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List of abbreviations

EAW	European Arrest Warrant
FD EAW	*Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States*
FD 909	*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*
CJEU	Court of Justice of the European Union
TEU	*Treaty on European Union*
TFEU	*Treaty on the Functioning of the European Union*
ECE	*European Convention on Extradition*, Paris, 13 December 1957
1983 Convention	*European Convention on the Transfer of Sentenced Persons*, Strasbourg, 12 March 1983

Foreword

This report is based on a comparative study of both the implementations and implications of Article 4(6) and Article 5(3) of the *Framework Decision on the European Arrest Warrant* (FD EAW) in the EU Member States. The overarching question of this report is whether resocialisation supersedes surrender. This study, which stems from issues that came to surface in the EAW practice in the Netherlands, was set up in 2015. At the European Judicial Network (EJN) conference in Rome in 2013 the topic had already been discussed amongst the EJN contact points of Germany, France, Belgium and the Netherlands. These experts in the field of European criminal law agreed that it would be worthwhile to initiate a joint research project focusing on Member State practice on the surrender of nationals and residents under the EAW system. In addition, the Center for International Legal Assistance of the Public Prosecutors office in Amsterdam believed it to be necessary to examine how the *Kozlowski* and *Wolzenburg* rulings of the CJEU had influenced the surrender procedure in other EU Member States. The need for a research project on these topics was also fuelled by the *Lopes da Silva* case of the CJEU which influenced the jurisprudence in the Netherlands.

The initiators of the project believe that cross border judicial analysis will help Member States to develop national criminal legislation and procedures and to determine common norms and values within the EU. The aim of this project is for EU Member States to learn more about alternative approaches with regard to the application of Article 4(6) FD EAW by providing an overview of the different practices in the EU. This is done through comparing the different legal provisions implementing Article 4(6) FD EAW in the examined EU Member States and the subsequent procedures. In the end, the goal of this project is not to prescribe what the best approach is with regard to this refusal ground, but to provide an overview from which other EU Member States could learn if they need or want to.

In this foreword the project team would like to thank the European Commission and the partner Member States for their trust in the project plan and for their patience, assistance and dedication during the course of the project. After each phase the partner countries and the associated partners awaited the further developments and expressed their full collaboration. Special gratitude

goes out to the French delegates and to the German delegate, who made it possible to have the introductory meeting in Paris and the first plenary meeting in Munich.

Moreover, 35 delegates of 16 EU Member States, who gathered at the second plenary meeting in Amsterdam on 14 June 2017, contributed with their presence and with their input to the results of this comparative study. Judges, prosecutors, academics, and legal advisors from the various national ministries of justice as well as from the European Commission discussed the outcome of the comparative study and the Opinion of the Advocate General of the CJEU, Mr. Bot, of 15.02.2017 in the *Popławski* case (C-579/15) in a very fruitful conference.

Chapter ONE

Introduction

This chapter will describe the history, objectives, scope, contents and methodology of this study. The following paragraph will describe the general foundation of the current surrender procedure in the EU and will introduce the overarching research questions for this study. Furthermore it will cover the changes in the surrender procedure in the Netherlands since 2008. In this part an overview is given of the applicable provisions in the *Dutch Surrender Act*, the resulting practices and more importantly, an introduction into the issues that sparked this research project. This part will also focus on the broad implications of jurisprudence of the CJEU in the EU surrender procedure. Sections 1.2 to 1.4 will set out the scope and contents of this study as well provide a justification for the chosen methodology and the used questionnaire.

1.1 History and objectives

Since the introduction of the FD EAW in 2002, the provisions dealing with the optional grounds for non-execution of an EAW concerning nationals or residents of the executing Member State have been the subject of extensive debate in both academic literature and jurisprudence. In the period from 2004 until 2017, we have seen three separate decisions of the CJEU on this particular subject.[1] This debate has primarily focused on the issue of discrimination between nationals and non-nationals with respect to the execution of EAWs. This issue came about due to the changes made when the FD EAW replaced the old extradition procedure under the *1957 European Convention on Extradition* and its protocols. As the FD EAW was intended to replace the old extradition instruments, the old system principle of an absolute competence of a Member State to refuse extradition of its nationals was abolished.[2] Due to the right of citizens of Member States of the EU to travel freely within the inner territory of the EU, an absolute refusal ground for nationals in extradition procedures between Member States was considered undesirable. Such a refusal ground would, after

1 Case C-66/08, *Kozlowski*, EU:C:2008:437, Case C-123/08, *Wolzenburg* EU:C:2009:616 and Case C-42/11, *Lopes da Silva,* EU:C:2012:517.

2 FD EAW replaced the *1957 European Convention on Extradition*, its two protocols of 1975 and 1978, the provisions concerning extradition of the *Terrorism Convention* and the two Union conventions of 1995 and 1996 and certain provisions of the Schengen Implementing Convention.

all, lead to impunity for EU citizens when they seek refuge in their Member State of origin. Furthermore, considering the high amount of mutual trust between the EU Member States, the old 'traditional' refusal grounds were considered obsolete.[3]

As a result of this paradigm shift, it was noted during the introduction of FD EAW that the main point of focus was no longer nationality, but the place of the wanted person's main residence.[4] As a consequence, provisions were introduced for the purpose of 'facilitating the execution of the sentence passed in the country of arrest when it is there that the person is most likely to achieve integration'.[5] Moreover, it was established that 'when a European arrest warrant is executed, the execution can be made conditional on the guarantee of the person's subsequent return for the execution of the sentence passed by the foreign authority'.[6] As a result, Article 4(6) and Article 5(3) FD EAW were incorporated in the FD EAW. Article 4(6) FD EAW provides for the possibility not to execute an EAW for the purpose of executing an irrevocable sentence when 'the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law'.[7] In Article 5(3) FD EAW, the possibility was introduced to surrender a national or resident of the executing Member State under the 'condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State'.[8]

3 V.H. Glerum, *De weigeringsgronden bij uitlevering en overlevering* (Wolf Legal Publishers 2013) p. 396.

4 *See Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States*, COM(2001) 522 final, Brussels, 25 September 2001 *(hereafter Explanatory Memorandum FD EAW)* pp. 5-6.

5 *See Explanatory Memorandum FD EAW* pp. 5-6.

6 *See Explanatory Memorandum FD EAW* pp. 5-6. Advocate General Bot in the *Kozlowski* case (Case C-66/08, *Kozlowski*, EU:C:2008:437) described this change in paradigm as follows in para 103: 'The right moment therefore seems to have arrived to add equal treatment before the courts to these legal constructs. In other words, since a citizen of the Union from now on has rights in every Member State which are largely the same as those enjoyed by nationals of that State, it is fair that he should comply with the same obligations in criminal law matters and, if he commits an offence, be prosecuted and tried before the courts of that State in the same way as its nationals'.

7 *See* Article 4(6) FD EAW.

8 *See* Article 5(3) FD EAW.

Although the content and scope of both articles and its implications for a national surrender procedure will be discussed in more detail below, it is important to stress that the underlying principle of both articles, based on the concept of facilitating reintegration into society, deviates considerably from the 'old' extradition instruments. In the present system, it should be ensured that 'the European arrest warrant does not apply to the detriment of the reintegration of the convicted person' which is believed to be to 'the detriment of the legitimate interest of all Member States in crime prevention'.[9] The question, however, is whether this principle of facilitating reintegration into society corresponds entirely with the 'objective of general interest of preventing, in the area of freedom, security and justice, the impunity of persons definitively convicted and sentenced in one EU Member State'.[10] In the current EAW system, a situation may occur in which the surrender of a wanted person who resides in the executing Member State should be refused on the basis of the implementation of Article 4(6) FD EAW, whereas at the same time, the executing Member State cannot (or cannot immediately) take over the sentence or criminal proceedings due to legal, practical or political considerations. The consequence of this example could be impunity, which for obvious reasons is undesirable.

The possibility of impunity as a result of the application of Article 4(6) and Article 5(3) FD EAW and the necessity to prevent impunity is also evidenced by the introduction of FD 909. Consideration 12 of the Preamble mentions that FD 909 applies *mutatis mutandis* to the enforcement of sentences with regard to cases that fall within the scope of Article 4(6) and Article 5(3) of FD EAW. Furthermore, it is mentioned that:

> this means, *inter alia*, that, without prejudice to that Framework Decision, the executing State could verify the existence of grounds for non-recognition and non-enforcement as provided in Article 9 of this Framework Decision, including the checking of double criminality to the extent that the executing State makes a declaration under Article 7(4) of this Framework Decision, as a condition for recognising and enforcing the judgment with a view to considering whether to surrender the person or to enforce the sentence in cases pursuant to Article 4(6) of Framework Decision 2002/584/JHA.[11]

9 Opinion of Advocate General Bot, Case C-66/08, *Kozlowski*, EU:C:2008:437, par. 136.
10 Case C-129/14, *Spasic*, EU:C:2014:586, par. 65.
11 Preamble to FD 909, Consideration no. 12.

Article 25 of FD 909 additionally provides that:

> without prejudice to Framework Decision 2002/584/JHA, provisions of this Framework Decision shall apply, *mutatis mutandis,* to the extent they are compatible with provisions under that Framework Decision, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that Framework Decision, or where, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned.

From these two provisions it can be concluded that FD 909 is closely linked to FD EAW and, more specifically, to the provisions of Article 4(6) and Article 5(3) FD EAW. Apparently, at the introduction of FD 909, it was deemed necessary to underline the necessity of preventing impunity when either one of both provisions is applied by an executing Member State.

When looking at the current system and the problems it may pose, the question comes to surface which of the two principles should prevail when set opposite each other. Should the principle of facilitating reintegration into society at all times prevail so that it must lead to the refusal of the EAW? Or is the principle of facilitating reintegration into society subordinate to the overarching principle of a general interest of all Member States in preventing impunity and should a wanted person, in instances like those mentioned above, be surrendered when the transfer of the execution can or will not succeed? Hence, the question one could ask in this context is whether resocialisation supersedes surrender? It is this question that surfaced in the Netherlands in 2013 as a result of the jurisprudence of the European Court of Justice and revised national legislation regarding jurisdiction to prosecute. This question was the catalyst for this study. In order to fully comprehend the reasons why these questions surfaced, it is necessary to provide an overview of the changes made in Dutch surrender procedures since 2008. Although the main point of departure is Dutch legislation and procedure, this overview also provides an analysis of the jurisprudence of the CJEU, which has widespread implications for the EU surrender procedures in all EU Member States.

The implications of the CJEU rulings in Kozlowski, Wolzenburg, *and* Lopes da Silva *in the Netherlands*

In the Netherlands, FD EAW has been implemented in the Surrender Act of 29th of April 2004 (hereinafter referred to as the Dutch Act).[12] One issue relating to the Dutch Act and the FD EAW has been particularly heavily debated in the International Court Chamber in Amsterdam in recent years. This discussion is based on the Dutch application of the grounds for non-execution of an EAW (Article 4(6) of FD EAW, and to lesser extent, Article 5(3) of the FD EAW).

Article 6(2) of the Dutch Act states that an EAW – for execution purposes – must be refused when the wanted person is a Dutch national.[13] Article 6(5) of the Dutch Act furthermore provides that this refusal ground also applies to non-citizen residents in the Netherlands with a permanent residence permit in the Netherlands. This group of people has the right to be treated equal to Dutch citizens in a wide range of areas, and the permanent residence status is typically held by people originally from outside the EU. In addition, Article 6(5) of the Dutch Act provides two additional conditions that should be fulfilled before execution is refused: the Netherlands must have jurisdiction over the offences mentioned in the EAW and there should be no expectation that the

12 In the Netherlands, the legislator has chosen to centralize the execution of the incoming EAWs. The Center for International Legal Assistance (IRC in Dutch) of the Public Prosecutor's Office in Amsterdam is the central authority for receiving and processing incoming EAWs. In addition, the International Court Chamber in Amsterdam has exclusive jurisdiction to decide upon the surrender of a requested person if the person does not consent. The decision of the International Court Chamber on the EAW is final and no appeal is possible.

13 Article 6 of the *Dutch Act* reads as follows:

1. Surrender of a Dutch person may be allowed where requested because of a criminal investigation against that person if, in the opinion of the executing judicial authority, it is guaranteed that, if he is given a non-suspended custodial sentence in the issuing Member State for acts for which surrender can be allowed, he will be able to serve that sentence in the Netherlands.
2. Surrender of a Dutch person shall not be allowed if the person is requested for execution of a custodial sentenced imposed upon him by final judgment.
3. If surrender is refused solely on the grounds of paragraph 2, the public prosecutor shall notify the issuing judicial authority of the willingness to take over execution of the judgment.
4. The public prosecutor shall immediately notify Our Minister of any surrender with return guaranteed as per paragraph 1, and of any refusal of surrender under the declaration of willingness to take over execution of the foreign judgment in the terms of paragraph 3.
5. *Paragraphs 1 – 4 shall also apply to an alien with a residence permit for an indefinite time, where he can be prosecuted in the Netherlands for the acts underlying the European arrest warrant and provided he is expected not to forfeit his right of residence in the Netherlands as a result of a sentence or order imposed upon him after surrender.*

wanted person will lose his/her residence rights due to the expected sentence abroad. In the years after the introduction of the Dutch Act, the main question resulting from the application of these provisions was whether a wanted person possessed a permanent residence permit.

This situation changed in 2008 and 2009 due to the case-law of the European Court of Justice in the *Kozlowski* and, more importantly, *Wolzenburg* cases.[14] In *Kozlowski*, it was ruled that a wanted person must be considered a resident in the executing State when he has established his actual place of residence there, and, during a certain period of time, has acquired a connection with that Member State. According to the CJEU, the terms 'staying' and 'resident' are autonomous concepts within Union law. It is for the national court to assess whether there are sufficient connections between the requested person and the executing State.[15] Objective factors such as the length, nature and conditions of his presence, and his family and economic ties may contribute to the conclusion that a wanted person has significant ties with the executing Member State. In *Wolzenburg*, which dealt with the Dutch implementation of Article 4(6) FD EAW, the court ruled that Member States may not infringe upon EU law, in particular on the provisions of the EU Treaties relating to free movement. EU citizens can therefore, as a starting point, rely on Article 12 TEC, which guarantees to EU citizens equal treatment with respect to nationals of the relevant Member State, once these EU citizens lawfully reside in another Member State. The court held that 'in the case of a citizen of the Union, the Member State of execution cannot, in addition to a condition as to the duration of residence in that State, make application of the ground for optional non-execution of a European arrest warrant laid down in that provision subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration'.[16] The court did, however, consider that Article 18 TFEU does not prevent Member States from requiring, as a condition, a period of at least 5 years of continuous and lawful residence within their territory in order to consider EU citizens on an equal footing with nationals for the purposes of application of the related optional ground for refusal. The CJEU based this interpretation on the argument that the objective of Article 4(6) of the FD EAW is to enable, as was mentioned above, the judicial authorities to give particular weight to the possibility of increasing the requested person's

14 Case C-66/08, *Kozlowski*, EU:C:2008:437 and Case C-123/08, *Wolzenburg* EU:C:2009:616.
15 Case C-66/08, *Kozlowski*, EU:C:2008:437, par. 43.
16 *See* ruling of the Grand Chamber in Case C-123/08, *Wolzenburg* EU:C:2009:616.

chances of reintegrating into society. Therefore, the Court considered that it is reasonable that Member States may require evidence of the pre-existence of a certain degree of integration within that society.

The consequence of both cases for the Dutch surrender procedure was significant. After the *Kozlowski* and *Wolzenburg* rulings, the surrender procedure in the Netherlands has crystallized into a rather comprehensive system. In this system EU citizens living in the Netherlands may, due to their legal stay in the Netherlands and due to their EU citizenship, be treated equal to Dutch nationals with respect of Article 6(2) of the Dutch Act, provided that they have resided in the Netherlands for 5 years. In the post-*Wolzenburg* system, the main condition to be eligible for being treated equal to a Dutch national is that the EU citizen concerned has been a legal resident in the Netherlands for a period of at least 5 years without interruption, immediately prior to the decision on surrender. When the court in Amsterdam determines (1) that a wanted person with EU citizenship meets the threshold of 5 years legal residency in the Netherlands, the execution of an EAW must be refused when the other two cumulative criteria of Article 6(5) of the Dutch Act are also fulfilled, namely: (2) there should be no risk of losing this right to reside in the Netherlands due to the possible foreign sentence and (3) the wanted person can be prosecuted in the Netherlands for the acts underlying the EAW.[17] As jurisdiction in the Netherlands over criminal offences was, in general, limited to offences committed on Dutch territory or by a Dutch national abroad, cases regarding EAWs in which a foreign national could fall under the scope of Article 6(5) Dutch Act were limited to EAWs in which the offences were committed on Dutch soil.

In the *Lopes da Silva* case, the CJEU ruled in 2012 that, in transposing Article 4(6) FD EAW, a Member State cannot automatically and absolutely exclude from its scope EU citizens staying or residing on its territory. The CJEU emphasized the importance of an analysis of the person's connections with the executing Member State. Recalling the *Kozlowski* and *Wolzenburg* rulings, the Court recognized that, when implementing the ground for optional non-execution provided for by Article 4(6) FD EAW, Member States have a certain margin of discretion.[18] In transposing this provision, Member States

17 (1) The wanted person can be prosecuted in the Netherlands for the acts underlying the European arrest warrant and (2) he is expected not to forfeit his right of residence in the Netherlands as a result of a sentence or order imposed upon him after surrender.

18 Allowing for instance to require the demonstration of a certain degree of integration in the society of the executing Member State.

are, however, required to comply with Article 18 TFEU.[19] As a consequence of the *Lopes da Silva* ruling, the International Court Chamber in Amsterdam has ruled that condition 3 above (the requirement that The Netherlands has the power to prosecute the wanted person for the underlying offense) is discriminatory.[20] In a so-called cassation in the interest of law, the Supreme Court in the Netherlands decided that, in order to prevent impunity, it is justifiable to apply the condition of national jurisdiction over the offences mentioned in the EAW.[21] In July 2014, the Criminal Code of the Netherlands was revised. The revised Criminal Code provides that the Netherlands has jurisdiction over offences committed abroad by both nationals and EU citizens who can be equated to Dutch nationals. The assessment of whether the Netherlands has jurisdiction over offences committed by an EU resident under these new provisions is done on the basis of the condition that the EU resident should have resided in the Netherlands on a legal basis for an uninterrupted period of at least five years.[22]

As a consequence of the revision of the Dutch provisions on jurisdiction over criminal offences, the number of EAW cases in which a wanted person could fall under the scope of the Dutch implementation of Article 4(6) and Article 5(3) FD EAW increased significantly. Due to these amendments, the Netherlands gained jurisdiction over all offences committed by EU residents who reside in the Netherlands on a legal basis for an uninterrupted period of at least five years. As a result, the third cumulative condition of Article 6(5) of the Dutch Act – the condition that the Netherlands can prosecute the offences mentioned in the EAW – no longer plays an autonomous role in the Dutch surrender procedure.

The increase in the number of surrender cases in which a wanted person could fall under the scope of the refusal ground has resulted in an on-going debate in EAW court proceedings. This debate mainly focuses on the conditions that may play a role in assessing whether the wanted person has legal residence in the Netherlands. The reason for this debate is that the condition of permanent and legal residence in the Netherlands for a period longer than 5 years without interruption immediately prior to the decision on surrender is not easily

19 Case C-42/11, *Lopes da Silva,* EU:C:2012:517, par. 39.
20 District Court of Amsterdam, 25 June 2013, *Standowicz* ECLI:NL:RBAMS:2013:3852.
21 Hoge Raad, 18 March 2014, ECLI:NL:HR:2014:650.
22 Article 7 in conjunction with Article 86b of the Dutch Criminal Code.

fulfilled. The court not only has to assess whether a person has been living in the Netherlands continuously for a period of 5 years immediately prior to the decision on surrender, it also needs to assess whether the person has resided legally in the Netherlands that entire time.[23] What makes this investigation additionally difficult is that registration in the municipal register is not (and cannot be) imposed as a precondition for the lawful residence of EU citizens, which means that the exact date that the residence began for EU citizens can be difficult to quickly determine.

Although this on-going debate, which is also occurring in other EU Member States, was an important catalyst in initiating this study, another incentive to initiate this project comes from the aforementioned tension between the principles of facilitating reintegration into society on the one hand and the objective of preventing impunity on the other. This tension, which surfaced in the Netherlands in its national surrender procedure with regard to Polish EAWs, is derived from the text of Article 4(6) FD EAW, which states that an EAW can be refused when it relates to nationals or residents and 'that State undertakes to execute the sentence or detention order in accordance with its domestic law'.

The obligation to undertake the execution of the sentence in Article 4(6) FD EAW

In the Netherlands, the provision that the 'State undertakes to execute the sentence or detention order in accordance with its domestic law' has been implemented in Article 6(3) of the Dutch Act. This specific provision states that, in cases in which the surrender of a Dutch national is refused because the EAW was issued for the execution of an irrevocable sentence, the public prosecutor should inform the issuing authority of the willingness to take over the execution of the sentence on the basis of *European Convention on the Transfer of Sentenced Persons of 12 March 1983* (hereafter, 'the *1983 Convention*') or any other applicable treaty. A problem surfaced after FD 909 was implemented in Dutch law on 12 July 2012. The Dutch legislator chose to apply the possibility provided in Article 28(2) of FD 909 to make a 'declaration indicating that, in cases where the final judgment has been issued before the date [the Member

23 Conditions that play or played a role in assessing whether the wanted person has legal residence in the Netherlands are, *inter alia*, evidence of living and housing in the Netherlands (a mortgage or rental contract), actual employment (enough income to sustain him or herself) and health care insurance in the Netherlands.

State] specifies, [the Member State] will as an issuing and an executing State, continue to apply the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011'. In other words, the Dutch legislator decided that FD 909 only applies to cases in which a judgment became irrevocable after 5 December 2011. As a result of this declaration, with regard to any EAW in which the surrender of a Dutch national or resident was requested on the basis of the execution of a sentence which became irrevocable before 5 December 2011, the actual transfer of the sentence could only be done by using the old instruments, usually the *1983 Convention*.[24]

This declaration would not cause any problems if and when all EU Member States ratify and implement all the pre-existing instruments on the transfer of sentences. However, this is presently not the case. Consequently, problems have arisen in the Netherlands with regard to Polish EAWs issued for the execution of a sentence that became irrevocable prior to 5 December 2011. When such an EAW is issued with regard to a Polish national who resides in the Netherlands for a period longer then 5 years without interruption and who fulfils all conditions to be a legal equivalent to a Dutch citizen, it may be impossible to actually transfer the sentence to the Netherlands when the EAW has been refused on the basis of Article 4(6) FD EAW. This impossibility originates in the fact that Poland has only ratified the *1983 Convention* and its additional protocol and not the European Conventions of 1970 and 1991.[25] As a consequence, the transfer of a sentence from Poland to the Netherlands in these circumstances is only possible when evidence is available that the sentenced person has actually fled Poland in order to avoid the execution of the sentence in Poland.[26] This leads to the problem that the transfer of a sentence from Poland to the Netherlands, when the concerned person is staying in and has ties with the Netherlands, is only possible when evidence is available that the person concerned fled Polish jurisdiction in order to evade the Polish sentence. Consequently, in cases in which a Polish EAW was issued for the execution of a sentence that became irrevocable prior to 5 December 2011, in which the surrender was requested of a Polish national who can be equated to a Dutch citizen and who did not

24 Poland, Ireland, Malta, Lithuania and the Netherlands made this declaration.

25 Additional Protocol to the Convention on the Transfer of Sentenced Persons, Strasbourg (18 December 1997), *European Convention on the International Validity of Criminal Judgments*, The Hague (28 May 1970); *Convention Between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences*, Brussels (13 November 1991)

26 *See* Article 2(1) of the *Additional Protocol to the Convention on the Transfer of Sentenced Persons,* Strasbourg (18 December 1997).

evidently flee from Poland, the transfer of the sentence – after the EAW has been refused – is not possible. As the final implication of this situation may be impunity, the question – and now we again return to the main research question of this study – is whether in situations as mentioned above, resocialisation should supersede surrender. Or, in other words, can a Member State – in case the transfer of the sentence did not or cannot succeed – still decide to refuse the EAW, or should this Member State then decide to surrender the person?

The initiation of the project

At the end of 2014, the realization grew that a comprehensive study was needed to examine whether similar issues have surfaced in other Member States and if yes, how other Member States cope with these issues. On the one side, this realization was based on the growing number of cases in which persons were eligible to fall under the scope of both the Dutch implementations of Article 4(6) and 5(3) of FD EAW. On the other side, this realization was based on the problems relating to the Dutch implementation of Article 4(6) FD EAW and the clause that states that the 'state undertakes to execute the sentence or detention order in accordance with its domestic law'. After all, as a result of rising migration numbers based on the right of free movement within the EU, other EU Member States might experience similar difficulties in their surrender procedures.

One of the main objectives of this project is to explore whether a similar treatment of wanted EU citizens exists in other Member States. If indeed a similar assessment is made in other EU Member States, it is worth investigating on which grounds the relevant authorities assess whether a wanted person of another (EU) nationality is considered a permanent and legal resident with respect to Article 4(6) FD EAW and Article 5(3) FD EAW. The other main objective of this study is to investigate whether similar issues regarding the 'obligation' to undertake the execution of the sentence mentioned in Article 4(6) FD EAW exist in other Member States and if so, how other Member States cope with this issue. If similar issues do not exist in other Member States, it is worth studying why these issues do not exist.

It should be noted that the importance of such a comparative study was also evidenced by the preliminary questions asked by the court in Amsterdam in November 2015 in the case against Daniel Adam Popławski.[27] This case mainly

27 Case C-579/15, *Popławski*, EU:C:2017:503.

dealt with the question whether it is possible to refuse an EAW for the purpose of executing an irrevocable sentence when, prior to the decision on the surrender, it is evident that the execution of the sentence in the refusing Member State is impossible (which thus may lead to impunity). Although this research project was initiated prior to the preliminary questions in Popławski, both this study and the case are intertwined with each other for obvious reasons. Yet, whereas the CJEU looks to interpret legal principles, the aim of this project is to conduct a comparative study regarding the present implementations and practices of Article 4(6) FD EAW on the national level. The aim of this project, as will be set out in more detail below, is to contribute to a better understanding of the legal and practical applications of Article 4(6) FD EAW and Article 5(3) FD EAW in EU Member States and, especially in the aftermath of the *Popławski* ruling, to function as a tool for better mutual understanding between Member States with respect to this topic.

1.2 General scope and contents

As mentioned above, the main objective of the project is to gain more insight into the differences and similarities in national legislation implementing Article 4(6) FD EAW and Article 5(3) FD EAW. In doing so, the project team has striven to provide an answer to the overarching research question: 'Does resocialization supersede surrender?'. Accordingly, the project has focused on two main research topics.[28]

The first research topic deals with the 'obligation' to undertake the execution of the sentence as mentioned in Article 4(6) FD EAW. It is studied whether this article, and more specifically the obligation to undertake the execution of the sentence, has been implemented in the national legislations of the participating Member States, and if so, whether the refusal ground is considered mandatory or optional. Furthermore, the national procedures that were incorporated as a result of the implementation have been studied, as well as the legal consequences of a refusal. As the legal consequences of a refusal can be far-reaching – as we have seen in the Netherlands – it is assessed whether the

28 In relation to these two research topics, the implementation of FD 909 on the enforcement of sentences and how this Framework Decision is applied in the participating EU Member States was studied. The aim thereof is to achieve insight in the applicability and possibilities of other judicial cooperation instruments to transfer the execution of a sentence. Article 25 of FD 909 is also relevant in relation to this.

transfer of the sentence is considered mandatory in the examined Member States, on which legal basis the transfer of the sentence takes place, and by which authority. Finally, it is studied whether the assessment of whether the sentence can actually be transferred is conducted prior to or after the decision on whether to execute an EAW and what the consequences of such an assessment are.

The second research topic focuses on the procedure, criteria and legal consequences of equal treatment as a national on the basis of Article 4(6) FD EAW and Article 5(3) FD EAW. Both Article 5(3) FD EAW and Article 4(6) FD EAW share the 'objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires'. Given these shared objectives, the research conducted with respect of Article 4(6) FD EAW will not only focus on the legal and practical implications of both the interpretation and implementation of Article 4(6) FD EAW, but will also focus on the implications with regard to Article 5(3) FD EAW. After all, the equal treatment of non-nationals lies at the heart of both procedures. It is examined whether differences in both procedures exist in the examined Member States.

This report is divided into three parts. Chapter 2 examines the implementation of Article 4(6) FD EAW in the legal systems of the participating Member States, the national legal procedure based on this implementation, and the legal consequences of a refusal based on Article 4(6) FD EAW. The first part describes the national laws, procedures, designated authorities and legal particularities concerning Article 4(6) FD EAW. The goal of this description is not to provide an exhaustive overview of the entire national procedure on this matter. The scope of this topic was determined by three main points of focus: the manner of implementation; the procedure with regard to own nationals, EU residents and non-EU residents; and the legal consequences of a refusal for these categories of persons.

Chapter 3 examines the implementation of Article 5(3) FD EAW in the legal systems of the participating Member States, the national legal procedure based on this implementation, and the legal consequences of a guarantee to return based on Article 5(3) FD EAW. It should be noted that the scope of Chapter 3 predominantly lies on the main characteristics of the procedure in respect of Article 5(3) FD EAW in each of the examined Member States. Consequently, the description of each of the Member States' procedures in this chapter is non-exhaustive. The focus is on the main differences between the different

Member States on this specific matter and not on describing the entire procedure in full detail.

Chapter 4 of this report answers the two research topics mentioned above. Chapter 4 draws conclusions on the basis of the research conducted. It will be analyzed which procedures are used in different Member States, and the similarities and differences will be addressed. As the main objective of this project is to provide an overview of the implementations, procedures, criteria and legal implications in the examined Member States, this Chapter 4 is not meant to be an instrument to criticize the implementation of Article 4(6) and 5(3) FD EAW in the different Member States. Rather, it provides insight in the legal systems of other Member States.

The fifth and final chapter of this report will focus on the ruling of the CJEU in the case against Mr. Popławski. Chapter 5 gives an overview of the background of the *Popławski* ruling and the contents of the judgment. Furthermore, an analysis of the implications of the *Popławski* ruling for these Member States will be provided.

1.3 Methodology

In order to conduct this comparative analysis in the most effective way, it is necessary to know what the legal state of affairs in each of the examined Member States is with regard to both the implementation and the practice of Article 4(6) and 5(3) FD EAW. In order to conduct this study, a questionnaire was developed in which several questions relating to this topic were submitted to a group of practitioners in each participating Member State.

The project team invited several Member States, which served as a cross section of the different legal systems throughout the EU, to join this project. Member States were chosen that were most likely to have experienced similar issues with regard to Article 4(6) FD EAW and 5(3) FD EAW. These issues could be based on a rise in migration flows in recent years, on the fact that a Member State made a declaration on Article 28(2) FD 909 or on the fact that a Member State recently joined the EU and had to implement all framework decisions as a condition for becoming part of the EU. The results obtained from this initial survey gave rise to the impression that further examination of this issue in the other Member States was necessary. As a result, the questionnaire was sent to other EU Member States after the initial survey.

As mentioned above, the questionnaire was sent to experts in the Member States, and it was requested that they would fill in and return the questionnaire to the project team in Amsterdam.[29] The definitive version of the questionnaire was established after an initial draft was first discussed in Paris with the partner countries Belgium, France and Germany in November 2015. The project team visited the participating countries in order to interview the experts. Hereafter, both the written answers and the oral interviews were analyzed and processed by the project team. In October 2016, the results of this process were sent to the participating countries for review and subsequently presented to the participating countries during a plenary meeting in Munich, Germany. During this meeting, the project team addressed the particularities of the research for each of the participating Member States. In addition, working groups were established in which the implications of the results as a whole were discussed. These expert discussions contributed much to the findings described in this report.

After the Plenary Meeting, the project team wrote a preliminary report. In addition, the questionnaire was sent to the remaining 18 EU Member States in early 2017. At the same time, the preliminary procedure at the CJEU in Luxembourg in the case of Mr. Popławski was ongoing and the Advocate General, Mr. Yves Bot, submitted his Opinion on 15 February 2017. In early June 2017 the preliminary report was reviewed by the partner-countries of Belgium, Germany and France. A second plenary meeting was held in Amsterdam on 14 June 2017 with all the participants that had cooperated in this project. During this final meeting, the project team outlined the final research report and the delegates of the partner countries have shared their views on the upcoming *Popławski* ruling. On 29 June 2017, the CJEU delivered its judgment in the *Popławski* case.

A second plenary meeting was held in Amsterdam on 14 June 2017 with all the participants that had cooperated in this project. During this final meeting, the project team outlined the final research report and the delegates of the partner countries shared their views on the upcoming *Popławski* ruling.

29 The contents of the questionnaire will be discussed in more detail below.

1.4 Questionnaire

As mentioned above, a questionnaire was developed to collect the necessary data for our research project. This questionnaire, which is available as an annex to this written report, can be divided into seven different sets of questions.

The first set of questions focuses on whether Article 4(6) FD EAW has been implemented, and if yes, how Article 4(6) FD EAW had been implemented into the national laws of the Member State involved. Furthermore, Member States were asked to provide details on the national implementation of these provisions and the relevant provisions of law.

The second set of questions deals with the question how, as an executing country, an EAW is dealt with, from the start of the procedure until the judicial decision and the execution of the decision in the context of Article 4(6) FD EAW. These questions can be further subdivided into three parts: the procedure with respect of a Member States' own nationals; the procedure regarding persons with either EU nationality or third country nationality (non-EU); and the accelerated procedure. Furthermore, the conditions for equal treatment are part of this set of questions.

The third set of questions focuses on the legal implications or consequences of a refusal of an EAW, based on the implementation of Article 4(6) FD EAW. Member States were asked whether they execute the sentence mentioned in the EAW on their own initiative or whether the executing state offers the requesting State to take over the execution of the sentence mentioned in the EAW. In addition, we asked whether taking over the sentence is considered an obligation in the examined Member States and whether taking over this procedure is similar for every category of wanted persons (own nationals, persons with an EU nationality, and third country persons). Furthermore, it is assessed on which legal basis the (transfer of the) execution of the sentence is done, when the EAW is refused based on the implementation of Article 4(6) FD EAW, which authority in the examined Member States decides on this matter, and how (procedure/grounds) this decision is reached.

In the fourth set of questions it is assessed how, as an executing country, an EAW is dealt with, from the start of the procedure, until the judicial decision and the execution of the decision in the context of Article 5(3) FD EAW. As was done with respect to the second set of questions mentioned above, these

questions were subdivided into two parts: a Member States' nationals and the procedure regarding persons with either EU nationality or non-EU nationality.

The fifth set of questions focuses on the legal implications or consequences of a surrender with a "guarantee to return" as mentioned in Article 5(3) FD EAW. It is assessed how, after the actual surrender of a wanted person with a "guarantee to return" or a surrender under the condition of return, the return of this person is actually arranged and regulated. Furthermore, the questionnaire asked to what extent either the issuing or executing state is obliged, after an irrevocable conviction of the wanted person, to take back or return the sentenced person when a guarantee to return has been provided. If indeed such an obligation does not exist in the examined Member State, the questionnaire requested further information on the question of which authority decides on whether a wanted person should be taken back, returned or not taken back or returned at all. In addition, the questionnaire asked whether a possible loss of the right of residence plays a role in a decision not to agree with the return of the wanted person and whether an alternative, such as the transfer of the proceedings, is offered in case a guarantee to return is not provided.

The sixth set of questions focuses on what the concerned Member State, when in the role of the issuing state, would do when its EAW has been refused on the grounds of Article 4(6) FD EAW and which authority and under which criteria it would provide a "guarantee to return" when requested by an executing state on the basis of Article 5(3) FD EAW.

Through the answers received on these questions, the project team was able to assess how Article 4(6) and Article 5(3) FD EAW are implemented in the legal systems of the examined Member States, which procedures were set up, and which criteria were being used in applying both Articles. As mentioned above, these answers obviously raised additional questions regarding the specific details of the national procedures. These additional questions were discussed during the oral interviews conducted in each of the participating Member States in the course of 2016.

Chapter TWO

Implementation and national procedure regarding Article 4(6) FD EAW and the legal consequences of a refusal of an EAW on these grounds

2.1 Introduction

Compared to the traditional extradition procedure laid down in the 1957 European Convention on Extradition (ECE), a significant development can be distinguished when looking at the FD EAW. Article 6(1) of the ECE, relating to the extradition of nationals and residents in the requested country, states that countries have an absolute right to refuse the extradition of nationals. On the other hand, Article 4(6) FD EAW provides that the executing EU Member State may refuse to surrender nationals and residents for the execution of a sentence, under the condition that the judicial authorities of the executing EU Member State will transfer the sentence imposed by the issuing EU Member State. Article 4(6) FD EAW states that the executing judicial authority may refuse to execute the European arrest warrant:

> if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.

As was mentioned in the introduction of this study, Article 4(6) FD EAW was incorporated in the Framework Decision in order to ensure that the execution of an EAW does not result in negative consequences for the social reintegration of the convicted person, which is a legitimate interest of all the Member States when looking at crime prevention. Article 4(6) FD EAW, 'sets out a ground for optional non-execution of the European arrest warrant pursuant to which the executing judicial authority may refuse to execute such a warrant issued for the purposes of execution of a sentence where the requested person is staying in, or is a national or a resident of the executing Member State', and that State

undertakes to execute that sentence in accordance with its domestic law'.[30] How this ground for optional non-execution should be incorporated in national law and the exact meaning and scope of this article is not defined by the FD EAW. This ambiguity has led, as we have seen above, to at least three CJEU decisions in which issues relating to the interpretation of this provision were discussed. Although the CJEU has set out the scope and meaning of certain aspects of this provision, the application of the elements of this provision is left to the individual Member States, which, due to the character of the framework decision as an instrument, have an extensive margin of discretion.

As an objective of this project is to examine how the participating Member States have applied this margin of discretion, this chapter will focus on the question whether the ground for optional non-execution in Article 4(6) FD EAW was incorporated into the statutory laws of the examined Member States and if yes, which procedure was introduced as a result of this implementation. This chapter examines how Member States have implemented this optional provision in their national statutory laws and whether the refusal ground is considered optional or mandatory. In addition to the implementation of Article 4(6) FD EAW, a description of how each of the examined Member States has implemented the refusal ground into their national procedures will be provided.

2.2 Overview of the implementation, national procedure and legal consequences in the examined Member States

In this section the answers of each of the participating Member States with regard to the implementation of Article 4(6) FD EAW and the resulting national procedures are provided. Each paragraph in this chapter will focus on the particular Member States that were examined in this research project. The description of answers can be divided into two components, being the implementation on the one hand and the national procedure and legal consequences on the other. Subsequently, the component focusing on the Member States' procedure and legal consequences for the purposes of Article 4(6) FD EAW can be divided into two sub-categories of treatment of wanted persons, namely: one part which focuses on the treatment of nationals and one part which focuses on

30 Case C-66/08, *Kozlowski*, EU:C:2008:437, par. 33.

the treatment of EU nationals and non-EU nationals. Finally, a description will be provided on the question whether the possible loss of the right of residence may influence a decision on the basis of the national implementation of Article 4(6) FD EAW.

2.2.1 Belgium

Implementation
Belgium has implemented Article 4(6) FD EAW as a ground for optional non-execution in its national legislation. Article 6(4) of the Belgian Law of 15 May 2012 provides that the execution of an EAW can be refused:

> if the European arrest warrant was issued for the execution of a sentence or detention order, when the person concerned stays in Belgium or is Belgian or residing in Belgium and the competent Belgian authorities undertake to execute this sentence or detention order in compliance with Belgian law.

As the provision states that the EAW *can* be refused, there is no obligation for the court that executes the EAW to refuse the surrender in case a wanted person fulfils the criteria mentioned in this provision.[31]

Procedure and legal consequences of a refusal
The wanted person needs to request for the court to apply the above refusal ground; it will not be done on the court's own initiative. Another condition of this ground for optional non-execution in Belgium is that the refusal of an EAW on the basis of the Belgian implementation of Article 4(6) FD EAW depends on the actual possibility to take over the sentence. In practice, this means that when the Belgian authorities, during the EAW proceedings (prior to the court decision), find that there are reasons to believe that the EAW may be refused based on the Belgian implementation of Article 4(6) FD EAW, the public prosecutor will inform the issuing Member State about the refusal ground. Furthermore, the public prosecutor will request the issuing Member State to forward the request to take over the sentence (or the 909-certificate), its

31 The EAW procedure in Belgium can be assessed by three courts. In the first stage of the proceedings, the council chamber of the court decides on whether the EAW may be executed. An appeal to this decision is possible at the indictment chamber of the court. Finally an appeal before the court of cassation is possible in order to review the legality of the decision of the Indictment Chamber.

corresponding verdict and, if necessary, a document that informs the Belgian public prosecutor on any detention that has already begun abroad. The court assesses whether the transfer of the foreign sentence to Belgium is effectively possible and may therefore seek the advice of the competent pubic prosecutor. If the court subsequently finds that the sentence cannot be transferred to Belgium on the basis of the received request, the court may decide to accept the EAW after all, even though the wanted person is a Belgian national or resident. On the other hand, if the court finds that the refusal ground of Article 4(6) FD EAW applies and the transfer of the sentence to Belgium is effectively possible, Article 38 of the Belgian Law of 15 May 2012 prescribes that the court should include in its decision to refuse the EAW on these grounds, a decision to recognize and execute the foreign sentence. As a result, the refusal of the EAW on the basis of the Belgian implementation of Article 4(6) FD EAW leads to the immediate enforceability of the foreign sentence in Belgium. The wanted person will, when detained, stay detained so that the sentence can be executed immediately. Belgian law does not require that the issuing Member State has implemented an international instrument for the transfer of sentences such as FD 909 in order to transfer the sentence on the basis of Article 38 of the Belgian Law of 15 May 2012.

Nationals

Under Belgian law, the surrender of Belgian nationals is possible. In the event that a wanted person has the Belgian nationality and he or she invokes the refusal ground of Article 4(6) FD EAW, this does not automatically mean that the court will indeed apply the refusal ground. In order to initially come under the scope of Article 4(6) FD EAW, citizenship it not the key requirement, but rather, whether the wanted person has 'strong ties with Belgium'. In the event that a Belgian national does not have strong ties with Belgium, the court will not apply the optional ground for refusal. The objective of this provision is to prevent that the wanted person will be alienated from his familial, cultural and social environment, regardless of nationality. If, despite the nationality of the wanted person, there is no concrete tie with Belgium, there is no incentive to invoke the refusal ground.

EU and non-EU nationals

With regard to EU nationals and non-EU nationals, a similar approach is applied as is done with regard to Belgian nationals. The terms 'resident' and 'staying in Belgium' are interpreted in conformity with the *Kozlowski* and *Wolzenburg* cases. Nevertheless, a 5-year threshold – as was provided for in the *Wolzenburg* case – is not a condition in the Belgian procedure with respect

to the Belgian implementation of Article 4(6) FD EAW. Several courts have nonetheless ruled that residence in Belgium for a maximum of four months is insufficient to establish close ties with Belgium. The investigative court will assess in each individual case whether EU nationals or non-EU nationals have actually and effectively build up a sustainable and regular tie with Belgium. Factors that may play a role in assessing whether a person could be eligible for equal treatment could be: registration in the municipal register, a possible loss of the right of residence, and evidence that the wanted person deliberately absconded certain probation conditions in the issuing Member State.[32] It should, however, be mentioned that these factors are not decisive. A wanted person who has been registered in the municipal and/or population register can be surrendered when the court assesses that sufficient close ties with Belgium have not been established.

Possible loss of the right of residence

The possible loss of the right of residence and the risk of being expelled is a factor of importance in the EAW procedure in Belgium. A possible loss of the right of residence will be subject to review during the procedure. In doing so, the court may request advice from the Immigration Services in Belgium. In cases when the decision to actually expel the wanted person can be taken on short notice by the Immigration Services, the decision on the EAW will be postponed so as to await the decision by the Immigration Services. A long-term resident in Belgium may lose his right of residence when he has left the EU as a whole for twelve consecutive months and/or he has left Belgium territory for at least six years and/or he has committed fraud or other unlawful means to receive his status and/or he seriously damaged Belgian public order or security.

2.2.2 France

Implementation

Article 4(6) FD EAW has been implemented in Article 695-24 par. 2 of the *French Code of Criminal Procedure*. The old text of Article 695-24 par. 2 stated that the execution of a European Arrest Warrant may be refused 'if the person wanted in relation to the execution of a custodial sentence or safety measure

32 Examples of a lack of sufficient ties with Belgium are: a wanted person who has registered in the municipal register only one week prior to his arrest on the basis of the EAW; a wanted person who has registered in the population register four months prior to his arrest on the basis of the EAW; a wanted person who has registered in the population register during his detention on the basis of the EAW.

is a French national or has been lawfully residing for at least five years on the national territory and the conviction is enforceable on the French territory pursuant to provisions of Article 728-31'. After the introduction of FD 909, this legal provision was adjusted by the Law of 5 August 2013 (2013-711). This adjustment was made as a result of the Lopes da Silva ruling of the CJEU of 5 September 2012, in which the CJEU concluded that the old French provision of Article 695-24 par. 2 could be considered in breach of EU law. The current paragraph 2 of Article 695-24 provides that the execution of an EAW for execution purposes may be refused when the wanted person has French nationality or has legally lived in France for a period of at least five uninterrupted years. The current text of Article 695-24 provides that an EAW may be refused:

> (1) If the requested person is the subject of proceedings before the French judicial authorities or if these authorities have decided not to initiate a prosecution or to put an end to one in relation to the offences for which the arrest warrant has been issued;
>
> (2) If the person wanted in relation to the execution of a custodial sentence or safety measure is a French national or has legally lived in France territory for a period of at least five uninterrupted years and the conviction is enforceable on the French territory pursuant to provisions of Article 728-31;
>
> (3) If the matters in respect of which it was issued were committed, wholly or partly, on French national territory;
>
> (4) If the offense has been committed outside the territory of the issuing Member State and French law does not permit the prosecution of the offense when committed outside French national territory.

From the text of paragraph 2, it becomes clear that when an EAW is refused for these reasons, it is imperative that the criminal sentence can actually be executed on French territory in conformity with Article 728-31 of the French Code of Criminal Procedure. FD 909 has been implemented in France in Articles 728-31 through 728-33 of the French Code of Criminal Procedure. It thus depends on the actual possibility to transfer the sentence on the basis of the French implementation of FD 909 whether this ground for optional non-execution may be applied.

Procedure and legal consequences of a refusal

In France, the general public prosecutor at the Court of Appeal is the competent authority to receive incoming EAWs. The general public prosecutor will then request that the Chamber of Instruction of a Court of Appeal within its territorial competence decides on the EAW. If prior to or during the EAW procedure, the general public prosecutor or the court believes that the wanted person has French nationality or has uninterrupted legal residence for a period of five years, the prosecutor who is responsible for the district where the wanted person is residing will be requested to assess whether the conditions in Article 728-31 of the French code of criminal procedure are met.[33] If the district prosecutor indeed finds that these conditions are met, the prosecutor will request the issuing Member State to send a request (mostly a 909-certificate) to transfer the sentence to France.[34] Upon receiving the request, the district prosecutor will decide on the basis of the French implementation of FD 909 (i.e. Article 728-31 through Article 728-33 of the French Code of Criminal Procedure) whether the sentence can be recognized and executed in France.[35] After this decision, or after the adjustment and certification procedure of the foreign sentence, the district prosecutor will directly inform the general prosecutor. After being informed by the district prosecutor, the general prosecutor at the Court of Appeal may request the Chamber of Instruction of the Court of Appeal to refuse the EAW on the basis of the French implementation of Article 4(6) FD EAW.[36] The sentence will then directly be enforced. Consequently, the wanted person will remain detained so that the sentence can be executed immediately after the decision on the EAW. If, however, the certificate or request was not sent, is incomplete, or does not comply with the conditions, the transfer of the execution of the sentence should be refused and the prosecutor at the district court must decide not to recognize the foreign sentence. In this case, the district prosecutor will also inform the general prosecutor at the Court of Appeal.

33 In case of the absence of a known address in France, the prosecutor at the district court of Paris is the competent authority. Article 728-31 of the French Code of Criminal Procedure reads: '*The recognition and execution on French soil of a foreign conviction may only be refused in the cases as mentioned in articles 728-32 to 728-33. The decision to refuse will be motivated with reference to these articles.*

34 Article 728-34 of the French Code of Criminal Procedure provides: 'The public prosecutor can request the competent authority of another Member State to send him a request that seeks the recognition and execution on French territory of a conviction that was pronounced by the jurisdiction of this state.'

35 In case the request comes from Bulgaria or Ireland, the *1983 Convention* and its *Additional Protocol* will be used (only for a French national which fled the issuing Member State).

36 In France, the Chamber of Instruction of the territorial competent Court of Appeal is competent to decide on incoming EAWs. The decision of the Court of Appeal may be appealed at the Court of Cassation.

When the sentence cannot be transferred or the certificate is withdrawn, the general public prosecutor at the Court of Appeal will conclude that the material conditions to fulfil the French implementation of Article 4(6) FD EAW are not met. As a consequence, the Court of Appeal grants the execution of the EAW.

Nationals, EU-nationals and Non-EU nationals

Given the fact that the refusal of an EAW for execution purposes is optional, both French nationals and persons who have legally resided in France for a period of at least five uninterrupted years may be surrendered when the transfer of the sentence cannot take place. French nationals should have strong ties with France in order to successfully invoke the refusal ground of Article 695-24-2°. In this respect, the court handling the EAW will determine whether the person concerned has proof of integration, hence has a genuine, stable and lasting connection in France. If the court finds that these strong ties do not exist in a specific case, this could (in theory) lead to the surrender of the French national to the issuing Member State.[37]

For EU citizens, the condition to meet the threshold of the refusal ground on the basis of Article 4(6) FD EAW is 5 years of legal, actual and uninterrupted residence in France. For non-EU nationals, this assessment focuses on whether the person possesses a residence permit for an indefinite period. The condition to be eligible to fall under the refusal ground is thus that the person should demonstrate that he has stayed in France on a legal basis and that he is registered in France for the last 5 years. All the circumstances of the case will be looked into, such as the level of integration, the behaviour of the wanted person, employment of the wanted person in France, and other family members staying in France.

Possible loss of the right of residence

The possible loss of the right of residence can be a factor in the EAW proceedings. The Chamber of Instruction will decide whether the wanted person could be expelled from France on a definite or a temporary basis. However, only the Administrative authorities can decide on the loss of the right of residence. Nonetheless, the risk of losing the right of residence could influence the decision on the EAW.

37 Thus far, this situation has not been brought to the attention of the central authority.

2.2.3 Germany

Implementation
Article 4(6) FD EAW is implemented in Germany in Section 80(3) and 83(b) of the *Act on International Cooperation in Criminal Matters* (IRG). Section 80(3) of the IRG reads:

> the extradition of a German citizen for the purpose of enforcement shall be inadmissible unless the wanted person, after being notified of his rights, gives his consent and this is noted in the judicial record. Section 41(3) and (4) shall apply mutatis mutandis.

Paragraph 2 of section B of Article 83(b) further states that extradition of a foreign citizen normally living on German territory may be refused:

> if in the case of an extradition for the purpose of enforcement, after being judicially warned, the person sought does not consent on the record of the court and his interest in an enforcement in Germany prevails. Section 41(3) and (4) shall apply mutatis mutandis.

From the text of both provisions, it becomes clear that the 'obligation' to undertake as mentioned in Article 4(6) FD EAW is not explicitly laid down in German law.

Procedure and legal consequences of a refusal
In Germany, the Generalstaatsanwalt (general prosecutor) is the competent authority with regard to incoming EAWs. In practice, the assessment whether to apply the refusal ground of Article 4(6) FD EAW is done after an initial hearing of the wanted person by the judge at the competent court.[38] After this initial hearing, the general prosecutor decides whether the refusal ground of Article 4(6) FD EAW applies in a specific case. If the general prosecutor decides that the refusal ground of Article 4(6) FD EAW does not apply, the court will evaluate this decision after again hearing the wanted person's response to the decision

38 The relevant legal provision is section 79 (2) IRG, which reads:
'*Prior to the decision of the Oberlandesgericht on admissibility, the authority in charge of granting assistance shall decide whether it intends to raise objections under § 83b. The decision not to raise objections must contain reasons. It is subject to review by the Oberlandesgericht in the procedure under § 29; the parties shall be heard. When being notified under § 41(4) the person sought shall be warned that in the case of simplified extradition a judicial review is not available.*'

made by the general prosecutor. In this phase of the procedure, the wanted person or his lawyer has the possibility to provide information on his or her level of integration into German society. If the court hereafter finds that the decision made by the general prosecutor is considered a reasonable decision, the execution of the EAW will be allowed if no other refusal grounds apply. If, however, the general prosecutor finds that the refusal ground of Article 4(6) FD EAW does apply, the EAW is rejected. Hereafter the general prosecutor informs the issuing Member State on the non-execution of the EAW and offers the issuing Member State to transfer the sentence to Germany. The German authorities do not execute the sentence *ex officio*. The German authorities require that the issuing Member State specifically requests the transfer of the sentence to Germany. The transfer of the sentence is therefore done independently from the EAW procedure. A negative result of the proceedings with respect of the transfer of the sentence does not affect the EAW procedure.

As mentioned above, the German authorities offer to transfer the sentence when the extradition is not possible. In cases in which Germany is the issuing Member State, problems may occur with certain Member States, if the execution of the sentence will be taken over automatically without informing the German authorities directly. This automatic transfer of the sentence is done on the basis of the EAW.

Nationals

In Germany, the surrender of nationals for the purposes of Article 4(6) FD EAW is possible, but only when the wanted person consents thereto.[39] In case the wanted person does not consent, the refusal ground is mandatory.[40]

39 Section 80(3) of the IRG reads: 'the extradition of a German citizen for the purpose of enforcement shall be inadmissible unless the person sought after being notified of his rights gives his consent and this is noted in a judicial record. Section 41(3) and (4) shall apply mutatis mutandis.'

40 In practice, the Prosecutor General's Office that has received the EAW for a German national will send the wanted person a summons to hear him on the EAW. This hearing will take place at a local court and the judge will ask the wanted person whether he consents to his surrender. If the wanted person does not show up in court, the police may use force in order to take him to court when the court has ordered to do so. In case the wanted person does not consent at the court hearing, no extradition is possible. In the rare event that the wanted person does consent, it will be assessed whether any other refusal grounds may exist. If not, the surrender will be granted.

EU nationals and non-EU nationals

In the German surrender procedure, no legal distinction is made between EU nationals and non-EU nationals. The principle criterion is: 'foreigner citizens living on German soil'. It does not matter whether that person is, for example, an Austrian or an Iraqi national. The surrender of a foreign citizen residing in German territory may be refused if his interest in serving the sentence in Germany prevails. The applicable criteria to decide whether a foreign citizen should serve his sentence in Germany are not laid down in German legislation. The main question that should be answered is whether the execution of the sentence in the issuing Member State would cause the same kind of hardship for the sentenced person as it would for a German citizen. In addition, an assessment regarding the preferable place for re-socialization is important in the German surrender procedure. Criteria that are used in making this assessment can be: whether the wanted person has citizenship in the requesting state, time of residence in Germany, family/relatives in Germany, German language skills, legal status/right of residence, and employment. The decision on whether the refusal ground of Article 4(6) FD EAW applies does not depend on the condition that a person should be in Germany for a certain fixed, amount of time. In some cases, a wanted person can reside in Germany for a few months, but is nevertheless considered to fall under the scope of the refusal ground. Similarly, residing in Germany for many years does not automatically mean that the refusal ground applies. Hence, there is no such thing as a fixed legal criterion of five years as was provided in the *Wolzenburg* case. In case the wanted person is not registered in the municipal register, it is still possible to apply the refusal ground. A successful application of the refusal ground would, however, be unusual. German language skills, on the other hand, are considered to be important, given the fact that these skills enhance a successful re-socialization after a prison sentence. There is, however, no hierarchy between the different criteria applied in the procedure. The main point of departure is the level of integration into German society.

Possible loss of the right of residence

The possible loss of the right of residence does play a role in German EAW procedure. The Administrative Authority (Immigration Services) will decide on whether a wanted person might lose his residency rights. If there are indications that a person might be expelled, then the public prosecutor is supposed to contact the Administrative Authority. The prosecutor will request them to provide information on the right of residence of the sentenced person and possible consequences to this right as a result of the criminal acts committed abroad. Factors that play a role are: danger for public security, length of stay

(more than 5 years), personal ties, economic and social ties, effects on family and the committed offences. In case the Administrative Authority believes that the wanted person will be expelled, the public prosecutor will decide that the wanted person is not eligible for equal treatment.

2.2.4 Austria

Implementation
In Austria, the ground of refusal provided of Article 4(6) FD EAW is implemented in Section 5(4) of the *Federal Law on Judicial Cooperation in Criminal Matters with the Member States of the European Union* (EU-JZG). From the text of Section 5(4) of the EU-JZG it becomes clear that the 'obligation' to undertake is incorporated in the provision itself. The text of section 5(4) of the EU-JGZ reads:

> The execution of a European arrest warrant against an Austrian national for the enforcement of a custodial sentence or a preventive measure involving deprivation of liberty is inadmissible. If an Austrian judicial authority is requested to execute such an arrest warrant, the sentence or measure imposed by the issuing State shall be enforced in Austria according to § 39 to § 44, also without separate application by the issuing judicial authority, if the execution of this European arrest warrant would otherwise be admissible.

Procedure and legal consequences of a refusal
After a refusal of the surrender, the Austrian authorities will flag the alert in the Schengen Information System. Consequently, the execution of the foreign sentence will have to be initiated – *ex officio*. This is a legal obligation.

The competence to decide on the execution of the sentence is with the Regional Criminal Court. This is usually the same court as the one that refused the execution of the EAW, but it concerns different departments at the court's competence. The appeal against this decision of the Regional Criminal Court can be filed by the wanted person or the public prosecutor at the Court of Appeal, which will make the final decision on the execution of the EAW.

In principle, FD 909 would be the legal basis for the execution of the sentence. However, the EU-JZG provides for a legal basis reaching further than the FD

909, because the prerogatives and the grounds of refusal[41] under the FD 909 are not valid in cases of incoming EAW for the execution of a sentence against an Austrian national nor against an EU-national with a permit of permanent residence.

In order to take over the execution of the sanction, a copy of the foreign verdict containing a final sentence is usually required because, under common circumstances, the EAW itself does not contain all the necessary information to be able to take over the execution of the respective sentence. The law explicitly states that neither the certificate under the FD 909 nor a formal request of the issuing/sentencing state is necessary. A revision of the surrender decision after a refusal of the execution of a foreign sentence in Austria is not possible under Austrian law.

Nationals
When an EAW is issued against an Austrian national for the purpose of executing a custodial sentence or a preventive measure involving deprivation of liberty, the EAW should be refused and the sentence or measure shall be enforced in Austria. This refusal ground is considered mandatory for all Austrian nationals. These nationals are, however, entitled to waive the refusal ground. Such a declaration to waive should be given before the competent court that decides on the execution of the EAW. The competent court is the Regional Criminal Court of first degree. In case the person concerned is taken into pre-trial custody or in custody with a view to surrender, the declaration to waive cannot be validly given prior to the first periodical hearing on the detention (i.e. always after consultation with a lawyer). When the person concerned does not waive the refusal ground, the competent court will refuse the surrender.

EU and Non-EU nationals
Section 5(4) EU-JZG applies to EU citizens having permanent residence in Austria similarly as it would apply to Austrian citizens. As only Austrian nationals and EU citizens fall under the scope of the Austrian implementing legislation of Article 4(6) FD EAW, non-EU nationals are not eligible for equal treatment for the purposes of Article 4(6) FD EAW.

41 For example, even the double criminality requirement has been abolished for the execution of a sentence in situations of an EAW against an Austrian national (or an EU-national with a permit for permanent residence).

With permanent residence, a lawful and uninterrupted stay on the Austrian territory is meant. Such lawful and uninterrupted stay can only be established when the wanted person possesses a permit of permanent residence as described in Section 53a para 1 and 2 of the *Austrian Federal Law on Establishment and Residence* (hereafter referred to as NAG). Permanent residence permits are issued by the Foreigner Police Authorities in an administrative procedure. This permanent residence may be lost for reasons of public security or order. Given the fact that Austrian law requires an uninterrupted stay for more than five years on the Austrian territory, an interruption of stay will affect the possible equal treatment. The time of interruption is laid down in the NAG in a detailed manner. The continuity of stay is not considered to be interrupted in case: 1) the person resides outside Austrian territory for less than 6 months per year; 2) the person stays outside Austrian territory to fulfil the obligations under military law; 3) the person was outside Austrian territory for serious reasons such as pregnancy and birth, serious illness, study or professional education or deployment for a period of a maximum of 12 months during the last 5 years. In order to assess a possible equal treatment of residents with nationals, the prosecutor will involve the Administrative authorities (i.e. Foreigner Police) and request these authorities to decide on whether the person concerned should be treated equally. The court will then respect this decision. In case the Administrative authorities have not decided on the request within the provided time limits, the court will decide on its own authority.

Although only nationals and EU-citizens can fall under the scope of the Austrian implementing legislation of Article 4(6) FD EAW, non-EU nationals do have the possibility to invoke Article 8 ECHR, 'right to respect for private and family life' which can also lead to the execution of the foreign sentence in Austria. There is however only a small amount of cases in which this argument succeeded.

Possible loss of the right of residence

A person in possession of a residence permit in Austria may lose his residency rights in case of a prison sentence given abroad. The Austrian Foreigners Police will be informed about the surrender decision by the Austrian Court. After being notified, the Foreigners Police will check whether the conditions for expulsion of the person concerned apply. In case the threshold of a maximum of 5-year imprisonment has not been met, it has to be assessed whether the person concerned poses an actual threat to public security in Austria. If the right of permanent residence has been lost due to reasons of public security or order, the Administrative Authority has to issue an expulsion order, which has

to be taken into account by the court that decides on the execution of the EAW. If the Administrative authorities have not issued such an order, but there are grounds for the court to believe that the person has lost his or her right of permanent residence in Austria, the court dealing with the surrender procedure has to assess this question *ex officio*. The length of lawful and continuous stay in Austria is an important factor, but also aspects of Art 8 ECHR – which is part of Austrian constitutional law – have to be considered. When assessing the danger to public security or to public order, the conviction that is basis of the EAW and other convictions in Austria have to be taken into account.

2.2.5 Croatia

Implementation
Article 4(6) FD EAW has been implemented in Croatia in Article 22(4) of the *Act on Judicial Co-operation in Criminal Matters with Member States of the European Union* (hereinafter referred to as Croatian Act). The 'obligation to undertake' as mentioned in art 4(6) FD EAW is implemented in Title VII – 'Recognition and enforcement of Judgments imposing custodial sentences or measures involving the deprivation of liberty' of the Croatian Act.

The ground for refusal is mandatory (but should be considered an optional refusal with regard to the consent of the wanted person to serve the sentence in Croatia). The provision reads:

> (4) If the EAW has been issued for the purposes of executing a custodial sentence or detention order, and the person whose arrest is requested is a national or resident of the Republic of Croatia, and if the person whose arrest is requested agrees to serve the sentence in the Republic of Croatia, the District Court will postpone its decision on the application seeking endorsement of the EAW for execution. In connection with the transfer of the enforcement of the sentence, the District Court will request documentation from the requesting State and will set an appropriate time limit for receipt thereof, which may not exceed 15 days.
> The time limits, referred to in Sections 28 and 32 of this Act, will start to run as from the date of expiration of the time limit set by the District Court for receipt of the documentation. After the decision on transfer of the enforcement of the sentence imposed by the requesting State has become final, the District Court will reject the application seeking endorsement of the EAW for execution.

Procedure and legal consequences of a refusal
The County Court – and in appeal the Supreme Court – is the competent authority to decide on the EAW and the transfer of the sentence. If the wanted person is a national, resides in or is domiciled in Croatia, he first needs to consent to serve the sentence in Croatia in order for the court to apply the refusal ground of Article 22(4) of the Croatian Act.

The court shall postpone the decision on the EAW in order to assess the possibility to take over the execution of the foreign sentence. The court will request the relevant documentation (the copy of the foreign verdict and the certificate) from the issuing State based on the FD 909 and shall set an appropriate time limit not exceeding 15 working days for its submission. If the foreign competent authority does not submit the certificate within this time limit, the court shall have to refuse the EAW if the wanted person requests to serve his sentence in Croatia. In case the concerned Croatian national does consent with the transfer of the sentence, the County Court responsible for the EAW proceedings will, upon receiving the appropriate documentation, refuse the EAW as soon as the decision on the transfer of the sentence becomes final. The detention of the wanted person in the period in which the certificate and appropriate documentation of the issuing authority will have to be received is continued without interruption. If the person does not consent to serve the sentence in Croatia, the surrender of the requested person to the issuing Member State will take place, even when this concerns a Croatian national.

If the surrender for a verdict would have been partly refused due to a lack of dual criminality, but the surrender is actually entirely refused because of the implementation of Article 4(6) FD EAW, Article 95 of the *Act on Partial Recognition and Enforcement of a Sentence* applies. The relevant provision states:

> When the Court establishes that grounds exist for a partial recognition of a foreign judgment, it shall, before deciding to refuse the recognition and enforcement of the sentence, consult the competent authority of the issuing State with a view to find an agreement on the partial recognition of the judgment and enforcement of the sentence. Such recognition and enforcement shall not result in the aggravation of the sentence imposed in the issuing State.

In principle, FD 909 would be the legal basis for the execution of the sentence. However, it depends on whether the issuing State has implemented FD 909.

Nationals

According to Article 22(4) of the Croatian Act the surrender of a Croatian national for the execution for a verdict can be refused, but in order to take over the punishment, the consent of the requested person is required. If the wanted person does not consent to serve his sentence in Croatia, he will be surrendered to the requested country for the execution of the sentence.

EU and non-EU nationals

For EU nationals and non-EU nationals, a similar approach as for Croatian nationals applies. In case a foreign person is registered at the Ministry of Internal Affairs – which is obligatory as a resident in Croatia – the person concerned will be treated the same as a Croatian national for the purposes of Article 4(6) FD EAW. The obligation to register at the municipality is therefore considered the main condition to be eligible for equal treatment. The fulfilment of this condition is not bound by a fixed period of actual residence in Croatia. Hence, to be eligible for equal treatment it does not depend on whether the wanted person has registered for either 2 days or 5 years. As the Croatian Ministry of Internal Affairs or the Department of Immigration Services possess the information regarding all municipal registrations in Croatia, one of these two institutions will be involved in assessing whether a person is eligible for equal treatment for the purposes of Article 4(6) FD EAW.

Possible loss of the right of residence

The Department of Immigration Services will be contacted to provide relevant information regarding a possible loss of the right of residence. If indeed the wanted person loses his right of residence during the EAW procedure, he will be treated as a persona non grata and the surrender will be allowed. The relevant factors to be assessed by the Immigration Services may be: danger for public security or public order or public health. Whether the wanted person will actually be considered a persona non grata will be decided by the Ministry of Internal Affairs.

2.2.6 Poland

Implementation
Article 4(6) FD EAW has been implemented into Polish law in Article 607(s) of the *Criminal Procedure Code* (CPC). The refusal ground is mandatory with respect to Polish nationals and persons granted asylum in Poland (unless the wanted person consents to the surrender) and optional in the case of non-nationals residing in Poland or who permanently stay in Poland.

The relevant provisions of Article 607(s) CPC read as follows:

1. The European Warrant issued to execute a penalty of deprivation of liberty or a measure consisting in deprivation of liberty against the prosecuted person who is a Polish citizen or has been granted asylum in the Republic of Poland shall not be executed, unless such person expresses consent to surrender.
2. Execution of the European Warrant may also be refused if it has been issued for the purpose referred to in § 1, and the requested person has the place of residence or permanently stays in the territory of the Republic of Poland.
3. When refusing extradition due to reasons specified in § 1 or § 2, the court shall decide on execution of the penalty or measure that has been decided by the judicial authority of the European Warrant issuing state.

Procedure and legal consequences of a refusal
The 'obligation' to undertake has been clearly described in paragraph 3 of Article 607(s) CPC. In practice, this implementation of the 'obligation' to undertake does indeed entail an obligation for the circuit court responsible for the execution of the EAW to automatically decide on the enforcement of the penalty in Poland when the EAW should be refused.[42] As a consequence, the court will, in one decision, decide that the EAW will be refused and that the

42 When an EAW is received by the Polish authorities, a prosecutor questions the requested person and may move that she/he be put in provisional detention. Provisional detention is always decided upon by a competent circuit court (2nd tier court) which – in the case of an EAW – can last no more than 100 days in total. The EAW is then transferred to a court which decides whether it can be executed. The decision of the court is subject to a complaint which can be filed both by the requested person (or their defense counsel) and a public prosecutor.

sentence will be transferred to Poland, irrespective of the will of the issuing authority. The decision to transfer the sentence is a legal consequence of the refusal of the EAW. Furthermore, the provision implementing Article 4(6) FD EAW is a self-standing basis to enforce the penalty imposed by the issuing Member State. This follows directly from the legal framework and no further assessment is necessary. In other words, the actual transfer of the sentence is not based on the implementation of FD 909 or any other instrument for transfer of sentences. As a consequence of this procedure, there are no obstacles to enforce the sentence in Poland as long as the refused EAW fulfils the requirements mentioned in the FD EAW regarding double criminality or the list offences. If, however, the court believes that a copy of the judicial decision imposing deprivation of liberty in the issuing Member State may be necessary to enforce the ruling, a copy of such decision and any other information indispensable for the enforcement of the penalty may be requested.

Nationals, EU nationals and non-EU nationals

From the provisions of Article 607(s) CPC it becomes clear that the surrender of Polish nationals and persons granted asylum in Poland is allowed, provided that they consent thereto. Upon implementing FD EAW, Poland specifically amended its constitution to provide for the possibility of the surrender of nationals. In cases where nationals or persons granted asylum in Poland do not consent, the EAW will be refused and the sentence will be taken over.

Paragraph 1 of Article 607(s) CPC indicates that (in addition to Polish nationals) only persons granted asylum would fall under the scope of the refusal ground. However, Paragraph 2 provides that persons who reside in or permanently stay in Poland could fall under the scope of the refusal ground so that the EAW may be refused.

The same court that decides on the EAW also assesses whether a person can be considered a resident in Poland. Because it can be expected that the prospects of rehabilitation will be greater with regard to EU nationals residing or staying in Poland, it is deemed likely that courts may take these circumstances into account. In doing so, there are no strict criteria that will be applied by the court nor are there any provisions that prescribe which conditions would apply. The court would take into account certain circumstances such as whether the wanted person owns real estate or other assets in Poland or whether the wanted person has any family in Poland. If an EU national would be considered a resident in Poland the EAW may be refused.

Possible loss of the right of residence
In Poland, there are no provisions requiring the court to consider the possible loss of the right of residence when deciding on the execution of the EAW. Furthermore, there is no jurisprudence available from which it may be concluded that considerations as a possible loss of the right of residence are taken into account when deciding whether to execute an EAW, as the Polish implementation only refers to nationals and non-nationals granted asylum.

2.2.7 Spain

Implementation
Spain has implemented Article 4(6) FD EAW as an optional ground for refusal in Articles 48 and 91 of *Act 23/2014 of 20 November 2014 on Mutual Recognition of Judicial Decisions in Criminal Matters in the European Union* (hereafter referred to as Spanish Act). Article 48(2)(B) of the Spanish Act states that the Spanish executing judicial authority may refuse the execution of an EAW:

> when a European arrest and surrender warrant has been handed down for the purposes of execution of a custodial sentence or measure of deprivation of liberty, the requested person being a Spanish national, except if he consents to serve the same in the issuing State. Otherwise, he must serve the sentence in Spain.

This paragraph states that Spanish nationals may not be surrendered for the execution of a sentence to the issuing state, except when the wanted person consents to serve the sentence in the issuing state. In Article 91 of the Spanish Act the 'obligation' to take over the sentence as mentioned in Article 4(6) FD EAW is provided. Article 91 of the Spanish Act reads:

> when a European arrest and surrender warrant is refused or conditioned based on the Spanish nationality of the sentenced person, the Central Criminal Judge shall apply the provisions of this Chapter for the purposes of fulfilling the sentence imposed by another Member State, preventing impunity of the sentenced person.

It should be noted that the words 'the provisions of this Chapter' in Article 91 of the Spanish Act refer to the chapter in which FD 909 has been implemented in Spain. The actual transfer of the sentence upon a refusal on the basis of Article 48 of the Spanish Act is therefore based on FD 909, whereas the obligation to actually take over the sentence upon a refusal is based on FD EAW.

Procedure and legal consequences of a refusal

According to Article 35(2) of the Spanish Act, the competent judicial authority to execute an EAW is one of the six Spanish Central Investigating Judges.[43] In case a Central Investigating Judge finds that the refusal ground as provided in Article 48(2)(B) of the Spanish Act applies to a specific case, Article 91 of the Spanish Act provides that if indeed the case is refused for these reasons, Spain is obliged to take over the sentence. In doing so, the Central Investigating Judge may, prior to his/her decision to refuse the EAW on this refusal ground, make a preliminary assessment to ensure whether the imposed foreign sentence can actually be enforced in Spain. If indeed the EAW is refused, the Central Investigating Judge will forward his/her decision to the Central Criminal Judge. The wanted person will be placed under the authority of the Central Criminal Judge, who is the competent authority for the execution of FD 909. The refusal of the surrender and the rules governing the execution of the transfer of prisoners should run parallel. Given that there is an obligation to execute the foreign sentence after a refusal on the basis of Article 48 of the Spanish Act, any difficulties arising from the conditions relating to the execution of the sentence will have to be resolved by the Spanish executing authority. The Central Criminal Judge does, however, have its own competence to apply the rules of the Spanish implementation of FD 909. The situation may occur in which the EAW is refused by the Central Investigation Judge after which the Central Criminal Judge decides, on the basis of the Spanish implementation of FD 909, that its conditions are not met and that the transfer of the sentence cannot take place.

In practice, upon the arrest of a wanted person, he/she will be heard by the Central Investigating Judge within 72 hours. At this hearing, the wanted person shall be heard on the question whether he or she would like to consent to surrender. In case the wanted person does not consent, the Central

43 When the EAW refers to a minor, jurisdiction lies with the Central Judge for Minors. The decisions from the Central Investigating Judges or from the Central Judge for Minors are subject to appeal before the Criminal Chamber of the Audiencia Nacional. The Spanish EAW procedure starts with a first hearing (*audiencia*) by the Central Investigating Judge, attended by the Public Prosecutor and the legal counsel of the arrested person. In case the wanted person has not consented to be surrendered for the execution of the sentence, a second hearing will be held (*vista*) within a maximum term of 3 days. At this hearing, which may be done in absentia, evidence may be brought before the court. The Central Investigating Judge shall decide within 10 days whether the person is to be surrendered, taking into account, among others, the nationality or residence in Spain of the person requested for execution purposes.

Investigating Judge shall call the parties to hold a second hearing, which must be held within a maximum term of 3 days. At this second hearing, nationality or residence in Spain may be proven or discussed. In the course of the first or second hearing, the Central Investigating Judge shall decide on whether the arrested person should be remanded in custody or provisionally released, taking the measures deemed necessary to prevent the person absconding. A difficulty may arise at the moment when the person has been put under the authority of the Central Criminal Judge, after the surrender has been refused on the basis of Article 48(2)(B) of the Spanish Act. In the Spanish framework of the transfer of prisoners, a specific request from the issuing state to the executing State for provisional arrest is needed to keep the person in custody after the EAW has been refused. It may be argued that the EAW itself may function as a request for provisional arrest, in case the surrender is refused on grounds of nationality/residence.

Nationals

Although the surrender of Spanish nationals is allowed in Spain, the Spanish Constitutional Court has ruled that whenever a Spanish national opts for serving the sentence imposed in another Member State in Spain, it is mandatory to refuse his surrender. If the surrender is refused on this ground, the Spanish executing authority will proceed to execute the sentence directly, thus without requesting the opinion of the issuing authority.

EU and non-EU nationals

As seen above, non-Spanish nationals residing in Spain were not included in the text of Article 48(2)(B) of the Spanish Act.[44] The applicability of the current Article 48(2)(B) is therefore limited. Spanish case law has, however, shown that the national competent authorities have made attempts to find a remedy in order to balance the difference between nationals and residents for the purposes of Article 48(2)(B) of the Spanish Act. The fact that Article 48(2)(B) of the Spanish Act does not mention residents along with nationals when transposing Article 4(6) FD EAW is being interpreted by the courts as an accidental, involuntary omission of the Spanish legislator. The courts have come to this conclusion on the basis of a close reading of Article 55(2) of the Spanish Act

44 It should be noted that the current Act 23/2014, which was amended in 2014 after its first introduction in 2003, was introduced after the CJEU had ruled in the Lopes Da Silva case on 5 September 2012. Apparently it was decided not to amend Article 48(2)(B) of the Spanish Act.

in which it is provided that a surrender of a Spanish national or resident for prosecution purposes may only be done under the condition of return. It is assessed that the Spanish legislator intended to provide for the possibility of equal treatment to both nationals and residents when an EAW has been issued for execution purposes.[45]

In order to assess whether a wanted person may be considered a resident in Spain, the defense should provide evidence of residence in Spain. However, the court may also gather such evidence on its own accord. There is considerable flexibility with regard to admissible evidence: house rental contracts, children's school certificates, etcetera may be put forward. As most EU citizens are not registered in Spain, such registration, which would be enough evidence in itself, is not frequently provided nor required. With regard to non-EU nationals, jurisprudence in Spain has shown that non-EU residents do not fall under the scope of Article 48(2)(B) of the Spanish Act. In theory, it could be possible that a non-EU national is treated like a Spanish national for the purposes of Article 4(6) FD EAW. Most likely, the criteria would be more restrictive and the judicial discretion for the court would be wider.

Possible loss of the right of residence

The Spanish Immigration Services may be approached *ex officio* or at a party's request to produce evidence on the lawfulness of one's residency. The possible loss of residence rights with regard to the execution of a European arrest warrant is not provided for in Spanish law. The surrender to the issuing Member State should not influence that continued residence. During the period of actual surrender, the residence of the wanted person must be considered suspended. As a result, the wanted person will not lose the rights that were build up. The main argument for this procedure is that the person did not commit a crime in Spain and that he has received his residence permit in accordance with Spanish law.

45 This interpretation is facilitated by the express rule contained in Article 4(3) of the Act 23/2014, which states: 'Interpretation of the provisions set forth in this Act shall be performed pursuant to the rules of the European Union that regulate each one of the mutual recognition instruments'.

2.2.8 Sweden

Implementation
In Sweden, Article 4(6) FD EAW has been transposed as a ground for mandatory non-execution. The provision has been implemented in Chapter 2 Section 6 of the *Swedish Law on Surrender from Sweden According to a European Arrest Warrant* (hereinafter referred to as the "EAW-law"):

> When the person whose surrender is requested for execution of a custodial sentence or detention order is a Swedish national, surrender may not be granted if the person concerned demands that the sanction be enforced in Sweden.
>
> If, at the time of the act, the requested person has been permanently residing in the issuing Member State for at least two years, the provisions of the first paragraph applies only if, with respect to his or her personal circumstances or for any other reason, there are particular reasons why the enforcement should take place in Sweden.

Procedure and legal consequences of a refusal
An incoming EAW will be handled by one of the three international public prosecution offices in Malmö, Göteborg, or Stockholm. The local jurisdiction will in most cases be determined by reference to the place of domicile of the wanted person or to the place where the wanted person was arrested.

If the wanted person is a Swedish national, the public prosecutor of one of the above-mentioned prosecution offices will ask the wanted person if he/she wants to serve the sentence in Sweden. The prosecutor will then instigate the proceedings at the District Court. The District Court will decide on the EAW. If the court refuses to execute the warrant pursuant to Chapter 2 Section 6 of the EAW-law, the procedure for the transfer of the sentence will continue according the Swedish *Law on Recognition and Enforcement of Custodial Sentences Within the EU* in which the FD 909 has been transposed (hereinafter referred to as "EVL-law").

Under the EAW-law, the prosecutor is obliged to inform the issuing state when a person has requested that the sentence shall be enforced in Sweden. The prosecutor shall also inform the Prison and Probation Service – the competent judicial authority for the enforcement of the foreign sentence in Sweden – about the person's request and the court's decision to refuse the surrender

request.[46] Subsequently, the Prison and Probation Service shall inform the issuing Member State about the procedure for the actual transfer of the sentence. A simplified procedure applies in these cases because the court's decision to refuse the surrender implies that the sentence shall be executed in Sweden. This simplified procedure means that the conditions for enforcement, as well as the grounds for refusal and non-recognition in the EVL-law, shall not be applied by the Prison and Probation Service.[47] However, according to Chapter 7 Section 1 of the EAW-law, the Prison and Probation Service may decide not to recognize a judgment if the issuing Member State opposes.[48]

In order to handle the matter according to the EVL-law, the Prison and Probation Service should receive the certificate and a copy of the judgment. In practice, this means that the transfer of the foreign sentence by Prison and Probation Service depends on the cooperation of the issuing Member State. However, an explicit consent or formal request from the issuing Member State in order to transfer the sentence is not required. The requirement of a certificate and a copy of the judgment is stated in Chapter 3 Section 6 in the EVL-law and based on Article 5(1) and Article 25 FD 909. If the certificate is incomplete or manifestly incorrect and it has not thereafter been completed or corrected within a reasonable deadline, the Prison and Probation Service may refuse to recognize the judgment.[49]

The legal basis for the transfer of a sentence in the situation that the surrender has been refused is the EVL-law.[50] According to the transitional provision to Chapter 7 Section 1 of the EAW-law, the previous regulation of the law applies to cases initiated before 1 April 2015, in relation to Member States that have not implemented the FD 909 and in relation to those Member States that have made a declaration to Article 28(2) of FD 909. In such cases, the legal basis for transfer of a sentence is the *1983 Convention*.

46 If the sentence concerns forensic psychiatric care, the National Board of Health and Welfare is the competent judicial authority and in case the sentence relates to a minor the National Board of Institutional Care is the competent authority to execute the transfer of the sentence.

47 According to Chapter 7 Section 1 of the EAW law.

48 Consequently, this may lead to impunity if the issuing authority refuses to send the certificate and copy of the judgment as the sentence can't be executed in Sweden.

49 Chapter 3, Section 7 EVL-law and Article 9 of the FD 909.

50 With regard to the enforcement of the sentence, the punishment can under certain circumstances be adjusted by the Swedish judicial authorities according to Chapter 3 Section 12-14 and based on Article 8 par. 2-4 FD 909. If the punishment is time-limited and exceeds 18 years of imprisonment, the penalty will be adjusted to 18 years.

Nationals
The first sentence of Chapter 2 Section 6 of the Swedish Law states that surrender may not be granted if the requested person, who is wanted for execution of a custodial sentence, is a Swedish national and requests that the sentence will be executed in Sweden. The requested person has to invoke the refusal ground, and subsequently, this leads to a refusal to execute the EAW.

Section 6 of the EAW-law does, however, contain an exception to the aforementioned provision in the second paragraph. In case an EAW has been received or the wanted person has been arrested on the basis of the EAW, the requested person will be questioned by the police. At this stage, the arrested national will be asked whether he or she prefers to serve the sentence in Sweden. In case that the person choses to serve the sentence in Sweden, the Swedish authorities may contact the issuing authorities on this matter and ask for additional information about the applicability of the aforementioned Swedish legal provision. Moreover, the requested person may use supplementary documents to prove that he did not reside in the issuing Member State for at least two years at the time that the offences was committed. If it appears that he did reside in the issuing Member State for at least two years at the time of the act, he may demonstrate that there are special circumstances that justify why the sentence should be executed in Sweden. For instance, a severe illness or the advanced age of the wanted person may be considered as a justification to apply the refusal ground. The court has discretionary power to assess what circumstances will be considered as special.

EU and non-EU nationals
The District Court decides on whether there are grounds for refusal according to Chapter 2 Section 6 of the EAW-law. As already mentioned, this legal provision only applies to Swedish nationals. The Swedish legislator is currently drafting legislation in line with the *Kozlowski* and *Wolzenburg* doctrine. As there is no large population of EU citizens with a permanent residence in Sweden, it has not yet occurred that citizens from other EU Member States have invoked the refusal ground of Section 6 of the EAW-law in EAW proceedings.

2.2.9 Italy

Implementation
Article 4(6) FD EAW has been implemented in Article 18 of the *Law no. 69 of 22 April 2005* (hereafter referred to as the Italian Law). This refusal ground is

implemented as a ground for mandatory non-execution and the 'obligation' to undertake as provided in Article 4(6) FD EAW has been implemented in Italy as a strict obligation. Article 18 provides that the Court of Appeal shall refuse surrender:

> if the European Arrest Warrant has been issued for the purposes of execution of a custodial sentence or detention order, when the requested person is an Italian citizen, provided that the Court of Appeal orders that the sentence or detention order be executed in Italy in accordance with its domestic law.

From the provisions in the Italian Law, it follows that the refusal ground applies to Italian nationals only. The Italian Constitutional Court, in its judgment no. 227 of 21 - 24 June 2010, however, held that this provision conflicted with Article 4(6) FD EAW and Article 18 TFEU (ex Article 12 TEC). The court declared it unconstitutional 'insofar as it does not provide for the refusal to surrender for the purposes of the execution of a custodial sentence in Italy in accordance with its domestic law also in the case of a national of another Member State of the European Union, who lawfully and actually resides or lives in Italy'.[51] As a consequence of this ruling, the refusal ground currently applies to all persons with the exception of non-EU nationals. In this judgment, the Constitutional Court moreover defined this ground for refusal as mandatory. As will be mentioned below, in practice this refusal ground is not entirely mandatory given the fact that a wanted person may waive the application of the refusal ground in a specific case. The wanted person thus has a right to consent to his surrender.

Procedure and legal consequences of a refusal

In Italy, the Court of Appeal is the competent court to decide on the execution of incoming EAWs. Decisions of the Court of Appeal may be appealed at the Italian Court of Cassation.[52]

Prior to its decision to refuse the EAW on the basis of Article 4(6) FD EAW, the Court of Appeal has to investigate whether *other* grounds for refusal apply. When other grounds for refusal grounds do not apply, the court will assess

51 Published on 30 June 2010 in no. 26 of the Italian Official Journal [Gazzetta Ufficiale] – 1st special series.

52 At the court of cassation the merits of the case may be assessed, but the gathering of evidence is not possible.

whether the foreign judgment can be recognized and the sentence taken over. If indeed the foreign sentence can be recognized, the Court of Appeal, in one decision, will refuse the EAW, recognize the judgment, and take over the sentence.

A 909-certificate is practically never requested during this procedure. As a result, the issuing Member State cannot be involved. It should, however, be mentioned that, in order to investigate whether a judgment can be recognized (and the sentence taken over), the Court of Appeal will assess whether any of the refusal grounds provided in the Italian implementation of FD 909 apply.[53] Consequently, the competent authority of the issuing Member State could be involved for consultation pursuant to Articles 9(3) and 10 FD 909. This reasoning is based on Article 25 FD 909, which provides that provisions of FD 909 shall apply, *mutatis mutandis* to the extent that they are compatible with provisions under FD EAW, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of FD EAW.

As mentioned, in case none of the refusal grounds apply and when the criteria given in the Italian implementation of Article 4(6) FD EAW are met, the Court of Appeal will decide, in one verdict, that the sentence will be transferred to Italy and that the EAW will be refused. Although the Italian appellate courts use the criteria given in the Italian implementation of FD 909 to assess whether the foreign sentence can be taken over, FD 909 is not regarded as the legal basis for taking over the sentence. Given the fact that the 'obligation' to undertake is provided in the Article 4(6) FD EAW, Article 4(6) FD EAW is seen as the legal basis for taking over the sentence.[54]

In theory, one may suggest that a problem could occur when the court of appeal finds that the sentence, based on the criteria given in the Italian implementation of FD 909, cannot be taken over, and thus, the EAW cannot be refused. In practice, however, the possibility of such a situation is fictive and depends on the differences between the grounds for refusal provided for in FD EAW and in FD 909. In any event, given the fact that the obligation to take over

53 The criteria provided in the Italian implementation of FD 909 apply to all sentences, irrespective of whether these sentences became irrevocable prior to the introduction of FD 909.

54 According to the Court of Cassation, the conditions for the transfer of the execution of the sentence have their autonomous legal basis in the domestic provisions implementing Article 4(6) FD EAW

the sentence in case the EAW is refused on the basis of Article 4(6) FD EAW is strict, no examples in Italy are known in which the transfer of the sentence was not possible. If, however, such a situation would occur, this may lead to impunity, considering that it would not be possible to not refuse the execution of the EAW.

After the EAW has been refused and the Court of Appeal has decided that the sentence should be transferred to Italy, the prosecutor involved will order the execution of the sentence. Such an order is required before the sentence can be actually carried out in a prison facility in Italy. In case the wanted person is still detained on the basis of a pre-trial detention order provided in the EAW proceedings, there is no obligation to revoke this pre-trial detention order when the EAW is refused and the risk of fleeing continues to exist. The wanted person who has been arrested on the basis of an EAW can continue to be detained until the Italian authorities can actually execute the execution of the foreign sentence.[55]

In doing so, an adaption of the sentence is only possible pursuant to Article 8 and Article 10 FD 909 (which apply as a consequence of the abovementioned provision of Article 25 FD 909). In this respect it should be noted that, as a consequence of the recognition of the judgment, the domestic Italian legislation applies to the enforcement of the judgment.[56] As a result, according to Article 656 of the Italian *Criminal Procedure Code*, the execution of the sentence may be suspended in order to enable the person concerned to be granted measures alternative to detention (e.g., probation under the supervision of social services) in case of custodial sentences of up to of three years.

Nationals

In principle the surrender of an Italian citizen for execution purposes is not allowed. The Court of Cassation, however, has held that:

55 This reasoning was also recognized by the Court of Cassation: 'when the Court of Appeal refuses to surrender an Italian citizen pursuant to Article 18 (1)(r) of *Law no. 69 of 22 April 2005*, it must not revoke the precautionary measure applied to the person concerned, since that measure remains effective to enable the execution in Italy of the custodial sentence inflicted by the foreign judgment of conviction'. *See* Court of Cassation, 6th Criminal Division, judgment no. 17960 of 17 April 2013, filed on 18 April 2013, rv. CED 255169.

56 This reasoning is based on Article 17 FD 909.

> the execution of the sentence in Italy, instead of in the issuing Member State, is influenced by the indications given by the person concerned himself, since there are no reasons of domestic public order to believe that, in the context of the European Union, a sentence inflicted by a judicial authority of a Member State must mandatorily be executed in Italy, if the Italian citizen does not request it. In fact, the latter might have his residence, interests or deeply established affective bonds in the issuing State. As a consequence, in this case, it would be reasonable to take into account the options expressed by the person concerned in order to identify the territory where the sentence is to be executed.[57]

In other judgments, the Court of Cassation has confirmed the principle that 'it is the person concerned who is entitled to choose the place where the sentence is to be executed'.

EU nationals and non-EU nationals

As mentioned above, only EU citizens can invoke the refusal ground of the Italian Law next to Italian nationals. In order to invoke the refusal ground as an EU citizen, certain criteria apply. The Italian Court of Cassation has ruled that 'actual and extemporaneous bonds of the person in the state' can be based on:

> the person's lawful presence in Italy; the appreciable continuity and stability of the length of their presence; the distance in time between it and when the crime was committed and the sentence inflicted abroad; the fact of fixing in Italy the main (though not the exclusive) and well established place of his work, family and affective bonds; the payment, if due, of taxes and social security contributions. The concept of "place of living" [dimora] – which is significant for the same purposes – is to be identified with a stay in the State that has some stability and duration, and is suitable for establishing bonds with that State that are equivalent to those that would form in case of residence.[58]

Hence, the main criteria to fall under the scope of the refusal ground is that the EU citizen has fixed and maintained his/her main (though not exclusive)

57 Court of Cassation, 6th Criminal Division, judgment no. 46845 of 10 December 2007, filed on 17 December 2007, case of *Pano*, cit.

58 Court of Cassation, 6th Criminal Division, judgment no. 9767 of 26 February 2014, filed on 27 February 2014, case of *Echim*, rv. 259118.

and well-established place of work, family and affective bonds in Italy. This legal residence is not limited by an obligatory registration in the municipality. Neither is a minimum number of years of legal residence required to fulfil the criterion of legal residence, although an EU citizen who has acquired the right to permanently stay in Italy as a consequence of having stayed uninterruptedly for five years in the country, will fall directly under the scope of the refusal ground. Previous convictions and pending prosecutions in Italy do not constitute elements to be used to disprove the actual and extemporaneous bonds of the person in Italy.

In practice, the wanted person, during the EAW proceedings, should indicate that he or she fulfils the criteria of permanent residence in Italy. However, the Court of Appeal may also assess this *ex officio*. There is no specific burden of proof for the wanted person. The court must ascertain whether the indication of the wanted person is correct. In doing so, the information provided by the wanted person should be specific. The court has the competence to investigate the information provided by the wanted person (i.e. address information) or to order the police to check whether the information provided by the wanted person is indeed correct. As mentioned above with regard to Italian nationals, also EU citizens may consent to being surrendered to the issuing Member State in order to execute the sentence imposed in the issuing Member State.

Possible loss of the right of residence
If indeed a wanted person has legal residency in Italy, but he is considered a threat to public security, the wanted person may lose his legal residency. However, there are currently no rulings known in Italy in which such an issue has played a role. This may be due to the fact that losing legal residency rights in Italy is rather difficult for EU citizens with strong ties to Italy. At the same time, the Court of Cassation has frequently and repeatedly held that the presence of a foreign citizen has to be proven to be lawful. Hence, if an EU citizen never had any residence rights in Italy, the Court of Appeal could choose not to apply the ground for refusal and, consequently, could execute the European Arrest Warrant ordering the surrender of the requested person.

2.2.10 The Netherlands

Implementation
Article 4(6) FD EAW has been implemented into the Dutch statutory law as a mandatory ground for refusal. Article 6 of the *Dutch Surrender Act* states:

> 2. Surrender of a Dutch person shall not be allowed if the person is requested for execution of a custodial sentenced imposed upon him by final judgment.
> 3. If surrender is refused solely on the grounds of paragraph 2, the public prosecutor shall notify the issuing judicial authority of the willingness to take over execution of the judgment (in accordance with the procedure envisaged in Article 11 of the Convention made at Strasbourg on 21 March 1983 on the transfer of sentenced persons (Treaty Series, 1983, 74), or on the basis of another applicable convention).[59]
> 4. The public prosecutor shall immediately notify Our Minister of any surrender with return guaranteed as per paragraph 1, and of any refusal of surrender under the declaration of willingness to take over execution of the foreign judgment in the terms of paragraph 3.
> 5. Paragraphs 1 – 4 shall also apply to an alien with a residence permit for an indefinite time, where he can be prosecuted in the Netherlands for the acts underlying the European arrest warrant and provided he is expected not to forfeit his right of residence in the Netherlands as a result of a sentence or order imposed upon him after surrender.

Procedure and legal consequences of a refusal

In the Netherlands, the legislator has chosen to centralize the execution of incoming EAWs. The Centre for International Legal Assistance of the Public Prosecutor's office (hereafter referred to as the IRC) in Amsterdam is the central authority for the receipt and treatment of the incoming EAWs. In addition, the International Court Chamber in Amsterdam (hereinafter referred to as the Court) has exclusive jurisdiction to decide upon the surrender of the requested person. The decision of the IRC is final and no appeal is possible.

After a refusal of the EAW based on Article 4(6) FD EAW, the IRC will communicate the judgment with the issuing Member State and inform them about the willingness to take over the execution of the sentence. A copy of this letter will also be sent to the Ministry of Security and Justice, more precisely the Department for the International Transfer of Sentences (Department IOS), which is the appointed authority in the Netherlands for the transfer of sentences.

59 This part of the legal provision has been cancelled by the amendment of law since 1 November 2012.

According to the Dutch implementation law of the FD 909 and the Dutch declaration with regard to Article 28 of the FD 909,[60] FD 909 only applies in cases in which a final judgment was given after 5 December 2011.

In case the transfer concerns an irrevocable sentence after 5 December 2011, the Department IOS will handle the certificate issued on the basis of the FD 909[61] and will consent to the execution of the sentence in the Netherlands, after the judicial proceedings and the positive judgment by the Court of Appeal of Arnhem-Leeuwarden.

For an EAW in which the surrender of a Dutch national or resident was requested on the basis of the execution of a sentence that became irrevocable *before* 5 December 2011, one of the old conventions should be invoked.[62] This may cause problems, because not all EU Member States have ratified and implemented all the pre-existing instruments on the transfer of sentences.

For example, Poland did not ratify the *European Convention on the International Validity of Criminal Judgments of 1970*[63] and the Convention Between the Member States of the European Communities on the Enforcement of Foreign Criminal Sanctions (1991).[64] The convention that is applicable is the *Additional Protocol to the Convention on the Transfer of Sentenced Persons* (Council of Europe Treaty No. 167), which could lead to the problem that the transfer of a sentence from Poland to the Netherlands when the person is actually residing in the Netherlands can only take place when evidence is available that the person concerned escaped Polish jurisdiction in order to evade the Polish sentence. Consequently, in all of the cases in which a Polish EAW was issued for the

60 Article 28 states that any Member State may – in cases where the final judgment has been issued before 5 December 2011 – continue to apply the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011. Poland as well as the Netherlands applied this transitional provision regarding the FD 909.

61 Receipt of a copy of the verdict is required. The certificate of the FD 909 should be translated into English or Dutch.

62 Such as the *European Convention on the International Validity of Criminal Judgments,* The Hague, 28 May 1970, the *1983 Convention* its 1997 *Additional Protocol*, the *Convention Implementing the Schengen Agreement,* Schengen, 14 June 1985 and the *1991 Convention Between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences*.

63 *The 1970 European Convention on the International Validity of Criminal Judgments*, see note 63.

64 The 1991 Convention Between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences, see note 23.

execution of an irrevocable sentence issued before 5 December 2011 for a Polish citizen who can be treated equally and who did not evidently flee from Poland, the transfer of the sentence is impossible. After all, the Dutch system requires a treaty basis on which the actual transfer can be based.[65] FD 909 would not apply because of the wording of the transitional law laid down in the Dutch law implementing the FD 909. In cases in which a final judgment was given before 5 December 2011 the old conventions on the transfer of sentences, mentioned above, would apply, but of course, only with countries that have ratified them. Consequently, as this legal basis is missing in situations described above, the transfer of the sentence is currently not possible.[66]

Whether the actual transfer of the sentence will be possible will become clear after the decision of the Court on the EAW. According to Article 6(3) of the *Dutch Surrender Act*, the Netherlands has an obligation to offer the issuing authority the possibility to take over the sentence. However, this is not an obligation of result to actually take over the sentence. As described above, there are situations in which the surrender is refused and the transfer of the sentence cannot take place. When the Ministry of Security and Justice has rejected the FD 909 certificate or the request to take over the execution of the sentence cannot take place, there is no legal remedy or a possibility to go back and review the surrender decision.

Nationals

From the text of Article 6(3) of the Dutch Act it becomes clear that the 'obligation' to undertake as given in Article 4(6) FD EAW has been transposed as a 'notification of the willingness' to transfer the sentence. In practice, this means that, upon receipt of the EAW, the public prosecutor in Amsterdam who is responsible for the EAW will assess whether the EAW was sent for the execution of a judgment against a Dutch national. If indeed the EAW was sent for these purposes, the Dutch public prosecutor must decide to release the wanted person for the EAW. Hereafter, the public prosecutor will inform the issuing Member State that the EAW has been refused and that the Netherlands is willing to take over the execution of the sentence. As a result, the refusal ground provided in Article 6(2) of the Dutch Act is strictly mandatory. This provision does not offer the possibility for the Dutch national to consent to his surrender to the issuing Member State, nor does it provide a margin of discretion to

65 Article 2 of *The Dutch Act on the Transfer of Sentences of 10 September1986*.
66 This specific point is being discussed in the *Popławski*-case, see Chapter 5 of this report.

the judicial authorities to decide in the interest of reintegration of the Dutch national.

Non-EU nationals

When the public prosecutor in Amsterdam, upon receiving the EAW, finds that the EAW was sent for the execution of a judgment of a non-EU national, the procedure differs from the procedure for Dutch nationals. As is mentioned in Article 6(5) of the Dutch Act, paragraphs 1 to 4 similarly apply to an alien with a residence permit for indefinite time. Article 6(5) of the Dutch Act, however, provides two additional conditions that should be fulfilled: the Netherlands must have jurisdiction over the offences committed and there should be no expectation that the wanted person may lose his residence rights due to the expected sentence abroad.[67]

The prosecutor in Amsterdam, who is the competent judicial authority for the receipt and treatment of an EAW, will assess whether the wanted person possesses a residence permit for indefinite time. If yes, the prosecutor will check whether the Netherlands has jurisdiction over the offence(s) mentioned in the EAW. Hereafter, the public prosecutor will request the Immigration and Naturalization Services to evaluate whether the wanted person may loose his residence status as a result of the foreign sentence. When the Immigration Service finds that there is no expectation that the wanted person will lose his residence status, the prosecutor will refuse the EAW on the basis of Article 6(5) of the Dutch Act. Similar to the procedure regarding a Dutch national, the prosecutor will inform the issuing Member State and declare the Dutch willingness to transfer the sentence. In case one of the two additional conditions (jurisdiction and/or the possibility of losing the residence permit) is not fulfilled, the public prosecutor will bring the case before the International Criminal Chamber of the court in Amsterdam. The court will assess whether one of the conditions is indeed unmet. If the International Criminal Chamber

67 As mentioned in the introduction to this report, the scope of Article 6(5) of the Dutch Act has changed significantly after its introduction in 2004. Before the *Kozlowski* and *Wolzenburg* cases, the refusal ground of this provision only applied to persons who possessed a residence permit for indefinite time, irrespective of whether the person was an EU-citizen or not. As the condition of possessing a residence permit for indefinite time does not apply to EU citizens since the aforementioned cases of the CJEU, this requirement now only applies to non-EU nationals who are sought for an EAW based on an irrevocable judgment in the issuing state.

then determines that either of the conditions is not met, then the surrender may be granted.

EU nationals

After the *Wolzenburg* decision of the CJEU, Dutch case-law has shown that residents from another EU Member State – who rarely posses a residence permit – may, due to their legal stay in the Netherlands and due to their EU citizenship, be treated equal to Dutch nationals with respect to Article 6 par. 2 of the Dutch Act. In this system, the main condition to be eligible for being treated equal to a Dutch national is that the person concerned is a permanent and legal resident in the Netherlands, meaning that, immediately prior to the decision on surrender, they have resided in the Netherlands for a period of at least 5 years without interruption. When the court in Amsterdam determines that a wanted person with EU nationality meets the threshold of 5 years residency in the Netherlands, the EAW for execution purposes must be refused when the other two cumulative criteria of Article 6 par. 5 of the Dutch Act are also fulfilled (jurisdiction and no loss of residency rights). The condition of permanent and legal residence in the Netherlands for a period longer then 5 years without interruption, immediately prior to the decision on surrender is not easily fulfilled. The court not only assesses whether a person has been residing in the Netherlands for a period of 5 years immediately prior to the decision on surrender (which can be based on a non-obligatory registration in the municipal register), it also assesses whether the person involved resides legally in the Netherlands. Conditions that may play a role in assessing whether the wanted person has legal residence in the Netherlands are, inter alia, evidence of living and housing in the Netherlands (i.e. a mortgage or rental contract), actual employment (i.e. sufficient income to sustain him or herself) and healthcare insurance in the Netherlands. Furthermore, the relocation of the main place of stay of the requested person for a certain period to another Member State may result in not being treated equal to a Dutch national. Also a period of detention may result in the interruption of the legal stay. Furthermore, receiving social welfare for a certain period in the Netherlands during the last 5 years could influence the period of 5 years of legal stay. The requested person should indicate that he has had and still has income from actual labour.

Possible loss of the right of residence

In addition to the condition lawful residence in the Netherlands for a period longer then 5 years without interruption, immediately prior to the decision on surrender, the other two conditions as provided in Article 6 par. 5 of the Dutch

Act still apply. The EU national has to fulfil three cumulative conditions with respect of Article 6 par. 5 Dutch Act in order to be treated equal to a Dutch national: (1) the wanted person should have had legal residence in the Netherlands for a period of at least five years as mentioned above, (2) there should be no concrete risk of losing this right due to the possible foreign sentence, and (3) the Netherlands should have had jurisdiction over the offences mentioned in the EAW.[68] The second condition continues to play a role in Dutch surrender procedure. If indeed a person fulfils the first and third condition, the public prosecutor in Amsterdam will, during or prior to the EAW proceedings at the court in Amsterdam, request the Immigration and Naturalization Services to evaluate whether the wanted person may lose his right of residence as a result of the foreign sentence. Relevant factors in assessing whether the wanted person may lose his or her right of residence are that the wanted person poses an actual threat to Dutch society and/or danger to the public order, the length of stay in the Netherlands, and the family life of the wanted person in the Netherlands and the expected penalty abroad. If indeed the Immigration Service indicates that the resident will or may lose his right of residence, the wanted person will not be treated equal to a Dutch national for the purposes of the refusal ground of Article 4(6) FD EAW. Hence, the court in Amsterdam will, if no other applicable refusal grounds apply, execute the EAW.

2.2.11 Bulgaria, Czech Republic, Denmark, Finland, Portugal, Romania and Slovakia

This paragraph describes the implementation, national procedure and legal consequences of Article 4(6) FD EAW in the remaining seven examined countries. Contrary to the rest of the participating countries, which we explained into detail above, in this paragraph we will provide a brief, combined overview of our findings.

Implementation

Bulgaria, Denmark, Portugal, Romania and Slovakia have implemented Article 4(6) FD EAW as a ground for optional non-execution in their national law.

68 With regard to the third condition, it has already already mentioned that due to amendments of the Dutch legislation regarding jurisdiction, the Netherlands gained jurisdiction in practically all cases in which a person could be considered equal to a Dutch national. As a result, the third cumulative condition of Article 6 par. 5 of the Dutch Act, i.e. the condition that the Netherlands have jurisdiction over the offences mentioned in the EAW, no longer plays an autonomous role.

In the Czech Republic, the ground for refusal is mandatory, but only when several conditions are cumulatively fulfilled.[69]

In Finland, the refusal ground is incorporated as a mandatory ground for non-execution for nationals, but as an optional ground for non-execution when the wanted person has his or her permanent residence in Finland. Furthermore, the personal circumstances or other special reasons should be weighed to consider whether the wanted person should serve the custodial sentence in Finland.

Procedure and legal consequences of a refusal

In Finland and Denmark, the 'obligation to undertake' is not perceived as an obligation to actually take over the sentence, but as an obligation to inform the issuing Member State of their willingness to take over the sentence. Consequently, in the course of the EAW procedure, it is not necessary to assess whether the sentence can actually be transferred. An outcome of this procedure is that a gap may arise between the moment when the EAW is refused and the moment when the procedure regarding the transfer of the sentence is initiated. Furthermore, a situation may occur in which the EAW is refused, but the sentence is not transferred.[70]

In Bulgaria, Portugal, Romania, Slovakia and the Czech Republic, the 'obligation' to take on the sentence is considered as an actual obligation. In these countries, it is examined whether the actual transfer of the sentence is possible during the EAW procedure and prior to the court's decision on the EAW. Depending on whether the sentence can be transferred, the executing authority decides to either refuse the EAW or to surrender the wanted person.

69 These conditions are:
1. The requested person is a citizen of the Czech Republic or a citizen of another Member State with a permanent residence in the territory of the Czech Republic. 2. The EAW was issued for the purpose of surrender for execution of an unsuspended sentence of imprisonment or protective measure associated with imprisonment. 3. Conditions for recognition and execution of the decision in the territory of the Czech Republic, imposing such a sentence or protective measure, are met. 4. The person declares before the court into the protocol that he/she does not consent with execution of this sentence or protective measure in the requesting state

70 However, Denmark stated in their questionnaire that they have not yet experienced a case where the transfer of the sentence did not succeed.

Legal basis for the transfer of the sentence
In almost all examined Member States, FD 909 was considered the legal basis for the transfer of the sentence. At the time of writing, Bulgaria has, however, not yet transposed FD 909 into their national law. Therefore, the legal basis for the transfer of the sentence in Bulgaria is the *1983 Convention*.

Categories of wanted persons and criteria for equal treatment
After examining the answers received from the examined members states, it becomes clear that, next to the various kinds of implementation of Article 4(6) FD EAW, also the groups of persons that fall under the scope of the refusal ground vary. In Bulgaria, Finland, Portugal and Romania all categories of persons – under certain conditions – are eligible to fall under the scope of Article 4(6) FD EAW, while in the Czech Republic, non-EU nationals are excluded from the scope of this provision. In Denmark and Slovakia, no distinction is made between EU-nationals and non-EU nationals as long has they have the status of permanent resident in the respective Member State.

Within these categories of wanted persons, different criteria are used in the national courts' assessment of whether a wanted person may fall under the scope of the refusal ground. In Romania and the Czech Republic, the court assesses whether the person resided for a continuous and uninterrupted period of 5 years following the *Kozlowski* and *Wolzenburg* rulings of the CJEU. Other Member States leave full discretion to the individual national judges responsible for the execution of the EAW in the application of the facultative refusal ground. The non-exhaustive list of criteria that is most commonly used in their assessment on equal treatment are the length of stay in the country, the ability to speak the national language, the family ties in the respective country, the economic circumstances of the wanted person, the actual employment and a blank criminal record.

Chapter

THREE

Procedure in respect of Article 5(3) FD EAW and the legal and practical implications of a 'guarantee to return' or a surrender under the condition of return in the examined Member States

3.1 Introduction

The system of the surrender procedure – derived from the FD EAW – allows the competent judicial authorities of the executing Member State to decide that a sentence must be executed on their own territory. This has been set down in Article 5(3) of FD EAW, which states:

> The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:
> [...]
> 3. where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.

The objective of this provision is to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society. Hence, the executing state is allowed to subject the surrender of its nationals and residents for purposes of conducting a prosecution to the condition that he or she is returned to the executing Member State in order to serve out the sentence or detention order. This seems coherent with the ambitious attempt to build an Area of Freedom, Security and Justice, which the Lisbon Treaty enshrines as one of the objectives of the European integration process.

This chapter gives an overview of the national procedures with respect to Article 5(3) FD EAW and the legal and practical implications of a 'guarantee to

return' and of surrenders under the condition that the issuing Member States later returns the wanted person to the executing Member State. A distinction is made between a request for a guarantee to return by the executing Member State and surrenders under the condition of return to the executing Member State. The difference between the two approaches lies in the fact that, in certain executing Member States, the surrender decision may only be taken when the issuing Member State has guaranteed that, if the wanted person is sentenced to an unconditional prison sentence without appeal in the issuing Member State after the surrender, he/she will be allowed to carry out this sentence in the executing Member State. Other executing Member States do not request for a guarantee to return, but rather, they surrender a person under the condition that he/she is allowed to later choose to carry out the punishment in the executing Member State after being surrendered and irrevocably sentenced. This condition is written down explicitly in the surrender decision.

As mentioned in the general introduction to this report, Article 5(3) FD EAW and Article 4(6) FD EAW both share the 'objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires'.[71] Given this shared objective, the research conducted on the interpretation and implementation of Article 4(6) FD EAW also focuses somewhat on these implications with regard to Article 5(3) FD EAW. For example the equal treatment of non-nationals is relevant for both procedures, and it is thus necessary to investigate whether differences in both procedures exist in the examined Member States. The questionnaire that forms the basis of this research also focused on questions relating to the procedure and legal consequences in the Member States regarding the so-called guarantee to return or surrender under the condition of return on the basis of Article 5(3) FD EAW. However, as this research report as a whole primarily focuses on Article 4(6) FD EAW, the focus of this chapter is on the main characteristics of the procedure with respect to Article 5(3) FD EAW rather than describing the entire procedure in detail.

Section 3.2 of this chapter focuses on the national procedures in the examined Member States with respect to Article 5(3) FD EAW. The differences and legal implications will be discussed extensively in the comparative analysis made in chapter 4.

71 *See* Case C-123/08, *Wolzenburg* EU:C:2009:616, par. 62.

3.2 Overview of national procedures in the examined Member States

This Section provides the answers of each of the participating Member States with regard to the legal consequences of a surrender with a "guarantee to return" as mentioned in Article 5(3) FD EAW. Each sub-section in this chapter will focus on the particular Member States that were examined in this research project. The description of the Member States' procedure can be divided into two components of the national procedure, namely: the Member State as issuing authority and the Member State as executing authority. Subsequently, the component focusing on the Member State as an executing authority can also be divided into two sub-categories, namely: the procedure prior to the actual surrender of the wanted person, and the procedure after the surrender (meaning the return of the sentenced person).

3.2.1 Belgium

Belgium as executing authority

In case the Belgian authorities execute an EAW for prosecution purposes in which the surrender of a Belgian national is requested, the actual surrender can only take place after the guarantee to return is provided by the issuing Member State.[72] This procedure similarly applies to EU nationals and non-EU nationals who actually and effectively build up a sustainable and regular tie with Belgium.[73] The criteria in order to establish this tie are equal to the applicable criteria of the refusal ground of Article 4(6) FD EAW. The court that decides on the question whether the surrender is allowed can decide to make the surrender subject to the guarantee to return. The actual request will be done by the office of the public prosecutor. It is not necessary that the guarantee to return is available when the court decides on the execution of the EAW. However, when the guarantee to return is not provided within 20 days after the decision to surrender is final, the wanted person will be released in anticipation of receiving the guarantee. When, in the course of the EAW proceedings, the person concerned explicitly requests to apply the return guarantee, the public prosecutor will anticipate on the possibility that the wanted person will fall under the scope of the Belgian implementation of Article 5(3) FD EAW

72 *See* Article 8 of the *Belgian Law Concerning the European Arrest Warrant of 19 December 2003.*
73 *See* Chapter 2, sub-section 2.2.1 of this report.

prior to court hearing by requesting, if necessary, the return guarantee. When the wanted person chooses the accelerated procedure (gives consent to the surrender procedure according to Article 13 of FD EAW) the surrender on the basis of a guarantee to return is not possible. Given the fact that only the court may impose this condition (to return) and the fact that the court is not involved in the procedure regarding the accelerated procedure, the guarantee to return is not possible in combination with the accelerated procedure in Belgium. As a consequence a surrender of a Belgian national, EU national or non-EU national on the basis of the accelerated procedure as mentioned in Article 13 FD EAW will always be done without a guarantee to return.

In case the Belgian authorities have surrendered a person under the condition that the person should return to Belgium when he is irrevocably sentenced, the issuing Member State should take the initiative to inform the Belgium authorities of the definitive sentence. When the Belgian authorities receive a request for the transfer of the sentence, the prosecutor in Brussels is the competent authority to acknowledge and execute a verdict on the basis of FD 909. The ministry of Justice is the competent authority to decide on request based on the old instruments. The approval will be done prior to the actual transfer of the wanted person. The decision to either approve or disapprove the certificate will be done on the basis of an assessment of the actual connection of the wanted person with Belgium. As part of this assessment a possible loss of the right of residence may be taken into account. When indeed a verdict is acknowledged and executed in Belgium on the basis of the Belgian implementation of FD 909, the prosecutor may decide to adjust the sentence in two occasions. The first occasion is when the length of the foreign sentence exceeds the maximum sentence possible under Belgian law for similar offences. The second occasion is when the nature of the sentence is incompatible with Belgian law. In that case the prosecutor may decide to adjust the sentence to a sentence that would have been imposed for similar offences under Belgian law. This could for example be an adjustment to electronic detention.

Belgium as issuing authority

In case the Belgian authorities have issued an EAW on the basis of which the executing authority requests for a guarantee of return, the Federal Public Service of Justice of the Ministry of Justice is the designated authority to provide such a guarantee. The Federal Public Service of Justice has authorized the Prosecution Service to provide the executing authority with the requested guarantee of return. The Prosecution Service will subsequently inform the Federal Public Service of Justice of every guarantee of return that has been

issued. The formal criterion for providing a guarantee of return is that the wanted person has to be a national or resident in the executing country. The guarantee of return is, however, provided in almost all cases in which a guarantee to return is requested. In case a guarantee to return is provided and the wanted person is indeed surrendered to Belgium and convicted to an unconditional prison sentence, the execution of the guarantee to return is obligatory in Belgium. Belgium has nonetheless the possibility to refuse the execution of the 909-certificate, if one of the refusal grounds listed in FD 909 apply.

3.2.2 France

France as an executing authority

In the event that surrender is requested for the purpose of prosecution for a French national, the surrender is subject to the condition that the requested person, after being heard, is returned to France in order to serve the sentence passed against him/her in the issuing Member State. According to the French law the guarantee to return should be submitted before the Investigation Chamber rules on the surrender.[74] The guarantee of return is normally requested by the Prosecutor General's Office. If the guarantee to return is not received the Investigation Chamber may adjourn the hearing and instruct the Prosecutor General to request the guarantee to return before the hearing will be continued. If the guarantee of return is however not submitted, the surrender may be refused by the Investigating Chamber.[75]

France considers that, resulting from the guarantee of return, both the issuing and executing judicial authorities should be committed to initiate and execute the transfer of the sentence on the basis of the FD909. However, at the time of providing the guarantee, both the issuing authority and France, as an executing authority, are not in the position to assess whether one of the grounds for non-recognition or non-enforcement of the decision can be invoked with regard to the foreign sentence. To avoid any misunderstandings, France specifies

74 *See* Article 695-32 of the Code of Criminal Procedure as amended by het Act of the 5th of August 2013

75 The French project members have questioned several Prosecutor's General offices in preparation of the interview and questionnaire; one of the Prosecutor's General offices stated that the Court in their province, in stead of asking for a guarantee to return, will include a legal consideration in the verdict, stating that foreign sentence will be enforced in France in accordance with the procedure for mutual recognition of judgment (FD909).

in the guarantee to return that it can only be carried out in accordance with the implementation of the provisions of the FD 909.

The difficulty that can arise in practice is that the guarantee to return is not subject to the same conditions as the mutual recognition of the sentence. Furthermore, both procedures will not automatically fall under the jurisdiction of the same authority. In France it is the Prosecutor's Generals Office to request the guarantee to return, which will consequently be assessed by the Investigating Chamber. However, it is the public prosecutor of the wanted person's last known address – or in the absence of a known domicile, the public prosecutor of the district court in Paris[76] – to check whether the prerogatives of the FD 909 are met.

Since the FD 909 has been transposed in French law under Article 728-10 until 728-76, the execution of the guarantee to return is subject to the fulfilment of the conditions (hence whether grounds for non-recognition or non-enforcement can be invoked) as laid down in domestic law[77]. In case the request is based on the *1983 Convention*[78], the French Ministry of Justice is the competent authority to assess the return. The consent of the sentenced person is a *sine qua non* condition for the transfer of the sentence ex Article 3 of the *1983 Convention*. If the guarantee of return is based on the *1983 Convention*, conversion of the imposed penalty in France cannot be applied by the Member State.

The abovementioned procedure and criteria are the same for persons who can be treated equally to a French national.[79] These persons are surrendered under the condition that they are allowed to serve their prison term in France. Furthermore, when the wanted person choses the accelerated procedure (gives consent to the surrender procedure according to Article 13 of the FD EAW), the procedure with respect to the condition to return is exactly the same as in the regular procedure.

76 *See* Article 728-34 of the French Criminal Procedure Code.
77 *See* Article 728-23 and 728-24 of the French Criminal Procedure Code.
78 This convention still applies in surrender procedures with respect to Bulgaria and Ireland.
79 A person regularly residing for a period of five interrupted years on the French territory.

France as an issuing authority

In case the French authorities have issued an EAW on the basis of which the executing authority requests for a guarantee of return, the public prosecutor which issued the EAW is the designated authority to provide the requested guarantee. In case a guarantee to return is requested from the Netherlands, the Bureau de l'Entraide Pénale Internationale (BEPI) is the designated authority to provide the requested guarantee.[80] If the executing Member State would want to adjust the imposed French penalty, the sentence would be enforced on French territory, in spite of the guarantee of return.[81]

3.2.3 Germany

Germany as executing authority

In case the German authorities execute an EAW in which the surrender of a German national is requested, the actual surrender can only take place under the condition that the person is allowed to serve his prison term in Germany.[82] In practice, the German authorities do not request the issuing Member State to provide a guarantee to return. Extradition is granted under the condition that the person may serve his sentence in Germany. In case a Member State does not act in accordance with this condition, the general prosecutions office (*Generaalstaatsanwaltschaft*) will ask for a guarantee to return in subsequent cases coming from that specific country. When such a situation occurs, the guarantee to return should be received prior to the decision of the court (*Oberlandesgericht*) on the admissibility of the extradition. In such cases, the EAW will be refused when a guarantee to return is not provided by the issuing Member State. As a consequence, the requesting state could request to transfer the proceedings. When such a request is made, the necessary steps to investigate the case will be taken. This may lead to Germany formally taking over the proceedings.

80 This exception arises from an agreement between France and the Netherlands in 2005.

81 France will ask the executing authority for information regarding the adjustment of the sentence. Removing the certificate is still possible until the beginning of the execution of the sentence in the executing Member State.

82 *See* Article 80 of the German Law on International Mutual Legal Assistance (Gesetz über die internationale Rechtshilfe in Strafsachen) of 27 June 1994 (latest addition: 31 July 2016): *'die Auslieferung eines Deutschen zum Zwecke der Strafverfolgung ist nur zulässig, wenn gesichert ist, dass der ersuchende Mitgliedstaat nach Verhängung einer rechtskräftigen Freiheitsstrafe oder sonstigen Sanktion anbieten wird, den Verfolgten auf seinen Wunsch zur Vollstreckung in den Geltungsbereich dieses Gesetzes zurückzuüberstellen.'*

The procedure and criteria regarding equal treatment as nationals on the basis of Article 5(3) FD EAW are the same as under Article 4(6) FD EAW.[83] Persons who can be treated equal to a German citizen are extradited under the condition that the person is allowed to serve his/her prison term in Germany. Furthermore, when the wanted person chooses the accelerated procedure (gives consent to the surrender procedure according to Article 13 of the FD EAW) the procedure with respect to the condition to return is exactly the same as in the regular procedure.

In case the German authorities have surrendered a person under the condition that the person should return to Germany when he is irrevocably sentenced, it is the responsibility of the sentenced person to request he be returned to Germany. In case the sentenced person does not want to be returned, there is no obligation for the issuing or executing state to take further action. Under German law, there are no formal requirements on which a request to take over the sentence by the sentenced person must be based. In case such a request is filed in Germany, the competent authority for deciding on the taking over of the execution of the sentence, when the request is based on FD 909, is the prosecutions office. In case the request is based on the *1983 Convention*, the competent authority is the Ministry of Justice. However, before the competent authority can execute the actual transfer of the sentence, a court has to decide on the enforceability of the sentence. As part of this decision, a court will assess whether the sentenced person will lose his right of residence in Germany.

When the court has decided that the sentence can be taken over by Germany, the sentence is executed without interruption after the return of the sentenced person. An adjustment of the sentence would only be made if the imposed sentence exceeds the maximum penalty that can be imposed for the offence under German law.

Germany as an issuing authority

In case the German authorities have issued an EAW on the basis of which the executing authority requests a guarantee of return, the prosecution office (*Staatsanwaltschaft*) is the designated authority to provide such a guarantee. Under German law, no specific criteria exist with regard to providing a guarantee to return. However, the prosecution office aims to align the guarantee to national requirements in the issuing Member State.

83 *See* Chapter 2 of this report, sub-section 2.2.3.

3.2.4 Austria

Austria as executing authority

Due to Austria's transposition of the FD EAW through the *Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union* (EU-JZG) and in particular the principle of obligatory prosecution of crimes committed by own nationals also outside of Austria, the cases in which Austrian nationals will be surrendered for criminal prosecution on the basis of an EAW are rather exceptional. Whenever the acts for which a European Arrest Warrant has been issued are subject to the jurisdiction of Austrian criminal law, the surrender of the wanted person under an EAW is inadmissible as per Article 5(2) of the EU-JZG. The public prosecutor will then start an Austrian criminal procedure on their own initiative.

In the almost fictitious situation in which Austria surrenders an Austrian national for the purpose of prosecution, the Regional Criminal Court has to ask for a guarantee foreseen under of Article 5(3) FD EAW. The EAW will be refused when the requested guarantee to return is not provided by the issuing Member State.

With regard to EU residents living in Austria who can be treated equally to Austrian nationals, EU-JZG thus far does not regulate a guarantee to return. Consequently, a person who is an EU resident from another EU Member State is not eligible to be surrendered under the condition of return.

When a wanted person, not being an Austrian national, chooses the accelerated procedure (gives consent to the surrender procedure according to Article 13 of the FD EAW), the surrender of the wanted person will also take place without asking for a guarantee to return.

A resident from Austria, despite being surrendered without a guarantee to return, can still ask the Austrian authorities to apply FD 909. The Federal Ministry of Justice in Austria will check whether the prerogatives of FD 909 are met. If the wanted person is eligible to serve the foreign sentence in Austria, the actual return of the wanted person will be arranged via the Federal Ministry of Justice.

Austria as an issuing authority
If an Austrian judicial authority issues an EAW for prosecution purposes and the executing Member State – in which the respective person is a national or has his/her domicile or permanent residence – requires a guarantee that the person concerned will be returned for the enforcement of the sentence imposed by the Austrian court, the guarantee is provided by the Regional Criminal Court upon request of the Public Prosecutor. Under Austrian law, no specific criteria exist with regard to sending such a guarantee to return.

The actual return of the EU citizen will be arranged via the Federal Ministry of Justice. The director of the detention facility where the person concerned is serving the Austrian sentence will report the case to the Federal Ministry of Justice. The Federal Ministry of Justice will then assess whether the prerogatives under the FD 909 (or the *1983 Convention*) are met and consequently issue a certificate. The certificate will be sent to the respective Member State. A formal request of the sentenced person is not necessary. However, the person will be heard when preparing the certificate under FD 909.

3.2.5 Croatia

Croatia as executing authority
In the Republic of Croatia, the surrender of a Croatian national or a person residing in the Republic of Croatia for an EAW, which is issued for the purpose of prosecution for crimes committed in the issuing Member State, is subject to the condition that the wanted person, after being sentenced in the respective Member State, will be returned to the Republic of Croatia.[84]

The guarantee of return is requested by the County Court, which will have to be submitted prior to the decision on the European Arrest Warrant. If the guarantee has not been submitted prior to the decision on the European Arrest Warrant, the County Court will consequently refuse to surrender the wanted person. In that case, Croatia is not obliged to offer any alternatives, for example to take over the proceedings, to the issuing Member State.

84 *See* Chapter 2, sub-section 2.2.5 of this report. The wanted person needs to have an active registered address at the Ministry of Internal Affairs.

The obligation to return the requested person to the Republic of Croatia is also part of the surrender decision, which will be sent to issuing judicial authority. Croatia, as an executing Member State, does not initiate the return of the wanted person. Hence, it is up to the issuing Member State to regulate the return of the sentenced person.

When the surrendered person has been sentenced in the issuing Member State and returns to the Republic of Croatia, the County Court is the competent authority to acknowledge and execute a verdict on the basis of the FD 909. The Croatian law provides the possibility to either adapt or adjust the sentence imposed in the issuing Member State when the surrender was done under the condition of return.[85] Under Croatian law, the imposed custodial sentence can be adapted not only in terms of its duration but also in terms of the nature of the sentence. In the context of duration, the imposed sentence can only be adapted when it exceeds the maximum punishment provided for in Croatian law. As a consequence, the imposed sentence can be adjusted into the maximum penalty provided for under Croatian law. Furthermore, when the sentence or measure is incompatible with domestic law, the sentence will be converted into the punishment that corresponds most closely to the sentence imposed in the executing Member State. However, it is not possible to convert a prison sentence or custodial order that has been passed against the wanted person in the issuing state into a pecuniary punishment.

As part of this assessment – done by the County Court – a possible loss of the right of residence may be taken into account. In case the wanted person loses his right of residency in the Republic of Croatia, the foreign decision will not be transferred on the basis of the FD 909. An exception may occur in case the Ministry for Justice Affairs has given consent to the issuing state to transmit the judgment imposing a custodial sentence or any measure involving deprivation of liberty and also the sentenced person has given his/her consent for the execution of the foreign verdict in the Republic of Croatia.

If the requested person – being a Croatian national or a person residing in the Republic of Croatia –chooses to be surrendered via the accelerated procedure, the investigating judge or panel outside the trial of the competent court shall, without delay, and no later than three days after the consent, render a decision granting surrender, unless prevented by reasons to refuse the execution of the

85 According to Article 91 of the *Croation Surrender Act*.

European Arrest Warrant. The accelerated procedure does not differ from the regular procedure when it comes to the guarantee to return.

Croatia as issuing authority
If the Republic of Croatia has issued an EAW for which a guarantee of return is requested by the executing authority, the judge who issued the EAW will provide this guarantee of return.

3.2.6 Poland

Poland as executing authority
An EAW for the prosecution of a Polish national or a person granted asylum in Poland is only executed in Poland under the condition that the convicted person is returned to Poland after the conviction, provided that the person consents thereto.[86] This condition is included in the court decision on the execution of the EAW. The Polish authorities have noted that a mechanism for requesting from the issuing Member State a guarantee to return the wanted person – which is done in several Member States – is not provided for in the FD EAW itself, and therefore it is not included in the Polish implementing provisions. In case the EAW is executed on the condition that the convicted person is returned, the return is, considered a binding obligation on the issuing and executing Member State. Therefore, according to Polish law, the issuing Member State is obliged to return the sentenced person and the Polish authorities are obliged to take the sentenced person back. This is an automatic procedure; there are no formalities to be taken into account. The obligation for the issuing and executing Member State does depend on the consent of the sentenced person to the return. The obvious question that arises from the obligation of the issuing Member State to return the sentenced person is what would happen when the issuing Member State does not fulfil this obligation to return the sentenced person when the sentenced person has consented to his return. This issue was discussed by the Polish Supreme Court. The Polish Supreme Court indicated in its judgment of 12 September 2012 (case file no. V KK 238/12) that, although Article 5(3) FD EAW does not introduce an additional or new ground

86 Article 5(3) FD EAW has been implemented into Article 607t CPC:
§ 1 If the European Warrant has been issued to prosecute a person who is a Polish citizen or has been granted asylum in the Republic of Poland, surrender may be performed on the condition that such person shall be returned to the territory of the Republic of Poland after the proceedings in the European Warrant issuing state have been validly concluded, if the person consents thereto.

to refuse an EAW, a persistent breach by a Member State of the obligation to return the surrendered person may, in certain cases, constitute a ground to refuse to execute an EAW based on the fundamental rights rule. In the same ruling, the Supreme Court indicated that this cannot be invoked as a means of retaliation against another Member State and that each case has to be assessed individually.

As mentioned above, Polish nationals and person who have been granted asylum in Poland are eligible to be surrendered under the condition that they are returned to Poland following a conviction in the issuing Member State. Non-Polish nationals who have not been granted asylum in Poland are not subject to the condition to return. Furthermore, when the wanted person chooses the accelerated procedure (gives consent to the surrender procedure according to Article 13 of the FD EAW) the procedure with respect to the condition to return is exactly the same as in the regular procedure. It is stressed that the consent to being surrendered via the accelerated procedure is taken independently of the consent to be returned after being sentenced in the issuing Member State.

It has already been mentioned that the return of the sentenced person from the issuing Member State to Poland is not restricted by any formalities or conditions. Consequently, the sentenced person does not have to make a formal request to be returned to Poland. The requested person may express the lack of consent to the eventual return at the stage of the execution of the EAW. In such case, the EAW is executed unconditionally and the person serves the penalty in the issuing Member State. The requirement for the surrendered person's consent to be returned was added to the Polish surrender provisions in July 2015. Before July 2015, the Polish request for a return of the surrendered and sentenced national or non-national granted asylum did not take into account the surrendered person's views. Hence, a Polish request to return was made in every case in which a person was surrendered under the condition to return. As this system was considered not to involve the surrendered person views in the decision-making and the requirements of proper rehabilitation were not taken into account, the system was amended.

It has been indicated that the enforcement of the foreign sentence in Poland is done by using the same procedure as is used with regard to Article 6(4) FD EAW.[87] The Polish court converts the sentence into the Polish system and may

87 *See* Chapter 2, sub-section 2.2.6 of this report.

reduce its length if it would exceed the maximum provided for by Polish law for such an offence. The sentence is enforced without interruption after return, and any time spent in detention in the issuing Member State or during transfer is deducted from the sentence. The possible loss of the right of residence in Poland does not play a role in the assessment made by the Polish courts, which decide on whether the sentence and the person may be transferred to Poland.

Poland as issuing authority
In case the Polish authorities have issued an EAW on the basis of which the executing authority surrendered the person sought on the condition that the person should be returned following the conviction, enforcement proceedings in Poland are not initiated once the sentence is passed and irrevocable. Immediately after the Polish judgment becomes final and binding, the competent court issues a decision on the transfer of the convicted person back to the executing Member State.

3.2.7 Spain

Spain as executing authority
In Spain the FD EAW is implemented in such a manner that only a surrender under the condition of return is allowed. As only a surrender under the condition of return is allowed, it is not imperative that the executing court obtains a guarantee from the issuing authority prior to the decision on the surrender. Consequently, the court, when deciding on the surrender, will include as part of the decision a condition for the return of the person if convicted in the issuing Member State. The compliance with this condition 'shall be articulated through the terms set forth in the decision on serving of custodial sentences or measures of deprivation of liberty' as mentioned in Article 55 par. 2 of the Spanish Act implementing FD EAW.[88] The obligation to return shall be set forth in the decision to surrender and all Spanish judicial authorities are bound by this condition to return. When the surrendered person was sentenced in the

88 *See* Article 55.2 of the *Spanish Act (23/2014) of on Mutual Recognition of Judicial decisions in Criminal Matters in the European Union (AMR) 20 of November 2014*: 'Likewise, when the person who is subject to an European arrest and surrender warrant for the purposes of taking criminal action is a Spanish national or resident in Spain, his surrender may be subject, after being heard in that regard, to the condition of him being returned to Spain to serve the custodial sentence or measure of detention that may be handed down against him by the issuing State. Compliance with that condition shall be articulated through the terms set forth in the decision on serving of custodial sentences or measures of deprivation of liberty.'

issuing Member State and returns to Spain, the Spanish Act does not provide the possibility to either adapt or adjust the sentence imposed in the issuing Member State when the surrender was done under the condition of return. Such an adaptation or adjustment is, however, possible when no condition to return was provided and the transfer of the person would take place on the basis of FD 909.

The Spanish act on mutual recognition provides that the procedure and requirements regarding Article 5(3) FD EAW are similar for nationals and residents. The term 'residents' in this manner also includes EU nationals and non-EU nationals. Consequently, a person who is either a Spanish national or a resident is eligible to be surrendered under the condition of return. When the return of the person to Spain has been agreed, due to the fact that this person has legal residence in Spain and this person may loose the right of residence in Spain, in principle the return agreement is still binding for the executing judicial authority. This scenario has, however, not been foreseen in the Spanish Act. It is considered that in these cases, the Spanish issuing authority would be entitled to renounce the right to demand the person back to Spain, hence allowing the executing authority to carry out with the enforcement of the imposed sentence. Such renouncement by the issuing authority would, however, be problematic in case the surrendered person has already consented with his return to Spain.

As the Spanish procedural system only requires a condition to return, it is difficult to ascertain whether any precedents of infringements of this condition after a person has been surrendered to an issuing Member State have occurred. If the issuing Member State, however, fails to provide a guarantee to return, the surrender will be refused. In that case Spain is not obliged to offer any alternatives to the issuing Member State. When the allegedly committed offence would, however, fall under the jurisdiction of Spanish courts they may request and take over the transfer of the proceedings pursuant to the European Convention on Mutual Assistance in Criminal Matters of 20 of April 1959.

Spain as issuing Member State

When Spain is the issuing Member State and when the executing authority has requested for a guarantee to return, the authority providing this guarantee is either the examining judge or the court that will try the case. Hereafter the court shall formulate an order in which it either accepts or rejects the conditions. If indeed the court decides that the condition is accepted, the order in which the court commits itself to the transmission and to the enforcement of the sentence of the executing Member State shall be binding for all judicial

authorities that are competent in the subsequent phases of the Spanish criminal proceedings.[89] In other words, if the judicial authority issuing the EAW is an examining judge who has agreed with the executing Member State on the return of the wanted person after being sentenced irrevocably, such an agreement is binding not only for the examining judge, but also for the sentencing court and the authorities responsible for the enforcement of the sentence in Spain (i.e. the penitentiary surveillance judge). In addition, the surrendered and sentenced person is also entitled to request for his transfer back to the executing Member State when he was surrendered under the condition to return. In this case it would be a demand rather than a petition *stricto sensu* because the judicial authorities of both the issuing and executing Member States already agreed on the condition to return. Such a request made by the surrendered person is, as mentioned above, however, not necessary considering the fact that the return of the sentenced person shall be ordered by the sentencing court once the appeals have been exhausted in Spain. In case the return was not included as a condition during the surrender procedure, the sentenced person may apply to be transferred back to the country of his nationality, origin, or where he has bounds and roots in conformity with the provisions FD 909.

3.2.8 Sweden

Sweden as executing authority

If a Swedish national, whose surrender is requested for the execution of a custodial sentence or detention order, demands that the sanction be enforced in Sweden, surrender may only be granted if the issuing authority provides this guarantee to return. On the other hand, if the Swedish national was a resident of the issuing Member State for at least two years at the time of the crime, surrender may be granted without a guarantee to return, if there are no special circumstances for the sentence to be executed in Sweden.[90] The guarantee to return is only applicable for Swedish nationals. Consequently, EU citizens and non-EU nationals are not eligible to be surrendered with a guarantee to return to Sweden.[91]

89 *See* Article 44 of the *Spanish Act (23/2014) on Mutual Recognition of Judicial Decisions in Criminal Matters in the European Union (AMR) 20 of November 2014*.

90 For example: advanced age, severe illness of the wanted person or in case the wanted person is sentenced to life imprisonment in the issuing Member State.

91 The Swedish ministry is currently drafting a new law with regard to EU Nationals and Non-EU nationals.

It is the public prosecutor handling the matter in court who will send the request for the guarantee to return to the issuing Member State. If the guarantee to return is not provided by the issuing Member State, this may constitute a ground for refusal in the execution of the EAW.[92] Thus far, the guarantees to return always have been provided by the issuing Member States.

After receiving a guarantee of return, the District Court will also include the condition to return in the court's decision on the execution of the EAW. This condition is considered to be binding on the issuing and executing Member State. Therefore, the issuing Member State is obliged to return the sentenced person and the Swedish authorities are obliged to take the sentenced person back. The court will also send the verdict to the Prison and Probation Service, which is the competent authority that handles the matter according to the provisions in the EVL-law and FD909. A formal request by the surrendered person is not necessary for the transfer of the sentence because the wanted person has already been heard on this matter before the decision on the EAW.

The sentence may be adjusted under certain circumstances in order to be enforceable in Sweden according to Chapter 3 Sections 12-14 of the EVL-law (these provisions are based on Article 8 par. 2-4 of FD 909). The Prison and Probation Service may make minor adjustments in the sentence, but if a new sentence needs to be imposed, the Prison and Probation Service shall submit the matter to the Prosecution Authority in order for a prosecutor to submit an application to the District Court. The rule is not to adjust the sentence in terms of duration – hence not even when the imposed sentence in the issuing Member State exceeds the maximum punishment that can be imposed for the same offence in Sweden. The adjustment in duration is only possible when the wanted person is sentenced to a time-limited imprisonment that exceeds 18 years. In this case, the sentence will be adjusted to 18 years of imprisonment.

Sweden as issuing authority

When Sweden is the issuing authority and the executing authority requests for a guarantee to return, the authority providing this guarantee is the Public Prosecutor's Office after consent of the Prosecutor General. When the wanted person is irrevocably sentenced in Sweden, the prosecutor will then initiate a procedure concerning the transfer of the sentence and the transfer of the sentenced person back to the executing Member State by referring the case to

92 Chapter 3, section 2 of the Swedish EAW-law.

the Prison and Probation Service. The legal basis for transfer of the sentence is usually the EVL-law, which is the implementation of the FD 909, but could also be the *1983 Convention*.

3.2.9 Italy

Article 5(3) FD EAW is implemented in Italy in Article 19(C) of *Law no. 69 of 22 April 2005*, which provides:

> where the person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the State of Italy, the surrender shall be subject to the condition that the requested person, after having been heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.

In Italy no 'guarantee to return' provided by the issuing Member State is required before the decision on the EAW is taken. The condition to return is provided in the decision of the Court of Appeal in which the EAW is executed. The Court of Cassation has furthermore held that, when the condition to return is not contained in the judgment of the Court of Appeal, such condition shall be set by the Court of Cassation on its own initiative, also in the absence of a specific request to do so.[93]

In case Italy has surrendered a person to the issuing state under the condition of return, the latter has to be made in compliance with the provisions of Legislative Decree no. 161 of 7 September 2010.[94] As a consequence, when the judgment (conviction) becomes final, the issuing Member State must therefore issue the certificate provided in Article 4 FD 909.[95] As a result, Italy must give recognition to the sentence and will have the possibility to adjust the sentence, pursuant to Article 8 and Article 10 FD 909. It should be noted that the wanted person may waive the possibility to be surrendered under the condition of return. In this sense, the condition is not mandatory.

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93 Court of Cassation, 6th Criminal Division, judgment no. 49978 of 28 December 2012, filed on 28 December 2012, case of Marti, rv. CED 254013.

94 *Legislative Decree no. 161 of 7 September 2010, Provisions for the Transposition into Domestic Law of Council Framework Decision 2008/909/JHA on the Application of the Principle of Mutual Recognition of Judgments in Criminal Matters Imposing Custodial Sentences or Measures Involving Deprivation of Liberty for the Purpose of Their Enforcement in the European Union.*

95 In particular by filling in the second box of field (f).

From the text of Article 19(C) of the Italian law it can also be concluded that in Italy both Italian nationals and persons who have legal residence in Italy could fall under the scope of Article 5(3) FD EAW. The criteria for ascertaining the condition of being a resident are the same as described with reference to Article 4(6) FD EAW.[96]

One may think of a situation in which the issuing Member State preliminarily declares not to consent to the return to Italy. In such a situation, one may conceive it as logical that the condition is not fulfilled and that the decision to surrender should therefore considered to be ineffective. However, it does not seem that in this situation there would actually be a refusal of surrender, given that its non-implementation ensues from the non-acceptance – by the issuing Member State – of a condition lawfully imposed by the executing State on the decision of surrender. In a situation like this, the Italian authorities may take into consideration the transfer of the proceedings with regard to cases in which the crimes have been committed entirely abroad.[97]

In case the surrender of a wanted person is done successfully from Italy, the issuing Member State is obliged to comply with the condition to return required by Italy, except when the requested person requests to serve his sentence in the issuing Member State. As mentioned above, in such case the legal basis of return is Article 5(3) FD EAW.

Under Italian law, an explicit provision that regulates the situation in which the issuing Member State violates the obligation to return surrendered persons to Italy does not exist. In case such a situation may occur, the Italian authorities

96 *See* Chapter 2, sub-section 2.2.9.

97 In this case, the obligation to take over the proceedings on the basis of the principle of *aut dedere aut iudicare*, provided for in Article 6(2) of the *European Convention on Extradition,* Paris, 13 December 1957, should not apply. The proceedings could only be transferred on the basis of Article 21 of the *Strasbourg Convention* of 20 April 1959, which provides no obligation to take over the prosecution. Considering that Article 21 of the Strasbourg Convention also presupposes that there is Italian jurisdiction, it must be noted that, if a crime has been committed – entirely or partially – in Italy, this would constitute a ground for refusal provided in Article 4(7)(a) FD EAW (and, in Italian domestic law, by Article 18(p), first part, of Law no. 69 of 22 April 2005) and not the ground for refusal provided in Article 4(3) FD EAW. For this reason, the only cases where a transfer of the criminal proceedings could be taken into consideration are those in which the crimes have been entirely committed abroad, in respect of which the provisions of articles 7 to 10 of the *Italian Criminal Code* provide for prosecution (at times subsequent to a request from the Ministry of Justice).

would most probably decide not to surrender the next wanted person to that specific Member State.

Italy as issuing authority
In cases in which the Italian authorities have issued an EAW and then executing Member State requests a guarantee of return, the guarantee to return will be provided by the Italian Ministry of Justice.

3.2.10 The Netherlands

The Netherlands as executing authority
Article 6(1) of the *Dutch Surrender Act* states that a Dutch national may be surrendered if two conditions are met.[98] The first condition is that the surrender must be sought for prosecution purposes in the issuing Member State only. The second condition is that the issuing Member State must have guaranteed that, in case the wanted person is sentenced to an unconditional prison sentence without appeal in the issuing Member State after the surrender, the wanted person will be allowed to carry out this punishment in the Netherlands. The consequence of this procedure is that whenever the surrender of a Dutch national is requested for prosecution purposes, a guarantee to return is requested from the issuing Member State. The guarantee to return is requested by the central authority (public prosecutor in Amsterdam) and is requested prior to the decision on surrender by the court in Amsterdam. Only on very rare occasions has a guarantee to return not been provided by the requesting state. If indeed a guarantee to return is not provided, the court in Amsterdam will decide to refuse the request to surrender. This also implies that, when an EAW is refused in the Netherlands due to the refusal of the issuing Member State to provide a guarantee to return, offering an alternative such as the transfer of the prosecution is not prescribed. In practice, the wanted person will be released from custody and the public prosecutor will send a letter to the issuing Member State in which it is explained that the surrender has been refused.

The procedure and criteria regarding equal treatment as nationals in EAWs for prosecution purposes (Article 5(3) FD EAW) is not different from the procedure regarding EAWs for execution purposes (Article 4(6) FD EAW). When it is not evident that a wanted person can be considered equal to a Dutch national, a guarantee to return will generally not be requested by the prosecutor

98 *See* Article 6(1) of the *Dutch Surrender Act*.

prior to the first court hearing. In case the court in Amsterdam decides that a person should indeed be considered equal to a Dutch national, the court shall decide that the hearing should be adjourned so that a guarantee to return can be requested. Furthermore, it should be mentioned that the accelerated procedure does not differ from the regular procedure when it comes to the guarantee to return.

According to the Dutch rules, the Netherlands is not in all circumstances obliged to take back a person who has been surrendered after a guarantee to return has been provided when either the *1983 Convention* or FD 909 applies. Only when certain conditions from these instruments are met, is it possible to transfer a sentence from the issuing Member State to the Netherlands. The Ministry of Justice determines whether these conditions are met. The International Transfer of Criminal Judgments Department applies the acts on transfer of sentences on behalf of the Minister of Justice. In other words, the guarantee to return is neither a right of the wanted person to actually return to the Netherlands nor does it, from the internal perspective of the Dutch law, create an obligation for the Netherlands to under all circumstances actually take over the sentence.

As already mentioned, the Ministry of Justice determines whether a person who was surrendered from the Netherlands on the basis of a guarantee to return, may actually return to the Netherlands. For instance, when the wanted person loses his right to reside in the Netherlands due to a conviction in the issuing Member State, the Dutch commitment to actually take back the wanted person is lifted. The country where the person is detained is expected to take the first step to arrange this transfer.

The transfer of the sentence to the Netherlands is only possible if certain conditions are met which are mentioned in the applicable instrument. The Ministry of Justice will assess these conditions. With regard to persons who would like to be transferred and who possess a residence permit or lawful residence in the Netherlands as an EU citizen, the Immigration and Naturalization Service may revoke the residence permit because the person has been convicted abroad. The Immigration and Naturalization Service assesses the personal situation of the person involved, how long this person has lived in the Netherlands, and the length of the foreign sentence. If the Immigration and Naturalization Service actually intends to revoke the residence permit, the Minister of Security and

Justice will decide that the sentence transfer will not take place, as there is no 'interest of resocialisation' in the Netherlands.

In the Netherlands, the main rule is that the sentence from the issuing Member State is not adapted in the Netherlands when FD 909 applies. This means that the sentence remains the same in the Netherlands. However, there are two exceptions to this rule. The first exception is that when the sentence is higher than the maximum sentence in the Netherlands for the crime for which the person was convicted, the sentence is adjusted to the Dutch maximum sentence by the Arnhem-Leeuwarden Court of Justice. The second exception is that when a guarantee to return is provided in the surrender procedure, the sentence may be commuted. The sentence may be adapted to a sentence that would have been imposed for similar offences under Dutch law. The Arnhem-Leeuwarden Court of Justice will advise the Ministry of Justice on this adaptation. This rule is provided in Article 2:11 par. 5 of the Dutch implementation of FD 909. This Article states that in case the sentenced person is surrendered under the guarantee to return as mentioned in Article 6 par. 1 of the *Dutch Surrender Act*, it should be assessed whether the sentence corresponds to the sentence that would be imposed for that offence in the Netherlands. If necessary, the sentence may be adjusted accordingly. In doing so, the views of the sentencing Member State with regard to the severity of the offence should be taken into account. The main reason why the Dutch government has chosen to implement FD 909 in this manner is that it prevents unequal treatment between persons who are surrendered for prosecution purposes as compared to persons who are prosecuted in the Netherlands.[99]

The Netherlands as issuing authority

In the Netherlands, the public prosecutor – as the competent issuing authority – provides the guarantee of return. In practice, the guarantee to return will be provided to the executing Member State when requested.

3.2.11 Bulgaria, Czech Republic, Denmark, Finland, Portugal, Romania and Slovakia

This sub-section describes the legal and practical implications of a 'guarantee to return' or a surrender under the condition to return in the remaining seven examined countries. Contrary to the participating countries, which we

99 *See Explanatory Memorandum on the Dutch Implementation of the FD 909* (PbEU L 337) in the Parliamentary Papers II 2010/11, 32885, nr. 3, p. 15.

explained in detail above, in this sub-section we provide only a brief, combined overview of our findings.

Procedure

In the Czech Republic, Bulgaria, Slovakia, Portugal, and Denmark, a guarantee to return is explicitly requested from the issuing Member State. In most of the examined Member States, this guarantee is requested before the court rules on the surrender. However, in Slovakia, a guarantee to return is requested after the decision of the court on whether to execute the EAW, but prior to the actual surrender of the wanted person. In Romania and Finland, the guarantee to return is included in the court's decision, whereas in Denmark a combination of both approaches can be found. In some occasions, the extradition of the wanted person is granted under the condition of return. In other occasions, a guarantee to return is explicitly requested by Denmark.

Criteria for equal treatment

In most of the examined Member States, a parallel can be drawn with regard to the persons entitled to apply for the ground of refusal of Article 4(6) FD EAW as to the persons eligible to fall under the scope of Article 5(3) FD EAW. However, there are exceptions. In Slovakia and Bulgaria, the criteria applicable to categories of wanted persons eligible for the guarantee to return are stricter than the criteria applicable to the categories of wanted persons that may fall under the scope of Article 4(6) FD EAW. In Slovakia, only nationals are eligible to be surrendered under the condition to return. Meanwhile, in Bulgaria, the guarantee to return is required for a Bulgarian national or a foreign citizen who is a permanent resident in Bulgaria,[100] while the optional ground to refuse an EAW under the Bulgarian implementation of Article 4(6) EAW also applies to persons who temporarily stay or only factually reside in Bulgaria.[101] In Finland, in case a wanted person is not a Finnish national, the wanted person is only allowed to serve the custodial sentence in Finland (and consequently be surrendered under the condition to return) on the basis of his or her personal circumstances or other personal reasons that justify the applicability of this condition.

100 *See* Article 41(3) of the *Bulgarian Extradition and European Arrest Warrant Act*.
101 *See* Article 41(1)(4) of the *Bulgarian Extradition and European Arrest Warrant Act*.

Legal consequences

More than half of the investigated countries from this sub-section (Bulgaria, Slovakia, Romania and Portugal) consider the guarantee to return or the condition to return (mostly) binding upon the issuing Member State. The Czech Republic, Finland, and Denmark believe that both the issuing and executing state are obliged to actually take back or return the sentenced person when a guarantee to return has been provided.

Chapter

FOUR

Comparative analysis

4.1 Introduction

In the previous chapters, the implementations, procedures, and legal implications of both Article 4(6) and Article 5(3) FD EAW have been described. As these descriptions focus purely on the national applications of these provisions, this Chapter will analyse the common norms and differences in the examined Member States. The goal is to gain more insight into the problems that sparked this study and their possible solutions.

This chapter is divided into two main sections. Section 4.2 compares and analyses the application of Article 4(6) FD EAW in the examined Member States. Section 4.3 compares and analyses national applications of Article 5(3) FD EAW. In both paragraphs, a few differences and similarities will be highlighted and an analysis will be provided of the possible implications thereof. With respect to Article 4(6) FD EAW, these possible implications will be discussed into more detail in Chapter 5 in which the implications of the *Popławski* ruling are also analysed.

4.2 Article 4(6) FD EAW

Chapter 2 provided an overview of the existing procedures and legal consequences with respect to the national application/implementation of Article 4(6) FD EAW. The main findings regarding Article 4(6) FD EAW can be divided into five distinctive areas of attention. First, the way in which Article 4(6) FD EAW has been transposed differently in the national systems of the examined Member States. Second, the manner in which the Member States have implemented the obligation to undertake to execute the sentence. Third, regarding the different authorities that are competent to decide on either the EAW or the transfer of the sentence. Fourth, with regard to the different legal bases to transfer the sentence that apply in the several examined Member States. Finally, on the different criteria that apply and that determine whether a wanted person may fall under the scope of the refusal ground of Article 4(6) FD EAW.

Implementation

Article 4(6) FD EAW has been transposed differently in the national legal systems of the examined Member States. In describing these transpositions, two groups of Member States can be distinguished. The first group of Member States have transposed Article 4(6) FD EAW as a ground for optional non-execution. In practice, this means any category of wanted persons (nationals, EU residents, and/or non-EU residents) may be surrendered when the ties with the executing Member State are considered insufficient. The implementation of Article 4(6) FD EAW into a ground for optional non-execution seems to be in line with the principle of facilitating reintegration into society. After all, this implementation provides the deciding judicial authority with the mandate to assess whether any category of wanted persons has actual ties with the executing Member State.

The second group of Member States have transposed the refusal ground as a ground for mandatory non-execution for certain categories of wanted persons (nationals, EU residents, and/or non-EU residents). When the refusal ground of Article 4(6) FD EAW applies to a certain category of wanted persons, the deciding judicial authority is obliged to refuse the execution of the EAW. Within this practice, a large group of Member States have transposed the refusal ground in such a way that the actual application of the refusal ground depends on either the consent of the wanted person to be surrendered to the issuing Member State or on the request of the wanted person to invoke the refusal ground. The refusal ground is only considered mandatory when it is applied in case the wanted person objects to the surrender or otherwise requests to apply the refusal ground. Given the fact that it depends solely on the wanted person whether he or she will be surrendered, both exceptions are considered to be mandatory refusals for the purpose of this project. After all, the deciding judicial authority does not have any discretionary margin not to refuse the EAW.

Given the fact that Article 4(6) FD EAW states that an EAW *may* be refused, the question is whether a ground for mandatory non-execution, even if the wanted person requests to apply the refusal ground or when he has the possibility to consent to his or her surrender, is in line with the aforementioned principle of facilitating reintegration into society. This, for example, may result in the mandatory refusal of the execution of an EAW issued with regard to a national of the executing Member State who has been residing in the issuing Member

State for the past 20 years. Whether such a refusal would serve the objective of facilitating reintegration into society is doubtful.[102]

The 'obligation' to undertake the execution of the sentence

In describing the procedures with respect to the implementation of Article 4(6) FD EAW in the examined Member States, roughly three types of procedure with regard to the so-called obligation to undertake can be distinguished.

The first type of procedure is characterized by the declaration of willingness of the executing Member State to execute the sentence after the EAW is refused. Given that the 'obligation' to undertake is not considered an absolute obligation to take over the sentence, it is not necessary to assess in the course of the EAW procedure whether the sentence can actually be transferred. In this procedure, the transfer of the sentence is considered a possible consequence of the refusal. An outcome of this procedure is that a gap may arise between the moment when the EAW is refused and the moment when the transfer of the sentence is initiated. Another outcome of this procedure is that by informing the issuing Member State of its willingness to take over the sentence after the EAW has been refused, it is not evident that the sentence will actually be taken over by the executing Member State. A situation may occur in which the EAW is refused, but the sentence is or cannot be executed in the Member State that already refused the EAW. The question is whether this interpretation of the 'obligation' to undertake is in conformity with the object and purpose of Article 4(6) FD EAW. This provision, after all, prescribes that an EAW may be refused when it concerns a resident or person staying in the executing Member State or when it concerns a national and that state *undertakes* to execute the sentence or detention order. When looking at the texts of the Dutch, German and French translations of Article 4(6) FD EAW, the 'obligation' to undertake has been translated differently. In the Dutch text the undertaking has been translated into *'zich er toe verbindt'* which translates to a commitment on the side of the executing state to execute the sentence. In the French and German texts it is translated to *'s'engage'* and *'sich verpflichtet'* which can be translated to respectively 'commits to' and 'obliged to'. Given these different translations, it is unclear how the 'obligation' to undertake should be interpreted. Whether a declaration of willingness to execute the sentence could be considered an

102 Given that this issue also lies at the basis of the preliminary proceedings in the *Popławski* case (Case C-579/15, *Popławski*, EU:C:2017:503), a more in- depth discussion on this matter will be provided in Chapter 5.

actual undertaking to execute the sentence does thus not become clear from the wording of Article 4(6) FD EAW.[103]

The Member States that apply the second type of procedure perceive the 'obligation' to undertake as an actual obligation. These Member States will execute the sentence mentioned in the EAW without interruption and do not require a formal request from the issuing authority after the EAW has been refused. In these Member States, the decision on the refusal of the EAW will be taken at the same time and by the same authority as the decision to execute the foreign sentence. As a result, a gap between the refusal of the EAW and the transfer of the sentence, which is a possible consequence of applying the first or third type of procedure, does therefore not exist. One may, however, wonder whether a procedure in which the executing Member State executes the sentence without a prior request thereto or without informing the issuing Member State is in conformity with the European regulations on the transfer of sentences. The decision to issue an EAW for the execution of an irrevocable sentence cannot necessarily be equated to a decision to request for the execution of the sentence in the executing Member State. The issuing Member State may have legitimate reasons not to consent with the execution of a sentence in another Member State.

The group of Member States that apply the third type of procedure also perceive the 'obligation' to undertake as an actual obligation. In this type of procedure it is assessed, during the EAW procedure and prior to the decision on the execution of the EAW, whether the actual transfer of the sentence is possible when the EAW would be refused for the purposes of Article 4(6) FD EAW. In doing so, the EAW procedure is interrupted so that the issuing Member State can be requested to provide a request for the transfer of the sentence and/or the verdict, or it will be assessed – without requesting and receiving a request for the transfer of the sentence – whether the sentence can be executed on the basis of national legislation. After the request is received and/or the sentence can indeed be transferred, the EAW proceedings are continued. Depending on whether the sentence can be executed, the deciding judicial authority decides to either refuse the EAW or to surrender the wanted person. For these Member States the actual possibility to take over of the sentence is considered a condition for the refusal of the EAW. The actual transfer and execution of the sentence is a consequence of the refusal. If the sentence cannot be transferred,

103 See note 102.

the EAW will not be refused and vice versa. Although it will be assessed during the EAW procedure whether the sentence can be transferred, this does not mean that the sentence will be executed without interruption in all Member States mentioned in this group. A situation may occur in which a gap arises between either the refusal of the surrender, the formal recognition of the sentence and the actual execution of the sentence.

Deciding authority

With regard to the above-mentioned first and second type of procedure it should be noted that a difference exists in the examined Member States with regard to the authorities that decide on either the EAW or the request for the transfer of the sentence. It may occur that the decision on the refusal of the EAW is taken by a different authority than the decision on the request for the transfer of the sentence. The latter authority could be another judicial authority or another Administrative Authority. This may result in a situation that authority A has decided that the EAW should be refused and the sentence be transferred and that the authority B decides, after the EAW has been refused, that the sentence is not transferred.

Legal basis for the transfer of the sentence

The legal basis for the transfer of the sentence after a refusal of an EAW on the basis of the implementation of Article 4(6) FD differs in the examined Member States. A large group of Member States execute the foreign sentence on the basis of FD 909. Another group of Member States have stated that Article 4(6) FD EAW functions as a legal basis to execute the sentence. This reasoning is based on Article 25 FD 909, which provides that provisions of FD 909 shall apply, *mutatis mutandis*, to the extent that they are compatible with provisions under FD EAW, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of FD EAW. Some Member States have made a declaration on the basis of Article 28 FD 909 and believe that FD 909 only applies to EAWs in which the surrender is requested with regard to judgments that became final after 5 December 2011.[104] For any EAW in which the surrender is requested for a sentence that became final before 5 December 2011, the old instruments apply.

104 Poland, Ireland, Malta, Lithuania and the Netherlands have made this declaration.

Nationals, EU nationals and non-EU nationals
The examined Member States apply different criteria in assessing whether a wanted person may fall under the scope of the refusal ground of Article 4(6) FD EAW.

A large group of Member States do not formally require that a wanted person who is a national of another EU Member State should reside for a certain, fixed, amount of time in the executing Member State in order to be eligible to fall under the scope of their implementations of Article 4(6) FD EAW. The condition of '5 years of continuous and lawful residence within their territory' as was provided by the CJEU in the *Wolzenburg* case is not applied by these Member States. Given the fact that these Member States do not require a threshold of 5 years or any other fixed time limit, other factors to establish whether a person has significant ties with the executing Member State are taken into account. Given the extensive margin of appreciation that is provided to the judicial authorities that assess whether a person has significant ties, it is difficult to distinguish an exhaustive or limitative list of the most important criteria that are applied by these Member States. Nevertheless, it should be noted that most Member States look at the time of residence of the EU national in the executing Member State, his or her employment and the existence of any family or relatives and language skills. Several Member States do not require that the EU national has registered in the municipality whereas one Member State only requires that the wanted person is registered in order to establish significant ties.

Another group of Member States do require that a wanted person who is a national of another EU Member State resides continuously and lawfully in the executing Member State for a fixed period of five years as was provided in the *Wolzenburg* case. In order to assess whether a wanted person has continuous and legal stay in the executing Member State, similar criteria should be fulfilled as is done in the Member States that do not apply the *Wolzenburg* criteria. Certain criteria do, however, play a more important role in the Member States that do apply the criterion of 5 years of continuous and lawful residence within their territory. For obvious reasons, it is important to assess whether the wanted person indeed has been staying for five years on the territory of the executing Member State. In order to assess this stay, a registration in the municipality, house rental contracts, employment contracts and income specifications are important indicators. Some Member States will also assess whether the wanted person has any relatives who are living in that Member

State or whether the wanted person speaks the language. Other Member States will assess whether the wanted person has health insurance. It should be noted that the deciding authorities of the Member States that apply the criterion of five years of continuous and legal stay only have a limited margin of discretion on this matter. Anyone who can prove that he has been residing in the executing Member State for more than five years will relatively easy fall under the scope of the refusal ground of Article 4(6) FD EAW, whereas anyone who does not meet the five year threshold will not fall under the scope of Article 4(6) FD EAW. This may result in the situation that a person who has been living in a certain Member State for the last four and a half years, who speaks the language, has a steady income and a family will not meet the threshold of Article 4(6) FD EAW, whereas a person with a recent criminal record who has been residing in the same Member State for 5 years, while his family still lives in the issuing Member State and who does not speak the national language of the executing Member State, will meet that threshold.

As was already mentioned above, it should be noted that the deciding authorities in Member States that do not use a threshold of five years of continuous stay have a rather broad margin of appreciation to assess whether someone would meet the requirements of Article 4(6) FD EAW. One may expect, given this broad margin of discretion, that it would be less difficult to meet the threshold of legal stay. However, this is not the case. This study has shown that when judicial authorities have a broad margin of appreciation to assess whether a person fulfils the requirements, they are less inclined to rule that a wanted person indeed meets these requirements. It should also be noted that, as a result of the broad range of different criteria that are used by the examined Member States, a situation may occur in which a particular wanted person could meet the threshold of Article 4(6) FD EAW in multiple Member States. For example, a person with German nationality, who had been residing in the Netherlands permanently based on the last five years of residency, but who then moves to and registers in a municipality in Croatia, could fall under the scope of Article 4(6) FD EAW in all three Member States. Given that the applied criteria are so divergent, the question is, in which Member State the reintegration of the wanted person should take place. Given the importance of the principle of facilitating reintegration, one may argue that it is important that the criteria to establish whether a wanted person could fall under the scope of the refusal ground would be applied more uniformly throughout the EU.

4.3 Article 5(3) FD EAW

Chapter 3 described the legal regimes with regard to the implementation of Article 5(3) FD EAW in the examined Member States. From this description, three main areas of attention can be distilled, being: the legal procedure, categories of wanted persons and criteria for equal treatment and the legal consequences.

Legal procedure
Most Member States[105] explicitly request the guarantee to return from the issuing Member State. In other Member States,[106] the condition to return is not explicitly requested for, but is part of the granted surrender. Consequently, the condition will be included in the surrender decision of the court. Some Member States[107] use a combination of both practices and explicitly ask for a guarantee to return and in addition will include the condition in the surrender decision of the court.

Furthermore, the moment at which the requested guarantee should be provided differs in the examined Member States. In most of the Member States the requested guarantee to return should be submitted prior to a court's decision on the surrender. However, there are exceptions to this situation. Certain Member States[108] may also request the guarantee to return from the issuing Member State after the court has ruled on the surrender.

It is shown that, once requested, a guarantee to return is provided by the issuing Member State in almost all cases. A refusal of the surrender based on the fact that the guarantee to return has not been submitted, is therefore highly exceptional.

In one of the examined Member States,[109] the cases in which nationals will be surrendered to the issuing Member State for the purpose of prosecution are very limited, due to their transposition of the FD EAW into its domestic law and in particular the principle of obligatory prosecution of crimes committed

105 Belgium, Bulgaria, Croatia, Czech Republic, Denmark, France, Netherlands, Portugal, Slovakia and Sweden.
106 Denmark, Finland, France (occasionally) Germany, Poland, Spain, Romania.
107 Croatia, Denmark and Sweden.
108 Belgium, Slovakia.
109 Austria.

by own nationals also outside its territory. As a result, the EAW will be refused and the public prosecutor will initiate its own criminal proceedings against the person.

Categories of wanted persons and criteria for equal treatment
In most of the Member States, the criteria used in to assess whether a person falls under the scope of Article 5(3) FD EAW are the same as the criteria that are used for the refusal ground of Article 4(6) FD EAW. However, certain Member States[110] use different (stricter) criteria for persons eligible for a guarantee to return. In these Member States, there are different categories of persons who may or may not fall under the scope of Article 5(3) FD EAW in comparison with Article 4(6) FD EAW.

Legal consequences
The examined Member States perceive the legal consequences of a guarantee to return or a condition to return differently. In some Member States,[111] it is perceived as a binding agreement between the issuing Member State and the executing Member State, such that the return should at all times take place. In other Member States,[112] it is only perceived as a binding obligation for the issuing Member State. Hence, for the Member State that issued the guarantee to return and which should transfer the wanted person back after an irrevocable sentence. In one Member State[113] the condition is seen as a 'right' of the wanted person.

The competent authority to assess whether a wanted person may return to the executing Member State after he has been irrevocably sentenced in the issuing Member State is in one Member State[114] a separate authority. Consequently, another authority decides on the actual return of the wanted person. Given the fact that two authorities take independent decisions, it may be possible that the wanted person who was surrendered under the condition to return, in practice does not return.

110 For example, Bulgaria, Poland and Spain.
111 Czech Republic, Denmark, Finland France, Italy, Poland, Spain, Sweden.
112 Belgium, Bulgaria, Croatia, Romania and Slovakia.
113 Germany.
114 The Netherlands.

Chapter

FIVE

The Popławski judgment

5.1 Introduction

As is mentioned in the introduction to this report, in the case of D.A. Popławski, the International Court Chamber in Amsterdam asked the CJEU in 2015 for an interpretation of Article 4(6) FD EAW.[115] This case deals with the question whether it is possible to refuse an EAW for the purpose of executing an irrevocable sentence when, prior to the decision on the surrender, it is evident that the execution of the sentence in the refusing Member State is not possible.

Given the fact that the CJEU has looked into questions relating to the implementation of Article 4(6) FD EAW and more specifically to the question whether this provision may be implemented as a ground for mandatory non-execution and to the question whether the 'obligation to undertake' may be implemented as an 'obligation to inform', it is evident that the outcome of this preliminary procedure affects the procedures relating to Article 4(6) FD EAW in the examined Member States.

Given the scope and purpose of this project, it is evident that a comparative analysis should include an analysis of the *Popławski* ruling and should examine the possible implications for the procedures in the Member States. Therefore, this Chapter provides an overview of facts leading to the *Popławski* ruling and the content of the judgment. Furthermore, this Chapter analyzes the implications of the *Popławski* ruling for these Member States.

5.2 Facts and background

Mr. Popławski, a Polish national, was arrested on 9 January 2014 in the Netherlands on the basis of an EAW issued by the District Court of Poznań (Poland) on 7 October 2013. This EAW requested surrender of Mr. Popławski for the execution of a conditional custodial sentence of 1 year. On 15 April 2010, the District Court in Poznań ordered the enforcement of the conditional custodial sentence.

115 Case C-579/15, *Popławski*, EU:C:2017:503.

At the initial hearing in this case on 25th of March 2014, the Amsterdam court decided to adjourn the hearing so that the public prosecutor could request the Polish authorities to provide additional information on the offence for which Mr. Popławski was convicted in Poland. On 28 November 2014, the hearing was continued. At this hearing, the public prosecutor concluded that, on the basis of information provided by the wanted person and his lawyer, Mr. Popławski demonstrated that he had fulfilled the condition of permanent and legal residence in the Netherlands for a period longer than 5 years without interruption immediately prior to the decision on surrender. The public prosecutor furthermore held that the Immigration and Naturalization Service had indicated that it is not expected that Mr. Popławski will lose his residence rights as a result of the Polish conviction. Finally, the public prosecutor held that, as a result, the Netherlands has jurisdiction over the offence on which the EAW was based. The public prosecutor concluded that the Dutch refusal ground based on the implementation of Article 4(6) FD EAW applies in this case. However, the public prosecutor also held that the question as to whether the Netherlands can actually transfer and execute the sentence should be answered in the negative.

On 12 December 2014, the Amsterdam court decided to re-open the hearing in the case of Mr. Popławski to provide the public prosecutor the opportunity to provide additional information to support its point of view that the execution of the Polish sentence in the Netherlands is not possible. At the hearing of 30 January 2015, the Amsterdam court announced that it was considering the possibility to ask preliminary questions to the CJEU on this matter and it adjourned the hearing. On 30 October 2015, the Amsterdam court, after consulting all parties on this matter, decided to indeed ask preliminary questions to the CJEU. In its ruling, the Amsterdam court decided that Mr. Popławski fulfilled the criteria of Article 6 par. 5 of the *Dutch Act*. Therefore, the refusal ground was applied.

In its referral decision, the Amsterdam court submitted four questions to the court. The first three questions are important for this project. Given the fact that the fourth question only indirectly deals with the research done in the project, this question will not be discussed in this report.

In the first question it was asked whether a Member State is allowed to:

> transpose Article 4(6) [FD EAW] into its national law in such a way that its executive judicial authority is, without more, obliged to refuse surrender, for purposes of executing a sentence, of a national or resident of the executing Member State, by operation of law, that refusal gives rise to the willingness to take over the execution of the custodial sentence imposed on the national or resident, but the decision to take over execution of the sentence is taken only after refusal of surrender for purposes of executing the sentence, and a positive decision is dependent on (1) a basis for the decision in a treaty or convention which is in force between the issuing Member State and the executing Member State, (2) the conditions set by that treaty or convention, and (3) the cooperation of the issuing Member State by, for example, making a request to that effect, with the result that there is a risk that, following refusal of surrender for purposes of executing the sentence, the executing Member State cannot take over execution of that sentence, while that risk does not affect the obligation to refuse surrender for purposes of executing the sentence?[116]

In questions two and three, the referring court asked the CJEU, in case the answer to question 1 is "no", whether national courts can apply the provisions of FD EAW directly, and if so, whether Article 4(6) FD EAW is sufficiently precise and unconditional so as to be applied directly by national courts. If such a direct application is not possible, the referring court has asked the CJEU whether a Member State, whose national law requires a treaty basis for the execution of a foreign sentence, is allowed to transpose FD EAW into its national law in such a way that FD EAW itself constitutes the (by Dutch law required) legal (treaty) basis for the transfer of the sentence, so that the risk of impunity can be avoided.

As was described in detail in the introduction to this report, these preliminary questions are based on the Dutch implementation of Article 4(6) FD EAW. More specifically the questions were caused by the fact that the Dutch implementation in Article 6 of the Dutch Surrender Act contains a mandatory refusal ground. However no obligation exists to execute the sentence, after a refusal of the EAW. Article 6 of the Dutch Surrender Act provides that just

116 *Request for a Preliminary Ruling from the Rechtbank Amsterdam (Netherlands) lodged on 6 November 2015 — Openbaar Ministerie v. Daniel Adam Popławski* (Case C-579/15).

willingness is expressed by the prosecutor to transfer the sentence. This was complicated by the decision of the Dutch legislator to apply the possibility provided in Article 28 of FD 909 to make a declaration that states that a Member State may continue to apply the existing (pre-FD 909) legal instruments on the transfer of sentenced persons for any EAW that is based on a sentence that became irrevocable before 5 December 2011. On the basis of the existing instruments between the Netherlands and Poland, the transfer of a sentence from Poland to the Netherlands in these circumstances is only possible when evidence is available that the sentenced person has actually fled Poland in order to avoid the execution of the sentence in Poland. In case the Ministry of Justice determines that the wanted person did not flee from justice, this situation may result in impunity when the judicial authority in the Netherlands applies the Dutch implementation of Article 4(6) FD EAW, which is implemented as a mandatory ground for non-execution. Finally, the questions were sparked by the impossibility to transfer the sentence in the case of Mr Popławski. This was due to the answer of the Polish authorities that they would not send a request to transfer the sentence, but that the Dutch authorities, should they decide to refuse the EAW, should then execute the sentence, without a request thereto from Poland, on the basis of Article 4(6) FD EAW after which the Ministry of Justice refused the transfer of the sentence.

5.3 Judgment of the CJEU

In its judgment of 29 June 2017, the CJEU ruled that, in transposing Article 4(6) FD EAW in the national law of a Member State, a Member State should provide the deciding judicial authority with a margin of discretion to decide whether it is appropriate to refuse the execution of the EAW. In applying this margin of discretion, the executing judicial authority should 'give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires'.[117] The CJEU based this ruling on the text of the FD EAW and more specifically on the text of Article 2(1) FD EAW, from which it can be concluded that 'the execution of the EAW constitutes the rule, [and] the refusal to execute is intended to be an exception which must be interpreted strictly'.[118] Furthermore, the CJEU recalled that Article 4(6) FD EAW sets out a ground for optional non-execution

117 Case C-579/15, *Popławski*, EU:C:2017:503, par. 21.
118 Case C-579/15, *Popławski*, EU:C:2017:503, par. 19.

of an EAW. Under this optional ground for non-execution, the 'executing judicial authority "may" refuse to execute an EAW for the purposes of enforcing a custodial sentence where, in particular, the requested person is a resident of the executing Member State, as is the case in the main proceedings, and that State "undertakes" to enforce that sentence in accordance with its domestic law'.[119] The CJEU ruled that the 'obligation to undertake' provided in Article 4(6) FD EAW indeed entails an actual obligation to undertake.[120] This means that 'any refusal to execute an EAW presupposes an actual undertaking on the part of the executing Member State to execute the custodial sentence imposed on the requested person', and that 'any refusal to execute an EAW must be preceded by the executing judicial authority's examination of whether it is actually possible to execute the sentence in accordance with its domestic law'.[121] In case this actual possibility does not exist, the executing judicial authority should decide to allow the surrender. The CJEU concluded that declaring willingness to take over the sentence does not constitute an actual undertaking to take over the sentence.

Hereafter, the CJEU analyzed whether the FD EAW had direct effect, and whether Article 4(6) FD EAW may be considered as a legal basis for the transfer of the sentence under Dutch law. In answering these questions, the court has ruled that the FD EAW does not have direct effect. However, the CJEU recalled the *Pupino* judgment and held that the 'obligation to interpret national law in conformity with EU law is inherent in the system of the FEU Treaty' and that this 'principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*'.[122] Although the CJEU recalled that it has 'consistently held that it does not have jurisdiction to interpret the domestic law of a Member State', it also held that it may provide guidance so that the national court is enabled to give judgment.[123] The CJEU therefore submitted that, given the fact that FD EAW has 'replaced all conventions which existed between Member States and that it coexists, whilst having its own legal arrangements defined by EU law, with the extradition conventions in force between the various Member States and third States, it is not inconceivable

119 Case C-579/15, *Popławski*, EU:C:2017:503, par. 20.
120 *See* par. 38, which states that it is 'the obligation for the Netherlands State to execute the EAW in question or, in the event of a refusal, the obligation to ensure that the sentence pronounced in Poland is actually executed'.
121 Case C-579/15, *Popławski*, EU:C:2017:503, par. 22.
122 Case C-579/15, *Popławski*, EU:C:2017:503, par. 30 and 33.
123 Case C-579/15, *Popławski*, EU:C:2017:503, par. 39.

that that framework decision could be placed on the same footing as such a convention'.[124] Furthermore, the CJEU submitted that Article 6(3) of the *Dutch Act*, which requires another applicable convention for the transfer of the sentence when FD 909 does not apply, does not rule out an interpretation in which Article 4(6) FD EAW is being regarded as such another applicable convention, especially because such an interpretation is compatible with the purposes of the FD EAW.

5.4 Implications of the *Popławski* ruling regarding the application of Article 4(6) FD EAW

Implementation

Chapter 4 described how Article 4(6) FD EAW has been transposed differently in the national legal systems of the examined Member States. As a result, two types of implementation could be distinguished. The examined Member States (1) transposed it either as a ground for optional non-execution or (2) transposed it as a ground for mandatory non-execution, which also means that it is transposed in such a way that the refusal depends on the consent or request of the wanted person. The question is, when looking at the *Popławski* judgment, whether these different forms of implementation conform to the scope and objective of Article 4(6) FD EAW.

In paragraph 23 of the ruling, the Court held that 'legislation of a Member State which implements Article 4(6) of FD EAW by providing that its judicial authorities are, in any event, obliged to refuse to execute an EAW in the event that the requested person resides in that Member State, without those authorities having any margin of discretion, and without that Member State actually undertaking to execute the custodial sentence pronounced against that requested person, thereby creating a risk of impunity of that requested person, cannot be regarded as compatible with that framework decision'.[125] When looking at this paragraph, it seems obvious that a transposition of Article 4(6) FD EAW into a ground for mandatory non-execution for certain categories of wanted persons without actually undertaking to execute the sentence is not in line with FD EAW. The deciding judicial authority does, after all, not have any margin of discretion when it comes to the question whether an EAW should be

124 Case C-579/15, *Popławski*, EU:C:2017:503CJEU, par. 41.
125 Case C-579/15, *Popławski*, EU:C:2017:503, par. 23.

refused. Another type of implementation, namely the implementation of Article 4(6) FD EAW as a ground for mandatory non-execution when the wanted person does not consent or request it, is, for the same reasons, not in line with the *Popławski* judgment.

Although it is clear that a transposition of Article 4(6) FD EAW into a ground for mandatory non-execution is not in line with the *Popławski* ruling, the subsequent question is how this provision should be transposed into the national laws of the Member States. In answering this question, it is important to look at what the CJEU exactly meant with the concept of the margin of discretion of the deciding judicial authority. Although it is evident that the CJEU implied that a certain margin of discretion for the deciding judicial authority is necessary, the question is how this margin of discretion should be conceived. When examining the ruling of the CJEU and the text of the provision, two applications of the margin of discretion may be distinguished: a narrow application and a broad application.

A narrow application is characterized by the small amount of discretion provided to the deciding judicial authority in assessing whether to refuse the EAW. When this narrow application is used, a procedure similar to the ground for mandatory non-execution as was mentioned above would be possible. In such a procedure, the deciding judicial authority is forced by law to refuse the execution of an EAW when it concerns certain categories of wanted persons, as long as the necessary mechanisms are in place to be able to undertake the execution of the sentence. In this procedure, the executing Member State, in its national legislation, could for example oblige the deciding judicial authority to refuse all EAWs for nationals of the executing Member State in those cases where the foreign sentence can be executed in executing Member State. When the transfer of the sentence is not possible, the deciding judicial authority should decide that the national must be surrendered. In this type of procedure, the ground rule would be the surrender of the wanted person, except if they meet a nationality or residency requirement *and* the transfer of the sentence is possible in the executing Member State. When such a narrow application is used, the only margin of discretion for the deciding judicial authority is the power to assess whether a wanted person would fall under one of the categories of wanted persons for whom the refusal ground would apply.

A broad application implies a deciding judicial authority with the discretionary power to assess the chances of reintegration into society of a wanted person prior to assessing whether the sentence can actually be transferred.

This assessment of the chances of reintegration is not limited by the existence of certain categories of wanted persons who fall under the refusal ground automatically. The deciding judicial authority would thus have the power to surrender any wanted person, irrespective of his nationality, when it appears that there are insufficient ties with the executing member state.[126] This application would thus, unlike the narrow application, take into account another important aspect of Article 4(6) FD EAW. In paragraph 21 of the *Popławski* ruling the CJEU namely states that the deciding judicial authority, as part of its margin of discretion, 'must take into consideration the objective of the ground for optional non-execution set out in that provision, which, according to the Court's settled case-law, means enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires'.[127] From this link between the margin of discretion and the objective of reintegration into society, it becomes clear that the margin of discretion should also include an assessment of the chances of reintegration of the wanted person. It seems clear that prior to actually assessing whether the sentence can be transferred, the deciding judicial authority should assess whether the chances of reintegration into society of the wanted person, who would fall within the scope of the refusal ground, would increase when the EAW would be refused and the sentence would be transferred. Furthermore, the deciding judicial authority would also have the ability, when it appears that the sentence cannot be transferred, to surrender a wanted person irrespective of whether he has extensive ties with the executing member state. The margin of discretion thus would encompass both the power to assess whether any wanted person would fall under the scope of the refusal ground and the ability to decide to surrender that wanted person when the transfer of the sentence cannot take place.

When both the narrow and broad application to the margin of discretion are analyzed, it seems clear that a narrow application would not be in line with the *Popławski* ruling given the fact that such an application would not take into account the objective of reintegration into society. This finding would lead to the consequence, as will be explained into more detail below, that certain Member States, which have provisions in their constitutions prohibiting the surrender

126 An outcome of this broad application is that it is questionable whether it is possible that the nationality of the wanted person of a certain Member State should lead to the 'irrebuttable presumption that the social rehabilitation of the person concerned is necessarily best favored by having the sentence executed in that State'.

127 Case C-579/15, *Popławski*, EU:C:2017:503, par. 21.

of nationals for the purpose of the execution of an irrevocable sentence, are required to change their national legislation. If indeed an assessment regarding the preferable Member State of resocialization should be made with regard to all persons, these Member States would not only need to change their implementations of Article 4(6) FD EAW in a way that might be *contra legem*, but may also be required to change their constitutions. One can imagine the political and legal issues such changes may cause.

The obligation to undertake the execution of the sentence

In its judgment, the CJEU stated that it follows from the wording of Article 4(6) FD EAW that 'any refusal to execute an EAW presupposes an actual undertaking on the part of the executing Member State to execute the custodial sentence imposed on the requested person, even though, in any event, the mere fact that that Member State declares itself 'willing' to execute the sentence could not be regarded as justifying such a refusal'.[128] This means that any judicial authority deciding on the execution of an EAW, should, prior to actually refusing the EAW, examine whether it is actually possible to transfer the sentence to the executing Member State. When looking at the findings in Chapter 2 and Chapter 4 of this report, it is evident that the procedures in a significant number of Member States are not in conformity with the *Popławski* ruling. In these Member States, it is not assessed prior to the refusal whether it is possible to undertake to execute the sentence. After the refusal, these Member States declare themselves willing to take over the sentence and they subsequently wait for any request thereto. After the EAW has been refused, it is not possible to re-open the EAW proceedings in these Member States. Given the fact that the CJEU has ruled that such a declaration of willingness could not justify a refusal of the EAW, the question is what the consequences of this ruling are for these Member States. Another question that arises is what the consequences of this ruling are for those Member States that decide to refuse the EAW and to take over the sentence *ex officio* without investigating whether the issuing Member State consents thereto or requests thereto. After all, in these Member States, the execution of the sentence is an automatic consequence of the refusal of the EAW.

Although the CJEU has not clarified in detail how the Member States should shape their national procedures on this matter, the CJEU does provide some guidance. According to the CJEU, 'any refusal to execute an EAW must be

128 Case C-579/15, *Popławski*, EU:C:2017:503, par. 22.

preceded by the executing judicial authority's examination of whether it is actually possible to execute the sentence in accordance with its domestic law'.[129] Furthermore, the CJEU stated that when it seems impossible to execute the sentence, it is up to the judicial authority to execute the EAW and to surrender the wanted person. It thus becomes clear that the court aims at a national procedure in which a refusal would not be possible when no assessment on the possibility of the transfer of the sentence has been made. In practical terms, this would mean that the deciding judicial authority should always investigate this matter during the EAW procedure. Furthermore, the CJEU clearly stated that this assessment should be done on the basis of domestic law. This means that when national provisions are not in place on which the transfer of the sentence can be based, the surrender should be approved.

The CJEU did not set out how this assessment on the possibility of the transfer of the sentence should be done in practice. Given the CJEU's statement that it should be examined whether it is *actually* possible to transfer the sentence, it seems obvious that the deciding judicial authority should be convinced that the sentence will actually be transferred and executed when the EAW is refused.

Deciding authority

The *Popławski* ruling does not provide any explicit answers to the question whether the judicial authority deciding on the execution of the EAW should also be the deciding judicial authority on the actual transfer and execution of the sentence. As we have seen in Chapter 2 and Chapter 3 of this report, several Member States have put in place separate authorities that decide on either the EAW or on the request for the transfer of the sentence. In other Member States, the deciding authority on the EAW will, in one judgment, both refuse the execution of the EAW and take over the sentence therewith binding all national authorities responsible for the actual execution of the sentence. Which procedure should prevail is difficult to answer when looking at the *Popławski* judgment. It does, however, seem evident that the deciding authority on the EAW should have a final say on the decision of the transfer of the sentence. In paragraph 43 of the *Popławski* judgment, the CJEU after all stated that the 'judicial authorities of the executing Member State are themselves required to ensure that the sentence pronounced against that person is actually executed' when the EAW is refused. On the basis of this reasoning, one could argue that the deciding judicial authority on the execution of the EAW should also be the

129 Case C-579/15, *Popławski*, EU:C:2017:503, par. 22.

deciding authority on the actual execution of the sentence and not, for example, an organ of the executive.[130]

Legal basis for the transfer of the sentence

In answering preliminary questions two and three, the CJEU stated that it may only provide guidance to the national court when it comes to the question whether Article 4(6) FD EAW may be seen as a legal basis for the transfer of the sentence. Although the answers to questions 2 and 3 mainly focused on the Dutch implementing provisions, the CJEU did indirectly rule that Article 4(6) FD EAW may, as such, be used as the legal basis on which the transfer of the sentence can take place. This means that, when conducting the aforementioned assessment on whether it is possible to actually transfer the sentence, the impossibility of the transfer cannot originate in the fact that a legal basis for the transfer of the sentence is lacking. After all, Article 4(6) FD EAW can, on its own, function as a legal basis.

Obligation of interpretation in conformity with the FD EAW

In paragraphs 32 to 36 of the *Popławski* judgment, the CJEU recalled settled case-law of the CJEU with regard to the obligation of interpretation in conformity with the EU framework decisions. The CJEU referred to a number of judgments from which it can be concluded that the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*. In doing so, the CJEU also referred repeatedly to the *Ognyanov* case,[131] in which a clear explanation of the obligation of conforming interpretation was provided. Paragraph 66 of *Ognyanov* held that:

> the obligation to interpret national law with EU law ceases [...] when the former cannot be applied in a way that would lead to a result compatible with that envisaged by that framework decision. In other words, that principle cannot serve as the basis for an interpretation of national law *contra legem*. That principle does, however, require that the national

130 This reasoning would also be in line with recital 8 of the FD EAW, which states that 'decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender'. The CJEU has ruled in the case of *Kovalkovas* (case C-477/16 PPU, *Kovalkovas*, ECLI:EU:C:2016:861) that the term judicial authority is an autonomous concept of EU law which means that that may preclude an 'organ of the executive'.

131 Case C-614/14, *Ognyanov*, EU:C:2016:514.

> court consider, where necessary, the whole body of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.

Although it is clear that this doctrine should be considered established case-law of the CJEU, it could pose significant problems for a number of the examined Member States with regard to their implementations of Article 4(6) FD EAW. As was described above, the most far-reaching and significant components of the *Popławski* ruling deal with the obligation to implement Article 4(6) FD EAW as a ground for optional non-execution only together with an obligation to undertake. However, a large group of Member States implemented Article 4(6) FD EAW as a ground for mandatory non-execution for certain categories of wanted persons and/or implemented the obligation to undertake as an obligation to inform on the willingness to undertake. Given that the national laws based on these two components clashes with the judgment of the CJEU, a problem may arise with regard to the obligation of conforming interpretation. In case the national implementation of a Member State, for example, prescribes that the surrender of a national or resident will not be allowed in case his surrender was requested for the purpose of an irrevocable custodial sentence, it will be difficult for the deciding judicial authority to apply that provision in such a way that it would lead to a result compatible with that envisaged by FD EAW. In other words, when in this case the deciding judicial authority would rule that the national should be surrendered because the sentence could not be executed, this ruling would be an interpretation of national law *contra legem*. When the national legislator is not willing or not able to change the national provision, the outcome might be that these Member States put aside the *Popławski* ruling and decide to continue with the existing procedure, which, for obvious reasons is undesirable.

5.5 Concluding remarks

In *Popławski*, the CJEU ruled that Article 4(6) FD EAW should be interpreted to the effect that it prohibits a situation in which an EAW for execution purposes should at all times be refused for certain categories of persons and where the executing Member State is only obliged to inform the issuing Member State of its willingness to take over the sentence. The CJEU furthermore held that in a situation as mentioned above, it should not be possible to refuse the EAW prior to the decision on the actual transfer of the sentence, or if the EAW is refused on these grounds it should be possible to challenge the refusal at

the moment when the subsequent transfer of the sentence proves to be impossible. Although it remains to be seen how this ruling will affect the procedures in the examined Member States, it is clear that the CJEU has explicitly ruled that a procedure in which an EAW is refused for the purposes of Article 4(6) FD EAW without a prior assessment whether the transfer of the sentence is actually possible, is not in conformity with the scope and purpose of Article 4(6) FD EAW. It seems that the national procedures regarding Article 4(6) FD EAW in a large group of Member States are in line with this judgment. This group of Member States indeed assesses prior to the decision on either the execution of the EAW or the refusal thereof, whether the sentence can actually be transferred. It is expected that these Member States will not need to adapt their national procedures significantly. It seems that another group of Member States will have to change their national procedures to a larger extent. Especially, the group of Member States that have implemented the provision as a ground for mandatory non-execution and/or declare that they are willing to execute the sentence after the refusal of the EAW will need to change their national procedures in one way or another.

In answering the question which lies at the basis of this report, namely whether resocialization supersedes surrender, the CJEU has provided a clear answer in its judgment. When a Member State refuses to execute an EAW based on Article 4(6) of FD EAW, that refusal must go hand-in-hand with an obligation to undertake the execution of the sentence by the executing Member State.[132] Although the CJEU has decided that the deciding judicial authority should be enabled to give particular weight to the notion of facilitating reintegration into society, it first of all decided that, when the executing Member State finds that it is impossible to undertake the execution of the sentence, the Member State is obliged to execute the EAW and thus surrender the wanted person. One could say that the principle of facilitating reintegration into society is limited by the actual possibility to take over the sentence and therefore does not supersede surrender.

132 Case C-579/15, Popławski, EU:C:2017:503, par. 22 : 'any refusal to execute an EAW presupposes an actual undertaking on the part of the executing Member State to execute the custodial sentence imposed on the requested person'.

ANNEX

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Questionnaire

CENTER FOR INTERNATIONAL LEGAL ASSISTANCE AMSTERDAM

QUESTIONNAIRE ON THE IMPLEMENTATION OF ARTICLE 4 PARAGRAPH 6 FRAMEWORK DECISION EAW

PROJECT 'A COMPARATIVE ANALYSIS OF THE IMPLEMENTATION OF ARTICLE 4 PARAGRAPH 6 FRAMEWORK DECISION 2002/584. RESOCIALIZATION ABOVE SURRENDER?'

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11 January 2016

Questionnaire

1. **How has article 4 par. 6 FD EAW been implemented in the national laws of the member state? Please provide details regarding the national implementation of these provisions and the relevant provisions of law. In answering this question, could you please provide extra attention to the following questions:**

   1.1. Is art. 4 par. 6 FD EAW implemented in the national law? If yes, could you specify whether the ground for refusal in the aforementioned article is optional or mandatory in your legal system? If not, could you please explain how nationals and residents are treated when their surrender is requested.

   1.2. Art. 4 par. 6 FD EAW states: "If the European arrest warrant has been issued for the purpose of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State **undertakes** to execute the sentence or detention order in accordance with its domestic law'. Could you indicate how this "obligation to undertake" is implemented in your legislation.

   1.3. Are extra conditions installed in your national law on surrender that limits the applicability of the refusal ground of art. 4 par. 6 FD EAW (such as jurisdiction in art. 6 par. 5 Dutch Surrender Act)?

2. **Could you explain, in the context of art. 4 par. 6 FD EAW, how, as an executing country, an EAW is dealt with, from the start of the procedure until the judicial decision and the execution of the decision? Please specifically note the following questions, divided by categories of wanted persons.**

   2.1. Own nationals

      2.1.1. Is the surrender allowed of own nationals, when an EAW is executed for an irrevocable and executable verdict with prison sentence?

      2.1.2. If yes, are there extra conditions or guarantees involved?

      2.1.3. If no, will the surrender be refused?

      2.1.4. Which judicial authority decides on this matter and in what stage of the procedure?

2.2. EU nationality /third country person

2.2.1. Does your national law on surrender(regarding art. 4 par. 6 FD EAW) make a distinction between categories of wanted persons, such as persons with an EU nationality, third country persons or others?

2.2.2. To what extent are categories of wanted persons (EU nationals or third country persons) to be treated equally as own nationals (for the scope of art. 4 par. 6 FD EAW). If this is possible in your national law, what conditions should be met for this equal treatment?

2.2.3. To what extent will the relocation of the main place of stay, for instance when the wanted person lived in another country for a period, or during detention abroad or in your executing State, influence this possible equal treatment?

2.2.4. What authority assesses a possible equal treatment of residents with an EU nationality or of third country persons? And in what stage of the procedure?

2.2.5. What would the legal consequences be in the surrender procedure of such an equal treatment (see also point 3.)?

2.2.6. To what extent is a possible loss of the right of residence in your executing country a factor in the decision (for example when the wanted person would become an unwanted or illegal alien, persona non grata)?

2.2.7. What procedure is followed in the assessment of a possible loss of the right of residence (which authority does this, in what stage of the surrender procedure, in what time frame)?

2.2.8. To what extent are Immigration Services or other authorities than judicial ones involved in the process.

2.2.9. Which factors play a part in the assessment of a possible loss of the right of residence? In the Netherlands factors weighed by the Immigration Services are for example: time spent or to be spent in detention, a "danger for public security", "actual threat", length of stay and family live (art. 8 ECHR).

2.3. Does the aforementioned procedure differ if the requested person choses the accelerated procedure (gives consent to the surrender procedure, hence expresses renunciation of entitlement to the 'speciality rule' according to article 13 of the FD EAW?) regarding:

2.3.1. Own national

2.3.2. EU nationality /third country person

3. What are the legal consequences of a refusal of an EAW, based on the implementation of art. 4 par. 6 FD EAW? Specifically note the following questions.

3.1 Does your executing state execute the sentence mentioned in the EAW on their own initiative? Or does your executing State offer the requesting State to take over the execution of the sentence mentioned in the EAW? Or does your executing state do nothing? Please mention if something else is relevant.

3.2 If the first two options apply, is this according to your national law an obligation? Which authority executes this or offers this? And is this the same authority that refused the EAW?

3.3 Is this procedure the same for every category of wanted persons (own nationals, persons with an EU nationality, third country persons). And does it depend on which EU country sent the EAW?

3.4 Art. 4 par. 6 of the FD EAW regulates that an EAW can be refused for nationals and residents of the executing member state "and that State undertakes to execute the sentence or detention order in accordance with its domestic law".
Could you specify in what stage of the surrender procedure is assessed whether the transfer of the sentence is actually possible?

3.4.1 If this is assessed before the decision is taken on whether the surrender will be allowed or refused:
Is the execution of the sentence (or the obligation or the offer to do so), a condition for the refusal of the EAW?

3.4.2 If this is assessed after the decision of refusal of the surrender:
Is the execution of the sentence (or the obligation or the offer to do so), a legal consequence of the refusal of the EAW? And what are the consequences if it turns out that the execution of the sentence is not possible or did not succeed? Will the surrender be allowed? Or will it still be refused, (which would bring along impunity)?

3.5 Which legal basis is used for the (transfer of the) execution of the sentence, when the EAW is refused based on the implementation of art. 4 par. 6 FD EAW?

3.5.1 Is the (art. 4 par. 6) FD EAW itself used as a basis, or does your national law requires another (treaty)basis that makes the (transfer of the) execution possible (such as FD 2008/909,

Schengen Agreement 19 June 1990, Convention on the transfer of sentenced persons , 21.03.83)?

3.5.2 Which authority assesses this? Which authority executes this?

3.5.3 Some countries (NL, PL, IE, MT) made the declaration of article 28(2) of the FD 909 (transfer of sentences), which means that the existing legal instruments apply on final judgments dated before the 5th of December 2011. Does this in the practice of your country create problems for the transfer of the sentence with these countries, after a refusal of the EAW based on art. 4 par. 6 FD EAW?

3.5.4 Are there other possibilities or alternatives in your executing state to fulfil the obligation of art. 4 par. 6 FD EAW to undertake the execution of the sentence?

3.6 If the surrender for a verdict would have been partly refused due to lack of dual criminality, but is actually entirely refused because of the implementation of art. 4 par. 6 FD EAW, what happens when the sentence is then executed in your state. Is this partly done? What is the procedure for this? Or is it refused?

3.7 When your executing state can undertake the execution of the sentence, must this be formally approved? If yes, by which authority? Is the receipt of a copy of the verdict a requirement in this procedure?

4 Could you explain, in the context of art. 5 par. 3 FD EAW how, as an executing country an EAW is dealt with, from the start of the procedure, until the judicial decision and the execution of the decision? Please specifically note the following questions, divided by categories of wanted persons.

4.1 Own nationals

4.1.1 Could you specify if and if yes, in which phase of the procedure a "guarantee to return" is requested to the authority that sent the EAW? Which authority requests this?

4.1.2 What are the consequences when this "guarantee to return" is not provided by the requesting state? Does that happen?

4.2 EU nationality / third country person

4.2.1 Is the procedure regarding equal treatment as own nationals in EAW's for prosecution purposes (and thus art 5 par. 3 FD EAW) different from the procedure regarding execution-EAWs (as described in point 2.2.)? Are the criteria for equal treatment the same as for art. 4 par. 6 FD EAW?

4.2.2 In which phase of the procedure will a "guarantee to return" be requested in the case of equal treatment of EU nationals/ third country persons? Which authority requests this?

4.2.3 What are the consequences when this "guarantee to return" is not provided by the requesting state? Does that happen?

4.3 Does the aforementioned procedure differ if the requested person choses the accelerated procedure (gives consent to the surrender procedure, hence expresses renunciation of entitlement to the 'speciality rule' according to article 13 of the FDEAB) regarding:

4.3.1. Own national

4.3.2. EU nationality /third country person

5. What are the legal consequences of a surrender with a "guarantee to return" as mentioned in art. 5 par. 3 FD EAW? Please specifically note the following questions.

5.1. To what extent is either the issuing or executing state obliged, after an irrevocable conviction of the wanted person, to take back or return the sentenced person when a guarantee to return has been provided? If such an obligation does not exist in your country, which authority decides on whether a wanted person should be taken back, returned or not taken back or returned at all?

5.2. Could you describe how, after the actual surrender of a wanted person with a "guarantee to return", the return of this person is actually arranged and regulated?

5.2.1. Must the surrendered person make a formal request for his return, after irrevocable conviction in the requesting state? What is the required legal basis for such requests? Which authority in your country decides on such a request to return to your country?
Or is it otherwise arranged?

5.2.2. What happens to the imposed sentence on return of the surrendered person? Which authority decides on that issue? Is the sentence executed without interruption after the return of the surrendered person? If not, when is the remainder of the sentence executed? Will the imposed penalty be adjusted somehow?

5.3. Could the possible loss of the right of residence in your country play a role in a decision not to agree with the return of the wanted person?

5.4. If the requesting state refuses to provide a guarantee to return and the surrender is thus refused, does your executing state offers an alternative, such as the transfer of the prosecution? Is there an obligation to do so? Are there specific criteria for such a transfer of the prosecution?

6. As a requesting state

6.1. If an EAW is refused, which you have sent, by the executing state on the base (of the implementation of) art. 4 par. 6 FD EAW, what actions do you take, if any at all?
6.2. Which authority provides a "guarantee to return" in your country, when requested by an executing state? What are the criteria?

7. Miscellany

7.1. Could you provide statistic data on the application of the refusal ground of art. 4 par. 6 and art. 5 par. 3 FD EAW in your executing country?
7.2. In relation to which requesting countries does the refusal ground of art. 4 par. 6 FD EAW occur the most in your surrender-procedures? Could you analyze why? Could you also specify it to categories of wanted persons (nationals, EU, third country)?
7.3. Could you provide statistic data on migration and immigration for your country?
7.4. Could you summarize relevant national jurisprudence regarding (the implementation of) art. 4 par. 6 FD EAW and art. 5 par. 3 FD EAW?
7.5. Could you mention European jurisprudence regarding art. 4 par. 6 and art. 5 par. 3 FD EAW which had a particularly large influence on the practice in your country?
7.6. Do certain human rights play a more significant role in this procedure regarding art. 4 par. 6 and art. 5 par. 3 FD EAW, such as ECHR and the Charter.
7.7. To what extent is a defense lawyer involved in the different stages of the surrender procedure, regarding art. 4 par. 6 FD EAW, and the subsequent execution of the sentence? What is the role and responsibility of the defense lawyer in de procedure?
7.8. To what extent does the view/opinion of the wanted person play a role in the procedure with regard to art. 4 par. 6 FD EAW ?

7.9. What happens when a national is on your national airport on his way to another country and he is arrested on the airport because of an EAW and the verdict turns out to be irrevocable?
   7.9.1. Does your answer depend on the country of the destination (within the EU or outside the EU)?
   7.9.2. Does your answer depend on if this question arises in the weekend, in the evening or during a working day?
   7.9.3. What if this is not a national but someone from another EU country, living 5 years in your country of a third country person?

7.10. Does it happen that nationals or equally treated EU nationals get arrested on an EAW and in 4 days the verdict turns out to be an irrevocable. If yes, what happens when punitive damages are requested for these 4 days?

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– DISCLAIMER – The interviewed practitioners and experts that have responded to the questionnaire stressed that their responses reflect their personal opinion, and do not constitute the official position of their Member State.

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In this study the surrender of nationals and residents within the EU is examined, both a complicated legal issue and a sensitive political issue.
Article 4 (6) of the Framework Decision on the EAW provides that a Member State may refuse the execution of a European Arrest Warrant, if that Member State undertakes the execution of the imposed sentence in accordance with its domestic law. This report describes the different implementations of Article 4 (6) of the FD EAW in the Member States and focuses on which authorities are involved in the process of refusing the EAW and the subsequent execution of the sentence, as well as which criteria should be fulfilled to be considered a resident. This report will address the consequences of a collision of the principle of facilitating reintegration into society with the principle of Mutual Recognition on which the intention to surrender the convicted person to the issuing state is based.

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Der Generalstaatsanwalt in München

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