [redacted], for subparagraph (a) and [redacted] for both subparagraphs), or was partially transposed (e.g. [redacted]). [redacted] did not transpose Article 8(2). [redacted] transposed all elements of Article 18(4), but made them mandatory, rather than leaving discretion, as in the FD ESO.

In [redacted], the national measures adhere quite closely to the wording of Article 18(4), but the partially complete and partially conforming transposition of Article 13 and Article 18(1) (which is cross-referenced by Article 18(4)) create concerns in terms of overall conformity with this provision of FD ESO.

In general, it can be noted that Article 18(4) revolves around cross-references to Article 13 – dealing with the adaptation of the supervision measures – and Articles 8(1) and 8(2), which lay down the types of supervision measures falling within the scope of FD ESO. This particular legislative technique has repercussions on the assessment of the national frameworks. For example, in [redacted], despite the lack of transposition of Article 18(4), it can be concluded that the issues in terms of conformity are mitigated by the complete transposition of Articles 8 and 13, which ensure the possibility to adapt the supervision measures and correctly identify the supervision measures.

Article 18(5) stipulates that the jurisdiction of the competent authority in the issuing State on the subsequent decisions is without prejudice to proceedings that may be initiated in the executing State against the person concerned, in relation to criminal offences other than those on which the decision on the supervision measure is based.

This provision had a low rate of transposition as it was found to be missing in several Member States (e.g. [redacted]).

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Article 21: Surrender of the person

Article 21 deals with the surrender of the person. More specifically, **Article 21(1)** clarifies that if the competent authority of the issuing State has issued an arrest warrant or another enforceable judicial decision with the same effect, the person shall be surrendered in accordance with FD EAW.

This provision was not transposed in some Member States (e.g. [redacted], [redacted]).

Conformity issues stemming from the lack of transposition of Article 21 may be mitigated by the fact that the national frameworks would apply where an EAW is issued, irrespective of whether or not Article 21(1) of FD ESO is transposed (e.g. [redacted], [redacted]).

Article 21(2) stipulates that, in this context, the competent authority of the executing State may not invoke Article 2(1) of FD EAW (which provides that an EAW may be issued for facts punishable by the law of the issuing State by a maximum of at least 12 months of detention or, if a sentence or detention order have been issued, of at least four months of detention) to refuse to surrender the person. This was not transposed in several Member States (e.g. [redacted]). [redacted] transposed it incorrectly, as the national provision does not stipulate that in the context of Article 2(1), Article 21(2) cannot be invoked.

In some Member States (e.g. [redacted]), the lack of transposition does not necessarily translate to lack of conformity of the national measures, as the legal frameworks would apply and – indirectly – also apply Article 21(2) of FD ESO.

2.5. Previous Convictions - Council Framework Decision 2008/675/JHA of 24 July 2008

Analysis of the implementation of FD Previous Convictions presents **quite a negative level of implementation** of the provisions. This covers the:

- subject matter of the FD,
- relevant definitions, and
- rules on considering a conviction handed down in another Member State during new criminal proceedings.

The research suggests that this **limited practical application** is sometimes linked to the specifics of Member States' criminal codes and criminal procedure laws.

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2.5.1. Opportunities and barriers in differentiating primary delinquents from repeat offenders across the EU

Adopted in July 2008, FD Previous Convictions is a short text comprising just six articles. It aims to allow Member States to consider previous convictions from other Member States during their own criminal proceedings. In that respect, 'the need to differentiate primary delinquents from the so-called repeat offenders represents a corollary of the principle of mutual recognition'[151]. While not seeking to harmonise laws, it enables Member States, based on the principle of equivalence, to give the same effects to convictions (i.e. final criminal court decisions) from other Member States. Member States have discretion in attributing effects to convictions, but the effects must be the same as if the judgment were a national one[152].

In 2014, the Commission published a report on the implementation of FD Previous Convictions[153], acknowledging the efforts of the 22 Member States that had implemented it and noting that the degree of **adherence to the FD Previous Conviction's intent and wording varied considerably**. The report found that several Member States did not provide an explicit definition of 'conviction', leading to differences in the scope of application and legal certainty as transposing laws vary to great extent. Most Member States required dual criminality, complicating the recognition of foreign convictions, and nine did not provide conclusive information to the Commission regarding their compliance with the rule that foreign previous convictions must have equivalent legal effects to national previous convictions, affecting legal certainty and mutual trust.

To date, the CJEU has rendered five judgments clarifying the interpretation of certain provisions of FD Previous Convictions (see Annex A3.4).

The proposal for the FD Previous Convictions was put forward in March 2005[154] and was followed in November that year by a Council Decision on the exchange of information extracted from criminal records[155]. This evolved into the Proposal for a European Criminal Records Information System (ECRIS) in 2008[156] , which led to legislation the following year[157]. ECRIS and FD Previous Convictions are related in that

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[151] Paulesu, P. P., 'Enforcement of judicial decisions', In: Kostoris, R.E. (Ed.), *Handbook of European Criminal Procedure*, Springer, Cham, Switzerland, 2018.

[152] Article 3(1).

[153] European Commission, *Report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decision 2008/675/JHA of 24 July 2008 on taking into account of convictions in the Member States of the European Union in the course of new criminal proceedings*, COM/2014/0312 final.

[154] Proposal for a Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, COM/2005/0091 final.

[155] Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record, OJ L 322, 9.12.2005, p. 33.

[156] Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA, COM/2008/0332 final.

[157] Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, OJ L 93, 7.4.2009, pp. 33; replaced by Directive (EU) 2019/884 of the European Parliament and of the Council of 17 April 2019 amending Council Framework Decision

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the functioning of 'ECRIS (...) is evaluated under the criterion of allowing the proper application of Framework Decision 2008/675/JHA'[158].

ECRIS comprises national criminal records databases, a common communication infrastructure providing an encrypted network, and interconnection software to facilitate information exchange between various criminal records databases. It operates on the principle of nationality, whereby each Member State maintains a central repository of all convictions handed down in the EU against its nationals. Member States must store, update, and exchange such information upon request, thereby providing comprehensive and updated information on their nationals' criminal records. Member States must exchange the information on criminal records for the purpose of criminal proceedings and, if permitted by national law, may make it available upon request for purposes other than criminal proceedings[159].

The 2016 impact assessment for the revision of Framework Decision 2009/315/JHA[160] found that ECRIS did not sufficiently cover the particularities of requests concerning third-country nationals and stateless persons, notably in relation to situations covered by FD Previous Convictions. The report notes that 'the increased efficiency of ECRIS with regard to [third-country nationals] TCN will promote its use for this purpose. It will help the implementation of Council Framework Decision 2008/675/JHA' and that 'ECRIS with regard to [third-country nationals] TCN will provide easy access to information on previous convictions of a [third-country national] TCN'. A new instrument, Directive (EU) 2019/884, has been adopted, amending ECRIS on this point[161].

FD Previous Convictions, together with the subsequent Decisions 2009/315/JHA and 2009/316/JHA, intended to improve the "circulation" of information on convictions: with the system of so-called European recidivism, in fact, it allows the use of the ECRIS (European Criminal Records Information System) certificate for any determination on punishment, in particular for the application of recidivism or for the declaration of

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2009/315/JHA, as regards the exchange of information on third-country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA PE/87/2018/REV/1 OJ L 151, p. 143; further modified by Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726.

[158] Giannakoula, A., 'Framework decisions under the Lisbon Treaty: Current status and open issues', *European Criminal Law Review*, Vol. 7, 2017, p. 275.

[159] Council Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States, Articles 6-7, OJ L 93, 7.4.2009, pp. 23.

[160] European Commission, Impact assessment accompanying the proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS) and replacing Council Decision 2009/316/JHA, SWD (2016) 4 final of 30 November 2016.

[161] Directive (EU) 2019/884 of the European Parliament and of the Council of 17 April 2019 amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third-country nationals and as regards the European Criminal Records Information System (ECRIS) and replacing Council Decision 2009/316/JHA, OJ L 151, 7.6.2019, pp. 151.

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habitual criminality of the convicted person, as well as any other assessment that the judge has to make, from the stage of preliminary investigations to that of execution.[162]

2.5.2. Overview of national transposition

The desk research covered several problematic provisions: Articles 1(2), 2, and 3.

The status of transposition and implementation is variable, with some provisions transposed and implemented well and others fragmented or not transposed.

Table 11 outlines the categorisation of the problematic provisions, based on transposition and implementation.

Table 11 - FD Previous Convictions: Overview of transposition status

Status of transposition	Problematic provisions
Positive	
Fragmented or missing	1(2); 2; 3.

The following sub-sections will focus on the articles identified as having a fragmented or missing transposition.

Article 1: Subject matter

Article 1 sets out the purpose and subject matter of FD Previous Convictions. More specifically, Article 1(2) clarifies that FD Previous Convictions shall not have the effect of amending the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU.

Member States took different approaches to the transposition of this provision. Some provide for transposition of this fundamental rights clause, either in specific or in general terms (e.g. [redacted]). Other Member States did not deem it necessary to transpose this provision (e.g [redacted]). The lack of explicit transposition thus creates conformity issues with the provision of FD Previous Convictions and with Article 6 of the TEU.

Article 2: Definitions

Article 2 provides for a definition of the term 'conviction', which, for the purposes of FD Previous Convictions, means any final decision of a criminal court establishing guilt of a criminal offence.

[162] Report to Legislative Decree No. 73 of 2016 as referred in "EU convictions and national criminal proceedings: FD 2008/675 in action (Cass. 3389/23)", 26 January 2023, Italian Supreme Court, https://canestrinilex.com/en/readings/eu-convictions-and-national-criminal-proceedings-fd-2008675-in-action-cass-338923.

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Several Member States did not transpose this provision (e.g. [redacted]).

Only [redacted] transposed this provision directly.

While this typically creates a conformity issue, different factors should be considered for some Member States. In [redacted], for example, a Supreme Court judgment of 2019[163] stated that the national Penal Code shall be interpreted in conformity with FD Previous Convictions. Accordingly, the gap created by the lack of transposition could be covered by way of an interpretation in line with Article 2. In [redacted], the explanatory memorandum to the national transposing measure indicates that Article 2 does not require explicit transposition, and it could be argued that, according to the [redacted] legislator, the lack of transposition of Article 2 does not create a conformity issue. Nevertheless, the lack of explicit transposition in these Member States gives rise to uncertainty and thus to concerns about the conformity of the national frameworks.

Article 3: Taking into account, in the course of new criminal proceedings, a conviction handed down in another Member State

Article 3 sets out how previous convictions handed down against the same person for different facts in other Member States should be considered in the course of criminal proceedings.

Article 3(1) clarifies that such previous convictions shall be taken into account to the same extent as previous national convictions, and equivalent legal effects shall be attached to them as to previous national convictions.

This provision lacks transposition in some Member States, with different conclusions on overall conformity with FD Previous Convictions. In [redacted], issues of conformity could be mitigated by the fact that the case-law of the Supreme Court indicates that the provisions of the Penal Code shall be interpreted in conformity with FD Previous Convictions. Although [redacted] did not transpose this measure, the Cooperation in Criminal Matters with the Member States of the European Union Act provides that the Ministry of Justice exchanges information from criminal records on final criminal convictions with competent authorities of other Member States, and the competent national authorities consider previous final criminal convictions in the same way as previous national convictions; nevertheless, the lack of explicit transposition poses conformity issues. [redacted] provides for a system where the National Criminal Registry collects data on criminal convictions handed down in another Member States only against [redacted] citizens, with no national provisions covering convictions handed down against non-[redacted] citizens. This raises concerns about the conformity of the national legal framework with the provision of FD Previous Convictions.

A recurring issue is evident among the Member States whose transposing measures follow the wording of Article 3(1) more closely (e.g. [redacted]), notably the lack of reference to the fact that information on previous convictions shall be obtained under applicable instruments on mutual legal assistance

[163] Supreme Court judgment, Case No 1-17-10162 on 21 June 2019.

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or on the exchange of information extracted from criminal records. [redacted]'s provisions state that the authorities are to take into account previous convictions, but do not clarify whether those are in [redacted] or in other Member States.

According to **Article 3(2)**, the provisions set out in Article 3(1) shall apply at the pre-trial stage, at the trial stage, and at the time of execution of the conviction, particularly with regard to the applicable rules of procedure.

No transposing measures could be identified in [redacted]. In some cases, however, the national measures concerning the taking into account of previous convictions make general references to the criminal proceedings, or to the criminal code and the criminal procedure code, which is deemed sufficient to ensure (including according to legal doctrine) that such national measures would apply throughout all phases of criminal proceedings, including the pre-trial stage, the trial stage and execution of the conviction (e.g. France).

Pursuant to **Article 3(3),** considering previous convictions shall not have the effect of interfering with, revoking or reviewing previous convictions or decisions relating to their execution by the Member State conducting the new proceedings. Several Member States do not transpose Article 3(3) specifically (e.g. [redacted]).

In line with Article 3(3), **Article 3(4)** stipulates that the taking into account of previous convictions pursuant to Article 3(1) shall not apply to the extent that, had the previous conviction been a national conviction in the Member State conducting the new proceedings, taking into account such previous conviction would have the effect of interfering with, revoking or reviewing the previous conviction or decisions relating to its execution.

The same considerations for the national transposition of Article 3(3) are applicable to Article 3(4).

According to **Article 3(5)**, in cases where the offence at the basis of the new proceedings was committed before the previous conviction had been handed down or fully executed, the taking into account of the previous conviction shall not have the effect of requiring Member States to apply their national rules on imposing sentences, where the application of those rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings. In such cases, Member States shall ensure that courts can take into account previous convictions in other ways.

Several Member States did not transpose this provision explicitly (e.g. [redacted]). The national measures applicable in [redacted] do not provide for the possibility to take into account previous convictions where the offence which is the subject of the new criminal proceedings was committed before the previous conviction

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was handed down. This provision, coupled with national judicial practice, meets the objective of FD Previous Convictions, despite the national measure following a different structure to Article 3(5).

2.6. Conflicts of Jurisdiction - Council Framework Decision 2009/948/JHA of 30 November 2009

The level of national implementation of FD Conflicts of Jurisdiction is **positive** overall. Several provisions are generally considered to have been implemented positively across the Member States. Most issues of **negative or fragmented transposition centre on the provisions on the obligation of competent authorities to contact the authorities of other Member States** where there are reasonable grounds to believe that parallel proceedings are being conducted, and the provision on cooperation with Eurojust. FD Conflicts of Jurisdiction is also characterised by a poor level of practical application, which is often linked to the specifics of national legal systems. These systems may resolve conflicts of jurisdiction via bilateral agreements or different channels, making FD Conflicts of Jurisdiction less relevant in practice.

2.6.1. Opportunities and barriers in preventing infringements to the *ne bis in idem* principle across Member States

FD Conflicts of Jurisdiction was adopted in November 2009, almost at the same time as the Lisbon Treaty. It followed the European Commission's 2005 Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings[164], which proposed combining procedural mechanisms[165], a priority rule[166], and a list of criteria[167] to be used by Member States when choosing the 'leading' jurisdiction. This would form a strategy to prevent and resolve conflicts of jurisdiction. The initiative for FD Conflicts of Jurisdiction came from five Member States[168], but did not include the priority rule. While the body of academic literature dealing with FD Conflicts of Jurisdiction is rather small, a larger number of publications deal with conflicts of

[164] European Commission, Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings, SEC(2005) 1767, COM/2005/0696 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52005DC0696

[165] The Green Paper foresaw that Member States with significant links to a case must be informed by the initiating State.

[166] In addition to the allocation mechanism, an EU provision could require Member States to centralise proceedings for the same case in a single 'leading' jurisdiction.

[167] Territoriality; Criteria related to the suspect or defendant; Victims' interests; Criteria related to State interests; Efficiency and rapidity of the proceedings.

[168] [redacted] Initiative for a Council Framework Decision 2009/948/JHA on prevention and settlement of conflicts of jurisdiction in criminal proceedings, 2009/C 39/03, OJ L C 39/2.

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jurisdiction in EU criminal law[169] and related issues, such as the *ne bis in idem* principle[170], and the transfer of proceedings in criminal matters[171].

Additional EU-level laws dealing with preventing and solving conflicts of jurisdiction include the EIO, EPPO, and Eurojust Regulation. Directive 2014/41/EU allows Member States to refuse the execution of an EIO in the event that it would lead to a violation of *ne bis in idem*[172], while the EPPO Regulation contains rules on allocation of cases among European delegated prosecutors (EDPs), including criteria for adjudicating conflicts of jurisdiction between EDPs from two Member States[173]. Finally, the Eurojust Regulation requires competent national authorities to inform their Eurojust members of cases in which conflicts of jurisdiction have arisen, or are likely to arise[174], as Eurojust can assist in resolving them[175].

FD Conflicts of Jurisdiction seeks to prevent infringements of the *ne bis in idem* principle[176]. There is a broad body of case-law interpreting this principle from the ECtHR[177] and the CJEU[178], but FD Conflicts of Jurisdiction is not referred in that

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[169] Caeiro, P., 'Jurisdiction in criminal matters in the EU: Negative and positive conflicts, and beyond', *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, Vol. 93, 2010, p. 366; Zimmermann, F., 'Conflicts of Criminal Jurisdiction', *Bergen Journal of Criminal law and Criminal Justice*, Vol. 3, Issue 1, 2015, p. 2; Deboyser, C., 'Eurojust's role in the matter of choice of forum', In: Luchtman, M. (Ed.), *Choice of Forum in Cooperation Against EU Financial Crime,* Eleven International Publishing, 2013; Herrnfeld, H.H., 'Mechanisms for settling conflicts of jurisdiction', In: Luchtman, M. (Ed.), *Choice of Forum in Cooperation Against EU Financial Crime*, Eleven International Publishing, 2013.

[170] Mitsilegas, V. and Giuffrida, F., '*Ne Bis in Idem* and Conflicts of Jurisdiction', In: Mitsilegas, V. (Ed.), *EU Criminal Law* (2nd ed.), Hart Publishing, 2022, pp. 171-172; Vervaele, J. A., 'The transnational *ne bis in idem* principle in the EU. Mutual recognition and equivalent protection of human rights', *Utrecht Law Review*, 2005, pp. 100-118; Neagu, N., 'The *ne bis in idem* principle in the interpretation of European Courts: towards uniform interpretation', *Leiden Journal of International Law*, Vol. 25, Issue 4, 2012, pp. 955-977.

[171] López, A. H., *Conflicts of Criminal Jurisdiction and Transfer of Proceedings in the EU* (Vol. 3), Springer Nature, 2022.

[172] Article 11(d) and recital 17 of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

[173] Article 26(4) of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

[174] Article 21(6)(a) and recital 27 of Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA.

[175] Recital 14 of Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

[176] Recital (3) – '....to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, which might lead to the final disposal of those proceedings in two or more Member States.'

[177] ECtHR, Gradinger v. Austria, No. 159/63/90; Oliveira v. Switzerland, No. 2571/94; Franz Fischer v. Austria, No. 37950/97.

[178] C-435/22; Judgment of the Court (Grand Chamber) of 12 May 2021, *WS v Bundesrepublik Deutschland,* C-505/19, ECLI:EU:C:2021:376; Judgment of the Court (Grand Chamber) of 20 March 2018, *Garlsson Real Estate SA and Others v Commissione Nazionale per le Società e la Borsa (Consob),* C-537/16, ECLI:EU:C:2018:193; Judgment of the Court (Grand Chamber) of 22 March 2022, *bpost SA v Autorité belge de la concurrence*, C-117/20, ECLI:EU:C:2022:202; Judgment of the Court (Second Chamber) of 2 September 2021, *Parchetul de pe lângă Tribunalul Braşov v LG and MH,* C-790/19, ECLI:EU:C:2021:661; Judgment of the Court (Second Chamber) of 18 July 2007, *Criminal proceedings against Norma Kraaijenbrink*, C-367/05, ECLI:EU:C:2007:444; Judgment of the Court (Second Chamber) of 18 July 2007, *Kretzinger*, C-

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jurisprudence with the exception of Case C-129/14 *Spasic*, which underlines that FD Conflicts of Jurisdiction [...] does 'not lay down an execution condition similar to that of Article 54 of the Convention Implementing the Schengen Agreement (CISA)' and thus, in cases of non-execution of the sentence imposed, permits authorities from one Member State to prosecute an individual who has been definitely convicted and sentenced by another Contracting State for the same actions[179].

The 2014 report on the implementation of FD Conflicts of Jurisdiction[180] noted that it constitutes a substantial step in preventing breaches to the *ne bis in idem* principle, but the 'degree of implementation of this Framework Decision varies significantly'. The report encouraged Member States 'to provide for exact statistical data as regards the referrals of cases'.

In 2016-2017, Eurojust published the first report on *ne bis in idem* case-law of the CJEU[181], along with guidelines for cases of conflicts of jurisdictions[182]. Eurojust suggests that upon detecting parallel proceedings, the competent authorities of the Member States involved should make contact, cooperate and coordinate, consolidate prosecution in one location if possible (the main factor being to prosecute in the jurisdiction where the majority of the criminality or loss occurred), and decide the prosecution's location early in the investigation or prosecution process[183].

The 2017 ELI study on conflicts of jurisdiction in criminal matters[184] pointed to FD Conflicts of Jurisdiction's lack of binding criteria for determining the best jurisdiction for prosecution. It also noted that the results of the Eurojust consultation process are not binding (with no follow-up enforcement mechanisms given in FD Conflicts of Jurisdiction). There may be a risk that defendants and victims may be deprived of their rights, as there is no way to contest the final jurisdiction decision. It argued that fundamental rights protection, in light of Article 47 (right to an effective remedy and to a fair trial) and Article 50 (right not to be tried or punished twice in criminal proceedings for the same criminal offence) of the CFR, is not stringent enough under FD Conflicts of Jurisdiction: there are no time limits in the consultation procedure; when Eurojust is involved, its proposal on the choice of forum is not binding; and there is no involvement

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288/05, ECLI:EU:C:2007:441; Judgment of the Court (First Chamber) of 28 September 2006, *Gasparini and Others*, C-467/04, ECLI:EU:C:2006:610; C-436/04; Judgment of the Court (Second Chamber) of 9 March 2006, *Criminal proceedings against Leopold Henri Van Esbroeck*, C-187/01, ECLI:EU:C:2006:165; C-385/01; Judgment of the Court (Second Chamber) of 11 December 2008, *Klaus Bourquain*, C-297/07, ECLI:EU:C:2008:708; Judgment of the Court (Grand Chamber) of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683.

179 Judgment of the Court (Grand Chamber), 27 May 2014, *Zoran Spasic*, C-129/14, ECLI:EU:C:2014:586, paras 64 and 68.

180 European Commission, *Report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings*, COM/2014/0313 final.

181 Eurojust, *Case-law by the Court of Justice of the European Union on the Principle of ne bis in idem in Criminal Matters*, 2017. This report was updated in 2020, 2021 and 2024.

182 Eurojust, *Guidelines for deciding 'which jurisdiction should prosecute?'*, 2016.

183 *Idem.*, p. 2.

184 European Law Institute (ELI), *Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union*, 2017.

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of the accused person in consultations to determine the appropriate jurisdiction[185]. Other critics highlighted the lack of a priority rule, implying that the 'first come, first served' approach prevails in practice[186], and the role of Eurojust, whose guidelines on the Member State of forum were considered vague and open-ended, which could lead to potential abuse[187].

In 2023, Eurojust published a report on the transfer of proceedings[188], underlining the lack of a specific EU legal instrument for the transfer of proceedings. It noted that FD Conflicts of Jurisdiction only mandates a consultation procedure aiming to prevent conflicts of jurisdictions, without regulating the subsequent transfer of proceedings after an agreement on the best jurisdiction for prosecution is reached.

In November 2024, the European Commission adopted Regulation (EU) 2024/3011[189] on the transfer of proceedings in criminal matters (Transfer of Proceedings Regulation). The analytical supporting document accompanying the original proposal[190] examined the coherence of the proposal with FD Conflicts of Jurisdiction, noting that as the FD does not regulate transfers of proceedings, the Regulation filling that gap could be helpful in resolving conflicts of jurisdiction and avoiding violations of the *ne bis in idem* principle[191] as its transposition is still pending - time will tell whether practice confirms this intention. Certain EU instruments go even further in setting down rules for centralising proceedings, such as Article 19(3) of the Directive on combating terrorism[192] and Article 7(2) of Council Framework Decision 2008/841/JHA (FD Organised Crime)[193].

2.6.2. Overview of national transposition

For FD Conflicts of Jurisdiction, the desk research covered several problematic provisions agreed with DG JUST: Articles 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, and 15.

The transposition status is variable, with some provisions correctly transposed and others fragmented or not transposed.

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[185] European Law Institute (ELI), *Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union*, 2017, pp. 13-14.

[186] de Jonge, B., 'Transfer of criminal proceedings: from stumbling block to cornerstone of cooperation in criminal matters in the EU', *ERA Forum*, Vol. 21, 2020, pp. 449–464.

[187] Zuidema, A., 'To which prosecution service? Analysing the way the Union resolves conflicts of criminal jurisdiction', *New Journal of European Criminal Law*, Vol. 14, Issue 3, 2023, pp. 374-396.

[188] Eurojust, *Report on the Transfer of Proceedings in the European Union*, 2023.

[189] Regulation (EU) 2024/3011 of the European Parliament and of the Council of 27 November 2024 on the transfer of proceedings in criminal matters, Recital 8.

[190] European Commission, Supporting Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters, SWD/2023/77 final.

[191] *Idem*. See 6.4. Coherence with other EU cross-border judicial cooperation instruments.

[192] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

[193] Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime.

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Table 12 outlines the categorisation of the problematic provisions based on transposition.

Table 12 - FD Conflicts of Jurisdiction: Overview of transposition status

Status of transposition	Problematic provisions
Positive	2(1)(a) (b) 4 (2) (3) 5(1); 6; 8; 9; 10; 11; 14.
Fragmented or missing	4(1); 5(2), (3); 12.

The following sub-sections will focus on the articles identified as having a fragmented or missing transposition.

Article 2: Subject matter and scope

Analysis of the provision revealed no transposition issues in any Member State.

Article 5: Obligation to contact

Article 5 outlines an obligation for a competent authority of a Member State to contact the competent authority of another Member State if there are reasonable grounds to believe that parallel proceedings are being conducted.

Article 5(2) provides that if the contacting authority does not know the identity of the competent authority to be contacted, it shall make all necessary inquiries, including via the contact points of the European Judicial Network (EJN), to obtain the details of that competent authority. Some Member States did not transpose this provision (e.g. [redacted]).

Article 5(3) stipulates that the procedure of contacting shall not apply when the competent authorities conducting parallel proceedings have already been informed of the existence of these proceedings by other means. Similar to Article 5(2), some Member States did not transpose this provision (e.g. [redacted]).

Article 12: Cooperation with Eurojust

Article 12 concerns cooperation with Eurojust and emphasises that FD Conflicts of Jurisdiction should be complementary and without prejudice to the Eurojust Decision. It also refers to the fact that where a consensus cannot be reached by the competent authorities, the matter shall be referred to Eurojust. Some Member States had transposition issues and cannot be considered to conform with the provision.

[redacted] did not transpose **Article 12(2)** and thus cannot be in conformity. This creates uncertainty that a matter would be referred to Eurojust if a consensus could be reached by the competent authorities. [redacted] omitted the reference to whether Eurojust is competent to act under Article 4(1) of the Eurojust Decision. Although [redacted] did not completely transpose this article, it can be considered to conform, as under the national law, the absence of certain conditions does not affect the process of cooperation with Eurojust.

Article 15: Relation to other legal instruments and other arrangements

Analysis of the provision revealed no transposition issues in any Member State.

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2.7. Financial Penalties - Council Framework Decision 2005/214/JHA of 24 February 2005

The in-depth **examination of the transposition and implementation** of FD Financial Penalties yields a **positive outcome**. While most provisions are generally transposed correctly, the **main concern** is some Member States' transposition of the **grounds for non-recognition** and **non-execution** as **mandatory, rather than optional**.

2.7.1. Opportunities and barriers

Adopted in 2005, FD Financial Penalties applies the principle of mutual recognition to financial penalties imposed by judicial or administrative authorities in relation to criminal offences, with the aim of facilitating their enforcement in a Member State other than that in which they were imposed. It applies to all offences for which financial penalties can be imposed and abolishes dual criminality checks for 39 offences. In 2008, the European Commission adopted a report on the measures taken by Member States to comply with this instrument, concluding that: 'The transposition is not satisfactory as only 11 notifications have been provided by Member States'[194].

In 2009, the FD on *in absentia* procedures and decisions was adopted[195] and had to be incorporated into FD Financial Penalties. In 2013, the first CJEU judgment on the FD was delivered in the *Baláž* case, clarifying the notion of 'court having jurisdiction in particular in criminal matters' in Article 1(a)(iii) of FD[196]. The CJEU ruled that this notion is an '*autonomous concept of Union law*' and should be interpreted as including 'any court or tribunal which applies a procedure that satisfies the essential characteristics of criminal procedure'. Therefore, financial penalties can result from the following, provided that the other applicable criteria are met:

- '(a) judgments issued by judicial authorities following the commission of a crime,
- (b) judgments adopted by judicial authorities concerning administrative violations,
- (c) measures imposed by non-judicial bodies after a criminal offence, and
- (d) measures imposed by non-judicial bodies for administrative violations'[197].

In 2017, Member States agreed the use of the so-called 'five standardised forms'[198] to complement and facilitate the procedure for enforcing FD Financial Penalties in practice. These forms facilitate the exchange of information between the issuing and executing States regarding different aspects of the execution process, such as payment, full or partial recognition of the decision, and non-recognition.

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[195] Council Framework Decision 2009/299/JHA, *op. cit.*

[196] Judgment of the Court (Grand Chamber) of 14 November 2013. Proceedings concerning the enforcement of a financial penalty issued against Marián Baláž. Reference for a preliminary ruling: Vrchní soud v Praze - Czech Republic, C-60/12.

[197] Paulesu, P. P., 'Enforcement of judicial decisions', In: Kostoris, R.E. (Ed.), *Handbook of European Criminal Procedure*, Springer, Cham, Switzerland, 2018, pp. 423-431.

[198] Explanatory memorandum to the five standardised forms for accompanying the procedure for enforcement of cross-border financial penalties as laid down by Framework Decision 2005/214/JHA, https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=25.

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road traffic offences after exchanging vehicle registration data, or, most importantly, because of decisions issued by Member States in cases of non-payment of a financial penalty for these offences, which often did not fall under FD Financial Penalties.

In 2023, the Commission proposed amendments to the CBE Directive[204], which were subsequently adopted in 2024[205]. Recital 23 underlines that 'there is a significant problem of non-enforcement related to road-safety-related traffic offences committed by non-residents and that amendments to Art. 1 of FD Financial Penalties which lays down the definition of a decision, might not be sufficient to tackle this problem effectively'. Recital 24 adds that: 'As Framework Decision 2005/214/JHA is not tailored to mass processing of road-safety-related traffic offences, for which small pecuniary sanctions are often qualified as administrative, and in order to ensure equal treatment of resident and non-resident drivers, specific provisions should be established in this Directive to provide Member States with the possibility to enforce administrative decisions on road traffic fines across borders and to provide mutual assistance for that enforcement. This does not preclude the application of the Framework Decision 2005/214/JHA.'

The new text introduces national contact points responsible for handling incoming and outgoing requests and responses for mutual assistance in the enforcement of final administrative decisions on road traffic fines imposed for road safety-related traffic offences (Article 3a). It also establishes additional mechanisms for identifying the person concerned (Article 5c) and introduces a new Article 5f on mutual assistance in enforcement activities. According to this new article, if a fine has been issued and remains unpaid, the Member State in which the traffic offence occurred may request enforcement assistance from the Member State in which the offender is registered or reside. Such request may only be made if: the fine is administrative, final, and enforceable; proof of service of the fine request to the person concerned is available; the relevant person has been informed and has had the opportunity to exercise legal remedies; and the fine exceeds EUR 70.

2.7.2. Overview of national transposition

Introduction

Desk research covered several problematic provisions of FD Penalties, as agreed with DG JUST: Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 14, 16, and 18.

[204] European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/413 facilitating cross-border exchange of information on road-safety-related traffic offences, COM(2023) 126 final.

[205] Directive (EU) 2024/3237 of the European Parliament and of the Council of 19 December 2024 amending Directive (EU) 2015/413 facilitating cross-border exchange of information on road-safety-related traffic offences (Text with EEA relevance). Official Journal of the European Union, L series, 2024/3237, 30.12.2024, ELI: http://data.europa.eu/eli/dir/2024/3237/oj; Directive (EU) 2015/413 of the European Parliament and of the Council facilitating cross-border exchange of information and mutual assistance on road-safety-related traffic offences, http://data.europa.eu/eli/dir/2015/413/2025-01-19.

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The transposition status of FD Penalties is variable, with some provisions positively transposed and others fragmented or not transposed.

Table 13 outlines the categorisation of the problematic provisions based on transposition and implementation.

Table 13 - FD Financial Penalties: Overview of transposition status

Status of transposition	Problematic provisions
Positive	1(a), (c), (d); 2; 3; 4(1), (2), (4), (5), (6), (7); 5; 6; 8; 9; 14(a), (b), (d); 16; 18.
Fragmented or missing	1(b); 4(3); 7; 14(c), (e); 16(2).

The following sub-sections will focus on the articles identified as having a fragmented or missing transposition.

Article 1: Definitions

Article 1 outlines the definitions for the purposes of FD Financial Penalties. Overall, Article 1 and its sub-articles reveal some issues with incomplete transposition, but in many cases these do not impact conformity. The discussion here focuses solely on those situations where the transposition results in a lack of conformity.

Article 1(b) second subparagraph specifies what a financial penalty cannot include. These are orders for the confiscation of instrumentalities or proceeds of crime, orders that have a civil nature and arise out of a claim for damages and restitution, and that are enforceable by Regulation (EU) 1215/2012 (Brussels Regulation)[206].

Many Member States did not transpose this provision (e.g. [redacted], [redacted]). In [redacted], for example, the provision is in conformity as it is provided elsewhere in national law that financial penalties would not be permitted in such circumstances. In other Member States (e.g. [redacted]) such a possibility is not provided elsewhere in national law, and difficulties can be expected to arise.

Article 4: Transmission of decisions and recourse to the central authority

Article 4 outlines the rules for transmitting a decision and making recourse to the central authority.

Article 4(3) provides that the decision, or a certified copy of the decision, together with a certificate (see Article 4(2) of FD Financial Penalties) shall be transmitted by the competent authority in the issuing State directly to the competent authority in the executing State by any means that leaves a written record under conditions allowing the executing State to establish its authenticity. The original of the decision, or a

[206] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351 20.12.2012, p. 1, 26.02.2015, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02012R1215-20150226

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Portugal	a, e, f, g, i, j
Slovenia	a, b, c, d(i), d(ii), e, f, g, h, i
Spain	a, c, d(i), d(ii), e, f, g, h, i, j

Article 7(2)(a) provides an optional ground of refusal for the competent authority of the executing State in cases where a decision against the sentenced person in respect of the same acts has been delivered in the executing State or in any State other than the issuing or executing State, and, in the latter case, that decision has been executed. Some Member States ( ) transposed this provision as a mandatory ground of refusal and the national competent authorities must refuse recognition on such grounds.

Article 7(2)(b) allows the competent authority to refuse a decision when, in one of the cases referenced in Article 5(3), the decision relates to acts that would not constitute an offence under the law of the executing State. , transposed this as a mandatory ground of refusal.

Article 7(2)(c) provides an optional ground of refusal given that the execution of the decision is statute-barred according to the law of the executing State and the decision relates to acts that fall within the jurisdiction of that State under its own law. made this an obligation for the competent authority.

Article 7(2)(d)(i) states that a decision may be refused if such decision relates to acts that are regarded by the law of the executing State as having been committed in whole or in part in the territory of the executing State or in a place treated as such. In , this is a mandatory ground of refusal.

Article 7(2)(d)(ii) states that a decision may be refused if such decision relates to acts that have been committed outside the territory of the issuing State and the law of the executing State does not allow prosecution for the same offences when committed outside its territory. In , this provision is a mandatory ground of refusal.

Article 7(2)(e) enables the competent executing authority to refuse a decision when there is immunity under the law of the executing State, making it impossible to execute the decision. In several Member States ( ), this constitutes a mandatory ground of refusal.

Article 7(2)(f) outlines an optional ground of refusal given that the concerned decision has been imposed on a natural person who, under the law of the executing State, due to their age could not yet have been held criminally liable for the acts in respect of which the decision was passed. In , this ground of refusal is mandatory.

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Article 7(2)(g) provides an optional ground of refusal when, according to the certificate outlined in Article 4, the person concerned, in case of written procedure, was not, in accordance with the law of the issuing State, informed personally or via a representative, competent according to national law, of their right to contest the case and of the time limits for such a legal remedy. [redacted] transposed the provision as mandatory.

Article 7(2)(h) allows for a decision to be refused if the financial penalty is below EUR 70 or equivalent. In [redacted], decisions must be refused if this condition is met.

Article 7(2)(i) states that the decision may be refused when, according to the certificate provided for in Article 4, the person did not appear in person at the trial resulting in the decision, unless the certificate states that the person, in accordance with further procedural requirements defined in the national law of the issuing State, in due time. Certain Member States ([redacted]) transposed this provision as a mandatory ground of refusal.

Article 7(2)(j) indicates that it is possible to refuse the recognition and execution of a decision if, according to the certificate provided for in Article 4, the person did not appear in person, unless the certificate states that the person, having been expressly informed about the proceedings and the possibility to appear in person in a trial, expressly waived their right to an oral hearing and expressly indicated that they did not contest the case. [redacted] transposed this as a mandatory ground of refusal.

Article 7(3) provides that in the cases referred to in paragraphs 1 and 2(c), (g), (i) and (j), before deciding not to recognise and to execute a decision, either totally or in part, the competent authority in the executing State shall consult the competent authority of the issuing State, by any appropriate means, and shall, where appropriate, ask it to supply any necessary information without delay. Similar to the rest of Article 7, issues have been identified with transposition, but not in relation to uncertainty as to whether the provision can be transposed as a mandatory ground.

For example, some Member States do not include all the relevant paragraphs (e.g. [redacted]), impacting conformity. Other elements of the provision were not transposed, such as in [redacted], where the transposing measure does not mention that this procedure should be followed where the public prosecutor intends to refuse the recognition and execution of a decision 'either totally or in part'.

Article 14: Information from the executing State

Article 14 refers to the receipt of information from the executing State. More specifically, it refers to the fact that the competent authority of the executing State shall, without delay, inform the competent authority of the issuing State by any means that leaves a written record in specific cases. In [redacted], for example, the requirement of

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immediacy was not transposed. Other issues with transposition were identified for Article 14(c) and (e).

Article 14(c) maintains that a written record should be left, without delay, to inform the competent authority of the issuing State of the total or partial non-execution of the decision for the reasons referenced in Article 8, Article 9(1) and (2), and Article 11(1). Some Member States (e.g. [redacted]) experienced difficulties when transposing this provision. For example, [redacted] makes no provision for a notification that leaves a written record. [redacted] do not distinguish between any decision not to recognise and execute a decision, according to Articles 7 or 20(3) of FD Financial Penalties (as stipulated in Article 14(b)), and total or partial non-execution of the decision for the reasons referenced in Article 8, Article 9(1) and (2), and Article 11(1) (as stipulated in Article 14(c) of FD Financial Penalties). [redacted] does not require notification of partial non-execution, only total non-execution. [redacted] did not transpose this provision.

Article 14(e) maintains that a written record should be left, without delay, to inform the competent authority of the issuing State of the application of alternative sanctions, according to Article 10. Some Member States (e.g. [redacted]) experienced difficulties in transposing this provision.

[redacted] did not transpose this provision. [redacted] and [redacted] transposed the provision, but with difficulty. [redacted] does not provide for a notification that leaves a written record, while [redacted] makes no reference to the application of any other alternative sanctions, nor does it mention an obligation for the executing authorities to inform the issuing State of this decision.

Article 16: Languages

Article 16 stipulates that the certificate must be translated into the official language(s) of the executing State, which can also state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the EU institutions.

Article 16(2) clarifies that the execution of the decision may be suspended for the time necessary to obtain its translation at the expense of the executing State. Several Member States did not adopt measures to transpose this provision (e.g. [redacted]) or only partially transposed it. For example, in [redacted], the law does not explicitly provide for suspension of execution.

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3. Part B – Possibilities for EU action, with special focus on legislation, so-called lisbonisation, of ex-third pillar instruments

Part B constitutes the second phase of the study, which focuses on the possibilities for lisbonising the FDs analysed in Part A of the report.

Having examined the state of transposition and implementation of the seven FDs in each of the Member States, this second part examines the possibility of revising and transforming these instruments into EU legislation to improve their implementation and, ultimately, relevance.

This required:

- **Further exploration of** the **aspects** that **limit** the **effective implementation** of the FDs, then identification of the **root causes** (problem drivers) and their **consequences** for Member States and the proper functioning of the Union.
- **Identification of possible solutions** that will determine the policy options the EU or state actors could adopt.

Section 3.1 provides a brief overview of the concept of lisbonisation, its origins and the legal requirements involved.

Section 3.2 presents the **baseline scenario** and what would happen **if the situation were to continue**, i.e. if no action were taken. It builds on the analysis of transposition and implementation presented in Part A and explores, for each FD[207], the **root causes of the implementation issues** in more detail, then categorises those causes (e.g. fragmented transposition, procedural challenges).

Although many common challenges and adverse effects affect several FDs, the **problems and consequences vary considerably.** The study team opted for a pragmatic and cautious, step-by-step approach, tackling the current situation and challenges by individual FD.
This analysis is presented by FD:

- FDs relating to arrests and conditions of detention (Section 3.2.1);
- FD Previous Convictions and FD Conflicts of Jurisdiction (Section 3.2.2);
- FD Financial Penalties (Section 3.2.3).

Section 3.3 presents the **legal basis for EU intervention** and establishes a direct link with possible **policy options**, ranging from the least restrictive (e.g. non-legislative and non-binding measures) to the most demanding (legislative, whether partial or comprehensive). Each policy option is accompanied by a feasibility assessment.

[207] The four FDs relating to detention (FD EAW; FD ESO; FD PAS; FD TOP) are analysed together here.

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3.1. Process of lisbonisation

The term 'lisbonisation' refers to a legislative process by which legal instruments adopted under the former third pillar of the EU (Title VI of the TEU), which dealt with police and judicial cooperation in criminal matters, become standard EU legal acts, namely directives or regulations, in place since the entry into force on 1 December 2009 of the Treaty of Lisbon (or TFEU).

With the abolition of the pillar systems, FDs, the main legislative instruments under the third pillar, could no longer be adopted. Since then, the existing FDs have been repealed and/or replaced, as directives or regulations under the OLP.

The legal basis for this transition is outlined in Protocol No. 36 on transitional provisions, annexed to the Treaty of Lisbon, with **Articles 9 and 10 (Title VII) of Protocol 36** the most relevant for judicial cooperation. Article 9 ensures that the legal effects of pre-Lisbon acts (including FDs) are preserved until they are repealed, annulled, or amended. Article 10(1) established a five-year transitional period during which:

- the European Commission could not initiate infringement proceedings under Article 258 of the TFEU;
- the CJEU retained only its limited pre-Lisbon jurisdiction;

Article 10(3) stipulated that after this five-year period, the full powers of the Commission and the CJEU would apply to these acts.

Directives and regulations under Article 288 of the TFEU are now the legislative instruments dealing with cooperation in criminal matters. Despite the Treaty's call for new legislative action, several FDs remain in force. Today, the acquis of the (former) third pillar in the area of mutual recognition in criminal matters is characterised by very partial lisbonisation[208]. With the exception of the FD on the European evidence warrant[209], which was lisbonised in the EIO Directive[210], and the FDs on freezing orders[211] and confiscation orders[212], which were lisbonised in Regulation (EU) 2018/1805[213], the other instruments of mutual recognition in criminal matters have not been amended and 'the **majority of pre-Lisbon measures on mutual recognition**

[208] Peers, S., 'EU Criminal Law and Police Cooperation', in Craig, P. and de Búrca, G. (Eds.), *The Evolution of EU Law*, 3rd edition, Oxford, 2021, https://doi.org/10.1093/oso/9780192846556.003.0023.

[209] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350, 30.12.2008, p. 72.

[210] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

[211] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.8.2003, p. 45.

[212] Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006, p. 59.

[213] 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.

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in criminal matters remain in force'[214]. By contrast, the third pillar acquis in the field of substantive criminal law has largely been replaced or amended.

Several reasons and/or **challenges** may **explain the delay in** the legislative process for adopting/revising instruments in mutual recognition in criminal matters:

- Issues relating to **fundamental rights –** the CFR became legally binding in 2009, after which a clause on the protection of such right became a standard part of recent directives and regulations in the area of criminal law cooperation. Although human rights protections are not explicitly mentioned among the grounds for refusal in the FDs, Member State practice and CJEU jurisprudence diverged from the language of the FDs[215]. These legal developments are clearly manifested in Member States' approaches to pre-trial detention, particularly its duration and justification[216]. Nevertheless, situations persist where suspects are returned to countries where they spend excessively long periods in prison before trial[217].
- The limits of '**à la carte' justice**, where the possibilities for non-participation or opt-outs are defined in a series of protocols accompanying the Lisbon Treaty to address 'Member States' concerns about the impact of the "lisbonisation" of EU criminal law on the sovereignty of States'[218].
- The priority given to **enforcement interests**, as reflected in several CJEU cases. Mutual recognition has been used to speed up judicial cooperation while reassuring Member States about further criminal law harmonisation. While it has simplified cooperation between States, it has also strengthened the powers of law enforcement.
- The priority given to **enforcement interests**, as reflected in several CJEU cases[219]. The CJEU has viewed the effectiveness of the system to be almost synonymous with achieving the issuing State's law enforcement objectives

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[214] Peers, S., 'EU Criminal Law and Police Cooperation', in Craig, P. and de Búrca, G. (Eds.), *The Evolution of EU Law*, 3rd edition, Oxford, 2021, https://doi.org/10.1093/oso/9780192846556.003.0023.

[215] Mitsilegas, V., 'The constitutional implications of mutual recognition in criminal matters in the EU', *Common Market Law Review*, Vol. 43, Issue 5, 2006, pp. 1277-1311, https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/43.5/COLA2006074.

[216] Article 51 of the CFR requires Member States to respect the Charter when implementing EU law. Some provisions have been used to challenge excessive or unjustified pre-trial detention, especially in cross-border cases involving EU instruments like the EAW, e.g. Article 6 of the CFR, which guarantees the right to liberty and security, and Article 47, which assures the right to an effective and fair trial.

[217] Spencer, J. R. and Csúri, A., 'EU criminal law', In: Barnard, P., *European Union Law*, Law Trove, Oxford, 2020, p. 815.

[218] Mitsilegas, V., *EU Criminal Law*, Hart Publishing, 2022, pp. 75-76.

[219] Judgment of the Court (Second Chamber) of 30 May 2013, *PPU, Jeremy F*, C-168/13, ECLI:EU:C:2013:358; Judgment of the Court of Justice of 28 July 2016, *JZ v Prokuratura Rejonowa Łódź – Śródmieście*, C-294/16, ECLI:EU:C:2016:610.

rather than a European vision[220]. This also explains the 'fall back' towards more harmonisation in victims' rights[221] and defence rights[222].

Academics point to the possible risks of 'lisbonising' as **it might inadvertently undermine the automaticity and simplification of interstate cooperation** at the core of these legal instruments[223]. They cite the EIO Directive (Lisbon Treaty instrument), which does not apply to all States (Ireland and Denmark). It also introduces an equivalence test[224] and a proportionality test[225], as well as new grounds for refusal[226]. Academics argue that to prevent the issuing authority from bypassing national safeguards, the EIO Directive now restricts the (previously) automatic effect[227] within the EU. The legislative initiative on the EIO and later on the European Protection Order[228] originated from seven and 12 Member States, respectively, demonstrating the desire of national parliaments to retain their influence in the sensitive area of criminal justice[229]. The grounds for refusing a European Protection Order are more limited than those for an EIO[230].

The possible legislative and political aspects and limitations must be considered in discussions on revising the frameworks analysed in this study.

The following sections examine the limitations in the implementation of the seven FDs, analysing the causes and problems in more detail, before suggesting possible policy measures and legal bases for EU action.

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[220] Mitsilegas, V., *EU Criminal Law*, Hart Publishing, 2022, p. 201.

[221] Cf. *supra*.

[222] Harding, 2015, *op. cit* ; Directive 2010/64/EU; Directive 2012/13/EU; Directive 2013/48/EU; Directive 2016/343/EU; Directive 2016/800/EU; Directive 2016/1919/EU.

[223] Mitsilegas, V., *EU Criminal Law*, Hart Publishing, 2022.

[224] Evaluates if the measure could be applied to the same offence under the domestic law of the State concerned.

[225] Requiring the issuing State to ensure that the measure is necessary and proportionate (1) for the purpose of the proceedings, (2) for obtaining this piece of evidence, (3) in the perspective of including another State.

[226] There are substantial grounds to believe that execution would be incompatible with the executing State's obligation in regard to Article 6 of the TEU and the CFR.

[227] Csúri, A., 'Towards an Inconsistent European Regime of Cross-Border Evidence: The EPPO and the European Investigation Order', In: Geelhoed, W., Erkelens, L., Meij, A. (Eds.), *Shifting Perspectives on the European Public Prosecutor's Office*. T.M.C. Asser Press, The Hague, 2018.

[228] Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, OJ L 338, 21.12.2011, pp. 2–18.

[229] Kostoris, R.E., 'European Law and Criminal Justice', In: Kostoris, R. (Ed.), *Handbook of European Criminal Procedure*. Springer, Cham., 2018, p. 20, https://doi.org/10.1007/978-3-319-72462-1_1.

[230] As can be seen by comparing Article 12 of Directive 2011/99/EU to Article 11 of the EIO Directive. The EIO adds the following grounds: (c) the investigative measure would not be authorised under the law of the executing State in a similar domestic case; (e) it relates to a criminal offence committed outside the territory of the issuing State and wholly/partially on the territory of the executing State, and the conduct in cause is not an offence in the executing State; (h) the use of the investigative measure is restricted under the law of the executing State to a list of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO.

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3.2. Baseline scenario – status quo

This section outlines the **key challenges associated with the baseline scenario,** i.e. if no further initiatives were taken. The FDs are **grouped thematically,** beginning with the FDs relating to detention and alternative measures, followed by FD Previous Convictions and FD Conflicts of Jurisdiction, and, finally, FD Financial Penalties.

3.2.1. FDs relating to detention

FD EAW, FD TOP, FD PAS and FD ESO are considered together, given the **substantial degree of overlap and interaction between these instruments**.

FDs relating to detention – objectives
FD EAW ▪ Facilitate the mutual recognition of judicial decisions concerning arrest and surrender. ▪ Ensure the respect of the fundamental rights of the surrendered persons. FD TOP ▪ Facilitate the social rehabilitation of sentenced persons. ▪ Facilitate the recognition of a criminal judgment and enforcement of the sentence. FD PAS ▪ Facilitate the social rehabilitation of sentenced persons. ▪ Improve the protection of victims and the general public. ▪ Facilitate the application of suitable probation measures and alternative sanctions. FD ESO ▪ Ensure that the person concerned will be available to stand trial. ▪ Promote, where appropriate, the use of non-custodial measures at the pre-trial stage. ▪ Improve the protection of victims and the general public.

The level of application of these FDs varies widely. For example, a **high volume of arrest warrants** is issued and executed annually under FD EAW but there is an almost **complete lack of practical implementation of FD ESO**. All of the instruments face **serious application challenges in practice**. The following section identifies the key challenges that can be expected to continue or deepen should the baseline scenario persist.

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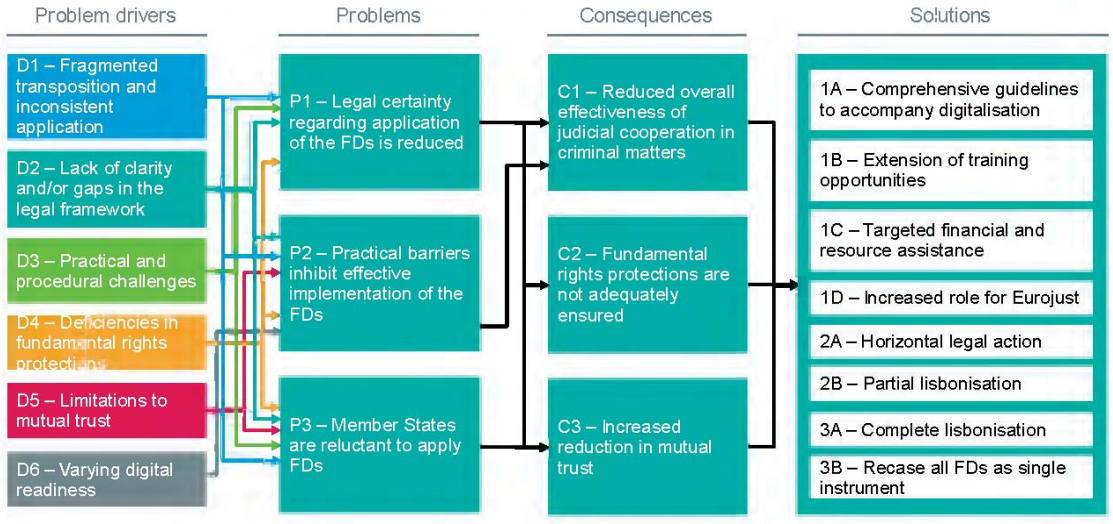
Figure 1 - Problem tree: FDs relating to detention



3.2.1.1. Fragmented transposition and inconsistent application due to complexities and gaps in the FDs

The FDs relating to detention have diverse origins. Some originate from European Commission proposals (FD EAW, FD ESO), others are Member States' initiatives (FD TOP is an initiative of Austria, Finland and Sweden; FD PAS is an initiative of Germany and France). The text of **each instrument is rather complex,** affecting clarity. As **adoption required unanimity at the time**, the texts of the legal acts **often contain elements of interest to only one or a few Member States or contain wording that is not fully consistent with other instruments**. This inconsistency has been criticised in recent years.

This status results in two key problem drivers: fragmented transposition and inconsistent application (driver 1) and lack of clarity and/or gaps in the legal framework (driver 2).

Driver 1 – Fragmented transposition and inconsistent application

While most provisions under these FDs have been fully transposed into Member State law, gaps remain with transposition and application of certain key provisions. This is reflected in the significant number of **CJEU preliminary rulings** on the interpretations of different articles of the FDs (over 100 cases on FD EAW alone) and by **ongoing non-compliance infringement procedures** launched by the Commission on FD EAW. Key topics include definitions and scope, grounds for refusal, provisions accounting for consent and other rights of the accused person, and provisions on procedures and time limits. The fragmented nature of the transposition negatively impacts the practical implementation of the FD and **reduces legal certainty** (problem 1 – Section 3.2.1.5), **as Member States and persons affected may be unable to understand precisely how an individual case will be resolved**.

All of the FDs related to detention have faced challenges with the specific grounds for non-recognition and non-execution. Common issues in the grounds for non-recognition include the **widespread transposition of optional grounds as mandatory,** despite

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CJEU rulings on FD EAW specifying that judicial authorities must exercise a degree of discretion in each case where an optional ground for non-recognition and non-execution applies. While the case-law derives specifically from FD EAW, the principle applies equally to the remaining FDs. **Refusals based on fundamental rights concerns present a challenge,** notably for FD EAW (see Section 3.2.1.4). National research has identified specific transposition issues with Articles 18 and 19 of FD EAW in relation to the situation while a person awaits a decision on surrender and the requirements for requesting a hearing or temporary surrender by the issuing State.

Even where transposition is accurate, inconsistent application presents challenges in practice. For example, national stakeholders at the study workshop pointed out that even if the **certificate** itself is not necessarily problematic, **the quality and sufficiency of information** received through the form at the beginning of a request is frequently insufficient to properly assess the request. Workshop participants highlighted that while the overall legal framework regarding ***in absentia*** **proceedings** is clear and well designed, challenges frequently arise due to the quantity and quality of information in the request form, which requires follow-up communications and thus creates a delay. This challenge is not limited to FD EAW. Survey respondents indicated a lack of sufficient information in communications as a challenge in FD EAW (65%), FD TOP (50%) and FD PAS (71%). A national stakeholder in Bulgaria confirmed that the need for additional information represents one of the most common challenges in implementing FD PAS. Limitations in the use of the form contribute to practical barriers that can inhibit effective application of the FDs (problem 2 – see Section 3.2.1.5). These challenges can contribute to the actual or perceived complexity of applying the FDs in practice, increasing reluctance to apply the lesser-used FD PAS and FD ESO (problem 3 – see Section 3.2.1.5).

The Commission's priorities include familiarising practitioners with the FD by offering training programmes and through expert organisations such as the European Prison Information System (EuroPris)[231] on FD TOP and the Confederation of European Probation (CEP)[232] on FD PAS and FD ESO.

Driver 2 – Lack of clarity and/or gaps in the legal framework

Challenges in application of these FDs include a distinct lack of clarity or a gap in design of the overall legal framework. Key issues are the complex and extensive body of case-law, uncertainty about the interaction between instruments, and an inability to completely account for differences in legal systems. Together, these challenges drive a further lack of legal certainty (problem 1 – see Section 3.2.1.5), creating uncertainty about how an individual request will be handled or even how it should be handled under the current legal framework. Like transposition challenges, these legal gaps or clarity issues can contribute to the actual or perceived complexity of applying these FDs in practice, leading to increased reluctance (problem 3 – see Section 3.2.1.5).

The **complex and extensive body of case-law,** particularly relating to FD EAW, is emblematic of a lack of clarity or gaps in the legal framework. While it intends to clarify or bridge these gaps, **the extent and complexity of the case-law may contribute to the overall lack of clarity.** The CJEU judgment has the force of *res judicata* and is

[231] EuroPris, n.d., https://www.europris.org/.
[232] Confederation of European Probation (CEP), n.d., https://www.cep-probation.org/.

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binding not only on the national court referring for a preliminary ruling, but on all Member States' national courts. Future cases on the same issue require no further reference if the answer is 'so obvious as to leave no scope for any reasonable doubt'[233]. 'Where national legislation has been the subject of different relevant judicial constructions, some leading to the application of that legislation in compliance with [EU] law, others leading to the opposite application, it must be held that, at the very least, such legislation is not sufficiently clear to ensure its application in compliance with [EU] law'[234]:

FD EAW is applied frequently and is widely seen as effective; however, accurate implementation requires extensive attention to over 100 CJEU rulings (to date). While extensive guidance is available on these rulings and their effects[235], **the extent of the case-law can prove quite onerous for national authorities and practitioners, who may struggle to stay up to date with fast-developing case-law**. It is reasonable to argue that without codification or clarification, the complexity of this body of case-law could itself result in uncertainty and inaccurate application of the instruments, especially as it grows.

Many questions have arisen before the CJEU about the **interaction of FD EAW with the other detention-related FDs[236].** Article 25 of FD TOP provides for a link to FD EAW. This provision, in conjunction with Article 4(6) and 5(3) of FD EAW, allows a Member State to refuse to surrender its nationals or residents or persons staying in that Member State if that Member State undertakes to enforce the prison sentence (Article 4(6) FD EAW) or to make surrender subject to the condition that the person, after being heard, is returned to the executing State to serve there the custodial sentence or detention order passed against them in the issuing State (Article 5(3) FD EAW). Article 25 of FD TOP establishes that the procedure under FD TOP shall apply to a refusal under Article 4(6) of FD EAW or a requirement of guarantees under Article 5(3) of FD EAW. Applying Article 25 of FD TOP means that, for example, the strict requirements under FD TOP for adaptation of a sentence, including the reduction of duration, apply where a surrender is refused under Article 4(6) of FD EAW[237]. These issues reduce legal certainty about how interactions between the instruments can and will proceed (problem 1 – see Section 3.2.1.5).

Legal gaps resulting from differences in legal systems present challenges to application of the FDs. The detention FDs aim to provide a common framework for cooperation between Member States on detention and non-custodial alternatives to detention, but do not seek to harmonise the area. The limits for the harmonisation of

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[233] Judgment of the Court of Justice of 6 October 1982, *CILFIT*, C-283/81, ECLI:EU:C:1982:335; CJEU Rules of Procedure, Article 104(3).

[234] Judgment of the Court of Justice of 9 December 2003, *Commission v Italy*, C-129/00 , ECLI:EU:C:2003:656, para 33.

[235] European Commission, *Commission Handbook on how to issue and execute a European arrest warrant*, 2017, OJ C 335, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1006(02)&from=DA.

[236] Request for preliminary ruling Case C-305/22, EU:C:2024:1030; Judgment of 11 September 2025, *Fira*, Case C-215/24, ECLI:EU:C:2025:695; Judgment of 11 March 2020, *SF*, C-314/18, ECLI:EU:C:2020:191; Judgment of 13 December 2018, *Sut*, C-514/17, ECLI:EU:C:2018:1016.

[237] The CJEU reached a judgment on 4 September 2025, but it was beyond the temporal timeframe of this study, see: Judgment of 4 September 2025, *C.J.*, C-305/22: EU:C:2025:665.

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criminal law result from the EU's limits of competence in this area, as laid down in Article 82(2) of the TFEU (see Sections 3.3.1 and 3.3.2). While the lack of harmonisation is not necessarily a challenge itself, some measures within the FDs inadequately address the multiplicity of legal systems. This is most visible in **FD PAS and FD ESO, which provide for recognition of probation and supervision measures without harmonising the alternative measures across the EU.**

Stakeholders have identified that specific forms of probation and supervision measures are frequently jurisdiction-specific and lack equivalents abroad. This can drive a reticence to trust other Member States with application of these measures, leading to reluctance to apply these FDs (problem 3 – see Section 3.2.1.5). The need to adapt probation measures, for example to facilitate application in another Member State, may discourage national authorities from issuing a request. These differences can create practical barriers that inhibit effective implementation of the FDs (problem 2 – see Section 3.2.1.5), as the lack of availability of a measure in another Member State may prevent the use of FD ESO even where there are applicable rules for adapting sentences. The lack of supervision measures across the Member States for FD ESO represents a significant barrier to use, and the inability of the current framework to address this gap suggests that the overall design of FD ESO may not be sufficient to fulfil its intended use. Currently, FD ESO is applied very rarely in practice, in part due to this inability to sufficiently account for differences between Member States.

3.2.1.2. Practical and procedural challenges

The study findings indicate distinct practical and procedural challenges. Distinct from legal gaps and/or transposition issues, these challenges relate to an issue of fit between the existing legal framework and practical realities of application (driver 3).

Driver 3 – Practical and procedural challenges

The findings identified procedural challenges with each of the FDs on detention, reflecting practitioners' opinions in peer reviews (Council mutual evaluation rounds) and expert meetings (Expert Group on EAW, EuroPris, CEP). These challenges include a practical inability to meet timelines, overall complexity of the procedures, and practitioners' awareness and experience of using these instruments.

Some of the challenges are FD-specific. For example, stakeholders identified that the **timelines** required for FD EAW do not adequately account for the practical requirements or the potential cost of physically transporting the requested person for surrender. National research has identified transposition issues in some Member States (see Sections 2.1.2, 2.2.2, and 2.3.2). Feedback during the study workshop on FD EAW highlighted that these practical arrangements alone could require more time than provided under the current deadlines. Respondents to the survey, by contrast, indicated that the need to extend time limits, or processes that exceed the time limits, are relatively rare in practice. These challenges can drive practical barriers, inhibiting effective application of the FDs (problem 2 – see Section 3.2.1.5).

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Stakeholders' feedback on timelines is further contextualised by **statistical data** on FD EAW collected by DG JUST[238]. The statistics indicate that timelines are generally upheld where the person concerned does not consent, but delays are common in other situations, such as where the person concerned gives consent. Statistics for 2022 indicate that the average time period for a decision, from arrest until a decision on surrender was reached, was 20.48 days where the person consented and 57.29 days where the person did not consent. While the latter is within the FD time limit of 60 days to reach a decision where the person does not consent, the process often exceeds the time limit in cases where consent is given. The total number of cases exceeding the overall 90-day time limit was low, at 248 out of 13,335 EAW requests in 2022. In 192 out of 8098 initiated surrender procedures, the person could not be surrendered within the 10-day time limit; in five cases, the person was ultimately released as the time limit could not be met. Where there is no consent, the statistics indicate that the time limits are kept, although the average is close to the limit. Even where the law is clear and consent is given, practical barriers prevent time limits from being met, strengthening the claim that the time limits are impractically short. However, delays are common where the person concerned consents. While the overall percentage of cases in which the 10-day time limit for transfer cannot be met is relatively low, stakeholder feedback indicates that this time limit may be particularly difficult to keep and that there is a lower tolerance for potential delays at this stage.

The 9th round of mutual evaluations identified that time limits are generally met where there is no need to request further information. However, where additional information is needed from the issuing State this process can take a great deal of time and potentially lead to delay[239]. Language and translation issues can also lead to delays, with Member States advised to be flexible about the languages required for a request, including using the option under Article 8(2) of FD EAW to accept requests in one or more of the official languages of the EU institutions.

The study identified more general and overarching challenges related to the procedure for each FD as a whole, for example **the processes can be complex and time-consuming**. While this represents a general challenge, stakeholders indicated that the overall process for applying FD ESO was particularly complex and time-consuming, making it not practically viable to complete the process and execute a supervision order before the person concerned was required to return to the original Member State for trial. As this instrument is designed specifically to provide for temporary supervision instead of imprisonment while a person awaits trial, the inability to complete this procedure in time undermines its overall purpose. Although the procedure for FD ESO follows the same design as that of FD EAW, FD TOP, and FD PAS, difficulties in completing the procedure within the specific, pre-trial context suggests that its design may not be suitable for its aim without further adaptation.

Proper implementation of the FD ESO by all Member States would allow suspected persons to go back to their country of residence while awaiting trial in another Member State. This could avoid long pre-trial detention in a foreign country following the execution of an EAW and before the actual trial takes place. Proper implementation of

[238] Council of the EU, *Statistics on the practical operation of the European arrest warrant – 2022*, SWD/2024/137, https://data.consilium.europa.eu/doc/document/ST-10173-2024-INIT/en/pdf.

[239] Council of the EU, *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 of 1 March 2023, 2023, p. 3.

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the FD PAS would increase judges' confidence that a person will be properly supervised in another Member State, encouraging them to impose an alternative sanction to be executed abroad, instead of a prison sentence.

There is a functional link between FD ESO and FD PAS. Once the accused person has been sent back under FD ESO and complied with conditions imposed on them in the pre-trial stage, a judge might be more likely to impose an alternative sanction, which can be executed abroad for the post-trial stage. However, as FD ESO is rarely applied, this opportunity remains unfulfilled.

Contact and communication between the issuing and executing States **is resource-intensive**. The language differences within the EU make extensive communication under the FDs costly and time-consuming. Firstly because of translation costs and secondly because it often takes time to determine what is meant by certain communications and to translate documents. Contact between the Member States should be made smoother and instantaneous by the results of the ongoing digitalisation of justice initiative (see Annex 4 - Case Study 4).

The study identifies specific areas for improvement, such as better accounting for the practical logistics of surrender, stricter information requirements, improved guidance to improve the sufficiency and quality of information in the initial request forms, and a more flexible approach to the language of submission. While these efforts may result in gains for many of the FDs relating to detention, respondents indicated that FD ESO faces broader issues and may need more comprehensive changes to ensure that the length and complexity of the procedure is adapted to reflect its purpose.

The study identified further issues related **to practitioner awareness and access to training**. Numerous training opportunities exist, in particular for FD EAW as the most widely used instrument, including through the European Judicial Training Network, through specialised bodies such as CEP, through training developed by the Commission (e.g. training e-Capsules for legal professionals developed by DG JUST in 2025), as well as national-level training[240]. Member States organise training through national training academies, with many respondents identifying national judicial academies or other national training as a primary source. Many stakeholders, however, indicated they had not received training. Survey results were mixed overall, with respondents in some jurisdictions, such as Czechia, reporting regular access to training for FD EAW, FD TOP and FD PAS. There is a particular challenge in respect of the lesser-used FD ESO[241]: stakeholder consultations confirmed little if any practical experience with that FD, while workshop feedback suggested it is rarely used or practically applied, complicating the ability to find experienced trainers.

Participants in the study workshop pointed to room for improvement in training processes, stating that training might only reach practitioners already engaged in the topic in depth. They suggested taking action to reach persons less familiar with the FDs. They highlighted that trainers need deep knowledge of national law in addition to

[240] See European Judicial Training Network 2025 catalogue, featuring training on the EAW and digitialisation, EJTN-2025-Training-Catalogue.pdf.

[241] Council of the EU, *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 of 1 March 2023, 2023.

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the FDs and suggested a pressing need to train trainers with this expertise at national level. They also noted a lack of regular communication and experience-sharing between practitioners in different Member States. More exchanges between practitioners could help to spread awareness and practical know-how, particularly for FD ESO, encouraging its use. Workshop participants and survey respondents stated that exchange programmes between practitioners in different Member States would be highly beneficial.

Practical and procedural challenges drive practical barriers to application (see problem 2 - Section 3.2.1.5). For example, Member States' representatives argue that time limits, while clear, are insufficiently tailored to account for practical requirements of surrender. The effect of this gap is that compliance with requirements becomes practically impossible in some cases. Similarly, incomplete information or challenges relating to translation provide a practical impediment to successful application. These challenges can drive further reluctance to apply the FDs, such as with FD ESO, where perceived practical complexity contributes to its widespread underuse (see problem 3 - Section 3.2.1.5).

3.2.1.3. Protection of fundamental rights

Protection of fundamental rights is a recurring issue in applying the FDs on detention. Issues include non-recognition of requests based on fundamental rights concerns and broader mutual trust concerns between Member States. These issues can be characterised as two key problem drivers: deficiencies in fundamental rights protections (driver 4) and limitations in mutual trust (driver 5).

Driver 4 – Deficiencies in fundamental rights protections

Deficiencies in fundamental rights protections, whether real or perceived, drive concerns about legal certainty (problem 1 – see Section 3.2.1.5), practical barriers to application (problem 2 - see Section 3.2.1.5), and reluctance to apply these FDs (problem 3 – see Section 3.2.1.5). The study identified a prevalent challenge in the form of non-recognition based on fundamental rights concerns.

At the time of adoption of the FDs relating to detention, a high level of mutual trust was assumed and enforced by the CJEU, whose decisions such as *Radu C-396/11* and *Melloni C-399/11* did not leave room for the executing authorities of Member States to scrutinise respect for fundamental rights with regard to FD EAW[242].

In recent years, the CJEU has tended to recognise exceptions to the principle of mutual recognition for reasons related to the protection of the fundamental rights of the requested persons. Through key rulings on refusals to recognise an EAW and surrender the person based on deficiencies (e.g. prison overcrowding, poor detention conditions), the CJEU has established justification for refusal. It has ruled that the presumption of mutual trust is not absolute, giving the executing State the possibility

[242] Xanthopoulou, E., 'Mutual trust and rights in EU criminal and asylum law: Three phases of evolution and the uncharted territory beyond blind trust', *Common Market Law Review*, Vol. 55, Issue 2, 2018, p. 493.

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to examine a claim of a violation of fundamental rights in the issuing State, overriding, even exceptionally, the obligation to surrender based on mutual trust[243].

That review is **limited,** in that **Member States must apply a two-step test** based on CJEU case-law.

The test requires showing that there is a **real risk** that:

1. the person sought will face inhuman or degrading treatment due to systemic flaws in the issuing state's prison system, and that
2. due to these **systematic deficiencies,** the person sought will face this treatment if surrendered[244].
   (see Annex 3 for details).

The test requires both an assessment of systematic deficiencies in respect of fundamental rights and an individual assessment *in concreto* regarding the requested person. While this enables some review of fundamental rights, some commentators argue that the threshold for refusing an EAW on this basis may be so high as to effectively render the protection meaningless: under this doctrine, a refusal could only occur in exceptional circumstances and subject to conditions[245]. The CJEU has also opened the door to refusals based on the lack of an independent judiciary[246]. Overall, this effect indicates a challenge to legal certainty, as the high bar to trigger application of the two-step test leaves commentors and practitioners uncertain that this test can effectively protect against harm (problem 1 – see Section 3.2.1.5). It may also contribute to practical barriers to application given the high bar (problem 2 – see Section 3.2.1.5), as well as drive further reluctance to apply the FDs, given concerns that the protections will be insufficient (problem 3 – see Section 3.2.1.5).

Case-law and practice primarily revolve around FD EAW. Concerns about **inhuman and degrading treatment** also have the potential to impact **FD TOP**. The limited CJEU case-law on FD TOP addresses non-recognition on the basis of fundamental rights concerns, specifically allowing refusal in cases of **systematic deficiencies in fair trial rights**[247]. This ruling applies a similar assessment to the two-step test, allowing refusals under FD TOP where there is evidence of systemic or generalised deficiencies in the right to a fair trial in that Member State, particularly regarding the independence of the courts, and substantial grounds to believe that these deficiencies affected the proceedings against the person concerned. While the CJEU has not addressed grounds for non-recognition based on fundamental rights under FD PAS and FD ESO, the establishment of this ground for FD EAW opens this possibility. When applied effectively, those specific instruments could serve to alleviate some potential fundamental rights concerns by providing alternatives to custodial measures (see driver 5 below).

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[243] CJEU, *Aranyosi and Căldăraru*, C-404 & 659/15; see Annex 3.

[244] Ibid.; Xanthopoulou, E., 'Mutual trust and rights in EU criminal and asylum law: Three phases of evolution and the uncharted territory beyond blind trust', *Common Market Law Review*, Vol. 55, Issue 2, 2018, p. 493.

[245] Shabbir, A., *The European Arrest Warrant: Trust, Fundamental Rights, and the Rule of Law*, STREAM Academic Network (Stream Comparative Report), 2023, p. 15, https://stream-eaw.eu/reports/.

[246] Judgment of the Court (Grand Chamber) of 25 July 2018, *PPU, C*-216/18, ECLI:EU:C:2018:586; see Section 3.1.3.

[247] Judgment of the Court of Justice of 9 November 2023, *Staatsanwaltschaft Aachen*, C-819/21, ECLI:EU:C:2023:841; see Annex 3.

A specific ground for refusal based on fundamental rights is not included in the FDs; however, the **CJEU has held that recognition can be refused based on fundamental rights concerns**[248]. Practical application of this principle therefore requires applying the CJEU case-law directly, without a mirroring article in the legally binding text of the FD itself. In practice, divergences in interpretation and inconsistent application of the fundamental rights review appear, as some countries apply a higher-level test when considering whether to surrender persons. This drives legal uncertainty (problem 1 – see Section 3.2.1.5) and, given the associated uncertainty, can create further reluctance to apply the FD (problem 3 – see Section 3.2.1.5).

Additional problems relating to fundamental rights include f**ragmented transposition of provisions relating to the rights of accused persons to be informed and to consent to certain procedures.** The study found fragmented transposition of the requirements to obtain consent prior to transfer under FD TOP (see Section 2.2.2). The literature review also identified potential challenges where consent is not clear under FD PAS (see Section 2.3.1)[249]. Again, these challenges risk driving a further lack of clarity and reluctance to apply the FDs.

Another significant development since the adoption of the FDs is that **the CFR became legally binding primary law**. The importance of fundamental rights has intensified as the European Parliament's strong position saw a clause on the protection of such right become a standard part of recent directives and regulations on criminal law cooperation. The protection of basic values has become even more pertinent due to the threat to EU values and rule of law backsliding in some Member States.

Driver 5 – Limitations to mutual trust

The challenges described in the previous section reflect a broader issue of limitations to mutual trust between Member States. The study identified a hesitation in using the instruments to trust proper application of the law in other Member States. For example, the common occurrence of refusals in FD EAW over fundamental rights and detention conditions reflects a lack of trust among Member States that fundamental rights will be respected. Questions about the independence of the judiciary in some Member States have also prompted Member State hesitance to recognise EAWs, reflecting mutual trust and recognition challenges. Beyond fundamental rights, concerns about proper application by other Member States may also hamper use of these FDs. Stakeholder feedback indicates that the initial hesitance of Member State authorities to apply FD ESO derives in part from a lack of trust that the executing State will be able to adequately supervise the individual concerned and prevent them from absconding before trial. This can drive reluctance to use the FDs (problem 3 – see Section 3.2.1.5).

Judicial cooperation in criminal matters is based on the principle of mutual recognition of judicial decisions founded on mutual trust between Member States that their national legal systems can provide equivalent and effective protection of the fundamental rights recognised at EU level. CJEU case-law, however, highlights that mutual trust does not mean blind trust and that deviations from the principle of mutual recognition are allowed

[248] CJEU, *Aranyosi and Căldăraru*, C-404 & 659/15; see Annex 3.

[249] McNally, G. and Burke, I., 'Implementation of the framework decision on the transfer of probation measures between States in the European Union', *EuroVista*, Vol. 2, Issue 2, 2012, pp. 70-77.

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in exceptional circumstances. This **mutual trust is not a static concept but can be undermined by Member States' action or reinforced through improved cooperation and communication**[250]. For example, the risk of fundamental rights violations undermines mutual trust between Member States, potentially impairing procedures based on mutual recognition, whereas active dialogue and communication between authorities can generate trust by providing evidence of equivalent and effective procedures.

Specific issues can have a particularly strong impact on negating mutual trust. The **independence of the judiciary** represents a fundamental basis for mutual trust, and any violation of this independence can undermine that trust[251]. As confirmed in the CJEU's *Associação Sindical dos Juízes Portugueses* decision, a guarantee of independence is inherent in the very function of the judiciary[252]. The resulting CJEU decision in *LM*[253] opened the possibility for Member States to refuse execution of an EAW where there is **a systematic deficiency regarding independence of the judiciary and this deficiency may affect the right of fair trial**[254]. Some Member States, including Ireland and the Netherlands, have been particularly proactive in assessing the independence of the judiciary in the issuing State. Threats to the independence of the judiciary in some Member States and the readiness of others to carefully assess independence before execution of an EAW raises a key vulnerability in the overall framework. This shows how limitations to mutual trust based on concerns about fundamental rights issues can drive further reluctance to apply the FDs (problem 3 – see Section 3.2.1.5). While these specific cases arose in the context of FD EAW, concerns about the independence of the judiciary and fundamental rights crucially undermine the mutual trust that underpins each of these instruments.

These challenges to mutual trust do not derive from the FDs themselves but can undermine their implementation. Proper functioning of these instruments can help to address these limitations of mutual trust. Proper implementation of safeguards, such as grounds for refusal, and the FDs creating alternatives to detention (FD PAS, FD ESO) can reinforce mutual trust by building familiarity with safeguards and alternatives in practice.

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[250] Xanthopoulou, E., 'Mutual trust and rights in EU criminal and asylum law: Three phases of evolution and the uncharted territory beyond blind trust', *Common Market Law Review*, Vol. 55, Issue 2, 2018, pp. 500-506.

[251] Korellis, A. and Ioannides, C., 'European Arrest Warrant and The Fundamental Rights of The Requested Person', LLPO Law Firm Blog, 2023, https://www.llpolawfirm.com/2023/09/08/european-arrest-warrant-and-the-fundamental-rights-of-the-requested-person/.

[252] Judgment of the Court of Justice of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, C-64/16, ECLI:EU:C:2018:117; Shabbir, A., *The European Arrest Warrant: Trust, Fundamental Rights, and the Rule of Law*, STREAM Academic Network (Stream Comparative Report), 2023, p. 39, https://stream-eaw.eu/reports/.

[253] Judgment of the Court (Grand Chamber) of 25 July 2018, *PPU, C*-216/18, ECLI:EU:C:2018:586.

[254] Korellis, A. and Ioannides, C., 'European Arrest Warrant and The Fundamental Rights of The Requested Person', LLPO Law Firm Blog, 2023, https://www.llpolawfirm.com/2023/09/08/european-arrest-warrant-and-the-fundamental-rights-of-the-requested-person/.

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The relationship between mutual trust and EU values, fundamental rights and rule of law protection in Member States clearly affects the operation of the principle of mutual recognition on which the FD system is based.

New aspects of detention policy

Concerns about inhuman and degrading treatment of a transferred person can undermine mutual trust in others' systems. The protection of this basic human right is a general challenge affecting FD EAW and FD TOP, as are the need for training on how fundamental rights concerns can be addressed, and the lack of sufficient material detention conditions for prisoners.

In recent years, new aspects of detention policy have gained importance at EU level, such as use of pre-trial detention and improvement of material detention conditions. In December 2022, the European Commission adopted the Recommendation on procedural rights of persons subject to pre-trial detention and on material detention conditions (the Recommendation)[255]. It serves as guidance for all Member States to strengthen protection of fundamental rights for suspects and persons accused of a crime who may be subject to pre-trial detention. This applies both to procedural rights and material detention conditions.

Background and justification for EU action in detention matters

The Recommendation was issued in response to continued high rates of pre-trial detention in many Member States, evidence of overcrowding in detention, and evidence of fundamental rights violations in relation to material detention conditions. It is also an EU-level response to concerns raised by Member States in preliminary rulings to the CJEU and clarifications given by the jurisprudence.

The Commission identified significant divergences between Member States in the use of pre-trial detention, including maximum time limits, average length, and proportion of pre-trial detainees in the prison population[256]. For example, seven Member States (Austria, Estonia, Germany, Latvia, Slovakia, Slovenia, Sweden) limit pre-trial detention to less than one year, while two (Italy, Romania) have limits of over five years, and six apply no time limit at all (Belgium, Cyprus, Finland, Ireland, Luxembourg, the Netherlands). Actual detention tends to be less lengthy, but the average length can exceed one year in some Member States (including 12.9 months in Slovenia, and 12.3 months in Hungary). The proportion of pre-trial detainees in the prison population exceeds 20% in 18 of the 27 Member States[257], reaching as high as 45.7% in the Netherlands and 31.5% in Italy.

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[255] 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/2022/8987.

[256] Council of the European Union, Non-paper from the Commission services in the context of the adoption of the Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions (JHA Non-paper), 15292/22, 2022, https://commission.europa.eu/system/files/2022-12/JHA Non-paper st15292 en22.pdf.

[257] Ibid., p. 6.

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The Commission identified significant issues of prison density and evidence of fundamental rights violations. Eight Member States have a prison density of more than 100 inmates per 100 places, with particularly high rates of more than 105 inmates per 100 places in five Member States (Belgium, Cyprus, Greece, Italy, Romania). The Commission also identified multiple violations of Articles 3 and 5 of the ECHR on inhuman and degrading treatment, with 81 violations of Article 3 and 46 violations of Article 5 in 2021.

Objectives and key aspects of the Recommendation

The Recommendation seeks to improve the status quo by outlining key general principles and setting minimum standards.

It sets out several general principles:

- Pre-trial detention should be used as a last resort;
- Detainees must be treated with respect and dignity and in line with relevant human rights obligations;
- Efforts should be made to manage detention in a way that facilitates social reintegration of detainees, with a view to preventing reoffending;
- Application without distinction to gender, ethnicity, age, or any other status.

It also sets out minimum standards in relation to the procedural rights of suspects and accused persons, including the use of pre-trial detention as a last resort, need for reasonable suspicion and grounds for pre-trial detention, periodic review, and effective remedies (e.g. right to appeal). Detention conditions are based on the Council of Europe's prison standards, with which Member States are familiar, such as specific standards for accommodation and allocation, hygiene, nutrition, legal assistance, and contact with the outside world.

Finally, the Recommendation includes reporting requirements for Member States, as well as a requirement for the Commission to present a report to the European Parliament and Council within 24 months of its adoption.

Impact of the Recommendation

The Recommendation presents a promising opportunity to align Member States' standards and practices in respect of pre-trial detention and detention conditions. The common standards and requirements to report can serve as a valuable guide and promote practical improvements.

Addressing these challenges may require further action. One survey respondent highlighted that Member States do not maintain poor detention conditions in bad faith, but, rather, lack the resources needed to make necessary improvements. An interview respondent highlighted that Belgium has attempted to use instruments such as FD TOP to address specific concerns, such as the incarceration of persons experiencing mental health challenges, but have found other Member States less responsive to these efforts. Stakeholders noted that FD ESO is limited in its design and cannot be effectively applied in practice. This overall assessment highlights that an existing key tool designed to alleviate the same concerns addressed in the Recommendation does

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not function as intended. While the Recommendation brings added value, fully addressing the issue of pre-trial detention and material detention conditions may require additional resource support to Member States, as well as improvements to tools that provide alternatives to detention, such as FD ESO.

3.2.1.4. Potential of digitalisation of justice

All four FDs on detention are part of the ongoing digitalisation of justice agenda, i.e. a process that leads to digital-by-default communication practices. Improved **infrastructure to send requests digitally, increased capacity for videoconferencing, and significant efficiency gains** can help to address ongoing implementation challenges. The potential success of digitalisation may hinge on the varying digital readiness of Member States (driver 6).

Driver 6 – Varying digital readiness

The digitalisation of justice agenda can help to address specific procedural issues related to **communication challenges, language and translation issues, and the sufficiency and quality of information included in the original request forms** (see Section 3.2.1.2). By making communication simpler, faster and more efficient, digitalisation can partly alleviate these challenges and **reduce the time-cost of the overall procedure.**

Digitalisation can help to ensure that all Member States are on relatively equal footing with regard to digital communication. Currently, the status of digitalisation is mixed, with some Member States (e.g. Estonia, the Netherlands, Sweden) having relatively high rates of digitalisation, with specific legislation and practice in place, and using digital tools. For example, arrangements in Estonia allow for remote hearing of a person in a pre-trial investigation while considering the possibility of pre-trial detention. Other Member States, such as Greece and Romania, have lower rates of digitalisation in their judicial authorities' operations.

Stakeholders have high expectations for the impact of the ongoing digitalisation of justice agenda on most of these FDs, with more than 70% of respondents to the survey for FD EAW, FD TOP, and FD PAS expecting a moderate or significant impact. Respondents were less optimistic about FD ESO, with 56% expecting no impact, and the majority indicating that FD ESO is not applied in practice and needs more comprehensive changes if it is to be effective. Varying digital readiness reflects a potential practical barrier to effective application of the FDs (see Section 3.2.1.2), as low rates of digital readiness may limit the practical improvements implied by digitalisation.

Identification of key problems and consequences

The following section summarises the key problems identified, based on the drivers outlined above, as well as the ensuing consequences.

Problem 1 - Legal certainty of the FDs is reduced

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A lack of legal certainty about the detention-related FDs negatively impacts the legal framework.

The lack of certainty is problematic on multiple levels. Firstly, it creates **practical challenges for the competent authorities charged with coordination under these instruments and for practitioners who engage with these instruments on a regular basis** (see Section 3.2.1.2). Secondly, it **represents substantial harm to the accused person**. For example, a person facing potential surrender under an arrest warrant may find that they are unable to reasonably understand how their case will be handled, the timelines, and defences available. In other circumstances, a person who may be eligible for probation, supervision, or other non-detention measures may remain in unnecessary detention due to a lack of clarity on the alternatives that can be arranged in another Member State (see Section 3.2.1.2).

Consequences of the lack of legal certainty include **reduced overall effectiveness of judicial cooperation in criminal matters (consequence 1**), as a lack of legal certainty drives further practical challenges for national authorities. There is an increased risk that **fundamental rights protections are not adequately ensured (consequence 2),** as the inability to understand how a case will be handled and the risk of continued detention where alternatives may be feasible directly impact a person's right to defence and the principles of legality and proportionality. Finally, the lack of legal certainty may drive an **increased reduction in mutual trust (consequence 3),** as it may drive Member States to impose additional barriers to implementation, compounding the original problem driver. This effect can be observed where Member States' lack of certainty creates a lack of confidence that the national legal systems of other Member States are capable of providing equivalent and effective protection of fundamental rights. This can lead Member States to take further steps to ensure these protections (e.g. increased refusals of requests based on fundamental rights concerns), limiting cooperation in real terms.

Problem 2 - Practical barriers inhibit effective implementation of the FDs

Beyond the challenges to legal certainty, procedural challenges and other practical barriers present barriers that can frustrate efforts to apply the FDs. Practical barriers may also derive from gaps in the legal framework or gaps in transposition, or relate to the inability of the legal framework to fully account for practical realities, creating barriers to implementation even where the law is relatively certain. Lack of/, or limited, awareness and training present a practical barrier, as improved knowledge and awareness can improve use.

The main consequence of this problem is **reduced overall effectiveness of judicial cooperation in criminal matters (consequence 1),** as these practical challenges result in a more onerous process overall.

Problem 3 - Member States are reluctant to apply FDs

Some of the detention **FDs are significantly underutilised** and national stakeholders express reluctance to engage with these instruments. While FD EAW is used extensively and FD TOP is used regularly, FD PAS is used far less frequently and **FD ESO is hardly applied** at all. Member States have shown that they are more likely to

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proceed with arrest and detention through an EAW than to pursue alternatives to detention.

The lack of utilisation of the underused FDs (notably FD PAS and FD ESO) can frustrate the key purpose of the instruments. For example, FD ESO's lack of practical application means that the expected benefits cannot materialise and individuals continue to face pre-trial detention when supervision could theoretically be facilitated. This lack of use suggests **reduced overall effectiveness (consequence 1)** and may increase the risk that **fundamental rights protections are not adequately ensured (consequence 2)**. For example, FD ESO is intended to reduce the need for pre-trial detention, but the reluctance to apply this instrument results in potentially unnecessary detention of persons awaiting trial. This reluctance risks exacerbating **limitations to mutual trust between Member States (consequence 3),** as the lack of trust in application of FD ESO becomes normalised and a lack of willingness to use the instrument becomes a baseline position for Member States.

3.2.2. FD Previous Convictions and FD Conflicts of Jurisdiction

These two framework decisions deal with distinct issues but are analysed jointly as both concern **elements of criminal procedure** that present similar challenges, which could persist or intensify if the baseline scenario continues.

FD Previous Convictions and FD Conflicts of Jurisdiction - objectives

FD Previous Convictions

- Ensure that convictions handed down by a court in one Member State have equivalent effect across all Member States.
- Ensure respect of the fundamental rights of suspects.

FD Conflicts of Jurisdiction

- Avoid any adverse consequences of parallel proceedings occurring against the same individual in more than one Member State.
- Prevent waste of time and resources on the part of national authorities.

3.2.2.1. FD Previous Convictions

Developed to clarify the approach to sentencing in cross-border contexts in cases of recidivism (irrespective of whether or not the new offence is related to the previous offence), FD Previous Convictions has considerable added value in **promoting mutual trust** in penal laws and judicial decisions in the European area of justice. As Member States apply national criminal law when defining penalties, taking previous convictions handed down in their own national legal system into account presents no issue. EU law, through this FD, encourages a judicial culture where previous convictions handed down in another Member State can be taken into account in the same way as a domestic judgment. The FD has the potential to increase the efficient administration of criminal justice by putting in place legal tools to assess the offender's criminal past, protecting victims while increasing mutual trust between national authorities by ensuring full implementation of the principle of mutual recognition.

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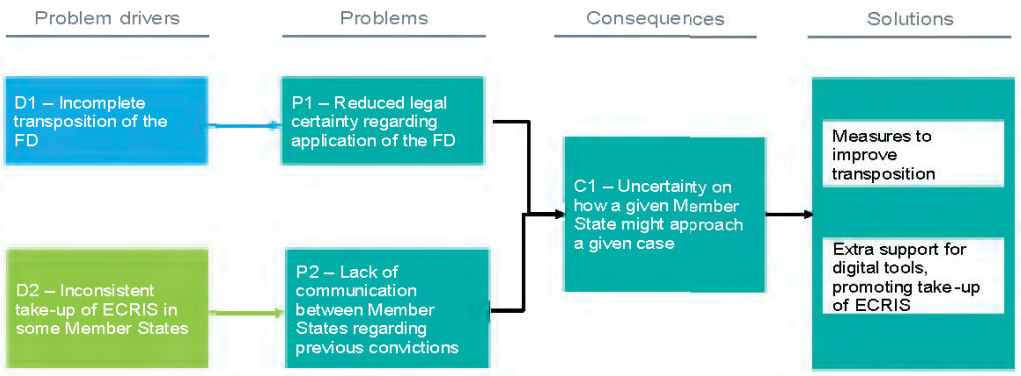
FD Previous Convictions does not imply formal recognition of judgments in cross-border contexts, but, rather, establishes the principle of 'equivalence' between national and foreign judgments, i.e. a judge evaluates the foreign judgment not for the purpose of its execution, but exclusively as a past act 'which, under domestic law, it may exert in the context of new criminal proceedings against the same person, but for different facts' (Article 1(1) FD Previous Convictions). The principle of assimilation of convictions by the courts of another Member State to domestic courts implies that they, for the sole purpose of the effects that the previous judgment explains in the context of new criminal proceedings under domestic law, can be used even in the absence of their recognition, even if required by national law. The 'taking into account' indicated by the FD does not mean automatic recognition. This limited EU regulatory scope is confirmed both by Recital 5 ('does not aim to harmonise the consequences attributed by different national legislations to the existence of previous convictions') and Recital 6 ('does not aim at the enforcement... obligation to take them into account exists only to the extent that they are taken into account by national law').

Figure 2 summarises the two main problems identified in implementing FD Previous Convictions and the consequences for its implementation and achievement of its objectives.

Figure 2 - Problem tree: FD Previous Convictions



Reduced legal certainty in application of FD Previous Convictions

Article 3 of FD Previous Convictions, dealing with taking into account in the course of criminal proceedings previous convictions handed down against the same person for different facts in other Member States, has been only **partially transposed by many Member States** (driver 1) (see Section 2.6.2). Notwithstanding the mitigation in some cases by national case-law or legal doctrine, or the fact that national measures do not explicitly conflict with the FD, the overall result is a lack of legal certainty about the application of FD Previous Convictions (problem 1).

Even if some incompletely transposed provisions involve generally accepted legal principles, EU law is clear that they should be explicitly transposed. National law should

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also remain aligned with CJEU jurisprudence where relevant. The lack of transposition makes it more difficult for an affected individual or a national authority of another Member State to understand how a previous foreign conviction will be handled, especially when a case involves a Member State that has not transposed FD Previous Convictions (consequence 1).

Lack of communication between Member States on previous convictions

The use of ECRIS, which is vital for the functioning of FD Previous Convictions, remains low in some Member States (driver 2). The Commission's 2020 implementation report[258] noted that many Member States, especially Eastern and Southern Member States, had sent few, if any, requests for information on previous convictions or updates on previously sent notifications using ECRIS. Similarly, the limited findings from the stakeholder consultations showed a demand for modernising and standardising databases, financial support for improving technical capacities, and more training on digital tools among practitioners. In a recent preliminary ruling (C-263/24), the CJEU pointed out that where the information available in ECRIS is not sufficient for a court to determine the category of acts covered by a defendant's previous convictions, it is for that court to verify with the court which handed down the previous convictions whether or not those convictions fall under the definition of 'conviction' in Article 2 of FD Previous Convictions[259]. This, however, results in an unnecessarily time-consuming process.

3.2.2.2. FD Conflicts of Jurisdiction

FD Conflicts of Jurisdiction establishes a procedural framework for reaching consensus on which Member States should investigate and prosecute a case. It is a first substantial step in preventing parallel proceedings against the same person and possible conflicts with the *ne bis in idem* principle and avoiding the risk of inadequate exercise of jurisdiction by Member States. However, while obligatory rules on the transfer of criminal proceedings are laid down in the Transfer of Proceedings Regulation[260], FD Conflicts of Jurisdiction (which has the effect of a directive) foresees only a consultation obligation without the possibility of a legally binding decision. In other words, it contains neither mandatory criteria to determine the geographically competent authority, nor does it provide rules or mechanisms to solve conflicts when parallel proceedings already exist in different Member States. Its added value is therefore limited.

While FD Conflicts of Jurisdiction aims to prevent conflicts by opening avenues for communication, the process for resolving disputes over jurisdiction, should they arise, is arguably **insufficiently formalised** and creates doubts as to whether guarantees of

[258] European Commission, *Report from the Commission to the European Parliament and the Council concerning the exchange through the European Criminal Records Information System (ECRIS) of information extracted from criminal records between the Member States*, COM(2020) 778 final, pp. 17-18, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52020SC0378.

[259] Judgment of the Court (Tenth Chamber) of 3 July 2025, C-263/24, *Smiliev*, ECLI:EU:C:2025:525, para, 76-77.

[260] Transfer of Proceedings Regulation, Recital 8.

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due process and the **right to a fair trial**, as outlined in the CFR, are to be respected. This may lead to either protracted disputes or non-recognition of decisions by national authorities.

According to the FD, if no agreement is reached between the Member States on who takes over the criminal proceedings, the case shall be referred to Eurojust, where appropriate, and provided that it falls under its competence. Eurojust plays a significant role and provides guidelines for Member States by trying to close the gaps that originate from EU law.

Criminal law lags behind civil matters, where issues on conflicts of jurisdiction have been successfully resolved since the 1968 Brussels Convention, predecessor to Regulation (EU) No 1215/2012 (Brussels I bis Regulation)[261]. Several legal acts in the area of criminal matters, particularly those related to specific types of crime such as Directive (EU) 2017/541[262] and Council Framework Decisions 2002/475/JHA[263] and 2008/841/JHA[264], oblige Member States to 'take the necessary measures to establish its jurisdiction over the offences' defined in the given EU law (e.g. Article 19 of Directive (EU) 2017/541). They also contain provisions referring to the factors to be taken into account with the aim of centralising criminal proceedings in a single Member State in the event that more than one Member State can validly prosecute on the basis of the same facts. These rules are limited to the EU definition of the offence. Although attempts have been made in the area of criminal law to regulate conflicts of jurisdiction, the establishment of the European Public Prosecutor's Office (EPPO)[265] showed the difficulty and political sensitivity in agreeing rules on mandatory transfer of proceedings in conflicting criminal law cases. Regulation (EU) 2017/1939 (EPPO Regulation) determines the 'territorial and material competence' of the EPPO, which builds on but does not affect the jurisdictional principles of the Member State's criminal law (Article 23). It clearly defines the EPPO jurisdiction, stating that it can only act in the case of alleged crimes committed on the territory of those Member States that had become part of this enhanced cooperation system (Article 2, paragraph 1, Articles 22 and 23). However, it has gaps regarding the EPPO's jurisdiction, as it does not clearly specify the criteria for the selection of delegated European prosecutors (EDPs) and confers upon EPPO Permanent Chambers a very wide discretionary power to allocate jurisdiction among EDPs of different Member States. Nevertheless, it contains provisions designed to resolve conflicts of jurisdiction between prosecutors by providing a prioritised list of factors to consider (Article 26(4)): the territory where the majority of the crime took place, the habitual residence of the suspect, their nationality,

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[261] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 299, 31.12.1972, pp. 32–42; Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, Recitals (7)-(11), pp. 1–32.

[262] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, p. 6.

[263] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164, 22.6.2002, p. 3.

[264] Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300, 11.11.2008, p. 42.

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and the place where the main financial damage occurred can be used to establish jurisdiction.

Challenges arise from balancing the centralised investigative system of the EPPO and the diverse legal frameworks of the Member States. These differences in procedural systems often raise concerns about safeguarding suspects' fundamental rights and resolving jurisdictional conflicts.

The Transfer of Proceedings Regulation was adopted in November 2024. Its aim is that the best-placed Member State investigates and prosecutes a criminal offence, preventing unnecessary parallel criminal proceedings in different EU Member States. It does not provide an EU-wide general mechanism for preventing and/or solving conflicts of jurisdictions, but has limited principles exclusively tailored for the use of the Regulation. To ensure that it is possible for criminal proceedings to be transferred in accordance with the Regulation, it establishes jurisdiction in specific cases (Article 3(1)) so that the requested State is able to exercise jurisdiction in relation to the criminal offences to which the national law of the requesting State is applicable. Jurisdiction is, for instance, established in situations in which the execution of an EAW is refused, if the criminal offence produces its effects or causes damage mainly in the requested State, and when criminal proceedings against the suspect or accused person are already ongoing. Nevertheless, 'the rules on jurisdiction provided for in this Regulation should not prevent Member States from adopting national measures to ensure that they are able to exercise jurisdiction in the specific cases provided for in this Regulation' (Recital 17). 'For the purposes of this Regulation, "original jurisdiction" is the jurisdiction which is already provided for by national law and does not derive from this Regulation' (Recital 43). Where jurisdiction is established by the requested State exclusively on the basis of those provided in the Regulation, that jurisdiction shall only be exercised pursuant to a request for the transfer of criminal proceedings under this Regulation (Article 3(2)).

There are no general rules at EU level for cases of conflicts of jurisdiction, only certain crime-specific guidance. The topic of 'preventing and solving of conflicts of jurisdiction' is likely to re-emerge on the European agenda, as it is explicitly referenced in Article 82 of the TFEU as one of the objectives of the AFSJ.

The following sections describe the overarching problems that derive from these challenges, alongside their drivers and consequences.

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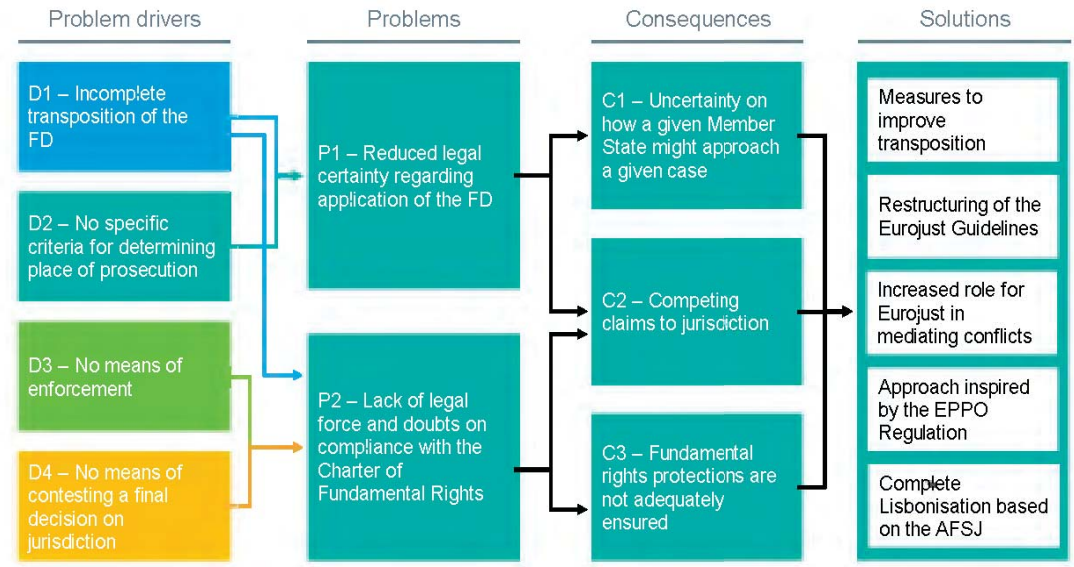
Figure 3 - Problem tree: FD Conflicts of Jurisdiction



Reduced legal certainty on application of FD Conflicts of Jurisdiction

FD Conflicts of Jurisdiction is an initiative of Czechia, Poland, Slovenia, Slovakia and Sweden[266]. As **adoption required unanimity** at the time, the **texts of the legal acts often contain elements of interest to only one or a few Member States,** or contain wording that is not fully consistent with other instruments.

Transposition of FD Conflicts of Jurisdiction is particularly patchy. Somewhat unusually, some areas are considered well-known general principles that are already part of national criminal procedural law both for domestic and cross-border cases (driver 1). This compounds the fact that it leaves room for interpretation by failing to outline criteria for determining the best place for prosecuting the defendant so as to allow for adjudication of competing justifiable jurisdictional claims (driver 2). This reduces legal certainty on the application of the FD (problem 1).

The lack of transposition may make it more difficult for Member States and persons affected to understand precisely how the most fundamental steps of applying these instruments can proceed, especially when a case involves a Member State that has not transposed FD Conflicts of Jurisdiction at all (consequence 1). It may in fact aggravate conflicts of jurisdiction, as a broad spectrum of interpretations by competing national authorities allows for competing claims to jurisdiction and potentially 'forum-shopping' by prosecutors (consequence 2).

Feedback from the stakeholder consultation suggests that some competent authorities may **not be aware of FD Conflicts of Jurisdiction or certain provisions,** such as the obligation to contact Eurojust. Nevertheless, its rules are generally applied by the competent authorities, as these principles are part of public international law and national criminal codes on preventing and resolving conflicts of jurisdiction for cross-

[266] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L 328, 15.12.2009, pp. 42, eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2009:328:FULL.

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border cases. This may mitigate the uncertainty created by imperfect transposition of the FD itself.

Lack of legal force and doubts about compliance with the CFR

The ELI study based on the 'Project on the Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Law'[267] identified several fundamental rights concerns, arguing that the process laid down in FD Conflicts of Jurisdiction is insufficiently formalised. Firstly, while Recital 9 only provides examples of criteria Member States can use if they wish (e.g. the territory where the majority of the crime took place, location of the suspect and possibilities for securing surrender or extradition, their nationality or residence, their significant interests, the significant interests of victims and witnesses, or the admissibility of evidence or any delays that may occur), it does not contain any binding criteria for establishing the best place to prosecute the defendant (driver 3). The study also argues the lack of a possibility to contest a final decision on jurisdiction reached as part of the contact between the Member States, even with the involvement of Eurojust (driver 4). The relevant Eurojust guidelines are referenced only in the Recital of FD Conflicts of Jurisdiction but are not referenced in the enacting terms. Any legal issues may be aggravated by incomplete transposition of the FD by the Member States (driver 1), as provisions that explicitly reference the CFR are not always transposed.

Consequently, FD Conflicts of Jurisdiction's enacting terms do not set down guiding principles or criteria on the preferred jurisdiction in case of conflicts in a way that assigns priority. This creates limitations in that it cannot be used to resolve conflicts of jurisdiction between competent Member States, and it also fails to assure the CFR rights of the persons involved (problem 2).

Despite the purpose of FD Conflicts of Jurisdiction, a lack of binding guidelines may allow for competing claims to jurisdiction by national authorities, and, potentially, 'forum-shopping' by prosecutors (consequence 2). The lack of a possibility to contest a final decision on jurisdiction also creates a risk of depriving defendants or victims of their rights as defined by the CFR (consequence 3).

The FD requires Member States to inform one another about the suspicion of parallel proceeding and subsequently enter into discussion: '[…] competent authorities often reach agreements on the concentration of proceedings on the basis of the identification of the best-placed jurisdiction. Such agreements could be reached in coordination meetings of the European Union Agency for Criminal Justice Cooperation (Eurojust), in bilateral or multilateral meetings without the intervention of Eurojust or following consultations under Framework Decision 2009/948/JHA'[268].

Eurojust plays a key role in facilitating preliminary contact and consultations and resolving jurisdiction issues. Eurojust may ask the competent authorities of the Member States concerned to accept that one may be in a better position to undertake

[267] European Law Institute (ELI), *Draft Legislative Proposal for the Prevention and Resolution of Conflicts of Jurisdiction in Criminal Matters in the European Union*, 2017, ELI_Report_Prevention_and_Resolution_of_Conflicts_of_Jurisdiction_in_Criminal_Matters_in_the_European_Union.pdf.

[268] Transfer of Proceedings Regulation, Recital 28.

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an investigation or to prosecute specific offences. The competent national authorities are also obliged to inform Eurojust of cases in which conflicts of jurisdiction have arisen or are likely to arise[269].

The 2023 Eurojust report on the transfer of proceedings in the EU[270] acknowledged the difficulties caused by differing national rules on jurisdiction and the 'strict link between transfers of proceedings and conflicts of jurisdiction'. It argued that an EU proposal on transfer of proceedings should 'reiterate the possibility of Member States involving and seeking the advice of Eurojust from an early stage, namely during preliminary consultations before a request for transfer is sent, and especially in cases of disagreement among the national authorities.'

However, while the relatively new Transfer of Proceedings Regulation includes a list of criteria for requesting the transfer of criminal proceedings (Article 5), and allows and encourages both parties to seek assistance from Eurojust (Recital 37 and Article 12), it does not offer an avenue for adjudicating competing justifiable jurisdictional claims in a way that is binding. While Article 17 offers suspects the right to a legal remedy against a decision to transfer criminal proceedings on the basis of the criteria provided for in Article 12(1) and (2), Articles 3 and 12 are primarily designed for cases where one Member State wishes to transfer proceedings to another as the situation around jurisdiction is already clear-cut, and are not worded to account for preventing and solving conflicts of jurisdiction. The Transfer of Proceedings Regulation does not fully resolve this problem.

Practitioners at Eurojust have expressed the view that a new legal instrument replacing FD Conflicts of Jurisdiction may be necessary to resolve ongoing issues that hamper international cooperation[271]. Some suggested that giving Eurojust binding powers to resolve conflicts of jurisdiction would be a positive step. They also agreed on the need to update Eurojust guidelines on jurisdiction, for example to downplay the location of the accused or witnesses' ability to attend (which they believe have been made less important by the FD on Custodial Sentences and the provisions of the EIO relating to videoconferencing, respectively). Additional needs noted are to consider the stage of proceedings in each Member State involved, to adjust the criteria on territoriality and personality to emphasise the place where the most important part of the criminality or loss occurred, and where there are multiple co-defendants, to consider their respective roles in the criminal act and their location at the time. A criterion based on the interests of the suspect was not seen as desirable due to its possible effects on mutual trust between Member States and the potential for suspects to cause unnecessary delays. Finally, ranking the criteria or making them into a hard law instrument was seen as unnecessarily limiting.

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[269] Proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters, COM/2023/185 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023PC0185.

[270] Eurojust, *Report on the Transfer of Proceedings in the European Union*, 2023, p. 33.

[271] Eurojust, *Strategic Seminar: Conflicts of Jurisdiction, Transfer of Proceedings and Ne Bis In Idem: Successes, Shortcomings and Solutions*, 2015, https://www.eurojust.europa.eu/sites/default/files/assets/report-20strategic-20seminar-20conflicts-20of-20jurisdiction-2015-06-04-en.pdf.

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3.2.2.3. Impact of digitalisation of justice

FD Conflicts of Jurisdiction forms part of the digitalisation of justice initiative.

Stakeholder consultations for this study suggest limited enthusiasm for the digitalisation of FD Conflicts of Jurisdiction among practitioners. This is largely because the FD is rarely used and, where it is used, requires communication between national authorities. Such communication is often conducted through a mix of existing bilateral relationships between national authorities and standard electronic means, such as phone or email, assisted by existing digital tools such as the EJN database. As a result, stakeholders were often not able to outline how digitalisation would improve the application of the FD.

Several practitioners were concerned that overly complex digital tools that lack translation capabilities would be off-putting and encourage their peers to stick with phone and email, with few concerns about insecure communications. Some observed that the effectiveness of the digitalisation of justice agenda for FD Conflicts of Jurisdiction would be undermined by a lack of digital communications devices in some courts, the slowness of some Member States to roll-out electronic file systems (this is a particular issue for prosecutors), or by national opt-outs that prevent the use of videoconferencing for interrogating suspects or witnesses. Given the known lack of awareness of the FD and the issues outlined above, practitioners do not necessarily see further updating digital communication systems as a priority and would prefer more training to improve digital skills, as well as financial and technical support to improve access to the necessary tools. These limited data reinforce the case for more training to ensure that all practitioners are aware of the options at their disposal.

3.2.3. FD Financial Penalties

FD Financial Penalties facilitates the enforcement of financial penalties across the Member States by allowing judicial or administrative authorities to transmit decisions on financial penalties issued in relation to criminal offences directly to another Member State for recognition and execution without further formality. The procedure applies mainly to situations where a fine is imposed on a person who is not a resident of the Member State where the offence was committed, who fails to pay the fine, and then leaves the territory of that country.

FD Financial Penalties - objectives
▪ Apply the principle of mutual recognition for financial penalties imposed by judicial or administrative authorities for the purpose of facilitating the enforcement of such penalties in a Member State other than the State in which the penalties are imposed.

While the FD is an important mutual instrument that addresses a genuine need, several key challenges may persist or even intensify if the current scenario remains unchanged.

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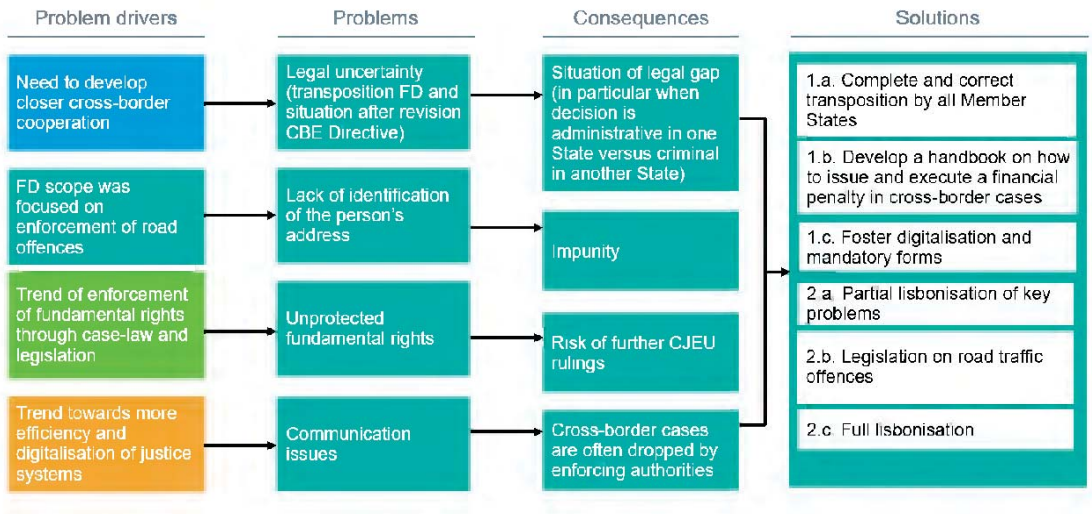
Figure 4 - Problem tree: FD Financial Penalties



3.2.3.1. Transposition issues

FD Financial Penalties was adopted on the initiative of the UK, France and Sweden[272]. As adoption required unanimity at the time, the text of the act **contains elements of interest for only one or a few Member States**. As noted in Section 2.7.2, there are **transposition problems** with:

- Article 4, regarding the transmission of decisions and recourse to the central authorities, with countries transposing the provision as discretionary rather than mandatory;
- Article 7, where some Member States treat all grounds for non-recognition and non-execution as mandatory;
- Article 14, relating to information from the executing State, with Member States facing difficulties in transposing and implementing these provisions, particularly the immediacy of notifications and the application of alternative sanctions.

3.2.3.2. CJEU case-law

All (six) CJEU judgments on interpreting FD Financial Penalties provisions are based on road offences, highlighting the practical significance of these offences within the extensive list of infractions covered by the FD. Three main types of issues can be identified in these judgments. Firstly, the **classification of road offences** under Article 5(1) of FD Financial Penalties[273]. Secondly, three judgments address **the administrative nature of the authorities** dealing with road offences in some Member

[272] European Commission, Document C:2001:278:TOC, OJ, C 278, 2 October 2001, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2001:278:FULL.

[273] Judgment of the Court (First Chamber) of 6 October 2021, *LU* (*Recouvrement d'amendes de circulation routière*), C-136/20, ECLI:EU:C:2021:804, para. 91.

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States, with cases examining whether an appeal procedure satisfies the requirements of the FD[274], whether an administrative authority in charge of controlling administrative action can be considered a court having jurisdiction in criminal matters[275], and whether the administrative nature of the procedure imposing the financial penalty constitutes a ground for non-execution by the executing State[276]. Thirdly, one judgment focuses on the key question of the **translation of the certificate** and the observance of the rights of the defence[277] (see Annex 3, section A3.5). The judgments clarified definitions of the FD and aspects of grounds of refusals, and highlighted the importance of procedural rights in the FD procedure (see Annex 3, section A3.5).

3.2.3.3. Practical and procedural challenges

Implementation of FD Financial Penalties faces **three key challenges**. First, communication between Member States remains complex despite the introduction of standardised forms. Second, translation requirements create disproportionate burdens, especially in minor cases. Third, differences in how offences are legally classified across Member States lead to enforcement gaps, particularly in road traffic cases.

Contact and communication between the issuing and executing States and the use of the five standardised forms

Contact and communication between the issuing and executing States are **resource intensive,** with language differences making extensive communication under the FD both **costly and time-consuming**.

In 2017, recognising the difficulties in communication during the cross-border procedure, and at the initiative of some Member States, **standardised forms**[278] were developed to improve communication, notably to facilitate the recognition and enforcement process. These forms are in addition to the certificate provided in the Annex to FD Financial Penalties, and do not impact the substantive content of the FD. The use of the forms by practitioners is not compulsory, but Member States are encouraged to promote their use to facilitate the mechanism for the execution of financial penalties and reduce the financial and administrative burden linked to the procedure. **In practice, their use is unequal**. One interviewee (the Netherlands) stated: 'We use the forms in our inbound cases, and we will start using the forms for our outbound cases. Forms 1, 2, 3, and 5 are practical and fairly easy to use. However, from the start, I think form 4 is too complex'. Another interviewee (Lithuania) stated: 'I am aware that such forms have been adopted. Our courts have also been informed about their existence, but I am not sure how frequently they are used in practice, as they are not mandatory. Some countries, when submitting requests, specifically ask

[274] Judgment of the Court (Seventh Chamber) of 7 April 2022, *D. B.*, C-150/21, ECLI:EU:C:2022:268.
[275] Judgment of the Court (Grand Chamber) of 14 November 2013, *Baláž*, C-60/12, ECLI:EU:C:2013:733.
[276] Judgment of the Court (First Chamber) of 5 December 2019, *Centraal Justitieel Incassobureau*, C-671/18, ECLI:EU:C:2019:1054.
[277] Judgment of the Court (First Chamber) of 6 October 2021, *D.P.*, C-338/20, ECLI:EU:C:2021:805.
[278] European Judicial Network (EJN), *Explanatory Memorandum and the five standardised forms*, 2017, https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/1984.

for these forms to be completed. Germany, for instance, consistently mentions their availability and recommends using them in responses. However, I cannot say to what extent our courts actually follow this recommendation'. Another interviewee (Bulgaria) pointed out that 'many practitioners are not aware of the existence of the forms'.

The **ongoing digitalisation of justice initiative** should smooth the contact between Member States and make it instantaneous.

Translation of documents

Translation poses a significant challenge in the mutual recognition of financial penalties. One interviewee (France) remarked: 'Regarding "outgoing" requests, the procedure provided by the Framework Decision appears cumbersome and costly. The **cost of translating recognition request documents is considered disproportionate to the often-modest amounts to be recovered'**. A survey respondent noted that: 'Often enough, such traffic offences are not prosecuted because it is too cumbersome to identify the driver, to serve documents in other Member States, and to translate all communication'.

There is also **uncertainty on the extent of translation**. As per Article 16 of FD Financial Penalties, the certificate is to be translated into one of the official languages of the executing State or in a language indicated by that State in its respective declaration. The question is thus whether and to what extent the underlying decision also needs to be translated. According to Advocate General Bobek in Case C-338/20, 'for enforcement purposes, the underlying decision is (metaphorically speaking) "absorbed" in the document that, briefly and schematically, summarises and explains it: the certificate provided for in Article 4 of Framework Decision 2005/214, the standard form for which is given in the Annex thereto'[279]. This approach favours reducing the burden of translation since, according to the Advocate General, 'the executing State is to trust the contents of the certificate', i.e. only the certificate needs to be translated, not the original decision[280]. However, according to the CJEU judgment in the same case[281], Article 20(3) of the FD must be interpreted as allowing the executing State to refuse to execute a decision where that decision has been notified to the addressee without a translation into a language which they understand of the elements of the decision that are essential for them to understand the charge brought against them and thus exercise their right to a defence, and where the addressee was not given the opportunity to obtain such a translation on request. This position aligns with the provisions in the recent revision of Directive (EU) 2015/413 (CBE Directive)[282], which foresees that if 'the decision on a road traffic fine or at least its essential content is not translated as provided for in Article 5b', this may constitute a ground for refusal for the executing authority, Article 5b(5) indicating that 'Member States shall ensure that the quality of the translation of the traffic offence notice and of the follow-up documents is

[279] Opinion of Advocate General Bobek of 2 September 2021, *Prokuratura Rejonowa Łódź-Bałuty*, C-338/20, ECLI:EU:C:2021:683, para. 45.

[280] Ibid.

[281] Judgment of the Court of Justice of 6 October 2021, *Prokuratura Rejonowa Łódź-Bałuty*, C-338/20, ECLI:EU:C:2021:805, para. 45.

[282] Directive (EU) 2015/413 of the European Parliament and of the Council of 11 March 2015 facilitating cross-border exchange of information and mutual assistance on road-safety-related traffic offences.

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at least of the quality required under Article 3(9) of Directive 2010/64/EU'. These translation requirements can be seen as deriving from and reinforcing the right to interpretation and translation in criminal proceedings and the right to a fair trial, while at the same time increasing the administrative burden on the side of the issuing State.

Criminal and semi-criminal offences vs administrative offences: road safety-related traffic offences

FD Financial Penalties is applicable to all offences for which financial penalties can be issued. **The most significant legal barrier to the successful application of the FD is differences in Member States' normative qualification of road traffic offences (criminal vs administrative) and their impact on national procedures and rights granted to presumed offenders.** The same offence can be classified as either administrative or criminal under respective national laws. Depending on the applicable national procedures, such offences might lead to proceedings brought by administrative bodies, or judicial authorities having jurisdiction in administrative or in criminal matters. Situations can arise when the national authorities of the Member State where the offence was committed require assistance from the national authorities in the country where the offender resides to collect the financial penalty, but the latter authorities refuse to cooperate under the FD procedure because it does not recognise the decision, as the criteria for a decision based on the *Baláž* case are not met.

The CJEU has clarified that the term 'court having jurisdiction in particular in criminal matters' (Article 1(a)(iii) FD Financial Penalties) is 'an autonomous concept of Union law and must be interpreted as covering any court or tribunal which applies a procedure that satisfies the essential characteristics of criminal procedure' and that 'a person is to be regarded as having had the opportunity to have a case tried before a court having jurisdiction in particular in criminal matters in the situation where, prior to bringing his appeal, that person was required to comply with a pre-litigation administrative procedure. Such a court must have full jurisdiction to examine the case as regards both the legal assessment and the factual circumstances'. The offences falling under this criterion are considered semi-criminal in this study.

Approximately 90%[283] of the total decisions issued in cross-border cases under FD Financial Penalties are linked to road traffic offences. However, the proportion of financial penalties successfully enforced - not including those that are paid voluntarily - varies from 0% to 1%[284]. The FD is not intended to address mass road traffic offences,

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[283] Comparative data are lacking; however, figures from Germany indicate that in 2018, 91% of all requests received by the Federal Office of Justice were traffic offences (Häussermann, B. and Johnson, C., 'Mutual recognition of financial penalties: Practical experiences in Germany with the application of Framework Decision 2005/214/JHA', *EUcrim*, Vol. 2, 2019, pp. 141-145). The 2023 ECORYS/Grimaldi study indicates that 'It is our understanding that approximately 95% of requests to recognise the decisions using the Framework Decision are related to road traffic offences' (ECORYS, Grimaldi Studio Legale, Wavestone and COWI, *Impact assessment support study for the revision of Directive (EU) 2015/413 facilitating cross-border exchange of information on road-safety-related traffic offences: Final report*, 2023).

[284] European Commission, *Report from the Commission to the European Parliament and the Council on the application of Directive (EU) 2015/413 facilitating cross-border exchange of information on road-safety-related traffic offences*, COM(2016) 744 final, p. 7.

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address provided by the issuing State in the certificate. FD Financial Penalties does not address the efforts that the executing State must undertake to locate the person. Practices vary considerably: some countries cease their efforts if the person cannot be found at the given address, whereas others check different registers or involve the police to investigate the person's whereabouts[288].

Road traffic offences again present a particular case, as the CBE Directive provides for the mechanism for identifying the driver (i.e. possible offender), including their identity and address in another Member State. The revised CBE Directive allows (the to-be-established) national contact points of the Member States to conduct automated searches in vehicle registers to retrieve data on end users of vehicles where such information is already available. It also establishes a data retention period in respect of the identity of the previous holders, owners, and end users of the vehicles, ensuring that authorities have access to the information they need for the investigation (Recital 10; Article 5c). Nevertheless, this mechanism is only available for administrative offences.

Execution can further turn out to be unsuccessful simply because **the person had no means to pay the financial penalty**. If the issuing State has excluded the possibility of any alternative sanctions, including custodial sanctions, in the certificate (Article 10), it regularly ends the possibilities for the executing State to execute the decision. Member States should carefully consider whether to include *ex officio* alternative sanctions in their enforcement requests.

Another issue relates to the **threshold of EUR 70** set in FD Financial Penalties. Article 7(2)(h) allows the executing State to refuse to recognise a decision if the financial penalty is below this threshold. This provision potentially creates two contradictory problems. On the one hand, the fine limit was set in 2005 and economic changes may have altered its value, making the limit set in the FD less of an obstacle to enforcement refusal. On the other hand, this means that petty offences may remain within the scope of the FD, while considered insufficiently grave by practitioners. As one interviewee noted, 'a significant number of procedures that could be subject to a recognition request concern contravention'. Often, execution of the request is more costly than the amount of the fine itself, particularly when the executing State makes additional efforts to identify the person, translate documents, etc.

The probability of application of the grounds for refusal of Article 7 was further reduced when the CJEU interpreted some of the grounds of refusals. In Case C-671/18[289], the Court pointed out that 'Article 7(2)(g) and Article 20(3) must be interpreted as meaning that where a decision requiring payment of a financial penalty has been notified in accordance with the national legislation of the issuing State, indicating **the right to contest the case and the time limit for such a legal remedy**, the authority of the Member State of execution may not refuse to recognise and execute that decision

[288] Häussermann, B. and Johnson, C., 'Mutual recognition of financial penalties: Practical experiences in Germany with the application of Framework Decision 2005/214/JHA', *EUcrim*, Vol. 2, 2019, pp. 141-145.

[289] Judgment of the Court of 5 December 2019, *Centraal Justitieel Incassobureau, Ministerie van Veiligheid en Justitie (CJIB)*, C-671/18, ECLI:EU:C:2019:1054.

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provided that the person concerned has had sufficient time to contest that decision, which is for the national court to verify, and the fact that the procedure imposing the financial penalty in question is administrative in nature is not relevant in that regard'.

3.2.3.5. Protection of fundamental rights

Since the adoption of FD Financial Penalties, the CFR has become legally binding primary law. The importance of fundamental rights intensified with the European Parliament's insertion of a clause on the protection of such right as a standard part of recent directives and regulations in the area of criminal law. Even the revised CBE Directive, which deals with purely administrative offences, introduced stringent rules to safeguard the fundamental rights of the citizens concerned (Recital 27; Article 5 and 5a). In recent years, **the CJEU has tended to recognise exceptions to the principle of mutual recognition for reasons related to the protection of the fundamental rights** of the person concerned:

- **C-338/20:** the **lack of translation** of the decision imposing a financial penalty for a road traffic offence can be considered a possible refusal ground to execute a financial penalty. The CJEU strengthened fundamental rights by recognising that **the requirement of effectiveness of criminal prosecution must be reconciled with respect for the fundamental rights of the person concerned**[290]. It indicated that Article 20(3) of FD Financial Penalties must be interpreted as allowing the authority of the executing State to refuse to execute a decision imposing a financial penalty for a road traffic offence, where that **decision has been notified to the addressee thereof without a translation into a language they understand** of the elements of the decision that are essential to enable them to understand the charge against them and to fully exercise their rights of defence, and without that addressee being afforded the opportunity to obtain such a translation on request.
- ***Baláž***: The CJEU reiterated that under Article 20(3) of FD Financial Penalties the competent authority in the executing State may oppose the recognition and execution of decisions if the certificate raises concerns about potential infringements of fundamental rights or legal principles as enshrined in Article 6 of the TEU. If the competent authority in the executing State is uncertain about whether the conditions governing recognition of the decision at issue imposing a financial penalty have been satisfied, **it may ask the competent authority in the issuing State for additional information** before drawing all of the appropriate conclusions from the assessments made by the latter authority in its response (para 31 of the judgment).
- **C-136/20**: the CJEU found that 'in order to ensure the effectiveness of the framework decision and, in particular, respect for fundamental rights, the

[290] Wahl, T., 'CJEU: Lack of translation can be refusal ground to execute financial penalty', *EUcrim*, Vol. 3, 2021, pp. 162-163, https://eucrim.eu/news/cjeu-lack-of-translation-can-be-refusal-ground-to-execute-financial-penalty/.

authority in the issuing State is obliged to provide that information', reinforcing fundamental rights protections[291].

Ad hoc agreements between Member States

In line with Article 18 of FD Financial Penalties, some countries have signed bilateral or multilateral agreements to improve the enforcement of fines for cross-border offences. Such agreements often regulate cooperation on road traffic offences.

Austria, Bulgaria, Croatia and Hungary signed the **Salzburg Forum Agreement on the cross-border enforcement of road safety-related traffic offences**[292] in 2012, which became operational in 2019. This important multilateral regional agreement is open for accession by other EU Member States[293] and has since been signed by Czechia, Poland, Romania, Slovenia and Slovakia. The agreement covers the original eight traffic offences listed in the CBE Directive before its revision, together with **non-cooperation of the owner of the vehicle in identifying the person driving the vehicle, the latter playing a crucial part in the investigation phase of the enforcement procedure.** The threshold of the fine is set at EUR 50. It provides for electronic transmission of the request for payment in cross-border cases that can be used as a substitute for paper certificates. While providing a copy of the original decision is recommended, it is not mandatory, and translation is generally not required by default. In addition, the agreement applies the duty of the vehicle owner/holder to cooperate with authorities in identifying the liable person. It includes provisions for the failure by the vehicle owner to reply to a request from another Member State requiring them to identify the driver, so as to help Member States with regimes that require driver identification as a precondition for issuing fines, allowing an enforcement rate close to 100%[294]. The practitioners using the Salzburg Forum mechanism for enforcement of cross-border fines find it more effective and less cumbersome than the procedure under FD Financial Penalties[295].

While the agreement aims to address shortcomings in the cross-border recognition of financial penalties related to road offences, it has been criticised for **fragmenting the rules within the EU**, leading to unequal treatment of EU citizens. Offenders residing in Member States that are not parties to such multilateral agreements are potentially not subject to investigation or enforcement of their offences[296]. This situation is likely

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[291] Judgment of the Court of 6 October 2021, *Zalaegerszegi Járásbíróság*, C-136/20, ECLI:EU:C:2021:804, para. 50.

[292] Agreement between the Republic of Bulgaria, the Republic of Croatia, Hungary and the Republic of Austria on facilitating cross-border enforcement of road safety-related traffic offences, 2012, https://www.salzburgforum.org/Treaties_and_Agreement/CBE_Agreement.html.

[293] Ibid., Article 14(1).

[294] ECORYS, Grimaldi Studio Legale, Wavestone and COWI, *Impact assessment support study for the revision of Directive (EU) 2015/413 facilitating cross-border exchange of information on road-safety-related traffic offences: Final report*, 2023, p. 118.

[295] Expert Group meeting to support the enforcement of road safety related traffic offences; Workshop on facilitating cross-border enforcement of sanctions for road safety related traffic offences, held on 11 December 2015 in Paris; Salzburg Forum Agreement.

[296] European Commission, *Impact assessment report accompanying the document proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2015/413*

to change once the revised CBE Directive enters into force in 2027, at least for administrative offences, as the Directive creates procedures for both investigation and execution of fines.

3.2.3.6. Digitalisation of cross-border communication and enforcement

The survey of justice practitioners familiar with FD Financial Penalties showed that **insufficient information included in requests** is the primary challenge in communicating with other Member States (73%), followed, at some distance, by **language barriers** (18%). One interview respondent (France) noted: 'The identified difficulties are more related to specific issues (such as missing information in the received certificates) than to an unsuitable procedure. The E-CODEX experiment could be a real lever'. Another respondent (Hungary) stated: 'These options [i.e. resulting from digitalisation] will significantly speed up and simplify the necessary communication. In my view, greater emphasis should be placed on the use of artificial intelligence to overcome language difficulties, by developing the possibility of its safe use'. An interviewee (Lithuania) said: 'There is added value in the digitisation of the entire process, but everything is still in the preparatory stages. It is too early to say how this will impact the system and what resources will be required for our transition to a decentralised system'.

Respondents believe that the ongoing **digitalisation** of justice agenda under the Digitalisation Regulation will have a significant impact on the implementation of FD Financial Penalties in their Member State, with 48% foreseeing **a significant impact** and 36% a moderate impact. The main challenges and needs in transitioning to the use of digital tools for communication in the context of FD Financial Penalties include the need for training (67%), financial support (64%), additional staff (36%), and addressing the lack of digital skills (24%).

3.2.3.7. Identification of key problems and consequences

The following section summarises the key problems identified based on the drivers outlined and their resulting consequences. These problems are regrouped under three headings: legal uncertainty; grounds for refusal and respect of fundamental rights; and communication.

Problem 1 – Legal uncertainty

The **patchy transposition of FD Financial Penalties** affects legal certainty. This includes the incomplete transposition of rules on transmission of decisions, grounds for refusal, information from the executing State, and translation. Member States should be encouraged to voluntarily incorporate the relevant provisions in full and

facilitating cross-border exchange of information on road-safety-related traffic offences, SWD/2023/126 final.

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asked why they have not considered doing this as a priority. Complete transposition by all Member States would ensure FD functionality.

The European Commission has certain means to ensure compliance by the Member States:

- Expert workshop on facilitating transposition;
- Guidelines, handbook, best practice on transposition;
- Training for professionals;
- Infringement procedure for non-transposition and non-compliance.

Some of these measures have been used (e.g. training) while others have not. Each is a resource-intensive step that needs to be carefully considered against all current priorities, together with their proportionality to the FD's current scope.

The **legal situation on cross-border enforcement of fines at EU level is arguably patchy,** particularly in light of the recent revision of the CBE Directive, the multilateral framework among certain Member States (Salzburg Forum), and numerous bilateral agreements. Nevertheless, each of these legal instruments has a specific, limited scope. On the one hand, FD Financial Penalties applies to all criminal offences for which financial penalties may be imposed and abolishes the requirement for dual criminality checks in relation to 39 listed offences (e.g. participation in a criminal organisation, terrorism, trafficking in human beings, arms, and stolen vehicles, swindling (obtaining money or possessions fraudulently), rape, and road traffic offences)[297]. On the other hand, the CBE Directive specifically covers 'administrative decisions on road traffic fines across borders'[298] and the Salzburg Forum Agreement covers 'decision[s] issued by a competent authority of a Contracting Party, requiring a financial penalty related to a traffic offence of both criminal and administrative nature to be paid whereby judicial review is available in accordance with the national law'[299]. FD Financial Penalties lists offences that infringe road traffic regulations within its scope (Article 5). Its application is not limited to underlying decisions of a criminal nature, enacted by criminal jurisdictions, but covers decisions of an administrative nature, enacted by administrative authorities (Article 1(a)(ii)), provided that the decision respects Article 1(a)(iii) of the FD, as clarified in *Baláž*. This approach is broad in terms of accepting mutual recognition of administrative decisions, e.g. semi-criminal offences (see Sections 2.7.1, **Error! Reference source not found.**, and 3.4.4).

The **revised CBE Directive streamlines mutual assistance procedures** between Member States for the cross-border investigation of road safety-related traffic offences. It **introduces new rules on mutual assistance** for the enforcement of fines, while strengthening the protection of fundamental rights of non-resident offenders, particularly vis-à-vis information provision. The new rules provide for **prompt and largely automated enforcement of fines related to road safety offences** (Article 2(1) CBE Directive), covering fines resulting from administrative decisions that are final and enforceable according to the applicable laws and regulations of the Member State where the offence occurred. As the Directive is based on a transport legal basis, it can only contain rules for decisions and fines of an administrative nature. The Member

[297] FD Financial Penalties, Article 5; Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

[298] Directive 2024/3237/EU, Recital 24.

[299] Salzburg Forum Agreement, Article 2(f).

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State of registration or residence must recognise and enforce the administrative decision without further formalities, unless grounds for non-recognition or non-enforcement are established. Requests must be sent electronically via a national contact point. The revision of the CBE Directive has duly considered the respective CJEU rulings and developments in respect of fundamental rights.

These recent legal developments are limited to certain road safety-related offences of an administrative nature, while FD Financial Penalties is applicable to all offences to which a fine can be issued, whether criminal or semi-criminal in nature. The significant difference in scope of the mutual recognition and assistance procedures, which are more detailed and up-to-standard for administrative fines than for the more serious type of (criminal) offences, may imply a need to establish a more efficient mutual recognition procedure that could provide rules for closer cooperation between Member States (detailed rules on exchange of information), stringent safeguards for the person concerned (enforced fundamental rights), and efficient and speedy cross-border procedures (by using information technology (IT)) for all types of offences.

EU-level legislators must regulate under the legal basis of the TFEU, i.e. a transport policy legal basis cannot go beyond administrative offences. For limited EU competence for criminal law, specific rules laid down under Title V of the TFEU must be respected. The legal situation for (certain) road safety-related offences is as follows: enforcement of fines **for administrative offences in both countries falls under the rules of the CBE Directive**, whereas for **criminal and semi-criminal offences** (those considered criminal in one Member State and administrative in another, but involving a criminal-type court at some stage of the procedure) **can be pursued under FD Financial Penalties**. Cases where the **same road safety offence is considered criminal in one Member State and purely administrative in another** are not covered by the current EU level rules, i.e. a person committing the offence of hit-and-run, even causing death, abroad will remain unpunished, as the offence is not legally categorised in the same way in the Member States concerned. **This potentially creates a legal gap at EU level**, leading to situations where the more severe version of an offence (considered a criminal offence in one state and administrative in another) remains without follow-up because the executing State could invoke the grounds for refusal under the FD procedure. Meanwhile, the less severe version of the offence (administrative in both countries) would be punishable, as it falls under the scope of the CBE Directive, allowing effective enforcement.

Problem 2 – Grounds of refusal and respect of fundamental rights

Although not a legally allowed ground of refusal, in practice some elements of the cross-border procedure for enforcing fines are referenced as refusals by the executing State, for example when the **lack of identification of the address of the person concerned leads to a *de facto* ground for non-recognition**. Often, the person concerned does not reside at the address provided by the issuing State. FD Financial Penalties does not address the efforts that the executing State must undertake to locate the person. Although it does not list 'the identification of the sentenced person's address' as a ground of refusal, in the case of road traffic offences at least, this reason is often used for non-recognition of enforcement requests. One survey respondent

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intervention might be sought to clarify the interpretation of grounds of refusal and rights of the person affected by the FD procedure: Member States are obliged to cater for strict procedural safeguards and rules for cross-border cases when administrative road safety offences are at stake, but no explicit similar safeguards have been established for criminal cases.

Problem 3 – Communication issues between Member States' competent authorities

Communication between the issuing and executing State when using FD Financial Penalties can be cumbersome and costly. The standardised forms developed in 2017 to improve and ease the communication procedure do not eliminate the need to translate the certificate and essential elements of the underlying decision. **Member States' use of these standardised forms is inconsistent**, partly because it is voluntary. One interviewee observed that 'others have not identified them'. Another (Lithuania) underlined that 'our courts have also been informed about their existence, but I am not sure how frequently they are used in practice, as they are not mandatory'. Countries with a higher level of centralisation of requests are better positioned to use these forms, but this is not the norm.

In road safety-related offences, **the revised CBE Directive has streamlined mutual assistance procedures between Member States.** The use of IT channels now **seems more straightforward,** while complex offences require an increased volume of exchanges. Ongoing EU-level developments to increase the efficiency of the justice system and **enhance digitalisation of communication** between Member States should ease communication between partners. The main objective is to establish a decentralised IT system for efficient and secure communication between the authorities involved in written communication under FD Financial Penalties (e.g. exchange of forms). In accordance with the Digitalisation Regulation, the Commission must adopt the technical specifications on the underlying IT system by January 2027. One of the main challenges is the different implementation of the FD in national systems, necessitating the identification of common ground, as well as the involvement of very different actors in each Member State and even possibly at different stages of the recognition and enforcement procedure. The EU-wide electronic system should become operational in the Member States by January 2030[303]. At present, faced with the high burden of communication and translation, practitioners from the issuing and executing State often decide to drop the case and discontinue enforcement efforts.

[303] Article 10(3)(d) of the Digitalisation Regulation underlines that the Commission must adopt implementing acts by 17 January 2029 for the legal acts listed in points 2, 5, 7, and 13 of Annex I and points 6 and 7 of Annex II; FD Financial Penalties is mentioned in Annex II, point 3.

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3.3. The EU right to act

3.3.1. Grounds for intervention

This analysis focuses on EU legal competence in relation to cooperation in criminal procedure relevant for all seven FDs. It sets aside other aspects of broader EU criminal law policy.

The European Communities initially had no legislative powers in criminal matters, as they exclusively targeted well-defined, limited economic and political cooperation. At the time the CJEU recognised in *Casati*[304] that, in principle, 'a standstill provision also applies to national rules operating in matters such as criminal law which are properly within the competence of the Member States'[305].

Although, there has been a clear division of matters where the EU and/or Member States can act, national legal systems, including criminal law, have always been influenced by European law. This follows mainly from the principle of primacy of EU law. The *Cassis de Dijon* judgment[306] in 1978 established the principle of mutual recognition between Member States: it is up to the national court, even in criminal matters, to prevent the application of a provision of national law that infringes a provision of the Treaty. 'In this way, European law resonates with the criminal law of the Member States if there is a concrete link with the freedoms granted to its internal market… As it has developed, the European Union's areas of competence have been extended through what is known as the dialogue of judges, on the basis of the provisions of the Treaties'[307].

Since the adoption of these seven FDs, the legal basis and process for adopting legislation in this area has changed fundamentally. With the Maastricht Treaty of 1992, the EU was divided into three pillars, each with different legislative powers, to create 'an area of freedom, security and justice without frontiers' that encompassed the birth of a 'European criminal law' (Article 3(2)). EU competence to act in criminal law cooperation formerly fell under the third pillar. The Amsterdam Treaty of 1997 introduced the FD as an instrument for cooperation in criminal matters. The harmonisation of criminal legislation finally took concrete form in primary law with the Treaty of Lisbon in 2007, which gave the EU the power to legislate in criminal matters. Protocol No. 36 of the Lisbon Treaty sustains the original legal basis for the FDs, allowing them to remain in force until they are repealed, annulled, or amended (see Section 1.2.1).

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[304] Judgment of the Court of 11 November 1981, *Casati*, C-203/80, ECLI:EU:C: 1981:261.

[305] Stewart, J., *A Union of criminal law - the vital European area of freedom, security and justice*, Schuman Paper No 766 of 29 October 2024, https://server.www.robert-schuman.eu/storage/en/doc/questions-d-europe/qe-766-en.pdf.

[306] Judgment of the Court of 20 February 1979, *Cassis de Dijon*, C-120/78, ECLI:EU:C:1979:42.

[307] Stewart, J., *A Union of criminal law - the vital European area of freedom, security and justice*, Schuman Paper No 766 of 29 October 2024, https://server.www.robert-schuman.eu/storage/en/doc/questions-d-europe/qe-766-en.pdf.

The specific articles of the Treaty at the time of the adoption of the different FDs were:

- Article 31(a-d) (now Article 82(1)(a-d) TFEU), providing for common action on judicial cooperation in criminal matters, including facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States (Article 31(a)), facilitating extradition between Member States (Article 31(b)), ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation (Article 31(c)), and preventing conflicts of jurisdiction between Member States (Article 31(d));
- Article 34(2)(b)308, permitting the Council to adopt FDs for the purpose of approximation of the laws and regulations of the Member States.

Table 15 identifies the original legal basis under the Treaty of Nice in force at the time of adoption of each of the FDs.

Table 15 - Original legal basis for each FD

FD	Year adopted	Original legal basis
FD EAW	2002	Article 31(a) & (b) and Article 34(2)(b) TEU
FD TOP	2008	Article 31(a) and Article 34(2)(b) TEU
FD PAS	2008	Article 31(a) & (c) and Article 34(2)(b) TEU
FD ESO	2005	Article 31(a) & (c) and Article 34(2)(b) TEU
FD Financial Penalties	2005	Article 31(a) and Article 34(2)(b) TEU
FD Previous Convictions	2008	Article 31 and Article 34(2)(b) TEU
FD Conflicts of Jurisdiction	2009	Article 31(1)(c) & (d) and Article 34(2)(b) TEU

Since the entry into force of the Treaty of Lisbon in 2009, the EU obtained **shared competence** with the Member States (**Article 4(2 j) TFEU**) to act in the area of judicial cooperation on criminal matters (falls under Chapter 4 Judicial Cooperation in Criminal Matters within Title V TFEU (AFSJ). In its opening line, **Article 82 of the TFEU** reinforces the underlying principle driving cooperation in the area in the last two decades, that 'judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas...'. As a matter of principle, a court in one Member State recognises the decisions and effects of a court's decision in another Member State. The foundation of the Union around common values, such as 'respect for human dignity, freedom, democracy, equality, the rule of law...'. (Article 2 TEU) demonstrates that the Member States are able to provide equivalent protection of fundamental rights[309].

Article 82(1) of the TFEU refers in general to 'adopt measures' in this field, meaning the entire range of EU legal instruments (regulations, directives, decisions, recommendations, opinions) are at the legislators' disposal. This more general legal

[308] Article 34 was repealed and replaced by the provisions of Chapters 1, 4 and 5 of Title IV of Part Three of the TFEU through the Treaty of Lisbon, as FDs may no longer be adopted but remain in effect, as per Protocol No. 36 (see Section 3.1).

[309] CJEU, *Aranyosi and Căldăraru*, C-404 & 659/15, para 77.

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basis may only be used to pursue specific but broadly defined policy objectives by directly establishing the competence for the European Parliament and Council, acting in accordance with the OLP (Article 289 TFEU) to adopt measures to:

- Lay down rules and procedures for ensuring the recognition throughout the Union of all forms of judgments and judicial decisions (Article 82(1)(a));
- Prevent and settle conflicts of jurisdiction between Member States (Article 82(1)(b));
- Support the training of the judiciary and judicial staff (Article 82(1)(c));
- Facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions (Article 82(1)(d)).

Article 82(2) of the TFEU provides that 'to the extent that is necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension', the EU legislators 'by means of directives...establish minimum rules'. 'Such rules shall take into account the differences between the legal traditions and systems of the Member States', allowing EU legislation that is largely acceptable and easily implementable by all Member States. Such minimum rules 'shall' specifically concern 'the rights of individuals in criminal procedure' (Article 82(2)(b)). The final enumerated area broadens the possibility of EU level action to 'any other specific aspects of criminal procedure which the Council has identified in advance by a decision', but simultaneously limits action by requiring a preceding additional legislative step as 'for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament' (Article 82(2)(d))

Article 85(2), last line, of the TFEU says: 'Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals'. In practice, it allows Member States to have more stringent standards at national level than those established by any EU legislation. Having more stringent national rules on the protection of fundamental rights than what is required by EU law as minimum standards might increase mutual trust and facilitate improved mutual recognition of judgments[310]. **Article 85 of the TFEU** further clarifies the competence for EU action in cross-border judicial cooperation on criminal matters. For the development of this policy field, 'Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States [...], on the basis of operations conducted and information supplied by the Member States' authorities [...]'. 'These tasks may include: [...] (c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network'.

'Judicial cooperation in criminal matters in the Union shall be based on **the principle of mutual recognition** of judgments **and** judicial decisions and the **approximation of**

[310] European Commission, *Impact assessment report accompanying the document proposal for a directive of the European Parliament and of the Council amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, SWD/2023/246 final, pp. 15-16, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023SC0246.

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the laws and regulations of the Member States' (Article 82(1)) (see Section 1.2.2). Approximation of the laws and regulations of the Member State has to be pursued when it is 'necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension' (Article 82(2) TFEU). Approximation pursues three precise aims[311]: (i) to avoid the phenomenon of 'forum shopping' by criminals; (ii) to assure equal treatment among citizens actively involved in crimes or who are victims of crimes; and (iii) to create a mutual feeling of justice. Approximation is intended to generate sufficient trust between legal systems to allow mutual recognition between legal orders[312].

Generally, the TFEU provides multiple potential legal bases for the EU to act to facilitate judicial cooperation on criminal matters. The EU may:

- adopt measures through the ordinary legislative procedure to achieve the objectives outlined in Article 82(1)(a-d).
- establish minimum rules through the adoption of a directive for the purposes outlined in Article 82(2)(a-d).
- outline specific scope of work and tasks for Eurojust to support the strengthening of judicial cooperation (Article 85).

As EU competence in criminal law is a sensitive area, **Article 82(3) of the TFEU** creates a new mechanism for Member States, the so-called **emergency brake system,** which provides grounds for enhanced cooperation through a procedure that is easier and faster than the OLP. The emergency brake allows Member States concerned about the consequences of a draft legislative act on the fundamental aspects of its criminal system to suspend the legislative procedure and bring the matter before the European Council. The European Council must, within four months, refer the matter back to the Commission so that the procedure is continued, or a request is made to the Commission, or the group of Member States concerned can submit a new proposal. If, within four months, no action has been taken by the European Council or if, within 12 months, the new legislative procedure has not been completed, **enhanced cooperation (Article 20(2) TEU, Article 329 TFEU)** will automatically begin if at least nine Member States are in favour. This cooperation can be described as a last-resort mechanism initiated when the Council 'has established that the objectives of such cooperation cannot be retained within a reasonable period by the Union as a whole' (Article 20 TEU). In general, the decision to authorise enhanced cooperation requires a specific decision of the Council. However, the Lisbon Treaty includes a notable exception to this rule. It is a form of 'automatism' in judicial cooperation on criminal matters and police cooperation, as **the authorisation to proceed with enhanced cooperation is granted automatically** on the ground of a clearly defined procedure. In the case of a deadlock, the authorisation to initiate enhanced cooperation 'shall be deemed to be granted' to the Member State(s) willing to participate. Enhanced cooperation is a solution for Member States that wish to carry on with a draft legislative

[311] Blanke, H.J. and Mangiameli, S. (Eds.), *Treaty on the Functioning of the European Union - A Commentary, Volume I: Preamble, Articles 1-89*, Springer, 2021, p. 1565.
[312] Ibid.

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act despite the activation of the emergency brake. Nevertheless, acts adopted within the framework of enhanced cooperation shall bind the participating Member State(s) only.

Such a provision testifies to the tension at the heart of the system of integration in the AFSJ between the creation of a single system and mechanisms allowing differentiation between Member States' judicial systems and political interest. In practice, enhanced cooperation in the criminal law area has never been used.

It remains somewhat unclear how the operation of mutual recognition in criminal law will function. This provision applies specifically to a directive under Article 82(2) of the TFEU (applying to legislation establishing minimum rules) and not to legislation under Article 82(1) of the TFEU. Article 82 of the TFEU stipulates that in respect of the concept of mutual recognition there is no possibility for a Member State to pull an emergency brake. That possibility does exist in respect of the enactment of legislation to the extent necessary to facilitate mutual recognition in criminal law cooperation matters with a cross-border dimension, such as the rights of individuals in criminal law procedures. It seems unlikely that the very notion of mutual recognition could function adequately here without all Member States' participation.

While enhanced cooperation leaves room for potential legislation despite opposition from one or more Member States, the prospect of the emergency brake being used might present a serious challenge to the feasibility of legislation under Article 82(2) of the TFEU. Use of the emergency brake and resort to enhanced cooperation could result in further fragmentation of a complex legal framework already contending with the potential variable geometry caused by the opt-out and opt-out/opt-in status of Denmark and Ireland, respectively (see Section 1.2.1). This legal basis allows for potentially deeper legislation; the risk of fragmentation and potential for political challenges can only be overcome if the participation of all Member States can be assured.

Partial lisbonisation and the effects of Protocol No. 36

Protocol No. 36 of the TFEU sustains the validity of legal acts under the former third pillar: these acts will remaining valid, even beyond the five-year transitional period, until they are repealed, annulled, or amended by a subsequent act of EU law. It also creates a five-year transitional period until the Commission's and CJEU's full powers to review and enforce former third pillar acts take effect.

The application of Protocol No. 36 raises a question about the legal effects of partially amending one of these FDs. Should an FD be amended in full, or repealed and fully replaced by a new act such as a directive, then the effects of lisbonisation are clear: the FD has been fully replaced and the new legal act takes its place with the full effect of EU legislation under the Lisbon Treaty. The effect of partial amendment is less certain. Some academics[313] argue that the amendment would only lisbonise the specific provisions affected and that while the provisions of the original FD would

[313] Satzger, H., *Legal effects of directives amending or repealing pre-Lisbon framework decisions*, 2015, p. 3, https://www.giustizia.it/resources/cms/documents/italia2014_ue_luiss_satzger.pdf.

remain valid, the unamended provisions would not have the force of lisbonised legal instruments (e.g. a provision that has not been amended would not obtain direct effect, unlike the amended provisions within the same FD). Others argue that amendment of an FD, even in part, effectively lisbonises the entire instrument, giving all provisions the qualities of a new measure, including direct effect[314]. To date, the CJEU has not ruled on the matter and it remains undecided[315].

3.3.2. Limitations to EU action

General considerations

The AFSJ is a **shared competence** between the EU and the Member States (**Article 4 TFEU**). As part of the AFSJ, the EU is tasked by the Treaties to act to facilitate judicial cooperation on civil and criminal matters with cross-border implications; as such, the EU could take legislative measures in the context of Title V of the TFEU, Chapters 3 and 4.

Article 69 of the TFEU specifies that national parliaments must ensure that all proposals and legislative initiatives under Chapter 4 comply with the principle of subsidiarity. Under the **principle of subsidiarity,** the Union should only act if, and insofar as, the objective of the action cannot be achieved sufficiently by the Member States alone (at national, regional and local levels)[316]. Accordingly, any envisaged policy options involving legislative changes must be viable under this condition.

Under **Article 67(1) of the TFEU**, the AFSJ is to be based on respect for the different legal systems and traditions of the Member States.

The impact of Denmark's opt-out of legislation in the AFSJ and Ireland's opt-in/opt-out presents a further limitation, as any lisbonised FDs would no longer apply to Denmark and potentially no longer apply to Ireland (see Sections 1.2.1 and 3.3.1). These mechanisms mean that legislation risks creating parallel systems in which the new legislation applies to all Member States except Ireland and Denmark, while all Member States are still bound by the present framework.

The legal bases of Article 82 of the TFEU partly provide for a limited, specific and clearly defined competence for EU action (see Section 3.3.1.) On the other hand, the list of categories for 'approximating minimum rules relating to criminal procedure in criminal matters having a cross-border dimension' can be broadened by any subject matter after unanimous identification by the Council and approval by the European Parliament. Ultimately, the EU is equipping itself with the means to strengthen harmonisation in the field of procedural and substantive criminal law by being a

[314] Ibid.; Blanchet, T., 'The genesis of Protocol 36', *New Journal of European Criminal Law*, Vol. 6, Issue 4, 2015, pp, 435, 437, https://journals.sagepub.com/doi/abs/10.1177/2032284415006004 08.

[315] Satzger, H., *Legal effects of directives amending or repealing pre-Lisbon framework decisions*, 2015, p. 534, https://www.giustizia.it/resources/cms/documents/italia2014_ue_luiss_satzger.pdf.

[316] TFEU, Protocol No. 2 on the application of the principles of subsidiarity and proportionality.

'potential generator of criminal law'[317]. However, this European legislative power remains subject to the sovereignty of the Member States and the principles of proportionality and necessity.

The emergency brake procedure presents a further limitation. Even where a legal basis is established under Article 82(2), the objection of a single Member State can result in suspension of the process, which can only be resumed with consensus of the European Council. If there is continued disagreement, a group of nine Member States may still proceed under the enhanced cooperation mechanism under Article 20(2) of the TEU and Article 329(1) of the TFEU. However, proceeding under enhanced cooperation would further fragment the legal framework, as the results of enhanced cooperation would only apply to participating Member States (Article 20(4) TEU).

The choice of the appropriate legal basis has constitutional significance. As the EU has conferred powers only, it must base any act on a Treaty provision that empowers it to approve such a measure. The choice of the legal basis determines the allocation of competence between the Union and the Member States and plays an essential role in the institutional balance[318]. It also determines the procedure to be followed in adopting the measure[319].

It is settled case-law that the choice of the legal basis for a measure must rest on objective factors amenable to judicial review, notably the aim and the content of the measure[320]. Although recourse to a **combination of legal bases** is legally feasibly at EU level, it is not possible where the procedures laid down for each are incompatible with one another[321]. This is the case, for example, when one legal basis would entail qualified majority voting in the Council and Parliament's full participation in the procedure (co-decision), while another legal basis requires that the Council decide by unanimity after consulting the Parliament. Similarly, incompatibility occurs when two legal bases require different participation of Member States in the vote at the Council, such as when the legal bases that are covered by the opt-in/opt-out schemes granted to Ireland and Denmark by Protocols 21 and 22 annexed to the TEU and to the TFEU (e.g. Article 82 TFEU), which cannot be combined with legal bases for which all Member States have the right to vote (e.g. Article 91 TFEU, the transport legal basis used for the CBE Directive).

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[317] Stewart, J., *A Union of criminal law - the vital European area of freedom, security and justice*, Schuman Paper No 766 of 29 October 2024, https://server.www.robert-schuman.eu/storage/en/doc/questions-d-europe/qe-766-en.pdf.

[318] Opinion 2/00 of the Court of 6 December 2001 (Cartagena Protocol), EU:C:2001:664, para. 5.

[319] Judgment of the Court of 19 July 2012, *Parliament v Council*, C-130/10, EU:C:2012:472, para. 80; Judgment of the Court of 24 June 2014, *Parliament v Council*, C-658/11, EU:C:2014:2025, para. 57; Judgment of the Court of 23 December 2015, *Parliament v Council*, C-595/14, EU:C:2015:847, para. 37. The rules on the manner in which EU institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves (Judgment of the Court, *Commission v Council*, C-28/12, EU:C:2015:282, para. 42).

[320] Judgment of the Court of 29 April 2004, *Commission v Council*, C-338/01, EU:C:2004:253, para. 54; Judgment of the Court of 19 July 2012, *Parliament v Council*, C-130/10, EU:C:2012:472, para. 42; Judgment of the Court of 18 December 2014, *United Kingdom v Council*, C-81/13, EU:C:2014:2449, para. 35; Judgment of the Court of 17 March 1993, *Commission v Council* (Waste Directive), C-155/91, EU:C:1993:98, para. 19 and 21; Judgment of the Court of 30 January 2001, *Spain v Council*, C-36/98, EU:C:2001:64, para. 59.

[321] Judgment of the Court, *Commission v Council* (Titanium Dioxide), C-300/89, EU:C:1991:244, para. 17-21; Judgment of the Court, *Parliament v Council*, C-130/10, EU:C:2012:472, para. 45.

Another problematic situation may arise where the Treaty provision provides for a specific procedure in the eventuality of no unanimity in the Council and the possible subsequent establishment of enhanced cooperation. The CJEU has accepted the combination of a legal basis that includes an emergency brake (namely, the one in Article 82(3) TFEU as regards Article 82(1) and (2) TFEU), with another legal basis providing for the OLP (Article 84 TFEU)[322].

The combination of a legislative legal basis with a non-legislative legal basis is likely to create a number of inconveniences: the mechanism of control of subsidiarity and the possibility to foresee delegated acts are provided for the legislative acts only (see Article 290(1) TFEU); differences in *locus standi* for the action of annulment pursuant to Article 263 of the TFEU; the obligation to deliberate in public for the Council, which applies only to the legislative acts. These generate some doubt about the possibility to combine two similar legal basis where the legislative legal basis and non-legislative legal basis are procedurally incompatible.

Where using two or multiple legal bases is not possible, the act must be split and the various components adopted separately on the basis of the appropriate Treaty provision.

Proposed policy options in this study

Although the details of the policy options are presented in the following chapters, it is useful to consider the relevant legal bases under the TFEU here.

Encouraging Member States to complete the transposition of existing measures is unproblematic from the point of view of subsidiarity and other limitations, as it relates to the status quo, and Article 288 of the TFEU sets out that decisions are binding and the correct and timely transposition of Union law is a legal obligation. Nor is there any issue of subsidiarity with policy options that envision targeted efficiency gains through the ongoing digitalisation of justice initiative, as the changes involved would be purely procedural and would not in themselves require any legislative changes to the FDs. Similarly, encouraging training activities has precedent in the EU: when new types of training initiatives are suggested, legislative and/or financial action might be necessary.

Several of the policy options envisaged involve expanding Eurojust's role in developing more precise guidelines (e.g. on jurisdiction) or giving it a moderately expanded mediation or coordination role, which may require some scrutiny on the legal basis and limitations. Under Article 85(1) of the TFEU, the tasks of 'the coordination of investigations and prosecutions' and 'strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction' are already entrusted to Eurojust. It is already acknowledged that strengthening judicial cooperation between Member States in relation to crimes involving two or more Member States cannot be sufficiently and reliably achieved at Member State level. As such, these policy options should also be unproblematic from the point of view of subsidiarity. The Joint Political Declaration of

[322] Opinion 1/19 (Istanbul Convention), EU:C:2021:198.

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28 September 2011 clearly stated that the effective implementation of Union law is a prerequisite for achieving the policy objectives of the Union[323] and such measures would simply help Eurojust to support the implementation of existing policy.

Several of the policy options envisioned involve substantive legislative measures, transforming soft law into legislation, or perhaps even partial or full lisbonisation of the instruments, to tackle more complex challenges. For issues regarding conflicts of jurisdiction, Article 82(1) of the TFEU explicitly grants the European Parliament and the Council broad authority to legislate to prevent and settle conflicts of jurisdiction between Member States without being limited to specific areas of criminal law. In addition, Article 82(2) allows for directives that establish minimum rules on the rights of individuals in criminal procedures and the rights of victims, on the grounds that the principle of judicial cooperation on criminal matters through mutual recognition needs to be upheld by action at Union level.

For detention issues, the legal uncertainty, cumbersome procedures and need to refer to a large and growing body of case-law all impede judicial cooperation on criminal matters between Member States by dissuading national authorities from using the existing instruments intended for that purpose. Rather than reducing the lack of mutual trust, an essential precondition of judicial cooperation between Member States, this makes it a baseline. The inability to understand how a case will be handled and the risk of continued detention where alternatives may be feasible directly impact a person's fundamental right to defence. Under Article 82(1) of the TFEU, the European Parliament and the Council may adopt measures to facilitate cooperation between Member States' judicial or equivalent authorities in relation to proceedings in criminal matters and the enforcement of decisions. Article 82(2) of the TFEU allows for directives that establish minimum rules on the rights of individuals and of victims in criminal procedures.

Financial penalties for road offences are something of a special case. Part of the enforcement of financial penalties for these offences is already captured by the revised CBE Directive (Article 5f). The study team suggests a policy option of revising FD Financial Penalties with a limited scope, 'matching' criminal law cooperation with that of the more stringent rules of the CBE Directive. The principle of subsidiarity and the legal basis under Title V of the TFEU must be respected and the new instrument should target the enforcement of financial penalties exclusively related to criminal offences that are cross-border in nature.

[323] Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, OJ C 369.

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3.4. Suggested policy options per FD

3.4.1. FDs relating to detention

Given their significant scope and objectives, as well as the high level of interaction between the detention-related instruments (FD EAW, FD TOP, FD PAS, FD ESO), policy options for these instruments are presented together. These policy options include four non-legislative measures, two partially legislative measures, and two comprehensive legislative measures.

Table 16 presents an overview of each policy option.

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Table 16 - Overview of suggested policy options regarding detention-related FDs

Policy options and measures	Summary of policy measures
PO 1 – Non-legislative measures	
PO 1.a. Comprehensive guidelines to accompany digitalisation	The digitalisation of justice agenda has considerable potential to address communication and efficiency-related challenges. This potential can be improved through the preparation of comprehensive guidelines on how these measures apply to the FDs in question, for example precision on the quantity and quality of information required in the relevant certificates
PO 1.b Existing training opportunities supplemented and centralised through a dedicated practitioner's hub	Many training opportunities exist, including through the Judicial Training Network and the forthcoming e-Capsule learning resources being produced by DG JUST. These can be supplemented with additional in-person 'live online training' and online modules covering key problematic areas of the FDs. Areas to be covered could include: case-law, grounds for refusal, interaction between the various FDs, and the role and support offered by Eurojust. This training, together with handbooks, guidelines, and reference materials, can be organised into an online practitioner's forum that enables/fosters direct communication
PO 1.c Targeted financial and/or resource support to Member States extended	Stakeholders have identified specific resource and capacity limitations in respect of digitalisation tools and knowledge, as well as specific financial limitations that inhibit Member States from improving detention conditions. The EU could address many of these challenges through targeted assistance with financing, direct support and in-kind resources
PO 1.d Consultation role of Eurojust extended	Expanding Eurojust's existing role in relation to FD EAW and under Article 4(5) of Regulation (EU) 2018/1727 (Eurojust Regulation) on providing consultations and written opinions to assist in resolving disagreements as to the application of the FDs. While not binding, these consultations and opinions can help to resolve practical difficulties and foster increased mutual trust through dialogue
PO 2 – Partial legislative measures	
PO 2.a. New horizontal legislation on cross-cutting topics	New directive(s) to horizontally address a common issue, such as the need to account for fundamental rights of accused persons, while accounting for the reluctance of Member State authorities to open otherwise functioning elements of the FD to changes that may impede their efficacy
PO 2.b Legislation partially lisbonising each FD	New legislative action for each FD separately to amend selected problematic provisions while expressly leaving the majority of each instrument unchanged
PO 3 – Comprehensive legislative measures	
PO 3.a Legislation comprehensively lisbonising each FD	New legislative acts to amend and update each of the individual FDs to address challenges specific to the individual FD
PO 3.b Legislation recasting all FDs relating to detention into a single act	New legislative act to comprehensively regulate the issue of detention, from arrest and surrender transfer, pre-trial detention and alternatives, to non-custodial alternatives to detention

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PO 1.a: Comprehensive guidelines to accompany digitalisation

Overview of the policy option

Digitalisation of the procedure under the FDs is ongoing, with implementing acts on decentralised IT systems and European electronic access points set to be adopted as follows: FD EAW by 17 January 2026, FD TOP by 17 January 2028, and FD PAS and FD ESO by 17 January 2029[324]. The first batch of legal instruments will then enter into application using the decentralised IT system by 17 January 2028[325]. As the digitalisation process remains in an early phase, the structure of the system might resolve some of the existing issues and/or could be incorporated as suggested below.

The policy option suggests developing new guidelines for the procedure laid down in the FDs to encompass and capitalise on the changes brought by digitalisation. The Digitalisation Regulation and Directive (EU) 2023/2843 (Digitalisation Directive) will result in digital-by-default communication via a decentralised IT system, including sending and receiving requests under each FD. Participants in the study workshop highlighted a significant knowledge gap in relation to the known-and-used FD EAW and the procedure originating from the other instruments, particularly FD ESO. As this system becomes operational (and its use is mandatory), **guidelines and training for end-users and practitioners** will likely be necessary. To meet this need and address existing challenges in procedure and communication, the Commission could use the opportunity to provide comprehensive guidance on the overall process under these FDs, while specifically addressing or accounting for digitalisation. This policy option could take the **form of individual handbooks per FD, or a single comprehensive handbook covering all four FDs.** Official handbooks were issued by the Commission for FD EAW in 2008 (last updated in 2023)[326] and FD TOP in 2019 (last updated in 2020)[327]. Both are widely used by practitioners.

Comprehensive guidelines could **potentially be integrated into the decentralised IT system itself,** in the form of prompts, text boxes with explanations, FAQs, and hyperlinks to additional relevant documents, allowing dynamic guidance. Sharing the guidelines in this manner could ensure the highest level of access to practitioners, while making the guidance more responsive to their situational needs.

The use of digital-by-default communications through a common system presents a vital opportunity to increase the efficiency of the communication and decision process under the FDs. It can also help to address existing challenges related to quality and sufficiency of information within the request forms used for these procedures. For example, limitations in the request forms and practical errors in the communication process are a common complication in FD EAW procedures (see Section 3.2.1.1).

[324] Digitalisation Regulation, Article 10(3).

[325] European Commission, Digitalisation Regulation – Member State notifications, European e-Justice Portal, n.d., https://webgate.ec.europa.eu/e-justice/39457/EN/digitalisation_regulation__member_state_notifications.

[326] European Commission, *Handbook on how to issue and execute a European Arrest Warrant (EAW)*, 2023, https://commission.europa.eu/document/28199bc3-b431-4d4a-856f-bae681bc8709_en.

[327] EuroPris, *Resource Book on the Transfer of Sentenced Prisoners under EU Framework Decision 909*, EuroPris/HMPPS Expert Group, February 2020, https://www.europris.org/wp-content/uploads/2020/02/Resource-Book-Transfer-of-Prisoners-February-2020.pdf.

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While some form of guidance for digitalisation will likely be provided, the production or updating of more specific guidelines addressing these FDs would more broadly reinforce basic requirements and good practices in the request procedure and in communication. For maximum effect, they could include detailed guidance for each field of the forms and specifications on the information required for specific situations, such as an *in absentia* request. This guidance could help to implement and enforce information requirements for requests. It could also include language support to improve related communication challenges.

Problems addressed

This policy option would primarily address problem 2 (practical barriers inhibit effective implementation of the FDs) by addressing challenges related to inconsistent application under driver 1 (fragmented transposition and inconsistent application), as well as challenges related to adoption of digitalisation under driver 6 (varying digital readiness).

Pros and cons

This policy option would not require additional legislation to the forthcomoing implementing acts on digitalisation. Rather, it would extend existing tools, such as the EAW handbook and the design of the decentralised IT system, for use with these FDs. As it would not require a new legal basis, political challenges are expected to be minimal compared to other policy options.

A **key benefit** is that digitalisation of the FDs is already underway, albeit in the early stages. This means that the cost of implementing the suggested measures could remain relatively low and the measures themselves would be fairly non-intrusive. This measure would not require any legislative changes or adaptations by the Member States but would provide additional resources to support ongoing changes. This option could improve stakeholders' knowledge and capacity and address practical issues.

The key limitation of this option is its **scope**. This option would only address practical aspects of the request procedure, chiefly communication. During the workshop, experts noted that handbooks are static resources that are not always adapted to providing context-specific guidance. A more dynamic tool, such as guidance directly integrated into the decentralised IT system, would be preferable. Some experts also expressed scepticism about the potential reach of guidelines and suggested a preference for improved training. Even with these guidelines, additional resources would likely be needed to support Member States with lower rates of digitalisation/digital readiness, which may lack sufficient training and capacity, as well as the technical resources to fully implement the new system.

PO 1.b: Existing training opportunities supplemented and centralised through a dedicated practitioner hub

Overview of policy option

This policy option would leverage and **extend the availability of training** on the four FDs to address key problem areas identified. Although numerous training opportunities exist, particularly for FD EAW, many practitioners indicated receiving little or no training (see Section 3.2.1.3). Awareness and training for FD ESO is particularly low. This

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finding identifies a potential limitation to the reach of EU-level training and an opportunity to extend that training. There is a particular need to train trainers and increase practical exchanges between practitioners in different Member States (see Section 3.2.1.2). Workshop participants highlighted that efficient training requires deep knowledge of national law, in addition to knowledge of the FDs themselves. As such, the most pressing need is to train trainers at national level to combine their expertise in national law with application of the FDs in the national legal system and in the national language of the audience.

Participants in both study workshops indicated a lack of **regular communication and direct experience-sharing between practitioners** in different Member States. EU-level specialised bodies exist for FD EAW, FD TOP, and FD PAS in the form of the EAW Expert Group, EuroPris, and CEP, respectively. These bodies serve as a forum for exchanges between experts across all Member States, facilitating cooperation. No such dedicated body exists for FD ESO. Despite these bodies' active work, many practitioners are not reached by their efforts: participants in the workshop indicated that training and information exchange activities may reach people with expertise in the area, rather than those lacking experience. More efforts towards regular and direct exchanges between practitioners could spread awareness and practical know-how and encourage FD use. Workshop participants and survey respondents stated that **increased exchange programmes between practitioners in different Member States** would be highly beneficial.

Under this policy option, the Commission could consider **extending the methodology and availability of existing training and developing new training options**. It could **provide additional financial support** to Member States to develop and maintain their own training strategies.

Training in various forms could be considered, such as short online modules as introductory or refresher training, with live training (online and in person) reinforcing core knowledge and acting as a forum for practitioners to meet, discuss issues, and share practical experiences. Crucially, this option could include expanded training of trainers.

To ensure maximum coordination and efficiency, the training could be made available through a **single access point in the form of an online platform,** centralising knowledge, training, and reference materials for practitioners and allowing for dynamic engagement. This access point could be a dedicated portal that provides training and enables direct communication between practitioners (e.g. online discussion forums). The benefit of a communication platform and increased practical exchanges is that these options go beyond theoretical training to allow dynamic instruction based on practical experience. The expansion of live training could also improve mutual trust and cooperation between Member States by strengthening individual professional relationships and facilitating better understanding of the different legal systems.

Problems addressed

This policy option primarily addresses problem 2 (practical barriers inhibit effective implementation of the FDs) by addressing **practical and procedural challenges**

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relating to insufficient knowledge or **experience**. It could also help to address various practical challenges by **encouraging best practices and solutions to common problems.** Once sufficient knowledge is widespread via adequate training, it would lead to more consistent and correct application of the FDs, with improved consistency eventually increasing legal certainty and addressing inconsistent application under problem 1 (legal certainty regarding the FDs is reduced, and/or the interaction between FDs). Improved training and awareness could also support increased use of underused instruments, such as FD ESO and FD PAS (see Section 3.2.1.3). Finally, this option could help to address problem 3 (Member States are reluctant to apply FDs) by reinforcing mutual trust through improved communication and deeper professional relationships between Member States.

Pros and cons

Extending training may not necessarily require legislation. However, to the extent that legislation may be needed (e.g. to establish a platform for training and exchanges), this action could be taken under Article 82 of the TFEU. The legal basis for extending training options may derive directly from Article 82(1)(c), which provides for the EU to act to support the training of the judiciary and judicial staff, and Article 82(1)(d), which provides for the EU to adopt measures to facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and enforcement of decisions. As this action would largely build on existing training efforts, challenges to the legal basis are unlikely.

The primary benefits of this option are that it is non-intrusive and builds, at least partly, on existing resources. Stakeholders have indicated a desire for additional training. This option also has the potential to address a range of issues rather than a single narrow problem.

The key limitations of this policy option are that while it could effectively address knowledge gaps and foster practical solutions, training cannot address underlying issues in the legal framework. The availability of national level expertise is a key challenge, notably for the rarely applied FD ESO. The availability of trainers at national level is likely to be low and would require significant efforts to identify and train sufficient trainers. Training can only serve to provide knowledge and encourage behaviour; it cannot ensure or enforce proper implementation.

An additional limitation is the financial cost of expanding training, particularly designing and implementing a single training platform. The Commission has established online platforms that enable communication between practitioners and serve as a centralised platform for reference materials in other contexts, such as the EC-REACT platform provided as part of Directive (EU) 2020/1828 (Representative Action Directive)[328]. Creation of such a platform may require legislative action, and its set-up would require substantial financial, technological, and human resources.

[328] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4 December, pp. 1–27, https://eur-lex.europa.eu/eli/dir/2020/1828/oj.

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PO 1.c: Targeted financial support to Member States extended

Overview of policy option

This policy option would entail **direct technical and financial support to Member States to address key gaps in resources and capacity**. This issue appears to be particularly relevant **in key areas such as detention conditions and digital readiness.**

The EU has no explicit competence on prison-related matters, as prison management is part of national sovereignty. However, human rights issues arising in detentions are not to be ignored. Member States are bound by material detention condition standards set by the Council of Europe, reinforced in the Commission Recommendations on pre-trial detention and material detention conditions[329], and each Member States experiences deficiencies in meeting these standards, to varying extents. In practice, refusals to execute EAWs due to fundamental rights concerns and material detention conditions represent a key challenge in applying FD EAW, as reflected in numerous cases before the CJEU. Refusals based on fundamental rights have also created complications regarding FD TOP (see Section 3.2.1.3). Fully addressing the underlying cause would require not only clarifying the legal basis for refusals, but also addressing the underlying material detention conditions in the Member States. Stakeholder feedback highlighted that poor detention conditions in some Member States may derive in large part from a financial inability to substantially improve conditions. In a 2021 policy debate, the Council discussed potential actions to improve pre-trial procedural rights and material detention conditions, ultimately advising against legislation but calling for the Commission to make additional funding available to Member States to improve conditions, as well as increased sharing of best practices and facilitating training[330]. This policy option calls for targeted financial assistance that could enable and incentivise national authorities to adopt measures to improve conditions of detention.

The availability of financial resources represents a key potential barrier to digitalisation, according to Member State stakeholders (see Section 3.2.1.5). Digital readiness varies across the Member States, and resources and funding are necessary to bridge this gap. This policy option could encompass additional funding opportunities or direct provision of software/other technical resources to Member States to assist with resource and training needs as a part of the digital transition.

This policy option may apply to other areas where additional funding would be beneficial and increase the efficiency of the use of the FDs, in addition to the pressing needs of material detention conditions and digitalisation. For example, it could address the training needs identified in PO 1.b by facilitating the creation of a single training

[329] Commission Recommendation of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, b59ddb88-b9c3-420c-98d5-622807f8729b_en.

[330] Council of the European Union, Outcome of the Council Meeting 3816th Council meeting: Justice and Home Affairs, 12574/21, 2021, https://www.consilium.europa.eu/media/52344/st12574-en21.pdf.

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platform and/or providing Member States with resources to expand training at national level. As this policy option is designed to address the varying resources and capacity of each Member State, a preliminary assessment of the capacity needs of each Member State would be necessary.

Problems addressed

This policy option would address problem 2 (practical barriers inhibit effective implementation of the FDs) and problem 3 (Member States are reluctant to apply FDs) by addressing specific challenges relating to **fundamental rights and material detention conditions,** as well as adaptation to the **digitalisation** of justice. By supporting improved detention conditions, it could address reluctance to use the FDs because of fundamental rights risks. By facilitating the transition to digitalisation of justice, it could also help to address broader **practical and procedural challenges** related to efficiency and effectiveness of communication.

Pros and cons

The key benefit of this policy option is that it provides an opportunity to address the root causes of issues by going beyond the legal framework and providing material support to close the gaps in Member States' capacity. It could also serve to provide much-needed material support in areas of key importance to the EU. As referenced in the Council Recommendations, this policy option is in line with Member States' positions.

The key challenge is expense compared to other options. The legal basis would also need to be carefully considered, given the absence of the EU's general competence to funnel resources specifically to penitentiaries[331]. That legal basis thus presents a potential challenge. The action would need to be designed carefully to ensure coherence with the limited available funding measures (e.g. use of structural funds to improve material conditions by improving ventilation and sanitary equipment; use of structural funds for energy efficiency in Poland and Czechia[332]; grants through the EEA/Norway Grants programme have been used to modernise detention facilities in the Member States[333]). To ensure consistency, the full availability of funding and funding sources would need to be systematically mapped. At the study workshop, some experts were sceptical about the need for funding, indicating that sufficient resources are available and the focus should remain on improving practical application of the FD procedures rather than on improving detention conditions. This contradicts survey responses noting that poor detention conditions are a key concern leading to

[331] Sellier, E. and Weyembergh, A., *Criminal Procedural Laws across the European Union – A Comparative Analysis of Selected Main Differences and the Impact they Have over the Development of EU Legislation*, European Parliament Think Tank, 2018, p. 120, www.europarl.europa.eu.

[332] Reduction of energy intensity of penitentiary units – Penal Institution in Potulice, https://kohesio.ec.europa.eu/en/projects/Q84619; Energy-saving project in Pankrác Prison, (UV955/2016/5) n.d., *https://kohesio.ec.europa.eu/en/projects/Q4589659*.

[333] EEA and Norway Grants, *Programme area no. 19: Correctional Services and Pre-trial Detention (Blue Book excerpt)*, Financial Mechanism Office, Brussels, 2019, https://eeagrants.org/sites/default/files/resources/Pages%2Bfrom%2BBlue%2BBook_PA%2B00-19.pdf.

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refusals and that a lack of resources inhibits improving detention conditions. These contrasting statements indicate some tension between Member States' perspectives, which may raise a political feasibility challenge to extending funding.

PO 1.d: Consultation role of Eurojust extended

Overview of policy option

This policy option would entail leveraging Eurojust to help to resolve common challenges relating to differences and disagreements between Member States. Article 16 of FD EAW provides that a Member State may seek advice from Eurojust if multiple EAW requests are received, and Article 17 indicates that Eurojust should be informed in case of repeated delays. No specific role for Eurojust is included in FD TOP, FD PAS, or FD ESO. Nevertheless, under Article 4(5) of the Eurojust Regulation, Eurojust may issue written opinions to resolve repeated issues arising in the context of judicial cooperation on criminal matters, arguably including issues arising under any of the FDs. The study findings indicate many challenges with grounds for refusal, particularly fundamental rights concerns. These repeat issues may eventually reduce mutual trust between Member States (see Section 3.2.1.3).

This policy option would extend the role of Eurojust to issue written opinions on recurring issues between Member States. For example, Member States could be encouraged to refer questions to Eurojust for a written opinion following a refusal on grounds that are commonly applied. Eurojust currently takes an active role in facilitating cooperation between Member States for FD EAW, with 612 new cases initiated in 2020, 489 in 2021[334], 504 in 2022, and 450 in 2023[335]. According to Eurojust's 2023 annual report, the total number of cases (new and ongoing) was 1 259 in 2023[336]. Stakeholders consulted during the study expressed little interest or need to expand Eurojust's role. For example, one workshop participant stated that the role of Eurojust is well organised and is implemented successfully. Another highlighted the positive role Eurojust already plays in resolving challenges related to refusals by coordinating bilateral meetings. Only one survey respondent mentioned that Eurojust and the EJN could play a greater role in FD PAS specifically.

The Transfer of Proceedings Regulation more directly outlines the role of Eurojust in providing consultations[337]. As practice under this regulation develops, future assessments should consider the relative benefits of these approaches.

Problems addressed

This policy option could address problem 1 (legal certainty regarding the FDs is reduced) by helping to resolve disputes arising in relation to inconsistent application,

[334] Eurojust, *Annual Report 2022*, Publications Office of the European Union, Luxembourg, 2023, https://www.eurojust.europa.eu/annual-report-2022.

[335] Eurojust, *Annual Report 2023*, Publications Office of the European Union, Luxembourg, 2024, https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-annual-report-2023-en.pdf.

[336] Ibid.

[337] Transfer of Proceedings Regulation, Article 18.

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or providing guidance where there is a lack of clarity. It could also address problem 2 (practical barriers inhibit effective implementation of the FDs) by supporting resolutions to practical challenges, and problem 3 (Member States are reluctant to apply FDs) by facilitating common solutions and encouraging dialogue to bolster mutual trust.

Pros and cons

The key benefit of this policy option is that it would reinforce or expand a mechanism for dispute resolution between Member States in respect of application of the FDs, reinforcing trust through dialogue. Eurojust's role in FD EAW-related matters has proven to have significant benefits and added value for cooperation among Member States, Introducing the same mechanism in FD TOP, FD PAS, or FD ESO might accrue similar benefits for enhanced cooperation.

The legal basis and political feasibility may present key limitations. Currently, Eurojust can offer written opinions and support, but cannot issue binding opinions (Recital 14 Eurojust Regulation). While this support can resolve disputes and support common understanding, a non-binding opinion cannot correct underlying issues such as inaccurate transposition. Expanding Eurojust's role to arbitration, for example, or to allow for binding opinions, would require substantial legislative change[338].

Member State buy-in is uncertain and implementation would require active efforts by Member States to seek out Eurojust assistance. Participants in the June workshop indicated a low appetite among Member States to change or expand the role of Eurojust. This option also depends on the capacity of Eurojust: while Eurojust is already very active in advising on FD EAW, this policy option would expand that involvement, potentially requiring more resources. Finally, the mechanism would necessarily be non-binding, potentially limiting its impact.

PO 2.a: New horizontal legislation on cross-cutting topics

Overview of policy option

This policy option addresses a specific narrow issue resulting in cross-cutting problems in all four FDs. An example of similar, horizontal legislation in this area from before the Lisbon Treaty is FD 2009/299/JHA, which revised FD EAW, FD TOP, FD PAS, and FD ESO to account for *in absentia rulings*[339]. At present, this policy option could be used to address cross-cutting issues such as the protection of fundamental rights and grounds for non-recognition, which impact multiple detention FDs. The suggested

[338] The Commission currently is revising the Eurojust Regulation to strengthen the agency and equip it for the new challenges arising from the evolving criminal landscape. This process began with an evaluation of the Eurojust Regulation, which was published in July 2025: Council of the EU, *Evaluation of the European Union Agency for Criminal Justice Cooperation*, SWD (2025) 182 final, https://data.consilium.europa.eu/doc/document/ST-11285-2025-INIT/en/pdf.

[339] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, EUR-Lex - 32009F0299 - EN - EUR-Lex (europa.eu).

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horizontal legislation would not serve primarily to amend the individual FDs, but, rather, **legislate the named issue at a broader level, qualifying the concepts in question by incorporating the relevant jurisprudence.** A **separate horizontal instrument could be enacted for each problem area, or a single horizontal instrument dealing with all cross-cutting issues relevant for all FDs.**

The **protection of fundamental rights** has been reinforced on multiple fronts over the last decade (see Section 3.2.3.5), for example by the position of the European Parliament in recent legislative processes, or by numerous CJEU rulings. The FDs contain less stringent provisions on protection of fundamental rights and do not contain grounds of refusal on the basis of (possible) breaches of fundamental rights, although cross-border cooperation refusal is a developing practice. For example, non-recognition of FD EAW requests on the basis of fundamental rights concerns is a common challenge, resulting in multiple cases before the CJEU, such as case-law allowing refusal based on deficits in the independence of the judiciary[340] or systematic deficiencies in fair trial rights[341] or breaches of EU directives on procedural rights[342] (see Section 3.2.1.3). The jurisprudence currently plays a substantial role in clarifying the existing framework, indicating significant added value of legislative action to resolve and clarify the rules underlying these disputes.

EU competence in this area is limited; detention conditions are primarily the responsibility of Member States, which agree to respect the existing Council of Europe standards on the matter, such as the 2006 European Prison Rules[343].

Prison conditions are closely monitored by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), as set up by the Council of Europe[344]. "Even though the European Treaties do not expressly confer competence to the EU to legislate on prison and prison conditions, the EU's

[340] Judgment of the Court (Grand Chamber) of 25 July 2018, *PPU*, C-216/18, ECLI:EU:C:2018:586.

[341] Judgment of the Court of Justice of 9 November 2023, *Staatsanwaltschaft Aachen*, C-819/21, ECLI:EU:C:2023:841.

[342] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; 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; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

[343] Council of Europe, Recommendation of the Committee of Ministers to Member States on the European Prison Rules, Rec(2006)2, Revised and amended by the Committee of Ministers on 1 July 2020, https://rm.coe.int/09000016809ee581.

[344] Reports on detention facilities in the EU Member States can be consulted for each Member State of the Council of Europe: https://www.coe.int/en/web/cpt/states.

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competence to act in this area is not straight-forward'[345]. However, the European Parliament has called for additional action to address these concerns[346] and the Council tabled a discussion on legislation, before advising against legislating[347].

The protection of procedural rights and conditions of imprisonment are, arguably, linked to the EU's fundamental rights laid down in the CFR, e.g. the prohibition of torture and inhuman or degrading treatment. They form the core fundamentals for judicial cooperation in criminal matters, and when Member States implement EU law on prison-related matters, they have to correctly implement the applicable CFR rights. The CJEU, while ensuring the uniform application of CFR rights across the Member States, has indirectly developed substantive jurisprudence on the right of prisoners (see Annex A3.1 for FD EAW case-law).

A number of legislative instruments on the procedural rights of suspects and accused persons and the non-binding Recommendation on detention conditions have been adopted at EU level. On these basis , the EU already has an indirect impact on national penitentiary systems.

Academic observers[348] have examined whether Article 82(2)(b) of the TFEU, on the rights of individuals in criminal procedures, can be used as a legal basis for regulating relevant elements of detention, and whether the expression 'criminal procedure' might comprise standards pertaining to material conditions[349]. It could be argued that Article 67 of the TFEU opens the possibility of regulating detention conditions, as the objectives for the AFSJ include 'measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters', which could include penitentiary bodies as 'other competent authorities'.

Broad EU legislation on detention may not be possible due to the absence of an explicit legal basis, but limited horizontal legislation that addresses specific, cross-cutting

[345] Luyten, K. and Murphy, C.M., *Prisons and detention in the EU*, European Parliamentary Research Service (EPRS) briefing, European Parliament, Brussels, 2025, p. 5, https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/772905/EPRS_BRI(2025)772905_EN.pdf.

[346] European Parliament resolution of 2 April 2014 on the mid-term review of the Stockholm Programme (2013/2024(INI)).

[347] Council of the European Union, Outcome of the Council Meeting 3816th Council meeting: Justice and Home Affairs, 12574/21, 2021, https://www.consilium.europa.eu/media/52344/st12574-en21.pdf.

[348] Wieczorek, I., 'EU harmonisation of norms regulating detention: Is EU competence (Art. 82(2)(b) TFEU) fit for purpose?', *European Journal on Criminal Policy and Research*, Vol. 28, 2022, pp. 465-481; Coventry, T., 'Pretrial etention: Assessing European Union competence under Article 82(2) TFEU', *New Journal of European Criminal Law*, Vol. 8, Issue 1, 2017, pp. 43-63; Mancano, L., 'Storming the Bastille: detention conditions, the right to liberty and the case for approximation in EU law', *Common Market Law Review*, Vol. 56, 2019, p. 87.

[349] Wieczorek, I., 'EU harmonisation of norms regulating detention: Is EU competence (Art. 82(2)(b) TFEU) fit for purpose?', *European Journal on Criminal Policy and Research*, Vol. 28, 2022, pp. 465-481; Mancano, L., *The European Union and deprivation of liberty. A legislative and judicial analysis from the perspective of the individual*, Hart Publishing, 2019, p. 138; Soo, A., 'Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures', *ERA Forum*, Vol. 20, 2020, p. 334.

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challenges falls within EU competence and has been already used to enact legislation. Further legislation could be introduced to **address fundamental and procedural rights for persons facing detention or non-custodial alternatives to detention, clarifying and codifying the case-law in this area**[350] and to **clarify the interaction between the different FDs**[351]**.**

The available legal basis could **codify grounds for non-recognition case-law, allowing refusal based on deficits in the independence of the judiciary or where there have been systematic deficiencies in fair trial rights**. In the same vein, the adapted grounds for refusal could be designed for **breaches of EU directives on procedural rights**.

One workshop participant recommended creating EU-level guarantees and remedies so that a person could be surrendered based on **an EAW with a guarantee that certain minimum detention conditions would be met and a legal remedy in the event of that guarantee not being respected**.

Horizontal legislation could have a broader scope in relation to the EU law covered. In addition to FD EAW, FD TOP, FD PAS and FD ESO, **FD Financial Penalties** contains a similar framework **on grounds for non-recognition/grounds for refusal**. Although CJEU rulings are less numerous (see Section A3.5 in Annex 3), problems appear in practice. Additionally, post-Lisbon Treaty instruments have a similar framework for grounds for refusal, such as Article 11 of the EIO Directive and Article 12 the Transfer of Proceedings Regulation. These instruments contain common grounds for refusal, such as violations of *ne bis in idem* or double criminality, as well as more specific grounds for non-recognition/refusal, such as where recognition may harm essential national security interests, jeopardise the source of the information, or involve the use of classified information relating to specific intelligence activities under the EIO Directive.

In short, while these specific changes would primarily effect FD EAW, and to a lesser extent FD TOP, from which the case-law derives, these changes could serve as an opportunity to address more general challenges in FD PAS and FD ESO and ensure harmonisation across these related FDs (see Section 3.2.1.1). These changes could even go further and incorporate other EU instruments, such as FD Financial Penalties.

Horizontal legislation could be used to address gaps affecting multiple FDs. FD ESO and FD PAS include protecting victims as a core objective, yet neither includes specific provisions accounting for victim protection, for example by enabling victims to be heard during the process or opposing recognition of a probation or supervision order (see Section 2.4.1). Horizontal legislation could be used to account for victims' rights more broadly within each of the FD processes and ensure that victims can be heard.

[350] Judgment of the Court of Justice of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, C-404/15 and C-659/15, ECLI:EU:C:2016:198.

[351] Opinion of 12 December 2024, C.J., C-305/22, EU:C:2024:1030; The judgment of the Court was issued in September 2025, after the cut-off date for the study.

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Problems addressed

This policy action would address problem 1 (legal certainty regarding the FDs is reduced) by resolving and clarifying key causes of disputes, such as protection of fundamental rights and grounds for non-recognition or other gaps in the legal framework. By resolving these challenges and helping to ensure more effective processes for protecting these rights, this option can also address problem 3 (Member States are reluctant to apply FDs).

Pros and cons

The **legal basis** for horizontal legislative action would need to remain aligned with the legal basis underpinning the original FDs (see Section 3.3.1). The legal basis for new legislative action in judicial cooperation on criminal matters would fall under Article 82 of the TFEU, which allows legislation through all forms of EU legal instruments within specifically defined limits (see Section 3.3.1). Under Article 82(1) of the TFEU, legislative action may only apply for specific goals, such as to 'lay down rules and procedures for ensuring the recognition throughout the Union of all forms of judgments and judicial decisions' (Article 82(1)(a)), or to 'facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions' (Article 82(1)(d)). Deeper legislation, including creation of minimum rules, may be possible under Article 82(2), but only to serve specific purposes, such as to set rules concerning 'the rights of individuals in criminal procedures' (Article 82(2)b)), or where 'legislation relative to a specific aspect of criminal procedure is identified in a unanimous action by the Council acting with consent of Parliament' (Article 82(2)d). Directives setting minimum rules may be possible only to the extent to which they specifically relate to the rights of individuals in criminal procedures, or if they meet the very high legislative bar to deeper action.

The legal basis presents a legal and political challenge as it provides for limited room to legislate on key issues, including material detention conditions and fundamental rights. Horizontal legislation, specifically in areas such as material detention conditions, must be narrowly tailored to fit within these grounds. Theoretically, Article 82(2)(d) of the TFEU may be possible for new aspects of EU criminal law and/or broader -scope legislation, but the consent required from Parliament and unanimity requirement for the Council presents a likely insurmountable political hurdle given national stakeholders' general reticence in relation to AFSJ. Some action may still be possible, however. For example, **creating procedural guarantees and remedies to better account for material detention conditions could be possible under Article 82(1),** which relates to rules and procedures for ensuring recognition and is in line with the existing possibilities for refusals or guarantees.

All legislative actions seeking to lisbonise these FDs face legal and political challenges (see Section 3.3.1). Notably, lisbonised acts would not apply to Denmark and (potentially) Ireland, and the potential use of the emergency brake under Article 82(3) TFEU.

A key benefit is that the limited scope with a focus solely on selected problematic issues could help to overcome Member States' resistance to legislative changes to the

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FDs. The focus on the protection of fundamental rights and ensuring the correct application of the grounds of refusal has already been the subject of change via extensive CJEU jurisprudence. **Given the extent of this jurisprudence, the Commission's role as legislator is vital to ensure proper, consistent guidance to the Member States on the key principles originating from the case-law**. Exercise of this legislative role can prevent individual Member States from applying divergent interpretations of the binding jurisprudence that would risk escalating legal uncertainties, leading to more CJEU referrals and a long cycle of questions. **Clarifying the interconnection and overlap between the different FDs**, based on practice and the guidance provided by jurisprudence, is a feasible legislative option. For specific issues such as **the rights of individuals in criminal procedure, the legal basis in Article 82(2) of the TFEU explicitly** allows potential for legislation.

The potential limitations to this policy option are that the individual issues themselves, particularly fundamental rights and detention conditions, are politically sensitive. While the limited scope may help to overcome Member States' reluctance to adapt the FDs, it may omit potentially problematic areas that could otherwise be addressed through more comprehensive legislation.

Stakeholders expressed concerns about the effects of legislative efforts partly amending the FDs. Academic debate indicates that the effect of partial amendments is unclear: some argue that amendment of even part of an FD would have the effect of lisbonising the entire FD[352], while others argue that partial amendments may only affect the relevant articles (see Section 3.1). However, the CJEU has not ruled on the matter and it remains undecided[353].

Should partial lisbonisation apply the legal effects of a directive solely to the articles amended, that partial amendment could create an uneven framework where some provisions of an FD have the characteristics of a directive (including direct effect) and others do not. This risks further complicating the overall legal framework. Such uncertainty might drive further reluctance towards even partial amendment.

PO 2.b: Legislation partially lisbonising each FD

Overview of policy option

This policy option would entail legislation designed to directly **address specific individual, limited issues within each FD,** rather than opening the FDs as a whole to amendment (see PO 3.a for comprehensive lisbonisation). The scope of this policy option would be similar to PO 2.a, focusing on a limited number of topics identified as particularly problematic, such as **grounds for refusal, fundamental rights, 'codification' of respective jurisprudence and/or better accounting for specific common practical challenges**, such as practical logistics of surrender, respect for time limits, accounting for differences in probation and supervision measures, and

[352] Blanchet, T., 'The genesis of Protocol 36', *New Journal of European Criminal Law,* Vol. 6, Issue 4, 2015, p. 438, https://journals.sagepub.com/doi/abs/10.1177/203228441500600408.

[353] Satzger, H., *Legal effects of directives amending or repealing pre-Lisbon framework decisions*, 2015, p. 534, https://www.giustizia.it/resources/cms/documents/italia2014_ue_luiss_satzger.pdf.

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Pros and cons

As with PO 2.a, the **legal** basis for partial lisbonisation must be based on Article 82 of the TFEU. As these amendments would represent refinements or adjustments to existing measures rather than legislation in new areas or significant expansion of the scope of the FD provisions, the legal basis itself does not present a barrier. The main legal challenge expected would relate to the effects of partial lisbonisation, whose effects are unclear and have not been finally determined by the CJEU. However, the possibility that lisbonisation of one article would have the effect of lisbonising the entire FD may present a significant challenge.

As outlined under PO 2.a, all legislative actions seeking to lisbonise these FDs face legal and political challenges due to the potential use of the emergency brake measure and the opt-in/opt-outs of Denmark and Ireland.

The key benefit of this policy option is that it would allow targeted actions to address specific challenges in each FD. As this action is less comprehensive than PO 3.a and 3.b, it may also be more resilient to Member States' resistance to change.

Potential limitations include the likelihood that most stakeholders might still oppose the modifications to these FDs, despite the limitations in scope. As this option would only address certain particularly problematic provisions, there is a risk that less prioritised measures would remain intact, despite observed challenges.

PO 3.a: Legislation comprehensively lisbonising each FD

Overview of policy option

This policy option would entail a single piece of legislation comprehensively amending one or more FDs. The result would be **a separate instrument, per FD, affecting a complete recast of the FD**. The study identified multiple gaps in each of the FDs (see Section 3.2.1). While horizontal legislation as per PO 2.a and targeted amendments as per PO 2.b could address the larger issues, a single piece of comprehensive legislation may be necessary to address a broader range, or even all, of the issues identified. Concepts based on CJEU jurisprudence would be incorporated to improve the clarity of legislation and enhance cooperation. This option could be applied to one or more instruments in turn, depending on the relative need. For example, findings indicate more substantial challenges with the overall design of FD ESO, with stakeholders observing that the procedure cannot necessarily be completed in time before the person concerned is required to return for trial, and that the lack of a harmonised approach to pre-trial supervision across the Member States makes the application of FD ESO particularly challenging. As these challenges are often systematic, more comprehensive lisbonisation may be most effective. By contrast, a limited policy option could be more appropriate for FD EAW, with which stakeholders are already largely satisfied.

Problems addressed

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This policy option would seek to comprehensively address as many individual challenges as possible. It would specifically address problem 1 (legal certainty regarding the FDs is reduced) and problem 2 (practical barriers inhibit effective implementation of the FDs) by addressing common problem areas in application, as well as any lack of clarity and/or gaps in the legal framework. If successful in resolving the most prominent challenges, this option could further address problem 3 (Member States are reluctant to apply FDs) by providing adapted or new structures to address and resolve challenges related to fundamental rights concerns that impact mutual trust.

Pros and cons

As with PO 2.a and PO 2.b, the **legal** basis for comprehensive lisbonisation is Article 82 of the TFEU. As this option does not imply partial lisbonisation, those challenges would no longer apply.

However, should opening the FD to amendment to further changes result in an expansion of the overall scope, potential problems could occur. For example, if amendments were to seek to establish minimum rules under Article 82(2), the more restrictive requirements of that legal basis would apply (see Section 3.3.1), including the requirement of European Parliament support, along with unanimous Council support, for any action beyond the narrow scope of actions provided for in Article 82(2).

As outlined under PO 2.a, all legislative actions seeking to lisbonise these FDs face legal and political challenges due to the potential use of the emergency brake measure and the opt-in/opt-outs of Denmark and Ireland.

The primary benefit of this policy option is that it can comprehensively address all identified challenges within one or more FDs in a single piece of legislation per FD. For FD ESO, in particular, and FD PAS, to a lesser extent, this option may be more effective (see Section 3.2.1.3). If taken in conjunction with legislative updates to other instruments, it could also serve as an opportunity to increase cohesion between instruments.

The primary limitation is that over the years, Member States have indicated general reluctance to revise the FDs, although stakeholders have not always clarified the basis of their opposition. Workshop participants stressed a very low appetite among Member States for legislation on these FDs, notably FD EAW.

Member States argue that the mechanism is functional as designed and that the framework itself does not require amendment, only efforts to ensure effective implementation. These statements run contrary to the study findings, which indicate fragmented transposition of FD requirements and inconsistent application. Member States perceive that full lisbonisation would provide less leeway in transposition.

Experts at the study workshop indicated that the strict interpretation of the Commission in infringement proceedings brought for FD EAW can create similar effects, i.e. Member States would not have substantial leeway to deviate from transposition requirements even without lisbonisation. The likelihood of Member State resistance makes this option highly controversial and likely unfeasible.

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PO 3.b: Legislation recasting all FDs relating to detention into a single act

Overview of policy option

This policy option would entail **a single piece of legislation encompassing the four FDs** related to detention (FD EAW, FD TOP, FD PAS, FD ESO). It could be limited to these FDs **or potentially extended to other connected EU acts, such as FD Financial Penalties, the EIO Directive and the Transfer of Proceedings Regulation**. The procedures under these instruments, including the post-Lisbon EIO Directive and Transfer of Proceedings Regulation, provide rules and procedures for mutual cooperation on criminal procedure and follow the same overall process used for the FDs relating to detention. Given the related scope and procedural similarities between these instruments, if FD Financial Penalties, the EIO Directive and the Transfer of Proceedings Regulation are not included in a recast, then particular care will need to be taken to ensure coherence between any new measures and these acts. Coherence across all mutual recognition instruments can support consistent and correct application. The proposal would build-in and accommodate the **digitalisation of justice** process already underway.

Under this policy option, matters of detention and non-custodial alternatives to detention would be regulated within a single instrument. The study findings indicated substantial challenges to the application of FD ESO, in particular resulting from gaps in the legal framework. Interaction between instruments also presents a substantial challenge, as disputes between Member States have arisen, e.g. the interaction between FD TOP and refusals under FD EAW (Article 4(6) and Article 5(3) and the subject of ongoing CJEU Case C-305/22[356]). Instruments such as FD ESO have the potential to reduce the need for detention in some circumstances and could be used instead of an EAW in some situations. However, due to limitations in the design of the instrument, FD ESO is practically unused (see Sections 3.2.1.2 and 3.2.1.3).

The goal of this policy option would be to produce **a single piece of legislation that not only addresses common challenges in each FD but maximises synergies and interoperability between standalone FDs. An omnibus proposal could result in a simpler regulatory framework** and lead to a clear, harmonised and simplified legal framework that reduces administrative burden**.** This instrument could, for example, provide clarity on when requests for surrender can be refused for the purpose of executing the custodial sentence within the executing State (e.g. CJEU Case C-305/22). It could also introduce a new process for issuing supervision orders as an alternative to EAWs at the prosecution stage and addressing the limitations of the FD ESO. Study findings on digitalisation and the use of videoconferencing identified an opportunity to reduce the less proportionate use of EAWs during investigative and prosecution phases of a criminal process in favour of leveraged FD EIO or FD ESO in conjunction with videoconferencing (see Section 3.2.1.5). A single act lisbonising the FDs related to detention could provide an opportunity to redesign the procedure for the

[356] Opinion of 12 December 2024, *C.J.*, C-305/22, EU:C:2024:1030; The judgment of the Court was issued in September 2025, after the cut-off date for the study.

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current FD ESO to ensure maximum integration of these processes with the use of videoconferencing under FD EIO. The new legislation would not need to adapt FD EAW to account for videoconferencing, as this has been undertaken by the Digitalisation Directive. However, it would seek to adapt the procedure for FD ESO and encourage use of ESOs and EIOs as an alternative.

Problems addressed

This measure would seek to address multiple challenges as comprehensively as possible and would also serve to improve synergies on detention issues.

Pros and cons

As with PO 2.a, PO 2.b, and PO 3.a, the legal basis for recasting all FDs into a single act is Article 82(1) of the TFEU. However, should amendments expand the scope clearly falling under Article 82(1), the legal basis would present a greater challenge, as the more restrictive Article 82(2) may be necessary (see PO 3.a).

As outlined under PO 2.a, all legislative actions seeking to lisbonise these FDs face legal and political challenges due to the potential use of the emergency brake measure and the opt-in/opt-outs of Denmark and Ireland.

The primary benefit of this measure is that it has the maximum potential for comprehensive legislation addressing challenges in each FD and (potentially) related instruments. It also has the maximum potential to ensure cohesion and interoperability between these instruments. It could be seen as the first element of a future EU Criminal Procedural Code, i.e. encompassing all EU legislation in the area under a single piece of law. This measure has significant potential to create a harmonised and simplified legal framework for cross-border cooperation that could reduce the administrative burden at Member State level, for example, by streamlining the numerous competent authorities. Finally, this harmonisation can be further optimised by full incorporation of the digitalisation of justice agenda, with fully streamlined mechanisms for cross-border cooperation.

The primary limitation is that this option would be the most legally intrusive and thus likely controversial. It would also require extensive effort, necessitating a complete overhaul of legislation at EU and Member State level. While the EU is only able to legislate within its competence, more in-depth legislation on this politically sensitive topic may risk being interpreted by Member States as overreach. This policy option thus has very low practical and political feasibility.

Overall conclusions on policy options for the FDs relating to detention

This section summarises the overall conclusions for the policy options considered.

Non-legislative options

- **Non-legislative options** can improve practical application and help to reduce the impact of the challenges identified. However, they cannot address deeper issues deriving from incorrect transposition or gaps in the legal framework. **PO**

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1.a, Comprehensive guidelines to accompany digitalisation provided, and PO 1.b, Existing training opportunities supplemented and centralised through a dedicated practitioner's hub, represent relatively non-intrusive measures that respond to practitioners' self-identified needs.

- **PO 1.a, Comprehensive guidelines to accompany digitalisation,** has the potential to address common practical challenges and has high feasibility, given its relatively low cost and non-intrusive nature. However, its narrow scope and limited depth mean that the overall impact on practical implementation may also be low.

- **PO 1.b, Existing training opportunities supplemented and centralised through a dedicated practitioner's hub,** can address a range of potential practical issues and may be highly feasible, as it is non-intrusive and builds on existing resources. However, it cannot address underlying issues in the legal framework, nor can it ensure implementation, limiting its impact.

- **PO 1.c, Extended targeted financial support to Member States,** could address specific crucial concerns, including improving capacity and access to resources for Member States to support improved detention conditions, additional training, and the transition to the use of digital tools. In 2021, debates at the Council concluded that funding actions could be used to improve material detention conditions specifically, indicating potentially lower political resistance to this policy option.

- **PO 1.d, Consultation role of Eurojust extended,** is not supported by the evidence gathered here, which found little stakeholder interest or perceived need to expand the role of Eurojust. Stakeholders highlighted the active support already provided by Eurojust regarding EAW.

Legislative options

- **PO 2.a, New horizontal legislation on cross-cutting topics,** would be particularly effective at addressing a specific issue in depth, such as detention conditions or grounds for refusal more generally, with benefits beyond these four FDs. The option has low feasibility, however, with particular challenges in legislation on fundamental rights and detention conditions.

- **PO 2.b, Legislation partially lisbonising each FD,** presents a good opportunity to address the most prevalent problems in each FD. However, it has low feasibility, given the resistance from Member States and uncertainty about the legal effects of amending limited articles within an FD.

- **PO 3.a, Legislation comprehensively lisbonising each FD,** presents a promising opportunity to provide a comprehensive update of one or more FDs to address existing challenges. Feasibility is very low, however, given the high chance of Member State opposition.

- **PO 3.b, Legislation recasting all FDs relating to detention into a single act,** would have the maximum potential to comprehensively address challenges within each FD, as well as related instruments. However, its intrusiveness and

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political resistance to comprehensive change make feasibility lowest of all options.

3.4.2. FD Previous Convictions

Given the comparative lack of issues with the FD, two policy options are proposed, both of which are strictly non-legislative. Table 17 presents an overview of each policy option.

Table 17 - Retained policy options and related measures

Policy options and measures	Summary of policy measures
PO 1 – Soft law measures	
PO 1.1. Complete and **correct transposition** by all Member States	Member States incorporate the relevant provisions in full, voluntarily or as a result of the Commission making use of its enforcement powers
PO 1.2. Targeted assistance for adopting digital tools	Targeted efforts to ensure that all Member States' national authorities have the training and equipment necessary to use existing (ECRIS) and/or future digital tools

PO 1.1. Complete and correct transposition by all Member States

Overview of the policy option

One of the main problems identified is the very incomplete transposition of FD Previous Convictions, which affects legal certainty. **Member States should be encouraged to voluntarily incorporate the relevant provisions in full**, with an investigation of the reasons they have not done so as a priority. Complete transposition by all Member States would help to prevent inconsistencies in recognising and applying foreign convictions. The European Commission could refer to its habitual means to ensure compliance with EU law:

- Expert workshops on facilitating transposition;
- Training of professionals;
- Guidelines and handbooks, that could include sharing best practice on transposition;
- Recommendation under Article 292 of the TFEU, highlighting the most common gaps in transposition (see Section 2.6.2) and inviting Member States to implement them;
- Infringement procedures for non-transposition and non-compliance.

Pros and cons

- The organisation of expert workshops or training for professionals would be straightforward, but could be resource-intensive depending on the forum, and likely to be welcomed by practitioners as an opportunity to share knowledge and make connections with other experts. Handbooks and/or guidelines are also known tools for such purposes (e.g. handbook on how to issue and execute a

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European Arrest Warrant[357]), but may not be sufficient to spur Member States to action. A recommendation under Article 292 of the TFEU could take a similar form to the Commission Recommendation on pre-trial detention.

- As handbooks, guidelines, and recommendation are soft law in nature, they rely on Member States voluntarily choosing to implement them, whereas infringement proceedings for non-transposition would allow the Commission to ensure compliance with FD requirements much more effectively. However, the Commission would have to carefully consider whether infringement proceedings would be proportionate and in line with its priorities at a given time.

PO 1.2. Targeted assistance for adopting digital tools

Overview of the policy option

The mutual trust that underpins FD Previous Convictions relies on an assumption that the legal systems of the different Member States will attach equivalent effects to a conviction handed down in another Member State's legal system. The Commission's 2020 implementation report[358] noted that many Member States, especially Eastern and Southern Member States, sent few if any requests for information on previous convictions or updates on previously sent notifications using ECRIS (see Section 3.2.2.2). This is consistent with the limited findings from the stakeholder consultations, which found a demand for **modernising and standardising databases, financial support for improving technical capacities, and more training on digital tools among practitioners.** Further assistance of this type could target Member States that appear to have low usage of ECRIS.

Pros and cons

There would undoubtedly be a financial cost, but the stakeholder consultation suggests that training and technical capacities are not evenly distributed, and offering financial and technical supports to improve these would be beneficial. Stakeholders believed that the fate of FD Previous Convictions should be tied to developments with ECRIS. They did not question that efforts to improve skills and access to digital tools would be helpful, but did not detail what precisely those developments would help.

3.4.3. FD Conflicts of Jurisdiction

Given the somewhat more complex issues with this FD, four main policy options are presented, one of which is entirely non-legislative and the remainder possibly requiring

[357] European Commission, *Commission Handbook on how to issue and execute a European arrest warrant*, 2017, OJ C 335, p. 10, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1006(02)&from=DA.

[358] European Commission, *Report from the Commission to the European Parliament and the Council concerning the exchange through the European Criminal Records Information System (ECRIS) of information extracted from criminal records between the Member States*, COM(2020) 778 final, pp. 17-18, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52020SC0378.

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legislative action. Some of the options are broken down into variants, using different means to achieve a similar objective.

Table 18 presents an overview of each policy option.

Table 18 - Retained policy options and related measures

Policy options and measures	Summary of policy measures
PO 1 Soft law measures	
PO 1.1. Complete and correct **transposition** by all Member States	Member States incorporate the relevant provisions in full, voluntarily or as a result of the Commission making use of its enforcement powers
PO 2 – Legislative measures	
PO 2.1. Restructuring Eurojust guidelines on jurisdiction and exploring **transforming** existing soft law measures into hard law	Eurojust to restructure its guidelines on jurisdiction to clarify certain aspects and align with the EAW and/or the EPPO Regulation Using a legislative act to transform the Eurojust guidelines on jurisdiction into binding law
PO 2.2. Extending the mediation role of Eurojust	Using a legislative act to create an option for the parties to a case to request mediation from Eurojust, resulting in either non-binding opinions or binding decisions, subject to judicial review by the CJEU under Article 263 of the TFEU
PO 2.3. Territoriality of the offence as the primary or sole criterion for resolving conflicts of jurisdiction	Lisbonising FD Conflicts of Jurisdiction, focusing solely on the territoriality of the offence and requiring consensus decisions among the Member States, subject to judicial review, to proceed

PO 1.1. Soft law measure: encourage Member States to correctly transpose the FD

Overview of the policy option

The patchy transposition of FD Conflicts of Jurisdiction affects legal certainty. **Member States should be encouraged to voluntarily incorporate the relevant provisions in full.** The European Commission could refer to its habitual means to ensure compliance with EU law:

- Expert workshops on facilitating transposition;
- Training of professionals;
- Sharing best practice on transposition, e.g. by publishing guidelines and handbooks;
- Recommendation under Article 292 of the TFEU highlighting the most common gaps in transposition (see Section 2.7.2) and inviting Member States to implement them;
- Infringement procedures for non-transposition and non-compliance.

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Pros and cons

- Most of the measures envisioned by PO 1.1 are resource-intensive, albeit not all to the same extent. The organisation of expert workshops and training for professionals would be straightforward, but could be resource intensive depending on the forum, and likely to be welcomed by practitioners as an opportunity to share knowledge and make connections with other experts. It would also have the benefit of improving practitioners' awareness of FD Conflicts of Jurisdiction, which the study has shown is limited, and might include raising awareness of the Transfer of Proceedings Regulation. The stakeholder consultation revealed that the European Judicial Training Network is planning a new round of training on FD Conflicts of Jurisdiction.
- Handbooks and/or guidelines are widely known tools (e.g. EAW Handbook) but may not be sufficient to spur Member States to action. A recommendation under Article 292 of the TFEU could take a similar approach to that of the Recommendation on pre-trial detention.
- As handbooks, guidelines, and recommendation are soft law in nature, they rely on Member States voluntarily choosing to implement them, whereas infringement proceedings for non-transposition would allow the Commission to ensure compliance with the FD's requirements much more effectively. However, the Commission would have to carefully consider whether infringement proceedings would be proportionate and in line with its priorities at a given time.

PO 2.1. Restructuring Eurojust guidelines on jurisdiction and/or turning them into binding law

Overview of the policy option

FD Conflicts of Jurisdiction only creates a consultation procedure when the suspicion of parallel proceedings arises, relying on general principles of international law. These principles are set down in a soft law format at EU level, i.e. Eurojust guidelines on jurisdiction. While EU law provides a non-binding mechanism through the FD rules to prevent conflicts of jurisdictions and with the Transfer of Proceedings Regulation rules on transfer of criminal proceedings from one Member State to another, the issue of solving conflicts of jurisdiction when they arise is not itself covered by EU law.

The raises the question of whether **EU law should contain binding rules on preventing and/or resolving conflicts of jurisdiction.** An ELI study[359] proposed restructuring the Eurojust guidelines to reduce potentially problematic factors. These new guidelines could de-emphasise the location of the accused or the witnesses, which would align with FD EAW and take advantage of the increased possibilities for remote participation in proceedings. They could also alter the definition of territoriality to put more weight on the location where the most important element of the crime was committed (emphasising State interests), and, in cases involving multiple co-

[359] European Law Institute (ELI), *Draft Legislative Proposal for the Prevention and Resolution of Conflicts of Jurisdiction in Criminal Matters in the European Union*, 2017, pp. 19-23.

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defendants, consider their respective roles in the crime and their locations. Finally, they could include a hierarchy of admissible factors, as well as a list of inadmissible factors, to discourage forum-shopping by prosecutors, including evidential problems, sentencing powers and legal requirements[360].

An alternative approach that could achieve a broadly similar goal is to change the Eurojust guidelines to mirror the provisions of Article 26(4) of the EPPO Regulation. This sets the territory where the majority of the crime took place as the primary criterion, and should that be insufficient to resolve the issue, allows the use of – in order of priority – the habitual residence of the suspect, their nationality, and the place where the main financial damage occurred.

The new guidelines could remain as soft law or be directly incorporated into legislation. The latter option would open decisions on jurisdiction to judicial review and allow the suspect a remedy to flawed jurisdiction decisions[361]. This would bring FD Conflicts of Jurisdiction more in line with the Transfer of Proceedings Regulation with regard to the suspect's right to a remedy, although not their right to request a transfer of proceedings.

Pros and cons

PO 2.1 would be both helpful and viable, provided it was well tailored. Eurojust's own stakeholder consultations suggested that practitioners responded positively to the suggestion to update the guidelines to downplay the location of the accused or witnesses' ability to attend, introduce the stage of proceedings in each Member State involved as a factor to consider, and adjust the criteria relating to territoriality and personality to emphasise the place where the most important part of the criminality or loss, occurred and, where there are multiple co-defendants, their respective roles in the criminal act and their location at the time.

A criterion based on the interests of the suspect was not seen as desirable due to its possible effects on mutual trust between Member States and the potential for suspects to cause unnecessary delays. Ranking the criteria or making them into a hard law instrument was seen as unnecessarily limiting[362]. Stakeholder consultations for this study concurred: while there was openness from Eurojust to embedding the list of criteria in law, all involved emphasised that a ranked list of criteria would be counterproductive, as conflicts of jurisdiction need to be considered on a case-by-case basis.

[360] Ibid., pp. 29-40.

[361] Ibid., p. 23.

[362] Eurojust, *Strategic Seminar: Conflicts of Jurisdiction, Transfer of Proceedings and Ne Bis In Idem: Successes, Shortcomings and Solutions*, 2015, https://www.eurojust.europa.eu/sites/default/files/assets/report-20strategic-20seminar-20conflicts-20of-20jurisdiction-2015-06-04-en.pdf.

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PO 2.2. Extending the mediation role of Eurojust

Overview of the policy option

Another option proposed by the 2017 ELI study and endorsed by some practitioners during the 2015 Eurojust workshop[363] is to **allow Eurojust to act as a mediator** in case of disputes over jurisdiction by issuing either non-binding reasoned opinions or binding decisions subject to limited judicial review by the CJEU under Article 263 of the TFEU. Under this route, the CJEU could annul a decision taken arbitrarily but could not reassess the facts of the case. Eurojust's mediation role could be triggered by the Member States involved in the procedure, the suspect, or the victim. This option could be combined with a new list of criteria (see PO 2.1), should that be deemed necessary, but would be perfectly workable by itself[364].

Pros and cons

PO 2.2 has considerable advantages. The option to allow Eurojust to issue binding decisions would allow a remedy in case of flawed decisions, addressing concerns about the fundamental rights of suspects. The option to allow both the suspect and the victim(s) to request mediation would do most to bring EU law on conflicts of jurisdiction in line with the Transfer of Proceedings Regulation.

The option is not ruled out by Article 85(1)(c) of the TFEU, and Article 4(5) of the Eurojust Regulation already allows Eurojust to issue written opinions on recurrent refusals or difficulties concerning the execution of requests for, and decisions on, judicial cooperation. While this provision was not designed for the possibility of binding mediation, it could nevertheless be built upon. This power is rarely used, typically only by national desks. During the stakeholder consultations, Eurojust representatives noted that they were reviewing the practice internally to clarify its purpose.

This solution would require both an amendment to the Eurojust Regulation and a new regulation[365], which stakeholder consultations suggest will reduce its viability with the Member States. Eurojust representatives also argue that it is rare for conflicts of jurisdiction to be so intractable that they need anything more than consultations to resolve.

PO 2.3. Establish the principle of territoriality of the offence as primary or sole criterion for resolving conflicts of jurisdiction

Overview of the policy option

Article 26(4) of the EPPO Regulation sets the territory where most of the crime took place as the primary criterion, and, should that be insufficient to resolve the issue, allows the use of – in order of priority – the habitual residence of the suspect, their

[363] Ibid., p. 6.

[364] European Law Institute (ELI), *Draft Legislative Proposal for the Prevention and Resolution of Conflicts of Jurisdiction in Criminal Matters in the European Union*, 2017, pp. 40-53.

[365] European Law Institute (ELI), *Draft Legislative Proposal for the Prevention and Resolution of Conflicts of Jurisdiction in Criminal Matters in the European Union*, 2017, p. 26.

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nationality, and the place where the main financial damage occurred. It thus creates a precedent[366] for **making the territoriality of the offence a key factor in resolving conflicts of jurisdiction**. Lisbonising the FD by listing the principles on preventing and resolving conflicts of jurisdictions in the text of the law, making them binding and adding a similar provision, could be a viable option.

The ELI has proposed a new legislative model based around the AFSJ, where Member States would no longer exercise jurisdiction based on extraterritorial jurisdictional principles and the sole criterion would be the territoriality of the offence. In the event of a multi-territorial offence, the relevant authorities in the Member States involved would have to come to an agreement, considering factors such as the location where the majority of the crime took place, the interest of concentrating multiple proceedings in a single Member State, the number of suspects involved, the location of evidence and of the suspect, the residency of the suspect or the victim, and the prospect of resocialisation. Should they fail to reach this agreement within 30 days, the suspect would have the right to request that a competent court in one of the Member States involved resolve the dispute, taking the same factors into consideration[367]. This policy option could go further and grant the same rights to the victim, allowing them a remedy in line with Article 17 of the Transfer of Proceedings Regulation.

Pros and cons

PO 2.3 would have the considerable benefit of eliminating most conflicts of jurisdiction, but would be the most complex and likely controversial policy option by far, requiring a new, far-reaching, and possibly unpopular regulation[368].

Overall, there are no general rules at EU level for cases of conflicts of jurisdiction; only certain crime specific guidance exists. Preventing and resolving of conflicts of jurisdiction is likely to re-emerge on the European agenda, as it is explicitly referenced in Article 82 of the TFEU as an objective of the AFSJ.

3.4.4. FD Financial Penalties

Table 19 presents the retained policy options and related measures for improving the cross-border enforcement of financial penalties. It distinguishes between non-legislative options (three options) and legislative options (three options).

Non-legislative options can improve practical application of FD Financial Penalties:

[366] Zuidema, A., 'To which prosecution service? Analysing the way the Union resolves conflicts of criminal jurisdiction', *New Journal of European Criminal Law*, Vol. 14, Issue 3, 2023, pp. 374-396, https://doi.org/10.1177/20322844231191373.

[367] European Law Institute (ELI), *Draft Legislative Proposal for the Prevention and Resolution of Conflicts of Jurisdiction in Criminal Matters in the European Union*, 2017, pp. 54-62.

[368] Ibid.

- PO 1.a, Support for complete transposition, encourages Member States to fully implement provisions through workshops, guidelines, training, and, where proportionate, infringement procedures;
- PO 1.b, Practitioner's handbook, provides practical guidance on issuing and executing financial penalties, including CJEU case-law, and integrates with digital tools;
- PO 1.c, Digitalisation and mandatory forms, takes advantage of ongoing EU digitalisation to improve communication between the issuing and executing State authorities. It makes standardised forms mandatory.

Legislative options aim to address structural gaps and strengthen fundamental rights protection:

- PO 2.a, Partial lisbonisation of key problems, amends FD Financial Penalties to introduce new refusal grounds, set time limits, and make standardised forms mandatory;
- PO 2.b, Legislation on road traffic offences, keeps FD Financial Penalties, but introduces a new instrument inspired by the CBE Directive to cover cross-border enforcement of fines for road-safety-related offences classified as criminal or semi-criminal in the issuing and the executing States;
- PO 2.c, Full lisbonisation, replaces FD Financial Penalties with a directive or regulation incorporating comprehensive mutual assistance and enforcement rules, aligned with digitalisation.

Table 19 - Retained policy options and related measures

Policy options and measures	Summary of policy measures
PO 1.a Complete and correct transposition by all Member States	Voluntarily incorporate the relevant provisions in full, and/or as a result of the Commission making use of its enforcement powers
PO 1.b. Handbook on how to issue and execute a financial penalty in cross-border cases	Aimed at legal practitioners, the handbook would summarise the experience gained over the past two decades of using the FD Financial Penalties procedure. It could provide a series of tips and recommendations to help legal practitioners and guide them through every step of the procedure. It should also reflect CJEU case-law
PO 1.c. Digitalisation and mandatory forms	Aimed at digitalising communication, including the use of the standardised forms, and incorporating the standardised forms for mandatory use
PO 2.a. Partial lisbonisation of key problems	Legislation designed to directly address specific, individual, and limited issues
PO 2.b. Legislation on road traffic offences	Legislation on road traffic offences/road safety-related traffic offences
PO 2.c. Full lisbonisation	New legislative act to comprehensively regulate the mutual recognition of financial penalties

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PO 1.a.: Complete and correct transposition by all Member States

Responding to problem 1 (legal uncertainty), the first set of policy options aims to improve the FD Financial Penalties text, developing guidelines, and/or closing the legal gap at EU level.

Member States should be encouraged to voluntarily incorporate the relevant provisions in full, with an investigation of the reasons they have not considered doing this as a priority. Complete transposition by all Member States would ensure that the FD Financial Penalties rules function correctly.

The European Commission could use the enforcement tools in its competence to ensure compliance with EU law:

- Expert workshop on facilitating transposition;
- Guidelines, handbook, best practice on transposition;
- Training of professionals;
- Infringement procedure for non-transposition and non-compliance.

Pros and cons

All of these measures from the Commission are **resource intensive. The Commission's right to consider whether to open infringement must also be duly respected**. This option needs to be considered carefully, taking account of all priorities at the time and the extent to which any of these tools are proportionate.

PO 1.b.: Develop a handbook on how to issue and execute a financial penalty in cross-border cases

A handbook could be drawn up based on discussions with experts in the Member States and agencies, together with the Commission, similar to the handbooks on FD EAW and on FD TOP. Aiming at practitioners, the handbook would summarise the experience gained over the past two decades of using the FD Financial Penalties procedure. It could provide **a series of tips and recommendations to guide legal practitioners through every step of the procedur**e. It should also include the legal developments based on **CJEU case-law**. As part of the ongoing initiative of digitalisation of justice, a decentralised IT system for digital-by-default communication will become operational in a few years time and the handbook could include guidance on using the system to transmit and receive requests. The handbook could be **integrated directly into the IT system through dynamic features** such as prompts, FAQs, and hyperlinks, ensuring real-time support for practitioners.

Pros and cons

The main advantage of this policy option is its relatively low cost and non-intrusive nature, as it builds on existing practices and complements digitalisation efforts already underway.

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PO 1.c.: Foster the digitalisation of communication, including mandatory use of the standardised forms

Most of the challenges related to communication between authorities and translation of documents in the enforcement procedure are likely to be addressed by the ongoing **digitisation of the FD procedure, as outlined in the Digitalisation Regulation**.

The five standardised **forms** are used to various degrees by the Member States (see Section 3.2.3.3), often due to lack of awareness and the fact that their use is voluntary. The ongoing digitalisation initiative should consider incorporating the forms at the relevant stage of the enforcement procedure and making them digitally available. Their visibility is likely to encourage regular use by experts, easing the enforcement procedure.

The use of the standardised forms could be made mandatory. This is only possible in the EU legal structure if they are made part of EU law, i.e. via legislative means. This requires a proposal based on the relevant legal basis, possibly Article 82(2) of the TFEU, and completing the OLP.

Pros and cons

As part of the EU initiative on digitalisation of criminal justice, 24 implementing acts need to be prepared, followed by two years of IT implementation work. The implementing act on the decentralised IT system on FD Financial Penalties is planned to be adopted by 17 January 2028[369]. During the discussion of the implementing act, the five standardised forms should be integrated, making their use automatic as part of the 'secure, efficient and reliable IT system'. The decentralised IT system on the FD itself should enter into force two years after this date (17 January 2030)[370]. The entire IT system for all 24 legal acts should be operational by early 2031[371].

If the five standardised forms are to be given legal value as an obligation, careful consideration has to be given to feasibility and reality. The proportionality of the measure should be considered in view of stakeholders' time and effort, notably the EU legislators in adopting a directive or a regulation in the OLP for the mere purpose of transforming the standardised forms into EU law.

PO 2.a.: Partial lisbonisation of key problems

The protection of fundamental rights has been reinforced on multiple fronts over the last decade (see Section 3.2.3.5), for example by the position of the European Parliament in recent legislative processes, or by the numerous rulings of CJEU. FD Financial Penalties contains less stringent provisions on the protection of fundamental rights and does not contain grounds of refusal on the basis of (possible) breach of fundamental rights. Nevertheless, in practice, cross-border cooperation has been refused on this basis.

[369] Digitalisation Regulation, Article 10(3)(c) and Annex II, point 3.
[370] Digitalisation Regulation, Article 26(3).
[371] Digitalisation Regulation, Article 10(3)(d), Annex II, and Article 26(3).

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The recently revised CBE Directive lays down the language regime for the communication between the offender and Member States' authorities (to be applied until the stage of appeal before a court) to ensure that communication takes place in a language of which that person has sufficient knowledge (Article 5(b)(1)). It also harmonises the time limits for sending documents (Article 5(a)(2)). FD Financial Penalties has no rules on this issue, possibly infringing the fundamental rights of persons concerned and prompting national courts to refer to the CJEU for clarification[372]. Cases before the CJEU allowed refusal based on breaches of EU directives on procedural rights (see Section 3.2.3.6).

Challenges arising from the current limitations on grounds for refusal and the protection of fundamental rights could be effectively addressed through **a partial lisbonisation of FD Financial Penalties**. The improved text could introduce explicit **grounds for refusal** based on infringements of fundamental rights, lack of translation, or incomplete requests. To **strengthen the protection of fundamental rights,** several measures could be incorporated in the new text:

- Time limits for issuing the certificate, transmitting it to the executing authority, and confirming the offender's identity and address;
- Clear obligations for competent authorities to ensure that the person understands the charges, including details of the offence, sanction, available remedies, deadlines, and the appeal body, allowing them to fully exercise their defence rights,;
- New refusal grounds where the decision or its essential content is not translated;
- Refusal grounds for infringements of fundamental rights or legal principles enshrined in the CFR.

Any future legislative attempt must take into account the ongoing digitalisation of justice efforts. The standardised forms could be incorporated as part of the procedure making their use mandatory (i.e. incorporating PO 1.c.).

Another element that a revision should consider is to enhance coherence of FD Financial Penalties with the EIO Directive by aligning the definitions of key terms in the FD with those set out in the EIO Directive, in particular the definitions of the notion of issuing State, issuing authority, executing State and executing authority[373]. This would reinforce the protection of fundamental rights as established in the EIO Directive (the EIO Directive explicitly refers to the rights of defence, presumption of innocence, legal remedies and data protection[374], while FD Financial Penalties does not) and expressly providing that the EIO Directive be utilised by the executing State to identify the offender in cases where a financial penalty is to be enforced but the identity of the person remains unknown or uncertain[375].

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[372] Judgment of the Court (First Chamber) of 6 October 2021, *D.P.*, C-338/20, ECLI:EU:C:2021:805; C-150/21; Judgment of the Court (First Chamber) of 5 December 2019, *Centraal Justitieel Incassobureau*, C-671/18, ECLI:EU:C:2019:1054.

[373] EIO Directive, Article 2; FD Financial Penalties, Article 1.

[374] EIO Directive, Articles 1(4), 14, 20 and Recital 12.

[375] EIO Directive, Article 3 (scope) and Article 5 (content and form).

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In the standard certificate annexed to FD Financial Penalties, a section could be added allowing the issuing authority to indicate that an EIO has been, or will be, issued for the purpose of identification of the offender.

Pros and cons

The key benefit of this policy option is that it would allow targeted actions to address specific challenges. The limited scope with a focus solely on selected problematic issues could help to overcome Member States' resistance to legislative changes to the FD. The focus on the protection of fundamental rights and ensuring the correct application of the grounds of refusals has already been the subject of change via CJEU jurisprudence.

Potential limitations are that the individual issues themselves, particularly fundamental rights and detention conditions, are politically sensitive. All legislative actions seeking to lisbonise the FD are likely to face legal and political challenges due to the potential use of the emergency brake measure and the opt-in/opt-outs of Denmark and Ireland.

As revision with limitations in scope would only address certain particularly problematic provisions, there is a risk that less prioritised measures would remain intact. Accordingly, it would not be able to address the fact that the legal framework at EU level for the cross-border enforcement of fines remains fragmented, particularly in light of the recent revision of the CBE Directive.

PO 2.b: Legislation on road traffic offences/road safety-related traffic offences

There are specific mechanisms for cross-border investigation and enforcement of fines laid down at EU level under transport policy (see Sections 2.5.1, 3.2.3.4, 3.2.3.9). Those rules are based on mutual assistance, such as FD Financial Penalties, but go beyond the FD's procedure and were partly prompted by the inadequacy of the FD rules when applied to road traffic cases.

The CBE Directive mechanisms are limited to 18 road safety-related traffic offences (Article 2), but it is open to revision to include other offences in the future (Article 11). The CBE Directive aims to protect road users by helping authorities in different EU Member States to share information on traffic offences related to road safety. This makes it easier to enforce sanctions for offences committed by vehicles registered in a Member State other than the one in which the offence took place, as drivers who commit road traffic offences abroad no longer remain anonymous (Article 4).

This initial phase of investigation into identifying the offender was laid down in 2015, but a significant number of the drivers were still able to act with impunity, as offences were not investigated properly. To complete the investigative procedure, further rules were established in 2024 to identify the person concerned (Article 5), namely, if the automated search in the vehicle registration database did not yield a result, the Member States of the offence may request mutual assistance to obtain additional information to establish the identity and address of the person concerned.

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In addition to searching different national databases, the new CBE Directive rules establish the cooperation obligation of the owner or end user of the vehicle to provide information on the identity of the person liable for the road safety-related traffic offence (the person actually driving the vehicle at the time) (Article 5(d)). As part of the mutual assistance mechanism, limited grounds of refusals are laid down that can be invoked by the requested Member State (Article 5(c)(8)).

Revision of the CBE Directive addressed the need to simplify procedures for the mutual recognition of administrative or judicial decisions concerning financial penalties linked to the named road safety-related traffic offences. It introduced mechanisms on mutual assistance in the service of the traffic offence notice and follow-up documents (Article 5(e)) by: harmonising the information letter's minimum content sent by authorities to the person concerned (Article 5(2)); addressing fundamental rights concerns, particularly regarding appeals against alleged road traffic offences committed abroad (Article 5(6)); tackling issues such as different deadlines for non-residents and residents on the submission of penalty notices by EU countries (Article 5(a)(2); missing or unclear information on the appeals procedure in the penalty notice (Article 5(2)(e)); missing evidence or untranslated prosecution documents; and unclear information on how to settle road traffic penalties.

The CBE Directive lays down the language regime for the communication between the offender and Member States' authorities (to be applied until the stage of appeal before a court) to ensure that communication takes place in a language of which this person has sufficient knowledge (Article 5(b)(1)). It also harmonises the time limits for sending the documents (Article 5(a)(2)). FD Financial Penalties has no rules on this issue, infringing the fundamental rights of persons concerned and prompting national courts to refer to the CJEU for clarification[376].

A tailored procedure on mutual assistance in enforcement activities is formulated for enforcing fines (Article 5(f)). The enforcement procedure builds on the investigative phase and makes use of the to-be-established electronic system for direct communication between the Member States (Article 5(g)). Compared to the FD Financial Penalties procedure, it provides for faster, more straightforward cooperation between the parties concerned and ensures higher respect for the fundamental rights of the person concerned.

The complex and detailed procedural rules of the CBE Directive cover the entire chain, from investigation of the offence to enforcement of a fine. They cater for the enhanced protection of procedural rights of the person concerned and the efficiency of the procedure for the authorities involved. However, they are limited to the listed offences and for cases where these offences are classified as administrative in both Member States. FD Financial Penalties applies to any criminal offence to which penalties can be attached. This means that, in real terms, the FD is applicable to all types of offences in the transport field, and is not confined solely to road traffic offences or road safety-related traffic offences. Among the 39 offences listed in FD Financial Penalties (Article

[376] Judgment of the Court (First Chamber) of 6 October 2021, *D.P.*, C-338/20, ECLI:EU:C:2021:805; C-150/21; Judgment of the Court (First Chamber) of 5 December 2019, *Centraal Justitieel Incassobureau*, C-671/18, ECLI:EU:C:2019:1054.

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5) that, without verification of double criminality, give rise to recognition and enforcement of decisions, is 'conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods', underlining its broad scope.

Under this policy option, **FD Financial Penalties would remain in force as it is, while a directive (or even a regulation) is enacted on road traffic offences with a more stringed mutual assistance mechanism** ('inspired' by the CBE Directive). FD Financial Penalties would be a law of *lex generalis* applicable to all offences to which a penalty can be issued, while the new legislation would serve as *lex specialis* for one type of offence. The legal basis would be Article 82, with due respect to the policy matter. The scope of the instrument would be limited to road traffic offences, so they would no longer be in the scope of FD Financial Penalties, but in referring to the broader concept of 'road traffic offences' it would be applicable to road safety-related offences listed in the CBE Directive, provided they are considered criminal offences in both Member States. The scope of the instrument could also encompass decisions where 'a court having jurisdiction in particular in criminal matters' is involved, embracing the CJEU position of considering the latter as 'an autonomous concept of EU law'. Having this broadened scope, the existing legal gap based on the different categorisation offences – administrative, criminal or semi-criminal (see Section 3.2.3.9) – of road traffic offences would be filled and no offence would remain unpunished in cross-border context. To complement and harmonise the EU-level legislation, the new law would mirror the key concepts of the CBE Directive and remedy the shortcomings of the FD Financial Penalties procedure: establish rules for the entire enforcement chain, from investigation of the offence to enforcement of a fine; reinforce the protection of fundamental rights, and lead to clear responsibilities of the authorities involved in the different stages of the procedure. It would also become part of the ongoing digitalisation of justice process under the Digitalisation Regulation, allowing for more efficient communication between the parties concerned.

Pros and cons

The primary benefit of this policy option is that it would create a complete and comprehensive EU-level framework for fines in relation to road traffic offences, or to certain road safety-related traffic offences, with administrative offences covered by the CBE Directive and criminal and semi-criminal offences covered by a directive/regulation that is *lex specialis* to FD Financial Penalties. The policy option would deliver greater efficiency by covering the entire procedural chain, from offender identification to fine enforcement. The new law would benefit from the full digitalisation of the certificate, information letter, etc. and communication between the national authorities. However, special attention needs to be paid to legislation based on Article 82(2) of the TFEU to respect the limitations of this AFSJ legal basis. The so-called double track, where the EU legislator tries to adopt criminal measures using the means of the first pillar or to pursue the aims of the first pillar using the means foreseen by the third pillar, has been judged unlawful by the CJEU[377].

[377] De Pasquale, P. and Pesce, C., 'Article 83 [Minimum Harmonisation] (ex-Article 31 TEU)', In: Hofmann, H., Bovis, C.J., and Hancher, L. (Eds.), *Treaty on the Functioning of the European Union*

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Potential limitations include the likelihood that some stakeholders might oppose the modifications to the FD, despite the limitations in scope, fearing that a further fragmented legal landscape will arise in relation to cross-border enforcement of financial penalties, with numerous instruments and the potential for overlapping regimes. Much would depend on the legislative drafting and negotiations.

PO 2.c. Full lisbonisation of FD Financial Penalties

This policy option combines the initiatives presented under PO 2.a. and PO 2.b. It overcomes the general problem areas of the FD (protection of fundamental rights, grounds of refusals) and creates more stringent rules on mutual assistance in enforcement, expanding the cooperation mechanism to an investigation mechanism leading to the fine. Ultimately, a directive or regulation based on Article 82(2) of the TFEU, with a broad scope of covering all crimes (not only road traffic offences) to which a fine can be attached would provide for a digitalised mutual assistance mechanism for the entire procedure from establishing a fine to its execution, as presented under PO 2.b.

Pros and cons

The key benefit of this policy option is that it would create a complete and comprehensive EU-level framework for executing all fines linked to committing a criminal offence in a cross-border context. It would deliver greater efficiency by covering the entire procedural chain, from offender identification to fine enforcement. The new law would benefit from the full digitalisation of the certificate, information letter etc. and communication between the national authorities. However, special attention needs to be paid to legislation based on Article 82(2) of the TFEU to respect the limitations of this AFSJ legal basis. The primary limitation is that this option would be the most legally intrusive and thus the most likely to be controversial.

– *A Commentary*, Springer, 2021, pp. 1581–1596, https://doi.org/10.1007/978-3-030-43511-0_84; Judgment of the Court (Grand Chamber) of 13 September 2005, *Commission v Council*, C-176/03, ECLI:EU:C:2005:542, para. 47–52; Judgment of the Court (Grand Chamber) of 23 October 2007, *Commission v Council*, C-440/05, ECLI:EU:C:2007:625, para. 64–70.

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ANNEXES

Annex 1: List of literature reviewed

The list of literature and works collected and examined by the team during the research for this study is presented below.

Author	Year	Title
EU institutions, legislation, communication, opinions		
Council	2000	Council Act (29 May 2000) establishing the Convention on Mutual Assistance in Criminal Matters (OJ C 197, 12.7.2000, p. 1), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000F0712%2802%29
Council	2002	Council Framework Decision (EU) 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584
Council	2008	Council Framework Decision (EU) 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008F0909
Council	2008	Council Framework Decision (EU) 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008F0947 (europa.eu)
Council	2009	Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009F0829
Council	2005	Council Framework Decision (EU) 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32005F0214
Council		Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008F0675
Council	2009	Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009F0948&%3A~%3Atext=The%20objective%20of%20this%20Framework%20Decision%20is%20to%2Cimproving%20the%20efficient%20and%20proper%20administration%20of%20justice
Council	2009	Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32009F0299

Council	2003	Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003F0577
Council	2006	Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognitions to confiscation orders, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006F0783&qid=1689757737724
Council	2017	Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, https://eur-lex.europa.eu/eli/reg/2017/1939/oj/eng
European Parliament and Council	2018	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, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018R1805
Council	2001	Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001F0220&qid=1689754504487
European Parliament and Council	2012	Directive (EU) 2012/29 of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32012L0029
European Parliament and Council	2012	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, https://eur-lex.europa.eu/eli/reg/2012/1215/oj/eng
European Parliament and Council	2014	Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, https://eur-lex.europa.eu/eli/dir/2014/41/oj/eng.
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Annex 2: Stakeholder consultation table

The table here provides an overview of the types of stakeholders consulted during the study and the methods used to consult them.

The synopsis summarising the consultation responses is presented in a separate annex to this final report.

Stakeholder type	Interest/ influence	Example of units	Mode of consultation	Rationale for consultation
I. EU level				
I.1. EU expert bodies	**High/High**	▪ DG JUST ▪ DG MOVE ▪ Eurojust ▪ EuroPris ▪ FRA	▪ Scoping interviews (up to 5) ▪ Focus groups	✓ First-hand knowledge of implementation barriers and status of transposition ✓ Knowledge of practical issues around cross-border cooperation in judicial matters (e.g. incompatibility between different penal systems, perception of different standards of respect of fundamental rights)
I.2. EU thematic experts	**High/Medium**		▪ Focus groups	✓ Specialised expertise on EU level judicial cooperation ✓ Specialised expertise on the process and challenges of lisbonisation
II. National level				
II.1. Ministry of Justice II.2. Ministry of the Interior II.3. Ministry of Defence Other relevant ministries (depending on separation of competence at national level)	**High/High**	▪ Relevant authorities/branches of the ministries, particularly in relation to the organisation and resources available to law enforcement authorities in the field of judicial cooperation in criminal matters	▪ Interviews by national legal experts (around 2 interviews for each Member State) ▪ Follow-up targeted interviews (where needed) (up to 20) ▪ Survey (over 100 national actors included ministries contacted thus far)	✓ First-hand knowledge of implementation barriers ✓ Understanding of cross-border coordination/recognition challenges ✓ Understanding of implementation barriers faced by law enforcement authorities

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Stakeholder type	Interest/ influence	Example of units	Mode of consultation	Rationale for consultation
II.5. Implementing authorities	**High/Medium**	▪ National judicial authorities (e.g. courts, judges, prosecution offices, prosecutors)	▪ Interviews by national legal experts (around 4 interviews for each Member State) ▪ Follow-up targeted interviews (where needed) ▪ Survey (over 100 national actors included prosecutors, courts, and other implementing authorities contacted thus far)	✓ Authorities responsible for direct implementation of the respective FDs ✓ First-hand knowledge of implementation barriers ✓ Understanding of cross-border coordination/recognition challenges
II.6. National thematic experts	**High/Medium**	▪ Training providers for law enforcement authorities ▪ Academics ▪ National advisors	▪ Interviews by national legal experts (around 1 interview for each Member State) ▪ Follow-up targeted interviews (where needed)	✓ Specialised expertise on issues with the national implementation of the FDs ✓ First-hand knowledge of implementation barriers ✓ Understanding of cross-border coordination/recognition challenges
II.7. Legal professionals	**High/High**	▪ Advocates ▪ Bar associations ▪ Legal aid experts	▪ Interviews by national legal experts (around 1 interview for each Member State) ▪ Follow-up targeted interviews (where needed) ▪ Survey (for quantitative data)	✓ Specialised expertise on issues with the national implementation of the FDs ✓ First-hand knowledge of implementation barriers

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Annex 3 Case-law of the CJEU – Evolution over time and by FD

A3.1 Developments in CJEU case-law relating to the EAW

Content and form of the EAW in the context of Article 8(1) of FD EAW

The content and form of the EAW in the context of Article 8(1) of FD EAW has been the subject of multiple cases before the CJEU. Key CJEU rulings all emphasise the need for a valid underlying judicial decision for issuing an EAW and the safeguards for effective judicial protection. Each judgment related to Article 8(1)(c) builds on the last. The other case in the section concerns Article 8(1)(f).

List of judgments:

1. Judgment of the Court of Justice of 1 June 2016, *Niculaie Aurel Bob-Dogi*, C-241/15, Request for a preliminary ruling from the *Curtea de Apel Cluj*, ECLI:EU:C:2016:385
2. Judgment of the Court of Justice of 10 November 2016, *Openbaar Ministerie v Halil Ibrahim Özçelik*, Request for a preliminary ruling from the *Rechtbank Amsterdam*, C-453/16, ECLI:EU:C:2016:860
3. Judgment of the Court of Justice of 13 January 2021, *Criminal proceedings against MM*, C-414/20, Request for a preliminary ruling from the *Spetsializiran nakazatelen sad*, ECLI:EU:C:2021:4
4. Judgment of the Court of Justice of 10 March 2021, *PI*, C-648/20, Request for a preliminary ruling from the *Westminster Magistrates' Court*, ECLI:EU:C:2021:187
5. Judgment of the Court of Justice of 17 March 2021, *JR*, C-488/19, Request for a preliminary ruling from the *High Court of Ireland*, ECLI:EU:C:2021:206
6. Judgment of the Court of Justice of 6 December 2018, *IK*, C-551/18, Request for a preliminary ruling from the *Hof van Cassatie*, ECLI:EU:C:2018:991

The bulk of the cases involve **Article 8(1)(c)** of FD EAW, which mandates that an EAW must be accompanied by 'evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect'.

Case **C-241/15**, ***Bob-Dogi,*** was submitted to the CJEU by the *Curtea de Apel Cluj* (Appeal Court, Cluj, Romania) relating to the execution of an EAW issued by the *Mátészalkai járásbíróság* (District Court, Mátészalka, Hungary) against a Romanian national. The CJEU held that when the EAW is issued for the purposes of prosecution, the 'term "arrest warrant" […] must be understood as referring to a national arrest warrant that is distinct from the European arrest warrant'. In addition, the executing judicial authority must refuse to give effect to an EAW 'if […] it concludes that the European arrest warrant is not valid because it was […] issued in the absence of any national warrant separate' from it. Following the CJEU's judgment, Hungary amended its national legislation, but Romania did not.

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Case **C-453/16**, ***Özçelik,*** was submitted to the CJEU by the *Rechtbank Amsterdam* (District Court, Amsterdam, Netherlands) related to the execution of an EAW against a Turkish national by the *Veszprémi Járásbíróság* (District Court, Veszprém, Hungary).The CJEU held that confirmation from the public prosecutor's office of a national arrest warrant issued previously by a police service constitutes a judicial decision under Article 8(1)(3) of the FD. Following the CJEU's judgment, neither the Netherlands nor Hungary amended their national legislation to implement the findings.

Case **C-414/20**, ***MM,*** was submitted to the CJEU by the *Spetsializiran nakazatelen sad* (Specialised Criminal Court, Bulgaria) questioning the validity of the EAW issued in support of a request for review of the pre-trial detention measure. The CJEU held, in the context of Article 8(1)(c), that an EAW is 'invalid where it is not based on a "[national] arrest warrant or any other enforceable judicial decision having the same effect"'. That concept includes 'national measures adopted by a judicial authority to search for and arrest a person [...] with a view to bringing that person before a court for the purpose of conducting the stages of the criminal proceedings'. It is for the national court to decide whether the measure meets this standard. Where the issuing authority is not a court and 'no provision is made [...] for an action to be brought before a court', national courts 'must be interpreted as permitting' review of the warrant's validity under Article 47 of the CFR. A breach of Article 8(1)(c) 'does not require the release' of the person in pre-trial detention. It is for the national court to decide 'what consequences the absence of such a national measure [...] may have' under domestic law. Following the CJEU's judgment in *MM*, Bulgaria amended its national legislation.

Case **C-648/20**, ***Svishtov Regional Prosecutor's Office,*** was submitted to the CJEU by the Westminster Magistrates' Court, UK, relating to the execution of an EAW issued for a Bulgarian national. The CJEU held that Article 8(1)(c) of FD EAW, read in light of Article 47 of the CFR and CJEU case-law, means that '[t]he requirements inherent in effective judicial protection [...] are not satisfied' where both the EAW and the underlying judicial decision are issued by a public prosecutor, and 'cannot be reviewed by a court in the issuing State prior to the surrender'. Bulgaria amended its national legislation following the CJEU's findings.

Case **C-488/19**, ***JR,*** was submitted to the CJEU by the High Court of Ireland regarding the execution in Ireland of an EAW issued against an individual to serve, in Lithuania, a custodial sentence imposed by a Norwegian court for drug trafficking. The CJEU held that Article 1(1) and Article 8(1)(c) mean that an EAW can be issued based on a judicial decision ordering the execution of a sentence imposed by a third-country court, where the judgment has been 'recognised by a decision of a court of the issuing Member State'. This is allowed 'pursuant to a bilateral agreement', provided the sentence is at least four months and the third State procedure complied with fundamental rights, in particular the obligations

arising under Articles 47 and 48 of the CFR. Lithuania amended its national legislation in light of the CJEU's findings.

Other case-law relates to **Article 8(1)(f)** of FD EAW, which requires that the EAW must include 'the penalty imposed if there is a final judgment or the prescribed scale of penalties for the offence under the law of the issuing Member State'.

Case **C-551/18**, ***IK,*** was submitted by the *Hof van Cassatie* (Court of Cassation, Belgium) relating to the execution of an EAW issued against a Belgian national that was rejected by the Dutch authorities. The CJEU held that Article 8(1)(f) of FD EAW should be understood to mean that if an EAW does not mention an additional sentence for conditional release, an EAW 'does not, on the same facts of the case in the main proceedings, preclude the enforcement of an additional sentence' after the main custodial sentence ends, provided there is 'an express decision to that effect [...] by the national courts with jurisdiction for the enforcement of sentences'. Following the CJEU's judgment in *IK*, neither Belgium nor the Netherlands amended their national legislation.

In conclusion, CJEU jurisprudence on Article 8(1) of FD EAW has provided guidance to issuing and executing judicial authorities regarding the required content and form of EAWs, reinforcing the need for both judicial cooperation and respect for fundamental rights. Following these rulings, some Member States amended their national legislation to align with CJEU interpretations.

Detention in the context of Articles 12 and 26 of FD EAW and Article 6 of the CFR

Article 12 of FD EAW concerns keeping the arrested person in detention and complements Article 26 of FD EAW, which provides for the deduction of the period of detention served in the executing State. These provisions are also linked to Article 6 of the CFR, on the right to liberty and security. Detention has been discussed by the CJEU in multiple cases clarifying the boundaries of lawful detention in the context of the EAW.

List of judgments:

1. Judgment of the Court of Justice of 16 July 2015, *Minister for Justice and Equality v Francis Lanigan*, C-237/155, Request for a preliminary ruling from the *High Court of Ireland*, ECLI:EU:C:2015:474
2. Judgment of the Court of Justice of 8 December 2022, *CJ*, C-492/22, Request for a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2022:964
3. Judgment of the Court of Justice of 28 July 2016, *JZ v Prokuratura Rejonowa Łódź – Śródmieście*, C-294/16, Request for a preliminary ruling from *the Sąd Rejonowy dla Łodzi - Śródmieścia w Łodzi*, ECLI:EU:C:2016:610

The first three cases involve **Article 12 of FD EAW**, considered in light of Article 6 of the CFR. Article 12 provides that a requested person may be kept in detention following their arrest or provisionally released in accordance with the law of the executing State, provided that all necessary steps are taken to prevent the person from absconding.

Case **C-237/15**, ***Lanigan,*** was submitted to the CJEU by the High Court of Ireland in the context of the execution in Ireland of an EAW issued by the Magistrates' Courts in Dungannon (Northern Ireland). The CJEU held that Article 12, in conjunction with Article 17 of FD EAW and Article 6 of the CFR, allows the holding of the requested person in custody, as per the law of the executing State, even if it exceeds the time limits provided in Article 17 of the FD, as long as the duration is not excessive in light of the characteristics of the procedure followed in the case in the main proceedings, which shall be determined by the national court. If the executing judicial authority decides to bring the requested person's custody to an end, that authority must attach to the person's provisional release any necessary measures to prevent absconding and ensure that the material conditions necessary for their effective surrender remain fulfilled for as long as no final decision on the execution of the EAW has been taken. Ireland did not amend its legislation following the CJEU's judgment in *Lanigan*.

Case **C-492/22**, ***CJ,*** was submitted to the CJEU by the *Rechtbank Amsterdam* (District Court, Amsterdam, Netherlands) in the context of the execution in the Netherlands of an EAW by the *Sąd Okręgowy w Krakowie Wydział III karny* (Regional Court, Krakow (Criminal Division III), Poland). The CJEU held that Articles 12 and 24(1) of the FD, read in conjunction with Article 6 of the CFR, do not preclude a person subject to an EAW, whose surrender has been postponed for criminal prosecution instituted against them in the executing State, from being kept in detention on the basis of the EAW while the criminal prosecution is conducted. Only the Netherlands amended its legislation following the CJEU's judgment, specifically in relation to Article 23(5) of the FD.

The other case, *JZ*, focuses on **Article 26 of FD EAW,** which stipulates that the issuing State must deduct any detention time served under an EAW from the total sentence, with all detention details provided by the executing authority upon surrender.

Case **C-294/16**, ***JZ,*** was submitted to the CJEU by the *Sąd Rejonowy dla Łodzi — Śródmieścia w Łodzi* (Poland) concerning a request for the deduction from the total period of the custodial sentence of the period during which an individual was subjected by the executing State to electronic monitoring and a curfew. The CJEU held that these measures, in conjunction with the monitoring of the person by an electronic tag, an obligation to report to a police station at fixed times on a daily basis or several times a week, and a ban on applying for foreign travel documents, are not, in principle, having regard to the type, duration, effects and manner of implementation of those measures, so restrictive as to give rise to a deprivation of liberty comparable to that arising from imprisonment and thus to be classified as 'detention', which it is nevertheless for the referring court to ascertain. Poland did not amend its legislation following the CJEU's judgment.

In conclusion, the CJEU's jurisprudence on Articles 12 and 26 of FD EAW, as well as Article 6 of the CFR, has clarified for both issuing and executing judicial authorities the conditions and limitations of detention under the FD EAW,

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ensuring a balance between judicial cooperation and the protection of fundamental rights. Only one Member State party to the case amended its national legislation to align with the CJEU ruling.

Double criminality in the context of Articles 2(2), 2(4) and 4(1)

Articles 2(2), 2(4) and 4(1) of FD EAW address double criminality. Article 2(2) refers to an exception to the double criminality rule for a list of 32 specific offences if they are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years. Article 2(4) refers to the application of dual criminality to those cases that fall outside of the scope of Article 2(2). Article 4(1) provides an optional ground for refusal for executing judicial authorities if double criminality is not met under Article 2(4). CJEU landmark rulings have interpreted the framework of double criminality, which has previously caused issues under the EAW framework.

List of judgments:

1. Judgment of the Court of Justice of 3 May 2007, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, C-303/05, Request for a preliminary ruling from the *Arbitragehof*, ECLI:EU:C:2007:261
2. Order of the Court of Justice of 25 September 2015, *Openbaar Ministerie v. A.*, C-463/15, Request for a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2015:634
3. Judgment of the Court of Justice of 3 March 2020, *Procureur-generaal v X*, C-717/18, Request for a preliminary ruling from the *Hof van beroep te Gent*, ECLI:EU:C:2020:142
4. Judgment of the Court of Justice of 14 July 2022, *Procureur général près la cour d'appel d'Angers*, C-168/21, Request for a preliminary ruling from the *Cour de cassation*, ECLI:EU:C:2022:558

All the cases concerned involve **Article 2 of FD EAW** regarding the scope of the offences that can give rise to surrender under an EAW. Both cases *A* and *Procureur général près la cour d'appel d'Anger* also concern **Article 4(1) of FD EAW** on the executing judicial authority's power to refuse to execute an EAW if the act is not an offence under the executing State's law, except in cases involving taxes, duties, customs, or exchange where differing laws do not justify refusal.

Case **C-303/05**, ***Advocaten voor de Wereld,*** was the first case ever brought before the CJEU on the EAW. It was submitted by the Belgian *Arbitragehof* (Court of Arbitration) seeking the annulment of the Belgian Law of 19 December 2003 on the EAW. The CJEU held that there was no factor undermining the validity of the FD EAW, affirming that the Council had discretion in selecting the FD. It upheld that the list of offences in Article 2(2) is among those whose seriousness, in terms of adversely affecting public order and public safety, justifies dispensing with the verification of double criminality. Following the CJEU judgment, Belgium did not amend its national legislation.

Case **C-463/15**, ***A,*** was submitted to the CJEU by the *Rechtbank Amsterdam* (District Court, Amsterdam, the Netherlands) concerning the execution in the Netherlands of an EAW issued in Belgium. The CJEU held that Articles 2(4) and

framework. Despite these rulings, only one Member State amended its national legislation following the CJEU judgment.

Scrutiny of the right to an effective remedy and a fair trial under Article 47

The right to an effective remedy and a fair trial under Article 47 of the CFR is important in the context of the FD EAW, as it focuses on the interplay between the principles of mutual trust and recognition underpinning the EAW mechanism and the fundamental rights enshrined in EU law. The CJEU has provided many important rulings concerning this interplay.

List of judgments:

1. Judgment of the Court of Justice of 29 January 2013, *Ciprian Vasile Radu*, C-396/11, Request for a preliminary ruling from the *Curtea de Apel Constanţa*, ECLI:EU:C:2013:39
2. Judgment of the Court of Justice of 25 July 2018, *LM*, C-216/18, Request for a preliminary ruling from the *High Court of Ireland*, ECLI:EU:C:2018:586
3. Judgment of the Court of Justice of 17 December 2020, *L and P.*, C-354/20 and C-412/20, Requests for a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2020:1033
4. Judgment of the Court of Justice of 22 February 2022, *X and Y*, C-562/21 and C-563/21, Requests for a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2022:100
5. Order of the Court of Justice of 12 July 2022, *WO and JL*, C-480/21, Request for a preliminary ruling from the *Supreme Court of Ireland*, ECLI:EU:C:2022:592
6. Judgment of the Court of Justice of 31 January 2023, *Puig Gordi and Others*, C-158/21, Request for a preliminary ruling from the *Tribunal Supremo*, ECLI:EU:C:2023:57

Case **C-396/11**, ***Radu,*** was submitted to the CJEU by the *Curtea de Apel Constanţa* (Court of Appeal, Constanta, Romania) relating to the execution in Romania of four EAWs issued by the German authorities. The CJEU held that the executing judicial authorities cannot refuse to execute an EAW on the ground that 'the requested person was not heard in the Member State before that arrest warrant was issued'. Neither Germany nor Romania amended their national legislation to implement these findings.

Case **C-216/18**, ***LM***, was submitted to the CJEU by the High Court of Ireland in connection with the execution in Ireland of EAWs issued by Polish courts. The CJEU held that Article 1(3) of the FD must be interpreted as meaning that where the executing judicial authority has to decide whether a person for whom an EAW is issued has material indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by Article 47 of the CFR, on account of systemic or generalised deficiencies concerning the independence of the issuing State's judiciary, that authority must determine, specifically and precisely, whether, having regard to their situation, as well as to the nature of the offence for which they are being prosecuted and the factual context that form the basis of the EAW, and in the light of the information provided by the issuing State pursuant to Article 15(2) of the FD, there are substantial grounds for believing that that person will run such a risk if they are surrendered to that State. Following the CJEU's judgment, neither Poland nor Ireland amended their national legislation to implement the findings.

Joined Cases **C-354/20** and **C-412/20**, ***L and P,*** were submitted to the CJEU by the *Rechtbank Amsterdam* (District Court, Amsterdam, Netherlands) concerning the execution of EAWs issued by the Polish authorities. The CJEU held that Articles 6(1) and 1(3) of FD EAW must be interpreted as meaning that where the executing judicial authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing State, which existed at the time of issue of that warrant or which arose after that issue, that authority cannot deny the status of 'issuing judicial authority' to the court that issued that arrest warrant and cannot presume that there are substantial grounds for believing that that person will, if they are surrendered to that Member State, run a real risk of breach of their fundamental right to a fair trial, guaranteed by Article 47(2) of the CFR, without carrying out a specific and precise verification which takes account of, inter alia, their personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled. The Netherlands amended its national legislation to implement these findings, while Poland did not.

Joined Cases **C-562/21** and **C-563/21**, **X and Y,** were submitted to the CJEU by the *Rechtbank Amsterdam* (District Court, Amsterdam, Netherlands) concerning the execution of two EAWs issued by Polish authorities.The CJEU held that Articles 1(2) and (3) of FD EAW must be interpreted as meaning that where the executing judicial authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing State, in particular as regards the procedure for the appointment of the members of the judiciary, that authority may refuse to surrender that person in the following two circumstances:

- In the context of an EAW issued to execute a custodial sentence or detention order, only if that authority finds that, in the particular circumstances of the case, there are substantial grounds to believe that there has been a breach of that person's fundamental right to a fair trial before an independent and impartial tribunal previously established by law;
- In the context of an EAW issued to conduct a criminal prosecution, only if that authority finds that, in the particular circumstances of that case, there are substantial grounds for believing that the factual context surrounding that EAW or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings in respect of that person.

Neither Poland nor the Netherlands amended their national legislation following the CJEU's findings.

Case **C-480/21**, ***W O and J L,*** was submitted to the CJEU by the Supreme Court of Ireland in connection with the execution in Ireland of five EAWs issued by Polish authorities. The CJEU held that Articles 1(2) and (3) of FD EAW must be interpreted to mean that where the executing judicial authority has evidence of systemic or general deficiencies concerning the independence of the issuing

State's judiciary, particularly regarding judicial appointments, that authority may refuse to surrender that person in the following circumstances:

- In the context of an EAW issued to execute a custodial sentence or detention order, only if that authority finds that, in the particular circumstances of the case, there are substantial grounds for believing that there has been a breach of that person's fundamental right before an independent and impartial tribunal previously established by law;
- In the context of an EAW issued to conduct a criminal prosecution, only if that authority finds that, in the particular circumstances of the case, there are substantial grounds for believing that.

Neither Poland nor Ireland amended their national legislation to implement the findings.

Finally, the case of ***Puig Gordi*** was submitted to the CJEU by the *Tribunal Supremo* (Supreme Court, Spain) in the context of criminal proceedings brought by Spain. The CJEU held that an executing judicial authority cannot refuse to execute an EAW on the basis of a ground for non-execution that arises not from the FD EAW, but solely from national law. However, that judicial authority may apply a national provision that refuses the execution of an EAW where the execution would infringe EU fundamental rights, provided that the scope of that provision does not go beyond the scope of Article 1(3) of the FD, as interpreted by the CJEU. Under Articles 1(1), 1(2), and 6(1), the executing authority may not verify whether an EAW has been issued by a judicial authority which had jurisdiction for that purpose and refuse to execute that EAW where it considers that this is not the case. Under Article 1(3), read in conjunction with Article 47(2) of the CFR, the executing judicial authority may not refuse to execute that warrant on the ground that that person is at risk, following their surrender to the issuing State, of being tried by a court which lacks jurisdiction for that purpose unless:

- That judicial authority has objective, reliable, specific and properly updated information showing that there are systemic or generalised deficiencies in the operation of the judicial system of the issuing State or deficiencies affecting the judicial protection of an objectively identifiable group of persons to which the person concerned belongs, which means that the individuals concerned are generally deprived in that State of an effective legal remedy enabling a review of the jurisdiction of the criminal court called upon to try them;
- That judicial authority finds that in the particular circumstances of the case, there are substantial grounds for believing that the court which is likely to hear the proceedings to which that person will be subject in the issuing State manifestly lacks jurisdiction for that purpose.

The fact that the person concerned was able, before the courts of the issuing State, to rely on their fundamental rights to challenge the issuing judicial authority's jurisdiction and the EAW warrant issued for them is of no decisive importance here.

Article 1(3) of the FD, read in conjunction with Article 47(2) of the CFR must be interpreted as meaning that in a situation where a person for whom an EAW has

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been issued alleges that they are at risk of being tried by a court lacking jurisdiction for that purpose, the existence of a report by the Working Group on Arbitrary Detention which does not directly relate to that person's situation may not be justification for the executing judicial authority to refuse to execute that EAW, but such a report may be considered by that judicial authority to assess whether there are systemic or generalised deficiencies in the judicial system of that State or deficiencies affecting the judicial protection of an objectively identifiable group of persons to which that person belongs. Finally, the FD does not preclude the issuing of several successive EAWs against a requested person to obtain their surrender by a Member State after the execution of a first EAW concerning that person has been refused by that Member State, provided that the execution of a new EAW does not result in an infringement of Article 1(3) of the FD and the issuing of the latter EAW is proportionate. Following the CJEU's judgment, neither Spain nor Belgium amended their national legislation.

In conclusion, CJEU jurisprudence has significantly clarified the application of the right to an effective remedy and a fair trial under Article 47 of the CFR within the FD EAW. The CJEU's rulings emphasise the balance between upholding mutual trust and judicial cooperation across Member States and ensuring the protection of fundamental rights, particularly in cases involving systemic or generalised deficiencies in the judiciary of the issuing State.

Prohibition of inhuman or degrading treatment under Article 4 of the CFR

The prohibition of inhuman or degrading treatment under Article 4 of the CFR is an absolute right that cannot be limited or infringed under any circumstances. In landmark rulings, the CJEU has established criteria for assessing EAW requests when prison conditions in the issuing state may violate Article 4 of the CFR.

List of judgments:

1. Judgment of the Court of Justice of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, C-404/15 and C-659/15, Requests for a preliminary ruling from the *Hanseatisches Oberlandesgericht in Bremen*, ECLI:EU:C:2016:198
2. Judgment of the Court of Justice of 25 July 2018, *ML*, C-220/18, Request for a preliminary ruling from the *Hanseatisches Oberlandesgericht in Bremen*, ECLI:EU:C:2018:589
3. Judgment of the Court of Justice of 15 October 2019, *Dumitru-Tudor Dorobantu*, C-128/18, Request for a preliminary ruling from the *Hanseatisches Oberlandesgericht Hamburg*, ECLI:EU:C:2019:857

Joined Cases **C-404/15 and C-659/15**, ***Aranayosi and Căldăraru,*** were submitted to the CJEU by the *Hanseatisches Oberlandesgericht Bremen* (Higher Regional Court of Bremen, Germany) relating to the execution of an EAW issued in respect of a Hungarian and a Romanian national. The CJEU held that where there is objective, reliable, specific and properly updated evidence on detention conditions in the issuing State that shows deficiencies, the executing judicial authority must determine, specifically and precisely, whether there is a real risk of inhuman or degrading treatment. A two-step assessment must be made:

- There must be a general risk. The executing authority must make its assessment on the basis of objective, reliable, specific and properly updated information. The deficiencies may be systemic or generalised

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or may affect certain groups of people or certain places of detention. Evidence of a real risk to general detention conditions in the issuing State cannot, in itself, lead to a refusal to execute the EAW.

- There must be a specific risk for the individual. If there is evidence available of a real risk to general detention conditions, the executing authority must determine that there are substantial grounds to believe that the requested person, if surrendered, will risk being subject to inhuman or degrading treatment. The executing authority must request all necessary supplementary information on the detention conditions from the issuing judicial authority. For this request, the issuing authority can set a timeline considering the time required to collect the information and the time limits in Article 17 of FD EAW.

The executing judicial authority should then decide to execute the warrant, in the case of no real risk, or postpone the execution, if there is a real risk. If the existence of a real risk cannot be discounted within a reasonable time, it must consider whether to bring the surrender procedure to an end. Following the CJEU's judgment in *Aranyosi and Căldăraru*, Hungary amended its national law to implement the findings, while Romania and Germany did not.

Case **C-220/18**, ***ML,*** was submitted to the CJEU by the *Hanseatisches Oberlandesgericht Bremen* (Higher Regional Court of Bremen, Germany) relating to the execution of an EAW issued in respect of a Hungarian national. The CJEU went one step further than in *Aranyosi and Căldăraru* by highlighting that the accuracy of the evidence of deficiencies in the detention conditions must be verified by the referring court, considering all available data:

- The executing judicial authority cannot dismiss the risk of inhuman or degrading treatment simply because the person can challenge detention conditions in the issuing State;
- The executing judicial authority is required to assess only the detention conditions in the prisons in which, according to the available information, that person will be detained, including on a temporary or transitional basis;
- The executing judicial authority must assess only the actual and precise detention conditions that are relevant for determining whether that person will be exposed to a 'real risk';
- The executing judicial authority may consider information from the issuing State's authorities, including assurances that the individual will not face inhuman or degrading treatment.

Neither Hungary nor Germany amended their national legislation to implement these findings.

Case **C-128/18**, ***Dorobantu,*** was submitted by the *Hanseatisches Oberlandesgericht Hamburg* (Higher Regional Court of Hamburg, Germany) relating to the execution of an EAW issued in respect of a Romanian national. The CJEU clarified its case-law on the conditions under which an EAW can be refused because of standards of detention in the issuing State. The CJEU held that the executing judicial authority must consider all relevant physical aspects of the conditions of detention in the prison where the person is intended to be

detained, such as personal space available to each detainee in a cell in that prison, sanitary conditions, and the extent of the detainee's freedom of movement within the prison (considered in light of the standards in Article 3 of the ECHR). This assessment is not limited to reviewing obvious inadequacies. In the assessment, the executing judicial authority must request necessary information from the issuing judicial authority and must rely on the assurances given by the authority, in the absence of any specific indications that the detention conditions infringe Article 4 of the CFR. It held that the executing authority cannot rule out the existence of a real risk of inhuman or degrading treatment merely because the person concerned has a legal remedy in the issuing State that allows them to challenge the conditions of their detention, or the issuing State has legislative or structural measures intended to reinforce the monitoring of detention conditions. Finally, it held that if the executing authority has substantial grounds for believing that that there is a real risk of inhuman or degrading treatment, it cannot be outweighed by considerations of judicial cooperation or mutual trust, and in such cases, the surrender must be refused. Following the CJEU's judgment, neither Germany nor Romania amended their national legislation.

In conclusion, the CJEU's jurisprudence has offered guidance for executing judicial authorities when executing EAWs in cases involving a suspected violation of Article 4 of the CFR. It ensures that judicial cooperation and mutual trust still respect an individual's absolute rights. Following these judgments, it seems that most Member States did not amend their national legislation.

In absentia in the context of Article 4a(1)

The interpretation of Article 4a(1) of FD EAW is pivotal to ensuring the balance between mutual recognition and the protection of fundamental rights under EU law. In landmark rulings, the CJEU has clarified the scope of 'trial resulting in the decision', the obligations of judicial authorities, and the interplay between EU law and national constitutional safeguards.

List of judgments:

1. Judgment of the Court of Justice of 26 February 2013, *Stefano Melloni v Ministerio Fiscal*, C-399/11, Request from a preliminary ruling from the *Tribunal Constitucional*, ECLI:EU:C:2013:107
2. Judgment of the Court of Justice of 24 May 2016, *Paweł Dworzecki*, C-108/16, Request for a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2016:346
3. Judgment of the Court of Justice of 10 August 2017, *Openbaar Ministerie v Tadas Tupikas*, C-270/17, Request for a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2017:628
4. Judgment of the Court of Justice of 10 August 2017, *Sławomir Andrzej Zdziaszek*, C-271/17, Request for a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2017:629
5. Judgment of the Court of Justice of 22 December 2017, *Samet Ardic*, C-571/17, Request for a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2017:1026
6. Judgment of the Court of Justice of 17 December 2020, *TR v Generalstaatsanwaltschaft Hamburg*, C-416/20, Request for a preliminary ruling from the *Hanseatisches Oberlandesgericht Hamburg*, ECLI:EU:C:2020:1042
7. Judgment of the Court of Justice of 23 March 2023, *Minister for Justice and Equality (Levee du sursis)*, C-514/21 and C-515/21, Request for a preliminary ruling from the *Court of Appeal of Ireland*, ECLI:EU:C:2023:235

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Case **C-399/11**, ***Melloni,*** was submitted to the CJEU by the *Tribunal Constitucional* (Supreme Court, Spain) concerning the execution of an EAW issued by the Italian authorities. The CJEU confirmed that Article 4a(1) is compatible with the requirements under Articles 47 and 48(2) of the CFR. The rights included in Articles 47 and 48(2) are not absolute, despite being essential components of the right to a fair trial, and the accused can waive these rights provided that it is established in an unequivocal manner that it is accompanied by minimum safeguards commensurate to its importance and that it does not run counter to any important public interest. Article 53 of the CFR does not allow that the surrender of a person convicted *in absentia* is made conditional on a national constitutional rule that requires the conviction to be open to review in the issuing State. Member States can apply higher national fundamental rights standards, but only if the level of protection is provided for by the CFR and the primacy, unity, and effectiveness of EU law are not compromised. Neither Italy nor Spain amended their legislation in light of the *Melloni* judgment.

Case **C-108/16**, ***Dworzecki,*** was submitted to the CJEU by the *Rechtbank Amsterdam* (District Court, Amsterdam, Netherlands) in the context of proceedings relating to the execution in the Netherlands of an EAW issued by the Polish authorities. The CJEU held that Article 4a(1)(a)(i) of FD EAW must be interpreted to mean that the expressions 'summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision' and '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' are autonomous concepts of EU law. A summons, such as the one at issue in the main proceedings – served not directly on the individual but handed to an adult resident of the household who undertook to pass it on, where it is unclear from the EAW whether and, if so, when the adult delivered the summons to the person concerned – does not satisfy the conditions outlined in that provision. Following the judgment, both the Netherlands and Poland amended their legislation.

Case **C-270/17**, ***Tupikas,*** was submitted to the CJEU by the *Rechtbank Amsterdam* (District Court, Amsterdam, Netherlands) in connection with the execution in the Netherlands of an EAW issued by the Lithuanian authorities. The CJEU held that where the issuing State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, at least one of which has been handed down *in absentia*, the concept of 'trial resulting in the decision' within the meaning of Article 4a(1) of the FD, must be interpreted as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case. An appeal proceeding, such as that at issue in *Tupikas*, in principle falls within that concept, but it is up to the referring court to satisfy itself that it has the aforementioned characteristics. Following the CJEU's judgment, neither the Netherlands nor Poland amended their national legislation.

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Joined Cases **C-514/21** and **C-515/21**, ***Minister for Justice and Equality (Levée du sursis),*** were submitted to the CJEU by the Irish Court of Appeal in the context of the execution in Ireland of two EAWs issued by the Hungarian and Polish authorities to execute custodial sentences. The CJEU provided that Article 4a(1) of FD EAW, read in conjunction with Articles 47 and 48 of the CFR, where the suspension of a custodial sentence is revoked, following a new criminal conviction, and an EAW for the purpose of serving that sentence is issued, that criminal conviction, hand down *in absentia* does constitute a decision under this provision. That is not the case for the decision revoking the suspension of that sentence. Article 4a(1) of the FD also authorises the executing judicial authority to refuse to surrender the requested person to the issuing State where it is apparent that the proceedings resulting in a second criminal conviction, which was decisive for the issuing of the EAW, took place *in absentia*, unless the EAW contains, in respect of those proceedings, one of the statements referred to in subparagraphs (a) to (d) of that provision. The FD EAW, interpreted in the context of Articles 47 and 48(2) of the CFR, does not allow the executing judicial authority to refuse the surrender of the requested person to the issuing State on the basis that the proceedings leading to the revocation of the suspended custodial sentence for the execution of which the EW was issued occurred *in absentia*. Nor does it permit making the surrender conditional upon a guarantee that the individual will be entitled to a retrial or an appeal in the issuing State, allowing for the re-examination of such revocation decision or the second criminal conviction handed down *in absentia*, which proves decisive for the issuance of the warrant. None of the Member States – Ireland, Hungary, Poland – amended their national legislation following the CJEU judgment.

In conclusion, the CJEU's jurisprudence on Article 4a(1) of FD EAW has provided essential clarity for judicial authorities on the execution of EAWs, particularly in cases involving *in absentia* proceedings and revocation decisions. It reinforces the balance between mutual recognition and the protection of fundamental rights under the CFR. Following these judgments, it seems that many Member States did not amend their national legislation.

Ne bis in idem

The principle of *ne bis in idem*, as applied in the context of FD EAW, plays a critical role in ensuring that individuals are not prosecuted or punished multiple times for the same criminal offence. The CJEU has addressed various aspects of this principle in a series of landmark rulings, clarifying the scope of 'same acts', the conditions under which EAW execution may be refused, and the relationship between EU law and national legal frameworks.

List of judgments:

1. Judgment of the Court of Justice of 16 November 2010, *Gaetano Mantello*, C-261/09, Request for a preliminary ruling from the *Oberlandesgericht Stuttgart*, ECLI:EU:C:2010:683
2. Judgment of the Court of Justice of 21 September 2023, *Juan*, C-164/22, Request for a preliminary ruling from the *Audiencia Nacional*, ECLI:EU:C:2023:684
3. Judgment of the Court of Justice of 25 July 2018, *AY*, C-268/17, Request for a preliminary ruling from the *Županijski Sud u Zagrebu*, ECLI:EU:C:2018:602
4. Judgment of the Court of Justice of 29 April 2021, *X*, C-665/20, Request for a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2021:339
5. Judgment of the Court of Justice of 16 December 2021, *Criminal proceedings against AB and others*, C-203/20, Request for a preliminary ruling from the *Okresný súd Bratislava III*, ECLI:EU:C:2021:1016.

The principle of *ne bis in idem* appears in CJEU case-law concerning various articles of the FD EAW. The first two cases focus on **Article 3(2) of FD EAW** concerning the grounds for mandatory non-execution of the EAW 'if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State'.

Case **C-261/09**, ***Mantello,*** was submitted to the CJEU by the *Oberlandesgericht Stuttgart* (Higher Regional Court of Stuttgart, Germany) in the context of the execution in Germany of an EAW relating to criminal proceedings instituted by the Italian authorities. The CJEU held that the concept of 'same acts' in Article 3(2) of FD EAW is an autonomous concept of EU law. The interpretation of 'same acts' cannot be left to the discretion of national judicial authorities based on national law but needs uniform application of EU law. In circumstances where in response to a request for information within the meaning of Article 15(2) of the FD made by the executing authority, applying its national law and in compliance with the requirements deriving from the concept of 'same acts' as enshrined in Article 3(2) of the FD, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referenced in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referenced in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Article 3(2) of FD EAW. Neither Germany nor Italy amended their national legislation to implement the CJEU findings.

Case **C-164/22, *Juan,*** was submitted to the CJEU by the *Audencia Nacional* (National High Court, Spain) in connection with the execution in Spain of an EAW issued by the Portuguese authorities. The CJEU held that Article 3(2) of FD EAW prevents the execution of an EAW issued by a Member State in a situation where the requested person has already been finally judged and is serving a prison sentence in another Member State for the offence, provided that that person is being prosecuted in the issuing State in respect of the same acts, without it being necessary to establish the existence of the 'same acts, to consider the classification of the offences in question under the law of the executing State.

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Following the CJEU's judgment, neither Spain nor Portugal amended their national legislation.

The following cases on the principle of *ne bis in idem* concern **Article 4 of FD EAW,** on optional grounds for refusal.

Case **C-268/17**, ***AY,*** was submitted by the *Županijski Sud u Zagrebu* (County Court, Zagreb, Croatia) concerning the issue of an EAW against a Hungarian national by the Croatian court. The CJEU held that Article 1(2) of FD EAW requires the judicial authority of the executing State to decide on any EAW forwarded to it, even if a previous decision has already been made regarding the same person and acts, and the second warrant is issued due to the indictment of the requested person in the issuing State. Articles 3(2) and 4(3) of the FD mean that a decision to terminate an investigation where the requested person was only interviewed as a witness and no criminal charges were brought cannot be used to refuse the execution of the EAW under either provision. Neither Hungary nor Croatia amended their national legislation to implement these findings.

Case **C-665/20, *X (Ne bis in idem),*** was submitted to the CJEU by the *Rechtbank Amsterdam* (District Court, Amsterdam, Netherlands) in the context of the execution in the Netherlands of an EAW issued by the German authorities. The CJEU clarified that under Article 4(5) of FD EAW, where a Member State chooses to transpose that provision into its national law, the executing judicial authority must have a margin of discretion to determine whether it is appropriate to refuse to execute an EAW. Under Article 3(2) and Article 4(5) of FD EAW, the concept of 'same acts' must be interpreted uniformly. Article 4(5) of FD EAW, which makes the application of the ground for optional non-execution in that provision subject to the condition that where there has been a sentence the sentence has been served, is currently being served, or may no longer be executed under sentencing country's law, must be interpreted as meaning that that condition is satisfied where the requested person has been finally sentenced for the same acts to a term of imprisonment, of which part has been served in the third State in which the sentence was handed down, whilst the remainder of that sentence has been remitted by a non-judicial authority of that State, as part of a general leniency measure that also applies to persons convicted of serious acts and is not based on objective criminal policy considerations. It is for the executing judicial authority, when exercising its discretion, to strike a balance between preventing impunity and combating crime and ensuring legal certainty for the person concerned. Neither the Netherlands nor Germany amended their national legislation to implement these findings.

The final case concerns **Article 50 of the CFR** and the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

Case **C-203/20**, ***AB,*** was submitted to the CJEU by the *Okresný súd Bratislava III* (District Court, Bratislava III, Slovakia) concerning criminal proceedings brought against numerous accused persons. The CJEU held that Article 50 of the

CFR does not preclude the issuing of an EAW against a person who was subject to a criminal prosecution that was initially discontinued by a final judicial decision adopted based on an amnesty, and resumed following the adoption of a law revoking that amnesty and setting aside that judicial decision, if that decision was adopted before any determination as to the criminal liability of the person concerned. Following the CJEU's judgment, Slovakia did not amend its national legislation.

In conclusion, the CJEU's rulings on the principle of *ne bis in idem* within FD EAW have provided clarification on the interpretation of 'same acts' and the conditions under which an EAW may be refused. These decisions strengthen the balance between mutual recognition and the protection of fundamental rights under EU law. Many Member States have yet to amend their national legislation in light of these findings.

Staying in, national, or resident in a Member State in the context of Article 4(6)

As per Article 4(6) of FD EAW, one ground for optional refusal is where the requested person is staying in or is a national or resident of the executing State, and that State is to execute the sentence or detention order under their national law. The CJEU addressed this optional ground in various judgments between 2008 and 2023.

List of judgments:

1. Judgment of the Court of Justice of 17 July 2008, *Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozłowski*, C-66/08,Request for a preliminary ruling from the *Oberlandesgericht Stuttgart*, ECLI:EU:C:2008:437
2. Judgment of the Court of Justice of 6 October 2009, *Dominic Wolzenburg*, C-123/08,Request for a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2009:616
3. Judgment of the Court of Justice of 5 September 2012, *João Pedro Lopes Da Silva Jorge*, C-42/11, Request for a preliminary ruling from the *Cour d'appel d'Amiens*, ECLI:EU:C:2012:517
4. Judgment of the Court of Justice of 29 June 2017, *Daniel Adam Popławski*, C-579/15, Request for a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2017:503
5. Judgment of the Court of Justice of 13 December 2018, *Ministère public v Marin-Simion Sut*, C-514/17, Request for a preliminary ruling from the *Cour d'appel de Liège*, ECLI:EU:C:2018:1016
6. Judgment of the Court of Justice of 24 June 2019, *Criminal proceedings against Daniel Adam Popławski*, C-573/17, Request for a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2019:530
7. Judgment of 6 June 2023, *O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)*, C-700/21, Request for a preliminary ruling from the *Corte costituzionale*, ECLI:EU:C:2023:444

Case C-66/08, ***Kozlowski,*** was submitted to the CJEU by the *Oberlandesgericht Stuttgart* (Higher Regional Court, Stuttgart, Germany) concerning the execution in Germany of an EAW issued by the Polish authorities against a Polish national. The CJEU held that Article 4(6) of FD EAW is to be interpreted to the effect that a requested person is 'resident' in the executing State when the person has establishd their actual place of residence there and is 'staying' there when,

following a stable period of presence in that Member State, the person has acquired connections with that Member State which are of a similar degree to those resulting from residence. Subsequently, to ascertain whether there are connections between the requested person and the executing State, which lead to the conclusion that that person is covered by the term 'staying' within Article 4(6), it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of that person, including the length, nature and conditions of their presence and their family and economic connections with the executing State. Neither Germany nor Poland amended their national legislation to implement these findings.

Case **C-123/08**, ***Wolzenburg***, was submitted to the CJEU by the *Rechtbank Amsterdam* (District Court, Amsterdam, Netherlands) concerning the execution in the Netherlands of an EAW issued by the German authorities concerning a German national. The CJEU held that national legislation that applies the ground included in Article 4(6) of FD EAW automatically to its own nationals, while requiring lawful residence for a continuous period of five years for non-nationals, is compatible with the principle of non-discrimination on grounds of nationality. However, a national legislation that makes the application of Article 4(6) of FD EAW subject to administrative formalities, such as residence of indefinite duration, is not compatible. This is because Article 19 of Directive 2004/38/EU does not require EU citizens who have acquired a right of permanent residence in another Member State to hold a residence permit of indefinite duration, and a residence permit has only declaratory and probative force and does not give any right. Following the CJEU judgment, the Netherlands amended its national legislation to introduce a new system for assessing whether someone qualifies as a 'resident', while Germany did not.

Case **C-42/11**, ***Lopes Da Silva Jorge***, was submitted to the CJEU by the cour d'appel d'Amiens (Court of Appeal, Amiens, France) in the context of the execution in France of an EAW issued by the Portuguese authorities concerning a Portuguese national resident in France. The CJEU held that Article 4(6) of FD EAW must be interpreted as meaning that although a Member State limits the situations in which an executing judicial authority may refuse to surrender a person who falls within the scope of that provision, it cannot automatically and absolutely exclude from its scope the nationals of other Member States staying or resident in its territory irrespective of their connections with it. The national court is required, taking into consideration the whole body of domestic law and applying the interpretive methods recognised by it, as far as possible, in light of the wording and purpose of the FD EAW, to ensure that the FD EAW is fully effective and achieves an outcome consistent with its objective. France amended its national legislation to extend the rule to those who are continuously resident in France, while Portugal did not.

Case **C-579/15**, ***Poplawski I***, was submitted to the CJEU by the *Rechtbank Amsterdam* (District Court, Amsterdam, Netherlands) in connection with the execution of an EAW in the Netherlands issued by Poland against a Polish

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law enshrined in the CFR, precludes national transposing law that excludes absolutely and automatically any third-country national staying or resident in the territory of that Member State from benefiting from the ground for optional non-execution, without the executing judicial authority being able to assess the individual's connections with that Member State. Additionally, Article 4(6) must be interpreted as meaning that in order to assess whether it is appropriate to refuse the execution of an EAW issued against a third-country national who is staying or resident in the executing State, the excuting judicial authority must assess all of the specific elements that characterise the person's specific situation which are capable of showing that there are, between the person and the executing State, connections demonstrating that they are sufficienctly integrated into that State such that the execution in that Member State would contribute to the individual's social rehabilitation after that sentence or detention order has been executed. The elements include their family, linguistic, cultural, social, and economic ties to the Member State, as well as the nature, duration, and conditions of their stay. Following the CJEU judgment, Italy amended its national legislation, while Romania did not.

In conclusion, the CJEU's rulings on Article 4(6) of FD EAW emphasise the need to assess the personal connections between the requested individual and the executing State, such as family, social, and economic ties, when considering whether to refuse the execution of an EAW. The CJEU consistently reinforces that Member States should not enact laws that automatically preclude surrender without considering the individual's links to the State in question. This approach ensures that proportionality and social rehabilitation are respected. The judgments indicate that national legislation should allow for a case-by-case assessment rather than imposing automatic refusals based on nationality or residence status. Many Member States have yet to amend their national legislation.

Speciality rule in the context of Article 27 of FD EAW

The speciality rule, as contained in Article 27, aims to protect the surrendered person from prosecution or serving a sentence which refers to facts committed prior to their surrender. In several rulings, the CJEU has clarified the application of the speciality rule in EAW proceedings.

List of judgments:

1. Judgment of the Court of Justice of 1 December 2008, *Criminal proceedings against Artur Leymann and Aleksei Pustovarov*, C-388/08, Request for a preliminary ruling from the *Korkein oikeus*, ECLI:EU:C:2008:669
2. Judgment of the Court of Justice of 24 September 2020, *Criminal proceedings against XC*, C-195/20, Request for a preliminary ruling from the *Bundesgerichtshof*, ECLI:EU:C:2020:749
3. Judgment of the Court of Justice of 26 October 2021, *HM and TZ*, C-428/21 and C -429/21, Request for a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2021:876

Case **C-388/08**, ***Leymann and Pustovarov,*** was submitted to the CJEU by the *Korkein oikeus* (Supreme Court, Finland) concerning criminal proceedings

brought in Finland pursuant to EAWs. The CJEU ruled that within the meaning of Article 27(2) of FD EAW, to establish whether the offence is considered as an 'other offence' than that for which a person was surrendered, it is necessary to assess whether the constituent elements of the offence, according to the description given by the issuing State are those in respect of which the person was surrendered and whether there is sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document. Modifications to the time, place, or type of offence are allowed, as long as they derive the evidence gathered in the course of proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence, and lead to grounds for non-execution under Articles 3 and 4 of FD EAW. In circumstances such as those in the main proceedings, a modification of the description of the offence concerning the kind of narcotics is not, of itself, to define an offence other than that for which the person was surrendered, consent must be requested, in accordance with Article 27(4) of FD EAW, and obtained if a penalty or a measure involving the deprivation of liberty is to be executed. The person surrendered can be prosecuted and sentenced for such an offence before that consent has been obtained, provided that no measure restricting liberty is applied during the prosecution or when judgment is given for that offence. The exception in Article 27(3)(c) does not preclude a measure restricting liberty from being imposed on the person surrendered before consent has been obtained where that restriction is lawful based on other charges which appear in the EAW. None of the Member States that were party to the case – Finland, Spain, the Netherlands – amended their national legislation to conform with these findings.

Case **C-195/20**, ***XC,*** was submitted to the CJEU by the *Bundesgerichtshof* (Federal Court of Justice, Germany) in relation to criminal proceedings against XC, who was sentenced in Germany to a custodial sentence committed in Portugal. The CJEU held that Article 27(2) and (3) of FD EAW must be interpreted as meaning that the speciality rule does not preclude a measure involving deprivation of liberty taken against a person subject to a first EAW based on a different offence to that which constituted the basis for the surrender under that EAW and before that offence, when that person's departure from the Member State that issued the first EAW was voluntary and they surrendered to that Member State under a second EAW issued after that departure to execute a custodial sentence, provided that, under the second EAW, the executing judicial authority of that Member State gave its consent to extending the prosecution to the offence which gave rise to that measure involving deprivation of liberty. Following the judgment, neither Germany nor Portugal amended their national legislation to reflect the findings of the CJEU.

Joined Cases **C-428/21** and **C-429/21**, ***HM and TZ***, were submitted to the CJEU by the *Rechtbank Amsterdam* (District Court, Amsterdam, Netherlands) in the context of the execution in the Netherlands of two EAWs by the Hungarian authorities concerning a third-country national and Belgian authorities concerning a Dutch national. The CJEU clarified that under Articles 27(3)(g), 27(4), and 28(3)

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of FD EAW, in light of Article 47 of the CFR, a person surrendered to the issuing judicial authority pursuant to an EAW is entitled to be heard by the executing judicial authority when the issuing authority receives a request for consent from the issuing judicial authority. The hearing can take place in the issuing State, provided that the issuing judicial authorities ensure that the person's right to be heard is exercised properly and effectively, and may be held without the direct participation of the executing judicial authority. However, the executing judicial authority must have sufficient information, including the position of the person concerned, to allow it, while respecting their rights of defence, to take a fully informed decision on the request for consent under Article 27(4) or 28(3) of FD EAW, and must, where appropriate, ask the issuing judicial authority to provide it, as a matter of urgency, with supplementary information. None of the Member States that were parties to the case – Belgium, the Netherlands, Hungary – amended their national legislation in light of these findings.

In conclusion, the CJEU's rulings on the speciality rule underscore its role in safeguarding individuals' rights within the EAW framework. These judgments clarify the scope of permissible modifications to the description of offences, the need for consent procedures when extending prosecutions or executing sentences, and the right of the surrendered person to be heard. However, there seems to be a lack of corresponding amendments to national legislation by the Member States.

Conclusion

The CJEU jurisprudence on the FD EAW represents a cornerstone of judicial cooperation but also highlights the significant challenges faced by Member States in ensuring its consistent and effective implementation. With 114 cases decided to date, this vast body of case-law underscores the frequent use of the FD EAW by the national authorities, as well as the difficulties of navigating its complex and evolving interpretations.

Preliminary rulings are often submitted to the CJEU for similar topics, which might show a lack of clarity in the FD EAW. This is especially the case in relation to how national authorities should interpret fundamental rights in light of the provisions of FD EAW (e.g. right to a fair trial, right to liberty and security, prohibition of inhuman or degrading treatment). Other topics that also recur interact often with fundamental rights topics, such as judgments *in absentia*, detention conditions, and the speciality rule. The 9th round of mutual evaluation established that Member States do not apply CJEU case-law on detention conditions, which requires a need for clarification at EU level. This could be the case for fundamental rights in general, based on the consistent applications for preliminary rulings.

The sheer volume of CJEU rulings, coupled with their technical depth, creates significant challenges for Member States. Many have not adapted their national legal frameworks and practices to align with these CJEU's judgments, which may

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risk delays, inconsistencies, or non-compliance. Even in cases where Member States have amended their national legislation, only those who are party to the case are expected to do so, which may result in one Member State applying the FD correctly and others still applying it incorrectly, undermining the principle of mutual trust. The 9th round of mutual evaluations highlighted these challenges, observing that Member States do not uniformly or consistently apply CJEU case-law and noting that national lawyers are not sufficiently aware of CJEU case-law in the field. These unresolved questions indicate that the guidance provided by the CJEU, while important, has not always been sufficient to achieve harmonisation or to address the root causes of disparities in national implementation.

Addressing these challenges may require coordinated action at both national and EU level. At national level, Member States could prioritise the timely implementation of CJEU rulings, as well as ensure their understanding of CJEU interpretations. At EU level, clarifications on how to interpret CJEU jurisprudence may be required via codification, supplementary instruments, or EU-wide guidance to promote uniform interpretation.

In conclusion, while CJEU jurisprudence has provided essential clarification and guidance, it presents challenges for Member States, highlighting the need for further action to ensure consistency, efficiency, and fairness. Clarifications to the vast body of case-law may make it easier for Member States to ensure their national legislation and practice is aligned with CJEU interpretations and thus improve judicial cooperation between Member States and the functioning of the FD EAW in general.

A3.2 Developments in CJEU case-law on FD TOP

List of judgments:

1. Judgment of the Court of Justice of 8 November 2016, *Atanas Ognyanov*, C-554/14, Request for a preliminary ruling from the *Sofiyski gradski sad*, ECLI:EU:C:2016:835
2. Judgment of the Court of Justice of 15 April 2021, *AV*, C-221/19, Request for a preliminary ruling from the *Sąd Okręgowy w Gdańsku*, ECLI:EU:C:2021:278
3. Judgment of the Court of Justice of 11 March 2020, *SF*, C-314/18, Request for a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2020:191
4. Judgment of the Court of Justice of 9 November 2023, *Staatsanwaltschaft Aachen*, C-819/21, Request for a preliminary ruling from the *Landgericht Aachen*, ECLI:EU:C:2023:841
5. Judgment of the Court of Justice of 11 January 2017, *Joszef Grundza*, C-289/15, Request for a preliminary ruling from the *Krajský súd v Prešove*, ECLI:EU:C:2017:4
6. Judgment of the Court of Justice of 25 January 2017, *Gerrit van Vemde*, C-582/15, Request for a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2017:37
7. Judgment of the Court of Justice of 24 June 2019, *Daniel Adam Popławski*, C-573/17, Request from a preliminary ruling from the *Rechtbank Amsterdam*, ECLI:EU:C:2019:530

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Case **C-544/14, *Ognyanov,*** focused on Articles **17(1) and (2) of FD TOP**. It was submitted by the *Sofiyski gradski sad* (Sofia City Court, Bulgaria) relating to the recognition of a judgment in a criminal case and the enforcement in Bulgaria of a custodial sentence imposed by a Danish court. The CJEU held that Article 17(1) and (2) of FD TOP precludes a national rule being interpreted in a way that permits the executing State to grant the sentenced person a reduction in sentence by reason of work they carried out during the period of their detention in the issuing State, although no such reduction was granted by the competent authorities of the issuing State, in accordance with its laws. It clarified that EU law requires national courts to take into consideration the whole body of national laws and to interpret them, as far as possible, in accordance with FD TOP to achieve its objective, and to disapply, if needed and on its own authority, the interpretation adopted by the national court of last resort, if that interpretation is not compatible with EU law. Following the CJEU judgment, neither Bulgaria nor Denmark amended their national legislation.

The CJEU again had the chance to interpret Articles 17(1) and (2) in Case **C-221/19, *AV,*** along with **Articles 8(2)-(4) and 19 FD TOP*.*** This case was submitted by the *Sąd Okręgowy w Gdańsku* (Regional Court, Gdańsk, Poland) concerning the delivery of an aggregate sentence, covering a sentence involving deprivation of liberty delivered by a German court, recognised for its enforcement in Poland. The case considered both FD TOP and FD Previous Convictions (for the part of the judgment on FD Previous Convictions, see below). The CJEU held that the combined provisions of Article 8(2) to (4), Article 17(1) and (2) and Article 19 of FD TOP allow the issue of an aggregate sentence to include previous sentences handed down against the person concerned in the Member State in which that aggregate sentence is delivered, and also sentences handed down against them in another Member State, which are enforced under FD TOP in the first Member State. Such an aggregate sentence, however, cannot lead to an adaptation of the duration or nature of those sentences, which goes beyond the strict limits laid down in Article 8(2) to (4). Nor must it breach the obligation imposed by Article 17(2) to deduct the full period of deprivation of liberty already served, where appropriate, by the sentenced person in the issuing State, from the total duration of the deprivation of liberty to be served in the executing State and comply with Article 19(2), which prohibits reviewing or altering sentences imposed in another Member State. Neither Poland nor Germany amended their national legislation in light of these findings.

Case **C-314/18**, ***SF,*** involved Article 8(2), as well as **Articles 1(a)-(b), 3(3)-(4), and 25 of FD TOP**. It was submitted by the *Rechtbank Amsterdam* (District Court, Amsterdam, Netherlands) in the context of proceedings relating to the execution in the Netherlands of an EAW issued by a UK court. The CJEU emphasised that Article 8 of FD TOP sets strict limits on how executing States can adapt sentences imposed by issuing States. In particular, the execution of an EAW is subject to

the condition that the executing State can only, to enforce such execution, adapt the duration of that sentence or detention within the strict conditions set out in Article 8(2) of FD TOP. Following the judgment, the Netherlands amended its national law.

In Case **C-819/21**, ***Staatsanwaltschaft Aachen,*** the CJEU interpreted **Articles 3(4) and 8 of FD TOP**. This case was submitted by the *Landgericht Aachen* (Regional Court, Aachen, Germany) relating to a request for the recognition and enforcement in Germany of a judgment of a Polish court imposing a custodial sentence. The CJEU held that in the context of Articles 3(4) and 8 of FD TOP, the competent authority of the executing State may refuse to recognise and enforce a criminal judgment delivered by another Member State if there is evidence of systemic or generalised deficiencies in the right to a fair trial in that Member State, particularly regarding the independence of the courts, and substantial grounds to believe these deficiencies affected the proceedings against the person concerned. The competent authority of the executing State must assess the situation in the issuing State up to the date of the relevant conviction, and, if needed, to the date of any subsequent conviction revoking a suspended sentence. Neither Germany nor Poland amended their national legislation considering the CJEU findings.

In Case **C-289/15**, ***Grundza,*** the CJEU ruled on **Articles 7(3) and 9(1)(d) of FD TOP.** It was submitted by the *Krajský súd v Prešove* (Regional Court, Prešov, Slovakia) concerning the recognition of a criminal judgment and the enforcement in Slovakia of a custodial sentence imposed by a Czech court. The CJEU held that Article 7(3) and Article 9(1)(d) of FD TOP must be interpreted to mean that the condition of double criminality has been met if the factual elements of the offence, as stated in the judgment of the competent authority in the issuing State, would also be subject to a criminal sanction in the territory of the executing State. Czechia amended its national legislation in light of the CJEU findings, but Slovakia did not.

Case **C-582/15, *Vemde,* and** Case **C-573/17, *Poplawski,*** concerned **Article 28(2) of FD TOP**. Case C-582/15, *Vemde,* was submitted to the CJEU by the *Rechtbank Amsterdam* (District Court, Amsterdam, Netherlands) relating to the enforcement of a three-year custodial sentence in the Netherlands imposed by a Belgian court. Case C-573/17, *Poplawski,* was submitted to the CJEU by the *Rechtbank Amsterdam* (District Court, Amsterdam, Netherlands) in connection with the execution in the Netherlands of an EAW issued by a Polish court. The CJEU held, first in *Vemde*, that Article 28(2) must be interpreted as meaning that it covers only judgments that became final before the date specified by the Member State concerned. In *Poplawski*, it held that Article 28(2) must be interpreted as meaning that a declaration made pursuant to that provision by a Member State after that FD was adopted is not capable of producing legal effects. It also found that the principle of the primacy of EU law must be interpreted as meaning that it does not require a national court to disapply a provision of national law that is incompatible with the provisions of an FD, as they do not have direct

effect. The authorities of the Member States, including the courts, are nevertheless required to interpret their national law to the greatest extent possible in conformity with EU law, enabling them to ensure an outcome that is compatible with the objective pursued by FD TOP. Following the judgment, the Netherlands (party to both cases), Poland (*Poplawski*), and Belgium (*Vemde*) did not amend their national legislation to align with these findings.

Similar to FD EAW, FD TOP is founded on the principle of mutual recognition, i.e. all Member States protect individuals' fundamental rights equally, based on the fact that they all share common standards of protection (CFR and/or ECHR). However, in regard to the application of FD TOP and more specifically when issuing a certificate to transfer a prisoner to another Member State, the competent authorities assess the situation of fundamental rights in relation to detention conditions. In doing so, they refer to the joined cases **C-404/15 and C-659/15**, ***Aranayosi and Căldăraru*** as a guide, although this case-law comes from the jurisprudence of FD EAW.

Some Member States require a certificate to be issued on the basis of Article 4(6) of FD EAW in accordance with FD TOP to determine a legal basis to enforce the sentence imposed by another Member State, as some practitioners claimed that the certificate under FD TOP provides greater fundamental rights guarantees. Case **C-179/22** is currently pending before the CJEU.

Conclusion

Jurisprudence on FD TOP remains limited, with only seven cases brought before the CJEU since its adoption.

Despite its limited scope, the CJEU case-law serves as a useful guide for interpreting the FD TOP, offering clarity on issues such as mutual recognition, sentence adaptation, and systemic deficiencies in fair trial rights.

Reliance on these few CJEU judgments as interpretive tools requires Member States to extrapolate broader principles from the limited case-law, considering the broader objectives of the FD TOP when interpreting its provisions. The 9th round of mutual evaluation found that Member States are often required to consider the CJEU's jurisprudence on the FD EAW to interpret the provisions of FD TOP, mostly in cases where the prison conditions in the executing State must be assessed, on the basis of *Aranayosi and Căldăraru.*

A3.3 Developments in CJEU jurisprudence on FD PAS

List of judgments:

Judgment of the Court of Justice of 26 March 2020, *A.P.*, C-2/19, Request for a preliminary ruling from the *Riigikohus*, ECLI:EU:C:2020:237

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Developments in CJEU jurisprudence on FD PAS

Case **C-2/19, *A.P.***, is the only case submitted to the CJEU on FD PAS by the *Riigikohus* (Supreme Court, Estonia). The case concerns **Articles 1(2) and 4(1)(d) of FD PAS**. Article 1(2) stipulates that the FD applies to: (a) only the recognition of judgments and, where applicable, probation decisions; (b) the transfer of responsibility for the supervision of probation measures and alternative sanctions; and (c) all other decisions related to those under (a) and (b). Article 4(1)(d) then stipulates that FD PAS applies to instructions relating to behaviour, residence, education and training, leisure activities, or containing limitations on or modalities of carrying out a professional activity. The CJEU held that Article 1(2) of FD PAS, read in conjunction with Article 4(1)(d), must be interpreted as meaning that recognition of a judgment that has imposed a custodial sentence which is suspended due to a legal obligation not to commit a new criminal offence during a probation period falls within the scope of FD PAS, provided that that legal obligation results from that judgment or from a probation decision taken based on that judgment, a matter which is for the referring court to establish. Following the judgment, Latvia amended its national law to include probationary supervision as a fully fledged alternative to application of a conditional sentence clarifying national law regarding the status of probationary measures. Estonia did not amend its legislation to implement the CJEU findings.

Conclusion

FD PAS has seen very limited application in general, likely explaining why only one case has been referred to the CJEU.

The isolated instance of judicial interpretation leaves much of the FD PAS's application unexplored. While the judgment in Case C-2/19 *A.P.* provides some clarification on the interpretation of Articles 1(2) and 4(1)(d), the broader lack of case-law and engagement leaves significant ambiguities unresolved, highlighting the need for more robust use and interpretation to realise the FD PAS's potential within the EU's mutual recognition framework.

A3.4 Developments in CJEU jurisprudence on FD Previous Convictions

List of judgments:

1. Judgment of the Court of Justice of 21 September 2017, *Trayan Beshkov v Sofiyska rayonna prokuratura*, C-171/16, Request for a preliminary ruling from the *Sofiyski rayonen sad*, ECLI:EU:C:2017:710
2. Judgment of the Court of Justice of 5 July 2018, *Criminal proceedings against Dániel Bertold Lada*, C-390/16, Request for a preliminary ruling from the *Szombathelyi Törvényszék*, ECLI:EU:C:2018:532
3. Judgment of the Court of Justice of 15 April 2021, *A.V.*, C-221/19, Request for preliminary ruling from the *Sąd Okręgowy w Gdańsku*, ECLI:EU:C:2021:278
4. Judgment of the Court of Justice of 12 January 2023, PPU, *MV (Confusion des peines)*, C-583/22, Request for a preliminary ruling from the *Bundesgerichtshof*, ECLI:EU:C:2023:5.
5. Judgment of the Court of Justice of 5 October 2023, *QS (Révocation du sursis)*, C-219/22, Request for a preliminary ruling from the *Rayonen sad Nesebar*, ECLI:EU:C:2023:732

Developments in CJEU jurisprudence on FD Previous Convictions

All cases, except *Lada*, were submitted to the CJEU in respect of **Article 3 of FD Previous Convictions**. This is the core provision concerning how to consider a conviction handed down in another Member State in the course of new criminal proceedings.

In case **C-171/16**, ***Beshkov,*** the CJEU was asked questions related to **Articles 3(1) and 3(3) of FD Previous Convictions**. Article 3(1) provides that each Member State must ensure that in criminal proceedings, previous convictions from other Member States are considered in the same way as national convictions, as long as the information is obtained through mutual legal assistance or criminal record exchanges, and in line with national law. Article 3(3) then provides that previous convictions from other Member States, as mentioned in paragraph 1, shall not affect, revoke, or review any prior convictions or decisions regarding their execution in the Member State conducting the new proceedings.

Case **C-171/16**, *Beshkov,* was referred to the CJEU by the *Sofiyski Rayonen sad* (Sofia District Court, Bulgaria) in the context of an application made by an individual that the court should take into account their previous conviction before a court of another Member State. The CJEU held that FD Previous Convictions applies 'to a national procedure that is concerned with the imposition, for the purposes of execution, of an overall custodial sentence that takes into account the sentence imposed on that person by a national court and also that imposed following a previous conviction handed down by a court of another Member State against the same person for different facts'. It ruled that the FD excludes the requirement for a national procedure for prior recognition of a foreign conviction by the courts of a Member State. Finally, it found that Article 3(3) of the FD precludes national legislation allowing a court, for the purposes of execution of an overall custodial sentence that takes into account the sentence imposed

following a previous conviction handed down by a court of another Member State, to alter for that purpose the arrangements for execution of that latter. Neither Bulgaria nor Austria amended their national legislation in light of the CJEU findings.

In Case **C-221/19**, ***AV,*** the CJEU was asked two questions – one on FD Previous Convictions and another on FD TOP (see Section 3.3.2). The case was referred by the *Sąd Okręgowy w Gdańsku* (Regional Court, Gdańsk, Poland) concerning the delivery of an aggregate sentence covering a sentence in respect of AV, involving deprivation of liberty delivered by a court in another Member State, recognised for the purposes of its enforcement in Poland. On FD Previous Convictions, the CJEU was asked about the interpretation of **Article 3(3).** The CJEU held that it must be interpreted as permitting the issue of an aggregate sentence covering not only one or more previous convictions handed down against the person concerned in the Member State in which that aggregate sentence is delivered, but also one or more convictions handed down against them in another Member State and which are enforced under FD TOP, on condition that that aggregate sentence observes, in so far as concerns the latter convictions, the conditions and limits arising from FD TOP, notably incompatibilities based on duration or nature of the sentence, discount of periods of the sentence already served, and applications to review the judgment. Neither Poland nor Germany amended their national legislation to reflect these findings.

Case **C-219/22**, ***QS,*** focused on the interpretation of **Article 3(3) of FD Previous Convictions**. The case was submitted to the CJEU by the *Rayonen sad Nesebar* (District Court, Nesebar, Bulgaria) concerning the effective execution in one Member State of a final conviction to a custodial sentence accompanied by a probationary suspension measure imposed on a national of another Member State by a court of that other Member State. The CJEU held that Article 3(3) must be interpreted as meaning that it does not preclude legislation of a Member State allowing its courts, in new criminal proceedings against a person previously convicted in another Member State with a probationary suspension, to revoke that suspension and order execution of the sentence, provided that the conviction has been forwarded to and recognised by FD PAS (see Section 3.3.). Neither Romania nor Bulgaria amended their national legislation to implement these findings.

Case **C-583/22** PPU, ***MV,*** focused on **Article 3(1) and (5) FD Previous Convictions**. The case was submitted to the CJEU by the *Bundesgerichtshof* (Federal Court of Justice, Germany) in the context of an appeal on a point of law brought before the *Bundesgerichtshof* (Federal Court of Justice, Germany) against a judgment of the *Landgericht Freiburg im Breisgau* (Regional Court, Freiburg im Breisgau, Germany). In *Beshkov,* the CJEU clarified the interpretation of Article 3(1). Article 3(5) of the FD stipulates that if the offence in the new proceedings occurred before the previous conviction was handed down or fully executed, Articles 3(1) and (2) do not require Member States to apply national rules on imposing sentences if doing so would limit the judge's discretion.

However, Member States must ensure that courts can still consider previous convictions from other Member States. In this case, the CJEU held that Article 3(1) and (5) of FD Previous Convictions must be interpreted as meaning that a Member State is not required to attach to previous convictions handed down in another Member State effects equivalent to those of national convictions under national rules on cumulative sentencing where, first, the offence was committed before those convictions and, secondly, applying those rules would prevent the court from imposing an executable sentence. The second subparagraph of Article 3(5) must be interpreted as meaning that taking into account previous convictions from another Member State does not require the court to justify the disadvantage caused by the inability to impose a cumulative sentence. Following the judgment, Germany did not amend its national legislation.

Case **C-390/16, *Lada,*** is the only case that does not concern Article 3 of FD Previous Convictions. Instead, it focuses more broadly on the interpretation of the FD in light of Article 82 of the TFEU, on judicial cooperation in criminal matters. The case was submitted to the CJEU by the *Szombathelyi Törvényszék* (Szombathely Court, Hungary) concerning proceedings brought before a Hungarian court for the recognition of a conviction handed down in another Member State which has become final. The CJEU held that FD Previous Convictions, read in light of Article 82 of the TFEU, must be interpreted as precluding the taking into account in a Member State's new criminal proceedings of a final judgment from another Member State convicting that person of other offences, if it is conditional on a special prior recognition procedure by the courts of the first Member State. Hungary amended its national legislation to implement the CJEU findings, while Austria did not.

Conclusion

The jurisprudence on FD Previous Convictions is relatively limited to a few cases in light of the amount of time passed since its adoption.

Most cases on the FD Previous Convictions relate to Article 3(3), suggesting that it may require further clarification to enhance judicial cooperation between the Member States.

The limited number of cases concerning FD Previous Convictions may reflect a broader issue with the FD's application in practice. This could indicate that potential complexities or ambiguities in these provisions have yet to be fully tested in court or effectively addressed in practice.

Ultimately, the CJEU jurisprudence on FD Previous Convictions is important to ensure a coherent and effective legal framework for handling previous convictions across borders. However, the jurisprudence is limited and may leave ambiguities in the FD that have not yet been addressed.

3.5. A3.5 Developments in CJEU jurisprudence on FD Financial Penalties

List of judgments:

1. Judgment of the Court of Justice of 14 November 2013, *Marián Baláž*, C-60/12, Request for a preliminary ruling from the *Vrchní soud v Praze*, ECLI:EU:C:2013:733
2. Judgment of the Court of Justice of 5 December 2019, *Centraal Justitieel Incassobureau, Ministerie van Veiligheid en Justitie (CJIB)*, C-671/18, Request for a preliminary ruling from the *Sąd Rejonowy w Chełmnie*, ECLI:EU:C:2019:1054
3. Judgment of the Court of Justice of 4 March 2020, *Centraal Justitieel Incassobureau, Ministerie van Veiligheid en Justitie (CJIB) v ZP*, C-183/18, Request for a preliminary ruling from the *Sąd Rejonowy Gdańsk-Południe w Gdańsku*, ECLI:EU:C:2020:153
4. Judgment of the Court of Justice of 6 October 2021, *D.P.*, C-338/20, Request for a preliminary ruling from the *Sąd Rejonowy dla Łodzi-Śródmieścia w Łodzi*, ECLI:EU:C:2021:805
5. Judgment of the Court of Justice of 7 April 2022, *D.B.*, C-150/21, Request for a preliminary ruling from the *Sąd Rejonowy dla Łodzi-Śródmieścia w Łodzi*, ECLI:EU:C:2022:268

Developments in CJEU jurisprudence on FD Financial Penalties

Case **C-60/12**, ***Marián Baláž***, was submitted to the CJEU by the *Vrchní soud v Praze* (High Court, Prague, Czechia) in the context of enforcement proceedings relating to the recovery of a fine imposed on a Czech national in respect of a road traffic accident committed in Austria. The CJEU held that the term 'court having jurisdiction in particular in criminal matters' **in Article 1(a)(iii) of FD Financial Penalties** is an autonomous concept under EU law and must be interpreted as covering any court or tribunal which applies a procedure that satisfies the essential characteristics of criminal procedure. It also held that Article 1(a)(iii) must be interpreted to mean that a person has had the opportunity to have a case tried before a court having jurisdiction in particular in criminal matters if, prior to bringing their appeal, that person was required to comply with a pre-litigation administrative procedure. Such court must have full jurisdiction to examine the case as regards both the legal assessment and the factual circumstances. Neither Czechia nor Austria amended their national law to implement these findings.

In Case **C-183/18**, ***BNP*,** the CJEU had to interpret **Article 9(3) of FD Financial Penalties** along with Article 1(a). The case was submitted by *Sąd Rejonowy Gdańsk-Południe w Gdańsku* (District Court for Gdańsk-South, Gdańsk, Poland) in proceedings brought by the Dutch *Centraal Justitieel Incassobureau*, *Ministerie van Veiligheid en Justitie* relating to the recognition and enforcement of a financial penalty imposed. The CJEU held that a 'legal person' as set out in Article 1(a) and 9(3) of FD Financial Penalties must be interpreted in light of the law of the State that issued the decision imposing a financial penalty**.** It also held that the FD must be interpreted as not requiring a national court to refrain from applying the provision of national law that is incompatible with Article 9(3) of the FD since it is does not have direct effect. Nevertheless, the referring court is required to give, as far as possible, an interpretation of national law in accordance

with EU law to ensure that it is compatible with the aim pursued by the FD. Neither the Netherlands nor Poland amended their national legislation to implement the CJEU findings

In Case **C-338/20**, ***D.P.,*** the CJEU interpreted **Article 1(a) and Article 20(3) of FD Financial Penalties** The case was submitted by the *Sąd Rejonowy dla Łodzi-Śródmieścia w Łodzi* (District Court for Łódź-Śródmieście, Łódź, Poland) for the purposes of obtaining recognition and enforcement in Poland of a financial penalty imposed in the Netherlands in respect of a road traffic offence. The CJEU held that Article 20(3) of FD Financial Penalties must be interpreted as allowing the executing State to refuse to execute a decision within the meaning of Article 1(a) of the FD imposing a financial penalty for a road traffic offence, where that decision has been notified to the addressee without a translation into a language they understand of the elements of the decision that are essential for them to understand the change brought against them and, thus, exercise their right to a defence; and where the addressee was not given the opportunity to obtain such a translation on request. Following the judgment, neither Poland nor the Netherlands amended their national legislation to implement these findings.

In Case **C-150/21**, ***D.B.,*** the CJEU provided a ruling on **Article 1(a)(ii) of FD Financial Penalties.** The case was submitted by *Sąd Rejonowy dla Łodzi-Śródmieścia w Łodzi* (District Court for the central district of Łódź, Poland) for the purposes of obtaining recognition and enforcement in Poland of a financial penalty imposed in the Netherlands in respect of a road traffic offence. The CJEU held that Article 1(a)(ii) of FD Financial Penalties must be interpreted as meaning that a final decision requiring a financial penalty to be paid by a natural person, adopted by an authority of the issuing State other than a court in respect of a criminal offence under the law of the issuing State, constitutes a 'decision' within the meaning of Article 1(a)(ii), if the issuing State's legislation provides for a two-stage appeal process. This process should entail that the decision is to be examined first by a public prosecutor placed under the hierarchical authority of the Minister for Justice and, subsequently, if that public prosecutor adopts a decision dismissing that appeal, by a court having jurisdiction in criminal matters. The examination by the court may be seized by the person concerned, given that access is not made impossible or excessively difficult. Neither the Netherlands nor Poland amended their national legislation to implement these findings.

In Case **C-671/18**, ***CJIB,*** the CJEU provided clarification on **Articles 7(2)(g) and 20(3) of FD Financial Penalties.** Article 20(3) was ruled upon again following this judgment in Case **C-338/20**, ***D.P.*** (see above). The case was submitted by *Sąd Rejonowy w Chełmnie* (District Court, Chełmno, Poland) concerning proceedings brought by the *Centraal Justitieel Incassobureau, Ministerie van Veiligheid en Justitie* (Central Fine Collection Agency, Ministry of Justice and Security, the Netherlands) to obtain recognition and enforcement in Poland of a financial penalty imposed in the Netherlands in respect of a road traffic offence. The CJEU held that Articles 7(2)(g) and 20(3) of the FD must be interpreted as meaning that where a decision requiring payment of a financial penalty has been

notified in accordance with the national legislation of the issuing State, indicating the right to contest the case and the time limit for such a legal remedy, the authority of the executing State may not refuse to recognise and execute that decision. This is provided that the person concerned has had sufficient time to contest that decision, which is for the national court to verify. The fact that the procedure imposing the financial penalty is administrative in nature is not relevant. More specifically, the CJEU ruled that Article 20(3) entails that the competent authority of the executing State may not refuse to recognise and execute a decision requiring payment of a financial penalty in respect of road traffic offences where such a penalty has been imposed on the person in whose name the vehicle in question is registered on the basis of a presumption of liability covered by the national legislation of the issuing State, as long as that presumption may be rebutted. Neither the Netherlands nor Poland amended their national legislation to align with these findings.

Conclusion

The cases, with the exception of Case **C-671/18**, *CJIB*, focus on the interpretation of Article 1(a) of FD Financial Penalties and its various subparagraphs, reflecting ongoing uncertainty regarding what constitutes a 'decision' under the FD. The CJEU has repeatedly clarified procedural safeguards required to ensure fair treatment, particularly concerning decisions by non-judicial authorities and the right to appeal.

A significant majority of the cases concern road traffic offences, as this category forms the primary practical application of FD Financial Penalties. This pattern suggests that the application of the FD may encounter more difficulties when applied to road traffic offences than other offences.

Another useful observation is the involvement of Poland and the Netherlands in almost all cases submitted to the CJEU.

In conclusion, the CJEU's rulings underscore the importance of addressing recurring issues, such as continuing questions on the same provisions, application to road traffic offences, and ensuring the uniform application of the FD by all Member States.

Annex 4: Case studies

Case Study 1: Mandatory and optional grounds for refusal

Introduction

FD EAW, FD PAS, FD TOP, FD ESO, and FD Financial Penalties are all based on the notion of mutual recognition, which is grounded on the mutual trust between Member States and provides that Member States shall recognise and execute requests for judicial cooperation adopted by the competent authorities of other Member States.

Having a common nature, these FDs also share a common structure in the key elements of their cooperation procedure. Identification of grounds for refusal is one such cornerstone, allowing the competent authorities of the executing State to refuse recognition and execution of the request for judicial cooperation, should one of the grounds for refusal be met.

The grounds for refusal can be optional or mandatory. Where confronted with a ground for optional refusal, the competent authority in the executing State shall have the opportunity to decide, within its discretion, whether or not the request for judicial cooperation should be refused. In the case of a ground for mandatory refusal, the competent authority shall be bound to refuse recognition and execution of the request for judicial cooperation, without any margin of discretion.

FD PAS (Article 11), FD TOP (Article 9), FD ESO (Article 15), and FD Financial Penalties (Article 7) solely provide for grounds for optional refusal, while FD EAW provides for both mandatory and optional grounds for refusal in its text. Some grounds for refusal, despite slight linguistic differences, recur in most of the FDs analysed . This applies in cases of *ne bis in idem*[378], cases where the sentenced person cannot be held criminally liable due to their age[379], lack of double criminality, cases where the criminal prosecution or punishment is statute-barred (all FDs), cases where the offence has been committed in the territory of the executing State and cases where the person was not present at trial (FD EAW, FD PAS, FD TOP, FD Financial Penalties), cases where the certificate is incomplete or manifestly non-corresponding and cases where there is immunity (FD PAS, FD TOP, FD ESO, FD Financial Penalties), cases where the conditions for forwarding a judgment and/or a certificate are not met (FD PAS, FD TOP, FD

[378] FD EAW foresees two different grounds for refusal relating to *ne bis in idem*, depending on whether the final judgment for the same act has been issued by a Member State (ground for mandatory non-execution) or a third State (ground for optional non-execution).

[379] This is regarded as a ground for mandatory non-execution in FD EAW, whereas in the other FDs it is a ground for optional refusal.

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ESO), and cases where the probation measure or alternative sanction or the sentence are less than six months, or the financial penalty is below or equal to EUR 70 (FD PAS, FD TOP, FD Financial Penalties).

Other grounds for refusal are specific to an individual FD. In FD EAW, this applies in cases where the offence is covered by an amnesty in the executing State, where the person is being prosecuted in the executing State for the same act, where there is a decision in the executing State not to prosecute or to halt proceedings or a final judgment prevents further proceedings, and where the requested person is staying in, or is a national or resident of the executing State, and the latter undertakes to execute the sentence or detention order. In FD PAS, this applies in cases where the medical or therapeutic treatment cannot be supervised. In FD TOP, this applies in cases where the issuing State did not consent to apply the speciality rule[380] and where the measure of psychiatric health or deprivation of liberty cannot be executed. In FD ESO, this applies in cases where, should the supervision measure issued by the issuing State be breached, surrender under FD EAW would have to be refused by the executing State. In FD Financial Penalties, this applies in cases where the person concerned was, in case of a written procedure, not properly informed of their rights.

Given the important role played by the grounds for refusal for the purposes of the proper functioning of judicial cooperation in criminal matters based on mutual trust[381], it is essential that the provisions of the FDs setting out the grounds for refusal are transposed and implemented correctly in the Member States.

As grounds for refusal are exceptions to the duty to cooperate, and thus to execute the orders or requests received by other Member States, they should be examined through the lens of the objectives of mutual recognition. The implementation of grounds for refusal with a wider or different scope than that laid down in the FDs, or the provision of additional grounds for refusal that are not foreseen in the FDs, appear to be an obstacle to mutual recognition and to a harmonised framework governing judicial cooperation in criminal matters across the EU.

This is confirmed by the consistent jurisprudence of the CJEU in the *Melloni* case[382] and subsequent judgments[383], according to which the execution of the

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[380] FD EAW also provides for the specialty rule in Article 27. However, unlike FD TOP, it does not qualify the refusal to consent to the application of the specialty rule as a ground for refusal, given that, under FD EAW, it is for the executing State to give such consent, and not for the issuing State (as in FD TOP).

[381] Council of the EU, *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 of 1 March 2023, 2023.

[382] Judgment of the Court (Grand Chamber) of 26 February 2013, *Stefano Melloni v Ministerio Fiscal*, C-399/11, ECLI:EU:C:2013:107, para. 38.

[383] Judgment of the Court (Grand Chamber) of 17 December 2020, *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'emission)*, C-354/20 and C-412/20, ECLI:EU:C:2020:1033, para. 37.

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requests for judicial cooperation shall constitute the rule, whereas refusal to execution is intended to be an exception that must be interpreted strictly. While this case-law has been developed by the CJEU in relation to FD EAW, it should, in principle, be automatically applicable to the other FDs that provide for a list of grounds for refusal, although no explicit indication in this regard has yet been given by the CJEU.

Another aspect that should be taken into account when analysing the national transposition and implementation of the grounds for refusal relates to whether and to what extent their nature – mandatory or optional – as provided in the FDs is mirrored in the national transposition measures.

In a ruling in relation to FD EAW, the CJEU clarified that where Member States transposed the grounds for optional refusal, the executing State's competent authority must itself have a margin of discretion as to whether or not it is appropriate to refuse execution on the basis of the specific ground invoked[384]. It follows from the phrasing of the relevant provisions of FD EAW that such margin of discretion shall lie with the competent authority of the executing State examining a specific case, and not with the Member State itself, specifically its legislator when transposing the FD[385]. The latter situation would occur where a Member State decided to transpose in mandatory terms one or more ground(s) for refusal that are conceived as optional in the relevant FD. Similarly, although no explicit extension of these principles to other FDs has yet been made by the CJEU, such extension is arguably justified in light of the similarities of the provisions on grounds for refusal that are present in other FDs.

This case study focuses on six Member States that have adopted different approaches to the transposition and implementation of the grounds for refusal across the FDs: Luxembourg and Romania transposed (most of) the grounds for refusal respecting the mandatory or optional character of such grounds; Spain and Slovenia transposed (most) as grounds for mandatory refusal; Hungary and Poland introduced additional grounds for refusal not foreseen in the FDs. Greece is the only country that has correctly transposed all mandatory and optional grounds for refusal across all FDs analysed here.

Member States transposing correctly the mandatory or optional character of the grounds for refusal

Luxembourg and Romania are selected as Member States where the national transposing legislation (generally) mirrors the optional or mandatory nature of the specific grounds for refusal, as foreseen in the FDs.

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[384] Judgment of the Court (Fifth Chamber) of 29 April 2021, *PPU*, C-665/20, ECLI:EU:C:2021:339, para. 41.

[385] Council of the EU, *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 of 1 March 2023, 2023.

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mandatory (and not optional) refusal only in the legislation transposing FD Financial Penalties, and does not appear to be transposed at all in relation to FD TOP.

Notwithstanding these exceptions, Luxembourg can be regarded as a Member State whose legislation in most cases mirrors the optional or mandatory nature of the specific grounds for refusal. Consistently with this finding, stakeholders highlighted no specific issues arising in practice.

For Luxembourg, the survey did not identify specific emerging issues or problems concerning the grounds for refusal identified in FD EAW[386]. For FD PAS, stakeholders interviewed showed few transfers of sentences. This may be linked to a general lack of familiarity with FD PAS or to the length and complexity of the related procedures, which may lead judicial authorities to opt for simpler procedures (see Case Study 3). In the rare cases where FD PAS was applied, no particular difficulty arose. Similarly, based on the insight provided by a representative of the Prosecutor General's Office (also interviewed on the application of FD ESO in Luxembourg), the grounds for refusal and non-recognition are deemed sufficient for FD ESO and should remain optional. He noted only one case in which a non-EU national saw their request refused, based on the fact that they had no residence in Luxembourg.

Representatives from the Office of the General Prosecution in Luxembourg who were interviewed on the application of FD TOP argued that Articles 9(1)(c) and 9(1)(e) should be mandatory grounds for refusal instead of optional, but without providing further explanation or justification. Article 9(1)(c) has been transposed as mandatory in Luxembourgish law, whereas Article 9(1)(e) has been transposed as optional, mirroring the provision of FD TOP.

Romania

Similar to Luxembourg, the transposition of the grounds for refusal provided for in FD EAW in Romania closely resembles the wording of the FD, in terms of the legislative technique adopted.

The introductory wording of the transposing legislation clarifies whether the Romanian executing judicial authority 'shall' or 'may' refuse to execute the EAW. The national legislation then proceeds to list the specific grounds for refusal identified as mandatory or optional, closely transposing the relevant provisions of FD EAW. However, despite a rather clear legislative framework, there is some lack of clarity on the nature of the grounds for refusal in practice, according to the national authorities' survey responses.

Stakeholders expressed different views on the grounds for refusal in cases of lack of double criminality (Article 4(1) FD EAW). One survey respondent described it as not implemented, while two others described it as applying

[386] The survey respondent from Luxembourg only replied to the survey questions on FD EAW.

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mandatorily. This is likely linked to the fact that Romanian legislation transposes Article 2(4) of FD EAW in mandatory terms, stating that for offences other than those mentioned in Article 2(2) of FD EAW, the surrender 'is subject' to the condition that those acts constitute an offence in Romanian law. Nevertheless, the national provision transposing Article 4(1) FD EAW is clear in establishing the ground for refusal as optional.

One survey respondent described the grounds for refusal corresponding to Article 4(2) and Article 4(4)-(7) of FD EAW as mandatory, while another noted that the grounds for refusal corresponding to Article 4(3) and 4a of FD EAW were not implemented. These are most likely inaccurate statements, as confirmed by the desk research and other survey respondents, who reiterated the optional nature of these grounds for refusal, as transposed in Romanian legislation.

When asked about FD TOP, one judge interviewed stated that all grounds for refusal are implemented in Romanian law and there is nothing that needs to be amended, including their optional or mandatory nature.

Stakeholders did not identify a specific need to amend the way the grounds for refusal are outlined in the FDs, but some issues emerge in practice. Romanian participants in the EAW workshop pointed to issues arising in the recognition of EAWs issued by Romania, allegedly due to insufficient knowledge of FD EAW by the national competent authorities. For instance, it is important for the issuing authority to explain the type of offence that constitutes the basis of the EAW to avoid the executing authority requesting further information and any misunderstandings that may lead to refusals to execute the EAW.

Eespite a clear legal framework that correctly identifies the optional or mandatory grounds for refusal, problems relating to the execution of requests for judicial cooperation and mutual recognition can originate from the lack of sufficient knowledge among the competent authorities. Limiting the number of competent authorities per Member State may be best practice, allowing for the build-up and centralisation of specialised knowledge that could significantly reduce the risks of misunderstanding or erroneous application of the law. The exclusive competence of the District Court of Amsterdam on EAW cases is a positive example.

Member States transposing the grounds for optional refusal as grounds for mandatory refusal

Spain and Slovenia[387] have transposed (most of) the grounds for optional refusal as mandatory in their national legal systems. In such cases, the respective national frameworks provide for no discretion for the executing State's competent authorities on whether or not the requests for judicial cooperation should be refused.

[387] No replies to the survey were received from Spain and Slovenia. Accordingly, this section is based on desk research, as well as stakeholder interviews for Slovenia.

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Spain

In Spain, some of the grounds foreseen for optional refusal in FD EAW are closely mirrored in the national transposing legislation, with their optional nature respected (Articles 4(1), 4(2), 4(6) and 4(7)). However, when it comes to the transposition of the remaining grounds for refusal foreseen in FD EAW (Articles 4(3)-(5) and 4a), the national legislation is clearly phrased in mandatory terms for the competent authority[388].

With respect to the other FDs that foresee grounds for optional refusal, Spanish legislation generally provides for transposition in mandatory terms for the competent authority, with very limited exceptions where the competent authority would be allowed discretion on whether or not to refuse judicial cooperation (Article 11(1)(d) and (k) of FD PAS, Article 9(1)(d) and (l) of FD TOP, Article 15(1)(d) of FD ESO, Article 7(2)(b) and (d)(i) of FD Financial Penalties).

The grounds for refusal in Spanish legislation generally appear to be transposed in scattered provisions of law, not always adjacent to one another, rather than grouped as sub-paragraphs of the same provision or transposed in adjacent provisions. While this was not confirmed by stakeholders, it is possible that the legislative technique adopted may result in confusion for practitioners and increase the risk of misapplication of the grounds for refusal by national authorities.

Analysis of the Spanish transposition of the grounds for refusal across the different FDs reveals that while the majority of the grounds for refusal have been transposed as mandatory in national legislation, some patterns can be identified in the grounds for which the legislator opted to preserve the optional nature. This is due to the fact that, in some cases, the same national legal measure serves as the transposition measure for more than one FD. For example, where the request for judicial cooperation concerns acts that do not constitute an offence under the law of the executing State (and that do not fall within the list of offence for which the double criminality check does not apply): national law provides a ground for optional refusal across all five FDs. In cases where the request for judicial cooperation relates to acts regarded by the law of the executing State as having been committed in whole or in part in the territory of the executing State, the competent authority would retain discretion when deciding whether or not execution of such request should be refused.

Slovenia

Slovenian national legislation appears to transpose most of the grounds for optional refusal as mandatory, with some limited exceptions. The national

[388] An amendment to the legislation transposing FD EAW in Spain entered into force on 3 April 2025 and has remedied these issues – the grounds for refusal of Article 4(3)-(5) and 4a of FD EAW are now transposed as grounds for optional refusal. This legislative amendment was adopted after the desk research for this study was finalised and is not reflected here.

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measures closely follow the text of the FD, not altering the optional nature of the ground for refusal, only in relation to Article 4(2)[389], (6), and (7) of FD EAW, Article 11(1)(f), (j) of FD PAS, Article 9(1)(f), (h), and (l) of FD TOP, and Article 15(1)(h) of FD ESO. In all other cases, the transposing legislation departs from the wording of the FDs and provides for grounds for mandatory refusal.

The legislative technique used by the Slovenian legislator when transposing the grounds for refusal is similar to Luxembourg and Romania. National law provides for either separate articles (transposition of FD EAW) or separate paragraphs of the same article (transposition of FD PAS, FD TOP, FD ESO, and FD Financial Penalties) with an introductory wording that makes it clear whether the competent authority 'shall' or 'may' refuse the relevant request for judicial cooperation. The different grounds for refusal are then listed, ensuring clarity as to whether the grounds for refusal are mandatory or optional.

In some cases, the grounds for refusal for which the Slovenian legislator opted to grant discretion to the competent authority recur across more than one FD. More specifically, in cases where there is immunity under the law of the executing State, or where there remain less than six months of duration of the probation measure or alternative sanction or sentence to be served, the competent authority retains a margin of discretion both under the law transposing FD PAS and under the law transposing FD TOP. Additionally, where the request for judicial cooperation concerns offences regarded by the law of the executing State as having been committed in whole or in part in the territory of the executing State, the legislation transposing FD EAW, FD PAS and FD TOP grants discretion to the executing authority on whether or not a refusal should be opposed.

Slovenian stakeholders view on the transposition of the grounds for non-recognition and non-enforcement differ between FDs. Despite the discrepancies between the FDs and the relevant transposing measures, Slovenian stakeholders interviewed in relation to FD ESO and FD TOP (in both cases, representatives of the judiciary) have only rarely had cases where their decision was not recognised or where they had to refuse the enforcement of a decision. While this may be somewhat linked to the number and types of requests received under these FDs, it may also be an indicator that, despite the transposition of the grounds for refusal in mandatory terms, this does not necessarily result in systematic refusals to execute the requests. This finding seems to be confirmed by the stakeholders interviewed, who claimed that in case of doubt, Member States' authorities communicate with each other directly to resolve the situation. It therefore appears that, regardless of the nature of the grounds for refusals as transposed in national

[389] The national transposing legislation in Slovenia provides for a general ground for optional non-execution of the EAW where the requested person is being prosecuted in Slovenia for the same act as that on which the EAW is based. However, non-execution of the EAW becomes mandatory where the offence is committed against the Republic of Slovenia, or where the offence is committed against a citizen of the Republic of Slovenia and no security has been provided for the enforcement of the property claim of the injured party.

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law, Member States liaise with each other to simplify communication and cross-border cooperation.

For FD PAS, a representative of one Prosecution Office in Slovenia interviewed as part of the study stated that the national legislator had decided to define most grounds for non-recognition and non-execution as mandatory to eliminate the need for lengthy deliberation on whether to accept the issuing State's proposal. For FD TOP, however, they did not understand why the provisions were implemented as mandatory, which resulted in cases where decisions from other Member States were refused (sometimes unnecessarily) and could not be enforced.

The choice to transpose most of the grounds for refusal as mandatory in Slovenia provides for a less flexible framework, with requests for judicial cooperation sometimes refused even where that would not be necessary. To partially mitigate this, it seems to be common practice among judicial authorities to engage in bilateral communications as a first step, ensuring that any issues related to grounds for refusal may be resolved more flexibly.

Member States introducing additional grounds for refusal not foreseen in the FDs

Hungary's and Poland's national legal systems provide for additional grounds for refusal that are not foreseen in the FDs themselves. The practice of introducing additional grounds for refusal appears problematic, as the CJEU has clarified that the grounds for refusal should be subject to strict interpretation and construed as an exception to the general rule, which is the execution of the request for judicial cooperation. The introduction of additional grounds for refusal undermines the harmonisation of laws across the Member States and risks jeopardising the FDs' effectiveness and the goal of mutual recognition in the AFSJ more generally.

Hungary

Hungary's framework transposing FD EAW[390], FD PAS and FD TOP provides for additional grounds for mandatory refusal.

According to Article 5(3) of Act CLXXX of 2012 on cooperation with the Member States of the European Union in criminal matters (EUtv.), where an EAW is issued to execute a custodial sentence or measure involving deprivation of liberty, the court shall refuse to execute it if it orders the provisional arrest of the accused person for the act on the basis of which the EAW was issued, or the enforcement of the decision of the Member State imposing a final custodial sentence or detention order.

[390] An amendment to the legislation transposing FD EAW in Hungary was adopted after the desk research for this study was finalised and is not reflected here.

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The premise of this ground for refusal might resemble the wording of Article 4(6) of FD EAW ('if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order'). However, the scope of Article 5(3) EUtv. differs from that of Article 4(6), as it does not necessarily concern situations where the requested person is staying in, or is a national or a resident of the executing State. On the contrary, all requested persons, regardless of their nationality or place of residence, seem to potentially fall within the scope of application of Article 5(3) EUtv., which only requires the order of the provisional arrest of the requested person, or of the enforcement of the decision of the Member State imposing a final custodial sentence or detention order. Article 4(6) of FD EAW is transposed – partially and in a non-conforming manner – by a different provision of national law, Article 5(4) EUtv., which limits its scope to Hungarian nationals with an address in the Hungarian territory, and does not make reference to the provisional arrest of the requested person (which is not mentioned in Article 4(6) of FD EAW). It can be concluded that while Article 4(6) of FD EAW is transposed (partially and not in conformity) by Article 5(4) EUtv., Article 5(3) EUtv. amounts to an additional ground for mandatory refusal. The wide scope of application of this provision is capable of giving rise to refusals to the execution of an EAW in cases that are different from those where a refusal should be allowed according to FD EAW and the relevant national transposing measures.

Specific concerns are raised by the fact that under Article 5(3) EUtv., execution of an EAW may be refused on the sole basis of the order of a provisional arrest. A critical consequence of this provision is that it could lead to undue situations of impunity: as the provisional arrest is typically a temporary measure under Hungarian law and does not automatically lead to the enforcement of a conviction or sentence, the non-execution of the EAW could potentially favour the requested person absconding or escaping justice, frustrating the aim of FD EAW.

In relation to FD PAS and FD TOP, additional grounds for mandatory refusal appear to be present in the Hungarian legal framework. Article 109(3) EUtv. outlines the conditions that must be met for a Member State judgment to be considered and recognised in the context of requests for judicial assistance. If these conditions are not satisfied, the judgment shall be mandatorily disregarded. In light of the general wording of this provision, Article 109(3) EUtv. is considered to set forth grounds for mandatory refusal that are relevant for the transposition of both FD PAS and FD TOP.

Article 109(3)(d) of EUtv. provides for a mandatory ground for refusing recognition of the judgment where a criminal procedure is in place in Hungary concerning the acts on which the Member State judgment is based, and the Member State judgment does not bar conducting the criminal procedure. This ground for refusal concerns situations where criminal proceedings are running in parallel in the executing State, and a final judgment has not yet been issued. This situation is not covered in Article 11 of FD PAS nor in Article 9 of FD TOP, which only address situations that would be contrary to the principle of *ne bis in idem* (under,

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interviewed for FD TOP, as well as FD Financial Penalties and FD ESO (judges from different instances and courts and a representative of the Ministry of Justice), all approved of the grounds for refusal in place in Hungarian law, stating that the system is logical and well thought-through, and no adaptations appear necessary. This seems to suggest that no specific issues arise in practice from the application of the national transposing measures, and that the additional ground for refusal in FD TOP does not create issues that stakeholders deem worth flagging.

Poland

Poland introduced additional grounds for refusal in its legislation transposing FD EAW and FD PAS. With regard to FD EAW, under the Polish Code of Criminal Procedure, execution of an EAW shall be mandatorily refused where it has been issued in connection with an offence committed without the use of violence due to political reasons (Article 607p(1) point (6)). The Polish Code of Criminal Procedure introduces an additional ground for non-execution, according to which an EAW issued against a Polish citizen can be executed only where it is based on an act that was not committed in Polish territory and that constitutes an offence under Polish law (Article 607p(2)).

The situation covered by Article 607p(1) point (6) appears to be entirely different from the situations regarded as grounds for mandatory or optional grounds for refusal by Articles 3, 4 and 4a of FD EAW. The national legislation thus appears to unduly expand the scope of possible exceptions that the competent authority in the executing State can use to oppose to the execution of an EAW.

Article 607p(2) subjects the surrender of Polish citizens to the condition that the act was not committed on Polish territory, while also providing for a mandatory double criminality check. As a consequence, the national legislation subjects the execution of an EAW issued against a Polish national to stricter conditions than those laid down in FD EAW, potentially contravening the provision of Article 2(2) of FD EAW, which lists the offences that should lead to the execution of the EAW without a double criminality check by the executing authority.

These divergences of Polish legislation from the provisions of FD EAW raise serious concerns as they appear to be grounded in national constitutional law. More specifically, Article 55 of the Polish Constitution provides that extradition of a Polish citizen shall be prohibited unless it is based on an offence committed outside the territory of Poland and which constitutes an offence under Polish law (unless it concerns crimes such as genocide, crimes against humanity, war crimes or aggression). Additionally, according to the Polish Constitution, the extradition of a person suspected of the commission of a crime for political reasons, but without the use of force, shall be forbidden.

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mandatorily or optionally, then detailing the single grounds for refusal in sub-provisions, appears to enhance legal clarity and facilitate correct national transposition, and could thus be considered best practice.

However, this legislative technique does not necessarily translate into a close mirroring of the mandatory or optional nature of the grounds for refusal in the national transposing legislation, as in the example of Slovenia. In Member States where optional grounds for refusal are transposed as mandatory, national legislation takes away the possibility for competent judicial authorities to adjust their decisions on a case-by-case basis and adopt solutions tailored to the specific case at hand. Bilateral and informal communication between the competent authorities concerned emerges as a positive practice, with the potential to allow for simpler communication and cooperation, although it does not solve the rigidity of the system given by the incorrect transposition of grounds for optional refusal as grounds for mandatory refusal. Bilateral communication between the judicial authorities concerned is not new to the EU instruments of judicial cooperation, and more recent instruments such as the EIO[393] acknowledge the possibility to use this channel of direct communication to solve issues or clarifications that may emerge in practice.

Some Member States appear to provide for situations that lead to the refusal of the request for judicial cooperation that are not foreseen as such in the relevant FDs. This can originate in differences between the text of the FDs themselves that the national legislator did not fully respect in transposing the EU laws. For example, FD EAW regulates situations such as the existence of ongoing criminal proceedings in the executing State on the same acts that are at the basis of the request for an EAW as grounds for refusal, but this is not the case in the other FDs. In these cases, the introduction of additional grounds for refusal in the national legal frameworks may be a negative consequence.

In other cases, the provision of additional grounds for refusal that are not foreseen in the FDs appears to relate to principles of constitutional law. For example, in Poland, the national legislation provides for stricter rules governing the surrender of Polish citizens, or the surrender of persons that are suspected of the commission of a crime for political reasons, but without the use of force.

Although no specific issues emerge from the stakeholder consultation, the use of additional grounds for refusal by Member States appears to risk the goals of mutual recognition and the overall objectives of the AFSJ. A potential best practice to address the use of the additional grounds for refusal adopted by specific Member States could be the development of implementation models, such as standard forms, to be used in practical application of the FDs. The use

[393] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, https://eur-lex.europa.eu/eli/dir/2014/41/oj/eng.

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of such models or forms could discourage the application by competent authorities of grounds for refusals that are not foreseen therein.

Finally, as most of the issues stem from the incorrect implementation of the FDs, rather than from inherent flaws in the FDs themselves, raising awareness among national authorities of the legal nature of the grounds for refusal enshrined in the FDs and related CJEU jurisprudence would contribute towards more harmonised implementation and application across the Member States.

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Case Study 2: Fundamental rights

Introduction

Respect of fundamental rights plays a pivotal role in the architecture of legal instruments based on mutual trust and mutual recognition. First of all, the EU institutions and the Member States have to respect the rights, freedoms and principles set out in the CFR, which are applicable to all procedures regarding the FDs and their implementation. Second, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of Union law, giving the CJEU an active role[394]. Third, the application of common standards of fundamental rights across the EU is important for the functioning of mutual recognition instruments, as mutual recognition between judicial authorities is founded on the mutual trust that Member States' criminal justice meets the same standard of fundamental rights[395].

At the same time, the respect of fundamental rights stands somewhat in tension with the principle of mutual recognition in practice. For example, it raises the question of whether Member States, when required to execute a request for judicial cooperation, should be generally entitled to refuse such execution, alleging a non-sufficient level of protection of fundamental rights in the issuing State. Such general refusal would risk undermining the effective functioning of judicial cooperation in criminal matters based on the EU mutual recognition legal instruments, which is central to giving security to citizens in the AFSJ.

FDs based on the principle of mutual recognition provide for an exhaustive list of grounds under which the competent authority in the executing State shall or may refuse execution of the request for judicial cooperation. CJEU case-law in relation to FD EAW[396] clarifies that such grounds for refusal constitute an exception to the general rule, which is that the requests for judicial cooperation issued under FD EAW shall be executed by the competent authority in the executing State. For this reason, grounds for refusal are subject to strict interpretation, and refusals shall not be opposed on the basis of grounds that are not foreseen in the relevant FD. This case-law has been developed by the CJEU in relation to FD EAW. While the similar structure of other FDs that provide for grounds for refusal (FD PAS, FD TOP, FD ESO, FD Financial Penalties) may justify the extension of these principles to the grounds for refusal provided therein, such explicit extension has yet to be made by the CJEU.

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[394] Treaty on European Union, Article 6.

[395] Marguery, T.P., 'Rebuttal of mutual trust and mutual recognition in criminal matters: Is 'exceptional' enough?', *European Papers*, Vol. 1, Issue 3, 2016, pp. 943-963.

[396] Judgment of the Court (Grand Chamber) of 17 December 2020, *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'emission)*, C-354/20 and C-412/20, ECLI:EU:C:2020:1033, para. 37.

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Unlike a more recent instrument on judicial cooperation such as the EIO[397], none of the FDs explicitly foresees a ground for refusal that can be invoked in cases where there appears to be a risk to the protection of fundamental rights. On the contrary, fundamental rights are addressed in recitals and separate provisions, which clarify that such FDs 'shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'[398].

On one hand, it appears that the strict interpretation of the grounds for refusal foreseen in the FDs, backed by the consistent case-law of the CJEU, would not allow to conclude that (risks of) violations of fundamental rights can be formally opposed by the executing State as grounds on which a request for judicial cooperation can be refused. On the other hand hand, the FDs shall be implemented and applied in a way that complies with the obligation of Member States to respect fundamental rights, as mandated by the FDs themselves.

Abundant CJEU jurisprudence gives useful clarifications on the interpretation that should be given to the fundamental rights clauses foreseen in the FDs. Due to the links between the protection of fundamental rights afforded by the CFR, and that afforded by the ECHR[399], important guidance also follows from the jurisprudence of the European Court of Human Rights (ECtHR).

For the purpose of this case study, the analysis focuses on the following fundamental rights, as enshrined in the CFR: prohibition of torture and inhuman or degrading treatment or punishment (Article 4), right to liberty and security (Article 6), and the right to an effective remedy and to a fair trial (Article 47).

The analysis focuses specifically on FD EAW, FD PAS, FD TOP and FD ESO, as FDs that address situations of detention or deprivation of liberty of suspects or accused persons, and on a group of selected Member States that appear to have adopted different approaches to fundamental rights when requested to execute requests under these FDs (Germany, Hungary, Ireland, Italy, the Netherlands, Romania).

CJEU and ECtHR jurisprudence on the protection of fundamental rights in the context of mutual recognition instruments

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[397] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, Article 11(1)(f).

[398] Recital 12 and Article 1(3) of FD EAW, Recital 5 and Article 1(4) of FD PAS, Recital 13 and Article 3(4) of FD TOP, Recital 16 and Article 5 of FD ESO, Recital 5 and Article 3 of FD Financial Penalties.

[399] TEU, Article 6(3) (Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law). Charter of Fundamental Rights of the European Union, Article 52(3) (In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection).

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The choice of the European legislator to include a general clause on the respect of fundamental rights, but not to include it as a specific ground for refusal in the FDs has led to numerous CJEU judgments. These are most frequently in relation to FD EAW, providing clarifications on the extent to which mutual recognition shall be subject to the executing State being satisfied that the execution of the judicial cooperation request does not pose risks to fundamental rights.

Several CJEU judgments address the issue of potential violations to the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFR) in the context of FD EAW. A landmark case is Joined Cases C-404/15 and C-659/15 PPU[400] (*Aranyosi and Căldăraru*), where the CJEU clarified that where the executing judicial authority is in possession of evidence of a real risk of inhuman or degrading treatment, it shall assess the existence of such risk through a two-step assessment. Firstly, the executing judicial authority shall rely on information demonstrating that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people or certain places of detention. Secondly, the executing judicial authority must carry out a specific and precise assessment as to whether the person concerned will be concretely subject to that risk. Should this two-step assessment show the risk for the person concerned of a violation of Article 4 of the CFR, the execution of the EAW shall be postponed, as long as the risk of Article 4 violation is present. If such risk cannot be discounted within a reasonable time, the detention of the person concerned shall eventually be brought to an end, having regard to the principle of proportionality.

Similar considerations relate to the right to an effective remedy and to a fair trial (Article 47 CFR). In Case C-216/18 PPU[401] (*LM*), the CJEU appears to apply the reasoning of *Aranyosi and Căldăraru* to the right to a fair trial as essential for the rule of law. Accordingly, where confronted with a request for surrender of a person which raises concerns about the respect of their right to a fair trial in the issuing State, the executing judicial authority shall, as a first step, assess whether there is a real risk, connected with a lack of independence of the courts of that Member State, of a breach of the right to a fair trial. As a second step, it should assess specifically and precisely whether, in the particular circumstances of the case, the requested person would run that risk following their surrender. The CJEU concluded that where the two-step assessment reveals a risk of violation of Article 47 of the CFR, 'the executing judicial authority must refrain from giving effect to the European arrest warrant'.

As far as the right to liberty and security (Article 6 CFR) is concerned, the CJEU has provided indications in relation to the lawfulness of the deprivation of liberty

[400] Judgment of the Court of Justice of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, C-404/15 and C-659/15, ECLI:EU:C:2016:198.

[401] Judgment of the Court (Grand Chamber) of 25 July 2018, *PPU, C*-216/18, ECLI:EU:C:2018:586.

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in the context of the procedure laid down in FD EAW. In Case C-237/15 PPU[402] (*Lanigan*), the CJEU clarified that the provisions of FD EAW, in light of Article 6 of the CFR, do not preclude holding the requested person in custody even if the total duration for which the person has been held in custody exceeds the time limits for the execution of the EAW, provided that the duration is not excessive. When custody ends, the executing authority shall implement appropriate measures to prevent absconding and ensure that the material conditions necessary for the effective surrender of the person remain fulfilled until the final decision is taken on the execution of the EAW.

With these judgments, the CJEU did not expressly qualify the situations where a concrete risk of violation of fundamental rights arises as grounds for refusal[403]. It acknowledged, however, that a balance shall be struck between the need to ensure the execution of instruments based on mutual recognition and the need to protect the fundamental rights of the persons concerned. Accordingly, it clarified the type of assessment to be conducted by the competent authorities in the executing State to ascertain the existence of a risk of a fundamental rights violation, as well as the remedies in such cases.

The protection of fundamental rights in the context of mutual recognition legal instruments, especially in the FD EAW, has also been the subject of different judgments of the ECtHR. As clarified in the case-law of the ECtHR[404], the relationship between EU law and the ECHR in relation to fundamental rights protection is governed by a presumption of equivalent protection under the Bosphorus doctrine. According to ECtHR case-law, a State does not depart from the requirements of the ECHR where it does no more than implement legal obligations following from being a Member State[405], and the full potential of the mechanism for supervising fundamental rights provided by EU law has been deployed[406]. However, if in a particular case the ECtHR determined that the protection of fundamental rights as enshrined in the ECHR was manifestly deficient, the presumption of equivalent protection can be rebutted[407].

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[402] Judgment of the Court (Grand Chamber) of 16 July 2015, *PPU*, C-237/15, ECLI:EU:C:2015:474.

[403] Weyembergh, A., and Sellier, E., *Criminal procedural laws across the European Union - A comparative analysis of selected main differences and the impact they have over the development of EU legislation*, Policy Department for citizen's rights and constitutional affairs, European Parliament, August 2018; European Union Agency for Fundamental Rights (FRA), *European Arrest Warrant proceedings - Room for improvement to guarantee rights in practice*, 26 March 2024, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2024-european-arrest-warrant-proceedings_en.pdf.

[404] Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, Grand Chamber, no. 54036/98, ECHR, 30 June 2005, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-69564%22]}; Michaud v. France, Fifth Section, no. 12323/11, ECHR, 6 December 2012, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-115377%22]}.

[405] Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, Grand Chamber, no. 54036/98, ECHR, 30 June 2005, para. 156.

[406] Avotiņš v. Latvia, Grand Chamber, no. 17502/07, ECHR, 23 May 2016, para. 105, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-163114%22]}.

[407] Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, Grand Chamber, no. 54036/98, ECHR, 30 June 2005, para. 156; European Court of Human Rights (ECtHR),

The ECtHR has issued several judgments in situations where allegations concerned the risk of inhuman or degrading treatment (Article 3 ECHR), the lawfulness of deprivation of liberty (Article 5 ECHR), and the right to a fair trial and to an effective remedy (Articles 6 and 13 ECHR) in connection with the application of FD EAW[408].

In Bivolaru and Moldovan v. France[409], concerning the surrender of two persons pursuant to FD EAW, the ECtHR found that the provisions of FD EAW did not leave the executing State with an autonomous margin of manoeuvre and that there was no serious difficulty with the interpretation of the relevant provisions of FD EAW that would justify the need for a preliminary ruling from the CJEU. As a consequence, the presumption of equal protection applied to the case. However, the ECtHR considered that a real risk of violation of Article 3 of the ECHR had been established and that the execution of the EAW entailed a manifestly deficient protection of fundamental rights. The presumption of equal protection was therefore rebutted, and a violation of Article 3 of the ECHR found.

The ECtHR relates the execution of mutual recognition instruments (*in casu*, FD EAW) to positive human rights duties in relation to absolute human rights (e.g. right to life, prohibition of torture and inhuman treatment). In the case of Romeo Castaño v. Belgium[410], the Belgian State was convicted for its refusal to execute the EAWs issued by Spain and surrender the person sought. According to the ECtHR, the Belgian judicial authorities had failed to apply the double test of *Aranyosi and Căldăraru* by limiting the test to the systemic risk *in abstracto* only. The failure to test the systemic risk *in concreto* led to the refusal of execution and, in the opinion of the ECtHR, to a violation of the positive human rights duty (also called procedural human rights duty) under the ECHR.

Against this complex rebalancing of effective enforcement and human rights application in the context of mutual recognition in criminal matters, Member States have taken different approaches to the checks they perform on the risks of fundamental rights violations in the context of FD EAW, FD PAS, FD TOP and FD ESO.

Member States with an active approach to checking fundamental rights protection

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European Union Agency for Fundamental Rights (FRA), *Joint Factsheet, European Arrest Warrant and Fundamental Rights – ECtHR and CJEU Case-Law*, 18 June 2024, https://fra.europa.eu/sites/default/files/fra_uploads/ecthr-fra-2024-european-arrest-warrant-fundamental-rights_en.pdf.

[408] European Court of Human Rights (ECtHR), European Union Agency for Fundamental Rights (FRA), *Joint Factsheet, European Arrest Warrant and Fundamental Rights – ECtHR and CJEU Case-Law*, 18 June 2024, https://fra.europa.eu/sites/default/files/fra_uploads/ecthr-fra-2024-european-arrest-warrant-fundamental-rights_en.pdf.

[409] Bivolaru and Moldovan v. France, Fifth Section, no. 40324/16 and 12623/17, ECHR, 25 March 2021, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-209069%22]}.

[410] Romeo Castaño v. Belgium, Second Section, no. 8351/17, ECHR, 9 July 2019, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-194618%22]}.

The Netherlands

The Netherlands' approach follows indications from the provisions of the FDs and relevant case-law. For FD EAW, this is the result of amendments to national transposing legislation, which originally included a ground for refusal concerning fundamental rights violation, which was subsequently amended with a provision that more closely follows the CJEU case-law established with *Aranyosi and Căldăraru*.

Provisions of the Constitution of the Netherlands (Article 93 and 94) provide that provisions of treaties and resolutions by international institutions shall become binding in the Netherlands after their publication, and that statutory regulations in force within the country shall not be applicable if such application would conflict with provisions of treaties or resolutions by international institutions that are binding on all persons. This constitutional clause, when read in the light of the protection for fundamental rights afforded by the TEU (and the CFR) and the ECHR, is capable of ensuring that implementation of the FDs shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles, as stipulated in FD EAW, FD PAS, FD TOP, and FD ESO.

For FD EAW specifically (no similar national provision is found with respect to FD PAS, FD TOP and FD ESO), Article 11 of the Surrender Act (SA) provides for the codification in national law of the principles emerging from the case-law of the CJEU. The national measure provides that an EAW will not be acted upon in cases where, in the opinion of the court, there are compelling grounds to believe (based on concrete facts) that the requested person, after surrender, faces a real risk that their fundamental rights guaranteed by the CFR will be violated. It also specifies that if there is a possibility that the real risk of the violation referenced in the first paragraph can be excluded should the circumstances change, the court must postpone the decision on surrender.

The introduction of this provision in Dutch law provides clear guidance to judges and authorities and can be regarded as beneficial. It also raises the question of whether a similar provision, more explicit on the interplay between the respect of fundamental rights and the execution of requests for judicial cooperation (in this case, EAWs), should be incorporated into EU law by amending the relevant FD(s). While such codification in EU law would bind the CJEU itself, and potentially limit the further development of its case-law, the stability of the CJEU jurisprudence on the matter seems to mitigate the possible impact of this risk. On the contrary, implementing such a measure would reinforce the legal framework established by the CJEU and clarify its applicability across all Member States, ensuring more consistent transposition into national legislation.

While Article 11 of the SA provides for an important safeguard for the protection of fundamental rights of the requested person, some issues are potentially concerning. Firstly, the national measure does not provide indications on how the competent authority should ascertain the existence of a real risk of violation of

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the fundamental rights. This assessment should essentially be demanded of the competent authority, which should apply the indications provided in the CJEU case-law to the specific case at hand. Should provisions of national law provide more detailed guidance on how the assessment is to be carried out, that would potentially undermine the jurisprudence of the CJEU, for example through the introduction of more rigid or restrictive conditions than those established by the CJEU.

While the national measure expressly makes reference to postponing execution of the EAW until the risk of fundamental rights violation is remedied, it also clarifies that the EAW 'shall not be acted upon' where the competent authority ascertains the existence of such risk. Although the current phrasing of Article 11 of the SA is the result of a legislative amendment aiming to achieve better alignment with the CJEU case-law[411], the current formulation is still liable to be interpreted as introducing an additional ground for non-execution of the EAW not foreseen in FD EAW[412]. However, the wording of the national provision seems to provide for a transposition of FD EAW that respects the CJEU case-law. It can be argued that, with the *Aranyosi and Căldăraru* judgment, the CJEU essentially introduced an additional ground for refusal, subject to a precise step-by-step assessment to be followed by the executing State's authorities. The Dutch national legislation does not appear to go beyond the limits imposed by the CJEU case-law: it does not mandate the refusal to execute the EAW as the only solution in cases where fundamental rights concerns are identified following the two-step approach, but allows postponement of execution of the EAW where the fundamental right violation risk might be excluded.

Despite the lack of express indication in the legislative measures, one respondent to the national authorities' survey highlighted that there is clear jurisprudence at national level concerning the two-step test that the competent authority should follow when assessing the existence of a risk of fundamental rights violation[413]. This is also facilitated by the fact that, in the Netherlands, the competence for all surrender procedures lies with a single, highly specialised authority, the District Court of Amsterdam. The survey respondent mentioned that the sources of information that the competent court considers in the first step of the assessment include: documents and reports from the CPT (which is, according a Dutch judge as well as a legal advisor participating in the EAW workshop, the most updated and reliable source for the first step of the two-step assessment), the United Nations (UN) and the Council of Europe, judgments of the ECtHR, reports from

[411] Strengthening Trust in the European Criminal Justice Area through Mutual Recognition and the Streamlines Application of the European Arrest Warrant (STREAM), Shabbir A., *The European Arrest Warrant: Trust, Fundamental Rights, and the Rule of Law – A Comparative Report of 14 EU Member States*, 2023, p. 26, https://stream-eaw.eu/wp-content/uploads/2023/09/final-STREAM-Comparative-Report.pdf.

[412] STREAM, Buisman S.S., *Periodic Country Report: The Netherlands*, 2023, p. 5, https://stream-eaw.eu/wp-content/uploads/2023/06/STREAM-Country-Report_The-Netherlands2.pdf.

[413] Court of Amsterdam 28.11.2017, ECLI:NL:RBAMS:2017: 1269; Court of Amsterdam, 11.02.2020, ECLI:NL:RBAMS:2020:1097; Court of Amsterdam, 27.10.2022, ECLI:NL:RBAMS:2022:6217.

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non-governmental organisations (NGOs) and human rights organisations, information from the press, and information provided by the issuing State or other Member States. Dutch stakeholders at the EAW workshop stated that there were clear shortcomings in the existing databases (in particular the FRA database), and that updated and accessible information is necessary to aid judicial assessments.

Subsequently, in the second step of the assessment, the national competent authority generally asks for information to be provided by the issuing State in relation to detention conditions, the specific prison where the requested person would be detained, and the duration of their stay in that prison. One survey respondent highlighted that in some cases, the competent national authority does not rely on mere guarantees or general information provided by the issuing State.

A similar situation occurs in relation to the practical application of other FDs. One representative of the department of International Transfer of Sentenced Persons, interviewed on the application of the FD TOP, stated that in certain cases, a guarantee is to be provided by the executing State regarding the detention conditions in their facilities and the protection of fundamental rights (in general), before the transfer of a Dutch judgment to another Member State can take place. Should that guarantee not be provided, the judgment cannot be transferred and FD TOP cannot be properly executed.

The survey results highlighted that the Netherlands sometimes experiences difficulties in receiving the requested information or in receiving information in a timely manner from other Member States (exacerbated by the fact that, during the lengthy procedure of exchange of information, the person is often deprived of their liberty). This issue is particularly serious, as it can result in undue postponement of the execution of a mutual recognition request. The situation would improve if all Member States had a central authority responsible for answering questions or providing guarantees to the executing State, e.g. in relation to detention facilities. These communication issues between countries, particularly concerning detention conditions in the issuing State, were raised in the survey and confirmed in the EAW workshop. Participants from the Netherlands questioned whether the two-step test was working effectively, given the difficulty to obtain the necessary information, in particular the difficulty for the defendant and the defence counsel to supply any useful additional information. They noted that the process of obtaining a full response from the issuing State in EAW cases is often time-consuming and that this lengthy procedure sometimes results in instances where the court concludes that there is insufficient information and terminates the surrender proceedings.

The exchange of details on fundamental right protection among Member States when applying mutual recognition instruments appears to need improvement, especially in respect of detention conditions. Establishing a mechanism that ensures the swift provision and oversight of this crucial information by the competent authority would greatly enhance efficiency of collaboration between

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the competent authorities. The District Court of Amsterdam has coordinated a programme to formulate recommendations, including the creation of a template to ask for supplementary information from the issuing State in the context of an EAW procedure. The establishment of a mechanism or system for the digital exchange of requests and responses, possibly with the use of standard templates such as those in the District Court of Amsterdam initiative, could speed the process and smooth collaboration. To facilitate cooperation and coordination between national authorities, actors such as Eurojust or the EJN could play a role by compiling and publishing overviews of national jurisprudence or reports on case-law analysis, building consistent practices and know-how. A useful example is the Terrorism Convictions Monitor published regularly by Eurojust, which provides an overview of terrorism-related judgments across the EU, and is intended to facilitate and encourage the sharing of information[414].

In some cases, the assessments conducted by national competent authorities could exclude real risks of fundamental rights violation within a reasonable time, while in other cases the national competent authority decided to bring the procedure to an end[415].

Finally, cases where fundamental rights issues may lead to the non-execution of requests for mutual recognition and judicial cooperation raise the concern of impunity. There is a need to identify viable alternatives to avoid situations where executing a request for judicial cooperation would lead to risks of fundamental rights violations, or, conversely, non-execution would lead to the impunity of the person sought or judged. Among the possible solutions, an integrative approach to judicial cooperation has been proposed[416], whereby the different mutual recognition instruments would provide the competent authorities with a series of possibilities from which the most appropriate judicial cooperation mechanism could be identified. For example, in EAW cases that raise fundamental rights concerns, it could be considered best practice for the competent authorities to consider alternatives such as the transfer of sentences (according to FD TOP) or the transfer of proceedings (e.g. under the Transfer of Proceedings Regulation[417]). However, such alternative options would still require the agreement of the authorities and Member States involved. For example, the Public Prosecutor Office in Amsterdam is reportedly not in favour of refusal of

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[414] Eurojust, Terrorism Convictions Monitor, n.d., https://www.eurojust.europa.eu/crime-types-and-cases/crime-types/terrorism.

[415] Council of the EU, *Evaluation report on the 9th round of mutual evaluations, 9th round of mutual evaluations on mutual recognition legal instruments in the filed of deprivation and restriction of liberty, Report on the Netherlands*, 2022, p. 30, https://data.consilium.europa.eu/doc/document/ST-13190-2022-REV-1/en/pdf.

[416] Ouwerkerk, J., 'Are alternatives to the European arrest warrant underused? The case for an integrative approach to judicial cooperation mechanisms in the EU criminal justice area', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 29, Issue 2, 2021, https://brill.com/view/journals/eccl/29/2/article-p87_87.xml?srsltid=AfmBOopW8nqN6JA-5L59JMkwd0ZJQvCdRb02_Lm4QGFYEKj33MZdLeSI.

[417] Regulation (EU) 2024/3011 of the European Parliament and of the Council of 27 November 2024 on the transfer of proceedings in criminal matters, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32024R3011.

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surrender to a Member State due to detention conditions accompanied by the offering an alternative (such as taking over execution of the punishment or taking over criminal proceedings)[418].

Germany

The Act on International Mutual Assistance in Criminal Matters (IRG) is a horizontal piece of legislation relevant for the implementation of all FDs analysed here. Section 73 of the IRG provides an express clause concerning fundamental rights protection, which is more succinct than the clause in the Dutch national legislation and does not follow CJEU case-law as closely.

According to Section 73 of the IRG, the provision of mutual legal assistance shall be inadmissible (i.e. the request for judicial cooperation shall not be considered or executed) if it would contradict fundamental principles of the German legal system and, with respect to requests for judicial cooperation with other Member States, if it would be contrary to the principles in Article 6 of the TEU.

Although German legislation succeeds in providing an explicit guarantee for the protection of fundamental rights in the context of the implementation of requests for judicial cooperation, the national measure appears to be phrased in general terms, which may lead to uncertainties in relation to its interpretation and application.

Firstly, while the national measure refers to EU law (Article 6 TEU) as the standard for fundamental rights protection in the context of judicial cooperation with Member States, it also makes a general reference to the fundamental principles of the German legal system. While the jurisprudence of the German Constitutional Court is respectful of the principle of the primacy of EU law, in a judgment in relation to the respect of fundamental rights in the context of an EAW procedure[419], the Constitutional Court held that EU law could be declared inapplicable where it is necessary, in exceptional cases, to protect the principles of the constitutional identity (including human dignity)[420].

Secondly, the national measure does not fully clarify the nature of the clause on fundamental rights protection, even though the results of the national authorities' survey may suggest that this issue does not raise particular problems. Only one

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[418] Council of the EU, *Evaluation report on the 9th round of mutual evaluations, 9th round of mutual evaluations on mutual recognition legal instruments in the filed of deprivation and restriction of liberty, Report on the Netherlands*, 2022, p. 31.

[419] Constitutional Court 2nd Senate, 15 December 2015, 2 BvR 2735/14, ECLI:DE:BVerfG:2015:rs20151215.2bvr273514, English press release No. 4/2016 of 26 January 2016, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html.

[420] Wahl, T., 'Refusal of European arrest warrants due to fair trial infringements. Review of the CJEU's judgment in "LM" by national courts in Europe', *Eucrim*, Vol. 4, 2020, pp. 321-330, https://eucrim.eu/articles/refusal-of-european-arrest-warrants-due-to-fair-trial-infringements/#docx-to-html-fn35.

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The national authorities' survey present different views of whether the competent authorities face difficulties in assessing detention conditions or fair trial rights in the issuing State. Four respondents did not highlight any specific difficulties, mentioning that in EAW procedures the issuing State usually provides the requested information within a short period of time, and the information provided is in most cases considered sufficient to proceed with the execution of the EAW. Two respondents underlined that the information provided by the issuing State is sometimes incomplete and requires follow-up, which delays the whole process. Often, reports on specific prisons' conditions are either outdated or not available. Another specific difficulty reported is that some Member States do not provide information to the convicted person on the specific prison where they will be detained, before the surrender takes place. This lack of information appears to be detrimental to the possibility for the competent authority in the executing State to correctly carry out the two-step test.

The German national legal system appears to provide meaningful safeguards ensuring that the execution of an EAW does not translate into a violation of the requested person's fundamental rights. The execution of a large number of EAWs has been refused in Germany on the basis of the reference to fundamental rights in Article 1(3) of FD EAW[423]. The German participant in the EAW workshop, a representative of the Federal Ministry of Justice, confirmed that position and highlighted that the varying detention conditions across the Member States often lead to refusals to execute EAWs in Germany. The *Aranyosi and Căldăraru* judgment is often used as a reference, as it requires executing judicial authorities to seek supplementary information from issuing authorities if there is a credible risk of inhuman or degrading treatment.

In Germany, concerns related to risks of fundamental rights violations in the context of the implementation of mutual recognition instruments undergo a double level of scrutiny. First, by the national courts competent for the execution of the request for judicial cooperation (in the case of FD EAW, the Higher Regional Courts of Appeals). The control exercised in practice at this level concerns the reliability of the assurances given by the issuing State as to the effective respect of the fundamental rights concerned, the prison conditions, the rule of law and independence of the judiciary (which has evident impacts on the respect of the concerned person's right to a fair trial), and the rights of suspects and accused persons[424]. Second, the German Constitutional Court comes into play, and is especially active in upholding the principles of CJEU and ECtHR case-law.[425] This was confirmed by the German participant in the EAW workshop.

While the checks of detention conditions for the detection of potential breaches of fundamental rights violations have been relatively effective, the German

[423] 76 out of 226 refusals issued in 2018 were based on Article 1(3) FD EAW (STREAM, Brodowski, R., *Periodic Country Report: Germany*, 2023, p. 1, https://stream-eaw.eu/wp-content/uploads/2023/07/STREAM_Country-Report_Germany3.pdf).

[424] STREAM, Brodowski, R., *Periodic Country Report: Germany*, 2023, pp. 8-11.

[425] STREAM, Brodowski, R., *Periodic Country Report: Germany*, 2023, pp. 6-7.

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participant in the EAW workshop stated that it was much more difficult to assess fair trial rights. The first step of the assessment is difficult to carry out, as it requires an in-depth investigation into the characteristics of a foreign system. In the second step, it is even more difficult, notably in the dialogue between competent authorities, or with the intervention of the defendant or their counsel, to identify information that can prove the existence of a risk in the specific case of a violation of fair trial rights. The two-step assessment established by the CJEU jurisprudence is harder to apply to fair trial rights violations than to detention conditions and has led to few cases of refusals to execute requests for judicial cooperation, typically only in exceptional cases which would warrant a procedure under Article 7 of the TEU (as in the *LM* judgment).

While the respect of fundamental rights in the context of the implementation of FD EAW appears subject to reassuring safeguards in Germany, most of these safeguards only come into play at the stage of the practical application of these legal instruments. By contrast, the legislation that transposes the relevant FDs appears less detailed and does not provide indications on the remedies (e.g. postponement of the surrender) that could be applied where a risk of fundamental rights violation is ascertained. In the EAW workshop, the German participants claimed that many fundamental rights issues in the context of the application of FD EAW arose from the varied interpretations and applications of CJEU case-law across Member States, and emphasised the need for mutual trust, better training and improved knowledge of the EAW framework to ensure consistent and fair application across the EU. The designation of one, or a limited number, of authorities competent for the mutual recognition and judicial cooperation procedures could again be regarded as best practice. The exclusive competence granted to a single authority (as in the case of the District Court of Amsterdam for surrender procedures) allows for the development of consistent case-law and in-depth knowledge among judges and staff, and may lead to a more active approach to fundamental rights guarantees and safeguards.

Ireland

Similar to the Netherlands and Germany, Ireland appears to have national provisions that (somewhat) expressly address the protection of fundamental rights in the context of mutual recognition legal instruments.

Firstly, there are general provisions of law. In addition to the Irish Constitution, whose Articles 40-44 provide for fundamental rights, the ECHR Act 2003 is considered relevant, due to the relationship between the ECHR and EU law in relation to fundamental rights protection. Section 2 of the ECHR Act 2003 specifically provides that in interpreting and applying any statutory provision or rule of law, a court shall, insofar as possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under ECHR provisions.

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When transposing FD EAW, Ireland adopted provisions that expressly address fundamental rights protection. Section 37 of the EAW Act 2003 stipulates that a person shall not be surrendered where their surrender would be incompatible with the State's obligations under the ECHR and its Protocols. A person shall not be surrendered if there are reasonable grounds to believe that the EAW was issued for reasons connected with their sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or that the person concerned would receive less favourable treatment for these reasons. Finally, a person shall not be surrendered if they would be sentenced to death or would be tortured or subjected to other inhuman or degrading treatment.

This national provision follows the wording of Recitals 12 and 13 to FD EAW. Despite the lack of express reference to Article 6 of the TEU, or to the CFR, Section 37 of the EAW Act 2003 appears to provide an effective safeguard for the protection of fundamental rights in the context of the implementation of FD EAW.

The wording of Section 37 of the EAW Act 2003, however, does not provide guidance for competent authorities on how the existence of a risk of violation of fundamental rights of the requested person should be assessed. By stating that a person 'shall not be surrendered', the Irish legislator seems to have foreseen an additional ground for mandatory non-execution of the EAW, as demonstrated by the fact that Section 37 is included under Part 3 of the EAW Act 2003, which groups the other grounds for mandatory or optional non-execution, and as confirmed by one respondent to national authorities' survey. However, these issues are not overly concerning. With its well-established case-law, the CJEU has clarified that fundamental rights concerns can lead to the non-execution of a request for surrender, and has clearly identified the steps that should be followed by the competent authorities to comply with its jurisprudence and not go beyond its scope.

In the absence of more detailed provisions, further indications can be found in national case-law. The CJEU judgment in the LM case originated from a preliminary ruling referral from the Irish High Court[426]. Further pieces of national case-law[427] appear to have followed the principles established by the CJEU, especially the two-step test to be carried out by the competent authority in the executing State. According to the Irish participant at the EAW workshop, a representative of the Irish Ministry of Justice, when dealing with UK cases, this two-step test is conducted in a single step. As the UK is no longer a Member State, and the notion of mutual trust can no longer be applied (as confirmed by a recent CJEU case from July 2024[428]), the single-step assessment is justified by the relationship of good faith between the EU and the UK. This single step assessment consists of assessing the fundamental rights conditions during the

[426] Minister for Justice and Equality v Celmer [2018], IEHC 152.

[427] Minister for Justice and Equality v Celmer [2019] IESC 80; Minister for Justice and Equality v Orlowski; Minister for Justice and Equality v Lyszkiewicz [2021] IESC 46.

[428] Judgment of the Court (Grand Chamber) of 29 July 2024, *Alchaster,* C-202/24.

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proceedings in the UK, especially in light of problems known to be specific to the UK, e.g. prison overcrowding.

Where Ireland acts as the executing State in EAW cases, no checks on the possible risk of violations of fundamental rights in relation to detention conditions in the issuing State is generally made *ex officio*, as it is usually for the defendant's lawyer to submit evidence, including NGOs' reports and experts' reports, which may then be integrated by additional information requested by the Department of Justice[429]. This was confirmed by a representative of the Irish Prison Service interviewed on the application of FD TOP, who stated that, when Irish authorities receive a request for the transfer of a prisoner, they assume that the issuing State has been compliant with fundamental rights and that they have done their due diligence before transmitting the request. The Irish participant at the EAW workshop noted that Ireland has a central authority in charge of coordination and communication with the competent authorities of other Member States, and that when the requested information on fundamental rights safeguards is not provided, or is not provided on time, reminders are sent to obtain the necessary information.

The Irish competent authorities, when requested to execute an EAW, tend to interpret the national provisions and the relevant case-law on fundamental rights strictly. While there is evidence of case-law where the Irish authorities, when acting as executing authorities, checked the respect of fundamental rights in relation to detention conditions, fair trial rights and procedural rights[430], the threshold is reportedly high, especially when the fundamental rights at stake require an assessment that is described as being more difficult to carry out by the competent authorities (e.g. family rights, rule of law concerns in relation to fair trial rights). In these cases, while it can be debated whether the two-step assessment developed by the CJEU provides the competent authority with actionable indications on how to assess the risk of fundamental rights violations, surrender is usually refused only in truly exceptional cases[431]. In practice, the Irish participant in the EAW workshop was not aware of any case refused for a breach of the right to fair trial and/or lack of independence of the judiciary.

Irish authorities, when assessing the fundamental rights concerns that arise in a specific case, tend to strive for the execution of the EAW, even if it involves going

[429] Council of the EU, *Evaluation report on the 9th round of mutual evaluations, 9th round of mutual evaluations on mutual recognition legal instruments in the filed of deprivation and restriction of liberty, Report on Ireland*, 2022, p. 19, https://data.consilium.europa.eu/doc/document/ST-7023-2022-REV-1/en/pdf.

[430] STREAM, Ryan, A., *Periodic Country Report: Ireland*, 2023, https://stream-eaw.eu/wp-content/uploads/2023/07/STREAM_Country-Report_Ireland3.pdf.

[431] STREAM, Shabbir A., *The European Arrest Warrant: Trust, Fundamental Rights, and the Rule of Law – A Comparative Report of 14 EU Member States*, 2023, p. 26.

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beyond the deadlines in FD EAW, and generally consider issuing authorities more familiar with the type of information they need to provide[432].

Balancing the assurances given by the issuing State and the evidence submitted by the defendant's lawyer in cases concerning risks of fundamental rights violations remains a difficult exercise. It was suggested that a European agency could conduct an official assessment of Member States' prisons to facilitate the assessments of the issuing State authorities[433]. The FRA database on prison conditions is currently being updated to align it with the Commission Recommendation on detention of 2022[434]. On the other hand, assessments of fundamental rights safeguards, such as in relation to detention conditions, take time and may be subject to the varying extents to which different Member States are affected by known problems, making it difficult for competent authorities to rely on comprehensive and updated reports.

The Irish legal system provides that its competent authorities, when requested to execute requests for judicial cooperation, generally carry out a check that the fundamental rights of the persons concerned would be respected in the issuing State. However, they usually do not carry out this check *ex officio* and rely, as a first source of information, on submission from the defendants and counsel. For fundamental rights such as family rights and fair trial rights, only truly exceptional cases justify, in practice, non-execution of a request for judicial cooperation.

Italy

When transposing the FDs considered here, Italy generally adopted an approach in line with the wording used by the European legislator and the relevant case-law of the CJEU.

For FD EAW, Italy adopted a fundamental rights clause that aims to transpose Article 1(3). According to Article 2 of Law no. 69/2005, as amended by Legislative Decree no. 10/2021 (EAW Law), the execution of the EAW may not, under any circumstances, entail a breach of the supreme principles of the constitutional order of the State or of the inalienable rights of the individual recognised by the Constitution, of the fundamental rights and fundamental legal principles enshrined in Article 6 of the TEU, or of the fundamental rights guaranteed by the CFR.

Desk research shows a similar provision in the legislation transposing FD TOP. Article 1 of Legislative Decree no. 161/2010 states that the provisions of that legislative act transpose FD TOP to the extent that they are compatible with the

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[432] Council of the EU, *Evaluation report on the 9th round of mutual evaluations, 9th round of mutual evaluations on mutual recognition legal instruments in the filed of deprivation and restriction of liberty, Report on Ireland*, 2022, p. 20.

[433] Ibid.

[434] Commission Recommendation of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, C(2022) 8987 final.

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highest constitutional principles in matter of fundamental rights, freedom rights, and right to a due process. Similar provisions are included in Legislative Decree no. 38/2016 transposing FD PAS, and Legislative Decree no. 36/2016 transposing FD ESO.

These provisions provide for a rather close transposition of the fundamental rights clauses in the FDs.

The EAW Law also provides for additional provisions in relation to the respect of fundamental rights. Article 1(3-ter) provides that Italy shall not execute EAWs issued by a Member State in respect of which the Council of the EU has suspended the implementation of the EAW mechanism for serious and persistent breach of the principles enshrined in Article 6(1) of the TEU within the meaning of Recital 10 of FD EAW.

Following the amendments brought by Legislative Decree no. 10/2021, the EAW Law no longer provides a list of several grounds for mandatory non-execution, including for situations where the EAW was based on a decision taken in breach of the right to a fair trial (Article 18(g)), where there was a serious risk for the requested person to be subjected to death penalty, torture, or inhuman or degrading treatment (Article 18(h)), or where the decision on the basis of which the EAW was issued included provisions that were contrary to the founding principles of the Italian legal system (Article 18(v)).

The current version of the EAW Law provides for an amended provision dealing with grounds for mandatory non-execution, which now only include those expressly foreseen in Article 3 of FD EAW. The explanatory memorandum to the amending legislation[435] (Legislative Decree no. 10/2021) expressly refers to the fact that trust and mutual recognition are a cornerstone of FD EAW and the grounds for non-execution foreseen in FD EAW shall be considered exhaustive and interpreted strictly. Explicit reference is made to the safeguards for the protection of fundamental rights that emerge from the case-law of the CJEU and to the two-step test. According to the explanatory memorandum, the choice of repealing the specific grounds for mandatory non-execution for fundamental rights concerns was justified by the consideration that codification of the specific fundamental rights concerns that give rise to a ground for non-execution would risk reducing their potential to 'expand in scope' and concealing the 'general acknowledgement' of fundamental rights in the context of the EAW procedure.

The national legislation in Italy has developed in line with the jurisprudence of the CJEU, both in relation to the strict interpretation of the grounds for refusal within mutual recognition legal instruments and in relation to the assessment of the existence of a risk of fundamental rights violation according to the two-step test. As a consequence, the national legislation appears to provide a solid reference

[435] Explanatory memorandum to Legislative Decree of 2 February 2021, no. 10, https://documenti.camera.it/apps/nuovosito/attigoverno/Schedalavori/getTesto.ashx?file=0201_F001.pdf&leg=XVIII#pagemode=none.

for national authorities, allowing them to discontinue an EAW procedure where fundamental rights concern arise, as confirmed by one respondent to the national authorities' survey.

One aspect that is lacking in the transposing legislation is a concrete indication (e.g. through a reference to the postponement of the execution of the EAW) of the remedies where a risk of fundamental rights violation is ascertained by the competent executing authorities in Italy.

Shifting the focus to how the legislation is applied in practice, desk research shows that the national jurisprudence follows the indications of the European courts, often expressly referring to the case-law of both the CJEU and the ECtHR[436]. Abundant case-law is present in Italy in relation to respect for the right to a fair trial and the prohibition of torture and inhuman or degrading treatment.

In relation to the right to a fair trial, the two-step test appears to be followed strictly by the Italian courts, which maintain that general allegations are not sufficient to establish a risk of violation of the right to a fair trial in the absence of a specific and precise verification, taking into account the personal situation of the person concerned, the nature of the offence and the factual context in which an EAW was issued[437]. However, Italian courts generally impose the burden of proof concerning the potential breach of fair trial rights on the defendant[438], an aspect which does not necessarily follow from the CJEU jurisprudence, and one that is capable of undermining its effectiveness.

With respect to the prohibition of torture and inhuman or degrading treatment, the Italian Supreme Court generally imposes on Courts of Appeal the duty to ask for additional information from the issuing authorities when the risk of poor detention conditions is determined according to assessments of international bodies or organisations or ECtHR decisions. The information requested includes indications of the specific detention premises where the requested person would be detained, the space available in cells, and the time spent outside the cells. Italian courts also refer to the need to update the information received to verify any change intervened in the detention conditions in the issuing State[439].

Italian legislation and jurisprudence appears to be aligned with the FDs in terms of the protection afforded to fundamental rights and its balance with the respect of the principle of mutual recognition. National courts show a strong will to execute EAWs according to the principle of mutual recognition[440], adhering to a strict interpretation of the jurisprudence of the CJEU. While information provided by the defendant or their counsel should be taken into account by the competent

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[436] STREAM, Allegrezza, S., *Periodic Country Report: Italy*, 2023, pp. 8-13, https://stream-eaw.eu/wp-content/uploads/2023/07/STREAM_Country-Report_Italy3.pdf.

[437] Ibid., p. 9.

[438] Ibid.

[439] STREAM, Allegrezza, S., *Periodic Country Report: Italy*, 2023, p. 12.

[440] STREAM, Shabbir A., *The European Arrest Warrant: Trust, Fundamental Rights, and the Rule of Law – A Comparative Report of 14 EU Member States*, 2023, p. 23.

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authorities to the utmost extent, imposing the burden of proof of the violation of fundamental rights (e.g. fair trial rights) on the defendant might be a an approach that limits the breadth of the CJEU case-law in practice.

Member States with a less active approach to checking fundamental rights protection

Hungary

Hungary adopted national legislation with a view to transposing the fundamental rights clauses foreseen in the FDs.

Act CLXXX of 2012 on cooperation with the Member States of the European Union in criminal matters (EUtv.), Article 5(1)(f), provides that the court shall refuse to execute the EAW if it would severely violate the fundamental rights of the defendant set out in an international agreement or EU legal act.

Article 109(3)(a), transposing the fundamental rights clause present in FD PAS and FD TOP, provides that judgments of foreign Member States may not be taken into consideration where the procedure which is the basis of the Member State judgment severely violated the fundamental rights attributed to the defendant in the criminal procedure set out in an international agreement or EU legal act.

While the existence of a national provision dealing with the respect of fundamental rights in the context of the implementation of mutual recognition legal instruments is positive, these provisions of EUtv. do not entirely align with the jurisprudence of the CJEU.

The two provisions of national law are sub-paragraphs of the same provisions setting out the grounds for refusal expressly foreseen by the FDs in question. This does not appear to be entirely aligned with the case-law of the CJEU on fundamental rights and on the grounds for refusal. This is also confirmed by the national authorities' survey, with respondents confirming the existence of a ground for mandatory non-execution of EAWs for fundamental rights concerns and of a ground for refusal for fundamental rights concerns in relation to FD PAS and FD TOP (different views were expressed in relation to FD TOP, as to the mandatory or optional nature of the ground for refusal).

Information on the practical application of these provisions of national law was provided in the interviews with a representative of the Ministry of Justice, as well as a Hungarian judge in relation to FD TOP, and a Hungarian judge in relation to FD ESO. These stakeholders stated that if there were serious violation(s) of fundamental rights of the accused in the criminal proceedings, the Hungarian competent authorities had to refuse to recognise (and give execution or enforcement to) the judgment issued in another Member State. According to the interviews, such refusal cases are extremely rare and solely apply in exceptional cases, in relation to serious violation of fundamental rights, on the basis of concrete facts and a request of the convicted person. The emphasis on the need

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the possibility to apply sentences of life imprisonment without parole) and general rule of law concerns[445]. This issue was brought up in the EAW workshop, where it was reported that in Sweden, refusals to execute EAWs in relation to detention conditions have concerned Romania and Hungary.

These issues, coupled with the absence of clear indications stemming from national legislation or case-law in relation to the assessment of risks of fundamental rights violations when acting as executing State, place Hungary among the Member States with a less active approach to checking fundamental rights protection.

Romania

In Romania, a national provision transposing the fundamental rights clause of Article 1(3) of FD EAW appears to be missing. Desk research identified provisions of the Law on international legal cooperation in criminal matters (LILCCM) as indirectly providing a transposition of Article 1(3) of FD EAW. More specifically, the introductory wording of Title III of the LILCCM provides that in the context of the implementation of FD EAW, judicial bodies shall provide the suspect, defendant or convicted person with a written notice on their rights during the criminal prosecution or during the procedure for execution of an EAW, which are then further detailed in ministerial orders, orders of the President of the High Court of Cassation and Justice, and of the attorney general of the Prosecutor's Office within the High Court of Cassation and Justice, as well as in secondary law.

The identified provisions of national law seem to deal with procedural rules to be respected by the competent authorities in Romania and do not provide for a general clause ensuring the implementation of the provisions of FD EAW (and relevant transposing legislation) in a way that respects the fundamental rights as enshrined in Article 6 of the TEU. However, the desk research clarified that secondary law is sometimes unclear or contradicts the provisions of primary law, which may lead to situations where the rights of suspects, defendants or convicted persons during the execution of an EAW are not respected.

In the absence of a direct transposition of Article 1(3) of FD EAW, Romania has not opted to introduce an additional ground for non-execution in case of fundamental rights concerns, as confirmed by the national authorities' survey.

The desk research did not identify case-law that is indicative of the practice of the Romanian competent authorities when acting as executing authorities to assess the existence of risks for the fundamental rights of the person concerned, nor were any clear indications provided by the survey of the national authorities. It is clear that no national provision codifies the two-step test developed in the jurisprudence of the CJEU, two respondents to the survey indicated jurisprudence

[445] STREAM, Bárd, P., *Periodic Country Report: Hungary*, 2023, https://stream-eaw.eu/wp-content/uploads/2023/06/STREAM_Country-Report_Hungary2.pdf.

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in this regard and noted that Romanian courts, when faced with a possible risk of fundamental rights violations, request information from the issuing State. However, one respondent also indicated that there are no consistent applicable criteria or practical verification endeavours, and each case is assessed separately by the Romanian courts.

Reports on the controls carried out in relation to detention conditions highlight that Romanian courts, when acting as executing authorities, have not asked for any information on detention conditions in other Member States, and generally apply the principle of mutual trust. For this reason, Romanian executing authorities have not established a set of criteria for assessing the potential risk of a violation of fundamental rights in relation to detention conditions[446]. It is also reported that Romanian authorities believe that if the requested person consents to the surrender, in principle there should be no need for the executing authority to request information on detention conditions from the issuing State[447].

When Romanian authorities act as issuing authorities, enquiries about detention conditions are frequently received. Processing the request from the competent authorities is expensive, with repercussions in the form of delays in the overall procedure of execution of the EAW. Requests for information from the executing State sometimes result in refusals to surrender or in the other Member State executing the sentence imposed in Romania instead[448]. This situation was confirmed by most of the participants at the EAW workshop, who stated that a particularly large number of cases involving breaches of fundamental rights in the criminal proceedings occurred in Romania, which often led to refusals to execute the EAWs in question.

The detention conditions observed in Romania are often the subject of criticism[449] and have been condemned by judgments of the ECtHR[450].

No clear indications can be identified in relation to the practice adopted by Romanian competent authorities when assessing the existence of risks of fundamental rights. There is a lack of cases where Romania, acting as the executing State, has requested information from the issuing State on the detention conditions in that country, or the respect of the right to a fair trial. The evidence shows that Romanian authorities seem to privilege a case-by-case

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[446] Council of the EU, *Evaluation report on the 9th round of mutual evaluations, 9th round of mutual evaluations on mutual recognition legal instruments in the filed of deprivation and restriction of liberty, Report on Romania*, 2022, p. 32, https://data.consilium.europa.eu/doc/document/ST-7608-2022-REV-1-COR-1/en/pdf.

[447] Ibid., p. 33.

[448] Ibid., p. 32.

[449] European Union Agency for Fundamental Rights (FRA), *Criminal detention conditions in the European Union: rules and reality*, 2019, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-criminal-detention-conditions-in-the-eu_en.pdf.

[450] Rezmiveș and others v. Romania, Fourth Section, no. 61467/12, 39516/13, 48231/13 and 68191/13, ECHR, 25 April 2017, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-173351%22]}.

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assessment, rather than following an established set of assessment criteria. Again, the designation of specialised courts with exclusive competence in these matters could be effective best practice to allow for the development of consistent national case-law that adheres to CJEU jurisprudence.

Conclusions

The respect for fundamental rights, as enshrined in Article 6 of the TEU, is a foundational element of mutual trust between Member States. As a consequence, ensuring the protection of fundamental rights is necessary for the effective functioning of mutual recognition in judicial cooperation in criminal matters. Should any of the rights of the CFR be violated in the procedure of implementation of the FDs, this would automatically lead to a violation of primary EU law.

The role played by fundamental rights in the architecture of the FDs analysed here is the result of the complex interplay between the wording of the FDs themselves and the abundant jurisprudence of the CJEU, the ECtHR, and domestic courts in some Member States.

Member States have taken different approaches to ensuring the protection of fundamental rights while implementing the FDs, particularly when they act as executing States and assess the existence of risks of fundamental rights violations in issuing States.

Member States with an active approach to checking fundamental rights protection have generally adopted provisions that transpose the fundamental rights clauses provided in the FDs. Often, however, they have introduced an additional ground for refusal, based on fundamental rights concerns, that is not foreseen in the text of the FDs.

Specific indications on how the risk of fundamental rights violations should be assessed by the national competent authorities are often found in national case-law. The national jurisprudence generally takes on board (and often directly references) the principles developed in the CJEU jurisprudence: if systematic deficiencies are found in the issuing State, the executing authority must consult the issuing authority to seek additional information or guarantees that fundamental rights will be upheld. Reference to the postponement of the execution of the request for judicial cooperation is generally made in the national legislation or case-law. However, should the assurances provided by the other Member State prove insufficient to exclude the risk of potential fundamental rights violations within a reasonable timeline, the executing authority should, as an exceptional measure, refuse execution of the request for judicial cooperation.

Some Member States appear less active in assessing the potential risks of fundamental rights violations when acting as executing States. In these cases, there is a lack of codification in national provisions of the principles established by the jurisprudence of the CJEU, or a lack of reference to CJEU case-law in the

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national jurisprudence. This is often due to a scarcity of practical cases where the competent authorities in the executing State have engaged in assessing the potential for fundamental rights violations in the issuing State.

Generally, Member States with a more active approach to checking fundamental rights protection are those whose national legislation or case-law reflects the indications provided by the CJEU. Having such express references to the CJEU jurisprudence (or to the indications provided by the CJEU in its judgments) in national law or case-law also helps to achieve a consistent and uniform approach within the Member State itself in cases where competence for requests for judicial cooperation does not lie with a single or limited number of national authorities. By contrast, the lack of such reference may risk misalignment with CJEU jurisprudence. In Hungary, for example, refusals to execute requests for judicial cooperation are extremely rare as these can take place only in exceptional cases and on the basis of complaints from the convicted person, which is a requirement that does not follow directly from the CJEU jurisprudence.

In conclusion, the choice of the EU legislator not to include an explicit ground for refusal on fundamental rights in the FDs (unlike the EIO Directive, for example) has led to different approaches to national implementation and application. Despite the abundant case-law of the CJEU and ECtHR in relation to FD EAW and FD TOP, the two-step assessment of the fundamental rights risks in the context of mutual recognition instruments is implemented differently across Member States. Some take take a more active approach than others, and, generally, the two-step assessment sets a rather high threshold to meet to justify the non-execution of a request for judicial cooperation, and seems more difficult in relation to specific fundamental rights, such as fair trial rights connected to rule of law standards. Several best practices were identified or mentioned by stakeholders. Firstly, national authorities with centralised competence for judicial cooperation cases helps to build knowledge among judges and staff and ensures more consistent implementation of the CJEU case-law. Secondly, the development and use of standardised methods and models for communication between the competent judicial authorities allows for a quicker exchange of more harmonised and comparable information, supporting national authorities in carrying out the two-step assessment. Finally, raising national authorities' awareness of the scope and content of the CFR appears necessary to achieve more robust and consistent protection of fundamental rights across the Member States.

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procedure, public prosecutors are very familiar with the steps envisaged by the FD.

The reason may be linked to the fact that the entry into force of the FD did not fundamentally affect the system for communicating and preventing conflicts of jurisdiction already applied in Czechia. National practitioners surveyed reported no challenges in communicating with competent authorities from other Member States when it comes to parallel proceedings. They also indicated that in the Czech legal system, this cooperation successfully worked before the entry into force of the FD, and the communication of conflicts of jurisdiction is covered by some bilateral agreements predating its entry into force[456] (see Czech FD Conflicts of Jurisdiction Country Fiche, Article 15(1), available as an annex to this study). Even though these agreements do not govern relationships with all Member States, they certainly apply between Czechia and those Member States with which they have the most frequent cases. Nevertheless, the FD establishes a mechanism capable of preventing conflicts of jurisdiction across the EU and is needed to complement the limited geographical scope of bilateral or multilateral agreements.

In Czechia, the procedure for transferring and taking over criminal proceedings is regulated in Act No. 104/2013 Coll[457] on international judicial cooperation in criminal matters. It is a complex legal arrangement that supplements the transfer procedure of criminal proceedings, which can be implemented either on the basis of the Council of Europe Convention on the Transfer of Criminal Proceedings, or on the basis of the Council of Europe Convention on Legal Assistance in Criminal Matters.

The common procedure followed in Czechia to identify potential parallel proceedings does not promote the application of FD Conflicts of Jurisdiction. Czech survey respondents explained that this is because competent authorities would search for parallel proceedings among their available national resources or would receive this information from parties in the proceedings or from another Member State, e.g. via police cooperation. Stakeholders interviewed reported no difficulties in communicating with other competent authorities. In these cases, the exemption envisaged by Article 5(3) of the FD would apply, namely that 'the procedure of contacting shall not apply when the competent authorities conducting parallel proceedings have already been informed of the existence of these proceedings by any other means'. This also explains why the possibility of resorting to consultation with Eurojust, as envisaged in Article 12 of FD Conflicts of Jurisdiction, has not been exercised in Czechia. Academics recommend

[456] Decree of the Minister of Foreign Affairs on the Treaty between the Czechoslovak Socialist Republic and the Republic of Austria on legal assistance in criminal matters, https://www.zakonyprolidi.cz/cs/1985-90; Decree of the Minister of Foreign Affairs on the Treaty between the Czechoslovak Socialist Republic and the Republic of Cyprus on legal assistance in civil and criminal matters, https://www.zakonyprolidi.cz/cs/1983-96

[457] Act No. 104/2013 Coll. on international judicial cooperation in criminal matters, https://www.zakonyprolidi.cz/cs/2013-104

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encouraging consultation with Eurojust as a standard approach, even if not legally mandatory.

In Ireland, the FD Conflicts of Jurisdiction has not been applied to date. During the desk research, no Irish transposing measure implementing this FD could be identified, nor any bilateral agreements on resolving conflicts of jurisdiction between Ireland and other Member States. Nevertheless, one survey respondent from Ireland said that the legislative process for the adoption of measures for the transfer of criminal proceedings to another Member State is ongoing. This is likely related to the Transfer of Proceedings Regulation, as Member States must accommodate this regulation before it becomes applicable in February 2027.

A potential parallel proceeding is typically identified in the investigation stage, through police cooperation or notifications from concerned parties, and the assistance of Eurojust is normally not required. However, unlike most other Member States, Ireland does not treat the investigation stage as part of the criminal proceedings. This may explain the lack of practical implementation of the FD: Ireland has not recognised a conflict of jurisdiction with another Member State, as the judicial proceeding has not started. Irish practitioners clarified that if there seems to be a parallel proceeding, the concerned Member State is usually contacted directly. Ireland generally bases jurisdiction on territorial activities[458] and, unlike other Member States, has limited application of the active personality principle[459] or the passive personality principle[460].

Ireland has designated public prosecutors as the competent authorities to manage conflicts of jurisdiction, although there is no standard procedure and no administrative authority to handle requests to/from other Member States. Despite the fact that the Irish practitioners surveyed are somewhat familiar with the procedure laid down in the FD, they would welcome practical training on operational measures.

Difficulties in identifying foreign competent authorities are rare, and the EJN can be contacted to address them, if necessary.

Finally, from 1 February 2027 the Transfer of Proceedings Regulation will apply. Member States will need to revise their national legislation to accommodate the requirements of the regulation, and assess its impact on the possible lisbonisation of FD Conflicts of Jurisdiction.

Member States lacking application of FD Previous Convictions

[458] The territorial principle means that a State asserts jurisdiction only if the offence has been committed, in part or in whole, in its territory.

[459] The nationality or active personality principle means that a State bases criminal jurisdiction on the nationality of the suspect.

[460] The passive personality principle bases criminal jurisdiction on the status of the victim of the crime as a national of the State exercising jurisdiction.

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Germany and Spain are two Member States where FD Previous Convictions has been rarely applied. As both countries present similarities in their reasons for the lack of application of this FD, they are analysed together.

In Germany, FD Previous Convictions is transposed by the Act of 02/10/2009 on the implementation of FD 2008/675/JHA on the taking into account of convictions handed down in other Member States in the course of new criminal proceedings[461]. Spain also has a legal instrument transposing this FD, namely Organic Law 7/2014[462] on the exchange of information on criminal records and consideration of criminal judgments in the European Union, recently modified by Organic Law 4/2024[463].

At the time of drafting the Organic Law 7/2014, the Spanish legislator included two limitations when considering previous convictions. The first is temporal: European convictions handed down before 15 August 2010 will not be taken into account. The second is material: European convictions may not be taken into account in the only case in which the offender may benefit, i.e. for the purpose of accumulation[464]. This material limitation incorporates the exemption envisaged by Article 3(5) of the FD into the national legal system. According to that provision, Member States are exempted from considering a previous European conviction where the offence giving rise to the new proceedings was committed prior to the European conviction, where taking it into account would limit the court when imposing a penalty in the new proceedings.

Although the recently approved Organic Law 4/2024 repeals these two limitations, it is too soon to assess the impacts of such amendments. Accordingly, this case study focuses on the application of the FD Previous Convictions in Spain under Organic Law 7/2014.

The introduction of Article 3(5) was supported by Germany, among other Member States, as it has a system of a single overall penalty for the commission of several offences, *concursus idealis*. German practitioners highlighted the flexibility provided by FD Previous Convictions and deemed it an advantage for its application. They noted the importance of the FD merely laying down a minimum obligation for the Member States to take account of convictions handed down in other Member States in new criminal proceedings rather than interfering unduly with national law. The FD takes into account the diversity of national solutions and procedures for considering a conviction handed down in another Member State.

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461 Act of 02/10/2009, https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*%5b@attr_id=%27bgbl109s3214.pdf%27%5d#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl109s3214.pdf%27%5D__1732030248340.

462 Organic Law 7/2014, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-11713.

463 Organic Law 4/2024, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2024-21414.

464 Muñoz de Morales, M. *Past, present and future of the recognition of European convictions in the Spanish legal system*, 13 October 2024, https://almacendederecho.org/pasado-presente-y-futuro-del-reconocimiento-de-condenas-europeas-en-el-ordenamiento-espanol.

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CJEU case-law where Germany was party to the proceedings provides additional clarifications on the application of the exception from Article 3(5). In Case C-583/22, the CJEU stated that the national court is not required to 'establish and give specific reasons for the disadvantage resulting from the impossibility of imposing a subsequent cumulative sentence which is laid down for earlier national convictions'[468]. This eases the disregarding of previous foreign convictions if they limit the court's power to impose a penalty in the new proceedings.

Finally, one survey respondent from Germany indicated that FD Previous Convictions 'is still unknown by an important number of prosecutorial and judicial practitioners', which may also explain the lack of application.

Member States lacking application of FD ESO

In the Netherlands, the FD ESO is incorporated into the national legal system by the Act of 05/06/2013 implementing Framework Decision 2009/829/JHA on the application between Member States of the European Union of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention[469]. Portugal also has a legal instrument in place for the transposition of this FD, namely Law 36/2015 on the legal regime for the issuance, recognition and monitoring of the execution of decisions on coercive measures as an alternative to preventive detention, as well as the surrender of a natural person between Member States in the event of non-compliance with the imposed measures, transposing Framework Decision 2009/ 829/JHA[470].

The 9th round of mutual evaluations concluded that the reluctance among judges to apply FD ESO is often linked to the difficulty in identifying cases where it would be effective and appropriate to issue an ESO, as it does not necessarily fit the purposes of the criminal procedure[471]. This is consistent with the feedback from Dutch participants at the EAW workshop, who shared that practitioners' lack of experience with applying the FD ESO, and general lack of awareness of the instrument, may result in misuse/abuse of the EAW. Academics also argue that the lack of application in the Netherlands may result from the particular national legal framework on pre-trial detention. The consideration of alternatives to pre-trial detention does not take place as a separate decision prior to deciding

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[468] Judgment of the Court of 12 January 2023, *PPU*, C-583/22, para. 81.

[469] Act of 05/06/2013 implementing Framework Decision 2009/829/JHA on the application between Member States of the European Union of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, https://zoek.officielebekendmakingen.nl/stb-2013-250.html#extrainformatie.

[470] Law 36/2015 on the legal regime for the issuance, recognition and monitoring of the execution of decisions on coercive measures as an alternative to preventive detention, as well as the surrender of a natural person between Member States in the event of non-compliance with the imposed measures, transposing Framework Decision 2009/ 829/JHA, https://diariodarepublica.pt/dr/legislacao-consolidada/lei/2015-67654180.

[471] Council of the EU, *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 of 1 March 2023, 2023, p. 8, first para.

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whether or not pre-trial detention must be ordered. On the contrary, these alternatives are discussed once the pre-trial detention has been ordered, which may not fully fall under the scope of FD ESO, affecting its use by Dutch competent authorities.

In Portugal, survey respondents and interviewees indicated that this FD has only been applied in two cases, with its authorities acting as issuing authorities in both instances. Practitioners surveyed acknowledged being only slightly familiar with the procedures contained in the FD ESO and noted that they would welcome practical training. Stakeholders interviewed stated that consultations with other competent authorities are always problematic due to of the difficulty in identifying a competent authority in the preliminary phases of the procedure. They added that even if foreign authorities are correctly identified for consultation, work volume often prevents timely consultations and effective cooperation.

The Portuguese courts are the designated competent authorities to issue requests under FD ESO. This can sometimes be in conflict with the views of public prosecutors. For instance, in Portugal, as the issuing State, one prosecutor had a suspect with dependent minors in another country and considered the FD ESO an appropriate instrument to deal with this situation, but the procedure was not authorised[472].

Further findings from the 9th round of mutual evaluations show that when a pre-trial investigation can be easily completed, it would not be appropriate to issue an ESO, which would complicate the handling of the case. In the event of this situation, a preferred option is to keep the suspect under provisional arrest for as short period of time, rather than releasing them to return for further investigation or a trial, as the time needed to process an ESO would be longer than that required to conclude the pre-trial investigation.

This is consistent with further input from Europris, which revealed that investigating judges are often reluctant to apply the FD ESO procedure due to concerns that suspects under provisional arrest will not be available for trial again, once released. This explains why competent authorities tend to not be willing to allow the suspect to leave the country when their presence will be needed in the course of the criminal procedure. In the Netherlands, there is a fear that the suspect will fail to appear in court when summoned because they are in a different Member State under a ESO. In those cases, it might be difficult to get them back easily and on time using an EAW[473]. Stakeholders from Portugal shared this view and indicated that the residual application of FD ESO is due to the fact that judicial authorities tend to be conservative towards innovation and initiatives from the EU, especially if authorities are not familiar with the outcome of certain proceedings

[472] Interview with FRA.

[473] Council of the European Union, *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*, 2022, p. 81, second para., https://open.overheid.nl/documenten/ronl-aee8de0e90b69ae8c5afb6de4f10ea6eed552d75/pdf.

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Member States lacking application of FD PAS

In Belgium, FD PAS is implemented by the Law of 21 May 2013 concerning the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanction imposed in a Member State of the EU[476]. Finland also has legislation transposing this FD, the Act 1170/2011 on national enforcement of the provisions of the Framework Decision on probation measures and alternative sanctions in the European Union and on the application of the Framework Decision[477].

While Member States can recognise prison sentences fairly simply, it seems far from straightforward to do so with alternative sanctions and probation measures involving particular types of care or prohibition, for which the executing authority may have no equivalent in its national system[478]. This is regulated in Article 9(1) of FD PAS, which states that the executing State is allowed to adapt a probation measure or alternative sanction, to a limited extent, if the original measure is incompatible with its national law.

In Finland, survey respondents explained that this adaptation is needed in all cases given significant differences in the nature and the duration of the sanctions. This results in time-consuming proceedings, because the concerned person has the right to appeal separately against this adaptation decision and against the decision to be/not be transferred.

Belgium has also experienced difficulties in the adaptation of measures due to the incompatibility of Belgian law with the nature of the penalty imposed by another Member State, as well as the procedure for adapting the sentence, according to the Belgian practitioners surveyed. In Belgium, the duration of the supervision and the point at which the measure ceases to apply should be made clear in specific cases. The lack of information on these aspects has also caused the Belgian authorities to have to adapt the measures imposed by other Member States.

Further replies to the survey in Belgium show that the connection between FD PAS and FD TOP has caused some challenges in the practical application of FD PAS, chiefly in relation to persons with psychiatric conditions. The first challenge concerns a conditional release, which is in some cases granted on condition that the sentenced person previously spent some time in a psychiatric hospital. This often turns into a reason not to apply FD PAS, as Article 1(3)(a) of FD PAS does

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[476] Law of 21 May 2013 concerning the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanction imposed in a Member State of the EU, https://etaamb.openjustice.be/fr/loi-du-21-mai-2013_n2013009242.html.

[477] Act 1170/2011 on national enforcement of the provisions of the Framework Decision on probation measures and alternative sanctions in the European Union and on the application of the Framework Decision, https://www.finlex.fi/en/laki/kaannokset/2011/en20111170.pdf.

[478] Council of the EU, *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*, 2022, p. 52, second para.

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not apply the execution of judgments falling under the scope of FD TOP, and some Member States consider the condition of previous hospitalisation to fall under FD TOP. However, if the certificate is then forwarded under FD TOP, the need for psychiatric measures is invoked as a ground of refusal, which leads to the impossibility of transfer of some measures. A similar situation occurs in Finland, where stakeholders mentioned that community service is a sanction that has been transferred under FD TOP, either as an independent sanction or as an ancillary sanction because, in some cases, community service is imposed in Finland instead of imprisonment. To bring clarity and facilitate the execution of such requests, practitioners and academics would welcome examining the possibility of merging FD PAS and FD TOP into a single comprehensive instrument including both measures, and establishing the use of a single form. It would also be helpful to develop a guide at EU level explaining the interaction between different FDs to avoid overlaps between several instruments.

On the double criminality check, interviewees from Finland shared that in their jurisdiction, community sanctions may well be imposed for offences other than those listed in Article 10 of FD PAS. In such cases, the lack of double criminality may constitute an obstacle to transfer and hinder the practical application of the FD. Another measure that creates challenges is the Belgian provision on 'disposal to Sentence Enforcement Court'. This is an additional penalty imposed by the judge at the same time as the principal custodial sentence. This additional penalty takes effect on the expiry of the main custodial sentence. The offender is then placed under the supervision of the Sentence Enforcement Court for a period ranging from 5-15 years. The Sentence Enforcement Court decides whether to carry out the disposition by deprivation of liberty or by release under supervision. In cases of foreign nationals with residence outside of Belgium sentenced for some very serious offences, recognition of this type of judicial supervision and post-release monitoring is mostly refused. Some Member States refuse it because no adaptation is possible under their national legal frameworks, and others because they consider such penalty to fall under FD TOP. To avoid these situations where FDs are used inefficiently, it could be relevant to explore the option of creating a guideline with the different measures/sanctions in the national legal frameworks and their compatibility between Member States.

Belgian case law[479] shows that the infrequent application of FD PAS may be due to the lack of clarity about the actual place of residence of the convicted person and consequent doubts about the feasibility of the proposed probation plan, including verification.

The particular scope of FD PAS, i.e. probation measures and alternative sanctions, calls for specific monitoring and supervision of sentenced persons. Effective monitoring requires great trust between the competent authorities of

[479] Cour de cassation - 30 mars 2021, P.21.0306.N, https://juportal.be/content/ECLI:BE:CASS:2021:ARR.20210330.2N.12.

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different Member States[480]. The Belgian practitioners surveyed noted that multiple national authorities may be competent to implement FD PAS, complicating matters and causing uncertainty as to which authority should be contacted at different stages of the procedure. EJN contact points are used to mitigate the issue.

Another reason for the lack of application of FD PAS might be lack of awareness among practitioners. For example, Finnish practitioners are not provided with specific training on FD PAS. Given that the competence to apply this instrument can correspond to different authorities, such training would be best done jointly for all competent authorities, namely CSA, prosecution offices, and courts[481]. In Belgium, one survey respondent explained that the Judicial Training Institute is responsible for the initial and continuing training of magistrates. Every year, the Institute organises training sessions on mutual recognition, covering, in particular, FD PAS. This training is complemented by working group sessions gathering representatives of the Justice FPS, the public prosecution service, and the Communities' probation services, which meet regularly to analyse the various practical issues and the options available in such situations.

Article 9(4) of FD PAS allows the issuing State to withdraw the decision to forward a judgment in case the sentence has been adapted and supervision in the executing State has not yet begun. In Finland, this type of withdrawal has happened because an executing State could not have a final decision before the supervision ended. This is particularly notable for the enforcement of community sanctions, as Finnish law states that a community service sanction must be completed within 15 months of the date when the judgment becomes enforceable. As a result, the time has usually expired when the competent authority receives a request for a transfer, or it elapses during the recognition and adaptation process. In such cases, the judgment is then not enforceable in Finland[482].

In Belgium, the practitioners surveyed stated that when the competent authorities act as executing authorities, no cases of withdrawal are reported. However, when they were issuing authorities, it often happens that the certificate is withdrawn because an important part of the measure (e.g. judicial supervision, if a person is sentenced to being at the disposal of an Sentence Enforcement Court) cannot be recognised by the executing State.

Finally, the lack of application of FD PAS in Finland is also affected by multilateral agreements. Practitioners and stakeholders acknowledge that they have had

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[480] Council of the EU, *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*, 2022, p. 16, fourth para.

[481] Council of the European Union, *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 Finland*, 2022, https://data.consilium.europa.eu/doc/document/ST-12472-2022-REV-1/en/pdf.

[482] Ibid., p. 23, first para.

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more transfers among Nordic countries based on the Act on Cooperation among Finland and the other Nordic States, Sweden, Denmark, and Norway, which covers probation measures and alternative sanctions[483]. They noted that this process is faster and more flexible than FD PAS because it is sufficient if the judgment is enforceable; it does not have to be final, and this cooperation does not contain any specific conditions for the transfer[484]. These aspects could be considered best practices for the possible simplification of FD PAS.

CONCLUSIONS

This analysis of the practical application of FD Conflicts of Jurisdiction, FD Previous Convictions, FD ESO and FD PAS in different Member States shows that some reasons explaining the lack of application are common to all four FDs, whereas others are specific to some of the instruments and relate to particularities in their scope.

There seems to be a general lack of familiarity with the procedures outlined by FD Conflicts of Jurisdiction, FD Previous Convictions, FD ESO and FD PAS. There is also a preference for FD-specific training, most of which focuses broadly on mutual recognition, and with the simultaneous participation of all competent authorities. Training should be complemented with exchanges of information between practitioners and should be accompanied by practical handbooks so that the absence of specific national procedural guidelines does not prompt reluctance to use these legal instruments[485].

The infrequent practical application of these FDs is not due to difficulties faced by Member States in identifying the competent authorities to be contacted in another Member State. Surveyed practitioners from six Member States[486] reported that challenges with identifying the foreign competent authorities are rare and easily overcome using the EJN and its Atlas database.

For FD Conflicts of Jurisdiction, the lack of application is related to the particularities of the national legal systems. Czechia opts to resolve conflicts of jurisdiction via bilateral agreements predating the entry into force of the FD and with a history of successful functioning in the country. Ireland has a different system to establish jurisdiction in criminal proceedings, which makes FD Conflicts of Jurisdiction less relevant. Nevertheless, the differences in national legal systems alone cannot be the reason for not using an EU-level instrument aiming

[483] Council of the European Union, *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 Finland,* 2022, p. 18, third para.

[484] Ibid., p. 23, third para.

[485] Ibid., p. 63, second para.

[486] No information available from survey respondents from the Netherlands and Spain.

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to overcome such differences by establishing a cooperation mechanism rather than harmonisation.

Similarly, the low number of cases of application of FD Previous Convictions in Germany and Spain reflects specificities of their criminal codes and criminal procedure law. These two Member States have a cumulative penalty system, where the sentences imposed are not the result of an arithmetical sum for each of the offences committed, but, rather, maximum limits are set. This makes national courts reluctant to apply the FDs and recognise previous convictions from another Member State because the maximum limit may then be reached, precluding the judges imposing a sentence in the new proceeding.

One of the key reasons for the lack of practical application of FD ESO is that the procedure takes place pre-trial. This raises concerns among practitioners that suspects in provisional arrest will not be available for trial again once released and explains why they are not willing to allow the suspect to leave the country when their presence will be needed in the course of the criminal procedure. The reluctance is also affected by the issuing authorities' uncertainty about the effectiveness of the monitoring by executing authorities. Some practitioners argue that communication between these authorities to monitor compliance with the measures imposed can be difficult in practice, and propose more regular personal exchanges with experts from Member States to enhance cooperation.

The specific scope of FD PAS, i.e. alternative sanctions and probation measures, often involves particular types of care or prohibition for which there may not be an equivalent in the executing State. The lack of equivalence can be related to the nature and duration of the measures or to the lack of specific information requested by the criminal legislation of the executing State, for example information on the point at which the measure ceases to apply. These factors require the measures to be adapted, which results in complex and time-consuming proceedings that may discourage competent authorities from applying FD PAS.

A common conclusion in relation to FD ESO and FD PAS is the length and complexity of the related procedures, with judicial authorities often opting for simpler solutions. Some practitioners suggested that simplifying the procedures at EU level could promote greater use[487].

Finally, the low use of these FDs is reflected in the lack of relevant CJEU jurisprudence. Due to the lack of request for preliminary rulings by national courts, there are no relevant judgments on FD Conflicts of Jurisdiction and FD ESO, and only a limited amount on FD Previous Convictions and FD PAS. The absence of

[487] Council of the European Union, *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 Finland*, 2022, p. 63, third para.

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harmonised guidance from the CJEU could also contribute to Member States' reluctance to issue requests under those FDs.

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Case Study 4: Digitalisation of justice

Introduction

The COVID-19 pandemic marked a turning point for the digitalisation of working methods, including in the field of justice, both domestically and in cross-border contexts. This shift emphasised the potential of videoconferencing and electronic channels of communication, including for building data for EU JHA agencies such as Eurojust and Europol. Digitalisation aims to ensure resilience and improve access to justice and the efficiency of justice systems. At present, judicial proceedings, particularly in cross-border situations, still take place mostly on paper and are based on traditional communication channels. This situation could hinder timely and efficient communication between national authorities in the fight against cross-border crime and terrorism. Digitalisation of justice systems is an important objective in light of the new push for European democracy and in line with the political priority of a Europe fit for the digital age[488].

Over the 2019-2023 period, the EU has made significant efforts to speed the digitalisation process and foster the use of digital services in justice systems. The focus was on legislative action, notably several legislative initiatives: the e-CODEX system[489] providing an appropriate framework for exchanging judicial information through secure services; Regulation 2020/1784 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters and Regulation 2020/1783 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, establishing the use of the decentralised IT system for relevant communications; Regulation 2023/1543 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings; and the Transfer of Proceedings Regulation, which similarly establishes an IT system for communication between competent authorities, and between competent authorities and service providers.

The Council of the EU has adopted the e-Justice Strategy 2024-2028[490], which should guide the ongoing digital transformation in the justice domain by integrating technology into the legal system throughout the EU.

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[488] European Commission, *Digitalisation of Justice*, n.d., https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/digitalisation-justice_en.

[489] Regulation (EU) 2022/850 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters, https://eur-lex.europa.eu/EN/legal-content/summary/e-codex-computerised-system-for-the-cross-border-electronic-exchange-of-data-in-the-area-of-judicial-cooperation-in-civil-and-criminal-matters.html.

[490] Council of the EU, e-Justice Strategy 2024-2028, C/2025/437, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202500437.

The Digitalisation Regulation[491] entered into force in January 2024. It aims to promote the use of digital channels for communication between the authorities involved in judicial cooperation within the EU, by extending the use of the e-CODEX system and, in civil and commercial matters, establishing the European electronic access point for communication with litigants. Effectively, the two main objectives of the regulation are to use the digital channel of communication between the competent authorities, as a rule, by establishing a common decentralised IT system based on the e-CODEX system and to provide a common framework of procedural rules for the participation by videoconference in certain judicial proceedings, including in criminal matters. It also mandates and gives legal effect to electronic signatures, seals and documents.

Alongside the Digitalisation Regulation, the EU adopted the Digitalisation Directive[492]. It introduces targeted amendments, including adding a new Article 8a to FD EAW, outlining specific provisions on the use of the decentralised IT system for cases where the requested person may want to benefit from the possibility of access to a lawyer and legal aid in the issuing State.

These legal instruments, among others, provide the legislative framework for the setting up of different digital platforms intended to facilitate cross-border judicial cooperation in criminal matters. These platforms are sometimes specific to a certain FD or particularly helpful in its application.

For FD EAW, even where the location of the requested person is known, the transmission of EAWs largely takes place through the Schengen Information System (SIS), a centralised system managed by the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA). It enables national authorities to enter and consult alerts on persons and objects for reasons such as the detention subject to an EAW.

To improve the application of FD TOP[493], some Member States' authorities have agreed to send transfer requests and any follow-up elements electronically. This requires the EJN Atlas database, which contains the email addresses of judicial and central authorities, to be maintained up to date. Where relevant, communication may occasionally also take place via the SIRENE bureaux, for those Member States that use the SIS, or via the Interpol bureaux, for other

[491] Regulation 2023/2844 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.

[492] Directive (EU) 2023/2843 amending Directives 2011/99/EU and 2014/41/EU, 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.

[493] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008F0909

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Member States[494]. Europris was created by the European Organisation of Prison and Correctional Services to provide a central knowledge base and enhance transparency and inter-jurisdictional cooperation, and is also a relevant tool in the application of FD TOP.

ECRIS is used in the application of FD Previous Convictions[495].

To date, the digitalisation of justice has focused on enabling efficient exchange of information between competent national authorities, as well as the smooth communication between these and other parties to the criminal proceedings, including the defendant. In this fast-changing environment, future initiatives must include data collection and data analysis provisions and address possible associated risks such as data or technological biases. This is particularly relevant considering the emergence and development of artificial intelligence (AI) applicable to cross-border judicial cooperation, for example to support practitioners to complete request forms or assess the fulfilment of conditions for the recognition of a foreign decision.

Enhanced use of these digital tools may ultimately strengthen judicial cooperation across the EU, a key objective in the AFSJ, and can substantially contribute to realising mutual trust when meeting standards of quality, efficiency and non-biased design and use. The proper functioning of the area of justice is essential, and the mutual recognition of judgments and judicial decisions across the EU, based on mutual trust in national systems, remains a cornerstone of judicial cooperation.

Member States selected for this case study are Estonia, the Netherlands and Sweden, as countries with a high level of digitalisation of justice, together with with Greece and Romania as examples of Member States with a lower level of digitalisation.

Member States with high digitalisation

National regulatory contexts

Estonia, the Netherlands, and Sweden have a high level of digitalisation of their judicial systems. Available data on certain digitalisation parameters supports this classification (e.g. proportion of the population who possess at least basic digital skills and who use the internet to interact with public administrations). According to Eurostat[496], 62.6% of the Estonian population have basic digital skills, followed

[494] Council of the EU, *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 of 1 March 2023, 2023m https://data.consilium.europa.eu/doc/document/ST-6741-2023-INIT/en/pdf.

[495] Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, https://eur-lex.europa.eu/eli/dec_framw/2008/675/oj/eng.

[496] Eurostat, *Digitalisation dashboard*, n.d., https://ec.europa.eu/eurostat/cache/dashboard/digitalisation.

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by 66.4% in Sweden, and 82.7% in the Netherlands. Results for online interaction show 79.8% in Sweden, 80.6% in Estonia, and 85.6% in the Netherlands.

These three Member States' national legislation foresee the use of information and communication technology (ICT) to implement legal instruments on cross-border judicial cooperation in various ways and at different stages of the proceedings. Estonia is the most digitalised of the three jurisdictions and is the source of the majority of the best practices presented here. Sweden has relevant legislation in force, such as Ordinance 2019:1283 on the Digitalisation of Justice[497], regulating the digital flow of information between public authorities, Law 2000:562 on International Legal Assistance in Criminal Matters[498], and Law 2017:1000 on a European Investigation Order[499], enabling law enforcement, judges and prosecutors to request electronic evidence necessary in a particular case.

Desk research shows that Estonia's Code of Criminal Procedure[500] allows the pre-trial investigation judge, in considering a possible pre-trial detention, to arrange for participation of the suspect, the defence counsel and the prosecutor by means of a technical solution enabling live interaction with the questioned person. This system can also be used later in the proceeding if the concerned person needs to be interviewed or examined during a court hearing, and the criminal file and the court file may also be kept, in part or in full, in digital form. Specifically applicable to the implementation of FD PAS[501], practitioners interviewed explained that the process to seek, record and store the consent of sentenced persons before forwarding a judgment is highly digitalised in Estonia. For instance, if the probation officer does not speak a language understandable to the concerned person, digital tools and means of communication are sometimes used for translation. The information is exchanged via email and the person is granted access to a probation digital portal containing documents concerning their case, as well as other materials, such as an overview of their rights and obligations. They can also receive and confirm their community service performance plan and electronic surveillance schedule via the portal. Finally, they are periodically sent notifications via SMS messages to remind them of the times of their meetings with a probation officer.

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[497] Ordinance 2019:1283 on the Digitalisation of Justice, https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/forordning-20191283-om-rattsvasendets_sfs-2019-1283//

[498] Law 2000:562 on International Legal Assistance in Criminal Matters, https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-2000562-om-internationell-rattslig-hjalp-i_sfs-2000-562/.

[499] Law 2017:1000 on a European Investigation Order, https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-20171000-om-en-europeisk-utredningsorder_sfs-2017-1000/.

[500] Estonian Code of Criminal Procedure, https://www.riigiteataja.ee/en/eli/530102013093/consolide.

[501] Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, https://eur-lex.europa.eu/eli/dec_framw/2008/947/oj/eng.

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These Estonian measuresmay be worth considering when assessing how to enhance digitalisation of justice in other Member States. However, the extent to which they are best practice will depend on a number of factors. Some of these factors relate to the specificities of national legal systems, but Member States wishing to progress in this regard may be willing to amend their laws (e.g. by ensuring that SMS notifications count as official notifications). Other factors will relate to infrastructure issues, such as internet availability, speed and quality.

To date, neither binding rules for cross-border access to electronic evidence nor non-binding guidance on the topic have been identified in any jurisdiction. Member States are keen to take taking legislative measures to embed the e-evidence package in criminal matters into domestic law. This includes national efforts to transpose Directive 2023/1544/EU on the gathering of electronic evidence in criminal proceedings by February 2026. For example, Sweden is working on a regulation that will affect over 25 pieces of legislation, requiring that all legal documents on judicial cooperation are exchanged digitally, and aiming to fully implement the European e-Evidence Digital Exchange System (eEDES), currently referred to as the Justice Digital Exchange System (JUDEX). The eEDES will make it easier for law enforcement and judicial authorities to obtain the electronic evidence they need to investigate and prosecute offences.

Lack of connectivity and technical issues

Despite the generally enabling legal framework for the use of digital tools in the selected Member States, the actual application and day-to-day operation of such tools is not exempt from technical challenges. Practitioners outlined difficulties in the form of delays with the exchange of requested documents. In certain Member States, especially those with regional distribution of competence, not all competent authorities are connected digitally, and in other cases, the executing State only allows for correspondence to be delivered via post and not digitally.

The Netherlands has a central authority competent for the application of FD Financial Penalties and its internal management and communication processes are largely supported by an automated system operated via a communication portal. Nevertheless, individual ICT systems still need to be linked to that digital communication portal. This means that the exchange of information between local authorities first reporting the offences and the centralised body processing the sanctions is not always straightforward. Issues include unnecessary delays, mismanagement of data and files, and missing important deadlines, implying that the execution of a financial penalty becomes statue-barred according to the law of the executing State. Adaptation of the ICT systems, sufficient financial resources, quality training of staff, and clear operational guidelines are essential, as competent authorities must become proficient in these new digital tools to ensure that the global management system works properly.

In Sweden, the population is generally familiar with ICTs and the digitalisation of justice is considered to have a significant and positive impact for competent

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authorities and to have contributed to faster and more efficient exchange of information. However, the digitalisation of justice still poses some challenges for practitioners, chiefly technical issues in the functioning of the digital tools and the lack of specific technical skills to handle them.

Data protection concerns

Some issues hindering broader digitalisation of justice across the EU for cooperation in criminal matters are linked to differences in national legal systems, particularly national rules governing the handling of personal data. It will be important to achieve technological integration while respecting national legal processes.

The Swedish practitioners surveyed reported that while their systems are equipped to handle digital exchanges, cross-border cooperation is sometimes hindered when partner Member States' are not in favour of the digital transfer of case files containing personal data. For example, Swedish practitioners requesting the digital transfer of case files to another Member State have been asked to send paper copies, meaning that their digitalised system cannot be optimised.

Stakeholders in the Netherlands explained that while the exchange of documents can take place via digital means, Member States work with diverse technological infrastructures and have different legal frameworks, which may translate into diverse levels of security of sensitive criminal justice data. In a scenario where a Dutch authority receives requests that are not compatible with their IT systems and/or security standards, adaptation may be required, affecting the efficiency of the cooperation, including the ability to act rapidly in urgent situations. For example, if a foreign authority attempted to transmit a final decision concerning a financial penalty via a secure file-sharing platform, challenges could emerge on receipt of the case file in the Netherlands due to technical incompatibilities between the two systems. More specifically, the foreign system may use a proprietary encryption standard that relies on a different protocol consistent with its national cybersecurity framework but not recognised by the Dutch infrastructure. As a result, the Dutch authority may not be able to decrypt the file or verify its authenticity without significant technical adjustments. To resolve the issue, the issuing authority would be asked to resend the documentation via an alternative digital channel that, while more widely accepted, would be less efficient. This could require additional steps, such as document reformulation, manual data entry, and coordination between the two authorities. These non-harmonised approaches do not assure system efficiency across Member States, with practitioners reporting a need for substantial resources and collaboration on harmonisation.

The use of different digital safety infrastructures may lead to hacking and other cybersecurity issues, as well as errors in data management and data processing. As a practical example, it may happen that information on parallel proceedings

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for the same offence in different Member States remains hidden from the authorities undertaking new criminal proceedings, which later raises issues under the *ne bis in idem* principle. The interoperability of cross-border digital systems in criminal matters is thus not only an efficiency concern, but is substantially linked to the quality of criminal justice.

Videoconferencing and other ways of digital communication

The level of digitalisation and the extent to which ICT is used depends on the specificities of the FD in question. Dutch interviewees acknowledged that in respect of FD Financial Penalties, the communication between competent authorities could be streamlined. Currently, they use liaison officers to intervene and solve any problems in the cooperation with foreign competent authorities. Dutch practitioners needing any clarification about another Member State's national legal context can ask for help from the liaison officers rather than requesting direct communication via videoconference with the other competent authority. Conversely, these types of telematic tools seem more relevant under FDs where direct and live communication with the suspect is needed to safeguard their fundamental rights, such as FD EAW or FD TOP. This is already envisaged by Article 6 of the Digitalisation Regulation, which introduced the use of videoconferencing or other distance communication technology in criminal matters applicable to various legal acts, including FD EAW, FD TOP and FD PAS.

Dutch attendees at the EAW workshop welcomed the legal certainty provided by Article 6 of the Digitalisation Regulation, particularly the use of videoconferencing to allow the accused person to participate in hearings. This resolves previous discrepancies and uncertainties about whether the EIO Directive covered the use of videoconferencing in that particular situation. Estonian practitioners reported that many EAWs are sometimes issued to enable the person to attend trials where prison sentences might be imposed. This is due to the fact that in some jurisdictions the hearings are part of the investigation phase and fall under the scope of the EIO Directive, whereas other Member States would request that the person is detained and transferred under the FD EAW to participate in hearings. This may result in disproportionate use of EAWs. Accordingly, having a specific legal provision allowing individuals to participate in court hearings via videoconferencing would reduce the number of EAWs for trial participation. While the use of videoconferencing for hearings has been addressed, it is not available in the trial context (see below). Article 6 of the Digitalisation Regulation will therefore partially support the implementation of mutual recognition instruments in the application of the *in absentia* ground for refusal of a foreign judicial decision.

Videoconferencing could promote more proportionate use of intrusive instruments such as the FD EAW as it could be used when a requested person is arrested on the basis of an EAW at an early stage. For example, it may prevent actual surrender if the issuing authority hears the person via videoconferencing and finds that surrender is unnecessary because the authority already has the person's declaration or statement. Alternatively, the EAW could be replaced with

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a less intrusive instrument such as the ESO if the person is already in the executing State and agrees to comply with supervision measures.

Discussions at the EAW workshop considered whether the scope of the use of videoconference should be broadened to hearings in the context of the execution of EAWs. Article 18(1)(a) of FD EAW currently refers to prosecution EAWs, meaning it is possible to hear the requested person via videoconference solely in that situation, i.e. when a prosecution EAW is issued. In practice, participants from the Netherlands reported that some requested persons prefer to undergo their sentence in the executing State, where they are nationals or residents, rather than in the issuing State. For example, the issuing authority could potentially withdraw the EAW and send a certificate under FD TOP instead if it were possible to speak to the issuing authority via video conference. It could thus be beneficial to broaden the scope to include execution EAWs, allowing the requested person to be heard even when the EAW is issued for the execution of a sentence, without prejudice to the application of Article 4(6) of FD EAW and the possible refusal of surrender it foresees.

The Digitalisation Regulation can facilitate optimum use of FD TOP and FD PAS, for instance by enabling digital hearing of convicted persons who reside in the Member State where the judgment has been imposed in relation to their views on being transferred to the executing State to undertake their sentence there. Enhanced digitalisation can improve the sending of relevant information from the executing State to the issuing State in the course of enforcing a judicial decision handed down by the latter, e.g. monitoring and reporting supervision under the FD ESO and FD PAS, or providing follow-up information on the (non-)execution of a financial penalty.

Member States with low digitalisation

National regulatory contexts

Greece and Romania have a lower level of digitalisation in the operations of their judicial authorities.

The latest available data from Eurostat[502] reveal that approximately 52% of the Greek population have basic digital skills and use the internet for interacting with public authorities. In Romania, these numbers are significantly lower, with only 27.7% of the population having basic digital skills and just 18.2% interacting with public authorities online. These data indicate that the lack of digitalisation is a systemic issue, rather than specific to the judiciary. They are consistent with results from the desk research in Greece, which show that the recent action plans of the Greek Ministry of Justice and its digitalisation of justice agenda target a faster and more effective administration of justice. The relevant strategies and legislative initiatives currently focus on enhancing the interoperability between the

[502] Eurostat data, n.d., https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202500437.

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national judicial authorities and citizens' digital access to justice, notably through progressive digitalisation and electronic and online access to official documents and national judicial decisions.

Similar to Estonia, the Netherlands, and Sweden, the digitalisation agenda in Greece does not explicitly include specific legislative instruments or other guidance with direct impact on the implementation of the FDs.

Lack of training and technical issues

Respondents from Greece and Romania identified two approaches when asked about the main challenges and needs of the digital transition applied to communications across Member States in the context of the application of the FDs.

Some practitioners acknowledged that the principal challenges are an overall lack of digital skills, a need for further digital training, and the need for increased financial support and additional adequately skilled staff. However, some considered communication with foreign competent authorities already vastly digitalised (i.e. the correspondence and exchange of documents oftentimes take place via email and digital signatures are accepted). In their view, the implementation of the digitalisation of justice agenda, particularly the Digitalisation Regulation, will have little impact on their day-to-day work. For example, Romanian practitioners reported that the requirement to use new digital platforms or tools does not always mean an improvement in the efficiency of the communications. Learning how to use new ICT is time-consuming and sometimes challenging, creating reluctance to apply them, as they feel more comfortable and efficient using traditional means of communication. Overall, the lack of dedicated training, together with the general lack of digital skills in the population, means that adaption to new ICT is perceived as challenging rather than enabling.

Greek stakeholders interviewed on their experiences with FD Previous Convictions noted that even if Member States have duly connected to the necessary platforms, they still may not be using them, or not using them to their full potential. Although Greece has not transposed FD Previous Convictions, it has been part of ECRIS since its inception, allowing effective electronic exchange of information with other Member States on previous convictions. However, some national judicial and prosecutorial authorities are not connected to the central databases containing foreign convictions (e.g. ECRIS-TCN). It may then be necessary to reform the practical mechanisms for the exchange of information and promote further digitalisation actions and rules for the direct and mandatory interconnection of decentralised authorities to ensure that the use of platforms like ECRIS is optimised.

Means of communication and data protection concerns

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Interviewees in Greece agreed with their Dutch counterparts on tailoring the requested level of digitalisation to the purpose and characteristics of the specific FD. For instance, videoconference hearings or other means of distance communication in criminal matters do not seem to be entirely relevant for the successful application of FD Conflicts of Jurisdiction, as it primarily regulates consultations between competent authorities without the need for a hearing of defendants, suspects or victims. However, digitalisation can improve the exchange and accessibility of information on ongoing or completed criminal proceedings across the EU. This would facilitate wider and better application of FD Conflicts of Jurisdiction, as well as other instruments, such as FD Previous Convictions.

Finally, stakeholders in both Greece and Romania stated that data protection is another aspect hindering the application of digital tools in the context of cross-border judicial cooperation. Prosecutors and judicial officers in both Member States may choose to continue to communicate by more secure traditional means, especially when handling sensitive documents and data, including compliance with the guarantee of confidentiality in attorney-client relations. This seems to reflect practitioners' perceptions and a lack of experience with new systems, rather than a legal reality. Data protection and security can be designed in digital tools so, in principle, there should be no national legislation precluding the use of ICT in favour of traditional communication on the basis of data protection.

Conclusions

The digitalisation of justice in the EU is strongly backed by an exhaustive legal framework at both European and Member State level and is generally welcomed by practitioners and stakeholders. However, this digital transition needs to be balanced with the necessary purchase of equipment and training of staff, areas where Member States identify more challenges.

In addition to technical or economic difficulties, some Member States' reluctance to digitalise their judicial procedures is due to the sensitive information that often needs to be exchanged. Discrepancies or incompatibilities between national legal systems in data usage and data protection are barriers to the effective employment of ICT across the EU for mutual cooperation in criminal matters. This situation may be exacerbated by the use and regulation of emerging technologies, such as AI. It is crucial to achieve technological integration while respecting national legal processes.

Stakeholders working on the application of different FDs note that being connected to an online platform does not necessarily mean it is used, or used correctly, reducing the overall level of digitalisation of justice. This may be due to the fact that a national central authority is connected to a larger EU-wide database or platform, while regional authorities are not. It could also be that the country has a centralised system for the exchange of information, but

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decentralised bodies do not yet have the means to connect to such systems. These issues ultimately affect communication and collaboration with other Member States, especially if interaction with foreign authorities then needs to take place via the central authority, which may not have all the necessary information, causing additional delays.

Finally, not all FDs require the same level of digitalisation or application of the same digital tools. It is therefore important to identify where the efforts and resources should focus.

Case Study 5: Road safety in the context of FD Financial Penalties

Introduction

In 2024, preliminary data gathered by the European Commission shows that the EU registered around 19 800 deaths in traffic incidents. Although this number is 3% lower than in 2023, improving road safety remains an EU priority, which aims to halve the number of fatal road accidents by 2030[503].

The proper functioning of FD Financial Penalties plays a relevant role in deterring drivers from illegal driving behaviour by penalising unsafe practices such as driving over the speed limit or under the effect of narcotic substances. It also deals with how to proceed when these situations happen across different Member States.

The CBE Directive was recently amended to overcome identified shortcomings in the original. These shortcomings were listed in a revision of the CBE Directive that took place in March 2023, prior to the amendment of the Directive[504]:

- Inadequate recognition of decisions on financial penalties because of unsuitable procedures – while existing EU procedures for mutual recognition are designed for serious criminal offences, they are not tailored to the enforcement of a multitude of administrative financial penalties for road traffic offences;
- Different levels of fundamental rights protection, such as different deadlines for non-residents and residents for the submission of penalty notices, insufficient information on appeal procedures, and missing translation of documents.

These issues result in 40% of cross-border offences going unpunished. The amended CBE Directive will enhance cooperation between Member States, streamline offender identification, and facilitate enforcement of fines[505]. In addition, the revised CBE Directive is based on equal treatment of drivers,

[503] European Commission, *EU road fatalities drop by 3% in 2024, but progress remains slow*, 2025, https://transport.ec.europa.eu/news-events/news/eu-road-fatalities-drop-3-2024-progress-remains-slow-2025-03-18_en .

[504] European Parliamentary Research Service (EPRS), *Revision of Directive (EU) 2015/413 on cross-border exchange of information on road safety-related traffic offences, 2023*, https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/740237/EPRS_BRI(2023)740237_EN.pdf.

[505] European Commission, *New rules for better cross-border enforcement of traffic laws*, 2024, https://transport.ec.europa.eu/news-events/news/new-rules-better-cross-border-enforcement-traffic-laws-2024-12-16_en.

irrespective of their status as residents or non-residents, and regardless of the qualifications of these infractions under administrative or criminal law.

FD Financial Penalties is a mutual recognition instrument intended to cover all types of criminal offences. Over the years, experience has shown that it is not intended to deal with mass road traffic offences, which are usually illicit acts under administrative law. This dichotomy between criminal and administrative offences is crucial, as the principal legal barrier to successful implementation of FD Financial Penalties is the fact that Member States give different normative qualifications to road traffic offences[506]. The difference also affects the rights granted to the alleged offenders, as, typically, criminal proceedings offer more guarantees to defendants when it comes to procedural rights.

Member States' decisions on financial penalties can only be recognised under FD Financial Penalties if road traffic offences are qualified as criminal offences or if their review is carried out under a procedure that is similar to criminal proceedings (Article 1(a)). Despite interpretation by the CJEU[507], there seemed to be legal uncertainty complicating Member States' administrative authorities' assessments of whether the courts of other Member States issuing the decisions could be qualified as courts with jurisdiction in criminal matters or as courts that review traffic offences under a procedure similar to criminal proceedings.

Due to its legal basis (Article 82 TFEU), it is not possible to amend FD Financial Penalties to account for proceedings for road safety offences that are purely administrative with no criminal legal component (see discussion below). Accordingly, the revision of the CBE Directive aimed to put in place rules on mutual administrative assistance in the enforcement of traffic-related fines. Recital 24 of the amended CBE Directive states that 'in order to ensure equal treatment of resident and non-resident drivers, specific provisions should be established in this Directive to provide Member States with the possibility to enforce administrative decisions on road traffic fines across borders and to provide mutual administrative assistance for that enforcement; without precluding the application of FD Financial Penalties'.

According to Article 5f of the amended CBE Directive, the mutual administrative assistance now covers cases of non-payment of financial penalties. This novelty addresses the situation of successful enforcement of financial penalties for road traffic offences, as decisions issued by Member States in cases of non-payment often did not fall under the scope of FD Financial Penalties (because the infraction was not considered a criminal offence).

In addition to facilitating the enforcement of administrative road traffic offences, the amended CBE Directive seeks to improve identification of the offender or, more accurately, the liable person. The precision of the wording is important as it

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[506] Report from the Commission to the European Parliament and the Council on the application of Directive (EU) 2015/413 facilitating cross-border exchange of information on road-safety-related traffic offences, COM/2016/0744 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0744

[507] Judgment of the Court (Grand Chamber) of 14 November 2013, *Baláž*, C-60/12, ECLI:EU:C:2013:733.

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encompasses the different liability regimes in the Member States, i.e. 'vehicle owner liability' and 'driver liability'.

Under the 'owner liability' regime, the vehicle owner is liable for the offence committed with their vehicle and detected by enforcement authorities in accordance with national rules, and has to pay the fine, regardless of whether or not they were driving the vehicle at the time. Conversely, the 'driver liability' regime means that the vehicle's driver is the person liable for the traffic violation. In these cases, enforcement authorities usually send a notification to the owner of the vehicle with a request to identify the driver. If the owner is not able to identify the driver, they are required to pay a fine on the basis of failure to respond to an information request[508]. Some Member States apply the so-called 'strict driver liability' regime, according to which enforcement authorities shall present evidence that the alleged offender was driving the vehicle involved in the infraction. Identifying the driver is thus a precondition for issuing a fine, and the vehicle's owner cannot be required to carry out such identification, as this would contradict the owner's privilege against self-incrimination envisaged by national legislation applying the regime.

Enforcing either of these regimes requires identifying the owner of the vehicle. To this end, the amended CBE Directive aims to resolve the lack of EU-wide mechanisms enabling exchange of vehicle registration data (VRD). Most road traffic offences are detected automatically or without stopping the vehicle, i.e. offences not subject to on-the-spot-fines, and are not followed up because Member States' enforcement authorities are often unable to identify the owner of the foreign vehicle and impose a fine. Article 4 of the CBE Directive outlines procedures for the exchange of VRD and mutual administrative assistance between Member States. It also addresses the lack of mutual administrative assistance and cooperation between Member States in investigating road traffic offences after exchanging vehicle registration data.

Recital 3 of the amended CBE Directive states that fundamental and procedural rights of non-resident drivers were not always respected in the context of cross-border investigations, in particular due to a lack of transparency in setting the amount of the financial penalties and in appeal procedures. To remedy these issues, Articles 5, 5a and 5b of the amended CBE Directive provide for a detailed and exhaustive procedure for the communication of the Traffic Offence Notice and clarify the elements it should include, the manner in which it should be delivered, and the procedural guarantees of the alleged offender (e.g. requirement to translate the notice into the language of the registration document of the vehicle).

The impact assessment carried out prior to the new legislative proposal suggested a policy option where grounds for refusing to recognise and execute

[508] Commission Staff Working Document on the evaluation of cross-border exchange of information on road traffic offences, SWD(2016) 355 final, https://transport.ec.europa.eu/system/files/2016-11/swd20160355.pdf.

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the decision related to a financial penalty issued by another Member State would be reduced[509] compared to the list provided in Article 7 of FD Financial Penalties.

Although this preliminary research seems to indicate that the amended CBE Directive would be the preferred instrument for the enforcement of road safety-related offences, some Member States are satisfied with the functioning of FD Financial Penalties for this purpose. This case study presents such input from Bulgaria and Germany. However, other Member States do not consider it the most suitable legislation to handle traffic violations, including Finland and France.

This case study presents examples of best practices, challenges and suggestions for improvement stemming from the experience of relevant practitioners in the selected Member States. It also describes the potential reasons for different perceptions on the effectiveness of FD Financial Penalties across jurisdictions.

Member States satisfied with the functioning of FD Financial Penalties

Competent authorities in Bulgaria and Germany view the application of FD Financial Penalties as satisfactory.

In Bulgaria, the main national measure transposing FD Financial Penalties is the Act on Recognition, Execution and Transmission of Confiscation or Seizure Orders and Decisions Imposing Financial Penalties[510]. The national legislation implements FD Financial Penalties in a conforming manner, with very few provisions considered partially transposed or partially conforming, none related to road safety. National case-law on FD Financial Penalties does not touch on road safety matters, suggesting that the recognition and enforcement of decisions covering this type of offence may not be particularly problematic.

The Bulgarian stakeholders interviewed gave interesting insights into the application of FD Financial Penalties in the context of road safety offences. On the one hand, they reported no difficulties in the execution of fines related to road traffic offences, with those concerned typically paying the fine voluntarily. There may be some instances where the information provided in the certificate is incomplete or requires clarification, and these are addressed by contacting the issuing authority. The requirement for a court to review the cases seems to be clearly implemented and has not posed challenges to practitioners, arguably thanks to the clarification provided by CJEU in *Baláž*, with this review required to be carried out under a procedure similar to criminal proceedings. This also applies to the determination of the law governing enforcement in accordance with Article 9 of FD Financial Penalties.

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[509] Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/413 facilitating cross-border exchange of information on road-safety-related traffic offences, pp. 10-11, https://transport.ec.europa.eu/system/files/2023-03/COM_2023_126_0.pdf.

[510] Entered into force in 2010 and later amended in 2011 and 2022, https://lex.bg/bg/laws/ldoc/2135664929.

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On the other hand, practitioners acknowledged some difficulties in identifying and contacting competent authorities in other Member States. For example, the competent authorities that actually issue the certificates are often administrative authorities, whereas the contact points for the implementation of the FD belong to the judiciary. In their experience, this can hinder communication between authorities, as the contact points do not always have the capacity to urge the responsible administrative authority to reply to the inquiries of the Bulgarian practitioners. The Bulgarian system is also affected by this issue, although in slightly different terms: while courts are competent for the recognition of the decision, the National Revenue Agency is in charge of its execution. According to the interviewees, this has led to cases where once the court had recognised the decision, it no longer took part in the execution and could not properly follow up on the development of the procedure, should the issuing authority so request. This lack of coordination between authorities in the same Member State ultimately precludes the correct assessment of the effectiveness of FD Financial Penalties. It could be argued that enhanced harmonisation across the EU in relation to the competent authority responsible for issuing and recognising the request, and executing the decision imposing a financial penalty could be beneficial to overall application of the FD.

Other aspects, while referring to the application of FD Financial Penalties, generally affect the recognition and execution of decisions on road safety offences. Bulgarian stakeholders reported that the timeframe to respond to a request under FD Financial Penalties, which on average takes between one and two months, is reasonable. In Bulgaria, the procedure for recognition of foreign decisions is highly simplified and the statute of limitations for such recognition is short.

Practitioners were satisfied with the appointment of a defence counsel to the person concerned when the latter cannot be found at the provided address in the country and thus cannot be notified and summoned to court. The appointment takes place instead of suspending the case until the person can be located, contributing to more effective enforcement of decisions. This is complemented by a non-binding practice across Bulgarian courts, according to which the person concerned is informed that they can voluntarily pay the financial penalty. The practice works well, as the person often pays and submits evidence of that payment to the court without needing to involve the National Revenue Agency.

The unified certificate and the five non-binding standardised forms accompanying the procedure for the enforcement of financial penalties are regularly used by the interviewed stakeholders, who find them very helpful. They were designed to complement the certificate that accompanies FD Financial Penalties as the process of execution of the penalties sometimes requires further communication between the Member States involved (e.g. to comply with obligations to inform each other about the impossibility of execution as indicated in Article 12(1) of FD Financial Penalties). In the absence of rules on how to communicate, and in

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which language, there was a need to provide standardised forms to facilitate these communications. In addition to improving communication, the use of the forms avoids high translation costs. The forms were developed based on practical experience with the implementation of the FD Financial Penalties, and with a strong emphasis on clarity, efficiency and user-friendliness. In Bulgaria, they are valued because the issuing authority has the necessary information in every phase of the procedure. The issuing authority often asks the executing authority to fill out these forms. They promote consistency and legal clarity by harmonising the exchange of information and they can reduce the administrative burden of national competent authorities. Nevertheless, as many practitioners are still not aware of these forms, it would be useful to encourage their use as best practice across the Member States, or even to make their use mandatory under EU legislation.

Bulgaria's participation in the Salzburg Forum Agreement[511] positively influenced the perception of the functioning of FD Financial Penalties. The Agreement is based on mutual trust and aims to facilitate cooperation on cross-border enforcement of administrative road safety-related traffic offences. It builds on FD Financial Penalties, as well as on the CBE Directive. For instance, Article 6(1) of the Agreement states that, in their cooperation, the contracting parties shall follow the procedures of FD Financial Penalties, unless otherwise provided in the Agreement. It also complements the list of offences of the CBE Directive by adding the non-cooperation of the owner of the vehicle in identifying the person driving the vehicle. During the negotiation of the proposal on amending the CBE Directive, Member States of the Salzburg Forum asked for the inclusion of a clause that would allow pre-existing bilateral agreements to remain in place.

In Germany the principal transposing measure is the Law on International Mutual Assistance in Criminal Matters[512], which transposes FD Financial Penalties in an almost totally conforming manner. Research on relevant national case-law found a result related to fines for traffic violations, with an interesting judgment covering the enforcement in Germany of a decision issued in the Netherlands for a road traffic offence. It aimed to clarify the extent to which the issuing State has to prove that the defendant was informed of their rights to contest the decision in the issuing State. The court concluded that the issuing State needs to prove that such rights were communicated in a written proceeding and that, in the case of absence of clear proof, the request for execution can be rejected by the German competent authority[513].

This practice to protect the defendant's rights could be encouraged in other Member States, based on a combined reading of Article 7(g) of FD Financial

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511 Salzburg Forum Agreement, n.d., https://www.salzburgforum.org/files/CBE%20Agreement.pdf.

512 Entered into force in 1994 and later amended in 2024, https://www.gesetze-im-internet.de/irg/BJNR020710982.html.

513 *Higher Regional Court of Zweibrücken, 22.06.2017 - 1 AR 2/16 - 1 SsRs 9/16*, https://dejure.org/dienste/vernetzung/rechtsprechung?Text=1%20AR%202/16.

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Penalties and Article 4 of Directive 2012/13/EU on the right to information in criminal proceedings, helping to harmonise the proceedings dealing with the mutual recognition of decisions on financial penalties for road traffic offences. The protection of the concerned person's procedural rights in the application of the FD could also be enhanced by harmonising other national practices. For instance, appointing a defence counsel when the person cannot be found at the provided address and cannot be notified and summoned to court (as in Bulgaria).

German practitioners acknowledged their overall satisfaction with the functioning of FD Financial Penalties when tackling road traffic offences. Survey responses agreed that FD Financial Penalties provides a sufficient and comprehensive legal basis for the enforcement of financial sanctions resulting from road traffic offences. It has also proved an effective instrument for the cross-border recognition and execution of such sanctions and there is no need to supplement FD Financial Penalties with regard to its enforcement-related provisions.

The application of FD Financial Penalties in Germany is not exempt from difficulties. Although the recognition and enforcement procedures work properly and are often used, German practitioners have sometimes encountered challenges in delivering an enforceable decision. This is because FD Financial Penalties will only be applicable once the decision on the financial penalty has become final and non-appealable. For example, stakeholders from the Federal Office of Justice, the competent authority both when Germany is the issuing State and the executing State, have experienced problems with the procedure that led to said enforceable decision, which in Germany is considered part of the 'investigation phase'. Difficulties related to the identification of the driver, the serving of documents, and the translation of the communications. These difficulties explain why some practitioners do not consider FD Financial Penalties the most suitable instrument for the enforcement of monetary sanctions related to road traffic offences. For example, as Germany applies the strict driver liability regime, practitioners from enforcement authorities reported that a high level of effort is required to provide the presumed offender with clear and exhaustive evidence of them committing the road traffic offence, compared to the relatively low chances of success that makes them reluctant to apply the FD in the first place.

The General German Automobile Club (ADAC) provided suggestions on how to improve the application of FD Financial Penalties. The main proposal concerns the destination of the revenue obtained from the execution of the financial penalties. Article 13 of FD Financial Penalties states that this revenue is to accrue to the executing State, unless otherwise agreed with the issuing State. However, respondents from ADAC argued that if this were reversed (i.e. the monies were to go to the issuing State), it would provide greater motivation to enforce monetary sanctions, as the benefit will remain in the issuing State.

Germany has bilateral agreements in place with Austria and the Netherlands covering different measures of mutual legal assistance in administrative matters,

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including traffic offences, such as the exchange of VRD, the identification of the driver or the enforcement of judicial decisions. During interviews, officers from DG MOVE shared that the agreement with the Netherlands is particularly relevant given the significant differences in the two legal systems; while Germany applies strict driver liability and has administrative authorities handle road infractions, the Netherlands applies owner liability and conducts criminal proceedings for traffic offences. The agreement overcomes such differences effectively, based on the number of unpaid fines enforced. Although this is an example of good practice, it may not be easy to replicate in the context of a possible lisbonisation of FD Financial Penalties, as these agreements cover the enforcement of all administrative decisions generally speaking, including traffic offences. They additionally offer the advantage of tailored solutions negotiated directly between two jurisdictions, allowing them to accommodate specific legal and administrative differences. By contrast, the lisbonisation of FD Financial Penalties could involve the adoption of uniform rules applicable across all Member States. Such rules would be inherently less flexible, as they would need to account for a much broader range of legal traditions, institutional capacities and enforcement models. In the context of a possible lisbonisation of the FD, and in addition to the amended CBE Directive, the EU can develop specific instruments if necessary to enhance the cross-border enforcement of administrative decisions based on the respective policy legal basis, while respecting the limitations to revert to a legal basis under the AFSJ. Such policy developments have already taken place in taxation[514], employment[515] and agriculture policy[516].

Member States dissatisfied with the functioning of FD Financial Penalties

In Finland, the dissatisfaction does not seem to be linked to shortcomings in the transposition of FD Financial Penalties. On the contrary, national desk research shows that the Act on the National Implementation of the Legislative Provisions of FD Financial Penalties on the Application of the Principle of Mutual Recognition to Financial Penalties[517] is almost fully in conformity with the provisions of FD Financial Penalties.

One of the main reasons for the perceived lack of effectiveness in the application of FD Financial Penalties may be asymmetrical knowledge of the instrument and the non-harmonised approach to its implementation between the competent

[514] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L 84, 31.3.2010.

[515] Directive 2014/67/EU (of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, OJ L 159, 28.5.2014, p. 11.

[516] Ongoing negotiation for a regulation of the European Parliament and of the Council on cooperation among enforcement authorities responsible for the enforcement of Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, COM/2024/576 final.

[517] Entered into force in 2007, https://www.finlex.fi/fi/lainsaadanto/saadoskokoelma/2007/231.

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authorities in Finland, i.e. the Legal Register Centre and the Ministry of Justice. While survey respondents from the Legal Register Centre were very familiar with the process outlined by FD Financial Penalties, and felt that the determination of competent authorities is clear, those from the Ministry of Justice were only somewhat familiar with the process and did not consider the identification of competent authorities straightforward, despite national case-law clarifying the matter. The Finnish Supreme Court explained that a District Court improperly applied the discretionary ground for refusal under Article 7(2)(h) of FD Financial Penalties as it did so without jurisdiction – Finnish law states that the Legal Register Centre holds this authority. This breach by the District Court underscored Finland's obligation to effectively implement EU law regarding mutual recognition of judgments and judicial cooperation in criminal matters[518] and may have affected the correct implementation of FD Financial Penalties in the country.

The lack of coordination affects the interaction between national authorities within Finland when the country acts as the issuing State, but also affects interactions between Finland and the executing State. Participants in the survey indicated that, in the context of Article 9 of FD Financial Penalties, which stipulates that the enforcement of the decision shall be governed by the law of the executing State, different practices may cause problems. For example, a decision on a traffic fine became statute-barred in Finland, yet the executing State continued the enforcement process, disregarding the original decision.

FD Financial Penalties is not considered to add value for Finnish practitioners in part because of the existence of bilateral or multilateral agreements covering the same subject matter. The Nordic countries have their own legal framework for the enforcement of administrative financial penalties, including those imposed for road traffic offences, which may have resulted in FD Financial Penalties being rarely applied. However, this situation is specific to Nordic countries and is not representative of the overall implementation of the FD across the Member States. For example, Bulgaria is part of a similar multilateral agreement (the Salzburg Forum Agreement), yet satisfactorily applies FD Financial Penalties.

The practitioners surveyed consider the procedure laid down by FD Financial Penalties not fully suited to the execution of fines for road traffic offences. For instance, they reported that the obligation to issue an accompanying certificate for the enforcement of the decision on the monetary sanction is an unnecessarily complicated requirement in their daily practice, as well as a time-consuming way of enforcing the most frequent types of fines. Although not highlighted by the stakeholders, the strict driver liability regime applicable in Finland may complicate the procedure, given the evidence that authorities should collect to prove the driver's implication in the traffic violation. For example, if Finland is acting as the issuing State, the competent authorities will need to unequivocally identify the

[518] *Supreme Court decision KKO:2016:27*, https://finlex.fi/fi/oikeus/kko/kko/2016/20160027.

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driver and their links to a different jurisdiction before requesting the recognition and execution of the financial penalty in another Member State.

Finally, in addition to potentially amending the obligatory nature of the accompanying certificate, practitioners suggested stronger monitoring of the EJN database to ensure that the data are up to date . They often find this is not the case, which causes difficulties when identifying and contacting competent authorities in other Member States. Enhancing the role of the EJN and Eurojust in facilitating the coordination and cooperation of national authorities would be welcome to further improve the functioning of mutual recognition instruments, particularly FD Financial Penalties.

Similar to Finland, France does not report a high level of satisfaction with the implementation of FD Financial Penalties.

Unlike other Member States, FD Financial Penalties has not been transposed into the French national system via special law, but rather through the general provisions already foreseen in the Code of Criminal Procedure[519]. This may impact the application of FD Financial Penalties to the extent that national legislation may not account for all specific situations in the recognition and enforcement of financial penalties across Member States.

For example, Article 5(1) of FD Financial Penalties lists a series of offences that shall, without verification of the double criminality of the act, give rise to recognition and enforcement of decisions. French law, however, does not mention that for the offences concerned, double criminality of the act shall not be verified. This additional verification may hinder the efficiency of FD Financial Penalties, as the recognition and subsequent enforcement of foreign decisions in France would need to undergo a more complex confirmation process. Stakeholders from the French courts acknowledged some difficulties in establishing a link between the offence described by the issuing authority and the corresponding French offence when acting as executing authorities. In addition, the execution by French authorities was occasionally challenging due to shortcomings or mistakes in the requests for recognition and execution. For example, practitioners reported cases where the request was addressed to a recipient court with no territorial competence, the action was already prescribed under French law, the accompanying certificates were missing information, or information was imprecise or uncertain.

Use of the harmonised accompanying documentation (i.e. the certificate foreseen by FD Financial Penalties and the non-binding standard forms) is not uniform among French authorities, according to the stakeholder consultation. Some courts always require transmission of the certificate, while others require it only when the information provided by the issuing State is incomplete. The five non-

[519] Entered into force in 1959 and latest amended in 2025, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154/2025-04-14/.

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binding forms are used by some French courts, but unused – and indeed unknown – by others. In relation to digital tools, the National Processing Centre is entrusted with the recovery of fines related to traffic offences under French law, reducing the workload of public prosecutors. However, this requires the implementation of an informatics processing tool, which does not seem to have taken place yet.

Other challenges stem from the characteristics of the French legislation governing the enforcement of financial penalties. In France, while the courts are responsible for recognising the sentence imposing the penalty, the General Treasury is the competent body for the enforcement of the payment. French courts reported they have not always received feedback on the effectiveness of this procedure and have not been informed by the General Treasury of whether or not fines have been paid. The current lack of communication from the General Treasury on the status of recovery procedures makes it impossible to inform the issuing State of the treatment given to their recognition requests. This is not only a domestic issue: French courts reported that they often do not receive feedback from the executing State, which would allow them to close the case and to properly assess the effectiveness of FD Financial Penalties. Clarifying and strengthening the communication responsibilities of the issuing State and executing State might help to address this issue.

France experiences significant challenges as a transit country, with approximately 25% of registered road traffic offences committed by foreign vehicles. French authorities found that non-residents often believed they were less likely to be sanctioned in a Member State where they did not reside. Even if sanctioned, these offenders believed it would be more difficult to be subjected to judicial action if they failed to pay fines imposed by foreign authorities[520]. This issue stems from a primary problem in enforcement: identifying the driver of the vehicle, who may not be the owner, which the amended CBE Directive seeks to improve. Practitioners pointed out that the procedure for enforcing a French decision on a traffic violation was cumbersome, as the costs of pursuing such action outweighed the proceeds of the fine and were difficult to enforce. In France, without clear identification or admission by the offender (i.e. the driver), no fine can be imposed[521]. The situation was further complicated by the long transmission times of procedures, which did not allow for the quick location of the offender, as the individual might have changed address or left the national territory in the meantime.

Nevertheless, stakeholders shared that the challenges with the recognition and enforcement are not linked to problems related to identifying the competent authority. The EJN Atlas database is regarded as a useful tool.

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[520] Ibid 508.

[521] French Property, 'Cross-border fines on driving offences', French News Archive, 6 June 2019, https://www.french-property.com/news/money_france/cross_border_offences_driving.

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France has no agreement with neighbouring Member States for mutual assistance covering road traffic offences, which may not have helped to improve the general perception of the enforcement of traffic fines.

Conclusions

FD Financial Penalties and the amended CBE Directive complement each other. Understanding their synergies and applying them in the most effective way is central to achieving the ultimate goal of enhancing the safety of European roads. The amended CBE Directive is more suitable for the enforcement of administrative decisions, which are typically the form for fines for traffic offences.

Research indicates that Member States were already taking steps to solve the shortcomings of the EU legislation before the amendment of the CBE Directive (or the potential revision of FD Financial Penalties). Several bilateral and multilateral agreements address some of these problems. For example, the Salzburg Forum Agreement covers mutual assistance with the non-cooperation of the owner of the vehicle in identifying the driver, and the bilateral agreement between Germany and the Netherlands manages to effectively overcome the differences in the two legal systems, both in terms of the nature of the offences and the liability regimes. Nevertheless, even if such agreements function well for some Member States, the EU cannot rely on their existence for effective enforcement of penalties for cross-border traffic offences, but should, rather, prioritise an efficient EU legal framework.

The analysis of related jurisprudence shows that Member States dealt with clarifications needed to improve the enforcement of road traffic sanctions prior to CJEU rulings on the same matters. For instance, a German judgment in 2017 outlined the conditions with which notifications in the issuing State must comply to guarantee the offender's procedural rights, with the first relevant CJEU sentence following in 2019[522].

There are some dividing elements in respect of the specificities of the procedure for the mutual recognition of decisions under FD Financial Penalties. For example, the requested accompanying certificate is considered helpful by practitioners in some Member States, but unnecessary and burdensome by others.

Overall, the issues affecting the successful enforcement of cross-border road safety-related offences may be caused by the characteristics of FD Financial Penalties as a legal instrument (applicable to criminal and quasi-criminal offences, having a broad/non-sectoral scope, setting up complex procedures) and by other implementation limitations at Member State level (problems identifying the competent national authorities, lack of clarity in the national distribution of competences). The amended CBE Directive shows how a sector-

[522] Judgment of the Court (First Chamber) of 5 December 2019, *Centraal Justitieel Incassobureau*, C-671/18, ECLI:EU:C:2019:1054.

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specific legal instrument might remedy the limits of FD Financial Penalties: it covers administrative offences, sets out exchaustive mechanisms for the investigation of this specific type of offence, and provides a mechanism for the issuing and enforcement of fines aiming to punish and deter inappropriate behaviour hindering road safety in the EU.

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