ARTICLES
SPECIAL SECTION – MUTUAL RECOGNITION AND MUTUAL TRUST: REINFORCING EU INTEGRATION? (FIRST PART)

# REBUTTAL OF MUTUAL TRUST AND MUTUAL RECOGNITION IN CRIMINAL MATTERS: IS 'EXCEPTIONAL' ENOUGH?

TONY MARGUERY*



ABSTRACT: The CJEU has recently found that mutual trust in the European Union is one of the principles relating to the constitutional structure of the Union. The principle is of fundamental importance in the construction of an Area of Freedom, Security and Justice (AFSJ) that includes judicial cooperation in criminal matters based on mutual recognition of judicial decisions. This contribution tries to clarify what the meaning and scope of mutual trust in criminal matters is. It discusses the following questions: What are the conditions for mutual trust to exist? What are the consequences of a lack of trust on judicial cooperation? It also puts the principle into the broader perspective of the European Convention on Human Rights system.

KEYWORDS: mutual trust – mutual recognition – fundamental rights – area of freedom, security and justice – European arrest warrant – equivalent protection.

## I. INTRODUCTION

Over the last couple of years, mutual trust[1] in the European Union (EU) has developed from a "necessary implication that Member States have trust in their criminal judicial

* Assistant Professor, Utrecht University, t.p.marguery@uu.nl.

[1] This contribution does not distinguish between mutual trust and mutual confidence even though one may contend that these are two different concepts. In fact, depending on the language used in its case law, the CJEU uses these concepts interchangeably.


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systems"[2] to a constitutional principle of EU law capable of making the accession to the European Convention on Human Rights (the European Convention) "liable to upset the underlying balance of the EU and undermine the autonomy of EU law".[3] In criminal matters, that principle underlies and justifies judicial cooperation through, in particular, the principle of mutual recognition. Judicial authorities have a EU obligation to recognise and enforce certain judicial decisions, for example a European Arrest Warrant (EAW), taken by a competent authority in another Member State (MS) unless an explicit ground for non-execution provided in EU legislation applies. In contrast to mutual recognition, the scope and limits to mutual trust in criminal justice systems are not clearly identified. Although its existence is presumed, mutual trust does not exist without any condition. A lack of trust between Member States cannot be excluded. If there is distrust between judicial authorities then one can legitimately expect that the latters will refuse to carry out their obligation of mutual recognition. A loss of trust between Member States could then be considered as a non-explicit limitation on mutual recognition. This will not only undermine the effectiveness of EU judicial cooperation, but also pose a threat to the further building of an Area of Freedom, Security and Justice (AFSJ). The existence of mutual trust is closely linked to the Member States respect for essential values, in particular the respect for fundamental rights, shared by the Union as a whole. In its Opinion 2/13 on the accession to the European Convention, the CJEU found that mutual trust imposed on Member States "save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law".[4] The essential question that this contribution tries to address is how mutual trust and the respect for fundamental rights operates between judicial authorities bound by the principle of mutual recognition in criminal matters. In the recent joined cases *Pál Aranyosi and Robert Caldararu*, the CJEU has for the first time ruled on the existence of such "exceptional circumstances" in judicial cooperation in criminal matters. It has acknowledged that a national court could refuse to surrender an individual to another Member State in application of an EAW if that court is satisfied that this individual would be exposed to a real risk of inhuman or degrading treatment contrary to Art. 4 of the Charter of Fundamental Rights of the EU (Charter) if surrendered. By contrast, the European Court of Human Rights (the European Court) is reluctant to consider that mutual trust, and consequently, mutual recognition can only be rebutted in exceptional circumstances. It considers that *any* serious allegation concerning the violation of any Convention right should be possible in order to

[2] Court of Justice, judgment of 11 February 2003, joined cases C-187/01 and C-385/01, *Hüseyin Gözütok and Klaus Brügge*, para. 33.

[3] Court of Justice, opinion 2/13 of 18 December 2014, para. 194. See, for example, E. SPAVENTA, *A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13*, in *Maastricht journal of European and comparative law*, 2015, p. 35 *et seq.*

[4] Opinion 2/13, cit., para. 191.

prevent a manifest deficiency in the European Convention protection. Although the position of the two European courts seems divergent, it will be contended that one actually witnesses a convergence between them in the definition and limitations of both the principle of mutual trust and mutual recognition for the purpose of preventing violations of individual's fundamental rights. The first section of this contribution will look at how the respect for fundamental rights is a pre-condition for mutual trust to exist in the context of mutual recognition in criminal matters. Taking the example of the EAW, the second section analyses the extent to which the CJEU allows for a limitation of mutual trust by national judicial authorities in case of a fundamental right violation. Finally, section three will attempt to clarify whether the EU fundamental right conditionality of mutual trust actually is in line with the obligations imposed on the EU Member States by the European Convention.

## II. The conditionality of mutual trust in EU criminal law

### II.1. From presumption to conditionality

In contrast to the principle of mutual recognition, the principle of mutual trust is not enshrined in the Treaty. It nonetheless underlies and justifies the obligation that judicial authorities involved in cooperation in criminal matters have to recognise and enforce judicial decisions taken by a competent authority in another Member State. For the Commission, trust not only implies that rules in the Member States are adequate, but also that they are correctly applied.[5] In the joined cases *Gözütok and Brügge*, the CJEU decided that the application of EU law – in this proceedings Art. 54 of the Convention on the Implementation of the Schengen Acquis (CISA)[6] on *ne bis in idem* – meant that "there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied".[7]

In the eyes of the Commission and the CJEU, the existence of mutual trust between the Member States seems based on the concept of equivalence of rules. Trust does not have to be established by law, it is presumed. The findings in *Gözütok and Brügge* convey the idea that all criminal justice systems in the EU are sufficiently equivalent in order to attain the objectives pertaining to criminal law, in particular to prosecute and judge those who committed a crime. Art. 54 CISA prevents double jeopardy in a transnational

[5] Communication COM(2000) 495 final of 27 July 2000 from the Commission on Mutual Recognition of Final Decisions in Criminal Matters, para. 3.1.

[6] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

[7] *Hüseyin Gözütok and Klaus Brügge*, cit., para. 33.

context, but only at the condition that this person cannot escape prosecution. Therefore, foreign decisions can be recognized only if they are made on the merits of the case.[8] The essential rationale to support the existence of mutual trust here is the capacity of a criminal justice system to complete its social function successfully while respecting the person's fundamental freedom to move within a single AFSJ.

However, an effective criminal justice system also implies the respect of essential values characterising a polity based on the rule of law and, in particular, of the fundamental rights of the individuals subject to it. When reading the preambles of the measures adopted in order to implement mutual recognition in criminal matters, the Commission worked on the assumption that all Member States shared their commitment to respect common values, and in particular, individuals' fundamental rights. The example of the EAW illustrates this. Preamble 10 of the Framework Decision on the EAW (the EAW Framework Decision)[9] indicates that the "mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union". This Preamble is followed by Preamble 12 and Art. 1, para. 3, that recall the central role of the Union fundamental rights enshrined in Art. 6 TEU amongst all the values upon which the Union is founded. These fundamental rights constitute a level playing field necessary to the existence of mutual trust between Member States. The CJEU seizes regularly the opportunity to confirm this.[10] In its Opinion 2/13, the CJEU ruled that mutual trust is only possible because of the "premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU".[11] The CJEU then continued by stating that the principle of mutual trust:

> "requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law [...] Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but save

[8] Court of Justice, judgment of 10 March 2005, case C-469/03, *Filomeno Mario Miraglia*, para. 35; see also Court of Justice, judgment of 29 June 2016, case C-486/14, *Piotr Kossowski*, para. 52.

[9] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

[10] See for example Court of Justice, judgment of 30 May 2013, case C-168/13 PPU, *Jeremy F. v. Premier ministre*, para. 35 in combination with para. 40; Court of Justice, judgment of 26 February 2013, case C-399/11, *Stefano Melloni v. Ministerio Fiscal* [GC], para. 37 in combination with para. 45.

[11] Opinion 2/13, cit., para. 168.

> in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU".[12]

The existence of mutual trust is thus conditioned firstly, by the premise that Member States share common values, and amongst these values fundamental rights; secondly, by the possibility to rebut that premise and suspend cooperation. Mutual trust can only be presumed if there is a body of fundamental rights common to all Member States which is adequately applied and is providing a high level of protection to individuals in the EU as a whole. Although this article will focus on fundamental rights, it should be mentioned that the CJEU has recently extended the conditionality of mutual trust to the respect other fundamental values pertaining to the respect of the rule of law, i.e. the respect of the separation of powers.[13]

### II.2. The fundamental right's condition for mutual trust in criminal matters

Art. 6 TEU identifies the Charter as the main source of fundamental rights, but it also mentions the European Convention and the constitutional traditions common to the Member States as constituting the general principles of Union law. It must be born in mind that even if the EU is not party to the European Convention, Art. 52, para. 3, of the Charter provides that the meaning and scope of those Charter's rights which correspond to rights guaranteed by the European Convention is to be the same as those laid down in the European Convention, but the Union is allowed to provide more extensive protection. So if the application of fundamental rights must be assessed, for example in EAW proceedings, the European Convention standards of protection will constitute the minimum guarantee, but the Charter, as interpreted by the CJEU, can offer a higher level of protection.

In order to justify mutual trust the common standards of fundamental rights must also be correctly applied in legislation and in concrete criminal proceedings. In this respect, all judicial authorities should have confidence that besides EU legislation, the Member States criminal justice leaves up to the same standards of fundamental rights. Firstly, EU fundamental rights are binding on the EU which ensures in particular that its legislation is "fundamental rights proof". The EU legislative process includes systematic fundamental rights checks, in particular the Commission uses a "better regulation

[12] Ivi, paras 168 and 192.

[13] The CJEU ruled that mutual trust is undermined when the principle of separation of powers is not respected. Such is the case where a Member State has granted the police or the ministry of justice the power to issue an EAW. Such authorities cannot be considered as judicial authorities for the application of the EAW Framework Decision, see Court of Justice, judgment of 10 November 2016, case C-452/16 PPU, *Poltorak*, para. 35 and Court of Justice, judgment of 10 November 2016, case C-477/16 PPU, *Kovalkovas*, para. 36; see also N. Cambien, in *European Papers*, 2017, www.europeanpapers.eu, forthcoming.

toolbox" when conducting impact assessments of draft legislation – that now also concern the AFSJ.[14] Also the European Parliament acts as co-legislator in the AFSJ and carries out an *ex ante* fundamental rights scrutiny of draft proposals[15] and the Commission has adopted "mutual trust enhancing" legislation on procedural safeguards in criminal proceedings.[16] As a last resort, the CJEU assesses the compatibility of the legislation adopted in the field of judicial cooperation in criminal matters with EU fundamental rights.[17] The respect for EU fundamental rights is a condition of validity of EU acts.[18] Secondly, as soon as they are acting within the scope of EU law, MS must comply with EU fundamental rights standards.[19] In the context of mutual recognition, the obligation to respect EU fundamental rights concerns both the issuing and the executing Member States.[20] The correct application of EU fundamental rights can also be guaranteed by the particular characteristics of EU judicial protection, such as the doctrines of direct effect,[21] consistent interpretation,[22] loyal cooperation[23] and supremacy. When implementing mutual recognition Member States must make sure that their criminal justice offers remedies to redress possible breaches of fundamental rights that are equivalent to remedies available when implementing national law. If the latter is in conflict with EU law, e.g. with EU fundamental rights, under certain conditions it must be set aside.[24] In case of doubts, national courts can, and sometime must, have recourse to the preliminary ruling procedure.[25] Finally, mutual trust exists also because Member States are in any case – thus also when they do not implement EU law – bound by their own sources of fundamental rights and by the European Convention to which all are party.[26]

[14] See European Commission, *Better Regulation Toolbox*, *Tool 24: Fundamental Rights and Human Rights*, ec.europa.eu, p. 176.

[15] Fundamental rights scrutiny essentially happens through assessment of the European Parliament Committees such as the Committee on Civil Liberties, Justice and Home Affairs (LIBE). It is however very much reactive in nature and therefore has been discussed, see for example V. KOSTA, *Fundamental Rights in EU Internal Market Legislation*, Oxford: Hart Publishing, 2015, p. 66.

[16] See European Commission, *Rights of suspects and accused*, ec.europa.eu.

[17] *Stefano Melloni v. Ministerio Fiscal* [GC], cit., paras 45 and 47.

[18] Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [GC], para. 281.

[19] Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson* [GC].

[20] *Jeremy F. v. Premier ministre*, cit., para. 40.

[21] It should however be recalled that the direct effect of Framework Decisions was excluded by Art. 34 TEU before the Treaty of Lisbon.

[22] Court of Justice, judgment of 16 June 2005, case C-105/03, *Criminal proceedings against Maria Pupino* [GC], para. 43.

[23] *Criminal proceedings against Maria Pupino* [GC], cit., para. 42

[24] See for example Court of Justice, judgment of 8 November 2016, C-554/14, *Atanas Ognyanov*, paras 54-71.

[25] *Åkerberg Fransson* [GC], cit., para. 47.

[26] *Jeremy F. v Premier ministre*, cit., paras 48-49.

The existence of EU fundamental rights and of mechanisms to remedy a possible violation thereof does not necessarily mean that in practice mutual trust is always guaranteed between EU judicial authorities. Trust can be lost. A failure of the system may well occur, but does that mean that any failure generates a loss of mutual trust? This question boils down to an assessment of when authorities can set aside their obligation of mutual recognition if the conditions for mutual trust are not met.

### II.3. Condition without control?

EU legislation implementing mutual recognition is silent on how fundamental rights checks should take place except when this happens by the application of a ground for non-execution. For example, Art. 1, para. 3, of the EAW Framework Decision stipulates that nothing in that Framework Decision "should have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union". However, this provision is not an explicit ground for non-execution of an EAW. There are only few such grounds.[27] With the exception of the Directive on the European Investigation Order,[28] there is no instrument implementing the principle of mutual recognition which provides a fundamental rights-based refusal ground allowing executing authorities to refuse the execution of a foreign decision. As the CJEU repeatedly held in EAW proceedings "the Member States may refuse to execute such a warrant *only* in the cases of mandatory non-execution provided for in Art. 3 thereof and in the cases of optional non-execution listed in Arts 4 and 4 let. a [of the EAW Framework Decision]".[29]

The narrow interpretation by the CJEU of non-execution grounds is precisely justified by the existence of mutual trust. If the executing authority must make sure that the fundamental rights as enshrined in Art. 6 TEU are respected this should not allow this authority to control whether the *issuing* authority has respected individuals' fundamental rights. According to the CJEU in *Melloni*, this argument raises, in reality, the question of the compatibility of EU legislation with the fundamental rights protected in the legal order of the EU.[30] If a judicial authority has doubt on this compatibility, it then should refer to the CJEU. By contrast, the executing State must *assume* that the issuing State fully respects the individuals' fundamental rights. Moreover, the CJEU considers that in case of breach of fundamental rights, it is for the individual concerned to challenge this

[27] Those grounds for non-execution ensure in particular that certain procedural safeguards are respected in the process of mutual recognition, for example, Art. 4, let. a), safeguarding the right to enjoy a fair trial when the individual was sentenced *in absentia*.

[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.

[29] Court of Justice, judgment of 29 January 2013, case C-396/11, *Radu*, para. 36 (emphasis added).

[30] *Stefano Melloni v. Ministerio Fiscal* [GC], cit., para. 45.

himself in the State responsible to respect Art. 6 TEU, thus in the issuing State if the breach originates from that State.[31]

The assumption is source of tension. Firstly, what should a judicial authority do if the level of protection of a particular right is higher in its legal system than in the EU common standard or in the issuing State? The CJEU held in *Melloni* that where no discretion is provided in the EU standard of fundamental rights because it has been exhaustively harmonised and became a uniform standard,[32] then this standard must apply. Allowing a Member State to apply its own standard of fundamental right would not only be contrary to the principle of supremacy of EU law,[33] but also to mutual trust itself.[34] By contrast, if there is some discretion and a situation is not entirely determined by Union law, Member States remain "free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromise".[35] A difference in Member States level of fundamental rights protection cannot imply a lack of trust between these States as long as the EU standards are respected.

Secondly, when should the judicial authority of the executing country consider that a breach of fundamental right in the issuing country is so grave that it actually prevents judicial cooperation because it casts doubt on that Member State's respect for EU values? EU legislation compatible with EU fundamental rights obviously does not guarantee that the rights of individuals are always respected in practice. In the context of mutual recognition, an infringement can take place in both the issuing and executing State. If the individual subject to mutual recognition argues that the issuing State has breached his or her right, must the judicial authority executing a foreign decision always disregard its duty to safeguard individuals' fundamental rights on the pretext that this individual will be able to challenge a possible fundamental right violation in the issuing state? For example, in the context of the EAW, can the fugitive rely on fundamental rights before the courts of the executing State in order to refuse the surrender? In the *Radu* case, the question was clearly posed if an executing authority is "entitled to examine whether the issue of an EAW complies with fundamental rights with a view, if that is not the case, to refusing its execution, even if that ground for non-execution is provided for neither in the [EAW Framework Decision] nor in the national legislation which transposed that decision".[36] In that case, the individual subject to an EAW issued by Germany contended before the Romanian Court that he should have been summoned or at least

[31] *Jeremy F. v. Premier ministre*, cit., para. 50.
[32] *Stefano Melloni v. Ministerio Fiscal* [GC], cit., paras 62 and 63.
[33] Ivi, para. 60.
[34] Ivi, para. 63.
[35] *Jeremy F. v. Premier ministre*, cit., para. 29; *Åkerberg Fransson* [GC], cit., para. 29.
[36] *Radu*, cit., para. 23.

he should have had the possibility to hire a lawyer and present his defence before the issuance of the EAW. Radu argued that his surrender should be refused on the ground that the issuance of the EAW was violating his right to a fair trial guaranteed in Arts 47 and 48 of the Charter and Art. 6 of the European Convention.[37] The CJEU decided that a right to be heard by the issuing judicial authorities before the EAW was issued is neither granted by the EAW Framework Decision nor is such a right covered by Arts 47 and 48 of the Charter. Allowing the suspect to be heard before an EAW is issued against him would in fact undermine the whole system of surrender set up by the Framework Decision, which is based on a "certain element of surprise", and consequently "prevent the achievement of the area of freedom, security and justice".[38] In other words, it would completely undermine the effectiveness of the EAW. Contrary to what AG Sharpston argued in her Opinion, the CJEU did not engage in the more general question whether the multiple references to fundamental rights protection in the EAW Framework Decision should be interpreted as non-explicit ground for non-execution of an EAW issued in breach of the fugitive's fundamental rights. Nevertheless, as we saw above, the CJEU ruled in Opinion 2/13 that that the principle of mutual trust could be rebutted in exceptional circumstances in order to guarantee fundamental rights protection.[39] It was only a matter of time before the CJEU would find the existence of such exceptional circumstances in the context of mutual recognition in criminal matters.

## III. "Trust is good, control is better": the judicial refutability of mutual trust

The first deference to the respect of fundamental rights in mutual recognition proceedings happened in the *Lanigan* case.[40] In this case, Lanigan was detained in Ireland in application of an EAW issued in the UK. In theory, the decision to execute an EAW cannot exceed the time limits imposed in the Framework Decision (60 days to execute an EAW,

[37] Ivi, para. 29

[38] Ivi, para. 40.

[39] Opinion 2/13, cit., paras 168 and 192. It should be noted that before the issuance of Opinion 2/13 the question whether national authorities can refuse to carry out their obligation stemming from instruments based on mutual trust if there is a risk or an actual violation of fundamental rights in the other Member State had already been answered in the affirmative in the field of asylum law. The Member States have an obligation to stop Dublin returns of asylum seekers to a Member State where there are substantial grounds to believe that there is a real risk of inhuman and degrading treatment in application of Art. 4 of the Charter and Art. 3 of the European Convention. See Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [GC], paras 97-106; see 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*, 2012, p. 319 *et seq.*

[40] The quotation in the title is commonly attributed to Vladimir Ilyich Ulyanov, better known as Lenin.

with a possible 30 days extension). In the case, the time limits were exceeded (Lanigan had been detained for almost two years). The Irish High Court questioned the CJEU on how to interpret the EAW Framework Decision if these deadlines were passed. After having ruled that the EAW Framework Decision did not oblige the executing authority to release the fugitive in such a case referring to Art. 1, para. 3, the CJEU ruled that this authority nonetheless was under the obligation to interpret the EAW Framework Decision in conformity with the right to liberty enshrined in Art. 6 of the Charter, and, in application of Arts 52, para. 3, and 53 of the Charter, in Art. 5 of the European Convention.[41]

In order to assess whether fundamental rights are respected in EAW proceedings, the executing authorities will have to carry out a concrete review of the situation at issue.[42]

The executing authorities cannot keep someone in detention in application of an EAW if that decision would be contrary to Arts 6 of the Charter and 5 of the European Convention. The CJEU for the first time relies on Art. 1, para. 3, of the EAW Framework Decision to allow the executing authorities of a Member State to assess the compatibility of an EAW with fundamental rights. If an EAW entails a violation of the fugitive's fundamental right to liberty, then the executing authority may release him (provided it makes sure that the person cannot abscond). Nevertheless, the execution of that EAW is not abandoned it is only postponed.[43] If this case does not clarify the scope of the principle of mutual trust in EAW proceedings, it nonetheless tells us that a control by the executing judicial authorities of fundamental rights respect can have an impact on the obligation of mutual recognition and eventually lead to a suspension of the proceedings.

It is only in the joined cases *Pál Aranyosi and Robert Caldararu* that the CJEU established a link between mutual trust, mutual recognition and fundamental rights. The CJEU clarified what kinds of exceptional circumstances could apply in EAW proceedings and limit mutual trust and consequently mutual recognition.[44] The Higher Regional Court of Bremen had to decide on the surrender of Mr Aranyosi to Hungary for the purpose of prosecution and on the surrender of Mr Caldararu to Romania for the purpose of executing a final sentence. In both cases, the referring court was satisfied that if the fugitives were sent back respectively to Hungary and Romania, they might be subject to conditions of detention amounting to a violation of Art. 3 of the European Convention and the general principles enshrined in Art. 6 TEU. Such a decision would be therefore in violation with the German law that provides that a request for mutual legal assistance is unlawful if contrary to Art. 6 TEU.[45] The CJEU firstly recalls that the applica-

[41] Court of Justice, judgment of 16 July 2015, case C-237/15 PPU, *Minister for Justice and Equality v. Francis Lanigan* [GC], paras 54-57.

[42] Ivi, para. 59.

[43] Ivi, para. 38.

[44] Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [GC].

[45] Ivi, paras 42 and 59.

tion of the EAW cannot have the effect to modify the obligation that the Member States have to respect EU fundamental rights.[46] It clearly emphasizes that this obligation has a special nature in the present cases that concern a possible violation of a right – the right not to be tortured or suffer degrading treatment protected by Arts 4 of the Charter and 3 of the European Convention – that is absolute and can, in no circumstances, be limited.[47] This right even constitutes one of the fundamental values of the Union and its Member States.[48] The execution of an EAW must not have the consequence that the person subject to it would suffer inhuman or degrading treatment. If 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, having regard to the standard of protection of fundamental rights guaranteed by EU law, and in particular, by Art. 4 of the Charter" this judicial authority is bound to assess the existence of that risk.[49]

The test imposed by the CJEU consists of two steps. Firstly, when assessing the violation of the right not to be tortured or suffer degrading treatment

> "the executing judicial authority must, initially, 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. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the Court, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN".[50]

The CJEU leaves a rather large margin of appreciation to national courts in order to be satisfied that a real risk of inhuman or degrading treatment exists. The use of the conjunction "or" seems to allow for a broad comprehension of the deficiencies affecting the detention conditions. Such deficiencies do not have to be systematic or generalised, but they can simply affect a particular place of detention.[51] Therefore, in order to meet the test a national court may for example refer to a pilot judgment of the European Court[52] or to cases where a violation of Art. 3 of the European Convention was found in

[46] Ivi, para. 83.

[47] Ivi, paras 85-87.

[48] Ivi, para. 87.

[49] Ivi, para. 88 (emphasis added).

[50] Ivi, para. 89.

[51] See C. COSTELLO, M. MOUZOURAKIS, *Reflexions on reading Tarakel: Is 'How Bad is Bad Enough' Good Enough*?, in *Asiel&Migrantenrecht*, 2014, p. 404 *et seq.*

[52] These types of judgments identify structural problems underlying repetitive cases against many countries and imposing an obligation on states party to the European Convention to address those problems. In the present case, the Bremen Court relied on the European Court of Human Rights, judgment of

specific situations due to the particular conditions suffered by the detained person or in specific detention facilities.[53] It must be noted that in the answers to the questions referred, the CJEU relies on the pilot judgment of the European Court *Torreggiani and Others v. Italy*, concerning the structural overcrowding problems of Italian prisons. That case recalls that states party to the European Convention have a legal obligation to take appropriate measures or actions to remedy the violations of rights found by the European Court. Consequently, the European Court called on the Italian authorities to put in place, within a year, a remedy or combination of remedies providing redress in respect of violations of the European Convention resulting from overcrowding in prison. The remedies put in place were welcomed by the European Court, which in later cases considered that the problem of prison overcrowding in Italy, while persistent, was now at less alarming proportions.[54]

Secondly, the executing judicial authority must also assess whether the person concerned will concretely be subject to that risk. The assessment must be "specific and precise". In other words, the executing authority cannot only rely on general information that a Member State has a very bad human rights record affecting one or more detention facilities; it must also be in possession of information about the specific place where the individual concerned will be detained, and about the conditions of detention in this specific facility.[55] 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 treatment, within the meaning of Art. 4".[56]

If the executing authority does not have the information concerning the situation in a particular detention facility or is aware of systemic deficiencies in the issuing Member

10 March 2015, nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, *Varga and Others v. Hungary*.

[53] The Bremen Court relied for example on the European Court of Human Rights, judgment of 10 June 2014, no. 45720/11, *Sandu Voicu v. Romania* concerning the failure to provide adequate health care in detention facilities; on the European Court of Human Rights, judgment of 10 June 2014, no. 13054/12, *Bujorean v. Roumanie*, concerning detention conditions in the Botoşani's prison; on the European Court of Human Rights, judgment of 10 June 2014, no. 79857/12, *Mihai Laurenţiu Marin v. Roumanie*, concerning the Poarta Albă and Măgineni's prisons and the European Court of Human Rights, judgment of 10 June 2014, no. 51318/12, *Constantin Aurelian Burlacu v. Romania*, concerning poor conditions of detention in the Bucharest police headquarters and in Rahova Prison.

[54] Italy has put in place a new remedy before a judicial authority about the material conditions of detention and had also introduced a compensatory remedy providing for damages to be paid to persons who had been subjected to detention contrary to the Convention; see for example European Court of Human Rights, judgment of case of 16 September 2014, nos 49169/09, 54908/09, 55156/09 *et al*., *Stella v. Italy,* para. 65.

[55] *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [GC], cit., para. 92.

[56] Ivi, para. 94, (emphasis added).

State, then it must request all necessary information from the issuing authority showing that the particular prison is safe or that measures have been taken to address the systemic deficiencies. Consequently, the decision to surrender the individual concerned must be suspended as long as it is necessary. Once the information is received and if the executing authority finds the existence of a real risk of inhuman or degrading treatment, it must postpone the execution of the EAW.[57] It seems that the execution can be suspended as long as the risk of inhuman treatment is present in the issuing state. The executing authority can however only decide to keep the individual concerned in detention as long as it is proportionate for the purpose of the case. In application of Art. 6 of the Charter and Art. 5 of the European Convention, and of the *Lanigan* case, the executing authority will have to decide to put an end on the detention eventually. The court must also take the presumption of innocence into account in cases where the fugitive is to be surrendered for prosecution.[58] Nevertheless, that authority must make sure that all necessary measures will be taken in order to avoid the individual to abscond.

The *Pál Aranyosi and Robert Caldararu* joined cases certainly raise many questions, but due to place constraints we will make two considerations. First of all, can the failure to respect fundamental rights by the issuing country be considered as a non-execution ground? Secondly, does this case law comply with the European Convention system and can it be extended to other fundamental rights?

The CJEU does not seem to create a new non-execution ground. It is established case law that the list of non-execution grounds provided in the EAW Framework Decision is exhaustive. Although Preamble 13 of the EAW Framework Decision provides that "[n]o person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment", as already said there is no explicit grounds in the EAW Framework Decision that provides for the non-execution of an EAW if it would be in violation of Arts 4 of the Charter and 3 of the European Convention. The CJEU rules that in such a case the executing authority should "postpone" the execution of the EAW. Obviously postponing is not the same as refusing to execute. Nevertheless, supposing that in most cases, the surrender of the EAW is indeed only postponed, it cannot be excluded that in other circumstances the surrender should simply be refused. What would happen in situations where the information concerning the detention facilities in the issuing state remains unsatisfactory for a long period?[59] In theory,

[57] Ivi, para. 98.

[58] Ivi, para. 100.

[59] In certain Member States prison conditions are extremely worrisome for years and does not seem to improve for all kinds of reasons (money, political will, etc.); see for example European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture

the executing authority should release the fugitive if the detention violates Arts 6 of the Charter and 5 of the European Convention. Of course, there are measures such as electronic ankle bracelets to make sure that an individual will not abscond, but not all Member States have such a system in place. Other measures such as a judicial control imposing on the fugitive regular visits to the police station may, with regard to certain persons, not be sufficient to prevent that person from absconding. It seems that the CJEU acknowledges that. The last sentence of the last paragraph provides that in such circumstances the "surrender procedure should be put to an end".[60] It is unclear how a national court should interpret this sentence. What should the executing State do with the fugitive? Prosecute him or her on the basis of national law in case the EAW was issued for the purpose of prosecution? Carry out the sentence in the prisons of the executing State in case the EAW was issued for the purpose of execution? Set the fugitive free? The CJEU will have to clarify.[61]

In addition to this vagueness, the situation creates a legal vacuum. In certain Member States, executing authorities apply a human rights based ground for non-execution of an EAW provided in their national law to implement the *Aranyosi and Caldararu* joined cases.[62] However, not only the compatibility of the EAW Framework Decision with such a national ground for non-execution is disputable,[63] but also in other Member States no similar provision have been enshrined in national legislation.[64] What would then be the legal basis in these latter Member States for suspending the execution of the EAW? Until clarification either provided by an amendment of the EAW Framework Decision or by a future ruling of the CJEU, it must be observed that mutual trust finds an important limitation in the "exceptional circumstances" created by the risk of degrading treatment

and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2015, CPT/Inf (2015) 36, www.cpt.coe.int or European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 23 April 2015, www.cpt.coe.int.

[60] *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [GC], cit., para. 104.

[61] See the pending reference in Court of Justice, Case C-496/16, *Aranyosi*.

[62] In addition to what happened in the *Aranyosi and Caldararu* proceedings where the German Court applied para. 73 of the Law on international legal assistance, such is also the situation in the Netherlands where the Amsterdam Court applies Art. 11 of the Dutch Surrender Act, available at wetten.overheid.nl, and non-official translation available at www.law.uj.edu.pl; see for example Court of Amsterdam: judgment of 13 September 2016, ECLI:NL:RBAMS:2016:6014; judgment of 4 August 2016, ECLI:NL:RBAMS:2016:4966; judgment of 28 April 2016, ECLI:NL:RBAMS:2016:2630.

[63] It is striking to see that in *Aranyosi and Caldararu* the CJEU did not strike down the German provision.

[64] See for example, Report from the Commission COM(2005) 63 final based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, p. 5. It should be mentioned that although explicit grounds of refusal for violation of fundamental rights have been added in national law, the Commission has always considered that these should be invoked only in exceptional circumstances within the Union.

in foreign prisons. This limitation has a concrete impact on the obligation of mutual recognition which in such a situation must be tempered if not set aside.

The *Aranyosi and Caldararu* joined cases raise also the question to what extent its findings on mutual trust and mutual recognition comply with the Member States obligation to respect the European Convention and whether the principle of mutual trust could be shaken by breaches of fundamental rights other than Arts 4 of the Charter and 3 of the European Convention.

## IV. *Avotinš v. Aranyosi*: clash of titans?

Recently, in the *Avotiņš v. Latvia* Case the Grand Chamber of the European Court of Human Rights[65] decided for the first time on the compatibility with Art. 6 of the European Convention of the EU system of mutual recognition. Mr Avotiņš had been ordered to pay a debt to F.H. Ltd by a Cypriot Court. This order had been given by default. In application of the "Brussels I Regulation"[66] F.H. Ltd sought to have the order enforced in Latvia where Avotiņš had his residence. A final judgment given by the Latvian Supreme Court confirmed that the Cypriot order had to be recognised and enforced in Latvia. Mr Avotiņš claimed, *inter alia*, that the Latvian judgment should not have recognised the Cypriot order in application of the ground for non-execution provided in Art. 34 of the Regulation.[67] In particular, Mr Avotiņš claimed that the Latvian Supreme Court could not recognise the Cypriot order because it had been given by default although F.H. Ltd's lawyers knew his whereabouts. Such a decision, Mr Avotiņš argued, was in breach of the Latvian's obligation to respect Art. 6 of the European Convention.[68]

Since the dispute was about the interpretation of a EU Regulation, the European Court assessed whether the so-called *Bosphorus* presumption doctrine should apply to this case and, consequently, should have dispensed the Latvian Supreme Court to assess whether the Cypriot Court had infringed the European Convention when imple-

[65] European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotiņš v. Latvia* [GC]. For an interesting analysis, see for example G. Biagioni, Avotiņš v. Latvia*. The Uneasy Balance Between Mutual Recognition of Judgments and Protection of Fundamental Rights*, in *European Papers*, 2016, www.europeanpapers.eu, p. 579 *et seq.*

[66] Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).

[67] Art. 34 of Regulation 44/2001, cit.: "A judgment shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought; 2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; [...]".

[68] Although it was also argued that the Cypriot order was in breach of the right to a fair hearing, the European Court declared the complaint against Cyprus inadmissible as being out of time.

menting the EU Regulation.[69] According to that doctrine[70] the EU guarantees a level of protection of fundamental rights equivalent to that of the European Convention.[71] There are two conditions for the presumption to apply.[72]

Firstly, it applies where the domestic authorities have no margin of manoeuvre when they implement EU law. For the first time, the European Court decides that EU Member States have no discretion "where the mutual recognition mechanisms require the court to presume that the observance of fundamental rights by another Member State has been sufficient".[73] Secondly, the mechanisms provided for by EU law in order to supervise the respect of fundamental rights must have deployed their full potential. In this respect, among all the EU supervisory mechanisms,[74] the possibility for a national court to refer questions to the CJEU in a particular case is satisfactory.[75] In this respect, the European Court recalls the broad discretion that national courts enjoy. The condition does not imply to refer a question in all cases without exception.[76]

In the case, these two conditions were met and the *Bosphorus* presumption applied. The European Court reiterated[77] that the presumption could be rebutted if "it is considered that the protection of Convention rights was manifestly deficient".[78] In such a case, national courts must let the European Convention's obligations prevail over their EU obligations. Put differently, if a national court was to find that while abiding by its obliga-

[69] It is worth noting that it is the first time that the European Court applies the *Bosphorus* presumption to EU mutual recognition.

[70] On this doctrine, see for example, O. DE SCHUTTER, *Bosphorus Post-Accession: Redefining the Relationships between the European Court of Human Rights and the Parties to the Convention*, in V. KOSTA, N. SKOUTARIS, V.P. TZEVELEKOS (eds), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing, 2014, p. 177 *et seq.* T. LOCK, *Beyond* Bosphorus*: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights*, in *Human Rights Law Review*, 2010, p. 529 *et seq.*

[71] It is interesting to note that for the European Court the protection is equivalent because of the existence of fundamental rights binding in the context of EU law, in particular the Charter, *Avotiņš v. Latvia* [GC], cit., paras 102-104. These two characteristics recall the conditions for mutual trust discussed in section II.2.

[72] *Avotiņš v. Latvia* [GC], cit., para. 105.

[73] Ivi, para. 115.

[74] These mechanims are listed in the European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], paras 160-164 and concern in particular the action for annulment, the action against the EU for failure to act, the plea of illegality, state liability and other means of judicial protection such as direct effect and consistent interpretation.

[75] However, "courts against whose decision no judicial remedy exists in national law are obliged to give reasons for refusing to refer a question to the CJEU for a preliminary ruling". *Avotiņš v. Latvia* [GC], cit., para. 110. The failure to provide reasons when rejecting a request to make a preliminary reference to the CJEU is a breach of Art. 6, para. 1, of the European Convention, see European Court of Human Rights, judgment of 8 April 2014, no. 17120/09, *Dhahbi v. Italy*.

[76] *Avotiņš v. Latvia* [GC], cit., para. 109.

[77] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], cit., paras 155-156.

[78] *Avotiņš v. Latvia* [GC], cit., para. 112.

tions under EU law the protection of a particular European Convention right would be manifestly deficient that court would have to set aside its obligations under EU law. The European Court further assessed whether the protection of the Art. 6, para. 1, of the European Convention had been manifestly deficient in the case against Mr Avotiņš. The European Court did however not find such a deficiency.

Although the Case concerns mutual recognition in civil matters, the European Court observes that mutual recognition mechanisms are founded on the principle of mutual trust between the EU Member States and are important for the construction of the AFSJ because it facilitates effective judicial cooperation in civil and criminal matters.[79] The European Court acknowledges the existence and role of mutual trust in the context of mutual recognition and notes that Member States have no margin of discretion when they implement mutual recognition whether in civil or in criminal matters. In the context of the EAW, this means that an executing court must presume that the individual's fundamental rights have been or will be respected in the issuing state. The European Court considers that the EU system of mutual recognition offers a protection to fundamental rights which is equivalent to that of the European Convention. Nevertheless, such a protection would not be considered as equivalent if it can be argued that that national court failed to refer to the CJEU where that court had doubts on the execution of the EAW.[80] It must be noted here that national courts have quite some discretion whether to refer or not to the CJEU. Especially, one may wonder to what extent an authority executing an EAW would have an obligation to send a reference if it has doubts not on the interpretation of EU law but rather on the level of fundamental rights protection in the issuing State. The question will then be if the *Bosphorus* presumption applies when can it be rebutted if a manifest deficiency in the mutual recognition system is showed?

The findings of the European Court concerning the test that national courts should apply to assess whether a fundamental right has been breached in the context of mutual recognition contrasts singularly with what the CJEU decided in its Opinion 2/13:

> "[l]imiting to exceptional cases the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient".[81]

[79] Ivi, cit., para. 113.

[80] The European Court notes here that the faculty and sometimes obligation for a national court to refer a question to the CJEU should not be considered with excessive formalism.

[81] *Avotiņš v. Latvia* [GC], cit., para. 114.

The European Court then rules that:

> "[i]f a *serious and substantiated complaint* is raised before [national courts] to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law".[82]

Thus where an individual subject to an EAW put forward a serious and substantiated complaint that the protection of one of his or her rights has been manifestly deficient and it cannot be remedied by EU law, the national court has the obligation under the Convention to assess whether the issuing Member State has respected or will respect this individual's fundamental rights.

The existence of a remedy provided in EU law is essential, but this requirement needs clarification. This requirement does not seem to refer to the possibility to refer the case to the CJEU since this is one of the conditions to apply the *Bosphorus* presumption first of all. In *Avotiņš v. Latvia* the European Court refers to the remedy provided in Art. 34 of the Brussels I Regulation. As said earlier, in EAW proceedings there is no human rights based ground for non-execution. The only existing remedy is that which the CJEU found in the *Aranyosi and Caldararu* joined cases, but it is limited to exceptional circumstances e.g. violations of Arts 3 of the European Convention and 4 of the Charter. In contrast to the CJEU case law, the European Court does not limit the role of national courts to exceptional circumstances. In theory, unless it decided to refer to the CJEU in this respect, a national court could not refuse to listen to the arguments of a plaintiff showing that the issuing State does not respect one of his or her Convention rights provided the argument is serious and substantiated. The contrast between the position of the CJEU and that of the European Court seems obvious. To date, the CJEU forbids the executing authorities to assess whether fundamental rights have been respected by the issuing State save where Arts 4 of the Charter and 3 of the European Convention are at stake, whereas the European Court opens the review to possible violation of any right. However, the contrast may well be less important than one may think at first glance. One may take the right to a fair trial as an example.

In the leading case *Soering* the European Court decided on the application in extradition proceedings of Art. 3 of the European Convention. This case applies also to EAW proceedings as the CJEU has always recalled that the EAW replaces extradition[83] and, for the same reason, the European Court has implicitly decided that the case law on extradition procedures applies to the EAW.[84] Indeed, the test imposed by the CJEU in

[82] Ivi, para. 116 (emphasis added).

[83] For example *Stefano Melloni v. Ministerio Fiscal* [GC], cit., para. 36; *Jeremy F. v. Premier ministre*, cit., para. 34 and, Court of Justice, judgment of 28 June 2012, case C-192/12 PPU, *Melvin West*, para. 54

[84] European Court of Human Rights, judgment of 4 May 2010, no. 56588/07, *Stapleton v. Ireland*; see E. Brouwer, in *European Papers*, 2016, www.europeanpapers.eu, p. 893 *et seq.*

*Aranyosi and Caldararu* in para. 94[85] is similar, to say the least, to that of the European Court which decided that the extradition of a fugitive must be refused if "s*ubstantial grounds* have been shown for believing that the person concerned, if extradited, faces a *real risk* of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country".[86]

In *Soering* not only the application of Art. 3 of the European Convention but also Art. 6 of the Convention came under discussion. The European Court did "not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country".[87] The right to a fair trial in criminal matters has the same meaning and scope in both the European Convention (Art. 6) and in the Charter (Arts 47 and 48). As decided by the CJEU in *DEB*, in application of Art. 52, para. 3, of the Charter should a right have the same meaning and scope in both human rights instruments, then the meaning and scope of the Charter provision should be determined in accordance not only with the text of the European Convention, but also Strasbourg case law.[88] Consequently, when deciding on EAW proceedings, the CJEU cannot impose stronger restrictions than those allowed by the European Court in extradition and/or EAW cases.

The test imposed by the European Court in respect of Art. 6 of the European Convention in extradition procedures is however more difficult to meet than the real risk test of Art. 3. The European Court imposes the existence of a "flagrant denial of justice". The European Court listed in the *Othman* case what flagrant denial can consist of. Such is the case, for example, of a conviction *in absentia* with no possibility subsequently to obtain a fresh determination of the merits of the charge, a trial which is summary in nature and conducted with a total disregard for the rights of the defence, a detention without any access to an independent and impartial tribunal to have the legality the detention

[85] "Consequently, in order to ensure respect for Article 4 of the Charter in the individual circumstances of the person who is the subject of the European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, 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 treatment, within the meaning of Article 4", *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [GC], cit., para. 94.

[86] European Court of Human Rights, judgment of 7 July 1989, no. 14038/88, *Soering v. the United Kingdom*, para. 91 (emphasis added).

[87] Ivi, para. 113.

[88] Court of Justice, judgment of 22 December 2010, case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, para. 35. See on that, S. Peers, S. Prechal, *Article 52*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights. A Commentary*, Oxford and Portland: Hart Publishing, 2014, p. 1490 *et seq.*

reviewed, a deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country or the use at trial of evidence obtained by torture.[89]

In fact:

> "in the twenty-two years since the Soering judgment, the Court has never found that an expulsion would be in violation of Article 6. This fact, when taken with the examples given in the preceding paragraph, serves to underline the Court's view that 'flagrant denial of justice' is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article".[90]

Furthermore, in cases concerning EAWs the European Court follows the case law of the CJEU[91] and decides that when the fugitive argues that the issuing Member State has breached Art. 6, it is more appropriate for the courts of that Member State to assess the violation of the right to fair trial.[92] It must then be concluded that, as far as the right to a fair trial is concerned, the recent *Avotiņš v. Latvia* case does not seem to change the fate of fugitives under EAW proceedings. In order to obtain from the executing authorities a decision refusing the surrender based on a violation to his or her right to a fair trial, a fugitive would have to put forward serious and substantiated arguments that the proceedings leading to the issuance of the EAW were (or will be) affected by a flagrant denial of justice that cannot be remedied, which, in the words of the European Court, is unlikely to happen.[93]

## V. Conclusion

The principle of mutual trust in criminal matters is slowly taking shape. In the context of mutual recognition, it is clearly linked to the commitment of the EU and its Member States to adhere to and respect common values. Among these values, the protection of the individual's fundamental rights is essential. When recognising and executing a foreign decision, the judicial authorities of a Member State are not only bound to presume

[89] European Court of Human Rights, judgment of 17 January 2012, no. 8139/09, *Othman (Abu Qatada) v. the United Kingdom*, paras 259 and 263.

[90] Ivi, para. 260.

[91] See for example *Jeremy F. v. Premier ministre*, cit., para. 50.

[92] *Stapleton v. Ireland*, cit., para. 29. In that case, the applicant was subject to an EAW issued by the UK and executed by Ireland. He complained that a delay in prosecuting a crime in the UK had amounted to a violation of Art. 6 of the European Convention and, that, consequently, Ireland should refuse to surrender him.

[93] One should note that although the *Pál Aranyosi and Robert Caldararu* joined cases was decided before *Avotiņš v. Latvia* the European Court did not refer to the findings of the CJEU.

that the EU legislation in the field of criminal law complies with fundamental rights but also that the authorities that issued this decision also complied with these fundamental rights. The presumption is very far reaching. In case of doubts, if no ground for non-execution applies to the pending proceedings a judicial authority will, in theory, only be able to refer to the CJEU. The presumption is justified also because legal and judicial remedies in all EU Member States exist in order to redress a possible breach of fundamental right. Nevertheless, in certain cases these remedies are insufficient or inefficient to redress the breach and prevent any further recurrence. For the CJEU, this happens only in "exceptional circumstances" in particular where mutual recognition leads to the transfer of fugitives to a Member State where the prison facilities are in such poor conditions that the transfer would amount to a violation of Art. 4 of the Charter and Art. 3 of the European Convention. The right protected by these provisions being absolute, the CJEU had no other choice but to acknowledge that in such circumstances the obligation of mutual recognition should be set aside. The CJEU does not however create a new ground for non-execution of this obligation. The argument of the CJEU moves to the level of mutual trust and goes back to the very commitments of each one of the EU Member States to respect fundamental values. The test imposed on judicial authorities is therefore very strict and detailed. For its part, the European Court of Human Rights acknowledges the existence and necessity of mutual trust underlying EU obligations in the AFSJ, but it seems less restrictive than the CJEU. Indeed it considers that the review of fundamental rights observance in the context of mutual recognition cannot be limited to "exceptional circumstances". Nevertheless, the position of the two European Courts is not as divergent as it may seem at first glance. When using the respect of the right to a fair trial in the context of extradition as an example, one can see that the case law of the European Court imposes very restrictive conditions of "flagrant denial of justice" on State party to refuse extradition based on violation of that right by the requesting State. This case law should also apply by analogy to EAW proceedings. The conditions are so restrictive that the European Court has up until now never found a breach amounting to such a flagrant denial of justice. The EU presumption of mutual trust is in fact one of the indicators reflecting that the rule of law is deteriorating in certain Member States at the moment.[94] It should certainly not be taken lightly. In the context of prison conditions, the report falls without call, these conditions are deteriorating also in EU Member States. If nothing is done and the situation worsens, this may well put an end to the transfer of fugitives in application of mutual recognition and, consequently, undermine the whole AFSJ.

[94] See S. PEERS, *Human Rights and the European Arrest Warrant: Has the ECJ turned from Poacher to Gamekeeper?*, 12 November 2016, eulawanalysis.blogspot.nl.