


The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness based on Earned Trust

*O modelo europeu de cooperação judiciária em matéria penal:
em busca de uma efetividade baseada em confiança merecida*

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ABSTRACT: The EU model of international judicial cooperation in criminal matters, based on a high level of presumed mutual trust among Member States and on the principle of mutual recognition resulting therefrom, purports to go beyond traditional models of cooperation by enabling simplicity and speed on a ‘no questions asked’ approach. The European Arrest Warrant is emblematic in this respect. Nonetheless, the operation of this tool has not been a straightforward or uncomplicated task, in particular from the point of view of the interplay between mutual recognition and fundamental rights. This article analyses the evolution of such interaction, and how fundamental rights can act as either limits or drivers of mutual recognition. It aims to show how individual rights and guarantees have limited automatic recognition and sheer effectiveness, and, conversely, how the harmonisation of defence rights at the EU level can provide a basis for enhancing mutual trust and thus facilitating mutual recognition in criminal matters. In conclusion, it will be submitted that EU law can achieve effective judicial cooperation in criminal matters by moving from ‘blind’ to earned trust in Europe’s area of criminal justice.

KEYWORDS: mutual recognition; European Arrest Warrant; European

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Criminal Law; fundamental rights; harmonisation; judicial cooperation; mutual trust.

RESUMO: *O modelo europeu de cooperação judiciária internacional em matéria penal, baseado em um elevado nível de confiança mútua presumida entre os Estados-Membros e no consequente princípio do reconhecimento mútuo, pretende ir além dos modelos tradicionais de cooperação, permitindo simplicidade e rapidez em uma perspectiva de "não se fazem perguntas". O mandado de detenção europeu é emblemático dessa abordagem. No entanto, o funcionamento desse mecanismo não tem sido uma tarefa simples ou descomplicada, especialmente em relação à interação entre o reconhecimento mútuo e os direitos fundamentais. Este artigo analisa a evolução de tal interação e como os direitos fundamentais podem atuar como limites ou facilitadores do reconhecimento mútuo. Pretende-se demonstrar como os direitos e garantias individuais limitam o reconhecimento automático e a pura eficácia e, inversamente, como a harmonização dos direitos de defesa na UE pode fornecer uma base adequada para reforçar a confiança mútua e facilitar assim o reconhecimento mútuo em matéria penal. Em conclusão, será sustentado que a legislação da UE pode alcançar uma cooperação judiciária efetiva em matéria penal, passando de confiança "cega" para confiança conquistada no âmbito da justiça penal europeia.*

PALAVRAS-CHAVE: *reconhecimento mútuo; mandado de detenção europeu; direito penal europeu; direitos fundamentais; harmonização; cooperação judiciária; confiança mútua.*

1. INTRODUCTION

The application of the principle of mutual recognition in the field of European Union (EU) criminal law has provided the motor of European integration in criminal matters. The adoption of a series of mutual recognition measures have established a system of inter-state cooperation aimed at automaticity and a lack of formality, based on a high level of presumed mutual trust among the systems of the Member States. The EU model aims to go beyond traditional models of international cooperation in criminal matters, in enabling simplicity and speed on a

‘no questions asked’ approach. Nonetheless, the operation of mutual recognition in EU criminal law, and in particular its emblematic Framework Decision on the European Arrest Warrant (FD-EAW), has demonstrated that presuming and claiming mutual trust in a field with a low level of EU-wide harmonisation and with significant consequences for fundamental rights has not been a straightforward or uncomplicated task.

The aim of this article is to map the evolution of the EU model of judicial cooperation in criminal matters by casting light on the interplay between mutual recognition and fundamental rights, and by examining in particular the extent to which fundamental rights can act as limits or as facilitators to recognition. The article will begin by placing the application of the principle of mutual recognition – by focusing on the FD-EAW – within the context of the objective to achieve effectiveness in inter-state cooperation in criminal matters. It will then analyse how fundamental rights have emerged as a limit to automatic mutual recognition (both in secondary EU law and in the case-law of the Court of Justice of the European Union - CJEU) and how harmonisation of defence rights can provide a basis for enhancing mutual trust and thus facilitating the operation of mutual recognition in criminal matters. In this manner, the article will assess the extent to which EU law can achieve effective judicial cooperation in criminal matters by moving from ‘blind’ to earned trust in Europe’s area of criminal justice.

2. JUDICIAL COOPERATION, MUTUAL RECOGNITION AND MUTUAL TRUST IN EUROPE’S AREA OF FREEDOM, SECURITY AND JUSTICE

In order to understand the relationship between mutual recognition and mutual trust in Europe’s area of criminal justice it is necessary to cast light on the very design of the Area of Freedom, Security and Justice (AFSJ) as such. While a key feature of the development of the AFSJ is the abolition of cross-border controls between Member States and the creation thus of a single European area where freedom of movement is secured, the latter is not accompanied by a single area of law. The law remains territorial, with Member States retaining to a great extent their sovereignty especially in the field of law enforcement.

A key challenge for European integration in the field has thus been how to make *national* legal systems interact in the borderless Area of Freedom, Security and Justice. Member States have thus far declined unification of law in Europe's criminal justice area. The focus has largely been on the development of systems of cooperation between Member State authorities, with the aim of extending national enforcement capacity throughout the AFSJ in order to compensate for the abolition of internal border controls.

The simplification of movement that the abolition of internal border controls entails has led under this compensatory logic to calls for a similar simplification in inter-state cooperation via automaticity and speed. Following this logic, the construction of the AFSJ as an area without internal frontiers intensifies and justifies automaticity in inter-state cooperation.² Automaticity in inter-state cooperation means that a *national* decision will be enforced beyond the territory of the issuing Member State by authorities in other EU Member States across the AFSJ without many questions being asked and with the requested authority having at its disposal extremely limited – if any at all – grounds to refuse the request for cooperation. The method chosen to secure such automaticity has been the application of the principle of mutual recognition in the fields of judicial cooperation in criminal matters.

Mutual recognition is attractive to Member States resisting further harmonisation or unification in European criminal law as mutual recognition is thought to enhance inter-state cooperation in criminal matters without Member States having to change their national laws to comply with EU harmonisation requirements.³ Mutual recognition creates extraterritoriality⁴: in a borderless AFSJ, the will of an authority

² V. MITSILEGAS, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice. From Automatic Inter-state Cooperation to the Slow Emergence of the Individual", in *Yearbook of European Law*, vol. 31, 2012, p. 319-372.

³ V. MITSILEGAS, "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU", *Common Market Law Review*, vol. 43, 2006, p. 1277-1311.

⁴ K. NICOLAIDIS and G. SHAFFER, "Transnational Mutual Recognition Regimes: Governance without Global Government", *Law and Contemporary Problems*, vol. 68, 2005, p.263-317; K. NICOLAIDIS, "Trusting the Poles? Constructing

in one Member State can be enforced beyond its territorial legal borders and across this area. The acceptance of such extraterritoriality requires a high level of mutual trust between the authorities which take part in the system and is premised upon the acceptance that membership of the European Union means that all EU Member States are fully compliant with fundamental rights norms. It is the acceptance of the high level of integration among EU Member States which has justified automaticity in inter-state cooperation and has led to the adoption of a series of EU instruments which in this context go beyond pre-existing, traditional forms of cooperation set out under public international law, which have afforded a greater degree of scrutiny to requests for cooperation. Membership of the European Union *presumes* the full respect of fundamental rights by all Member States, which creates mutual trust which in turn forms the basis of automaticity in inter-state cooperation in Europe's area of criminal justice.

Framed in this manner, mutual recognition has emerged as the motor of European integration in criminal matters under the third pillar. The adoption in 2001 by the Council of a detailed Programme of measures to implement the principle of mutual recognition of decisions in criminal matters⁵ has been followed by the adoption of a wide range of Framework Decisions putting forward a comprehensive system of mutual recognition in the field of criminal justice. These Framework Decisions have been adopted essentially in three stages, one shortly post-9/11, an intermediary stage consisting of the adoption of the Framework Decision on the European Evidence Warrant (now superseded by the post-Lisbon Directive on the European Investigation Order) and another in the years leading to the adoption of the Lisbon Treaty.⁶ Their ambit covers all stages of the criminal process extending from the pre-trial (recognition of arrest warrants⁷, evidence

Europe through Mutual Recognition”, *Journal of European Public Policy*, vol. 14, 2007, p. 682-698.

⁵ OJ C 12/10, 15.01.2001.

⁶ V. MITSILEGAS, “The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?”, *European Law Review*, vol. 34, 2009, p. 523-560.

⁷ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1, 18.07.2002.

warrants⁸, freezing orders⁹, decisions on bail¹⁰) to the post-trial stage (recognition of confiscation orders¹¹, of decisions on financial penalties¹², of probation orders¹³ and of decisions on the transfer of sentenced persons¹⁴). The system of mutual recognition was completed in the pre-Lisbon stage by a Framework Decision on judgments *in absentia*, which amended a number of the preceding Framework Decisions to specify cases when recognition of a judgment could or could not be refused¹⁵.

⁸ Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350/72, 30.12.2008. Post-Lisbon replaced by the Directive on the European Investigation Order (see below).

⁹ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196/45, 02.08.2003.

¹⁰ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294/20, 11.11.2009.

¹¹ Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328/59, 24.11.2006.

¹² Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76/16, 22.3.2005.

¹³ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337/102, 16.12.2008.

¹⁴ 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, OJ L 327/27, 5.12.2008.

¹⁵ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81/24, 27.3.2009.

The main features of the application of the principle of mutual recognition in criminal matters are automaticity, speed, and the execution of judicial decisions with a minimum of formality¹⁶. Based on mutual trust, the system includes very limited grounds to refuse the recognition and execution of a judicial decision or to raise questions regarding the legal system of the Member State of the issuing authority¹⁷. Automaticity has presented a number of challenges, most notably with regard to the protection of the fundamental rights of affected individuals. These challenges have arisen in particular in the context of the FD-EAW, which is emblematic of the application of the principle of mutual recognition in the field of criminal law. It is the first measure to be adopted in the field and the main mutual recognition measure which has been implemented fully and in detail at the time of writing. Automaticity in the operation of inter-state cooperation under the FD-EAW has been introduced at three levels. Firstly, cooperation must take place within a limited timeframe, under strict deadlines, and on the basis of a pro-forma form annexed to the Framework Decision – this means that in practice few questions can be asked by the executing authority beyond what has been included in the form¹⁸. Secondly, the executing authority is not allowed to verify the existence of dual criminality for a list of 32 categories of offences listed in the Framework Decision¹⁹ – this means that the executing state is asked to deploy its law enforcement mechanism and arrest and surrender an individual for conduct which might not be an offence under its domestic law²⁰. The third level of automaticity arises from the inclusion of limited grounds of refusal to recognise and execute a warrant under this instrument. The FD-EAW includes only three, in their majority procedural, mandatory grounds for refusal²¹, which are complemented

¹⁶ V. MITSILEGAS, fn. 2.

¹⁷ V. MITSILEGAS, *EU Criminal Law*, Hart, 2009, chapter 3.

¹⁸ See Articles 15, 17 and 23 of the Framework Decision. The Court has confirmed the limited role of the executing authority in examining the content of the European Arrest Warrant in its ruling in Case C-261/09 *Gaetano Mantello* [2010] ECR I-11477.

¹⁹ Article 2(2).

²⁰ See the Court's ruling in *Advocaten voor de Wereld* below.

²¹ Article 3.

by a series of optional grounds for refusal²² and provisions on guarantees underpinning the surrender process²³. Non-compliance with fundamental rights is not however explicitly included as a ground to refuse to execute a European Arrest Warrant (EAW).²⁴ This legislative choice reflects the view that cooperation can take place on the basis of a high level of mutual trust in the criminal justice systems of Member States, premised upon the presumption that fundamental rights are in principle respected fully across the European Union. However, as will be seen below, this uncritical acceptance of the existence of a high level of mutual trust has proven to be contested both in the implementation stage in EU Member States and subsequently in litigation before national and European courts.

3. LIMITING AUTOMATICITY: ADDRESSING FUNDAMENTAL RIGHTS CONCERNS IN LEGISLATION

The maximalist approach to mutual recognition adopted in the FD-EAW has led to reactions in European and national legislatures seeking ways of accommodating fundamental rights considerations within the operation of the EU system of mutual recognition²⁵. There are three ways in which fundamental rights concerns have been addressed in legislation: via the use of parallel mutual recognition instruments to alleviate the adverse fundamental rights consequences of automaticity in the execution of mutual recognition requests; via the insertion of grounds for refusal on fundamental rights grounds in subsequent legislation; and via legislation addressing proportionality concerns. In terms of the use of

²² Article 4.

²³ Articles 5, 27 and 28.

²⁴ The provision of Article 1(3) includes the general statement that ‘this Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU’. References to fundamental rights are included also under a general wording in the Preamble to the Framework Decision (recital 12).

²⁵ See V. MITSILEGAS, “Mutual Recognition, Mutual Trust and Fundamental Rights After Lisbon” in V. Mitsilegas, M. Bergström and T. Konstadinides (eds.), *Research Handbook on EU Criminal Law*, Edward Elgar, 2016, p. 148-168, whereupon this section is based.

parallel mutual recognition measures, fundamental rights concerns can be addressed by the Framework Decision on the mutual recognition of bail decisions (the European Supervision Order), which would enable an individual surrendered under a EAW to spend the pre-trial period under bail conditions in the executing, and not the issuing, Member State²⁶. In terms of the use of fundamental rights as a limit to mutual recognition, a number of Member States added non-compliance of surrender with fundamental rights as an express ground of refusal in their national law implementing the European Arrest Warrant Framework Decision²⁷. Moreover, the post-Lisbon Directive on the European Investigation Order (EIO)²⁸ expressly includes non-compliance with fundamental rights as a ground for refusal to recognise and execute an EIO²⁹. The Preamble to the same Directive affirms that the presumption of compliance by Member States with fundamental rights is rebuttable³⁰. Similar provisions have been included in the recent Regulation on mutual recognition of freezing and confiscation orders³¹.

²⁶ The use of the European Supervision Order as a means of addressing lengthy periods of pre-trial detention following the execution of a European Arrest Warrant was discussed and promoted in Sir Scott Baker, *A Review of the United Kingdom's Extradition Arrangements*, presented to the Home Secretary on 30 September 2011.

²⁷ On the implementation of the Framework Decision on the European Arrest Warrant, see V. MITSILEGAS, "The Area of Freedom, Security and Justice from Amsterdam to Lisbon: Challenges of Implementation, Constitutionality and Fundamental Rights", in J. Laffranque (ed.) *The Area of Freedom, Security and Justice, Including Information Society Issues* (Reports of the XXV FIDE Congress, Tallinn 2012), vol. 3, p. 21-142 and national reports included therein.

²⁸ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p. 1-36 .

²⁹ Article 11(1)(f) states that the recognition or execution of an EIO may be refused 'where there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter'.

³⁰ Preamble, recital 19.

³¹ Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, OJ L303/1, 28.11.2018, Articles 8(1)(f) and 19(1)(f).

The third way in which legislators have addressed fundamental rights concerns in the operation of mutual recognition has been via the insertion of proportionality check requirements in secondary law. The focus on proportionality has been triggered by concerns that the extensive scope of the FD-EAW combined with the abolition of the requirement to verify dual criminality has led to warrants being issued for offences considered minor or trivial in the executing state, resulting in considerable pressure to the criminal justice systems of executing Member States and disproportionate results for the requested individuals³². The need to address these proportionality concerns was acknowledged by the European Commission in its latest Report on the implementation of the Framework Decision³³. The prevailing view has thus far been for proportionality to be dealt with in the issuing and not in the executing Member State. This is the interpretative guidance given in the revised version of the European Handbook on how to issue a European Arrest Warrant³⁴. This approach has also been adopted by certain Member States in the implementation of EAW obligations³⁵. The requirement to introduce a proportionality check in the issuing state has also been introduced at EU level in the Directive on the European Investigation Order, which states that the issuing authority may only issue an EIO where the issuing of the latter is necessary and proportionate and where the investigative measures indicated in the EIO could have been ordered under the same conditions in a similar domestic

³² See Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy*, Fifteenth Report, session 2010-12, p. 40-3.

³³ *Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States* COM(2011) 175 final, Brussels, 11.4.2011, p. 8.

³⁴ For the latest version see *Commission Notice - Handbook on how to issue and execute a European arrest warrant*, OJ C 335/1, 6.10.2017, p. 14.

³⁵ A number of changes to the Polish Code of Criminal Procedure came into force on July 1 2015. These include an amendment to Article 607b, which now states that an arrest warrant will not be issued if it is not required by the interest of the administration of justice. The reference to the interest of the administration of justice can be seen as amounting to an implicit proportionality test. I am grateful to Celina Nowak for providing me the relevant information on Polish law.

case³⁶. The Directive thus links proportionality with the requirement to avoid abuse of law via the undertaking of “fishing expeditions” by the authorities of the issuing state.

4. THE RELATIONSHIP BETWEEN MUTUAL RECOGNITION, MUTUAL TRUST AND FUNDAMENTAL RIGHTS BEFORE THE EUROPEAN JUDICIARY

In its early case-law, the CJEU demonstrated strong support for the system established by the European Arrest Warrant Framework Decision³⁷. The entry into force of the Lisbon Treaty, bringing with it the communautarisation of the third pillar, the constitutionalisation of EU criminal law and of the Charter³⁸, has raised hopes that the CJEU would modify its stance regarding fundamental rights scrutiny in the operation of the EAW. These hopes were increased by CJEU case-law in the field of mutual recognition in asylum law: in the case of *NS and ME*, the CJEU ruled that a transfer under the Dublin Regulation would be incompatible with fundamental rights ‘if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State’³⁹. The CJEU approach constituted a paradigmatic shift on mutual recognition based on automaticity: the Court stated expressly that the presumption of compliance with fundamental rights in the receiving Member State is rebuttable⁴⁰ and it placed specific duties to sending authorities to examine fundamental rights compliance⁴¹.

³⁶ Article 6(1)(a) and (b) respectively. A similar approach regarding necessity and proportionality has been adopted in the confiscation Regulation: see Article 1(3) of the Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, OJ L 303, 28.11.2018, p. 1-38.

³⁷ V. MITSILEGAS, fn. 16, chapter 3.

³⁸ V. MITSILEGAS, *EU Criminal Law After Lisbon*, Hart, 2016, chapter 5.

³⁹ Case C-411/10, *N.S. v Secretary of State for the Home Department*, EU:C:2011:865, para 85.

⁴⁰ *Ibid.*, para 104.

⁴¹ *Ibid.*, para 94.

It has been argued that the paradigm change to the operation of mutual trust in *NS and ME* also would be applicable in transfers of individuals under the EAW, establishing thus a horizontal benchmark of fundamental rights protection across the Area of Freedom, Security and Justice⁴². Yet in its first major post-Lisbon cases on the EAW, and notwithstanding also parallel developments in post-Lisbon EU criminal law⁴³, the CJEU appeared reluctant to do so. In *Radu*⁴⁴, and notwithstanding the attempt by AG Sharpston to bring the protection of fundamental rights into the fore (notably by advancing arguments based on proportionality)⁴⁵ the CJEU continued to focus on the effectiveness of the EAW. The *Radu* judgment was followed by *Melloni*⁴⁶, where the CJEU found that Member States cannot refuse to execute a EAW on the basis of a level of fundamental rights protection provided under their national constitution which is higher than the level of protection provided in the Charter. By casting doubt on the uniformity of the standard of protection of fundamental rights as defined in the FD-EAW, Member States would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that Framework Decision⁴⁷. *Melloni* was followed by the questionable elevation of mutual trust to a fundamental principle of EU law in Opinion 2/13 concerning the accession of the EU to the ECHR⁴⁸.

⁴² See V. MITSILEGAS, fn. 1.

⁴³ The post-Lisbon mutual recognition Directive on the European Investigation Order has introduced an optional ground for non-recognition or non-execution where there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter (Article 11(1)(f)).

⁴⁴ Case C-396/11, *Radu*, EU:C:2013:39.

⁴⁵ *Radu*, in particular para. 103.

⁴⁶ Case C-399/11, *Melloni*, EU:C:2013:107.

⁴⁷ *Ibid.*, para 63.

⁴⁸ Case Opinion 2/13 of the Court, *Opinion pursuant to Article 218(11) TFEU*, ECLI:EU:C:2014:2454, paras. 191-192. For a critique, see V. MITSILEGAS, "The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice", *New Journal of European Criminal Law*, vol. 6, 2015, p. 460-485.

The reasoning of the CJEU in both *Melloni* and Opinion 2/13 can be explained from a constitutional law perspective as the Court sending a clear message to the Strasbourg Court and to national constitutional courts of its determination to uphold the primacy and autonomy of EU law⁴⁹. Yet the implications of the Court's reasoning for a meaningful fundamental rights scrutiny in the process of mutual recognition are profound. The CJEU elevated the inherently subjective concept of mutual trust into a fundamental principle of EU law⁵⁰ adopting a version of mutual trust which is to be taken at face value and to be presumed, with cracks in the façade of trust appearing only in exceptional cases. In defending the primacy and autonomy of EU law, the CJEU has thus however undermined the credibility of the EAW system in the eyes of national courts and the Strasbourg Court. The CJEU rulings appeared increasingly at odds with the Strasbourg approach centering on the individualised assessment of fundamental rights violations. This discrepancy was evident in the case of *Tarakhel*⁵¹, involving Dublin transfers from Switzerland to Italy, where the ECtHR found a breach of the Convention with regard to specific individuals *even in a case where generalised systemic deficiencies in the receiving state had not been ascertained*⁵². The CJEU approach vis-à-vis the protection of fundamental rights as enshrined in national constitutions has also raised alarm bells in national constitutional courts. These concerns have been expressed by the *Bundesverfassungsgericht* in a ruling delivered in 2015, where it intervened regarding the scrutiny of fundamental rights in the execution of a EAW in a case of trial in absentia where the defendant's

⁴⁹ See also the CJEU reiterating, in Opinion 2/13 (para. 188), the *Melloni* requirement to uphold the primacy, unity and effectiveness of EU law.

⁵⁰ V. MITSILEGAS, fn. 47.

⁵¹ ECtHR, *Tarakhel v. Switzerland*, Appl. No. 29217/12, Judgment of 4 November 2014.

⁵² *Ibid.*, para 115, emphasis added. As Halberstam has noted, *Tarakhel* was a strong warning signal to Luxembourg that the CJEU's standard better comport either in words or in practice with what Strasbourg demands or else the Dublin system violates the Convention. See D. HALBERSTAM, "It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward", *Michigan Law School, Public Law and Legal Theory Research Paper Series*, vol. 432, 2015, p. 27.

lawyer had not been notified⁵³. The *BVerfG* found that mutual trust has its limits and ‘can be shaken’⁵⁴, ‘if there are indications based on facts that the requirements indispensable for the protection of human dignity would not be complied with in the case of an extradition’⁵⁵. The *BVerfG* focused on the principle of individual guilt, placed within the context of the protection of human dignity, which it asserted is beyond the reach of European integration⁵⁶, and found that it also applies to extraditions that take place on the basis of the EAW Framework Decision⁵⁷. In a landmark ruling, it introduced the requirement of identity review of measures implementing the EAW when the principle of human dignity is at stake. While the *BVerfG* ultimately found that the system established by EU law was not unconstitutional, it put forward a mechanism of scrutiny of fundamental rights concerns by the executing authority on an individualised basis⁵⁸. Whereas the evocation of the identity review by the *BVerfG* has rightly been criticised⁵⁹, the intervention by the German Constitutional Court has been of considerable significance in raising alarm bells in Luxembourg regarding the implications of continuing to uphold a version of presumed, uncritical, ‘blind trust’ for the credibility of the EAW system in the eyes of the authorities which are called upon to operate it and in the eyes of national constitutional courts.

The Court of Justice had the opportunity to examine directly the relationship between fundamental rights, mutual recognition and mutual trust in the joined cases of *Aranyosi* and *Căldăraru*⁶⁰, both referred for a

⁵³ *BVerfG*, Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14 - paras. (1-126).

⁵⁴ *Ibid.*, para 67.

⁵⁵ *Ibid.*, para 74. Also see para 83.

⁵⁶ *Ibid.*, para 76.

⁵⁷ *Ibid.*, para 72.

⁵⁸ See paras. 63-72.

⁵⁹ Meyer has noted that the emphasis on identity review did not fit the facts of the case, as EU secondary law was compliant with the German Constitution: F. MEYER, “‘From Solange II to Forever I’: The German Federal Constitutional Court and the European Arrest Warrant (and how the CJEU responded)”, *New Journal of European Criminal Law*, vol. 7, 2016, p. 277-294, at 283.

⁶⁰ Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, EU:C:2016:198.

preliminary ruling by the Higher Regional Court of Bremen. The reference was another opportunity for the CJEU to address directly the question of whether the execution of an EAW could be refused on the grounds of concerns over the violation of fundamental rights. The cases involved both prosecution and conviction warrants issued by Romania and Hungary. Concerns by German authorities centered on the impact of execution on Article 4 of the Charter in view of the existence of pilot judgments by the European Court of Human Rights attesting breaches of Article 3 ECHR on the grounds of the unacceptable state in prison conditions in both countries⁶¹. The German Court raised two broad questions at the heart of the discussion on defining the parameters of mutual trust: on the extent to which serious fundamental rights concerns could lead to the inadmissibility of a EAW and on the legal framework and content related to the provision of assurances by the issuing authorities asserting compliance with fundamental rights.

In a departure from earlier judgments, the CJEU proceeded to provide detailed guidelines to executing authorities on how they must proceed when assessing the existence of a risk of inhuman or degrading treatment arising from the execution of a EAW. The CJEU put forward a two-step approach. First, a general assessment of the risk must take place. Where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, it is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a EAW⁶². To that end, the national court may rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. Sources may include judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by

⁶¹ *Ibid.*, paras 43-44 and 60-61.

⁶² *Ibid.*, para 88.

bodies of the Council of Europe or under the aegis of the United Nations⁶³. Domestic authorities are under a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected⁶⁴.

However, a finding by the executing judicial authority that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State does not automatically signify that the execution of the EAW must be refused⁶⁵. Therefore, in addition to a general assessment of the risk, it will also be necessary for the executing judicial authority as a second step to proceed to a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State⁶⁶. The executing authority is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment⁶⁷. If on the basis of the information provided the executing judicial authority finds that there exists a real risk of inhuman or degrading treatment for the individual in respect of whom the EAW was issued, then the execution is postponed, but it cannot be abandoned⁶⁸. Until the point of obtaining supplementing information that would discount the existence of a risk of inhuman or degrading treatment, a decision on the surrender must be postponed, but if the existence of that risk cannot be discounted within

⁶³ *Ibid.*, para 89.

⁶⁴ *Ibid.*, para 90.

⁶⁵ *Ibid.*, para 91.

⁶⁶ *Ibid.*, para 92.

⁶⁷ *Ibid.*, para 94.

⁶⁸ *Ibid.*, para 98.

a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end⁶⁹.

Aranyosi is a landmark judgment and a turning point in the CJEU approach on mutual trust. It confirms a shift from automatic mutual recognition based on uncritical mutual trust (or, as the CJEU President Koen Lenaerts has put it ‘blind trust’⁷⁰) to earned trust on the basis of an individualised assessment of the fundamental rights consequences of surrender on the ground⁷¹. *Aranyosi* is significant here in two respects: in departing from the CJEU mantra of ‘systemic deficiencies’ when confirming the requirement for the executing authority to examine the impact of the surrender on an individual basis; and in emphasising (as it has done in its case-law on asylum, and in particular in *NS*) the need for an assessment not only of the law, but also of the practice of fundamental rights protection as regards the individual concerned⁷². *Aranyosi* is significant in the CJEU setting detailed parameters for the co-operative relationship between national authorities responsible for operating the EAW. The CJEU has provided reasonably detailed guidance on the dialogue between authorities under Article 15 of the FD-EAW under a two-stage approach. In this context, the CJEU appears to have been inspired by the fundamental rights review approach adopted by the *BVerfG*, an approach that has been based, as with the *BVerfG*, on the recognition that the right in question is an absolute right linked to human dignity⁷³. Although *Aranyosi* is not the outcome of a direct dialogue between the CJEU on the one hand and the *BVerfG* or the ECtHR on the other, its

⁶⁹ *Ibid.*, para 104.

⁷⁰ K. LENAERTS, “La Vie Après l’Avis: Exploring the Principle of Mutual (yet not Blind) Trust”, *Common Market Law Review*, vol. 54, 2017, p. 805-840, at 806.

⁷¹ Writing on the need for earned trust before *Aranyosi*, see V. MITSILEGAS, fn. 37, chapter 5.

⁷² V. MITSILEGAS, “Re-setting the Parameters of Mutual Trust: From *Aranyosi* to *LM*” in V. Mitsilegas, L. Mancano and A. di Martino (eds.), *The Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis*, Hart, 2019, forthcoming.

⁷³ See also ANAGNOSTARAS, “Mutual Confidence is Not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: *Aranyosi* and *Caldararu*”, *Common Market Law Review*, vol. 53, 2016, p. 1675-1704, at 1702.

reasoning and outcome can be seen as a recognition by the CJEU of the approach taken by both these courts regarding mutual trust⁷⁴.

Aranyosi is also significant as it serves as a benchmark for the relations of EU Member States with third countries. In the case of *Petruhhin*⁷⁵, – which involved an extradition request from Russia – the CJEU stated unequivocally that the mere existence of declarations and accession to international treaties guaranteeing respect for fundamental rights in principle *are not in themselves sufficient* to ensure adequate protection where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the ECHR⁷⁶. The duties set out to judicial authorities by the CJEU in *Aranyosi* in internal EAW cases also apply, under certain circumstances, to requested authorities of EU Member States in extradition requests by third countries⁷⁷. In setting up its judgment, the Court reiterated that in its relations with the wider world, the European Union is to uphold and promote its values and interests and contribute to the protection of its citizens, in accordance with Article 3(5) TEU⁷⁸.

As a first step in a change of direction for the CJEU, *Aranyosi* leaves however a number of questions unanswered or creates further questions: is the adopted approach applicable only to cases involving challenges to Article 4 of the Charter, only to absolute rights, or to any fundamental right? What is the extent of the obligations of the authorities operating the EAW under the co-operative mechanism following Article 15 of the Framework Decision? In particular, what is the role of assurances in this co-operative paradigm? And what is the extent of these obligations if there are broader systemic concerns on the protection of fundamental rights in the Member State where the issuing authority is based, raising underlying rule of law issues? The CJEU has since had the opportunity

⁷⁴ K. LENAERTS, fn. 69, at 807. According to President Lenaerts, the contours of principle are not carved in stone, but will take concrete shape by means of a constructive dialogue between the ECJ, the ECtHR and national courts.

⁷⁵ Case C 182/15, *Petruhhin*, ECLI:EU:C:2016:630.

⁷⁶ *Ibid.*, para 57.

⁷⁷ *Ibid.*, paras 58 and 59.

⁷⁸ *Ibid.*, para 44.

to provide answers to some of these detailed questions – especially on the intensity of scrutiny and assurances – in the case of *ML*⁷⁹.

Moreover, and significantly, the CJEU has since dealt with the extension of fundamental rights grounds to limit automaticity and the link between fundamental rights and the rule of law. In its ruling in *LM*, also known as *Minister for Justice and Equality (Défaillances du système judiciaire)*⁸⁰, the Court of Justice extended the two-stage *Aranyosi* test to cases where the rule of law is at stake, under the perspective of the right to a fair trial. In keeping with its case law, and notably with Opinion 2/13, the Court first recalled that EU law is based on the fundamental premiss that the Member States share a set of common values, as stated in Article 2 TEU⁸¹. This implies and justifies the existence of mutual trust between the Member States that those values will be recognised⁸². Mutual trust underpins the principle of mutual recognition and they both are ‘of fundamental importance given that they allow an area without internal borders to be created and maintained’⁸³. However, in exceptional circumstances, limitations may be placed on both these principles, as it is the case when the right not to be subjected to inhuman or degrading treatment is at stake (Article 4 of the Charter)⁸⁴. The Court has now extended these limitations when the respect of Article 47 of the Charter, which enshrines the right to an effective remedy and to a fair trial, is jeopardised. The Luxembourg Court points out that judicial independence ‘forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the *rule of law*, will be safeguarded’⁸⁵. The Court then referred

⁷⁹ Case C-220/18 PPU, *Generalstaatsanwaltschaft*, ECLI:EU:C:2018:589.

⁸⁰ Case C-216/18 PPU, *Minister for Justice and Equality (Défaillances du système judiciaire)*, EU:C:2018:586.

⁸¹ *Ibid.*, para. 35.

⁸² *Ibidem*.

⁸³ *Ibid.*, para. 36.

⁸⁴ Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*

⁸⁵ *Ibid.*, para. 48 (emphasis added).

back to its judgment of February 2018 concerning the reduction in the remuneration of Portuguese judges, where it lingers over the notion of the rule of law⁸⁶. In this ruling, the Court provided the first interpretation of Article 47 of the Charter and highlights that ‘the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law’⁸⁷. This requires the independence of courts and tribunals, which is essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism⁸⁸. It is also essential, the Court added in *LM*, in the context of the EAW mechanism⁸⁹. Recalling some previous judgments on the rationale behind the EAW Framework Decision, the Court concludes that the high level of trust between Member States underpinning the EAW mechanism is founded on the premiss that the criminal courts of the other Member States ‘meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts’⁹⁰.

The Court’s ruling in *LM* is of far-reaching significance as it paves the way for rule of law scrutiny in Member States via the examination of the fundamental rights concerns underpinning the execution of a EAW. The dialogue between the Irish Court which referred the case and the CJEU constitutes a key example of bottom-up scrutiny of the rule of law across the European Union. This bottom-up scrutiny can go a long way in addressing the shortcomings of law and practice in relation to the operation of Article 7 TEU and the role and limits of EU institutions in scrutinizing effectively rule of law compliance in Member States⁹¹. National courts can escalate their concerns to the CJEU and invite the

⁸⁶ Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117.

⁸⁷ Case C-216/18 PPU, *Minister for Justice and Equality (Défaillances du système judiciaire)*, para. 51, with reference to para. 36 of Case C-64/16, *Associação Sindical dos Juizes Portugueses*.

⁸⁸ Case C-216/18 PPU, *Minister for Justice and Equality (Défaillances du système judiciaire)*, paras. 53-54, with reference to paras. 41-43 of Case C-64/16, *Associação Sindical dos Juizes Portugueses*.

⁸⁹ Case C-216/18 PPU, *Minister for Justice and Equality (Défaillances du système judiciaire)*, para. 55.

⁹⁰ *Ibid.*, para. 58.

⁹¹ V. MITSILEGAS and S. CARRERA, “Upholding the Rule of Law by Scrutinising Judicial Independence”, *CEPS Commentary*, (2018), <<https://www.>

Court of Justice to make an assessment. This scrutiny is central for the credible and effective operation of the EAW system, involving cross-border cooperation based on mutual trust. Rule of law scrutiny here occurs in a mechanism involving courts, rather than the executive. It is a mechanism which promotes dialogue and horizontal interactions, and which stresses the importance of rule of law compliance and scrutiny on the ground. The CJEU can act as the enabler of a dialogue between national authorities, providing avenues of communication and cooperation not only at the level of the highest courts, but importantly in the context of the operation of the EAW also at the level of lower courts. In terms of the scope of fundamental rights scrutiny, *LM* is of importance as it confirms that such scrutiny is not confined to Article 4 of the Charter but extends also to other rights (in the present case Article 47 rights) when linked to the operation of the rule of law.

5. HARMONISATION OF CRIMINAL PROCEDURAL LAW AS A FACILITATOR OF MUTUAL RECOGNITION – THE CASE OF DEFENCE RIGHTS

A key question arising from a highly integrated model of judicial cooperation in criminal matters based on mutual trust is the extent to which such a system can operate effectively and credibly without the establishment of a level-playing field in terms of procedural safeguards for the individuals concerned. The EU legislator has attempted to address mutual trust and fundamental rights challenges arising in the operation of mutual recognition by resorting to –at least minimum – harmonisation. Post-Lisbon, Article 82(2)(b) TFEU confers upon the European Union express competence to adopt minimum rules on the rights of individuals in criminal procedure. EU competence in the field is not self-standing, but functional: competence to adopt rules on procedural rights has been conferred to the EU only to the extent necessary to facilitate mutual recognition and police and judicial cooperation in criminal matters having a cross-border dimension. Since the entry into force of the Lisbon Treaty, six minimum standards Directives have been adopted under the Article 82(2)

ceps.eu/publications/upholding-rule-law-scrutinising-judicial-independence-irish-courts-request-preliminary> (last visited 13 Sept. 2018).

(b) TFEU legal basis covering the right to interpretation and translation⁹², the right to information⁹³, the right of access to a lawyer⁹⁴, legal aid⁹⁵, procedural safeguards for children⁹⁶ and the presumption of innocence and the right to be present at the trial in criminal proceedings⁹⁷. The Commission has also released a Green Paper on the application of EU criminal justice legislation in the field of detention discussing the possibility to propose legislation on the matter based on Article 82(2) TFEU⁹⁸.

The adoption of these Directives has been justified on the grounds that they would serve to enhance mutual trust. The Preamble to the Directive on the right to interpretation and translation states for instance that ‘mutual recognition of decisions in criminal matters can operate effectively in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own, implying not only

⁹² Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1-7, at 1.

⁹³ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1-10, at 1.

⁹⁴ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, p. 1-12, at 1.

⁹⁵ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, p. 1-8.

⁹⁶ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, p. 1-20.

⁹⁷ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings OJ L 65, 11.3.2016, p. 1–11.

⁹⁸ *Green Paper: Strengthening mutual trust in the European judicial area – A Green paper on the application of EU criminal justice legislation in the field of detention*, COM(2011) 327 final.

trust in the adequacy of other Member States' rules, but also trust that those rules are correctly applied⁹⁹. The same wording is used in the Preamble to the Directive on the right to information¹⁰⁰, and the right to access to a lawyer¹⁰¹. While it may be difficult to establish a direct causal link between the minimum harmonisation of criminal procedural rules at EU level on the one hand and the enhancement of mutual trust in the operation of mutual recognition on the other¹⁰², the adoption of EU law in the field will certainly serve to enhance the protection of fundamental rights in Europe's AFSJ and this may have an impact on the behaviour of the key actors – in particular judicial authorities – entrusted with the implementation and operation of mutual recognition. Although the stated aim of the Directives has been to establish minimum standards, they have introduced a series of binding norms on fundamental rights which have been interpreted by the Court of Justice thus far from a teleological perspective aiming to ensure the full effectiveness, including the effective exercise, of these rights¹⁰³.

There are three important parameters to the contribution of the EU measures on defence rights to the enhancement of the protection of fundamental rights and the reconfiguration of the relationship between authorities entrusted to implement the principle of mutual recognition. These parameters concern the level of protection envisaged by the EU instruments, the impact of the latter onto domestic legal orders, and the enhanced avenues of fundamental rights scrutiny

⁹⁹ Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, cit., recital 4.

¹⁰⁰ *Ibidem*.

¹⁰¹ *Ibid.*, Preamble, recital 6. While earlier drafts of the Directive on access to a lawyer expanded the link between defence rights and trust by stating that common minimum rules 'should increase confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust *and to the promotion of a fundamental rights culture in the Union*' COM(2011) 326 final, recital 3, emphasis added. Council of the EU, 10467/12, 2011/0154 (COD).

¹⁰² For such a critique, see V. MITSILEGAS, fn. 37, chapter 6.

¹⁰³ Case C-216/14 *Covaci*, ECLI:EU:C:2015:686; Joined Cases C-124/16 *Ianos Tranca*, C-188/16 *Tanja Reiter* and C-213/16 *Ionel Opria*, ECLI:EU:C:2017:228; see also Opinion of AG Bot, Case C-216/4, *Covaci*, ECLI:EU:C:2015:305, paras. 32-33, 74.

which the very existence of EU secondary law on fundamental rights entails. In terms of the level of protection: although the Directives introduce minimum standards and have been adopted to facilitate cross-border cooperation, they are applicable also to purely domestic situations¹⁰⁴. Importantly, the Directives allow Member States the possibility of offering a higher level of protection under national law. This is enshrined in the text of the Directives via the introduction of non-regression clauses, affirming that nothing in the Directives must be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection¹⁰⁵.

The existence of non-regression clauses renders the applicability of the *Melloni* ruling in cross-border cases contested. *Melloni* requires national authorities not to expect other systems to offer similarly high standards of fundamental rights protection to their own domestic standards, as long as the standard of protection in the Member State of the issuing authority is compatible with the Charter. This applies in particular in cases where there has been harmonisation at EU level. As the Preamble to the access to a lawyer Directive states expressly, a higher level of protection by Member States should not constitute an obstacle to the mutual recognition of judicial decisions that those minimum

¹⁰⁴ See P. CAEIRO, “Introdução / Introduction”, in Pedro Caeiro (org.), *A Agenda da União Europeia sobre os Direitos e Garantias da Defesa em Processo Penal: a “segunda vaga” e o seu previsível impacto sobre o direito português / The European Union Agenda on Procedural Safeguards for Suspects or Accused Persons: the “second wave” and its predictable impact on Portuguese law*, Instituto Jurídico, 2015 (available at: <https://ij.fd.uc.pt/publicacoes/comentarios/ebook_1_comentarios.pdf>), p. 8 f. (English version at p. 13 f.).

¹⁰⁵ Directive on the right to interpretation and translation in criminal proceedings, art. 8; Directive on the right to information in criminal proceedings, art. 10; Directive on the right of access to a lawyer in criminal proceedings, art. 14; Directive on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceeding, art. 11; Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings, art. 23; Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, art. 13.

rules are designed to facilitate¹⁰⁶. However, it is questionable whether minimum harmonisation in the field of procedural rights, coupled with non-regression clauses, is sufficient to justify such an approach. In terms of the interaction of national authorities trying to establish mutual trust, it may be a challenge to accept lower standards in fundamental rights in another Member State when EU law provides only for minimum harmonisation (which can constitute the lowest common denominator for protection at times) and leaves considerable margin of discretion for the adoption of higher standards by Member States. This is particularly the case as in this kind of legislation law in the books is inextricably linked with law in action, with effective protection being dependent on how the provisions of the Directives are actually implemented on the ground.

Having said that, the adoption of EU legislation in the field of procedural rights opens up two further avenues which will serve to enhance substantially the level of protection of fundamental rights. The second parameter in terms of providing a high level of protection involves the far-reaching impact of EU law on domestic legal systems. A number of key provisions conferring rights in the Directives have direct effect. In a system of decentralised enforcement of EU law, individuals can evoke and claim rights directly before their national courts if the EU Directives have not been implemented or have been inadequately implemented. Direct effect means in practice that a suspect or accused person can derive a number of key rights – such as the right to an interpreter or the right to access to a lawyer – directly from EU law if national legislation has not made appropriate provision in conformity with EU law¹⁰⁷.

These mechanisms of decentralised enforcement of secondary EU law which is essentially fundamental rights law are coupled with the third parameter of protection, namely the proliferation of avenues and means of scrutiny of implementation and operation of these measures on the ground. Post-Lisbon, the Commission has full powers to monitor the implementation of these Directives by Member States and has the power

¹⁰⁶ Preamble of the Directive on the right of access to a lawyer, cit., recital 54.

¹⁰⁷ The Spanish Constitutional Court has confirmed that provisions of the Directive on the right to information entail direct effect: see STC 13/2017, of 30 January 2017.

to introduce infringement proceedings before the Court of Justice when it considers that the Directives have not been implemented adequately. The scope of the Commission's scrutiny is broader than to check merely the provision of national legislation adopted to implement specifically the EU Directives in question. The Commission is also under the duty to scrutinise national systems more broadly to ensure that effective implementation has taken place, as well as to ensure that rights are applied fully in practice. It must be noted in this context that the procedural standards set out in the Directives will have an impact on a wide range of acts under national criminal procedure¹⁰⁸, which, under the CJEU approach in *Fransson*¹⁰⁹, will fall within Charter scrutiny although they do not necessarily implement a specific Directive provision. This view is reinforced by the Court's finding in *Siragusa* that it is important to consider the objective of protecting fundamental rights in EU law, which is to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States¹¹⁰.

This approach extends to the Commission's scrutiny of the implementation of mutual recognition measures such as the EAW. In view of persistent fundamental rights concerns raised at national level, such scrutiny must include prison and detention conditions and trial and pre-trial procedures, although the EU has not legislated specifically on these matters. The adoption of EU measures on procedural rights is significant in this context as it creates a continuum and a functional link between fundamental rights legislation and enforcement legislation in the European public order. It can be seen as a first step towards further convergence, either by further legislation leading to higher-level harmonisation, or at the level of the interpretation by the CJEU, by developing fundamental rights protections and an interpretative level-playing field via the definition of autonomous concepts.¹¹¹

¹⁰⁸ See Opinion of AG Bot in Case C-216/4, *Covaci*, EU:C:2015:305, in particular paras 105-106.

¹⁰⁹ Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105.

¹¹⁰ Case C-206/13, *Cruciano Siragusa*, EU:C:2014:126, para 31.

¹¹¹ On the role of autonomous concepts in managing diversity in Europe's area of criminal justice see V. MITSILEGAS, "Managing Legal Diversity in

6. CONCLUSION: FROM 'BLIND' TO EARNED TRUST IN EUROPE'S AREA OF CRIMINAL JUSTICE

This article has demonstrated the evolution of the place of fundamental rights in the operation of the principle of mutual recognition in EU criminal law. The initial approach of the EU legislator – exemplified in the adoption of the FD-EAW – which promoted automaticity in recognition based on 'blind trust' with limited space for fundamental rights scrutiny of the execution of mutual recognition requests has been met with resistance by national legislators and courts. This has led to the slow evolution of the case-law of the CJEU, which following direct and indirect dialogue with national courts has finally adopted a decisive move from 'blind' to earned trust in its ruling in *Aranyosi*, which introduced a mechanism for a meaningful scrutiny of the fundamental rights implications of a surrender for the individual concerned. *Aranyosi* has also been applied to extradition requests by third countries, and, significantly, its application has not been limited to Article 3 ECHR/Article 4 Charter cases but has been extended to judicial protection rights linked to the rule of law. At the same time, the EU legislators have made ample use of the opportunities offered by the Lisbon Treaty to 'legislate for human rights'¹¹² under Article 82(2) TFEU and to adopt a series of Directives covering a number of rights of the individual in criminal proceedings. Although these Directives claim to introduce minimum standards only, their impact on enhancing fundamental rights protection in Europe's area of criminal justice is significant: they apply not only to cross-border, but also to domestic situations; the need for their effectiveness has been underpinned by the CJEU; and a number of their key provisions have direct effect. Importantly, and similarly with the CJEU approach in *Aranyosi*, the adoption by the EU of measures on defence rights and the requirement to ensure their

Europe's Area of Criminal Justice: The Role of Autonomous Concepts" in R. Colson and S. Field (eds.), *EU Criminal Justice and the Challenges of Legal Diversity. Towards A Socio-Legal Approach to EU Criminal Policy*, CUP, 2016, p. 125-160.

¹¹² V. MITSILEGAS, "Legislating for Human Rights After Lisbon: The Transformative Effect of EU Measures on Procedural Rights in Criminal Proceedings", in M. Fletcher, E. Herlin-Karnell and C. Matera (eds.), *The European Union as an Area of Freedom, Security and Justice*, Routledge, 2017, p. 201-215.

effective implementation opens the door to extensive scrutiny of national criminal justice systems on the ground and in a holistic way.

Ensuring effective and real compliance with fundamental rights leads to a transformation of the operation of the principle of mutual recognition in criminal matters, on the basis of a shift from blind to earned trust in Europe's area of criminal justice. In this manner, via the opening of avenues of dialogue between national courts operating the system of mutual recognition, but also of avenues of dialogue between national courts and the CJEU and avenues of communication between national authorities, EU institutions and civil society, the European Union may be closer to achieving an effective and credible system of judicial cooperation legitimised via the effective, on the ground, protection of fundamental rights.

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