

## CONTENTS

Abbreviations in the introduction and conclusions	14
<b>PART I – INTRODUCTION</b>	<b>15</b>
1. Approach, objectives and structure	17
2. Methodology	23
<b>PART II – PART II APPLICATION OF MUTUAL RECOGNITION TO THE TRANSFER OF JUDGMENTS IMPOSING A SENTENCE IN THE CONTEXT OF EU LAW</b>	<b>29</b>
1. Origins of the principle of mutual recognition and the transfer of judgments imposing a sentence	31
2. Functioning of mutual recognition in EAW, FD 2008/909, and FD 2008/947	33
2.1. Framework Decision 2002/584/JHA on the European Arrest Warrant	33
2.2. Framework Decision 2008/909 Transfer of Prisoners	39
a) The power to forward judgments imposing a sentence (issuing State)	41
b) The obligation to recognize foreign judgments and execute the sentence (executing State)	43
c) Consent of the sentenced person to the transfer	44
2.3. Framework Decision 2008/947 on probation decisions and alternative sanctions	44
a) Scope of application	46
b) The procedure	46
c) Relation to other measures	48
<b>PART III – FRAMEWORK OF THE OBLIGATION OF MUTUAL RECOGNITION AND FUNDAMENTAL RIGHTS PROTECTION”</b>	<b>51</b>
1. Overview of the mechanisms of individuals’ fundamental rights protection in the EAW, FD 2008/909, and FD 2008/947	53
1.1. The FD 2002/584/JHA on the EAW	55
a) Safeguards for the requested (sentenced) person	55
b) The grounds for non-execution of an EAW	55
1.2. FD 2008/909 Transfer of Prisoners	57
a) Safeguards for the sentenced person: Informing the sentenced person and opinion of the sentenced person	57
b) Double incrimination and consent of the executing State	57
c) Interplay with the FD EAW	59
d) Exceptions to mutual recognition and rights provided to sentenced persons in FD 2008/909	60

## MUTUAL TRUST UNDER PRESSURE

1.3.	FD 2008/947 on probation decisions and alternative sanctions	62
	a) Procedural safeguards	62
	b) Double incrimination	62
	c) Grounds for non-execution	62
1.4.	Adequacy of fundamental rights protection in the EAW, FD 2008/909, and FD 2008/947	64
2.	Mutual trust and the obligation to respect fundamental rights	65
2.1.	Mutual trust and the respect of fundamental rights, bedrock of mutual recognition	65
2.2.	Enhancing mutual trust through harmonization: the right to a fair trial as implemented by Directive 2010/64, Directive 2012/13 and Directive 2013/48	67
	a) Directive 2010/64 on the right to interpretation and translation	69
	b) Directive 2012/13/EU on the right to information in criminal proceedings	73
	c) Directive 2013/48 on the right of access to a lawyer in criminal proceedings	75
3.	Beyond minimum requirements and formal grounds for refusal: the respect of fundamental rights in the EU multi-level constitutional order	79
3.1.	The ECHR	80
3.2.	EU fundamental rights and the relation with the ECHR	82
	a) The CFR and the ECHR	82
	b) The scope of the Member States' obligation to respect the CFR	84
3.3.	The non-respect of fundamental rights as a limit to mutual trust and consequences on mutual recognition	85
	a) The prohibition of torture and degrading treatment: from the <i>Soering</i> case to Joined cases C-404/15 and C-659/15	87
	b) Can a violation of other fundamental rights limit mutual trust and, consequently, mutual recognition? Considerations on the right to fair trial and family life.	90
PART IV – NATIONAL REPORTS		99
ITALY		101
1.	Meaning and scope of the fundamental rights subject of this study	103
1.1	Protection against torture and degrading treatment	103
	a) Status and content of the right	103
	b) The protection against torture and degrading treatment	105
1.2.	Fair trial	107
	a) Status and content of the right	107
	b) The protection of the right to a fair trial	111
1.3.	Family life	112

## CONTENTS

a)	Status and content of the right	113
b)	The protection of the right to family life	114
2.	National legal framework implementing the obligation of mutual recognition	115
2.1.	The status of the principle of mutual recognition and mutual trust in the national legal order	115
2.2.	The functioning of the EAW for the purpose of executing a custodial sentence or detention order	116
2.3.	FD 2008/909 on the transfer of prisoners	121
a)	Forwarding judgments imposing a sentence and the transfer of sentenced persons (issuing state)	122
b)	The obligation to recognize foreign judgments and execute the sentence (executing state)	128
2.4.	FD 2008/947	131
a)	Scope of application	131
b)	The procedure	132
3.	Impact of individual's fundamental rights in the context of the framework decisions	133
3.1.	EAW for the purpose of executing a custodial sentence or detention order	133
a)	Safeguards for the requested (sentenced) person	133
b)	Grounds for the non-execution of an EAW for the purpose of executing a custodial sentence or detention order	140
c)	What role do (possible) fundamental rights violations have in the decision to issue or execute an EAW?	145
3.2.	FD 2008/909	157
a)	Safeguards for the sentenced person	157
b)	Consent of the executing state	161
c)	Interplay with the FD on the EAW	161
d)	Exceptions to mutual recognition (situations when the executing state may refuse to accept the transfer of a sentenced person)	162
e)	What role do (possible) fundamental rights violations have in FD 2008/909?	164
3.3.	FD 2008/947	165
a)	Safeguards for the sentenced person	165
b)	Double incrimination, exceptions to mutual recognition and other limitations concerning the decision to recognize	167
c)	What role do (possible) fundamental rights violations have in FD 2008/947?	170
4.	In sum: how legal reality relates to the empirical conclusions	170
THE NETHERLANDS		175
1.	Meaning and scope of the fundamental rights subject of this study	177
2.	National legal framework implementing the obligation of mutual recognition	179

## MUTUAL TRUST UNDER PRESSURE

2.1.	The status of the principle of mutual recognition and mutual trust in the national legal order	179
2.2.	The functioning of the EAW for the purpose of executing a custodial sentence or detention order	180
2.3.	FD 2008/909 on the transfer of prisoners	182
	a) Forwarding judgements imposing a sentence and the transfer of sentenced persons	182
	b) The obligation to recognize foreign judgments and execute the sentence (executing state)	184
2.4.	FD 2008/947	189
	a) Scope of application	189
	b) The procedure	191
3.	Impact of individual's fundamental rights in the context of the framework decisions	192
3.1.	EAW for the purpose of executing a custodial sentence or detention order	192
	a) Safeguards for the requested (sentenced) person	192
	b) Grounds for the non-execution of an EAW for the purpose of executing a custodial sentence or detention order	204
	c) What role do (possible) fundamental rights violations have in the decision to issue or execute an EAW?	205
3.2.	FD 2008/909	228
	a) Safeguards for the sentenced person	228
	b) Consent of the executing state	232
	c) Interplay with the FD EAW	232
	d) Exceptions to mutual recognition (situations when the executing state may refuse to accept the transfer of a sentenced person)	233
	e) What role do (possible) fundamental rights violations have in FD 2008/909?	236
3.3.	FD 2008/947	238
	a) Safeguards for the sentenced person	238
	b) Double incrimination, exceptions to mutual recognition and other limitations concerning the decision to recognize	240
	c) What role do (possible) fundamental rights violations have in FD 2008/947?	244
4.	In sum: how legal reality relates to the empirical conclusions	245
<b>POLAND</b>		<b>249</b>
1.	Meaning and scope of the fundamental rights subject to this study	252
1.1.	Protection against torture and degrading treatment	252
	a) Status and content of the right	252
	b) The protection against torture and degrading treatment	257
1.2.	Fair trial	259

## CONTENTS

a)	Status and content of the right to fair trial	259
b)	The protection of the right to a fair trial	264
1.3	Family life	266
a)	Status and content of the right	266
b)	The protection of the right to family life	268
2.	National legal framework implementing the obligation of mutual recognition	269
2.1.	The status of the principle of mutual recognition and mutual trust in the national legal order	269
2.2.	The functioning of the EAW for the purpose of executing a custodial sentence or detention order	270
2.3.	FD 2008/909 transfer of prisoners	272
a)	Forwarding judgments imposing sentence and transfer of sentenced persons (issuing state)	272
b)	The obligation to recognize foreign judgments and execute the sentence (executing state)	276
2.4.	FD 2008/947	278
a)	Scope of application	278
b)	The procedure	279
c)	Relation to other measures	281
3.	Impact of individual's fundamental rights in the context of the framework decisions	282
3.1	EAW for the purpose of executing a custodial sentence or detention order	282
a)	Safeguards for the requested (sentenced) person	282
b)	Grounds for non-execution of an EAW for the purpose of executing a custodial sentence or detention order	286
c)	What role do (possible) fundamental rights violations have in the decision to issue or execute an EAW?	292
3.2.	FD 2008/909	295
a)	Safeguards for the sentenced person	295
b)	Consent of the executing state	298
c)	Interplay with the FD on the EAW	299
d)	Exceptions to mutual recognition (situations when the executing state may refuse to accept the transfer of a sentenced person)	299
e)	What role do (possible) fundamental rights violations have in FD 2008/909?	301
3.3.	FD 2008/947	304
a)	Safeguards of the sentenced person	304
b)	Double incrimination	307
c)	What role do (possible) fundamental rights violations have in FD 2008/947?	310

ROMANIA	313
1. Meaning and scope of the fundamental rights subject of this study	315
1.1. Protection against torture and degrading treatment	317
a) Status and content of the right	317
b) Protection against torture and degrading treatment	318
1.2. Fair trial	321
a) Status and content of the right	321
b) The protection of the right to a fair trial	322
1.3. Family life	323
a) Status and content of the right	323
b) The protection of the right to family life	325
2. National legal framework implementing the obligation of mutual recognition	327
2.1. The status of the principle of mutual recognition and mutual trust in the national legal order	328
2.2. The functioning of the EAW for the purpose of executing a custodial sentence or a detention order	328
2.3. FD 2008/909 on the transfer of prisoners	330
a) Forwarding judgments imposing a sentence and the transfer of sentenced persons (issuing state)	330
b) The obligation to recognize foreign judgments and to execute the sentence (executing state)	334
2.4. FD 2008/947	338
a) Scope of application	338
b) The procedure	338
c) Relation to other measures	343
3. Impact of individual's fundamental rights in the context of the framework decisions	343
3.1 EAW for the purpose of executing a custodial sentence or detention order	343
a) Safeguards for the requested (sentenced) person	343
b) Grounds for non-execution of an EAW for the purpose of executing a custodial sentence or detention order	355
c) What role do (possible) fundamental rights violations have in the decision to issue or execute an EAW?	349
3.2. FD 2008/909	352
a) Safeguards for the sentenced person	352
b) Consent of the executing state	355
c) Interplay with the FD EAW	355
d) Exceptions to mutual recognition (situations when the executing state may refuse to accept the transfer of a sentenced person)	355
e) What role do (possible) fundamental rights violations have in FD 2008/909?	358
3.3. FD 2008/947	358

## CONTENTS

a) Safeguards for the sentenced person	358
b) Double incrimination, exceptions to mutual recognition and other limitations concerning the decision to recognize	360
c) What role do (possible) fundamental rights violations have in the FD 2008/947?	361
SWEDEN	365
1. Meaning and scope of the fundamental rights subject of this study	367
1.1. Protection against torture and degrading treatment	367
a) Status and content of the right	367
b) The protection against torture and degrading treatment	372
1.2. Fair trial	372
a) Status and content of the right	375
b) The protection of the right to a fair trial	375
1.3. Family life	376
a) Status and content of the right	376
b) The protection of the right to family life	377
2. National legal framework implementing the obligation of mutual recognition	379
2.1. The status of the principle of mutual recognition and mutual trust in the national legal order	379
2.2. The functioning of the EAW for the purpose of executing a custodial sentence or detention order	379
2.3. FD 2008/909 transfer of prisoners	381
a) Forwarding judgments imposing a sentence and the transfer of sentenced persons (issuing state)	381
b) The obligation to recognize foreign judgments and to execute the sentence (executing state)	385
2.4. FD 2008/947	387
a) Scope of application	387
b) The procedure	388
c) Relation to other measures	388
3. Impact of individual's fundamental rights in the context of the framework decisions	389
3.1 EAW for the purpose of executing a custodial sentence or detention order	389
a) Safeguards for the requested (sentenced) person	389
b) Grounds for the non-execution of an EAW for the purpose of executing a custodial sentence or detention order	391
c) What role do (possible) fundamental rights violations have in the decision to issue or execute an EAW?	394
3.2. FD 2008/909	397
a) Safeguards for the sentenced person	397
b) Consent of the executing state	398

c)	Interplay with the FD on the EAW	400
d)	Exceptions to mutual recognition (situations when the executing state may refuse to accept the transfer of a sentenced person)	401
e)	What role do (possible) fundamental rights violations have in FD 2008/909?	402
3.3.	FD 2008/947	403
a)	Safeguards for the sentenced person	403
b)	Double incrimination, exceptions to mutual recognition and other limitations concerning the decision to recognize	404
c)	What role do (possible) fundamental rights violations have in the FD 2008/947?	404
4.	In sum: how legal reality relates to the empirical conclusions	405
PART V – COMPARATIVE ANALYSIS		407
1.	National legal frameworks transposing the analysed EU instruments	409
1.1.	Mutual recognition and mutual trust in national legal orders	409
1.2.	Functioning of the EAW for execution	411
1.3.	Functioning of Framework Decision 2008/909/JHA on the transfer of prisoners	412
a)	From the issuing State	412
b)	To the executing State	415
1.4.	Functioning of FD 2008/947/JHA on probation and alternative sanctions	416
2.	Procedural safeguards and limits to mutual recognition	416
2.1	EAW for execution	416
a)	Procedural safeguards	416
b)	Grounds for refusal	419
c)	Fundamental rights considerations by the executing authority	421
2.2.	FD 2008/909	424
a)	Procedural safeguards	424
b)	Grounds for refusal	425
c)	Fundamental rights considerations by the executing authority	426
2.3.	FD 2008/947	427
a)	Procedural safeguards	427
b)	Grounds for refusal	429
c)	Fundamental rights considerations by the executing authority	430
PART VI – CONCLUSIONS AND RECOMMENDATIONS		431
1.	Definition and scope of the principle of mutual trust	436
1.1.	Mutual trust in EAW proceedings for the execution of a sentence	436
1.2.	Mutual trust in transfer proceedings (FD 2008/909) and the transfer of probation decisions and alternative sanctions (FD 2008/947)	437

## CONTENTS

2. Lack of clear and precise complementary requirements accompanying mutual recognition	437
a) The <i>Aranyosi</i> and <i>Caldararu</i> Joined Cases test in EAW proceedings on the execution of a sentence	438
b) The social rehabilitation goal of FD 2008/909 and FD 2008/947	439
c) The assistance of a lawyer in FD 2008/909 and FD 2008/947 proceedings	441
d) Improve the knowledge of actors	441
3. Implementation of EU legislation	442
4. Exchange of information and cooperation	442
ANNEX – STATISTICS	445
1. Tables per year	447
2. Tables per country	450
CONTRIBUTORS	455