

FACILITATING JUDICIAL COOPERATION IN THE EU

*A Computable Approach to Mutual Recognition
in Criminal Matters*

Edited by

Giulia Lasagni

Giuseppe Contissa

Michele Caianiello

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Comparative Remarks on Mutual Recognition Instruments of Judicial Cooperation in Criminal Matters

Giulia Lasagni, Michele Caianiello and Isadora Neroni Rezende

1 Introduction*

The objective of this Chapter is to give a concise report on some of the most relevant trends emerging from a comparative analysis of national legal frameworks concerning the three cooperation tools studied in this research: the European Arrest Warrant (*infra*, §13.3), the European Investigation Order (*infra*, §13.4) and the Regulation 2018/1805 on freezing and confiscation orders (*infra*, §13.5).¹

Such mechanisms have been examined from a twofold perspective.

The first approach is a transversal legal comparative methodology. Due to the limited remit of this contribution, the analysis does not aim at listing all incongruencies in the cooperation framework and practices in the selected Member States (Bulgaria, Croatia, France, Germany, Italy, Poland, Portugal, Spain, and the Netherlands). On the contrary, it focuses on identifying different normative or jurisprudential approaches that seem to generate or incentivize divergent solutions in the functioning of the examined cooperation mechanisms.

In this perspective, the comparison seems to point out how it is more difficult than it appears at first glance not only to ensure a smooth and fair cooperation but also to deeply understand the causes that impede this outcome,

* Although the Chapter is a joint reflection of the authors, its drafting is broken down as follows: Giulia Lasagni §§ 1; 2; 5; 6 (Regulation conclusion and general part); Michele Caianiello, §§ 4–6 (EIO conclusion); Isadora Neroni Rezende §§ 3–6 (EAW conclusion). A special thanks for his precious suggestions to Antonio Pugliese.

1 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States; Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters; 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.

especially when looking not just at every single mechanism, but to the whole implementation of mutual recognition tools in the criminal matter.

The second perspective adopted in the research originates from a multi-disciplinary approach, that combines legal and computer science expertise (*infra*, § 13.2). Thanks to a semantic and textual examination of legal texts, in a previous research project,² the elaboration of “harmonization indexes” and “heat maps” based on Artificial Intelligence (AI) technology, facilitated the identification of similarities and lacunas in the design of implementation measures across domestic systems.

This method, now repoposed in the field of judicial cooperation, allowed for cross-checking the results of traditional legal analysis, trying to bypass, by way of automated assessments, some problematic features typical of comparative studies, such as linguistic discrepancies and ontological divergencies.

The results of this combined effort, as it will emerge, highlight several critical profiles that, on one side, show the difficulties in reaching effective cooperation in the criminal law field and, on the other, may help trace a potential way forward toward a higher level of fairness in these proceedings throughout the EU.

2 An Innovative Comparative Methodology: Combining Legal and Automated Analysis

The Facilex project adopted an integrated perspective to examine the state of play of judicial cooperation in criminal matters in the EU.

This innovative point of view grows upon a semantic analysis and annotation of the legal provisions contained in the three studied mechanisms.

The methodology, developed by computer scientists in cooperation with legal experts, takes its cues from the “translation” of legal text into a numerical text representation, following a computational approach that exploits Natural Language Processing (NLP) techniques, which is an application of AI technologies. According to it, text excerpts, such as legal provisions, have been transformed into a vector by which words are represented by numbers.

The main aim of such semantic analysis was the tracking of a significant frequency of occurrences from mere counts or redundancies. In other words, the output of the methodology does not substitute human analysis, but it supports it in the identification of gaps and misalignments. A common problem

2 CrossJustice, Grant Agreement no. 847346, Giuseppe Contissa, Giulia Lasagni, Michele Caianiello, Giovanni Sartor (eds) *Effective Protection of the Rights of the Accused in the EU Directives. A Computable Approach to Criminal Procedure Law* (Brill, Leiden, 2022).

in the use of AI for law is the ‘black box’ of the models, which makes it difficult to justify the results. The methodology developed in Facilex, based on an analysis that uses explicit and implicit concepts, provides more interpretable tools. This means that legal experts can not only see if two regulatory texts are similar, but why they are (or are not) so, based on concrete and verifiable concepts. This, in turn, represents a possible advantage for legal experts, who can reduce the time spent on comparative analysis and focus on the interpretative and strategic aspects of the regulations.

The impact of the developed approach can be appreciated on several levels, from the simplification of the work of comparative analysis to the possibility of improving the quality and consistency of national implementations of European legislation.

Indeed, one of the main problems in legal practice is the comparison between European legislation and the national regulations that implement it. Traditionally, this is a manual and challenging activity, especially if applied on a multi-level system, such as the EU.

In this regard, the creation of an “Harmonised Glossary”, enriched with implicit notions and relationships between concepts through Large Language Models (LLM), allows for automatic alignment between legislative sources, highlighting discrepancies and simplifying the identification of key concepts in national implementations.³

For the cooperation tools that require implementation (EAW and EIO) the methodology also brought to the development of a “Harmonization Index”, that is of the possibility to compare the level of harmonization among Member States with an automated approach. More specifically, the Index, which works on asymmetric and symmetric metrics to assess the similarity between European legislation and national implementations, is a useful indicator to spot harmonization gaps or a distortion in implementation. This can facilitate the identification of compliance issues with EU law; improve the uniformity of regulatory interpretations between different Member States; and support policy makers and supervisory bodies in monitoring the effectiveness of harmonisation.

In addition to retrospective analysis of national implementations (*ex-post*), the methodology can also be used to assess the degree of harmonisation *ex-ante*, i.e. before a piece of legislation is implemented. This could help European and national policy makers to anticipate transposition difficulties; national legislators to write regulations more in line with European law; and scholars and jurists to develop predictive models on future implementation.⁴

³ See, for more details, *infra*, Chapter 17.

⁴ Practical applications are also foreseeable for law firms, companies and institutions. For law firms, to obtain support in the comparative analysis of regulations between Member States,

3 Comparative Remarks on the Implementation of the EAW

The comparative analysis conducted reveals a contradictory picture of the state of implementation of the principle of mutual recognition in the EU, as both positive and negative trends can be discerned in the holding of the EAW system.

On the one hand, national legislators seem to show greater adherence to the spirit of the framework decision and have enacted subsequent reforms to adjust the national transposition to the European text. The transposition of some grounds for refusal, however, remains refractory to this phenomenon, for instance, when specific State interests come into play (such as for the grounds for refusal based on the *ne bis in idem* principle and the surrender of nationals).

On the other hand, the emergence of fundamental rights concerns in the EAW mechanism prompts other issues for EU criminal cooperation. Despite the clear position of the CJEU on the matter after *Aranyosi and Căldăraru*, the appreciation of this newly established “ground for refusal” is quite scattered across the Member States. In particular, the range of fundamental rights triggering the non-execution, as well as the threshold to refuse the surrender, are often interpreted quite flexibly in the national case law. These positions, together with the protective attitude expressed by some Member States in the transposition of certain grounds for refusal, continue to represent pitfalls for the integrity of the EU mutual recognition system in criminal matters, as argued below.

3.1 *Grounds for Refusal: towards Greater Adherence to EU Provisions?*

The transposition of the grounds for refusal has been a delicate issue in the implementation of the EAW FD across Member States. Concerned about losing their competencies in criminal matters, national legislators had often introduced additional grounds for refusal in the national law or transposed them as mandatory even where these were formulated as only optional in the European text. This trend raised – and still raises, as shown below – compliance issues with EU law. In fact, the CJEU considers that the primacy of EU law precludes a national legislation that translates as mandatory a ground for refusal that is only considered optional in the framework decision, thus excluding any margin of appreciation of judicial authorities on the decision to execute the EAW.⁵

useful for example for companies with transnational activities; for companies, to achieve greater certainty in assessing regulatory compliance in the various European markets.

5 Case C-396/22 *Generalstaatsanwaltschaft Berlin* [2023] ECLI:EU:C:2023:1029, paras 19–20; Case C-665/20 PPU *Local Court Tiergarten v X* [2021] EU:C:2021:339.

Over the years, however, a positive evolution has occurred, which displays a greater adherence by several Member States to the principle of mutual recognition. Some national legislators (as in Italy, France, Croatia, and the Netherlands, to some extent) have aligned their domestic laws to the framework decision, by converting some mandatory grounds for refusal into optional ones.⁶ Moreover, in the cases of most blatant mismatches between the European and the national text (for example, in Italy), subsequent reforms have expunged from the domestic system the grounds for refusal that do not appear in the EAW FD.⁷

In particular, an interesting example of this phenomenon regards the transposition of the double criminality requirement that, more than others in the past, has symbolized the preeminence of national sovereignty interests over the needs for cross-border cooperation. The first EAW FD transposition in some Member States provided the lack of double criminality as a mandatory ground for refusal but this has now been converted into a merely optional one in some domestic legislations (France, the Netherlands).⁸ Other States have kept the requirement as a basis for mandatory rejection of the EAW (Portugal, Italy), although this choice may – for the particular wording of Art 2(4) EAW FD – fall within the margin of appreciation of Member States without raising compliance issues.⁹

Some notable exceptions, however, still cast doubts on this progressive approach of national legislations to the text of the EAW FD. Specifically, Spain and Poland have signaled significant compliance issues in the implementation of the grounds for refusal, specifically, for the provision of additional bases not foreseen in the framework decision and the transposition of optional grounds as mandatory in the national law.¹⁰

6 See, for Croatia, Zlata Đurđević and others, Chapter 5, §2.1.3. (although, in this case, the amendment was prompted by an infringement procedure activated by the European Commission); for France, Eleonora Cervellera, Chapter 6, §1.2.1; for Italy, Isadora Neroni Rezende and others, Chapter 8, §2.2; for the Netherlands, see Camila Ugaz Heudebert and others, Chapter 12, §2.5.1.

7 Isadora Neroni Rezende and others (n 6) §1.

8 See, for France Eleonora Cervellera (n 6) §1.2.1.; for the Netherlands, see Camila Ugaz Heudebert and others (n 6) §2.5.3.

9 See FACILEX Italian national report, §7.2.2.2, available at <<https://site.unibo.it/facilex/en>> accessed 14 August 2024; for Portugal, Miguel João Costa and others, Chapter 10, §1.2.3. In fact, while Arts 3 and 4 EAW FD are directly addressed to the executing judicial authorities, Art 2(4) of the same decision appears to be addressed to the Member States, leaving it up to them to decide on the transposition of the principle of dual criminality into national law.

10 See, for Poland, Wojciech Jasiński and others, Chapter 9, §1.2.4; for Spain, Ana Maria Neira Pena, Chapter 11, §1.2.2.

Furthermore, the comparative analysis has unveiled some more specific issues that transversally affect national legislation on the grounds for refusal, often as a result of Member States' historical backgrounds. On the one hand, the transposition of the grounds inspired by the *ne bis in idem* principle still appears to be one of the most problematic across Member States. On the other hand, the refusal of the surrender of nationals and residents by the executing country is regulated in a very fragmented fashion in EU countries, raising problems for the principle of equal treatment. Both profiles are examined more in detail below.

3.1.1 A Strong Commitment to the *ne bis in idem* Principle

The implementation of the grounds for refusal – both mandatory and optional – inspired by the *ne bis in idem* suggests that the principle still bears great importance in Member States' legal cultures. Except for the Netherlands, which inadvertently transformed the relevant ground for refusal from mandatory into optional in 2021,¹¹ many Member States (for example, Germany, Poland, and Spain) have transposed the optional grounds of refusal based on the *ne bis in idem* (Arts 4(3) and 4(5) EAW FD) as mandatory, thus betraying the spirit of the EU text.¹²

Following a similar trend, other Member States have extended the scope of the mandatory ground for refusal in the framework decision (Art 3(2) EAW FD) in the national transposition, sometimes including situations that would have entailed judicial discretion by the executing authorities, rather than an automatic rejection of the warrant.

This is the case, for instance, of Italy, which has included judgements of no grounds to proceed (*sentenze di non luogo a procedere*) into the list of decisions that satisfy the requirement of “finally judged” under Art 3(2) EAW FD.¹³ Despite some ambiguities on the right framing of such decisions between national and EU law,¹⁴ it should be borne in mind that judgements of no grounds to proceed never become “final” under Italian procedural law, even when they are no

11 Camila Ugaz Heudebert and others (n 6) §2.5.4.1.

12 See, for Germany, Anna Albrecht and Anne Schneider, Chapter 7, §1.2.2.3 (where, however, the transposition of Art 4(3) EAW FD as a mandatory ground for refusal is not seen as problematic by the Authors); for Spain, Ana Maria Neira Pena (n 10) §1.2.2. (referring to both Arts 4(3) and (5) EAW FD); for Poland, Wojciech Jasiński and others (n 10) §1.2.4. (referring to Art 4(5) EAW FD only).

13 Isadora Neroni Rezende and others (n 6) §2.2.

14 In fact, the CJEU has considered Italian judgements of no ground to proceed as “final judgements” barring further prosecution in the EU under Art 54 of the Schengen Convention, see Case C-398/12 *M* [2014] ECLI:EU:C:2014:1057.

longer subject to appeal, meaning that the case can always be reopened when new evidence comes to light. In this sense, the judgements of no grounds to proceed appear more in line with the concept of a “final” judgement that has been passed upon the requested person in a Member State and that prevents further proceedings. Under Art 4(3) EAW FD, such decisions can only serve as a basis for an optional refusal; therefore, the transposition of this ground for refusal cannot be considered satisfying in this respect. Likewise, in Poland and Spain, the scope of the *ne bis in idem* exception has been broadened in the national transposition. Specifically, final decisions of third countries have been included – alongside those of EU Member States – among those that trigger a mandatory refusal of the warrant, although these can serve only as optional grounds according to the framework decision (Art 4(5) EAW FD).¹⁵

Against this background, the tendency to extend the outreach of the *ne bis in idem* as a ground for refusal appears to be a critical issue across Member States and represents an interesting exception to the phenomenon of progressive alignment of national transposition laws to the EAW FD.

3.1.2 Historical Resistance and Discrimination Issues in the Surrender of Nationals and Residents

Another common (and problematic) trend in the implementation of the grounds for refusal concerns the surrender of nationals and residents in the executing State, as provided by Art 4(6) EAW FD.

Originally, the adoption of the framework decision raised issues regarding the constitutional provisions of some Member States (Croatia, Poland, Germany) that, for historical reasons, forbade the extradition of their nationals. In Croatia, for example, the removal of the complete ban on the extradition of Croatian citizens foreseen in the Constitution was a benchmark in the country’s negotiations to accede to the EU.¹⁶ In Poland as well, constitutional amendments were necessary to allow the surrender of Polish nationals to other EU States, although some obstacles to the execution of EAWs were kept for these situations.¹⁷ Similarly, Germany has introduced narrow exceptions to the constitutional ban on the extradition of its citizens, which are to be strictly interpreted by the judiciary.¹⁸

15 See, for Poland, Wojciech Jasiński and others (n 10) §1.2.4.; for Spain, Ana Maria Neira Pena (n 10) §1.2.2.

16 Zlata Đurđević and others (n 6) §2.1.1.

17 Wojciech Jasiński and others (n 10) §1.2.1.

18 Anna Albrecht and Anne Schneider (n 12) §1.2.2.4.

Still to this day, citizens in some of these countries are afforded preferential treatment in the EAW mechanism. In Poland, for example, the national law requires that the double criminality requirement is always respected when the surrender of a Polish national is at stake, even if the warrant concerned one of the 32 categories of offences of Art 2(2) EAW FD.¹⁹ Moreover, Art 4(6) EAW is transposed as a mandatory ground for refusal for Polish citizens and refugees, and as an optional one for other residents, despite this distinction not being made in the European text.²⁰ In Germany, the regulation of the surrender of nationals and other EU or third-country citizens appears equally scattered. For instance, the surrender of nationals is forbidden unless the issuing State can claim a substantial (mainly territorial) link with the commission of the offence and promises to transfer the person back for the enforcement of the sentence. While the appreciation of the issuing State's substantial link with the crime allows for some judicial discretion, the refusal of surrender is considered mandatory if the abovementioned requirements are not met.²¹ The same ground for refusal is provided as thoroughly optional for EU citizens, whose surrender is thus subject to a wider margin of appreciation. While this judicial discretion is per se compatible with Art 4(6) EAW FD, the unfavorable treatment of EU citizens in comparison with German nationals raises issues for the principle of non-discrimination.²² Likewise, the surrender of third-country nationals, habitually resident in Germany, is permitted even without a substantial link of the crime to the issuing State but can be refused if their interests to remain in the country prevail. In this case, the decision on surrender is partly delegated to the executive authorities, a circumstance that further underlines the discretionary nature of the assessment. Unsurprisingly, the criteria according to which the interests of the foreign citizen not to be surrendered prevail remain

19 Wojciech Jasiński and others (n 10) §1.2.3.

20 Ibid §1.2.4.

21 To be true, section 80 IRG is very complex and allows the judge, in certain cases, to perform a balancing of the interests of the German national not to be surrendered and the interests of the issuing State to prosecute him or her. Although this leaves the judge some room for manoeuvre, from the theoretical point of view the balancing is still a condition for a pre-determined consequence: if the judge finds that the interests of the German citizen do not prevail and the other requirements of the paragraph are met, the judge is obliged to allow the surrender. See Anna Albrecht and Anne Schneider (n 12) §1.2.2.4.

22 Nonetheless, EU citizens are treated the same as German nationals only after five consecutive years of being legally resident in Germany, in accordance with the indications of the CJEU in *Wolzenburg* (see Case C-123/08 *Wolzenburg* [2009] ECLI:EU:C:2009:616; see also OLG Frankfurt a.M., decision of 08.12.2016, BeckRS 2016, 13556).

unclear, although they often refer to external factors such as the person's language skills, his or her work, and family ties.²³

It is unclear whether these differences in treatment raise compliance issues with Art 4(6) EAW FD per se, but they surely undermine the respect of the EU principle of non-discrimination. Under this principle, some Member States have progressively amended provisions allowing for the surrender of nationals and other citizens legally resident in their territory, following the positive trend described above. In Italy, for example, the scope of the domestic provision transposing Art 4(6) EAW FD has been extended multiple times under the influence of the Constitutional Court and the CJEU, and now covers both Italian citizens and other persons legally residing in Italy for five consecutive years (although this requirement is assessed differently in case law).²⁴ In both instances, the refusal is only optional, in accordance with the text of the framework decision. In the Netherlands, the surrender of nationals was strictly prohibited unless specific guarantees were given by the issuing State but is now subject to judicial discretion after a 2021 reform. According to Art 4(6) EAW FD and the interpretation of the CJEU in *Wolzenburg*, the surrender of other nationals legally resident in the country for at least five years follows the same regime.²⁵ Spanish legislation was also amended in 2018 to include residents – beyond nationals – among the categories of people protected under the optional ground of refusal foreseen in Art 4(6) EAW FD. Even before that, however, the domestic case law interpreted the criterion of residence quite broadly, also including situations where the person concerned could not prove legal residence but only the existence of social, linguistic, family, and work-related links with Spain.²⁶

Under a slightly different profile, Croatian judges also express a high commitment to the principle of mutual recognition when it comes to the surrender of Croatian nationals. It is the settled case law of the Supreme Court that national executing authorities are obliged to order the surrender of Croatian citizens to other Member States even where the prosecution or the execution of the sentence for the criminal offence is statute-barred in Croatia, contrary to the approach followed in other EU countries.²⁷

23 Anna Albrecht and Anne Schneider (n 12) §1.2.2.4.

24 Isadora Neroni Rezende and others (n 6) §2.2.

25 Camila Ugaz Heudebert and others (n 6) §2.5.2.1.

26 Ana Maria Neira Pena (n 10) §1.2.2.

27 Zlata Đurđević and others (n 6) §2.2.1.

3.2 *A Fragmented Approach to Fundamental Rights as Grounds for Refusal*

As widely known, the protection of fundamental rights considerations has made inroads in the EAW cooperation mechanism only at a later stage, imposing itself as a counterbalance to the principle of mutual recognition.²⁸ After some early CJEU decisions,²⁹ it was with *Aranyosi and Căldăraru* that the risk of fundamental rights violations emerged as a ground for refusal of a EAW. In the comparative perspective, the later development of fundamental rights considerations in the EAW system emerges in the fragmentary way in which national laws still incorporate this newly established ground for refusal, as well as in the way domestic courts approach it. These issues are examined in more detail below.

3.2.1 Fundamental Rights Clauses in National Legislation

Concerning the first aspect, most Member States involved in the analysis (Germany, Spain, Italy, Croatia, Poland, the Netherlands) include in their national legislation on the EAW a general clause about the protection of fundamental rights, although this is not always explicitly formulated as a ground for refusal.³⁰ The genesis of such provisions may, however, differ across EU countries. In Germany, for instance, a generic clause on the “EU public order” already existed in the national legislation but was only later interpreted as a basis to introduce fundamental rights risks as grounds for refusal.³¹ Other Member States (Croatia, the Netherlands),³² instead, incorporated a specific provision on this matter only as a follow-up to *Aranyosi and Căldăraru*.

Conversely, only a few countries (Bulgaria, Portugal, and France) do not include any specific grounds for refusal based on fundamental rights in their

28 On this topic, see *inter alia* Valsamis Mitsilegas, ‘The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe’s Area of Criminal Justice’ (2015) 6 NJECL 4; Petra Bárd, Sergio Carrera and Marco Stefan, ‘The Judicialisation of the European Arrest Warrant: Rule of Law and Fundamental Rights as Preconditions for Merited Mutual Trust’ (CEPS, 11 August 2023), <<https://cdn.ceps.eu/wp-content/uploads/2023/08/Judicialisation-of-the-European-Arrest-Warrant-STREAM-Report.pdf>> accessed 14 August 2024.

29 cf, for instance, Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107; Case C-396/11 *Radu* [2013] ECLI:EU:C:2013:39.

30 See, for Croatia, Zlata Đurđević and others (n 6) §1.2.2.1.; for Poland, Wojciech Jasiński and others (n 10) §1.2.5. (where, however, the provision about fundamental rights is explicitly formulated as a ground for refusal); for Spain, see Ana Maria Neira Pena (n 10) §1.2.3.

31 Anna Albrecht and Anne Schneider (n 12) §1.2.2.1.

32 See, for Croatia, Zlata Đurđević and others (n 6) §2.2.3.1.; for the Netherlands, see Camila Ugaz Heudebert and others (n 6) §2.4.2.

national law. This “lacuna” does not seem to raise issues in Bulgaria and France, where the case law directly considers fundamental rights in surrender decisions, referring to other international obligations (e.g., the ECHR in Bulgaria)³³ or the very text of the framework decision (i.e., Art 1(3) EAW FD in France).³⁴ The commitment to fundamental rights considerations in France also emerges in the provision of a peculiar ground for refusal based on the principle of non-discrimination, which forbids surrender when this may expose the person to discriminatory treatment in the issuing country (e.g., political persecution), but which finds no correspondent in the text of the framework decision.³⁵ Differently, in Portugal, the absence of any specific provision on fundamental rights may be symptomatic of the lack of such considerations in EAW proceedings, since no decisions applying the *Aranyosi and Căldăraru* test have been identified in jurisprudence.³⁶

3.2.2 Fundamental Rights Considerations in National Case Law

Concerning the second aspect, despite the established approach of the CJEU, domestic courts across the examined Member States seem to interpret the risk of fundamental rights violations quite differently. Only in Italy, Spain, Poland, and Croatia, national judges refer explicitly to the *Aranyosi and Căldăraru* test.³⁷ Conversely, in France and the Netherlands, domestic courts interpret this ground of refusal in a rather flexible fashion, considering that generic statements on the deficiencies of the issuing State can be enough to reject the execution of the EAW.³⁸ This approach – which eludes the second part of the *Aranyosi and Căldăraru* test – arguably sets a lower threshold to refuse surrender and disproportionally prioritizes fundamental rights over the needs of mutual recognition, possibly raising compliance issues with EU law.

A similar trend is also developing in relation to the range of fundamental rights that may trigger the application of this ground for refusal. For instance, several Member States appear ready to refuse the execution of a EAW to prevent the violation of *any* fundamental right enshrined in the national constitution. This is the case of Germany, where the Constitutional Court has developed a

33 Miroslava Manolova and Ekaterina Salkova, Chapter 4, §1.2.3.

34 Eleonora Cervellera (n 6) §1.2.2.1 (citing, for example, Cass. Crim., 28 February 2012, no. 12-80.744).

35 Eleonora Cervellera (n 6) §1.2.1.

36 Miguel João Costa and others (n 9) §1.2.3.

37 See, for Poland, Wojciech Jasiński and others (n 10) §1.2.5.; for Spain, Ana Maria Neira Pena (n 10) §1.2.3.

38 See, for France, Eleonora Cervellera (n 6) §1.2.2.1.; for the Netherlands, see Camila Ugaz Heudebert and others (n 6) §2.4.3.

right to reject the surrender, if this would infringe the constitutional rights and thus threaten the identity of the Constitution (so-called “*Identitätskontrolle*”, i.e., identity control).³⁹ In this light, German courts have refused to execute a EAW where this would have entailed a serious violation of fair trial guarantees, namely the right of access to a lawyer or of access to the file.⁴⁰ Likewise, Croatian courts have also included fair trial rights into the list of rights allowing for refusing a EAW, even if surrender is denied only if this would result in a flagrant denial of justice in the issuing State.⁴¹

While the CJEU has broadened the categories of rights allowing for rejecting a EAW,⁴² similar practices conceal risks for the holding of the mutual recognition system. Refusals in these circumstances should indeed be limited to the most serious violations of fundamental rights, for example, where the surrender may expose the person to a real risk of inhumane and degrading treatment according to the *Aranyosi and Căldăraru* test.

However, not all Member States seem to apply this high threshold in the application of fundamental rights-based grounds for refusal. An interesting example of this interpretative drift is the extensive use of private life considerations to refuse surrender in the French case law and, more recently, in Croatia. In fact, the settled case law of the French Court of Cassation requires investigating chambers to check *in concreto* that the surrender of the person does not disproportionately affect the respect for the right to private and family life under Art 8 ECHR.⁴³ Likewise, Croatian judges have been recently manifesting

39 BVerfGE 140, 317; see Anna Albrecht and Anne Schneider (n 12) §1.2.2.1.

40 OLG Karlsruhe BeckRS 2020, 27088; see Anna Albrecht and Anne Schneider (n 12) §1.2.2.1.

41 Zlata Đurđević and others (n 6) §2.2.3.4.

42 If in the early case *Radu* the CJEU denied that the violation of a procedural safeguard (such as the right to be heard) could ground the refusal of a EAW, since *Aranyosi and Căldăraru* the Court has progressively widened the range of fundamental rights that can prevent the execution of the warrant. In *LM* (Case C-216/18 PPU *LM* [2018] ECLI:EU:C:2018:586), for instance, the CJEU admitted that the right to a fair trial (specifically, to an independent and impartial tribunal) could lead to the rejection of a EAW if the *Aranyosi and Căldăraru* two-fold test was satisfied. After the Covid-19 pandemic, this possibility was also extended to the right to health (see Case C-804/21 PPU *C and CD v Šyyttäjä* [2022] ECLI:EU:C:2022:307 and Case C-699/21 *E.D.L.* [2023] ECLI:EU:C:2023:295).

43 Eleonora Cervellera (n 6) §1.2.2.1. In particular, the Author refers to a 2010, where the Court of Cassation overturned the decision of an investigating chamber that had agreed on the surrender of a person who had been living in France for several years, with her five school-going children, for the theft of a wallet worth 40 euros (Cass. crim., 12 May 2010, no. 10-82.746). In another ruling, the Court of Cassation confirmed an investigating chamber's refusal to surrender a wanted person to Germany for the offence of driving without a license, since the execution of the warrant would have caused a disproportionate breach of the person's right to respect for private and family life under Art 8 ECHR. In fact, the

greater attention to the right to private life when deciding whether to execute a EAW, requiring national executing authorities to acquire data on the specific circumstances of the case (e.g., time of residence in Croatia of the surrendee, the seriousness of the offence, best interests of the children involved) and assess whether the surrender would be proportionate to said right.⁴⁴ While this approach shows more sensitivity to fundamental rights, a systemic oversight on the impact on private life of the surrender, such as that applied in France and Croatia, does not seem to realize an adequate balance of such needs with the principle of mutual recognition. In these cases, the judicial assessment seems to circumvent the two-fold test of *Aranyosi and Căldăraru* – recently reaffirmed by the CJEU in *GN* also in relation to the right to private and family life⁴⁵ – so the threshold to refuse surrender is *de facto* much lower than that required by the CJEU.

4 Comparative Remarks on the Implementation of the EIO

4.1 *Introductory Overview*

The national reports show that, so far, the transposition and implementation of the EIO D have not given rise to any major problems. Member States have transposed the EIO D on time, given that, by 2018, all had adopted the necessary amendments in their national legislation as required by the directive. Moreover, no passage has given rise to particularly critical debates, with the exception perhaps of Germany, where the transposition law seems to leave show little concern for the mutual trust and mutual recognition that should characterise the actions of States (scholars have not failed to criticise the legislator in this respect).

Overall, the implementation of the EIO D does not appear problematic. This may be due to a few reasons. First, the EIO D was conceived with the main problems originating in the EAW FD already in mind. This allowed the EU legislator to take them into account and introduce some clauses that were missing in the EAW FD. Secondly, the concrete use of this instrument is perhaps still limited (although the numbers give hope for a progressive success also in quantitative terms: in this regard, the data provided by the Croatian

person concerned had worked regularly on French territory for several years, shared his life with a French woman, and was the father of two children living in France (Cass. crim., 5 May 2015, no. 15-82.108).

44 Zlata Đurđević and others (n 6) §2.2.3.2.

45 Case C-261/22 *GN* [2023] ECLI:EU:C:2023:1017.

report are interesting). Thirdly, it should not be forgotten that the EIO D avoids adopting common rules on the mutual admissibility of evidence, which is the most delicate aspect of evidentiary matters, leaving its decisions to national laws. This has led to a postponement in dealing *ex professo* with the exclusion of evidence, whenever a party (usually the defence) opposes admissibility. The simplification and the postponement of the issue have been largely achieved by invoking mutual recognition (in the name of which, national courts tend to admit evidence from a jurisdiction other than their own unless errors markedly conflict with their fundamental principles).

The impression, however, is that there is still too little data on the admissibility of evidence and remedies because the full operation of the EIO D is still too recent. Indeed, the EIO D, albeit implicitly, aims to create the general framework for jurisprudence to develop some common rules on the admissibility of evidence (the *Encrochat* judgment itself is an example).⁴⁶ In time, when these common rules start to emerge more clearly, it is realistic to think that we will have new sensitive legal issues brought to the attention of the Court of Justice.

4.2 *Respect for Fundamental Rights and Proportionality*

Having said, therefore, that the transposition of the directive does not seem to have given rise to too many problems so far, it must be emphasised that all States have implemented the general rejection clause, in the name of which an EIO cannot be adopted (or executed) if it is contrary to fundamental rights and inconsistent with the principle of proportionality. From this point of view, it is evident that the lesson drawn from the case law of the MFA-DF has indeed been considered by all States. Actually, the lesson had been taken on board by the European legislator in drawing up the EIO D, in which hypotheses of non-enforcement (or postponement) for violation of fundamental principles or failure to comply with proportionality were already introduced. Rather, in this respect, it should be noted that many States (Italy, Germany, Poland, Spain) have also included in the clause the due respect for national constitutional principles. This is certainly a legitimate and opportune choice, although perhaps superfluous, given that both the Charter of Fundamental Rights and the Treaty recognise respect for national traditions (albeit common ones). In addition, the Netherlands has also chosen to invoke the principle of subsidiarity, for which the same considerations apply as to constitutional principles:

46 On this point, please refer to what is discussed below in paragraph 4.5, on the admissibility of evidence.

this is undoubtedly correct, but it is already covered by the Treaties and the case law of the Court of Justice.

On the other hand, Poland's choice to subordinate the issuance and execution of the EIO to the respect of national interests raises some doubts. This step could eventually give rise to friction with the jurisprudence of the Court of Justice. Certain national interests must take precedence, such as national security, which, already in the provisions of the directive, legitimises the non-execution of the EIO. However, such a generic and neither punctual nor selective reference to national interests, always superordinate – according to the textual wording of the Polish transposition text – over the EIO, could give rise to conflicts, which will have to be resolved by the Court of Justice (or by an appropriate dialogue between the apex courts). It is, however, desirable that an interpretation inspired by the general principles of the EU legal system be able to resolve the risks of conflict a priori by interpreting the clause in harmony with supranational jurisprudence (and the legal sources on mutual recognition in EU judicial cooperation).

Finally, it should be noted that most of the jurisdictions examined have chosen to transpose all refusal clauses, both mandatory and optional. This choice does not give cause for concern. Indeed, the effectiveness of the implementation of the directive does not seem to be linked so much to the number of refusal clauses introduced on paper as to their application in practice. So far, from this last point of view (which is the one that counts), it must be acknowledged that the EIO seems to be implemented with prevailing consistency regarding the principle of mutual recognition and a mutual trust approach.

4.3 *Competent Authorities*

Most States include the prosecutor among the authorities legitimated to issue an EIO (see, for example, Italy, France, Netherlands, Poland). Likewise, the prosecutor is the referring figure when it comes to the execution of the EIO in the passive procedure. Some include also other authorities, such as the police (in Poland, where the police are competent for the so-called Petty Offences).

This choice does not entail too many problems, as it is generally provided that when the national law provides for judicial review of the requested act, the EIO must be issued by a judge in the strict sense of the word, or any case after a judge has authorised the police or public prosecutor to issue it. It must also be recognised that in several countries (e.g., France, but also Spain), the prosecutor is responsible for the phase preceding the investigation (the so-called preliminary inquiry). It was therefore inevitable that the choice fell on this figure, given that, in any case, when a sensitive act is to be performed (such as wiretapping) the intervention of a judge is required.

Rather, some problems may arise concerning the independence of the body, since in some systems the prosecutor acts under the direction (or at least the supervision) of the executive. So far, the problem has not arisen, but the possibility is not remote that it might arise, should the EIO be issued during a court case with significant political implications, and the acting prosecutor not offer adequate guarantees of independence from the executive. In such hypothetical eventualities, it is realistic to think that the jurisprudence of the Court of Justice on the matter would become relevant again and would have to dispel the uncertainties linked – we imagine – to a risk of conditioning by the executive.

From another perspective, it is worrying that most States have neglected the position of the defence. According to the research conducted only Italy (via an explicit provision) and Spain (which interprets *ad hoc* an already existing legal provision) offers the possibility for the defence counsel to take action, requiring the judge to issue an EIO. This is a gap that gives rise to some concern in perspective. Indeed, increasingly, the success of mutual recognition of court decisions will highlight the disproportion of resources between the prosecution and the defence. The former is now able to move within a network of effective connections, developed over decades (starting with the *liaison magistrates* in the late 1980s). The latter, on the other hand, still operates in isolation, because connections between defence offices are occasional and episodic, left to the resources and sagacity of individual professionals (or individual law firms). This disproportion must be mitigated by encouraging and incentivising the growth of effective channels of connection between professionals and law firms across the EU. An indirect way to foster such growth is to empower defences when involved in a transnational case, for example by giving them the power to request the court to issue an EIO. Acting to solicit an EIO, in fact, preliminarily requires that a defence lawyer develop adequate transnational contacts with colleagues in other EU countries, to be able to gather the necessary information to substantiate one's claims (and to be able to rely on a law firm to serve as a logistical base when one has to operate abroad).

It is true that, in most EU countries, the prosecutor should also investigate by looking for exculpatory evidence. However, such a legal choice alone, as we well know, is not sufficient to safeguard the needs of an effective defence, for which a proactive defence counsel who is aware of the transnational dimension of the modern criminal trial is also necessary. The fact that the role of the lawyer has been forgotten and that in most national laws transposing the EIO D this figure does not appear among those authorised to act, is not a good sign and denotes a cultural delay on the part of national legislators in conceiving the role of the defence counsel.

4.4 Remedies

In relation to remedies, no particular legal issues arise at first sight. An EIO may be issued when the law, for the evidence sought, is provided for in a similar domestic case by existing domestic law. The same then applies to the enforcement of an EIO in passive proceedings.

Of course, as became clear in the *Gavazonov* case,⁴⁷ the problem becomes relevant when the domestic legal system (this was the case in Bulgaria) does not provide any remedy against the possible violation of legal provisions concerning an investigative measure or evidence to be gathered. However, beyond that (Bulgaria itself adapted its system to the requests of the CJEU), no specific issues seem to arise.

Rather, it is worrying how most countries (France, The Netherlands) extensively use the secrecy clause to delay the communication to the defence of the possibility of challenging before a court the investigative measure or evidentiary operation performed. In most cases, investigative secrecy predominates, resulting in the defence not being notified of the possibility of challenging the EIO when it is executed. This also implies that often notification is made when it is very late, and it is difficult for the defence to effectively avail itself of effective legal remedies. Once again, the weakness of the defender emerges here, in the transposition of the EIO D. A weakness, in turn, which, in this case, was also made possible by the legal provisions of the directive, which are very sensitive to safeguarding national investigative secrecy. The opposite should apply. Once executed, the EIO is no longer secret. Thus, there should no longer be any problem alerting the defence of the legal remedies to which it has access. On the face of it, indeed, this is the minimum condition – officially alerting the defence of its prerogatives – that should be respected. One might perhaps think here that the directive should be amended to allow for timely and effective notice to the defence once the EIO has been executed. Of course, the possibility of appeal will have to coexist with the persistence of secrecy (secrecy, however, which may remain on acts other than the EIO, of which the defence has now come, or at least must be made, aware).

4.5 Admissibility

The admissibility of evidence, in a framework still in its infancy of EIO D, does not seem to give rise to problems. An open attitude generally prevails regarding the admissibility of evidence gathered through the EIO. An example, from this point of view, is Poland, which allows readings of all or almost all records of

47 Case C-852/19 *Gavazonov II* [2021] EU:C:2021:902, ECR I-7879.

evidence and information taken abroad. But similar solutions are also found in other systems, such as Spain or Italy, where the principle of mutual recognition ends up prevailing. Yet, both systems would have a general clause on the exclusion of evidence. However, in practice, openness to evidence gathered abroad (an attitude that goes back a long way, related to the need to accept deviations from the legal national model when cooperation from other States is required) still predominates. A similar solution applies, for example in Croatia, where it was decided not to penalise the failure to video-record the interrogation of the defendant (which is nevertheless required under the domestic rules under threat of exclusion of evidence).

Finally, the rule that, in the logic of mutual recognition, the justification and legitimacy of the EIO must only be appealed before the jurisdiction of the issuing State is certainly not conducive to the flourishing of exclusion cases. Usually, the defence is at a disadvantage, since it is difficult for it to prepare an effective strategy of attack if it is located, as is predominantly the case, in the State of execution of the EIO.

The *Encrochat* case itself, which has been touched upon sporadically in current research, does not seem to have changed the picture we have described so far. After all, the judgment of the Court of Justice of 30 April 2024⁴⁸ recalled that the admissibility of the evidence, understood as its legality and the justification of the measure, must only be appealed in the jurisdiction of the State where the data were originally collected, and cannot be dealt with in the jurisdiction of the State where the data are transferred thanks to an EIO. It is true, however, that the judgment recognises an exclusionary rule for cases where the defence could not effectively challenge the results of the data collected through EIO. This observation, in perspective, could open the way to relevant questions of admissibility for cases in which the defence receives too late official notice of the power to challenge the evidentiary measures carried out with EIO, or for cases in which it is not allowed effective disclosure of exculpatory evidence (an issue that, in theory, could be relevant in investigations carried out with the *Encrochat* and *SkyEcc* operations and has so far received little consideration from the courts before it was raised).

Furthermore, the thesis that a State issuing an EIO to obtain the transfer of evidence or information already in the possession of the executing State cannot question the legality and proportionality, with regard to how the evidence was originally obtained in the executing State, should perhaps be questioned, at least in part. Indeed, it is true that Art 11 EIO D provides that “information

48 Case C-670/22 *M.N. (EncroChat)* [2024] EU:C:2024:372.

or evidence which is already in the possession of the executing authority [...] always have to be available under the law of the executing State". However, this does not preclude the issuing State, when issuing an EIO, from verifying whether the measure is necessary and proportionate, taking into account the rights of the defence and whether it could have been issued in a similar domestic case, as stipulated in Art 6.

At any rate, the *Encrochat* court case presents numerous complexities that deserve careful examination, particularly regarding issues that have not been adequately assessed so far. Central to this discussion is the right of the defence to request access to potentially relevant and exculpatory communications. In this sense, a good practice seems to be the Dutch one, developed in the course of the investigations stemming from the SkyEcc case. The defence was granted access to data on its clients through the same forensic platform used by the police authorities, which deserves the attention of other States. This, as has been pointed out by the scholars who studied the case,⁴⁹ indeed seems to be a good practice to facilitate access to data for the defence as part of the right to a fair trial. This right is fundamental to ensuring a fair trial, as it allows defendants to effectively challenge the prosecution's evidence. Furthermore, understanding the methods by which communications were originally collected and decrypted is equally crucial, as transparency in this area is necessary to assess the legality of operations, balancing national interests with individual rights. Information concerning the modalities with which data were gathered originally is also essential to determine if the EIO can be issued respecting the requirements of the admissibility in a similar domestic case, as these cannot be derogated even when the EIO regards evidence already in the possession of the executing authority according to Art 11.

5 Comparative Remarks on the Implementation of Regulation 1805/2018

Last, in this comparative analysis, the application of Regulation 1805/2018 plays a somewhat special role. Being a regulation, this cooperation tool does not require any form of transposition or implementation and shall apply directly at the domestic level. The choice of such a legal basis, still rather uncommon in the criminal justice area, seems to produce ambivalent outcomes in the examined Member States.

49 Jan-Jaap Oerlemans, Sofie Royer, 'The future of data-driven investigations in light of the Sky ECC operation' [2023] 14 *New Journal of European Criminal Law*, 434.

On the one hand, as in the European legislator's intention, the use of a regulation has reduced the margin of discretion for national policymakers, decreasing the rate of error and discrepancies across domestic systems. On the other hand, however, what emerges from the comparative study is a certain degree of uneasiness in the direct handling of a European instrument by national legal practitioners, courts, and parties alike.

In this regard, a first contradiction arises between the general data, which hints at a broad application of the Regulation,⁵⁰ and the analysis of domestic case law, which appears extremely scarce in all the examined legal orders.⁵¹ Against a majority of States where no jurisprudence before the highest court can be reported yet (Bulgaria, France, Spain, Poland, and Portugal), a few others provide for a limited array of decisions focused on thematic issues depending on the country at stake. While in Germany, cases are referred almost exclusively to the territoriality clause of the Regulation;⁵² in the Netherlands, they are concentrated on two specific grounds for refusal (double criminality and fundamental rights violation);⁵³ and in Italy, attention has mainly focused on compliance with the principle of proportionality, on specific issues in the execution of measures (when Italy is an executing State), or on the completeness of certificates.⁵⁴ Peculiar in this context is the Croatian case, where a preliminary reference has already been issued to the Court of Justice to inquire on a series of interpretative questions (from the possibility of enforcing confiscation in case of acquittal, to the rights of the third parties involved in the procedure).⁵⁵

Four years after its entry into force, the reasons for such an underrepresentation of Regulation-related issues in the jurisprudence and (perhaps consequently) the limited attention given to it by legal doctrine is not straightforward, although some hypotheses can be formulated in light of the elements presented below.

50 As confirmed by Eurojust, interviewed on May 13, 2024, within the FACILEX project; the data supporting the claim are being elaborated by Eurojust, and will be published in an upcoming report on Regulation 1805/2018.

51 In this regard, a major difficulty of this study on the Regulation has been represented by the lack of substantial statistical information, regardless the provision of Art 35 Regulation that requires Member States to collect and submit relevant data.

52 See Anna Albrecht and Anne Schneider (n 12) § 1.4.2.2.

53 See Camila Ugaz Heudebert and others (n 6) § 4.5.

54 See Cass. Pen. sec. II, n. 34212 of 27/05/2022, reported on the FACILEX Italian report, available on: <https://site.unibo.it/facilex/en/the-project/results>.

55 See Zlata Đurđević and others (n 6) § 4.2.

5.1 *An Overlayed Field of Law*

The first aspect that seems to heavily impact the general enforcement of the Regulation is the extreme complexity of the whole legal regime concerning seizure, freezing, and confiscation in the European Union.

Legal systems that have been significantly impacted by the transposition of Framework Decisions 2003/577 and 2006/783,⁵⁶ and perhaps to a lower extent, by Directive 2014/42,⁵⁷ appear to be currently struggling in reconstructing a coherent operative framework that includes also the Regulation.

On the one hand, the Regulation has a limited scope of application as far as territoriality is concerned since it does not cover the cooperation with Denmark and Ireland (where, therefore, the previous legislation continues to apply). On the other hand, even within its scope, the succession of legislative sources in a short period⁵⁸ has likely contributed to a certain amount of confusion, which seems to have somewhat delayed the awareness by legal practitioners of the potential offered by the new legislation.

In this sense, the very discipline of the Regulation, which does not provide for clear coordination with the previous legislation, certainly plays a role. An example in this sense is shown by the grounds for refusal, which are provided for as both mandatory and optional in the Framework Decisions, whereas they are only optional in the Regulation. This discrepancy is reported as a major factor of uncertainty in all the States examined, to the point that in some instances national courts directly opt for the application of the older, and better-experimented regimes (e.g. in Bulgaria).⁵⁹ Another example is given by execution deadlines, established in the Regulation, but only seldom backed up at the national level by adequate provisions, that make the enforcement of the orders effective in practice.⁶⁰

56 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, and Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

57 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

58 A trend that is not giving any sign of discontinuity even after the entry into force of the Regulation, as clearly shown by the approval of Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation.

59 Miroslava Manolova and Ekaterina Salkova (n 33) §1.4.2. In this uncertainty finds its origin also the request for a preliminary reference by the Croatian authorities, mentioned above and in Zlata Đurđević and others (n 6) § 4.2.

60 In this sense, especially France (Eleonora Cervellera (n 6) §1.4.2) and Portugal (Miguel João Costa and others (n 9) § 1.4.4).

In this regard, it is not surprising that, although a regulation does not require any form of transposition into national law, most of the analyzed systems felt the need to introduce some sort of coordinating provision or at least to partially amend the previous legislation in an attempt to restore unity to the overall discipline, or to cover some fundamental issues related to the designation of the competent authority, the certificate procedure, and, to a lesser extent, remedies. Poland and Spain still represent an exception to this trend, although numerous calls are made for the implementation of similar instruments in those countries as well. Even where coordination has been implemented, however, the effort seems insufficient to ensure enough clarity in the regime of seizure, freezing, and confiscation.

A first conclusion thus strongly emerges from this comparative analysis: rather than a series of subsequent interventions that never fully overlap with each, the situation urgently calls for a rationalization of the whole sector at the European level, possibly with a single instrument that provides for a clear, all-encompassing regulation.

5.2 *A Still-Too-Vague Ontological Dimension*

A further element of complexity, strictly related to the first one, is the high level of fragmentation that can be reported regarding the ontological dimension of concepts and notions in this domain. In other words, despite the numerous interventions for harmonization, this cooperation field appears still extremely diverse when it comes to defining the single legal tools.

The extension of the scope of freezing, seizure, and confiscation orders, indeed, has a considerable impact on the effectiveness of the whole cooperation mechanism, as it increases or decreases the number of cases in which a Member State can request the execution of such measures on assets located in another Member State.⁶¹

An exemplification, in this sense, is the definition of “freezing order”, which is interpreted in very different ways across the European jurisdictions (for instance, for what concerns the purpose it can be used for).⁶² A great deal of fragmentation can also be observed about the forms of confiscation, which vary from State to State both as far as the typologies are concerned (conviction-based/non-conviction-based⁶³/civil forfeiture) and in relation to the requirements that define each of such measures.

61 In this sense, also Eleonora Cervellera (n 6) § 1.4.

62 E.g. in Spain it cannot be used for confiscation purposes, while this is possible in other legal orders, see Ana Maria Neira Pena (n 10) § 1.4.1.

63 In particular, non-conviction-based confiscations are reported in all the examined Member States, with the exception of the Netherlands, where a proposal to introduce

It is true that, in general, the influence of European legislation extended the scope of freezing and confiscation tools in domestic systems, therefore marking an advance in the efficiency of the fight against cross-border crime. Nonetheless, at times, this same extension also represented a factor for further complications. For instance, the fact that the Regulation also applies to proceedings that are not strictly speaking of a criminal nature in accordance with Recital 18, without a clear definition of the substantial nature of the single confiscation measures, has been identified as an obstacle to a smooth cooperation.⁶⁴

5.3 *Divergent Operational Rules*

Against these more transversal divergence issues, the comparative analysis brought to light a series of punctual discrepancies that are also reportedly diminishing the impact of the Regulation in its practical implementation.

The first aspect concerns the competent authorities, which each Member State must identify according to the new regime, and which have been chosen with a lot of variety across the countries. In some, the decision fell upon courts, however of different status, at the district level for instance in Bulgaria; depending on the state of procedure in Spain and Italy; in Croatia and Poland, courts are flanked by prosecution offices; in Germany and the Netherlands, prosecutors have a prominent role, while in France a significant position is held by an administrative authority (the Agency for the Management and Recovery of Seized and Confiscated Assets). Such a divergence may also be found within national systems, for example, in Poland and Italy, where the authority in charge varies also depending on the single tool at stake (freezing or confiscation).

A second aspect of discrepancy emerges, rather unsurprisingly in truth, about remedies. The need to establish effective remedies, vague as ever in the European legislation, has been variously interpreted by the national legislature regarding the Regulation.

In a few cases, that brought to the establishment of new forms of appeal (for instance in Germany, or Bulgaria, in the latter however only where the State acts as executing authority);⁶⁵ in others, the chosen solution was to

them is ongoing (see Camila Ugaz Heudebert and others (n 6)). On this matter, in any case, Directive 2024/1260 is likely to have a significant impact, once implemented at the national level.

64 This aspect is reported as especially problematic in some jurisdictions, e.g. Portugal, see Miguel João Costa and others (n 9) § 1.4.3, and Italy, see Isadora Neroni Rezende and others (n 6) § 4.2.

65 See Anna Albrecht and Anne Schneider (n 12) § 1.4.4 and Miroslava Manolova and Ekaterina Salkova (n 33) § 1.4.6.

extend remedies already available in the domestic framework also to the cases covered by the Regulation.

Finally, a third major factor of divergence can be observed with the status of third parties, especially where they can be identified with the crime victims. In this regard, differences among Member States are quite striking. In some, for instance, victims cannot be at all the beneficiary of confiscation measures (in any case, as in Poland, or in some circumstances, as in Spain),⁶⁶ while in others, victims may indirectly benefit from such measures, although without directly activating the single tools provided in the Regulation (as in France and in Italy).

6 Concluding Remarks

The picture that emerges from the analysis carried out shows that the path toward smooth and fair cooperation in the criminal justice field is a complex proceeding. In light of the above considerations, each of the examined cooperation mechanisms can be observed singularly, and for each, a specific conclusion could be drawn. The comparative analysis conducted indeed reveals a contradictory picture of the state of implementation of the principle of mutual recognition in the EU.

The EAW is the oldest of the EU mutual recognition instruments in criminal matters, and its use is generally well-established in the national practice. Over the years, Member States seem to have become more willing to adapt their transposition laws to the spirit of the framework decision, thus showing a greater commitment to the principle of mutual trust. Despite this widespread trend, however, some problems still seem to affect the integrity of the EAW mechanism. Even if some transposition issues are quite common for specific grounds for refusal – in particular, those related to the *ne bis in idem* and the surrender of nationals and other residents – the more complex legal issues for the holding of mutual recognition will likely stem from the incorporation of human rights considerations in the EAW system. The recent nature of the relevant grounds for refusal, which was not initially provided in the EU surrender mechanism, is evident in the fragmented approach that is developing across Member States. Domestic case law differs on the interpretation of the range of fundamental rights that may trigger the non-execution of a EAW and the threshold to refuse surrender. These divergences undermine the consistent

66 See Wojciech Jasiński and others (n 10) § 1.4.3 and Ana Maria Neira Pena (n 10) § 1.4.4.

application of the principle of mutual recognition in the EAW system, despite the efforts made by the CJEU in this regard since *Aranyosi and Căldăraru*. Against this scattered background, a more harmonized approach may likely be achieved with a reform of the EAW FD, clearly stating the conditions for refusing a EAW due to the real risk of fundamental rights violations.

The analysis carried out on the transposition of the EIO D shows a rather unproblematic picture so far. However, the EIO D is still in its beginning and has already shown considerable success. It is therefore conceivable that certain critical aspects, in particular, the marginal role left to the defence of the accused, may in the future give rise to complex legal issues, on which it may be necessary to intervene, either by amending the text of the directive (as in the case of the need to respect, at all costs and without exception, the secrecy of the investigation) or by changing certain interpretative solutions adopted so far. This last remark applies in particular to the so-called data-driven investigations,⁶⁷ which represent a new way of operating, very different from what is regulated by the EIO (which treats each investigative and evidentiary measure as a *unicum* and does not address the issue of massive data acquisition).

It is still too early to draw firm conclusions in this regard, but it is easy to imagine that the issue of admissibility of evidence will, therefore come up again. After all, while avoiding explicitly regulating the topic, the EIO D indirectly intervenes on admissibility, inviting national States to simplify their systems to focus on protecting the essential principles of their respective legal systems. The more transnational investigations proliferate, the more the indirect push to simplify national systems on evidentiary admissibility will be felt. It is, therefore to be expected that new problems will emerge, given that the admission of evidence is an area in which States have always appeared very jealous of their sovereignty.

Last, the Regulation, which, as a tool, could have seemed the best legislative option to prevent many of the implementation problems highlighted with regard to the EAW FD and the EIO D, seems to suffer from similar problems with opposite origins. The direct applicability of the instrument, in fact, perhaps still due to the peculiarity of similar solutions in criminal matters, seems – in

67 See Giulia Lasagni, 'Admissibility of Evidence in Criminal Proceedings: Lessons (and Problems) from the "Data Retention Saga"' in Lorena Bachmaier Winter and Farsam Salimi (eds), *Admissibility of Evidence in EU in Cross-Border Criminal Proceedings: Electronic Evidence, Efficiency and Fair Trial Rights*, (Bloomsbury Publishing, 2024), 29–48; Jan-Jaap Oerlemans, Dave van Toor, 'Legal Aspects of the EncroChat Operation: A Human Rights Perspective', [2022] 30 Eur.J.Crime Cr.L.Cr.J. 309; Jan-Jaap Oerlemans, Sofie Royer, 'The future of data-driven investigations in light of the Sky ECC operation', [2023] 14 NJECL 434.

these early years – to have perplexed numerous legal practitioners, first and foremost the courts, with the result that they often fail to exploit the full potential of the system. In this difficulty, as in the case of EAW FD and EIO D, the role of the national legislator also seems to have a prominent position. In the absence of a duty to transpose, in fact, the absence of rules or guidelines coordinating with the new discipline often seems to have left interpreters in doubt as to how and when to apply the Regulation. Without prejudice to these more general considerations, however, the certainly more problematic issue appears to be the fragmentary nature of the legislative basis for the confiscation and freezing of assets. In fact, the centrality of the issue, in the European and international context, would require today a complete systematisation of all legal acts still in force in the sector, starting from a clear definition of which legal institution (e.g., seizure, freezing, confiscation) can be used under which conditions and for which purposes.

In light of these considerations, it would seem natural to conclude that, in the end, the legal tool used to establish a cooperation mechanism is certainly a crucial factor, but maybe it is not the resolute one. Clarity in the legal bases and knowledge of the legal operators of what could be achieved thanks to a certain tool remain pivotal in making cooperation effective in practice, not only on a theoretical level. This consideration is particularly important, especially for the position of defence lawyers, who, as private individuals, appears today as the party of the proceeding that struggles more in transposing their action on transnational grounds. In this regard, defensive exceptions, raised till the level of preliminary references to the CJEU, have significantly contributed to strengthening the degree of protection of fundamental rights in all the three cooperation mechanisms analysed here. Still, especially the EIO D and the Regulation, insisting on subject matters where a transnational approach is less developed than with the surrender of suspects, show the limits of an approach that continues to portray the figure of the defence lawyer only seldomly on the European dimension. Thus, a change in the approach seems increasingly necessary.

Pointing the finger against gaps and lacunas, however, should not let us forget how much has actually been accomplished in the last few years. This is even more so, considering that procedures regulating investigation and trials, so far, have not been harmonized at the EU level and, therefore, present a significantly high level of divergence among Member States.

Just to mention one of the major achievements, reference could go to the effective functioning of all mechanisms in a context in which judicial authorities, police, and lawyers still widely disregard the legal systems of others and their languages and legal traditions.

Indirectly, the practice related to the three mechanisms also provided a push forward towards some approximation, if not harmonization, of investigative measures (for instance, as far as the requirement of judicial authorization is concerned).

Although at times frustrating in terms of foreseeability of the applicable procedural norm and effectiveness of cooperation, this complex but continuous accumulation of practice steadily contributes to the creation of a common culture on criminal proceedings in the EU that is starting to go well beyond the harmonization of single procedural safeguards. The reflection of this study tried to support this trend by increasing the level of mutual knowledge and understanding for legal operators, for a path that – in the current European and international context – appears today as fragile and fascinating as ever.