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Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions

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Abstract

This article contends that the presumption of mutual trust between the European Union Member States is a legal fiction. In the context of transfer of a custodial sentence from one country to another based on mutual recognition and mutual trust, a failure of the latter can have detrimental effects on judicial cooperation and, especially, on the functions of punishment. In particular, mutual recognition and mutual trust create a bridge between the external limits of punishment (fundamental rights) and the internal limits to the functions of punishment (retribution, deterrence and rehabilitation). The non-compliance with individuals' fundamental rights undermines the very social functions of punishment. Such a failure can only be prevented if the Member States and the European Union endeavour to establish and maintain a truly integrated penal policy with concerns for individuals at its very core.

Keywords

European Arrest Warrant, fundamental rights, mutual trust, punishment, transfer of sentences persons

1. Introduction

In the European Union (EU) the transfer of a custodial sentence from one country to another, based on the Framework Decision on the European Arrest Warrant (FD EAW)[1] and on the Framework

1. Council Framework Decision 2002/584/JHA of 13 June 2002 on the EAW and the surrender procedures between Member States, [2002] OJ L 190/1 (FD EAW).

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Decision on the Transfer of Prisoners (FD ToP),[2] is facilitated and accelerated by the principle of mutual recognition, which in turn is founded on the supposed mutual trust that must exist between Member States. The aim of these facilitated transfers is to ensure certainty of punishment and the fulfilment of all its functions in cross-border cases. This article contends, however, that mutual trust is a legal fiction. In practice, from the perspective of the transfer of sentences imposing terms of imprisonment, mutual trust does not always account for an adequate protection of the external limitation to punishment - namely the respect for fundamental rights - particularly where detention conditions are unsatisfactory. Moreover, in a cross-border context, mutual trust can have a disruptive effect on the retribution, deterrence and rehabilitation functions of punishment[3] which, in the context of this special issue, are seen as internal limits thereto. As a consequence thereof, the construction of the EU as an area of freedom, security and justice (AFSJ) centred on the individual and respect for fundamental rights may be seriously undermined (Article 3(2) TEU). A failure in mutual trust can only be prevented if the EU develops a truly integrated penal policy with concerns for individuals at its very core.

The argument will proceed as follows. The second section of this article analyses the essential features of the FD EAW and FD ToP and the meaning of mutual trust for these two instruments. The third section reveals some of the discrepancies affecting this system in the practice of EU Member States. The evidence is based on a recent legal and empirical analysis of mutual recognition cases conducted in five EU Member States, namely Italy, the Netherlands, Sweden, Romania and Poland.[4] The last section suggests several lines of action for the purpose of addressing these inconsistencies.

2. The role of mutual recognition and mutual trust in the execution of prison sentences under the EAW and the transfer of prisoners

The objective of the European Arrest Warrant (EAW) is to ensure the swift and efficient reduction of serious crimes within the EU through the expedient surrender of suspects of crime or persons who have been convicted of a crime.[5] The FD EAW authorizes a Member State (the issuing state), under certain conditions, to request another Member State (the executing state) to surrender an individual that is suspected of having committed a criminal offence or who has been sentenced for the commission of an offence. The FD EAW imposes an obligation on the executing state to surrender a person to the issuing state. In the case of an EAW, in principle, the executing state only agrees to recognize a sentence handed down by another country or a prosecution that might lead to such a sentence. It is not generally concerned with the execution of the punishment.[6]

2. 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, [2008] OJ L 327/27 (FD ToP).
3. See below Section 4.1 on the functions of punishment.
4. T. Marguery, *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU* (Wolf Legal Publishers, 2018).
5. Recital 5 of the Preamble to the FD EAW. For further information on the EAW, see for example L. Klimek, *European Arrest Warrant* (Springer, 2015); concerning the recent developments involving the EAW, see A.P. van der Mei, 'The European Arrest Warrant system: Recent developments in the case law of the Court of Justice', 24 *Maastricht Journal of European and Comparative Law* (2017), p. 882–904.
6. Article 4(6) of the FD EAW provides an exception where the requested person is a national or resident of the executing state and this state agrees to execute the sentence. The executing state must actually undertake to execute the sentence

By way of contrast, the FD ToP's declared aim is to ensure the social rehabilitation of a sentenced person through a simplified system of the recognition of the sentence within the EU.[7] It enables the issuing state, where a final sentence has been imposed on a person involving the deprivation of liberty, to forward the judgment together with a certificate to the executing state where the convicted person has the best opportunity of social reintegration . The FD ToP imposes an obligation on the executing state's competent authority to accept and execute the sentence that has been delivered in the issuing state against that person. The executing state not only recognizes a foreign sentence, but it also accepts, after adaptation if necessary,[8] to carry out the punishment. The aim of these two instruments is quite different and mutual recognition operates differently, but both the FD EAW and the FD ToP imply the extraterritorial application of criminal law and have the effect of transferring, almost automatically, the individual affected by it or the responsibility for executing a custodial sentence from one country to another.

National authorities are bound by a presumption of compliance with EU fundamental rights concerning the decision that they have to enforce.[9] The competent authority in the executing state must, in general terms, agree to execute an EAW or to recognize it unless formal requirements have not been met by the foreign decision (or the request is incomplete) or a non-execution ground applies.[10] The review of the merits of that decision in light of the fundamental rights of the individual concerned generally remains within the jurisdiction of the issuing state.[11] The executing authority must accept the application of the foreign criminal law and procedure. This extraterritoriality requires a high level of mutual trust between the different national authorities to ensure that the law of the country in question will adequately guarantee the rights of the individual.[12]

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and not only state its willingness to do so, see Case C-579/15 *Popławski* EU:C:2017:503, para. 42. Article 5(3) of the FD EAW reproduces this condition in the context of EAWs for prosecution.

7. Recital 9 of the Preamble and Article 3 of the FD ToP. See for a critical approach A. Martufi, 'Assessing the resilience of ''social rehabilitation'' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA', 9 *New Journal of European Criminal Law* (2018), p. 43–61; also I. Wieczorek, 'EU Constitutional limits to the Europeanization of Punishment: A case study on offenders' rehabilitation', 25 *Maastricht Journal of European and Comparative Law* (2018).
8. Concerning the enforcement and adaptation of the sentence see Article 8 of the FD ToP. In Case C-554/14 *Criminal proceedings against Ognyanov*, EU:C:2016:835, the CJEU decided that the law of the executing state can apply only to the part of the sentence that remains to be served by the sentenced person, after the transfer, on the territory of that state. Consequently, it is, for example, not possible for this latter state to grant a reduction in the sentence based on work carried out by the sentenced person during their imprisonment in the issuing state if that state does not allow work to be considered as a reason for a sentence reduction. See on this issue S. Montaldo, 'Judicial cooperation, Transfer of Prisoners and Offenders' Rehabilitation: No Fairy-Tale Bliss. Comment on Ognyanov', 2 *European Papers* (2017), p. 1–10.
9. The CJEU stresses that mutual trust *must* exist between Member States, see Case C-220/18 PPU *ML*, EU:C:2018:589, para. 53 and Case C-216/18 PPU *LM*, EU:C:2018:586, para. 40.
10. The FD EAW and the FD ToP both provide for an exhaustive list of grounds for the non-execution of a foreign decision. The FD EAW recognizes compulsory grounds of refusal (see Article 3 of the FD EAW) and optional grounds (see Articles 4 and 4a of the FD EAW). In addition to that, the EAW (see Article 5 of the FD EAW) provides that the execution of an EAW can be subject to certain conditions. For its part, the ToP only provides for optional grounds of refusal (see Article 9 of the FD ToP).
11. See for example in the context of the EAW, Case C-168/13 PPU *Jeremy F. v. Premier ministre*, EU:C:2013:358, para. 50.
12. Concerning the extraterritoriality of the EAW, see V. Mitsilegas, 'The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice', 6 *New Journal of European Criminal Law* (2015), p. 457.

The principle of mutual recognition on which the FD EAW and FD ToP are based is founded on a declared[13] mutual trust between the Member States.[14] Mutual trust[15] is itself grounded on Member States' implementation of and respect for the common values contained in Article 2 TEU, particularly the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights and the implementing EU law.[16] Mutual trust assumes all Member States' systems equally protect individuals' fundamental rights because they share common standards of protection. All Member States are bound by the Charter of Fundamental Rights of the EU (the Charter) when they implement EU law, and when they do not, then the European Convention on Human Rights (ECHR) provides a 'safety net'.[17] As Leanaerts has pointed out, this presumption is also supported by the special nature of EU law which implies, in particular, equality between the Member States and between their citizens before the Treaty (Article (4(2) TEU) and the duty of sincere cooperation between Member States and between the Member States and the Union (Article 4(3) TEU).[18] This aspect of mutual trust 'on paper' is also referred to as trust *in abstracto*.[19]

The limitation of judicial review imposed on domestic authorities because of mutual trust can result in severe tensions where these authorities have serious doubts as to a foreign counterpart's respect for the individual's fundamental rights. Fortunately, EU law does not require blind trust and a rebuttal of this trust is possible. It would be meaningless to base trust on a presumption of a general adherence to the values, if this adherence is not actually enforced.[20] Besides possible actions undertaken by the EU institutions to ensure that fundamental rights obligations are respected,[21] the safeguarding of these values also occurs on a more horizontal level. Domestic

13. One of the origins of mutual trust in the area of EU criminal law goes back to the decision of the CJEU in Joined Cases C-187/01 and C-385/01 *Hüseyin Gözütok and Klaus Brügge*, EU:C:2003:87, para. 33.
14. Recital 10 of the Preamble to the FD EAW and Recital 5 of the Preamble to the FD ToP, see also Case C-220/18 PPU *ML*, para. 49.
15. Concerning mutual trust, see, for example, V. Mitsilegas, 6 *New Journal of European Criminal Law* (2015), p. 457; A. Willems, 'Mutual trust as a term of art in EU criminal law: Revealing its hybrid character', 9 *European Journal of Legal Studies* (2016), p. 211–249; K. Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', 54 *Common Market Law Review* (2017), p. 805–840; S. Prechal, 'Mutual trust before the Court of Justice of the European Union', 2 *European Papers* (2017), p. 75–92; T. Marguery, 'Rebuttal of mutual trust and mutual recognition in criminal matters: Is 'exceptional' enough?', 1 *European Papers* (2016), p. 943–963; E. Xanthopoulou, 'Mutual trust and rights in EU criminal and asylum law: Three phase of evolution and the uncharted territory beyond blind trust', 55 *Common Market Law Review* (2018), p. 489–510; T. Van den Sanden, 'Het principe van wederzijds vertrouwen in de ruimte van vrijheid, veiligheid en recht', 15 *Tijdschrift voor Europees en economisch recht* (2014), p. 235.
16. Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties, EU:C:2014:2454, para. 168. And more recently Cases C-220/18 PPU *ML*, para. 48 and C-216/18 PPU *LM*, para. 35; see also Recital 2 of the Preamble to Council Resolution of 30 November 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings, [2009] OJ C 295/1.
17. See for example Case C-256/11 *Murat Dereci and Others v. Bundesministerium für Inneres*, EU:C:2011:734, para. 72.
18. See K. Lenaerts, 54 *Common Market Law Review* (2017), p. 813.
19. See C. Janssens, *The principle of mutual recognition in EU law* (Oxford University Press, 2013), p. 141–144.
20. For example, D. Halberstam, '"It's the Autonomy, Stupid!" A modest defence of Opinion 2/13 on EU Accession to the ECHR, and the way forward', 16 *German Law Journal* (2015), p. 105; D. Kochenov, 'EU law without the rule of law: Is the veneration of autonomy worth it?', 34 *Yearbook of European Law* (2015), p. 74–96.
21. Infringement proceedings based on Article 258 TFEU: Article 7 TEU recommendation from the Commission against Poland.

authorities are bound to refute their trust in exceptional circumstances, particularly when there are reasons to believe that fundamental rights are being seriously undermined.[22] Trust *in abstracto* should be confirmed *in concreto*.

The control exercised by a Member State concerning another Member State's respect for the values on which mutual trust is based can cause a serious mitigation of and, eventually, a de facto exception to mutual recognition. Especially concerning prison conditions, the CJEU concluded in *Aranyosi* and *Căldăraru*[23] that mutual trust can be rebutted where mutual recognition would entail a real risk of torture or degrading treatment (Article 4 of the Charter and Article 3 ECHR)[24] of the person subject to an EAW if they were transferred to the issuing country.[25]

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, this judicial authority is bound to assess the existence of that risk.[26] The assessment conducted by the executing authority takes place in two stages.

First, when assessing a violation of the right not to be tortured or not to suffer degrading treatment,

> [t]he 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 (. . .)[27]

The CJEU leaves a large amount of discretion to the national courts to consider that a real risk of inhuman or degrading treatment exists.[28]

Second, the executing judicial authority must also assess whether the person concerned will actually be subjected to this risk in the particular circumstances of the case.[29] The assessment must

22. Cases C-220/18 PPU *ML*, para. 50; and C-216/18 PPU *LM*, para. 37 (emphasis added); see also K. Lenaerts, 54 *Common Market Law Review* (2017) p. 805–840.
23. Joined Cases C-659/15 PPU and C-404/15 *Căldăraru and Aranyosi*, EU:C:2016:198; concerning the judgment see, for example, A. Willems, 9 *European Journal of Legal Studies* (2016), p. 211–249; G. Anagnostaras, 'Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Căldăraru', 53 *Common Market Law Review* (2016), p. 1675–1704; T. Marguery, 1 *European Papers* (2016), p. 943–963.
24. It should be noted that 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 the 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 under Article 4 of the Charter and Article 3 of the European Convention. See 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*, EU:C:2011:865, para. 97–106.
25. Recently, in C-216/18 PPU *LM*, the CJEU has extended the findings of the CJEU in the *Aranyosi* and *Căldăraru* judgment to the possible breach of the right to an independent tribunal, which is considered as the essence of the right to a fair trial (Article 47(2) of the Charter and Article 6(1) ECHR).
26. Joined Cases C-659/15 PPU and C-404/15 *Căldăraru and Aranyosi*, para. 88.
27. Ibid., para. 89.
28. National courts can rely on judgments of the ECtHR and reports and other documents produced by bodies of the Council of Europe, for example.
29. Joined Cases C-659/15 PPU and C-404/15 *Căldăraru and Aranyosi*, para. 94.

be 'specific and precise'.[30] The executing authority must be in possession of information about the specific place where the individual concerned will be detained, and about the conditions of detention in this facility. If the executing authority does not have information concerning the conditions of detention in a particular detention facility in the issuing Member State, then, as per Article 15(2) of the FD EAW, it must request all necessary information from the issuing authority to demonstrate that the particular prison meets the required human rights standards or that measures have been taken to address any systemic deficiencies. If there are problems in this respect, the decision to surrender the individual concerned must be suspended for as long as 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.[31] It seems that the execution can be suspended for as long as the risk of inhuman treatment is present in the issuing state. However, as per Article 6 of the Charter and Article 5 ECHR, as interpreted in the *Lanigan* case,[32] the executing authority can only decide to keep the individual concerned in detention for as long as this is proportionate for the purposes of the case.[33] In this respect, all necessary measures must be taken to prevent the individual from absconding. Eventually, if the executing authority cannot be satisfied within a reasonable period of time that the surrender will not lead to a violation of Article 3 ECHR of Article 4 of the Charter, then this authority 'must decide whether the surrender procedure should be brought to an end'.[34]

The *Aranyosi* and *Căldăraru* judgment relieved some of the tensions that were being felt by domestic authorities because of the questions and controversies linked to the exact outlines/limits of mutual trust. However, trust in this field remains something that cannot be imposed as a matter of law or case law. The following sections of this article are based on a legal and empirical analysis of mutual recognition cases conducted in Italy, the Netherlands, Sweden, Romania and Poland in the aftermath of the *Aranyosi* and *Căldăraru* judgment.[35] It reveals that certain problems of interpretation remain with regard to the principle of mutual trust and its limitations. Moreover, the extent of the mutual trust obligation still gives rise to certain questions with regard to the FD ToP, an instrument that was not at all discussed in the *Aranyosi* and *Caldararu* cases.

3. Mutual trust in practice in the context of the FD EAW and ToP

In the context of the transnational transfer of custodial sentences, a violation of an individual's fundamental rights can occur in three situations. Firstly, a violation may have affected the judgment that should be recognized (a past violation). Second, a violation may occur during the proceedings leading to the recognition of a judgment (a present violation). Finally, violations may take place in the future during the execution of the judgment (a future violation). Most of the problems have been reported with regard to the first and third category. With regard to the second category, in particular, procedural safeguards may be jeopardized during the recognition proceedings, such as the right to be heard in a language that is understood by the sentenced person.

30. Ibid., para. 92.
31. Ibid., para. 98.
32. Case C-237/15 PPU *Francis Lanigan v. Minister for Justice and Equality*, EU:C:2015:474.
33. See the contribution of L. Mancano, 'Mutual Recognition in Criminal Matters, Deprivation of Liberty and the Principle of Proportionality', 25 *Maastricht Journal of European and Comparative Law* (2018).
34. Joined Cases C-659/15 PPU and C-404/15 *Căldăraru and Aranyosi*, para. 104.
35. T. Marguery, *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU*.

However, no difficulties in this respect have been reported in the countries under analysis. This is either because the guarantees provided by the FD EAW and the FD ToP are sufficient and adequate or because these possible interferences can be remedied in the country that has issued the decision.[36] The following section will therefore focus on past and possible future violations of fundamental rights.

A. Past violations

With regard to past violations of the individual's fundamental rights that may have occurred in the issuing state, the observations can be split into two categories: cases where a strong presumption of trust may still create some tensions between the authorities and cases where the guarantees provided are sufficient.

Concerning the first category where cooperation might still be subject to some tension, although no cases have been reported in the countries studied, one can mention two situations in which this might take place in the future. First, in Poland, if there are reasonable grounds to believe that a sentence was imposed for the purpose of punishing a person on the grounds of their sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, then recognition may be refused.[37] Second, particularly in the Netherlands,[38] the question has been raised[39] as to whether the extradition case law of the European Court of Human Rights (ECtHR) in relation to a flagrant denial of a fundamental right that has occurred in the country which has issued the decision (in particular concerning the right to a fair trial and the right not to be tortured or suffer degrading treatment) should also apply to EAW and ToP procedures.[40] However, this question remains unanswered by the Dutch courts.[41] This is for two main reasons. Firstly, the threshold that is needed to refuse an extradition is very high and requires a flagrant denial of a fundamental right. Secondly, a claim that the sentenced person has not enjoyed a remedy in the sentencing country must be sufficiently substantiated to challenge this violation. Given such a high threshold, there are no cases where this question has been raised in practice.

Turning to cases where guarantees are sufficient in the event of past violations of fundamental rights, the national rapporteurs have concluded that a refusal to enforce a foreign custodial sentence is most likely to occur when the principle of *ne bis in idem* or the rights of accused persons with regards to a trial *in absentia* have not been respected in the country that imposed the sentence.[42] In such situations, however, the national authorities rely on the grounds of refusal provided for in the FD EAW (Articles 3(2) and 4(a)) and in the FD ToP (Article 9(c)) to protect these rights. The findings confirm, if necessary, that mutual trust is adequately enhanced by the

36. Ibid., p. 421 for the FD EAW and p. 427 for the FD ToP.
37. (PL) Article 611tk § 1 point 5 of the Polish Code of Criminal Procedure.
38. T. Marguery, *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU*, p. 206–209 and 236.
39. V. H. Glerum, *De weigeringsgronden bij uitlevering en overlevering: Een vergelijking en kritische evaluatie in het licht van het beginsel van wederzijdse erkenning* (Wolf Legal Publishers, 2013), p. 195.
40. In particular, ECtHR, *Soering versus the United Kingdom*, Application No. 14038/88, Judgment of 7 July 1989, para. 113; ECtHR, *Othman (Abu Qatada) versus the United Kingdom*, Judgment of 17 January 2012, Application No. 8139/09, para. 259 and 263. Concerning the notion of a flagrant denial of justice, see also the Opinion of Advocate General Sharpston in Case C-396/11 *Ciprian Vasile Radu*, EU:C:2013:39.
41. (NL) District Court of Amsterdam 27 April 2012, NL:RBAMS:2012:BW8962.
42. T. Marguery, *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU*, p. 148–149 and 164 (for Italy), p. 293 and p. 301–302 (for Poland), p. 395 (for Sweden) and, p. 421 and 426 (in the comparison).

establishment of standards for the protection of an individual's fundamental rights in EU legislation.

B. Risk of future violations

The research shows important differences in the implementation of the *Aranyosi* and *Căldăraru* judgment, which is meant to regulate the operation of mutual recognition in the event of possible future violations of human rights in the context of the EAW. Moreover, with regard to the FD ToP, it reveals that conditions of detention are very often (unlike in the EAW) not taken into consideration in the decision to transfer a sentence to another country. This poses the question of the scope of application of the conditionality of mutual trust in this Framework Decision.

1. Divergences in the interpretation of the Aranyosi and Căldăraru test

It should be stressed that the *Aranyosi* and *Căldăraru* judgment was met with a feeling of relief in several Member States and it marked an important change in the enforcement of mutual recognition. In general, most Member States (for example, Italy, Sweden and the Netherlands) have developed their own tests to assess the existence of a risk *in abstracto* and of a risk *in concreto* of a violation of Article 3 ECHR and Article 4 of the Charter.[43] Concerning the first tier of the *Aranyosi* and *Căldăraru* test, it must be observed that the role of the defence lawyer in the context of the *Aranyosi* and *Căldăraru* assessment varies between the Member States. In general, the defence bears the burden of proof when it comes to demonstrating that a surrender may lead to degrading treatment. However, it is unclear how the defence should obtain this information. As was concluded in the Swedish report,[44] the socioeconomic and geopolitical inequalities among EU Member States can cause havoc with the rights of the person in question. For example, in the absence of an adequate European network of defence lawyers, certain individuals may have luck on their side because they have a lawyer whose network extends to the issuing country, but others may not.

Moreover, the role and powers of the lawyer concerning the second tier of the test remain unclear. This is regrettable because most of the divergences take place where the executing authority has to identify precisely whether the transfer of the person will lead to a violation of Article 3 ECHR or Article 4 of the Charter in their specific case. Tensions especially occur when the executing judicial authorities must obtain information from their foreign counterparts.

First, language and other practical difficulties, such as the time limit for answering the information request, can be problematic. It is the executing authority that sets the deadline for the receipt of this information. In particular, there is no clear standard concerning the time limit for answering the request. Thus, this limit can vary from one country to another (for example, a maximum 30 days in Italy or no specific time limit in the Netherlands).[45]

Second, the extent of the control on the conditions of detention poses problems. Should the control concern all prisons where the person may be detained? Also, the amount and the exact nature of the information requested under Article 15(2) of the FD EAW to discard a real risk of degrading treatment can vary from one state to another. For example, in Italy, the information may

43. T. Marguery, *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU*, p. 422.
44. Ibid., p. 405.
45. Ibid., p. 155 and p. 216–217.

concern, among other things, the name of the prison, the minimum individual space, the hygiene conditions, the cleanliness of the cells and the national or international mechanisms that are implemented to control the effective detention conditions of the requested persons.[46] In other countries, such as the Netherlands, the courts may go further and request the issuing authorities to ensure the person in question is not to be detained in a specific prison. In other words, the surrender may be granted if an 'assurance' is given by the issuing state concerning the future detention conditions of that person.[47] By way of contrast, in Sweden, such guarantees would not be considered as admissible evidence by the courts.[48]

Some of the concerns mentioned here have recently been addressed in the already mentioned *ML* case. The CJEU clarified that the assessment of the conditions of detention in the issuing state should be done within the periods prescribed in Article 17 of the FD EAW.[49] Then, the CJEU decided that Article 15(2) of the FD EAW should only be used as a last resort to obtain information specific to the case. When the requested person may be detained in several facilities, the executing authorities are not obliged to control the conditions of detention in all the possible places of detention to which he/she may be sent. They are only required to assess the conditions in the prison(s) that has/have been mentioned by the issuing authority even if detention therein will be temporary or transitional. After that, it is the responsibility of the issuing state that is engaged.[50] To assess the conditions of detention in this (or these) prison(s), the executing authority should only require information from the issuing state that is necessary to discard all real risks of inhuman or degrading treatment within the meaning of Article 4 of the Charter. For this assessment, the executing authority can use the criteria of the ECtHR as summarized in the *Muršić* judgment.[51] With regard to the assurances granted by the issuing state, such assurances benefit from a strong presumption that is sufficient to dispel the executing authority's doubts concerning the conditions of detention in the issuing country if it was granted or endorsed by a judicial authority, otherwise it must be confirmed by an overall assessment of all the information available to the executing authority.[52]

Lastly, the empirical research shows that, in practice, the authorities in Poland and Romania consider mutual trust more rigidly and do not make exceptions thereto. At the time of writing, there are no Polish or Romanian cases that have applied the standards introduced in the *Aranyosi* and *Căldăraru* judgment and which have suspended decisions to surrender because of the detention conditions in the issuing country.[53] Interviews with Polish judges reveal that where problems do exist, rather than refusing to surrender, judges prefer to contact the authorities that issued the EAW

46. Ibid., p. 155–156.
47. Ibid., p. 216–218.
48. Ibid., p. 396–397.
49. That is a maximum of 90 days. After that period, the Member State must inform Eurojust of the exceptional circumstances that justify the deadline not being respected. See C-220/18 PPU *ML*, para. 84.
50. C-220/18 PPU *ML*, para. 87.
51. There is a strong presumption of a violation of Article 3 ECHR where the area of a prisoner's personal space is less than three meters square. Nevertheless, this presumption can be rebutted if the authorities of this state can show that the prisoner is sufficiently compensated for this lack of space with other benefits, such as freedom of movement and out of cell activities, and that confinement to such spaces was minor and limited in time, see ECtHR, *Muršić versus Croatia*, Application No. 7334/13, Judgment 20 October 2017, para. 102–141.
52. C-220/18 PPU *ML*, para. 112–115.
53. T. Marguery, *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU*, p. 294.

to discuss with them the alteration or cancellation of the warrant.[54] In Romania, interviews show the judicial authorities do not take the detention conditions in the issuing state into consideration when deciding on an EAW.[55] One of the reasons for this, it is said, is the systemic deficiencies of the Romanian detention facilities themselves. It would seem paradoxical that given these deficiencies Romania would request assurances from other countries. It has also been demonstrated that the 'scepticism' of certain countries asking very detailed information, let alone asking for assurances to be provided, is felt as 'distrust' by the authorities in countries such as Poland or Romania.[56]

2. Mutual trust, prison conditions and the transfer of prisoner proceedings

In the context of FD ToP, one may expect that the issuing country should also have confidence in the system in force in the executing state before it transfers a prisoner or a sentence. In contrast, when it comes to the EAW, it is the country that issues the judgment of conviction that should have trust in the executing state that the fundamental rights of the sentenced person will be adequately respected in the future because it is in this state that the sentence will be executed. The issuing state has no obligation to transfer a judgment. Also, it is highly unlikely that the state where the sentence is to be executed will refuse the transfer based on the poor detention conditions of its own facilities. This does not mean, of course, that the executing state is not responsible for acceptable detention facilities, but mutual trust does not play a major role when it comes to the obligation to recognize the sentence. Mutual trust, conversely, plays a role in the discretion enjoyed by the sentencing state to transfer a sentence to another state. The question must, however, be posed as to whether the latter state should take the detention conditions of the country of destination into account in the decision to transfer the sentence. Considering the absolute nature of the rights protected under Article 3 ECHR and Article 4 of the Charter respectively, it seems inescapable to answer this question in the affirmative. However, in practice, this does not seem to happen, at least not as clearly as in the EAW, for two reasons.

First, the *Aranyosi* and *Căldăraru* test was designed to guide the control exercised by domestic courts on the execution of EAWs. Technically it does not apply to ToP proceedings. The test that concerns obligations for judicial authorities is also not easily transferrable to the ToP situation, where non-judicial authorities can be involved in the transfers. In Italy and Poland, the transfer procedure is conducted by the judicial authorities whereas in others the procedure may be under the supervision of the Ministry of Justice (Romania or the Netherlands) or an administrative authority under the supervision of the government (Sweden).[57] The absence of judicial supervision can be problematic. In several cases offenders do not have a right to object to a transfer, and they do not enjoy any judicial remedy against it.[58] If no judicial authority is involved at all, this risks creating a gap in judicial protection, especially concerning a possible violation of fundamental rights in the executing state. It may be difficult, perhaps even impossible, for the defence to challenge a decision to transfer even if reliable and updated information exists concerning deficiencies in the

54. Ibid., p. 311.
55. Ibid., p. 352.
56. Ibid., p. 269, 364 and p. 409–410.
57. Ibid., p. 382.
58. This is the case if the prisoner is a national of the executing country, or if this person will be deported to the executing country or if they have fled to this country or otherwise returned in view of the criminal proceedings pending against them in the issuing state or following a conviction in that issuing state (see Article 6(2) of the FD ToP).

detention conditions in the executing state. In addition, even if an administrative authority is competent to decide on the transfer and is aware of the existence of the *Aranyosi* and *Căldăraru* test, it seems difficult to expect that it will have the same independence and expertise as a court when applying the *Aranyosi* and *Căldăraru* test.

Second, how and why the ToP should be used varies between the Member States, but ultimately prison conditions do not seem to be adequately taken into consideration in the implementation of the ToP. For example, in Italy, an assessment mechanism has been put in place so as to identify foreign detainees who fall within the scope of application of the FD ToP.[59] Individual reports do not include information concerning prison conditions in the country of destination. Furthermore, one of the stated aims of this assessment is to relieve pressure within Italian prisons in the aftermath of the ECtHR *Torreggiani* judgment condemning Italy for overcrowding in its prisons.[60] By contrast, in the reverse situation, the Dutch authorities[61] consider that the purpose of a transfer to the Netherlands should not be to remove the sentenced person from less favourable detention conditions. Consequently, it is fair to conclude that, in this country, prison conditions should not be part of the assessment of social rehabilitation. It remains unclear, however, how these conditions are considered by the Dutch authorities when issuing a request to transfer a sentence. In Poland[62] and in Romania,[63] prison conditions are simply not considered in the decision concerning the issuing of a request for a transfer from these countries to another, which is not surprising considering the position of these countries with regard to prison conditions in the context of the EAW.

C. Lines of action

Respect for the sentenced person's right not to be tortured or suffer degrading treatment as enshrined in Article 4 of the Charter and Article 3 ECHR has functioned as a catalyst for revealing tensions which can seriously undermine cooperation between Member States and the promise of an Area of Freedom, Security and Justice. In order to enhance mutual trust in this context, actions must be undertaken at both national and EU level. These recommendations are by no means exhaustive and other specific suggestions have been made.[64]

1. Actions at the Member State level

The Member States must realize that the fight against crime cannot be efficient if the fundamental rights of individuals are not properly enforced. The common (and minimum) norms must be respected.[65] Compliance with fundamental rights, on the one hand, and the fight against crime

59. T. Marguery, *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU*, p. 124–125.
60. ECtHR, *Torreggiani and Others versus Italy*, Application No. 43517/09, Judgment of 8 January 2013.
61. T. Marguery, *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU*, p. 237–238.
62. Ibid., p. 304.
63. Ibid., p. 358.
64. For a comparative study and recommendations concerning criminal procedural laws in the EU, see the forthcoming report for the LIBE Committee, 'Criminal procedural laws across the Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation', *LIBE Committee* (2018), forthcoming.
65. The very same discussion can be held with regard to countries such as Poland or Hungary, which are challenged for their rule of law backsliding, see for example Case C-216/18 PPU *LM*, see also Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final; L. Pech and S. Platon, 'Rule of Law backsliding in the EU: The Court of Justice to the rescue?', *EU Law Analysis* (2018), http://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html.

(and with it the safety of citizens), on the other, are interdependent. If fundamental rights are seriously jeopardized in one Member State, the mechanism of cooperation based on mutual recognition will be disrupted and with it the functions of deterrence, retribution and rehabilitation that are played by penal punishment. Ultimately, there are no winners. Not respecting fundamental rights may lead, in a worst-case scenario, to impunity.[66] What should happen to a sentenced person if the surrender procedure is terminated to avoid a violation of Articles 3 ECHR or Article 4 of the Charter? Should this person be released? To avoid such a disastrous outcome that would negate the deterrence and retribution functions of punishment, the sentence of this person, for example, might be transferred by applying the FD ToP. However, such a transfer will not always be legally possible and, if it is possible, it may not have the rehabilitation of the prisoner as its primary aim.[67] Mutual recognition establishes a link between the external limits (fundamental rights) and the internal limits to punishment (the functions of punishment) that must not be ignored.

Punishment involving imprisonment entails that politicians take their responsibilities into account and improve the conditions of detention in the detention facilities in their respective countries. This already happens,[68] but the process of improvement should be intensified. In this respect, solutions are already known and are proposed in particular by the bodies of the Council of Europe, such as the ECtHR or the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[69] Besides alternatives to imprisonment, the replacement of old and dilapidated prisons or the reduction of pre-trial detention, the ECtHR also prescribes the establishment of preventive and compensatory remedies.[70] But, as was rightly decided by the CJEU in *ML*, such remedies are not as such capable of averting the risk that a person, following their surrender, will be subjected to treatment that is incompatible with Article 4 of the Charter on account of the conditions of their detention.[71] Because a lack of knowledge is reported as a recurring issue in the five Member States that are the subject of the research,[72] Member States should encourage the domestic authorities responsible for the transfer of requested or sentenced persons to another Member State to update their knowledge of EU law, in particular where adequate guidelines have been established by the CJEU or the Commission.[73] When these authorities are confronted with difficulties concerning the application of EU law, they should refer to the

66. See for example S. McGrath, 'Murderers and rapists released early from Romanian prisons because of 'inhumane' overcrowding', *The Telegraph* (2017), https://www.telegraph.co.uk/news/2017/11/06/murderers-rapists-released-early-romanian-prisons-inhuman-overcrowding/; K. Lane Scheppele and L. Pech, 'What is Rule of Law Backsliding?', *Verfassungsblog* (2018), https://verfassungsblog.de/what-is-rule-of-law-backsliding/; A. Dori, 'Hic Rhodus, hic salta: The ECJ Hearing of the Landmark "Celmer" Case', *Verfassungsblog* (2018), https://verfassungsblog.de/hic-rhodus-hic-salta-the-ecj-hearing-of-the-landmark-celmer-case/.
67. See also Eurojust, 'The EAW and Prison Conditions – Outcome Report of the College Thematic Discussion', *Eurojust* (2017), http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejstrategicmeetings/Outcome%20report%20of%20College%20thematic%20discussion%20on%20EAW%20and%20prison%20conditions%20(May%202017)/2017-05_9197-17_Outcome-Report-on-EAW-and-Prison-Conditions_EN.pdf.
68. See for example, in Hungary, ECtHR, *Domjan v. Hungary*, Application No. 5433/17, Judgment of 14 November 2017.
69. ECtHR, *Varga and others v. Hungary*, Application No. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, Judgment of 10 March 2015, para. 104; Recommendation No. R(99) 22 concerning prison overcrowding and prison population inflation, White Paper on Prison Overcrowding, 30 September 1999.
70. ECtHR, *Varga and others v. Hungary*, para. 49.
71. C-220/18 PPU *ML*, para. 74.
72. T. Marguery, *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU*, p. 441.
73. Commission Notice of 6 October 2017, Handbook on how to issue and execute a European arrest warrant, [2017] OJ C 335/01.

CJEU. In this respect, one should recall that preliminary proceedings are accelerated when the individual who is subject to a national case is in detention (Article 267 *in fine* TFEU).

In addition, polarization between countries that are 'too trusting' and those that are 'too sceptical' should be avoided because it is unwelcome, often unnecessary and at odds with the duty of sincere cooperation. Moreover, where such a situation does occur, it can lead to differences in treatment between national and foreign prisoners and that is contrary to the aim of offering EU citizens an AFSJ built on respect for fundamental rights (Article 67(1) TFEU), as well as being potentially contrary to the principle of non-discrimination on grounds of nationality (Article 18 TFEU).[74] The principle of non-discrimination derives from the principle of equality which implies that 'comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified'.[75] Prisoners who are confined to a purely internal situation in a country with poor detention conditions will not enjoy the assurance given by their country to foreign prisoners in the context of an EAW that they will be detained in a 'good' prison. This is a difference in treatment that may be difficult to justify objectively.

Finally, divergences in the practice of the FD ToP should be addressed. The resocialization function of punishment may seriously be undermined when the FD ToP is used to 'get rid' of foreign prisoners rather than to ensure their social rehabilitation.[76] Moreover, the role played by an assessment of the conditions of detention in the country of destination does not appear very clearly in the decision to transfer. This is in complete contrast to what happens in the context of the EAW and calls for the further integration of penal policies and, therefore, action at the EU level.

D. Actions at the EU level

Some of the problems reported in this article confirm that mutual recognition is indeed facilitated by the adoption of minimum rules for safeguarding an individual's fundamental rights at the EU level. This has already been achieved to a certain extent.[77] However, this work should continue. For example, the adoption of EU minimum rules concerning detention conditions may be welcome.[78] However, in isolation from the failed attempt to establish such rules following the 2011 Green Paper on Detention,[79] one may question the existence of a legal basis in the Treaty to establish minimum conditions of detention. Article 82(2)(b) TFEU may be used to harmonize, for example, the rights of individuals in criminal procedure, to facilitate the mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. Conditions of detention may affect sentenced persons as well as persons

74. On the impact of EU citizenship in the field of punishment see the contribution of V. Mitsilegas, 25 *Maastricht Journal of European and Comparative Law* (2018).
75. Case C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, para. 56.
76. Concerning social rehabilitation see the contribution by A. Martufi, 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer', 9 *New Journal of European Criminal Law* (2018).
77. In addition to safeguards (such as grounds of refusal) that are provided in the FD EAW and the FD ToP, the procedural directives adopted in the application of the 2009 Roadmap should be mentioned. See Council Resolution of 30 November 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings, [2009] OJ C 295/1.
78. See also the mention of an absence of minimum standards under EU law in Case C-220/18 PPU *ML*, para. 90.
79. See European Commission, 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.

on remand, thus the rights of persons in a criminal procedure. Article 352 TFEU may also be a candidate for the harmonization of prison conditions provided that unanimity in the Council is attained, which might prove to be difficult.[80] Where possible the use of EU funding to improve these conditions is a good solution provided that the process is well monitored by the Commission.

In the absence of an amendment to the current legislation, certain improvements concerning mutual trust between judicial authorities that are confronted with a fundamental right deficit may be enhanced through soft law. For example, the scope of the principle of mutual trust develops with the case law of the CJEU. It is therefore essential to regularly update documents such as the handbook on how to issue and execute a European arrest warrant[81] and to monitor their dissemination in the Member States. The recent clarifications concerning the scope of the *Aranyosi* and *Căldăraru* test, in particular the nature of the questions that may be posed by the executing authorities to discard a risk of a violation of Article 4 of the Charter or Article 3 ECHR, should be included in the notice. It might be useful to add a multilingual template to help judicial authorities in the exchange of information; the template could recall the minimum requirements for conditions of detention. In the unfortunate absence of clear binding criteria concerning the social rehabilitation of prisoners, a similar notice may be welcome for the application of the FD ToP. The impact of detention conditions in the implementation of mutual recognition through the FD ToP should be further analysed. The apparent differences in the practices of the Member States in this respect are a matter of concern.

Finally, to attain the objective of the EU to offer its citizens a genuine Area of Freedom, Security and Justice with respect for the fundamental rights of individuals, the role of the defence lawyer should be better guaranteed and a genuine European network should be established.[82] There is no reason why prosecutors and judges should not enjoy networks such as Eurojust or the European Judicial Network and this should also apply to lawyers. After all, under Article 9 TEU the Union must respect the principle of the equality of its citizens and they should receive equal treatment from its institutions, bodies, offices and agencies.

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80. Article 352(1) TFEU provides the EU with general legislative authority if action should prove necessary to attain one of the objectives laid down in the treaties, and when the treaties have not provided the necessary powers, the Council should adopt the appropriate measures.
81. Commission Notice on the Handbook on how to issue and execute an EAW, [2017] OJ C 335/1.
82. The e-justice project should therefore be welcomed and developed, see European Justice, 'Welcome to the BETA version of the European e-Justice Portal', *European Justice* (2018), https://beta.e-justice.europa.eu/?action=home &plang=en.