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The European Arrest Warrant

In Member States we trust, or do we?

Severe deficiencies in the EU Member States' prisons raise challenges to the protection of fundamental rights

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List of abbreviations

AFSJ	Area of Freedom, Security and Justice
CJEU	Court of Justice of the European Union
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
EAW	European Arrest Warrant
EAW FD	Framework Decision 2022/584/JHA on the European Arrest Warrant
ECHR/Convention	European Convention on Human rights
ECtHR	European Court of Human Rights
EU/Union	European Union
European Council	Council of the European Union
FRA	European Union Agency for Fundamental Rights
JHA	Justice and Home Affairs
LIBE	European Parliament Committee on Civil Liberties Justice and Home Affairs
NPM	National Preventive Mechanism
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
The Charter	Charter of Fundamental Rights of the European Union
The Commission	European Commission

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1. Introduction

1.1. Problem, purpose and research question

The European Arrest Warrant (EAW) has been acclaimed as a successful EU legal instrument in the fight against terrorism and other serious crimes in the area of freedom, security and justice. During the last decade, the application of the instrument has increased. The number of issued EAWs has risen significantly from a total of 13.891 (2010) to 20 226 (2019).[1] These numbers confirm that this is a powerful legal instrument as the surrenders within the EAW system occur to an ever-greater extent.[2] Consequently, thousands of individuals are affected by the surrender procedure which causes concerns due to the insufficient protection of fundamental rights.

The efficient cross-border surrender procedure between the EU Member States is built on the principles of mutual recognition and mutual trust, the cornerstones of EU cooperation in criminal matters. Mutual trust presumes that all EU Member States respect fundamental rights to the same extent. However, the reality does not go hand in hand with this presumption as the prison conditions vary markedly in the EU. In some EU Member States, people deprived of liberty live in worrying conditions with limited access to water and daylight, quality food, ventilation, hygiene items and out-of-cell activities. Moreover, they are forced to live in dirty facilities along with rats, bedbugs and cockroaches. Given the overcrowding, the inmates often have no choice but to share beds with each other. The list is far from exhaustive, yet sufficient to show that fundamental rights are at stake.[3] Hence, the widespread issue with severe deficiencies related to overcrowding and other material conditions of detention constitutes one of the main challenges within the EAW system.

The purpose of the thesis is to examine, from a critical perspective, what challenges the EAW system faces regarding the balance of interests, or rather the conflict of interests, between mutual trust and the protection of fundamental rights in the EU criminal law sphere by focusing on cases related to poor prison conditions. Furthermore, the thesis aims to ascertain whether the conflict of interests has led to any difference in practice in strengthening the protection of individuals' fundamental rights. In this context, it is of relevance to examine the interaction between EU law and the European Convention on Human Rights (ECHR) and

[1] European Commission, Commission Staff Working Document, *Statistics on the practical operation of the European arrest warrant – 2020,* 8 December 2022, Brussels, SWD(2022) 417 final, p. 49.
[2] Number of EAWs that were executed: 3.467 (2010) and 5.665 (2019).
[3] See in particular Chapter 6 'Concerns regarding the increasing numbers of violations due to prison conditions'.

whether the latter has had any impact on the surrender procedure in cases related to prison conditions. Especially considering that the rights guaranteed by the ECHR have the same meaning and scope as corresponding rights stipulated in the Charter of Fundamental Rights of the European Union (the Charter).[4] Additionally, the ECHR can be regarded as the minimum level of protection within EU law and is therefore of relevance in examining if the principle of mutual trust constitutes a hindrance to achieving this level within the EAW system.

By drawing attention to the problematic aspects of the EAW system in comparison with how the reality looks like, the thesis aims to look ahead in order to discuss whether the current system adequately safeguards the rights of the individual or if it requires looking at alternative solutions that can ensure that fundamental rights are respected, if possible, without compromising the principles. Hence, the consequences of the current system, as presented in the analysis, will form the basis of the discussion regarding challenges for the future. The thesis is thus divided into two parts, one of which is of a more descriptive nature aiming to describe the material, and the other part consists of a critical analysis and discussion. In order to achieve the purpose, the thesis will answer the following question:

How does the conflict of interests between mutual trust and the protection of fundamental rights manifest in the EAW system, and how does it affect the protection of the requested person's fundamental rights in practice?

1.2. Method and material

In order to examine the conflict of interest within the EAW system, it is necessary to identify and interpret applicable legislation and other legal sources related to EU law. Thus, the European Legal Method is most suitable to use when answering the research question, especially given that the material primarily relates to EU law which is known for its specific characteristics and autonomy.[5] Hence, the material that will be used includes EU legislation, case law of the Court of Justice (CJEU) and other legal documents and publications published by the EU institutions. The focus will be on the CJEU's reasoning in case law as it continuously develops how the Framework Decision on the European Arrest Warrant (EAW FD)[6] should be interpreted and applied by the EU Member States. The selection of the CJEU's case law has been made based on relevance and importance for the development

[4] Charter of Fundamental Rights of the European Union, Article 52(3).
[5] J. Reichel, *EU-rättslig metod.* In: M. Nääv, M. Zamboni (Eds.), *Juridisk Metodlära*, (Studentlitteratur AB, 2018), pp. 109-142.
[6] Council of the European Union, *Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the Surrender Procedures between Member States*, 13 June 2002, OJ L 190.

within the EAW system related to the purpose of the thesis. In order to be able to study the protection of fundamental rights in relation to the principles that underlie EU cooperation in criminal law matters, there is reason to also look at the protection of rights in the ECHR which constitutes general principles of EU law. Moreover, the thesis will rely on literature published within the field of EU criminal law.

However, the thesis does not follow the European Legal Method strictly as it is not limited to looking at EU sources. In order to answer how the conflict of interest has affected the protection of individual rights in practice, it has been necessary to look at other sources that have examined or expressed what the reality looks like. The material relates to the prison conditions in Europe, which includes prison inspection and monitoring bodies independent of the EU (CPT, NPMs), statistics, policies and online resources. In addition, the case law of the European Court of Human Rights (ECtHR) will be of relevance aimed to clarify how the conditions in the Member States' prisons have looked over time.

A central part of the thesis will thus assess the relationship between the applicable legislation and the social situation, both in terms of the situation that led to the creation of the legislation and the interests it serves, but also in terms of the social situation in which the legislation is applied. The thesis will therefore use a social-legal approach.[7] In the analysis and discussion, I will identify the problematic aspects of balancing the interests within the EAW system and criticize it from a fundamental rights perspective, where social factors will be addressed. After identifying the problems in this area, future solutions to improve the system will be discussed.

1.3. Previous research

The European Arrest Warrant has been a controversial instrument since its adoption, giving rise to critical perspectives on this topic. Given that the practical operation of the EAW has been going on for over 15 years, previous research exists within this field. *Auke Willems* has studied the principle of mutual trust from multiple angles within the EU criminal law sphere, including the European Arrest Warrant.[8] His findings and perspectives on mutual trust have been helpful within this thesis's framework. *Tony Marguery* has, in his empirical research, been focusing on how the protection of fundamental rights affects the principles of mutual recognition and mutual trust by studying five EU Member States' implementation of the

[7] D. N. Schiff, *Socio-legal Theory: Social structure and law*, The Modern Law Review, Vol. 39 No. 3, May 1976, p. 287.
[8] A. Willems, *The Principle of Mutual Trust in EU Criminal Law*, (Hart Publishing, 2021).

EAW FD in their national legislation.[9] *Anne Weyembergh* and *Chloé Briere* are also of relevance, as they have studied different problematic aspects of EU cooperation in criminal matters as a whole.[10] However, this particular field within EU criminal law is constantly developing and my hope is that this thesis will contribute to a new perspective on the EAW system by highlighting the current situation, based on updated data and information. By focusing on the conflict of interests and the vague guidelines established at the EU level, the thesis aims to contribute to a broader understanding of the primary difficulties that exist at the national level and how this has affected the cornerstones of EU cooperation as well as the protection of individual rights in practice.

1.4. Delimitation

Regarding the EAW and the protection of fundamental rights, this thesis deals exclusively with Article 4 of the Charter and Article 3 of the ECHR (prohibition of torture and inhuman or degrading treatment or punishment) and related provisions ensuring this prohibition. Hence, circumstances related to torture or punishment in the Member States' prisons are left outside the scope of this thesis. Since the EAW system covers both the pre-trial and post-trial phases, it should be emphasized that detention conditions will be used as a collective term for all individuals who have been deprived of their liberty, not only after a final sentence. Detention conditions and prison conditions are therefore used as synonyms. The thesis will not cover the Member States' national legislation, the implementation and application of the EAW FD at a national level will therefore only be discussed in a general manner.

1.5. Structure of the thesis

The thesis is divided into 8 Chapters.

After this introductory chapter, *Chapter 2* aims to introduce the background to the EAW FD, its legal basis and legislative competence for the EU. Further, it contains the scope of the EAW FD and how the Member States are supposed to apply the instrument. *Chapter 3* aims to clarify the importance of mutual recognition and mutual trust in EU law by offering the reader a historical overview of how the principles were developed and their importance within the criminal law context. *Chapter 4* will focus on the protection of fundamental rights and

[9] T. Marguery, *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU: Transfer of Judgment of Conviction in the European Union and the Respect for Individual's Fundamental Rights*, (Wolf Legal Publishers, 2018).
[10] C. Brière, A. Weyembergh, *The needed balances in EU Criminal Law: Past, Present and Future*, (Hart Publishing, 2018).

human rights in the EU. Additionally, it covers a brief explanation of the prison inspection and monitoring bodies aimed to protect European citizens against ill-treatment during their time in prison. Although they are not bodies established by the EU, they are essential for safeguarding individuals' human rights within the EAW context.

Once the reader has gained an understanding of the functioning of the EAW FD, the principles on which it is built and the protection of fundamental rights, it is time to introduce the CJEU's reasoning in this matter. *Chapter 5,* will address the balance of interests between the principles and the protection of fundamental rights in the case law of the CJEU, mainly related to prison conditions. It will also address the issues with mutual trust within the EAW context by presenting the Member States' practical operation of the instrument. *Chapter 6* aims to make the conditions in the Member States' prisons visible based on the ECtHR's rulings, statistics, reports and recommendations. In the last and concluding *Chapter 7* and *Chapter 8,* the legal situation will be analyzed and discussed from a critical perspective focusing on the protection of the rights of the individual, intended to fulfill the purpose of the thesis and to answer the research questions. Furthermore, future challenges and solutions for the EAW system will be discussed.

2. The European Arrest Warrant

2.1. Background

Cooperation within the criminal justice context is not a new phenomenon for the EU Member States. Since the 1950s, there have been several multilateral conventions within this area, drafted by the Council of Europe. The first treaty serving as a basis for international cross-border cooperation in criminal matters was the European Convention on Extradition (1957).[11] However, when it comes to the EU, it has historically lacked competence within the criminal law field. Conceivably, this can be explained by the fact that criminal law has been considered to have a close connection to a state's sovereignty. In other words, criminal justice cooperation was something that was perceived sensitively by the Member States.[12] This approach was to be changed by the Maastricht Treaty (1992) and cooperation in the criminal field began to gradually emerge due to the adoption of the Treaty on European Union (TEU) and the three pillar structure.[13] The Third Pillar, also known as the Justice and Home Affairs pillar (JHA), resulted in a new approach of cooperation within the criminal law field which was recognized as a common interest of all Member States. Even if the scope of JHA was sensitive as it covered cooperation areas related to the Member States' sovereignty, the EU ensured that the Member States would retain a considerable degree of control.[14]

Before the entry into force of the TEU, the JHA Council was tasked with preparing an action plan in order to strengthen judicial cooperation, with particular reference to extradition.[15] After two years of ongoing proceedings, the EU introduced two Conventions[16] aimed to supplement the former multilateral treaty on extradition by making a more simplified surrender procedure.[17] However, these legal instruments did not live up to the expectations as they were poorly ratified by the Member States which undermined the strategy for improving cooperation in the criminal law sphere.[18]

[11] Council of Europe, *European Convention on Extradition*, 13 December 1957, ETS No. 24.
[12] U. Bernitz, A. Kjellgren, *Europarättens grunder*, (Norstedts Juridik, 2022), p. 457.
[13] Consolidated version of the Treaty on European Union, 29 July 1992, OJ C 191/61.
[14] A. Willems, *The Principle of Mutual Trust in EU Criminal Law*, (Hart Publishing, 2021), p. 35.
[15] European Commission, *Bulletin of the European Communities*, Brussels, No 10 (1993) Volume 26, point. 1.5.
[16] Convention on simplified extradition Procedure between the Member States of the European Union, 30 March 1995, OJ C 78/2; Convention relating to extradition between the Member States of the European Union, 23 October 1996, OJ C 313/12.
[17] M. Fichera, *The implementation of the European Arrest Warrant in the European Union: law, policy and practice*, (Intersentia Publishers, 2011), p. 19.
[18] European Commission, *Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States*, Brussels, 25 September 2001, COM(2001) 522 final/2.

With the entry into force of the Treaty of Amsterdam (1999), the major objective within the EU was to create and establish an area of freedom, security and justice (AFSJ).[19] As a result of the AFSJ and the abolition of internal border controls, criminal justice cooperation was deemed necessary considering the cross-border crimes as a consequence of the free movement. Hence, it was of significant importance to ensure the EU citizens an area where they would feel safe and secure.[20] The Treaty strengthened the competences of the EU institutions in these matters. Among other things, it was considered necessary to introduce a system that simplified the extradition procedure and was more efficient than the former ones. The subject was raised at the meeting in Tampere in 1999 and the European Commission was tasked with making a proposal on this matter.[21]

However, the September 11 terrorist attacks accelerated the process of a new extradition system. The catastrophic events caused great concerns and were primarily considered to be a threat to security and the free and democratic world. Although the attacks occurred in the United States, it had consequences for Europe as it was considered an attack on the entire Western world. The JHA Council described it as a matter of urgency and urged to implement the Tampere measures on mutual recognition as soon as possible.[22] Hence, the events would have a broad effect on an international level and result in common security measures with the aim of preventing, countering and fighting terrorism. A security landscape would be created, not only in the short term but also for the future.[23]

In light of the above, international terrorism became a prioritized subject for the EU's political leaders, i.e. within European politics, and legal instruments were required to combat the threats that Europe faced.[24] As a consequence of the growing political homogeneity of the EU Member States, it only took eight days for the European Commission to establish a proposal of the EAW FD which formed part of counter-terrorism measures and the security mission

[19] The Three Pillars: The European Communities, the Common Foreign and Security Policy, and the Justice and Home Affairs.
[20] Council of the European Union and European Commission, *Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of freedom, security and justice (Vienna Action Plan)*, 3 December 1998, OJ 1999/C 19/01.
[21] Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999, point. 35.
[22] See Council of the European Union, *Conclusions adopted by the Council (Justice and Home Affairs)*, Brussels, 25 September 2001, Doc. 12156/01.
[23] C. Brière, A. Weyembergh, *The needed balances in EU Criminal Law: Past, Present and Future*, (Hart Publishing, 2018), p. 215.
[24] L. Klimek, *European Arrest Warrant*, (Springer International Publishing, 2015), p. 23.

within the area of AFSJ.[25] The EAW FD would enable an effective system where wanted persons could be handed over from one Member State's judicial authority to another within the Union.[26] By adopting the EAW FD, the EU introduced a new and modern extradition mechanism built on the principles of mutual recognition and mutual trust, which has been acclaimed for its success since it entered into force on 1 January 2004.[27] It abolished all the former extradition agreements and welcomed a surrender procedure between the Member States' judicial authorities.[28] Notably, it went from the term 'extradition' to 'surrender'.[29]

2.2. Legal basis and EU competence

The EAW FD is a product of the Third Pillar, adopted in 2002 during the Amsterdam Era, pursuant to Articles 31 and 34(2) of the TEU[30]. The former provision, more precisely Article 31(a)(b) of the TEU, established the common measures which should be taken by the Member States within the judicial cooperation in criminal matters. According to the provision, such measures shall include, *inter alia,* facilitating and accelerating cooperation between the Member States in relation to extradition. Further, the Amsterdam Treaty provided a legal act, *framework decision,* which could be adopted purposely for 'approximation of the laws and regulations of the Member States' as was stated in Article 34(2)(b) of the TEU.[31] An initiative for such a measure could be made by a Member State or the European Commission and required unanimity. If all requirements were met, a framework decision became binding on the Member States. However, it was up to each Member State's national authorities to choose the form and approach for implementation at the national level as long as they could ensure

[25] European Commission, *Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States*, Brussels, 25 September 2001, COM(2001) 522 final/2; see also Article 3(2) of the TEU.
[26] Remarkably, the EAW system was primarily aimed at combating terrorism but would later expand to include a rather extensive list of offenses having nothing to do with it. In fact, statistics from 2019 show that terrorism corresponded to 2 percent of the total issued EAWs, see European Commission, *European arrest warrant statistics report*, available at: https://ec.europa.eu/info/sites/default/files/eaw_in_numbers_infographic_final_08_2021_en.pdf [accessed 13 October 2022].
[27] The principles will be clarified in Chapter 3.
[28] Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999,* 16 October 1999, point. 35.
[29] Note that the term extradition is still used to some extent.
[30] As amended by the Amsterdam Treaty; Consolidated version of the Treaty on European Union, 10 November 1997, OJ C 340/145.
[31] Ibid.

that the purpose was achieved.[32] The CJEU has found that the Member States' national courts are obliged to interpret framework decisions in a conforming manner, known as the principle of conforming interpretation. The meaning of this principle is that the national legislation must be interpreted in the light of the wording and purpose of the framework decision. Hence, it must be done as far as possible in order to achieve the aim.[33]

2.3. Scope of the Framework Decision

The EAW system differs from the traditional extradition procedure as it has significantly changed several aspects. It is defined as a judicial decision issued by a Member State's judicial authority (*the issuing Member State)* seeking the arrest and surrender of a requested person by a judicial authority in another Member State *(the executing Member State)* in order to conduct a criminal prosecution or execute a custodial sentence or detention order.[34] However, there are several criteria that need to be fulfilled in order for the EAW to be issued. Initially, there is a determination of the competent judicial authorities, which must be in accordance with the law of the Member State concerned. The framework decision requires that both the issuing and executing judicial authorities shall meet these criteria.[35] Further, it specifies the content and form of the EAW which must contain the identity and nationality of the wanted person, contact details to the issuing judicial authority and the nature and legal classification of the offense including a detailed description of the circumstances in which the offense was committed. It is the responsibility of the issuing Member State to complete the form with this information.[36]

Moreover, the offense must be of a certain degree of seriousness and result in, under the law of the issuing Member State, a penalty of a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.[37] Additionally, there is a requirement of double criminality, at least as a main rule.[38] Such a requirement was

[32] In this context, it should be clarified that a framework decision can be compared to a directive but should not be confused therewith. A directive can entail direct effect, provided certain criteria are met, which means that it creates rights for individuals in the Member States. This differs from a framework decision that does not entail direct effect and thus does not create rights for individuals that can be invoked before a national court, see Court of Justice, Grand Chamber Judgment of 16 June 2005, Case C-105/03, *Maria Pupino.*
[33] Court of Justice, Grand Chamber Judgment of 16 June 2005, Case C-105/03, *Maria Pupino,* para. 43.
[34] Framework Decision on the EAW, Article 1.
[35] Ibid., Article 6.
[36] Ibid., Article 8.
[37] Ibid., Article 2(1).
[38] Ibid., Article 2(2).

previously a prerequisite for being able to execute an extradition request under the former legal extradition mechanism. The definition of double criminality is that an act must be considered an offense in both the issuing and executing Member States. However, the EAW FD operates with the principle in a renewed way. Article 2(2) of the EAW FD establishes a list of 32 crime classifications, ranging from terrorism to fraud, and the common denominator for the majority of these listed crimes is that it concerns serious violent crimes.[39] With regard to these criminal classifications, the requirement of double criminality has been abolished. In other words, the non-listed offenses are still subject to the requirement.

Mutual recognition is defined explicitly in the EAW FD and is regarded as a cornerstone within this legal instrument, intended to be adhered to.[40] Once the executing Member State has received a request for surrender, the principle gives rise to an acceptance of the information provided by the issuing judicial authority resulting in an obligation to execute the EAW.[41] The surrender procedure 'shall be dealt with and executed as a matter of urgency'[42], in line with the aim of creating an effective system, meaning that strict time limits exist. If consent has been given by the requested person, a final decision on a surrender should be taken within ten days. In other cases, there is a time limit of 60 days.[43]

2.3.1. Grounds for non-execution

Even if the Member States are obliged to execute the EAW on the basis of mutual recognition and mutual trust, there are no absolute obligations as the framework decision provides various grounds that the executing Member State can invoke to refuse the execution. However, these grounds are limited as the situations are exhaustively stipulated in the framework decision, where it is divided into two separate grounds, mandatory and optional non-execution.[44] Regarding the former, it is limited to three grounds. The executing Member State *shall* refuse an execution if the requested person already has been judged by a Member State of the same act (ne bis in idem), if the offense is covered by amnesty in the executing Member State, or if the requested person may not be held criminally for the act(s) due to his or her age.[45] Besides

[39] U. Bernitz, A. Kjellgren, *Europarättens grunder,* (Norstedts Juridik, 2022), p. 469.
[40] Framework Decision on the EAW, Article 1(2).
[41] Ibid., It is also explicitly stated in the preamble, Recitals (2) and (6); U. Bernitz, A. Kjellgren, *Europarättens grunder,* (Norstedts Juridik, 2022), p. 469.
[42] Framework Decision on the EAW, Article 17(1).
[43] Ibid., Articles 17(2) and 17(3).
[44] See European Commission, *Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States,* Brussels, 25 September 2001, COM(2001) 522 final/2, Chapter III.
[45] Framework Decision on the EAW, Article 3.

the mandatory grounds, the executing Member State *may* refuse an execution on optional grounds. It follows from the wording that the discretion is left to the judicial authority of the executing Member State. Thus, this category of grounds can be used depending on the circumstances of the specific case.[46]

By limiting the grounds for refusal, the EAW system can maximize its effectiveness as it is intended to do. Since the EAW system was introduced, there has been a strict interpretation of these provisions in case law of the CJEU. According to the Court, the refusal to execute an EAW is an exception to the principles of mutual trust and mutual recognition and must therefore be interpreted strictly.[47] However, in recent years, the Court has recognized that a surrender may be refused based upon respect for the sought person's fundamental rights.[48] Yet, the EAW FD has not been reformed since the Court's findings. To clarify, no provision stipulates the risk of a breach of fundamental rights as a non-execution ground. The Member States may instead seek guidance on how to apply these grounds in the 'Handbook on how to issue and execute a European arrest warrant', which has been developed by the European Commission. Nevertheless, it only refers to the CJEU's findings in case law through a summary in bullet points and nothing further. It should be underlined that the handbook is not legally binding on the Member States.[49]

[46] Framework Decision on the EAW, Article 4.
[47] See Court of Justice, Grand Chamber Judgment of 25 July 2018, Case C-216/18 PPU, *LM*, para. 41.
[48] See Court of Justice, Grand Chamber Judgment of 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*; see also Chapter 5.2. ' Inadequate detention condition's compatibility with fundamental rights'.
[49] European Commission, *Commission Notice — Handbook on how to issue and execute a European arrest warrant*, 6 October 2017, OJ C 335/01. It should be noted that the handbook has not been updated since 2017.

3. Mutual recognition and mutual trust as cornerstones

3.1. Cassis de Dijon – The origin in the Internal Market

The concept of mutual recognition is not something new within the EU cooperation. The principle made its breakthrough in case law by the CJEU and was introduced by the Court in the *Cassis de Dijon* judgment (1979)[50], which concerned the internal market area, more precisely, the free movement of goods and services.

As to the facts of the case, it concerned the fruit liqueur Cassis de Dijon that originated in France. The French company that produced the liqueur intended to advertise it on the German market but encountered obstacles due to the requirements related to the minimum alcohol content. According to German legislation, fruit liqueurs could only be sold on the German market with a minimum alcohol content of 25 percent. Cassis de Dijon was not considered to meet these requirements as it had a lower alcohol content corresponding to 15-20 percent.[51] The Court ruled that such provisions laid down by the national legislation constituted a restriction within the internal market as it limited the free movement of goods, which form a fundamental rule of the EU, between the Member States.[52] On those grounds, the Court established that if goods are sold lawfully on the market in one of the EU Member States, the other Member States within the Union must allow these goods. Thus, another Member State cannot decide to prohibit the sale of these specific products, nor do another check regarding the conditions of the products.[53]

Consequently, Cassis de Dijon developed the principle of mutual recognition which paved the way for a nuanced EU law cooperation where the primary purpose, initially, was to ensure the free movement within the internal market. Following this judgment, the Court required the Member States to agree on common standards within this certain field, standards on which they had previously disagreed when comparing their legal systems. Hence, mutual recognition presupposed that the Member States would have *confidence* in other Member States' legislation and control systems.[54] Further, the principle would effectively neutralize the trade barriers between the Member States and, by extension, enable the free movement of goods

[50] Court of Justice, Judgment of 20 February 1979, Case C-120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*.
[51] Ibid., paras. 1-4.
[52] Ibid., para. 14.
[53] Ibid., paras. 14-15.
[54] U. Bernitz, A. Kjellgren, *Europarättens grunder*, (Norstedts Juridik, 2022), p. 300.

within the Union.[55] Mutual recognition has since this judgment played a key role in the EU judicial cooperation in this matter.[56] The principle would later extend to other areas within the EU, more precisely, the EU area of criminal justice.

3.2. EU area of criminal justice – The birth of a trust based system

In the autumn of 1999, a meeting was held in Tampere where the European Council referred to mutual recognition as the cornerstone of judicial cooperation both in the criminal and civil areas.[57] Thus, it became confirmed that the importance of the principle had increased. Two years later, mutual recognition was placed at the core of the 'Mutual Recognition Program of measures' within the area of criminal justice. As is stated in this program, an implementation of the principle would result in strengthened EU cooperation and enhanced protection of individual rights.[58] Moreover, trust was emphasized as a prerequisite for the function of mutual recognition in the field of criminal law, which required that the Member States had confidence in each other's domestic systems based on their shared commitments.[59] Hence, criminal cooperation requires that the Member States can rely on each other's legal systems by acknowledging and executing criminal justice decisions.[60]

However, the EAW FD would be the first legislative instrument to 'implement' mutual recognition in criminal law matters, which contributed to the establishment of mutual cooperation within this field.[61] It became the most prominent instrument on this basis and has since its adoption been gradually developed in case law by the CJEU.[62] The Commission had already in 2001, in a proposal for the EAW FD, expressed that 'The system of the European arrest warrant can function only when there is perfect trust between the Member States as to

[55] I. Armada, A. Weyembergh, *The mutual recognition principle and EU criminal law.* In: M. Fletcher, E. Herlin-Karnell, C. Matera (Eds.), *The European Union as an Area of Freedom, Security and Justice*, (Routledge, 2019), p. 112.
[56] See, for example, European Parliament and Council of the European Union, *Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008,* 19 March 2019, OJ L 91/1.
[57] Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999, point. 33.
[58] Council of the European Union, *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters*, 15 January 2001, OJ C 12/10.
[59] Ibid. It should be noted that the Council of the European Union only mentioned 'trust' and did not use the term 'mutual trust'. However, the principle was not mentioned in the Tampere conclusions.
[60] A. Willems, *The Principle of Mutual Trust in EU Criminal Law*, (Hart Publishing, 2021), p. 156. Nowadays, it is explicitly stated in Article 82(1) of the TFEU that 'judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions'.
[61] See Framework Decision on the EAW, Recital (6).
[62] C. Brière, A. Weyembergh, *The needed balances in EU Criminal Law: Past, Present and Future*, (Hart Publishing, 2018), p. 291.

the quality and reliability of their political and legal systems'.[63] A slightly vaguer wording confirms this statement in the preamble of the EAW FD which stipulates that mutual recognition is based on 'a high level of confidence between the Member States'.[64] The ambition within the EAW system has therefore been to let mutual trust achieve a perfect standard, at least a high level of trust according to the framework decision. In this context, it should be emphasized that there is no obligation for the Member States to blindly trust each other as there is no provision in international law that stipulates such a requirement. Notwithstanding, mutual trust is often described as blind faith, or blind trust, between the Member States. In other words, there exists a perception that the Member States are forced to rely blindly on each other in terms of their legal system.[65]

Although the protection of individual rights was intended to be strengthened by implementing the principle of mutual recognition within the criminal law sphere, it was early noticed that the protection of fundamental rights must be equivalent throughout the EU in order for the principles to have the position as cornerstones.[66] In this respect, the European Council stated that the principles imply the development of common standards with particular reference to the protection of procedural rights.[67] Nevertheless, since the birth of a trust-based system, the lack of safeguards brought a significant challenge to the EAW system, especially when it comes to the protection against ill-treatment due to poor prison conditions.

[63] European Commission, *Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States*, Brussels, 25 September 2001, COM(2001) 522 final/2, Article 49 (Chapter VIII).
[64] Framework Decision on the EAW, Recital (10).
[65] L. Klimek, *European Arrest Warrant,* (Springer International Publishing, 2015), p. 74.
[66] See Council of the European Union, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 3 March 2005, OJ C 53/1, point. 3.3.1.; see also Council of the European Union, *The Stockholm Programme: An open and secure Europe serving and protecting citizens,* 4 May 2010, OJ C 115/01, point. 2.4.
[67] Council of the European Union, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 3 March 2005, OJ C 53/1, point. 3.3.1.

4. Protection of fundamental rights and human rights in EU criminal law

4.1. European Arrest Warrant Framework Decision

The European Commission had already in their proposal for an EAW FD stated that it constitutes 'an instrument concerned to protect fundamental rights'.[68] However, this was not in reference to the requested persons' rights, as the Commission argued that one of the dual objectives of the EAW system is to protect the European citizens.[69] Beyond the EAW FD, the Commission emphasized that the national courts of each Member State remained subject to the norms laid down by the ECHR and the Charter.[70]

Fundamental rights are explicitly stated in the preamble and the main body of the EAW FD. In the preamble, the framework decision highlights its compatibility in regard to the fundamental rights and that it 'observes the principles recognized by Article 6 of the TEU and reflected in the Charter'.[71] This is supported by Article 1(3) of the EAW FD which stipulates the importance of the same article in the Treaty by clarifying that the 'framework decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU'.

Additionally, there is a possibility for the Member States to refuse a surrender procedure if the issued EAW relies on discriminatory grounds. This is the case when there are reasons to believe that the EAW has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation.[72] Moreover, the EAW FD explicitly states that a requested person *should not* be surrendered to a Member State where there is a serious risk that a person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.[73] Additionally, this is reflected by Articles 4 and 19(2) of the Charter. The aforementioned could be interpreted as meaning that if there is a risk that the individual's rights will be violated in the issuing Member State, this constitutes a ground for refusing a surrender. However, it should be emphasized that this follows from the preamble, which is

[68] European Commission, *Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States*, Brussels, 25 September 2001, COM(2001) 522 final/2, point. 4.4.
[69] See Chapter 2.1.
[70] European Commission, *Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States*, Brussels, 25 September 2001, COM(2001) 522 final/2, point. 4.4.8.
[71] Framework Decision on the EAW, Recital (12).
[72] Ibid.
[73] Ibid., Recital (13).

not considered mandatory compared to the main body of the EAW FD. Hence, The Member States are not obliged to transpose fundamental rights in their national legislation.[74]

4.2. European Convention on Human Rights

The Convention on Human Rights entered into force in 1953 by the Council of Europe, an international organization completely separated from the EU. However, all Member States of the EU have ratified the Convention. As contracting parties, they must ensure the Convention rights and freedoms within their jurisdiction.[75] Additionally, the Member States must comply with the ECHR when applying EU law.[76] It is the ECtHR that enforces the ECHR by testing the compliance of the signatory parties' national law and practice against the standards prescribed in the Convention.[77] Individuals can lodge an application to the ECtHR if they consider that their rights have been infringed.[78] Once the ECtHR finds a violation, the judgment becomes binding on the respondent State.[79] Even if the European Courts are independent of each other, the CJEU is well informed about the assessments made by the ECtHR and the importance of their findings has increased.[80]

The EU has not ratified the protocol which means that it is not a member of the ECHR.[81] Hence, the ECHR has not been incorporated into EU law. Consequently, individuals do not have the possibility to claim that an EU institution has violated their rights under the Convention as the ECtHR has no jurisdiction over such allegations.[82] However, the Convention is to be regarded as general legal principles that the EU is tasked with observing when applying EU law. Article 6(3) of the TEU stipulates the following:

> *'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'*

[74] See Council of the European Union, *REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, Brussels, 2 July 2020, COM(2020) 270 final, p. 8.
[75] See European Convention, Article 1.
[76] U. Bernitz, A. Kjellgren, *Europarättens grunder*, (Norstedts Juridik, 2022), p. 163.
[77] I. Cameron, *An introduction to the European Convention on Human Rights*, (Iustus, 2018), p. 76.
[78] See European Convention, Article 35.
[79] Ibid., Article 46.
[80] This will become clearer in the CJEU's assessments, see Chapter 5.2.3.
[81] See European Convention, Article 59.
[82] See Chapter 4.4.1. about EU accession to the ECHR.

4.3. EU Charter of Fundamental Rights

In the late twentieth century, the initiative for a 'Charter of Fundamental Rights' began.[83] In order to safeguard fundamental rights within the Union, the CJEU decided to focus on the constitutional traditions common to the Member States. Furthermore, international agreements of the Member States, such as the ECHR, and case law of the European Courts were given the function as a guideline in identifying fundamental rights.[84] By codifying it on paper, the rights would be more visible which was considered necessary in order to strengthen the protection of fundamental rights within the Union.[85] The Charter was proclaimed in 2000 and was signed concurrently with the Nice Treaty. By that time, it was not legally binding.[86] Following the entry into force of the Lisbon Treaty (2009), the Charter would be given the same legal value as the Treaties which together constitute primary EU law and resulted in a legally binding status. Given the high normative status, the EU and its Member States are since then bound by the Charter when they are applying or implementing EU law. Since a surrender under an EAW is governed by national law adopted to transpose an EU legal act (EAW FD), the Member States are applying EU law which falls within the scope of Article 51(1) of the Charter.[87]

Some of the provisions prescribed in the Charter are considered to be *absolute rights* which means that they cannot be legitimately limited under any circumstances. In order to identify whether a provision constitutes such a right, one cannot find an explicit definition in the Charter. In fact, it is determined by explanations to the Charter, the ECHR and case law.[88] An example of such an absolute right is the prohibition of torture and inhuman or degrading treatment or punishment stipulated in Article 4 of the Charter.[89]

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[83] Fundamental rights were initially considered to form an integral part of the general principles of EU law, see Court of Justice, Judgment of 17 December 1970, Case C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.

[84] See Court of Justice, Judgment of 14 May 1974, Case C-4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, para. 13; see also Charter of Fundamental Rights of the European Union, Preamble 5.

[85] Charter of Fundamental Rights of the European Union, Preamble 4.

[86] The CJEU stated that 'the Charter is not a legally binding instrument' in Case C-540/03, Grand Chamber Judgment of 27 June 2006, *European Parliament v. Council of the European Union*, para. 38.

[87] Charter of Fundamental Rights of the European Union, Article 51(1); see also Court of Justice, Grand Chamber Judgment of 26 February 2013, Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*; Court of Justice, Grand Chamber Judgment of 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, para. 84.

[88] European Union Agency for Fundamental Rights (FRA), *Guidance: Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level*, 18 November 2020, p. 70.

[89] See Court of Justice, Judgment of the Court of 12 June 2003, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, para. 80.

Moreover, several rights contained in the Charter correspond to the rights laid down by the ECHR in which they have their origin. Further, Article 52(3) of the Charter establishes that the rights prescribed in the Charter should have the same meaning and scope as the rights, to which it corresponds, guaranteed by the ECHR. Such corresponding provisions are Article 4 of the Charter and Article 3 of the ECHR.[90] Additionally, the provision stipulates that the EU law can provide more extensive protection than the Convention. In other words, the ECHR can be regarded as a minimum level in terms of the protection of the individual's rights.

4.4. Mutual trust – Presupposing that all Member States provide equivalent protection

Mutual trust presupposes that the Member States uphold the respect and protection of fundamental rights through their shared commitments in this manner.[91] Article 2 of the TEU stipulates that the values of the Union, *inter alia,* are the respect for human dignity, freedom, democracy and human rights. Furthermore, Article 3(1) of the TEU specifies that the Union's aim is to promote these values. The CJEU has stressed that mutual trust requires that the Member States trust each other's compliance with the fundamental rights recognized and guaranteed by EU law.[92] Thus, when the Member States implement EU law, there is a presumption that the fundamental rights have been observed in an equal manner by all national authorities within the EU. Such a presumption leaves no room for questioning, nor to check whether the rights actually have been observed in practice. However, the Court has stated that the principle of mutual trust can be rebutted in 'exceptional circumstances'. Such derogation has been clarified in case law by the CJEU.[93]

4.4.1. Opinion 2/13 – The obligation of mutual trust?

The Court's approach to the principle of mutual trust was further developed in 'Opinion 2/13' on the accession of the EU to the ECHR.[94] The journey to this opinion began in conjunction with the entry into force of the Treaty of Lisbon whereupon the EU Charter became a binding act. The drafters of the new revision Treaty thought it was the right time to introduce an

[90] The articles have the same wording 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.
[91] Council of the European Union, *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters*, 15 January 2001, OJ C 12/10.
[92] See Court of Justice, Grand Chamber Judgment of 25 July 2018, Case C-216/18 PPU, *LM*, para. 37.
[93] Ibid., para. 36.
[94] Court of Justice, Opinion 2/13 of the Court of 18 December 2014: *Accession by the 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.*

explicit basis for EU accession to the ECHR, which was inserted into Article 6(2) of the TEU. The provision stipulates that the EU shall accede to the ECHR and that such accession shall not change the EU's competences as defined in the Treaties. Thus, it was not only intended that the Member States would comply with the Convention, it was extended to also apply to the EU which would be bound by the ECHR and subsequently submit to the ECtHR's control mechanisms.[95] However, the European Commission requested an opinion from the CJEU concerning the agreement for EU accession to the ECHR. The Court was expected to deliver its opinion in order to determine whether such an accession, as well as a legally binding commitment, is compatible with the provisions laid down by the treaties.[96] In 2014, the Court delivered 'Opinion 2/13' in which they found that an accession cannot be considered compatible with primary EU law, at least not based on the draft agreement that was presented.[97]

The opinion is extensive and the CJEU addressed several different reasons underlying their conclusion. One of the main reasons was the trust presumption which status became strengthened. The Court emphasized that mutual trust is a prerequisite for EU cooperation, as trust is a necessity for AFSJ's functioning, which presumes that all Member States must be able to rely on each other's compliance with fundamental rights as stipulated in EU law, save in exceptional circumstances.[98] Such an approach entails that a Member State has no right to demand a higher level of national protection from another Member State. Following this, a Member State lacks the right to carry out a check whether the fundamental rights have been observed in a specific case, save in exceptional cases.[99] Notably, the Court went even further and stated that mutual trust between the Member States constitutes an *obligation* under EU law.[100]

Moreover, the Court declared that an accession to the ECHR would endanger the specific characteristics and autonomy of EU law. In the event of accession, it argued that the ECtHR would have the right to carry out external controls in order to ensure the EU's compliance with the rights and freedoms followed by the Convention. By extension, this would result in

[95] This is confirmed by Article 59 of the ECHR, where it appears that the Convention is open for signature and ratification by the EU.
[96] Court of Justice, Opinion 2/13 of the Court of 18 December 2014: *Accession by the 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,* para. 145.
[97] Ibid., para. 258.
[98] Ibid., para. 191.
[99] Ibid., para. 192.
[100] Ibid., para. 194.

an obligation for the EU and its institutions, including the CJEU, to comply with the decisions and judgments provided by the ECtHR.[101] Consequently, the EU would be equated with the Member States as contracting parties, which means that it is not possible to ensure that the intrinsic nature of the EU law is preserved.[102] Further, the Court pointed out that the ECHR would require the Member States to check each other regarding the observance of fundamental rights. Thus, this would also apply when the relations are governed by EU law. Hence, the Court considered that this would not be compatible with the principle of mutual trust between the Member States.[103] In light of the opinion, the accession was rejected mainly because of the failure to acknowledge the principle which was developed into an obligation for the Member States.

4.5. Prison inspection and monitoring bodies

In this context, it is relevant to briefly mention the prison inspection and monitoring bodies, operating both at the European and national levels, aiming to prevent ill-treatment in the Member States' detention facilities. Although these bodies are not established by the EU, they are of significance for the assessments within the EAW system.

4.5.1. CPT – European level

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), a committee of the Council of Europe, has the primary task of preventing ill-treatment of persons who have been deprived of their liberty in Europe.[104] This body has become a central actor within the EAW system and is of importance in the European Court's decision-making. In particular whilst inadequate prison conditions, nowadays, can constitute a ground for non-execution.[105]

The CPT organizes visits to different places of detention which, *inter alia,* includes prisons across the Union. After the visit, the Committee writes a report to the State concerned in which they have examined the compliance with fundamental rights. The report contains

[101] Court of Justice, Opinion 2/13 of the Court of 18 December 2014: *Accession by the 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* para. 181.
[102] Ibid., paras. 181, 193 and 258.
[103] Ibid., para. 194.
[104] Founded on the basis of Council of Europe, *The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Strasbourg, 26 November 1987, ETS No. 126; The Convention has been ratified by all EU Member States.
[105] See Chapter 5.2.

observations made during the visit and recommendations on areas of improvement.[106] In return, the Member State concerned is expected to respond to the findings presented in the report.[107] Following the judgments by the CJEU, it is important for the Member States to provide up-to-date information about the prison conditions in the risk assessment.[108] Therefore, it is increasingly common for the Member States' judicial authorities to refer to CPT reports in order to identify the prison conditions, in particular as the Committee carries out the reports continuously.[109]

4.5.2. NPM and OPCAT – National level

The Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is an international instrument aimed at protecting human rights in the UN system.[110] The Protocol requires the contracting States to establish and maintain a national body, a so-called National Preventive Mechanism (NPM), which is tasked with inspecting places where persons have been deprived of their liberty under its jurisdiction.[111] The role of an NPM is to prevent torture and ill-treatment by examining the detention conditions on a domestic level. Further, it provides recommendations on improvements addressed to the authorities who are of relevance in this matter.[112] However, OPCAT has not been ratified by all EU Member States which means that there is no obligation to establish NPMs in those states.[113]

[106] Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Text of the Convention and Explanatory Report*, CPT/Inf/C (2002), Article 10(1).
[107] Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *About CPT*, available at: https://www.coe.int/en/web/cpt/about-the-cpt [accessed 22 February 2023].
[108] Court of Justice, Grand Chamber Judgment of 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, para. 89.
[109] Usually every fourth year, see Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *About CPT*, available at: https://www.coe.int/en/web/cpt/about-the-cpt [accessed 22 February 2023].
[110] UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199.
[111] Ibid., Article 3.
[112] OHCHR, *Preventing torture: The Role of National Preventive Mechanisms*, 2018, available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/NPM/NPM_Guide.pdf [accessed 17 November 2022].
[113] See OHCHR, *National Preventive Mechanisms*, available at: https://www.ohchr.org/en/treaty-bodies/spt/national-preventive-mechanisms [accessed 24 February 2023].

5. The balance of interests between mutual trust and fundamental rights in CJEU case law concerning inhuman or degrading treatment

5.1. Challenging mutual trust

5.1.1. N.S – A step closer to taking fundamental rights seriously?

There is reason to account for the *N.S* judgment where the CJEU would take a different position concerning the balance of interests between fundamental rights and the principles underlying EU cooperation.[114] This was the first judgment within the AFSJ in which the Court limited the trust presumption in favor of fundamental rights. Although this case falls within the asylum context, more precisely the Common European Asylum System[115], it is of relevance to the later developments that will take place in case law within the EAW system.[116]

The appellant was an Afghan national who applied for asylum in the United Kingdom. As he had traveled through Greece, it was the Member State responsible for the application according to the asylum regulations. He was therefore transferred by the UK authorities back to Greece in accordance with the Dublin Regulation.[117] However, the appellant argued that a return to Greece would jeopardize his human rights and fundamental rights under the ECHR and EU law due to the systemic deficiencies that existed in the Greek asylum procedure and the asylum facilities.[118]

The Court held that the Member States are obliged to respect Article 4 of the Charter, stipulating that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment', and that the provision must be interpreted in such a way that an asylum seeker may not be transferred from one Member State to the Member State responsible, in the following situations:

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[114] Court of Justice, Grand Chamber Judgment of 21 December 2011, Case C-411/10, *N.S v. Secretary of State for the Home Department*.
[115] See the 'Common European Asylum System'; Council of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*.
[116] A. Willems, *The Principle of Mutual Trust in EU Criminal Law*, (Hart Publishing, 2021), p. 89; see also Court of Justice, Grand Chamber Judgment of 21 December 2011, Case C-411/10, *N.S v. Secretary of State for the Home Department*, para. 83.
[117] Court of Justice, Grand Chamber Judgment of 21 December 2011, Case C-411/10, *N.S v. Secretary of State for the Home Department*, paras. 34-37.
[118] Ibid., para. 40.

> *'[…] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.'*[119]

Thus, the Court ruled that a transfer of an asylum seeker can be refused if it violates the rights of the individual concerned. The judgment challenged mutual trust and made it clear that the Member States cannot always fully trust each other's systems. At least not when it comes to ensuring compliance with fundamental rights. Through this ruling, it could be argued that mutual trust no longer exists. In any case, it can be ascertained that the Court limited the principle. Recognizing fundamental rights as a basis for refusal would later be a subject for the Court to handle within the EAW surrender procedure. Hence, this outcome would, a few years later, be exported to the criminal law field in a case related to poor prison conditions.

5.2. Inadequate detention condition's compatibility with fundamental rights

5.2.1. Aranyosi and Căldăraru – Postponement of an EAW

In 2016, the CJEU received questions for a preliminary ruling in the context of the execution of two EAWs. As to the facts of these joined cases, *Aranyosi and Căldăraru,* Germany received two requests for surrender issued by the Romanian and Hungarian authorities.[120] The first case concerned Mr. Aranyosi, a Hungarian national, who lived in Germany. The Hungarian judicial authorities issued an EAW in order to surrender him for the purposes of prosecution. According to the EAW, Mr. Aranyosi was accused of burglary.[121]

However, the German judicial authorities expressed their concerns due to the Hungarian prison conditions, in particular, as the Hungarian authorities could not determine which facility he would be held in the event of surrender.[122] The Higher Regional Court of Bremen referred to a pilot judgment from the ECtHR, *Varga and Others v. Hungary*[123], where it was established that the overcrowding in the State's prisons violated Article 3 of the ECHR. Additionally, it referred to CPT reports which had identified that the Hungarian prison conditions did not satisfy the minimum standards regarding the personal space for each

[119] Court of Justice, Grand Chamber Judgment of 21 December 2011, Case C-411/10, *N.S v. Secretary of State for the Home Department*, para. 106.
[120] Court of Justice, Grand Chamber Judgment of 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*.
[121] Ibid., paras. 28-32.
[122] Ibid., paras. 39 and 44.
[123] ECtHR, *Varga and Others v. Hungary*, Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015.

inmate.[124] The German Court stated that this information is to be equated with probative evidence indicating that Mr. Aranyosi might be subjected to inhuman or degrading treatment upon surrender to Hungary.[125]

The second case concerned a Romanian national, Mr. Căldăraru, who was arrested in Germany due to an EAW issued by the Romanian judicial authorities.[126] The circumstances in his situation were similar to the case outlined above. Since the issuing Member State could not announce which facility he would be detained in, the German Court had to decide whether the Romanian prison conditions were compatible with fundamental rights. Relying on ECtHR's judgments and CPT reports regarding the detention conditions in Romania, the German Court stated that there existed evidence indicating that he would be subjected to inhuman or degrading treatment in its prison.[127]

In light of the circumstances brought forward, the German Court wanted the CJEU to answer how Article 1(3) of the EAW FD was supposed to be interpreted. The CJEU had to answer if a surrender of a person to the issuing Member State is impermissible in the event that there are strong indications that the detention conditions are in breach of the individual's fundamental rights, or whether it under such circumstances should be considered permissible if the issuing judicial authority can guarantee, through evidence, that the detention conditions are compatible with fundamental rights. Concerning the guarantee, the CJEU had to answer if there was an opportunity or obligation for the executing Member State to specify minimum requirements regarding the detention conditions.[128]

The CJEU stressed the importance of the principles of mutual recognition and mutual trust by referring to 'Opinion 2/13' where it was stated that limitations of the principles could only be made 'in exceptional circumstances'.[129] Moreover, it was emphasized that the principles are considered to be cornerstones of judicial cooperation where the confidence in each other's systems presupposes that the Member States provide equivalent protection, as the system requires them to respect fundamental rights as enshrined in the Charter.[130] The Court referred

[124] Court of Justice, Grand Chamber Judgment of 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, paras. 43-44.
[125] Ibid., para. 42.
[126] Ibid., para. 47.
[127] Ibid., paras. 59-61.
[128] Ibid., para. 63.
[129] Ibid., para. 82.
[130] Ibid., paras. 77, 79 and 83.

to the listed grounds for non-execution, under which the executing judicial authority may refuse a surrender procedure, and highlighted that the list is exhaustive.[131]

However, the Court argued that the right guaranteed by Article 4 of the Charter, which is considered to be an absolute prohibition, is binding on the Member States when they are implementing EU law. This is the case when the Member States' judicial authorities are applying their national legislation adopted to transpose the EAW FD.[132] Additionally, the Court pointed out that Article 4 of the Charter corresponds to Article 3 of the ECHR where no derogation is allowed.[133] These provisions stipulate one of the fundamental values within the Union which the Member States are obliged to maintain. Within this context, the Court stated how the executing judicial authority should pertain to the information left by the issuing Member State:

> '*[...] where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter, [...], that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment*.'[134]

The executing judicial authorities are thus bound to make a more detailed assessment regarding the existence of the risk of ill-treatment in situations where there is information indicating that there exist systemic deficiencies in the prison. Further, the Court once again referred to their reasoning in 'Opinion 2/13' in relation to the protection of fundamental rights and stated that another check of the conditions in another Member State is a deviation from the trust presumption.[135]

However, a risk assessment is required. Such an assessment must be based on properly updated information that needs to be considered objective, reliable and specific. The Court enumerated various sources where the information might be obtained, such as judgments of

[131] Court of Justice, Grand Chamber Judgment of 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, para. 80.
[132] Ibid., paras. 84-85.
[133] See European Convention, Article 15(2).
[134] Court of Justice, Grand Chamber Judgment of 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, para. 88.
[135] See Court of Justice, Opinion 2/13 of the Court of 18 December 2014: *Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and TEU Treaties*, para. 192.

the ECtHR or reports and documents published by the Council of Europe or the United Nations.[136] This information regarding prison conditions must demonstrate:

> *'[...] 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. […]'*[137]

Systemic or generalized deficiencies are, however, not sufficient for constituting grounds for a refusal to execute an EAW. This, as such deficiencies cannot show with certainty that the requested person, in a specific case, will be subjected to inhuman or degrading treatment upon surrender to the issuing Member State. Consequently, the Court placed additional demands on the executing judicial authority:

> *'[…] the executing judicial 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 Article 4.'*[138]

Hence, the executing judicial authority is expected to carry out an individualized assessment showing that the person concerned is at risk of such treatment. In accordance with Article 15(2) of the EAW FD, the issuing judicial authority must provide information, within a certain time limit, on the conditions for the individual's detention in the particular case. All necessary supplementary information is required in order to accomplish the assessment. It should be emphasized that it is the executing judicial authority that must request such information and decide the time limit.[139] Pending the information, the CJEU stressed that the executing judicial authority must postpone its decision on execution. However, this does not mean that it can be abandoned.[140]

Consequently, the Court developed a two-tier test to be carried out by the executing judicial authority in order to ascertain whether there is a real risk that the individual concerned, upon surrender to the issuing Member State, will be subjected to inhuman or degrading treatment in prison. Thus, Article 4 of the Charter and Article 3 of the ECHR are covered by this test:

[136] Court of Justice, Grand Chamber Judgment of 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, para. 89.
[137] Ibid., para. 89.
[138] Ibid., para. 94.
[139] Ibid., para. 97.
[140] Ibid., para. 98.

i. *The first step:* Are there any deficiencies in the issuing Member State that can be defined as systemic or generalized? It is required that such an assessment relies on information that is considered to be objective, reliable, specific and properly updated.

ii. *The second step*: In the event that systemic and generalized deficiencies can be identified, are there substantial grounds that the person concerned will be at risk of being subjected to this treatment in the event of a surrender? Such an assessment must be based on the individual case and requires supplementary information, regarding the place where the person will be detained, from the issuing Member State.

In light of the above, *Aranyosi and Căldăraru* had a significant impact on the development of the EAW system and a new focus emerged on fundamental rights. Bearing in mind that the Court earlier interpreted the non-execution grounds strictly, this ruling was groundbreaking and can almost be described as a milestone for the balance of interests between fundamental rights and mutual trust within the EAW system. The ruling allowed the Member States to postpone an EAW if there is a real risk that the requested person will be subjected to inhuman or degrading treatment in the issuing Member State's prison. The postponement lasts until the supplementary information has been given by the issuing Member State, aiming to discount the existence of such risks. Further, it clarified that communication between the issuing and executing judicial authority is of crucial importance within the EAW system.

5.2.2. M.L – Limited obligation for the executing Member State to investigate

Although the CJEU tried to guide the Member States in assessing the existence of risks that may violate the individual's fundamental rights by developing the two-tier test, uncertainties arose regarding the individual assessment. Consequently, in 2017, some of the questions in *Aranyosi and Căldăraru* returned to the Court in a request for a preliminary ruling issued by the Court of Appeal in Bremen.[141]

As to the facts of the *ML* judgment, the Hungarian judicial authority issued an EAW in order to prosecute a Hungarian national for several offenses committed in Hungary.[142] Upon request, the issuing judicial authority was able to specify in which facilities ML would be detained. They stated that ML, initially, would be placed in a prison in Budapest and

[141] Court of Justice, Judgment of 25 July 2018, Case C-220/18 PPU, *ML*.
[142] Ibid., para. 19.

thereafter be transferred to another prison in Szombathely, both located in Hungary. Further, he could be transferred to additional prisons within the State. However, an assurance was given by the issuing authority which provided that ML, during his time as a detainee, would not be subjected to inhuman or degrading treatment irrespective of prison.[143]

The German court decided to request supplementary information from the Hungarian judicial authority as a result of the reported deficiencies of the detention conditions in Hungary. They found it uncertain whether a surrender could be considered compatible with fundamental rights, in particular, while the Hungarian authority had indicated that ML could be transferred to other prisons. Given the concerns, the German court created a comprehensive list of questions, to which the Hungarian authorities were to answer, considering the detention conditions in the prisons where ML could conceivably be detained.[144] Hungary responded that their national legislation allowed the individuals deprived of their liberty to challenge their detention conditions compatibility with fundamental rights. Moreover, it was emphasized that there had been major changes regarding the number of prison places which had reduced the prison overcrowding.[145] Once again, it was assured that ML would not be subjected to such treatment as referred to in Article 4 of the Charter, regardless of the facility in which he would be incarcerated.[146]

The German court turned to the CJEU and raised the question of the extent of the assessment in view of the information provided by the issuing judicial authorities. In this case, whether the investigation should include all prison facilities where the person concerned might be held or whether it should be limited to the prisons in which the Hungarian authorities have indicated that he is likely to spend most of his time.[147]

The CJEU referred to the two-tier test developed in the case of *Aranyosi and Căldăraru* and emphasized that it follows from the specific and precise requirements that such an assessment cannot concern the detention conditions in all prisons in the issuing Member State.[148] Moreover, the Court argued that unforeseen circumstances might occur which means that the person concerned may be transferred to another prison. Consequently, it is not achievable, in practice, to identify all the prisons to which the individual may be placed in the event of

[143] Court of Justice, Judgment of 25 July 2018, Case C-220/18 PPU, *ML*, para. 22.
[144] Ibid., paras. 26-27.
[145] Ibid., para. 29.
[146] Ibid., para. 33.
[147] Ibid., paras. 37-38.
[148] Ibid., para. 78.

surrender.[149] According to the Court, requesting supplementary information should be seen as a last resort and this step should, therefore, only be carried out when the executing judicial authority does not have access to sufficient information.[150]

Additionally, the Court stressed that the objective pursued by the EAW system is to simplify the surrender procedure. Hence, the intention of the system would be undermined if the assessment was extended to an obligation, for the executing judicial authority, to assess the detention conditions in all prisons which could be subject for placement.[151] The Court concluded that such an obligation would be too comprehensive in view of mutual trust and stated the following:

> *'[…] those authorities are solely required to assess the conditions of detention in the prisons in which, according to the information available to them, it is actually intended that the person concerned will be detained, including on a temporary or transitional basis. […]*'[152]

Following this ruling, it is only the judicial authorities of the issuing Member State that have the competence to assess if the conditions are compatible with fundamental rights in the other prisons to which the person concerned, at a later stage, may be transferred to.[153] In other words, relocation is not covered by EU law which limits the obligation for the executing judicial authority to investigate in their risk assessment.

5.2.3. Dorobantu – Obligation to trust the guarantees provided by the issuing Member State and minimum standards

Following *Aranyosi and Căldăraru* and *ML*, the CJEU has continued to develop and clarify the assessment aiming to guide the Member States in identifying when inadequate detention conditions may infringe the prohibition of inhuman or degrading treatment. In 2019, the Court added new pieces to the two-tier test concerning the guarantees provided by the issuing judicial authority and minimum requirements related to the material conditions of detention.[154]

The *Dorobantu* judgment was triggered by a request for a preliminary ruling issued by the Higher Regional Court of Hamburg. The Romanian authorities requested an EAW for the

[149] Court of Justice, Judgment of 25 July 2018, Case C-220/18 PPU, *ML*, para. 81.
[150] Ibid., para. 79.
[151] Ibid., paras. 82-84.
[152] Ibid., para. 87.
[153] Ibid.
[154] Court of Justice, Grand Chamber Judgment of 15 October 2019, Case C-128/18, *Dumitru-Tudor Dorobantu*.

surrender of Dorobantu, a Romanian national, which the executing judicial authority had to respond to.[155] Following the two-tier test, the German court was able to establish that there were systemic and generalized deficiencies regarding the detention conditions in Romania. This was confirmed by, among other things, case law of the ECtHR.[156] The German court was later tasked with carrying out the individualized assessment based on the information provided by the Romanian authorities. Given the communicated information, the issuing judicial authority could not specify which facility Dorobantu would be placed in.[157] According to the German court, it was still questionable whether the issuing Member State could ensure that he would not be at risk of being subjected to inhuman or degrading treatment.

The first question referred to the CJEU for a preliminary ruling was whether Article 4 of the Charter meant that specific minimum standards could be determined regarding the conditions of the detention, primarily in relation to the size of the cell and the personal space available to a detainee.[158] As there were no minimum rules about the space requirements in EU law, the CJEU referred to relevant case law by the ECtHR in this matter.[159] However, it should be mentioned that the Court had no reason to determine the minimum requirements of personal space per detainee in a single-occupancy cell as Dorobantu was to be detained in a multi-occupancy cell if surrendered to Romania.[160] Relying on the ECtHR's calculation of personal space in the case of *Muršić v. Croatia*[161], the CJEU held that 3 square meters is the minimum requirement in a multi-occupancy cell. In other words, a detainee should have the right to a personal space of this size, otherwise, it would constitute a strong presumption of a violation of Article 3 of the ECHR and Article 4 of the Charter to which it corresponds. Additionally, factors related to material conditions should be taken into account in the assessment.[162]

Consequently, the Court determined that Article 4 of the Charter entailed a minimum requirement of 3 square meters of personal space. However, the Member States are free to prescribe higher minimum standards within their domestic systems in terms of detention conditions. Nevertheless, the executing Member State may not impose conditions higher than

[155] Court of Justice, Grand Chamber Judgment of 15 October 2019, Case C-128/18, *Dumitru-Tudor Dorobantu*, para. 19.
[156] Ibid., para. 22.
[157] Ibid., paras. 23-24.
[158] Ibid., para. 36.
[159] Ibid., para. 77. Within the meaning of Article 3 of the ECHR.
[160] Ibid., para. 70.
[161] See ECtHR, Case of *Muršić v Croatia*, Application no. 7334/13, 20 October 2016; see also Chapter 6.1.
[162] Court of Justice, Grand Chamber Judgment of 15 October 2019, Case C-128/18, *Dumitru-Tudor Dorobantu*, paras. 72-73.

these due to provisions of its own national law and use it as a requirement for the surrender procedure. Otherwise, it would undermine the principles of mutual trust and mutual recognition.[163] Thus, the CJEU established minimum standards by incorporating ECtHR's rulings which consequently applied to the surrender procedure.

The second question that the CJEU had to answer concerned the assessment of the information provided by the issuing judicial authority. The German court asked if they, in their capacity as the executing judicial authority, are limited to assess whether the conditions of detention in the issuing Member State are manifestly deficient or if it involves a comprehensive assessment of these conditions.[164] In this case, the Hungarian authorities were unable to specify which facility Dorobantu would be detained. The CJEU reiterated what had previously been determined in the case of *ML* and stated that the executing judicial authority is solely required to assess the detention conditions in the facility to which the person concerned, according to the available information, can de facto be held.[165] Thus, the CJEU confirmed their stance taken in previous case law.

When it comes to the issuing Member State's assurance that the person will not be subjected to inhuman or degrading treatment upon surrender, the CJEU determined that the executing judicial authority must relate to the information as follows:

> *'When the assurance that the person concerned will not suffer inhuman or degrading treatment on account of the actual and precise conditions of his detention, irrespective of the prison in which he is detained in the issuing Member State, has been given, or at least endorsed, by the issuing judicial authority, if need be after the assistance of the central authority, or one of the central authorities, of the issuing Member State, [...], the executing judicial authority must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter. […]'*[166]

However, the CJEU highlighted that it is only in exceptional circumstances that the executing Member State can establish that, notwithstanding the assurance provided by the issuing judicial authority, there is a real risk that the person concerned will be subjected to the treatment referred to in Article 4 of the Charter. In order to fall within the scope of

[163] Court of Justice, Grand Chamber Judgment of 15 October 2019, Case C-128/18, *Dumitru-Tudor Dorobantu*, para. 79.
[164] Ibid., para. 36.
[165] Ibid., para. 66.
[166] Ibid., para. 68.

exceptional circumstances, the executing judicial authority is required to provide precise information.[167]

Overall, this means that the executing judicial authority must rely on the information provided by the issuing judicial authority in terms of guaranteeing that the person would not be subjected to ill-treatment in the State's prison. In practice, the risk for such treatment is removed as a result of the assurance, despite the fact that the executing Member State has been able to establish that systemic and general deficiencies occur in the prisons of the issuing Member State. If the executing judicial authority does not rely on the information provided by the issuing Member State, it would undermine the principle of mutual trust. Consequently, the CJEU determines that the executing Member State must provide precise information to refute the general assurance that has been provided by the issuing Member State.

5.3. Consequences of the CJEU's rulings

5.3.1. The real issue with mutual trust –Member States at risk?

At both international and EU levels, it is quite difficult to find statistics on the use of the EAW and grounds for non-execution. Neither the Commission nor any other EU institution offers complete statistics on when the Member States have refused to execute EAWs due to concerns of inadequate prison conditions. However, the Commission has published a number of statistical reports on the EAW FD which only provides a concise overview of the practical operation of the legal instrument.[168] By quoting the Commission, these are not intended to 'naming or shaming any Member State'.[169] It should be emphasized that it is voluntary for the Member States to provide data on this matter and that it is the Member States themselves who report the statistics by answering a questionnaire.[170]

In 2020, during a LIBE committee[171] meeting, the Commission emphasized that they had noted tendencies that the Member States do not always trust each other fully when it comes to cross-border surrender procedures. Romania, Poland and Hungary were exemplified as those

[167] Court of Justice, Grand Chamber Judgment of 15 October 2019, Case C-128/18, *Dumitru-Tudor Dorobantu*, para. 69.
[168] See European Commission, Commission Staff Working Document, *Statistics on the practical operation of the European arrest warrant – 2020*, 8 December 2022, Brussels, SWD(2022) 417 final.
[169] European Parliament, meeting of the LIBE Committee, 20 February 2020 at 9:40-45, available at: https://multimedia.europarl.europa.eu/en/webstreaming/libe-committee-meeting_20200220-0900-COMMITTEE-LIBE [accessed 1 December 2022].
[170] Note that some participating Member States have not answered all questions.
[171] The European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE). Responsible for, among other things, the protection of fundamental rights in the AFSJ.

Member States where there exist deficiencies that have resulted in trust problems. Further, the Commission stated that Germany, Austria, the Netherlands and Ireland no longer automatically execute decisions in the criminal law sphere. At the same time, Member States such as Spain and France are concerned about this development as it threatens the effectiveness and principles underlying judicial cooperation in criminal matters. Consequently, some Member States have classified a number of issuing Member States at risk, while others choose not to take a position.[172] One of the factors highlighted by the Commission as a reason why some Member States do not execute decisions in accordance with the principles is the conditions in the Member States' prisons.[173]

Based on the Commission's statistics on the practical operation of the EAW, an increase in the number of refusals could be observed in comparison with previous year's data. However, the figures may be misleading as the Commission underlines that some Member States may participate one year but choose to forego another.[174] In 2019, 81 refusals were registered on the basis of fundamental rights and Germany represented the executing Member State in 65 of these.[175] In 2020, based on the latest available report, 108 refusals were reported and 73 of these were registered by Germany.[176] However, the available data only show when poor detention conditions have constituted a ground for refusal, without specifying which countries that have been the issuing Member States.[177] Additionally, the absence of a question relating to the risk assessment in the Commission's questionnaire means that no data are available to show the extent to which the executing Member State chooses to request additional information from the issuing judicial authority. *Tony Marguery* has in his empirical study specifically pointed out that the Romanian judicial authorities do not question prison conditions in other Member States when they have received an EAW request. One of the underlying reasons for this is due to the fact that the standard of Romanian facilities is poor. It

[172] European Parliament, meeting of the LIBE Committee, 20 February 2020 at 9:40-45, available at: https://multimedia.europarl.europa.eu/en/webstreaming/libe-committee-meeting_20200220-0900-COMMITTEE-LIBE [accessed 1 December 2022].
[173] Ibid., The Commission highlights that a number of prison standards have been reviewed as a result of the judgments of the ECtHR: Romania, Bulgaria, Belgium, France, Greece, Croatia, Italy, Latvia, Hungary and Portugal.
[174] European Commission, Commission Staff Working Document, *Statistics on the practical operation of the European arrest warrant – 2019*, Brussels, 6 August 2021, SWD(2021) 227 final, p. 16.
[175] Ibid., p. 36. In accordance with Framework Decision on the EAW, Article 1(3).
[176] European Commission, Commission Staff Working Document, *Statistics on the practical operation of the European arrest warrant – 2020*, Brussels, 8 December 2022, SWD(2022) 417 final, p. 43.
[177] Ibid., p. 44.

would, therefore, appear paradoxical if Romania requested additional information from the issuing judicial authority in this respect.[178]

Further, the Commission has noticed that the Courts of the Member States rely on different types of sources in their risk assessments which gives rise to a divergent assessment of the detention conditions across the EU.[179] The Commission has tried to solve this problem by requesting the European Union Agency for Fundamental Rights (FRA)[180] to compile information regarding prison conditions in the EU. FRA responded by setting up the criminal detention database, aimed to make it easier for the Member States to access information on the detention conditions across the Union. It covers, *inter alia*, case law, reports from prison inspection and monitoring bodies, and national standards on detention conditions. This information is primarily aimed at assisting judges and legal practitioners in their assessments involving mutual recognition instruments. Once again, it is important to point out that it is not intended to compare or rank the Member States' compliance with fundamental rights. Rather, it should be seen as guidance to an accurate assessment regarding prison conditions.[181]

In this context, it can also be mentioned that legal practitioners in the Member States had expressed their concerns regarding prison conditions and their compatibility with fundamental rights even before it was recognized as a ground for refusal.[182] In 2016, a questionnaire was sent out to Member States where experts from each state were asked to compile answers to a number of questions related to the EAW.[183] At this time, several Member States expressed that they had difficulties relying on specific Member States when it comes to their prison conditions compliance with fundamental rights, particularly regarding EAW requests from Hungary, Lithuania and Romania. The detention conditions were not always considered in the Member States' assessments, however, with regard to certain issuing Member States it was

[178] T. Marguery, *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU: Transfer of Judgment of Conviction in the European Union and the Respect for Individual's Fundamental Rights*, (Wolf Legal Publishers, 2018), p. 352.
[179] European Parliament, meeting of the LIBE Committee, 20 February 2020 at 9:40-45, available at: https://multimedia.europarl.europa.eu/en/webstreaming/libe-committee-meeting_20200220-0900-COMMITTEE-LIBE [accessed 1 December 2022].
[180] FRA is an EU body aimed to promote and protect fundamental rights in the EU.
[181] FRA, Criminal Detention Database 2015-2022, available at: https://fra.europa.eu/en/content/criminal-detention-database [accessed 10 December 2022].
[182] Council of Bars and Law Societies of Europe, European Lawyers Foundation, *Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners*, 17 November 2016, available at: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CRIMINAL_LAW/CRM_projects/EN_CRM_20161117_Study-on-the-European-Arrest-Warrant.pdf [accessed 2 December 2022], pp. 38-39.
[183] Ibid., p. 82.

deemed necessary.[184] Moreover, Ireland responded that inadequate detention conditions in the issuing Member States constituted the main ground 'for successful challenge to arrest warrants in this jurisdiction'. As is known by now, Germany turned to the CJEU for preliminary rulings in this matter.[185] This clearly reveals that the lack of trust between the Member States existed even before the CJEU's rulings.

[184] Council of Bars and Law Societies of Europe, European Lawyers Foundation, *Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners*, 17 November 2016, available at: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CRIMINAL_LAW/CRM_projects/EN_CRM_20161117_Study-on-the-European-Arrest-Warrant.pdf [accessed 2 December 2022], p. 38.
[185] Ibid., p. 161.

6. Concerns regarding the increasing numbers of violations due to prison conditions

This chapter aims to give an overview of what the reality looks like in the Member States' prisons. The clearest picture can be given based on the judgments of the ECtHR, the inspection and monitoring bodies and other documents and statistics that have been published in this area. Further, it is of relevance to explain the calculation underlying the minimum standards and whether the EAW system satisfies the ECHR's threshold, given that the absolute prohibition should have the same meaning and scope. Hence, *Bivolaru and Moldovan v. France* will serve as a benchmark in terms of whether EU law meets the minimum level of protection, which is essential in examining how the conflict of interests has affected the requested person's rights.

6.1. The ECtHR - minimum standards on prison conditions

6.1.1. Muršić v. Croatia

Prison overcrowding and factors linked to material conditions in the Member States have been a serious problem for a long period of time. Consequently, this poses an increased risk of violation of the prisoner's fundamental rights. Over the years, the ECtHR has developed various criteria in its case law on prison conditions based on Article 3 of the ECHR.[186] In 2016, the ECtHR established the applicable minimum standard that the Member States should adhere to as signatory parties and also observe during the surrender procedure, as confirmed by the CJEU's findings in *Dorobantu.*[187]

The ECtHR has highlighted the extreme lack of personal space as one central factor that weighs heavily in the Court's assessment of living conditions within the State's prison facilities. If the surface area in a multi-occupancy cell falls below 3 square meters per inmate, it gives rise to a strong presumption of a violation of the Convention. Hence, the ECtHR has developed a minimum standard of 3 square meters, in terms of personal space in a multi-occupancy cell, for the purposes of the prohibition of inhuman or degrading treatment.[188] Relying on the CPT methodology of calculating the space, it includes the area occupied with

[186] See ECtHR, *Factsheet – Detention conditions and treatment of prisoners,* December 2021, available at: https://www.echr.coe.int/documents/fs_detention_conditions_eng.pdf [accessed 23 February 2023].
[187] Court of Justice, Grand Chamber Judgment of 15 October 2019, Case C-128/18, *Dumitru-Tudor Dorobantu.*
[188] ECtHR, *Muršić v. Croatia,* Application no. 7334/13, 20 October 2016, paras. 136 and 137.

furniture whilst the area intended for sanitary facilities should not be included. Importance is attached to the detainee being able to move around normally.[189]

However, this can be rebutted by the respondent Government if there exist factors that can compensate for the insufficient personal space.[190] The ECtHR has stated that the following factors have to be cumulatively met in order to rebut the presumption:

i. *'the reductions in the required minimum personal space of 3 sq. m are short, occasional and minor;*
ii. *such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities;*
iii. *the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention.'*[191]

However, if the living space measures between 3 and 4 square meters, a cumulative assessment is required along with other factors related to the material conditions of the detention. The space aspect is still considered to weigh heavily but has to be coupled with factors such as ventilation, room temperature and access to natural light.[192] If an applicant raises concerns about the prison conditions but has 4 square meters of personal space in the prison cell, which exceed the minimum standard, the conditions must be examined in light of Article 3 of the ECHR where material conditions remain important.[193] It is the applicant's responsibility to provide evidence, which must be detailed and consistent, in support of their complaint. The Court has stated that such evidence may include photographs or statements by fellow inmates.[194] Thereafter, it is the task of the respondent Government to either corroborate or refute what the individual has claimed by providing information of the detention conditions in the specific case.[195]

6.2. Romania – Worrying trend of human rights violations

Applications concerning conditions of detention are covered by the ECtHR's priority policy which was adopted by the Court in 2009 due to the high numbers of incoming serious and urgent cases. The aim was to speed up the processing and adjudication by concentrating more

[189] ECtHR, *Muršić v. Croatia*, Application no. 7334/13, 20 October 2016, para. 114.
[190] Ibid., paras. 135 and 138.
[191] Ibid., para. 138.
[192] Ibid., para. 139.
[193] Ibid., para. 140.
[194] Ibid., para. 127.
[195] Ibid., para. 128.

resources on these applications.[196] However, the ECtHR handles the most cases against Romania in this category.[197] Hence, Romania has been highlighted given their history of continuous human rights violations, due to poor prison conditions.

6.2.1. The ECtHR's findings – high numbers of urgent cases

Date back in 2007, the Court found the first violation of Article 3 of the ECHR due to inadequate prison conditions in Romania.[198] Notably, this was the same year that Romania became a Member State of the EU.[199] Since then, the Court has dealt with the same issue concerning various prisons spread throughout Romanian territory.[200] Below, ECtHR's findings will illustrate what the reality looks like for many of the inmates in the State's prisons and the various factors leading to inhuman or degrading treatment.

In 2010, the Court held that a Romanian national had been subjected to inhuman or degrading treatment in the case of *Florea v. Romania.*[201] The applicant was detained in a prison with serious problems due to overcrowding. For approximately nine months, the appellant had to share a cell with between 110 and 120 other inmates on a surface area of 55 square meters. Additionally, there were only 35 beds available. The Court referred to the minimum threshold of 3 square meters and established that the applicant's personal space fell below the standard since he had between 1.57 and 2.36 square meters of space. Furthermore, the applicant suffered from chronic diseases and was advised to avoid smoking. The Court noted that there was an issue with passive smoking in the cell, as approximately 90 percent of the inmates smoked, which was against his doctor's advice. There were also notable deficiencies regarding hygiene factors.[202]

[196] See ECtHR, *The Court's Priority Policy*, available at: https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf [accessed 5 October 2022].
[197] See ECtHR, *Analysis of statistics 2021*, January 2022, available at: https://www.echr.coe.int/Documents/Stats_analysis_2021_ENG.pdf [accessed 5 October 2022], p. 5.
[198] See ECtHR, *Bragadireanu v. Romania*, Application no. 22088/04, 6 December 2007.
[199] European Union, *Romania*, available at: https://european-union.europa.eu/principles-countries-history/country-profiles/romania_en [accessed 18 February 2023].
[200] See violations of Article 3 ECHR regarding poor detention conditions, among many other cases between 2007-2009, ECtHR; *Petrea v. Romania*, Application no. 4792/03, 29 April 2008; *Gagiu v. Romania*, Application no. 63258/00, 24 February 2009; and, *Marian Stoicescu v. Romania*, Application no. 12934/02, 16 July 2009.
[201] ECtHR, *Florea v. Romania*, Application no. 37186/03, 14 September 2010; see more ECtHR judgments from 2010, *Dimakos v. Romania*, Application no. 10675/03, 6 July 2010; and, *Dobri v. Romania*, Application no. 25153/04, 14 December 2010.
[202] ECtHR, Press release issued by the Registrar of the Court, *Florea v. Romania (application no. 37186/03)*, 14 September 2010.

However, in 2012, the Court found that inadequate prison conditions constituted a structural problem in Romania.[203] In the case of *Iacov Stanciu v. Romania*, the applicant served his sentence in various prisons and complained of severe overcrowding and deficiencies regarding hygiene and sanitary factors. Among other things, he alleged that the cells were dirty and that there were cockroaches, rats, lice, and bedbugs in the prison.[204] Moreover, the access to hot or cold water was extremely limited.[205] He alleged that the poor conditions caused him various diseases which he did not receive adequate healthcare for.[206] The applicant argued that these deficiencies were a structural problem in the country which the Romanian authorities had been aware of.[207] The Court found that the applicant had less than 3 square meters of personal space in those facilities where he was detained. Particularly serious was the fact that there were not enough beds in the cells, forcing him to share his bed with other detainees.[208] Relying on findings from CPT and other human rights organizations, the Court confirmed that the applicant had experienced poor sanitary facilities as those he alleged. Moreover, the Court observed that he had developed a number of serious illnesses during his time in prison for which he did not receive adequate treatment.[209] His situation was further exacerbated by being transferred 38 times, over a 9-year period, between different detention facilities.[210] Consequently, the Court held that these circumstances attained the required level of severity of inhuman or degrading treatment under Article 3 of the ECHR.[211]

In 2014, *Remus Tudor v. Romania*, the applicant claimed that he had been placed in overcrowded cells. Additionally, there was no furniture in the cell aimed at keeping personal objects or food, which forced the inmates to store their food under their beds, a surface inhabited by a large number of insects. During the winter months, the temperature in the cell was very low and the access to hot water was non-existent for three months. Further, he contended that the air in the cell was unbreathable due to his cellmate's consumption of drugs and cigarettes.[212] The Court found that the applicant's allegations reflected conditions that had already been observed in similar cases in regard to the prison in question.[213] Thus, there had been a violation of Article 3 of the ECHR due the material conditions and overcrowding of

[203] ECtHR, *Iacov Stanciu v. Romania*, Application no. 35972/05, 24 July 2012, para. 196.
[204] Ibid., paras. 30-31.
[205] Ibid., para. 130.
[206] Ibid., para. 69.
[207] Ibid., para. 131.
[208] Ibid., para. 173.
[209] Ibid., paras. 181 and 187.
[210] Ibid., para. 178.
[211] Ibid., para. 179.
[212] ECtHR, *Remus Tudor v. Romania*, Application no. 19779/11, 15 April 2014, paras. 8-12.
[213] Ibid., para. 34.

the applicant's detention.[214] Two years later, in the case of *Macovei and others v. Romania,* 16 applicants relied on Article 3 of the ECHR in their complaints of inadequate conditions of their detention. Given the overcrowding, most of the applicants had extremely limited personal space in their prison cells which went far below the minimum standard. Some of them had only between 1,15 and 1.5 square meters of surface area. However, other material factors were also mentioned, such as insufficient access to showers and toilet facilities, infestation of insects, poor quality of food and inadequate natural lighting and ventilation.[215] Even if the Court did not consider it necessary to examine all the aspects concerning the material conditions, it referred to case law on the subject and held a breach of the Convention.

Applications regarding poor prison conditions in Romania would increase in 2017. Given a large number of applications,[216] the ECtHR decided to adopt the pilot judgment procedure in the case of *Rezmiveș and others v. Romania*.[217] The Court stated that the applicants' descriptions of the prison conditions were similar to those that had already been examined repeatedly by the Court. By using this procedure, the Court aimed to put an end to all identical cases which, according to the Court, were part of a 'general problem originating in a structural dysfunction specific to the Romanian prison system'.[218] However, the Court observed that the respondent State had the intention to improve the detention conditions by introducing new measures. Nevertheless, it was far from sufficient, and the critical situation could still give rise to further violations of the Convention.[219] Various measures were therefore required in order to reduce overcrowding and the deficiencies relating to material conditions of detention in the State's prisons. Consequently, the Court urged the Romanian Government to provide a precise timetable for the implementation of the general measures within a period of six months. Pending the improvement and the adoption by the Romanian

[214] ECtHR, *Remus Tudor v. Romania,* Application no. 19779/11, 15 April 2014, para. 37.
[215] ECtHR, *Macovei and others v. Romania,* Application nos. 50109/13, 63887/13, 73496/13, 17415/14, 20965/14, 24212/14, 24906/14, 27050/14, 36990/14, 37117/14, 39499/14, 39598/14, 40769/14, 42747/14, 48620/14 and 55840/14, see the appendix.
[216] In August 2016, 3,200 applications concerning poor detention conditions were pending before the ECtHR; see ECtHR, *Rezmiveș and Others v. Romania,* Application nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017, para. 109.
[217] ECtHR, *Rezmiveș and Others v. Romania,* Application nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017. Note that the applicants were placed in various detention facilities.
[218] Ibid., para. 110.
[219] Ibid., The Court found that it constituted a structural problem already in 2012, see ECtHR, *Iacov Stanciu v. Romania*, Application no. 35972/05, 24 July 2012, para. 113.

domestic authorities, the Court postponed the examination of all similar applications concerning Romania.[220]

Following the pilot judgment, 5000 similar cases were pending before the ECtHR. In July 2021, the Court reviewed the improvement in detention conditions in *Polgar v. Romania.*[221] All over again, the Court found that Romania had breached the Convention. Certainly, there had been improvements after the pilot judgment as the national authorities had implemented several measures which had reduced prison overcrowding. Unfortunately, a negative development was noted with a rising overcrowding number in 2021. The Court, therefore, came to the same conclusion in this ruling, the Romanian authorities must ensure that the reforms lead to a reduction concerning the number of detainees in the facilities in order to maintain a manageable level.[222] However, the worrying trend of human rights violations have continued, and Romanian prisons are still facing extensive challenges. Statistics from 2022 reveal that Romania is the EU Member State that has the highest number of violations of Article 3 of the ECHR as the Court held 37 violations during that year. This can be compared to Hungary, which is the second EU Member State in this category, with eight declared violations.[223]

6.2.2. The CPT's findings

The CPT has repeatedly visited Romania in order to investigate the conditions in the State's prisons.[224] In 2021, a visit was considered to be required with the aim of strengthening the protection against ill-treatment.[225] The focus was, among other things, to evaluate the measures that the Romanian authorities were supposed to take after the Committee's last visit in 2018, shortly after the pilot judgment in the case of *Rezmiveș and others v. Romania*.[226]

[220] ECtHR, *Rezmiveș and Others v. Romania,* Application nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017, paras. 3-4.
[221] ECtHR, *Polgar v. Romania,* Application no. 39412/19, 20 July 2021.
[222] ECtHR, Press release issued by the Registrar, *Judgment Polgar v. Romania - Conditions of detention in Romanian prisons and the effectiveness of the domestic remedies following the Court's pilot judgment*, 20 July 2021, ECHR 234 (2021), p. 1.
[223] ECtHR, *Violations by Article and by State 2022,* available at: https://www.echr.coe.int/Documents/Stats_violation_2022_ENG.pdf [accessed 9 February 2023]. Note that it does not appear if this is related to detention conditions.
[224] The investigation concerned Craiova Prison, Galați Prison, Giurgiu Prison and Mărgineni Prison.
[225] Council of Europe, European Committee for the Prevention of Torture, *Report to the Romanian Government on the ad hoc visit to Romania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 21 May 2021,* Strasbourg, 14 April 2022, CPT/Inf (2022) 06, p. 7.
[226] See Council of Europe, European Committee for the Prevention of Torture, *Report to the Romanian Government on the ad hoc visit to Romania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 19 February 2018,* Strasbourg, 19 March 2019, CPT/Inf (2019) 7.

With regard to the overcrowding in the State's prisons, the CPT stated that it constituted a serious problem because of the inadequate capacity in relation to the number of detainees. According to the CPT report, a number of prisons were operating above 150 percent of their capacity, whilst the prison estate operated at 127 percent of its official capacity.[227] Furthermore, it is stated that the percentage of overcrowding led to impaired quality of life and, in the long run, made it difficult for the inmates to reintegrate into society.[228] In this context, the CPT called on the Romanian authorities to take the necessary measures that ensure the minimum standard of living space for the inmates.[229]

In the response from the Romanian Government, it appears that the authorities are fully aware of the issue. By referring to the 'Action Plan for 2020-2025', which aims to implement the case of *Rezmiveș and others v. Romania*, they clearly show the existence of a strategy to resolve the overcrowding problem.[230] The measures, which are included in the Action Plan, involve the modernization of 946 accommodation places and the creation of 7,849 new accommodation places, including two new prisons. The financial costs for such investments cannot solely be covered by the Romanian state budget, they are therefore supported by other financial mechanisms and institutions.[231] The work is expected to be completed by the end of 2025 and is structured in year-by-year stages. In 2021, the goal was to create 210 new places and modernize 318 places. The lack of statistics makes it difficult to determine if Romania is taking measures to complete the plan, but the Romanian authorities, already in the first stage, stated that they had to postpone the deadlines due to circumstances related to the coronavirus. However, the objectives of the different stages differ markedly. In 2024, the goal is to create 5,419 new accommodation places.[232]

Further, the CPT report highlights several deficiencies linked to the material conditions, which, on a general level, were considered to be poor and dilapidated. Some examples that

[227] Council of Europe, European Committee for the Prevention of Torture, *Report to the Romanian Government on the ad hoc visit to Romania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 21 May 2021,* Strasbourg, 14 April 2022, CPT/Inf (2022) 06, p. 5.
[228] Ibid., p. 31.
[229] In comparison with case law of the ECtHR and CJEU, the CPT has applied a stricter standard in terms of personal space in a multi-occupancy prison cell. According to the CPT, 4 square meters of space per inmate should be considered the minimum standard.
[230] Council of Europe, *Response of the Romanian Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its ad hoc visit to Romania from 10 to 21 May 2021,* Strasbourg, 14 April 2022, CPT/Inf (2022) 07.
[231] Council of Europe, *Communication from Romania concerning the cases of BRAGADIREANU v. Romania (Application No. 22088/04) and Rezmives and Others v. Romania (Application No. 61467/12),* 23 November 2020, DH-DD(2020)1059, point. 65.
[232] Ibid., point. 66.

were noted; lack of equipment in the cell, mattresses and bedding infested with bedbugs and cockroaches, insufficient access to natural light sources, inadequate ventilation and poor sanitary facilities.[233] In light of these findings, the CPT recommended Romania to tackle the problem with inappropriate material conditions. In the prisons visited, the CPT observed that hot water was only available for 1.5 hours per day and the accessibility for this could take place during the time set aside for outdoor exercise, which forced the inmates to choose between having a shower or getting fresh air. CPT pointed out that the possibility of hot water is a prerequisite for personal hygiene and health. In light of the marks, the CPT recommended the Romanian authorities to ensure access to hot water for the inmates in terms of their personal hygiene and for the possibility of washing clothes and washing dishes.[234]

6.3. Overcrowding and inadequate detention conditions across the European Union

This sub-section aims to clarify that the problems of inadequate prison conditions are spread across the Union. All Member States have been examined based on available information published on the FRA database as well as the latest updated data on the number of prisoners in the Member States' facilities. It should be emphasized that the problems raised below are not exhaustively listed, rather it is intended to provide the reader with an overall picture of the challenges. Moreover, the EU's awareness of the problems will be discussed.

When the CJEU established the benchmark of fundamental rights protection in 2016, the referring Court expressed their concerns due to the Hungarian prison standards relying on the ECtHR's pilot judgment *Varga and Others v. Hungary*. Like Romania, Hungary had severe problems with its prison conditions and the situation was critical as 6,800 applications concerning detention conditions were pending before the ECtHR. Consequently, the situation became the subject of a pilot judgment in which the Court urged Hungary to remedy the problems of overcrowding in the State's prisons in order to ensure compliance with the European standard.[235] Interestingly, the measures were primarily aimed at reducing overcrowding, although the applicants' allegations had also included deficiencies related to

[233] Council of Europe, European Committee for the Prevention of Torture, *Report to the Romanian Government on the ad hoc visit to Romania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 21 May 2021,* Strasbourg, 14 April 2022, CPT/Inf (2022) 06, pp. 5 and 24.
[234] Ibid., p. 42.
[235] ECtHR, Press release issued by the Registrar of the Court, *Mass Applications concerning inadequate detention conditions in Hungary suspended*, 23 November 2016, ECHR 381 (2016); see also ECtHR, *Varga and Others v. Hungary*, Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015.

the material conditions which had been confirmed by CPT reports and considered in the Court's assessment. In light of the high numbers of inmates, the ECtHR recommended to Hungary that non-custodial punitive measures needed to be used more widely in order to achieve improvement.[236] Furthermore, the Hungarian government drew up an action plan that gave Hungarian prisoners a possibility to complain to their domestic court about prison conditions that violate their rights, something that had not existed before.[237]

During the CPT's last visit in 2018, it was noted that the Hungarian authorities had been working actively to achieve their objective of 'zero overcrowding' as the overpopulation rate had fallen.[238] In 2019, however, there were still problems with overcrowding, although it had been reduced to 110 percent of their total capacity compared to 113 percent in 2018.[239] According to recently published statistics, Hungary has managed to reduce the overcrowding rate to 99,7 %, based on their official capacity, which means that they have made huge improvements.[240] One of the underlying reasons for this can be the announcement of 2,750 new prison places.[241] However, deficiencies remain with regard to factors related to material conditions.

Romania and Hungary are far from the only Member States that are struggling to manage the prison population, which can lead to inmates not being given enough personal space. The table below lists the Member States that, according to available data, exceed their capacity.[242]

[236] ECtHR, Press release issued by the Registrar of the Court, *Hungary must take measures to improve the problem of widespread overcrowding in prisons*, 10 March 2015, ECHR 077 (2015).
[237] FRA, Criminal Detention in the EU Conditions and Monitoring, *Update on FRA's Criminal Detention Database (FRANET) Hungary 2021*, available at: https://fra.europa.eu/sites/default/files/fra_uploads/hungary-criminal-detention-2022-country-study_en.pdf [accessed 2 December 2022], p. 11.
[238] Council of Europe, European Committee for the Prevention of Torture, *Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 29 November 2018*, Strasbourg, 17 March 2020, CPT/Inf (2020) 8, p. 11.
[239] United States Department of State, *Country Reports on Human Rights Practices for 2020 HUNGARY*, available at: https://www.state.gov/wp-content/uploads/2021/03/HUNGARY-2020-HUMAN-RIGHTS-REPORT.pdf [accessed 5 December 2022].
[240] World Prison Brief (WPB), *World Prison Brief data: Hungary*, available at: https://www.prisonstudies.org/country/hungary [accessed 20 February 2023].
[241] United States Department of State, *Country Reports on Human Rights Practices for 2020 HUNGARY*, available at: https://www.state.gov/wp-content/uploads/2021/03/HUNGARY-2020-HUMAN-RIGHTS-REPORT.pdf [accessed 5 December 2022].
[242] It is important to bear in mind that the latter includes all persons who have been detained in various types of facilities, such as pre-trial detainees, juveniles, etc. Thus, it is not representative of inmates who are only serving a prison sentence after a final judgment.

Member State	Year[243]	Occupancy rate (percent)
Austria	2023	103,3
Belgium	2022	110,9
France	2023	119,0
Greece	2021	109,4
Italy	2022	109,5
Romania	2022	120,7
Slovenia	2023	106,2

Source: http://www.prisonstudies.org/

Several of the listed Member States struggle with combined difficulties in their prisons.[244] In this context, it should be added that a number of prisons in the Member States have poor material conditions despite overcrowding being under control. Bulgaria has been criticized for having extremely poor, even unacceptable, material conditions similar to those described in Romania.[245] Some facilities in Lithuania fall short of international standards in terms of hygiene, ventilation, quality of food and access to light. It has also been noted that the lack of adequate health contributes to the spread of life-threatening diseases and that there is internal violence among inmates as well as the use of violence by prison staff.[246] Such findings have also taken place in Cyprus, [247] Latvia[248] and Estonia[249].

[243] The year of the last updated data regarding the prison population in each EU Member State.
[244] See for example France: Council of Europe, European Committee for the Prevention of Torture, *France: anti-torture Committee deplores conditions of detention, prison overcrowding and lack of psychiatric beds*, available at: https://www.coe.int/en/web/cpt/-/france-anti-torture-committee-deplores-conditions-of-detention-prison-overcrowding-and-lack-of-psychiatric-beds [accessed 23 February 2023].
[245] Council of Europe, European Committee for the Prevention of Torture, *Report to the Bulgarian Government on the periodic visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 13 October 2021*, 18 October 2022, CPT/Inf (2022) 20.
[246] United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, *Concluding observations on the fourth periodic report of Lithuania**, 21 December 2021, CAT/C/LTU/CO/4.
[247] United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, *Concluding observations on the fifth periodic report of Cyprus**, 23 December 2019, CAT/C/CYP/CO/5.
[248] United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, *Concluding observations on the sixth periodic report of Latvia**, 24 December 2019, CAT/C/LVA/CO/6.
[249] United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, *Concluding observations on the fifth periodic report of Estonia**, 17 June 2013, CAT/C/EST/CO/5. It should be noted that the situation may have changed since 2013. However, according to a CPT report from 2017, there were still cramped conditions in some prisons, see Council of Europe, European Committee for the Prevention of Torture, *Report to the Estonian Government on the visit to Estonia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 September to 5 October 2017*, 19 November 2019, CPT/Inf (2019) 31.

These challenges have been discussed at the EU level since the 1990s, prior to the adoption of the EAW.[250] In 1999, the European Parliament expressed their concerns due to the 'extremely unfavorable conditions' in the EU prisons as many Member States did not respect the human rights enshrined in the international conventions.[251] Thereafter, the European Parliament has not been silent on this matter and has repeatedly urged the Commission to address the issue. Shortly after *Aranyosi and Căldăraru*, the European Parliament invited the Commission and the EU institutions to adopt measures, in their fields of competences, in order to create common standards of detention throughout the EU.[252] During the authoring of this thesis, the Commission has finally acted by adopting non-legislative measures aimed at overcoming the challenges presented above. Recommendations on material detention conditions have been brought forward to facilitate the EAW system and promote the protection of fundamental rights under EU law.[253] The Member States are now expected to either ensure or guarantee these recommendations in order to prevent ill-treatment in their prisons. As for personal space per detainee, the Commission reaffirms the established minimum standard of 3 square meters, which the Member States should guarantee. However, the Member States should offer a slightly higher-level surface area of 4 square meters. Further, the Commission underlines the importance of all other conditions being appropriate, in particular when the Member States have difficulties in complying with the standards due to overcrowding.[254]

Natural light and fresh air are exemplified as factors to be guaranteed. Regarding factors related to hygiene, the Member States should ensure that the prisoners have access to essentials, sanitary facilities regardless of the time of day, clean bedding and running water. Additionally, prisoners shall be offered food of a certain quality, which shall not be prepared or served in dirty areas.[255] These are just some of the recommendations that respond to the reported shortcomings in the States' facilities. Within 18 months from December 2022, the Member States should present how they have complied with the listed recommendations. As

[250] See European Parliament, *Resolution on poor conditions in prisons in the European Union,* 18 January 1996, OJ C 32.
[251] European Parliament, *Resolution on prison conditions in the European Union: improvements and alternative penalties,* 9 April 1999, OJ C 98/300. It should be noted that the EU had 15 Member States at that time.
[252] European Parliament, *Resolution of 5 October 2017 on prison systems and conditions 2015/2062(INI),* 5 October 2017, OJ C 346/103.
[253] European Commission, *Commission recommendation of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions,* Brussels, 8 December 2022, C(2022) 8987 final, points. 32-33.
[254] Ibid., points. 34-35.
[255] Ibid., points. 40-42.

soon as the Commission receives this information, the Commission will draw up a report for submission to the European Parliament and to the Council.[256]

6.4. Is the EAW subjected to the ECtHR's jurisdiction?

Recently, attention has been drawn to the ECtHR's judgment *Bivolaru and Moldovan v. France,* which concerned the execution of two EAWs from France to Romania where the ECtHR found that one of the applicants, Mr. Moldovan, had been subjected to ill-treatment in the State's prison.[257] This case is noteworthy as the Court established the bond between the EAW, at this point understood as an EU instrument built on mutual recognition and mutual trust, and the Convention. It was the first time that the ECtHR, within the EAW context, ruled that a Member State had not complied with its obligations as enshrined in Article 3 of the ECHR. In order to understand how the ECtHR could rule on a complaint related to the EAW, there is reason to clarify the Court's reasoning.

The ECtHR applied the *Bosphorus* presumption, also known as the presumption of equivalent protection.[258] This presumes that the Member States, as contracting States, act in compliance with the Convention when fulfilling their obligations under an international organization.[259] However, the presumption presupposes that the protection of fundamental rights, recognized by the organization, should be in a manner equivalent to the provisions laid down by the Convention. In other words, if equivalent protection exists, it is assumed that the Member State has complied with the ECHR. Such a presumption can only be rebutted if 'the protection of Convention rights was manifestly deficient' which is based on the circumstances on a case-by-case basis.[260] If it can be determined that such a situation exists, 'the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights'.[261]

However, the ECtHR considered that two criteria must be met for the presumption to be actualized. First, the domestic authorities cannot have any margin of maneuver when it comes to their international obligations. Secondly, the particular case must comply with the

[256] European Commission, *Commission recommendation of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions,* Brussels, 8 December 2022, C(2022) 8987 final, para. 87.
[257] ECtHR, *Bivolaru and Moldovan v. France,* Application nos. 40324/16 and 12623/17, 25 March 2021.
[258] Established by the ECtHR in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland,* Application no. 45036/98, 30 June 2005.
[259] Ibid., para. 155.
[260] Ibid., para. 156.
[261] Ibid.

deployment of the full potential of the supervisory mechanism provided for by EU law.[262] As for the first criteria, the ECtHR referred to the CJEU's ruling in *Aranyosi and Căldăraru* which required the French judicial authorities to make an assessment in order to ensure the compliance with Article 4 of the Charter. According to the ECtHR, the CJEU case law provides equivalent protection in this manner as the provision has the same meaning and scope as Article 3 of the ECHR. Additionally, the Court pointed out that the risk assessment must be done within the framework strictly delineated by the case law of the CJEU. Thus, the discretionary power of the executing judicial authority is limited. In light of the circumstances, it stated that the executing judicial authority had no margin of maneuver. Consequently, the ECtHR found that the presumption was applicable.[263]

However, this presumption was rebutted as the protection of fundamental rights had been manifestly deficient. The ECtHR found that the French court, as the executing Member State, had not carried out the individual risk assessment, in the context of the CJEU case law, correctly based on the information provided by the Romanian authorities. The information showed several deficiencies primarily related to overcrowding, in particular, given that the French authorities had received information that Mr. Moldovan would be detained in a cell with a personal space that went below the established minimum standard.[264] In light of the circumstances that had been brought forward by the issuing Member State, the ECtHR considered that the right conclusion would have been to refuse the execution of Mr. Moldovan, because the inadequate conditions of detention in Romania implied a real and individual risk that he would be subjected to ill-treatment.[265]

[262] See also ECtHR, *Michaud v. France,* Application no. 12323/11, 6 December 2012, paras. 113-115.
[263] ECtHR, Legal summary, *Bivolaru and Moldovan v. France,* Application nos. 40324/16 and 12623/17, 25 March 2021, (second applicant) (a).
[264] Between 2 and 3 square meters of personal space.
[265] ECtHR, Legal summary, *Bivolaru and Moldovan v. France,* Application nos. 40324/16 and 12623/17, 25 March 2021, (second applicant) (b).

7. EU cooperation at the expense of safeguarding individual rights?

7.1. The conflict of interests within the EAW system

'The system of the European arrest warrant can function only when there is perfect trust between the Member States'.[266] These were the words of the Commission before the entry into force of the EAW FD. Although this statement was not explicitly stated in the framework decision itself, it appears from the preamble that the EAW instrument is built on a 'high level of confidence' between the Member States. Regardless of notion, it clearly expresses the value of the trust presumption within the EAW context. Unexpectedly, the CJEU's findings on the internal market became transferred to the criminal law sphere.[267] The huge difference with implementing the principles of mutual recognition and mutual trust into the EAW mechanism was that it affected individuals deprived of their liberty, not the marketability of goods. Whether the principles would be successful in safeguarding fundamental rights did not seem to be the priority during the time of the birth of a trust-based system in EU criminal law, which may have its explanation in the urgent need to adopt counter-terrorism measures in the wake of 9/11. By focusing on the need to create a safer and more secure environment for the EU citizens within the AFSJ, the protection of the requested person's rights was consequently not observed.[268]

However, the underlying principles of EU cooperation are interrelated, and the principle of mutual trust plays a pivotal role in the operation of legal instruments built on mutual recognition. The stance towards mutual trust is built on a belief that the Member States provide equivalent protection of individual rights. However, taking this for granted has proven to be naive as the relationship between mutual trust and fundamental rights turned out to be complicated and strained within the EAW context. The difficulty became particularly noticeable when the Charter became legally binding, which meant that the Member States were not allowed to deviate from the rights enshrined in the Charter and the ECHR when applying the EAW FD.[269] Abruptly, the legal instrument, which entered into force pre-Lisbon, was faced with a major challenge as there was no article stipulating that the risk of violating fundamental rights could constitute a ground for refusal. In fact, fundamental rights were given a rather vague position in the preamble where Recital (13) of the EAW FD stipulates

[266] See Chapter 3.2.
[267] See Chapter 3.1.
[268] See Chapter 2.1.
[269] See Chapter 4.3.

that no person should be extradited to a State where there is a serious risk for being subjected to inhuman or degrading treatment. The consequence of this position in the framework decision was that the Member States could decide whether they wanted to recognize fundamental rights when implementing the EAW FD into their national legislation, resulting in varying interpretations and applications on a domestic level. Notably, the Commission found it disturbing that some of the Member States had decided to introduce fundamental rights as an explicit ground of refusal due to the exceptional nature of the listed non-execution grounds.[270] One could therefore argue that the exclusion of the protection of fundamental rights and human rights in the EAW FD constituted a gap that needed to be bridged. Hence, it could be said that from the beginning, the legal instrument did not consider fundamental rights; rather, it prioritized the principle of mutual trust by assuming that the rights were already respected in terms of the Member States' obligation to comply with international conventions. However, the severe difficulties in the Member States' prisons had already been noticed by the European Parliament prior to the adoption of the EAW, which indicates that the EU was fully aware that this would become a future problem.[271]

At the EU level, it has repeatedly been stressed that the trust presumption can only be limited in exceptional circumstances which support the valuation of the principle. This is confirmed by the fact that the CJEU has pointed out that the explicit non-execution grounds must be interpreted strictly as it constitutes a clear deviation from the cornerstones of EU cooperation.[272] Although the Charter became legally binding in 2009, it was not until several years later that the CJEU acknowledged that the risk of fundamental rights could constitute a limitation in that sense. Given the widespread problem of inadequate prison conditions and the increased awareness in light of the ECtHR's findings, the CJEU was required to take a position on the protection of fundamental rights in the surrender procedure. It cannot be denied that the outcome of *Aranyosi and Căldăraru* has been highly significant within the EAW context.[273] By shaping the two-tier test, the CJEU limited the principle of mutual trust in favor of fundamental rights. Drawing attention to the problematic aspects, at the EU level, of safeguarding individual's rights within the EAW system could be equated with an answer, or reaction, to the deficiencies that exist in the Member States' prisons. Although the Court

[270] European Commission, *Report from the Commission 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*, 23 February 2005, COM(2005) 0063 final.
[271] See Chapter 6.3.
[272] See Chapter 2.3.1.
[273] See Chapter 5.2.1.

recognized that risks of violations of fundamental rights could constitute a ground for non-execution, reasoning concerning the fundamental principles of EU cooperation remained at the core. If not explicitly, it appeared indirectly. Hence, the conflict of interests became obvious as the Court had to take on the challenge of pleasing several interests simultaneously.

The first step of the two-tier test can be considered an indirect expression of the trust presumption. In other words, at this stage, there is no need to request supplementary information from the issuing Member State, as it is the executing judicial authority that is responsible for carrying out the risk assessment in order to establish that systemic or generalized deficiencies exist. As for the second step of the two-tier test, it becomes clear that a derogation is being made from the Court's 'Opinion 2/13' where another check of the Member State's compliance with fundamental rights, save in exceptional cases, could not be considered to be in line with mutual trust between the Member States.[274] In *Aranyosi and Căldăraru*, the Court accepted that inadequate prison conditions might fall within the scope of 'exceptional cases' and favored fundamental rights over mutual trust by allowing the Member States to carry out another check. The *obligation* of mutual trust, as the Court stated in the opinion, which could be equated with an expression of blind faith, was a thing of the past. At least, that is the impression one could get at first glance.

Even if the executing judicial authority challenges the State seeking the sought person, which is seen as a derogation from mutual trust, it has to rely on the guarantees provided by the issuing judicial authority. The CJEU's stance regarding mutual trust in the second step of the two-tier test became visible in *Dorobantu* when ruling that it is an obligation to trust the guarantees provided by the issuing judicial authority.[275] This could therefore be interpreted as meaning that the risk of being subjected to ill-treatment is excluded due to the guarantees, even though the executing State has already established the existence of systemic and general deficiencies. Given that it is apparent that a number of Member States cannot guarantee the minimum standards in their prisons, is it likely to assume that the supplementary information provided is reliable? In some cases, the executing Member States remain doubtful about the trustworthiness of this information, probably because of the reported deficiencies on a general level.[276] However, the CJEU has taken a stance by establishing that it is not in line with the principle of mutual trust to question the guarantees further. The executing judicial authority may, therefore, only accept the information that has been provided and surrender the

[274] See Chapter 4.4.1.
[275] See Chapter 5.2.3.
[276] See Chapter 5.3.1.

requested person, although it is still questionable if the person will be treated with respect for its rights. Certainly, there is a possibility to refute the assurance left by the issuing judicial authority. However, this seems to be a challenge in practice given the requirement of *precise information*. The high threshold makes it extremely difficult for the defender to provide evidence relating to the precise conditions of the requested person's detention. Consequently, the person is positioned in a vulnerable situation after the assurance has been given, where it is difficult to prove that there is a real risk that its rights under the Charter will be violated in the event of surrender. Hence, the trust presumption trumps.

The aforementioned puts the protection of fundamental rights at risk, and one can, from the sought person's perspective, question the two-tier test's actual relevance and function since the individualized assessment must be based on supplementary information and guarantees provided by the issuing judicial authority. It is quite difficult to imagine that the issuing judicial authority specifies a facility with conditions indicating that there is a risk that the individual will be subjected to ill-treatment. Concerns are raised primarily regarding Member States where severe deficiencies have been reported, as they are free to say what they want in this situation without having to answer additional questions. It is conceivable that a Member State like Romania wants to avoid further tensions arising regarding its compatibility with fundamental rights in order for them to safeguard the cooperation and rebuild trust in them. By choosing a prison that lives up to the established minimum standard, a Member State is able to show that it values the principles that underlie EU cooperation in criminal matters. One must not forget that it serves the interest of the issuing judicial authority to have the EAW executed. This is extremely worrying from the perspective of the sought person, given the severe inadequacies in some prisons.

Assuming that the issuing Member State has provided correct information showing that the individual concerned will not be subjected to inhuman or degrading treatment upon surrender, can one be sure that the minimum standards are met during the entire time that the individual is deprived of liberty? The simple answer is no, such an assurance is not covered by the risk assessment as the CJEU ruled in *ML*.[277] Whether the prison conditions can be considered to be compatible with fundamental rights in the event of a transfer to another facility is a matter that falls within the jurisdiction of the issuing Member State concerned, not EU law. Hence, it is not possible to refuse a surrender relying on Article 4 of the Charter when it concerns eventual risks in the event of relocation as the Member States no longer apply the EU

[277] See Chapter 5.2.2.

regulation. Interestingly, mutual trust was not the only reason for the CJEU's findings. The focus was mainly on the underlying objectives of the legal instrument, where the efficiency could be threatened by an extended assessment. However, there is reason to look at the problematic aspects of the Court's ruling which not only covers the relocation of inmates but also when the issuing Member State cannot initially specify the facility to which the sought individual will be placed. This illustrates a concrete example of the uncertainty of the information provided and the consequence of a situation where the issuing judicial authority does not act in a sincere manner. In such a situation, there is no hindrance for the issuing Member State to transfer the detainee to another prison shortly after being placed in the prison that falls within the guarantee. There are concrete examples of prisoners being transferred repeatedly, such a situation is therefore not unrealistic.[278] Consequently, this can give rise to a high level of insecurity for the individual in terms of the risk of being subjected to inhuman or degrading treatment post-surrender.

On the other hand, it is understandable that the Court ruled that the issuing Member State cannot give a guarantee relating to future circumstances. This is incredibly difficult in practice, if not impossible. In some Member States, overcrowding has both decreased and increased over relatively short periods, indicating that it is uncertain whether the Member State concerned will have the prison population under control in the nearest future.[279] If the CJEU ruled that the executing Member State should investigate all the prisons where the requested person could be detained, it would be impossible to execute EAWs to Member States where deficiencies exist. In other words, one deviation would have been sufficient to conclude that there is a real risk that the requested person will be subjected to inhuman or degrading treatment upon surrender. Such a requirement would have resulted in the exclusion of certain Member States from the EAW which would have undermined the purpose of judicial cooperation in criminal matters. Consequently, all EAW cases issued by those states would be subject to postponement, which would affect the procedure's efficiency. One could, of course, argue that the focus on a simplified and efficient system is at the expense of the uncertain future of the individual. However, if the EU's priority had been fundamental rights, it would have to abandon the principle entirely by requiring the Member States to ensure the minimum standards before they can issue EAWs. In this way, the individual's rights can be ensured, and mutual trust preserved. Otherwise, it risks becoming a vicious spiral, where the

[278] See Chapter 6.2.1.
[279] See Chapter 6.3.

issuing judicial authorities continue to request EAWs while the executing judicial authorities feel obliged to carry out a risk assessment.

However, the CJEU's rulings have opened the door for the Member States to question each other's compatibility with fundamental rights. When this occurs to a greater extent, it clearly challenges the principle of mutual trust. Subsequently, it affects the efficiency of the surrender procedure as the Member States may postpone their decision on execution. This is far from the underlying purpose of the EAW system. At the same time, the individual is unavoidably caught in the crossfire and becomes the subject of information exchange between the Member States, where the issuing judicial authority has the final word. Hence, it is doubtful whether the CJEU has provided a sufficient safeguard by developing the two-tier test. One has to remember that the respect for human dignity and human rights form part of the EU's founding values to which the Member States are supposed to adhere. When it comes to prison conditions, these values have clearly been affected.

7.2. Any difference in practice regarding the protection of the individual's fundamental rights?

One of the identified weaknesses within the EAW system is the inadequacy of statistics on the practical operation of the instrument, as no complete and detailed overview is available. Consequently, we cannot know with certainty how the Member States, neither the issuing nor the executing judicial authority, deal with the EAW at the national level. Whether this is a way to protect EU cooperation, given the severe deficiencies in the Member States' prisons, is left unsaid. However, as long as providing the information is voluntary, essential data will be hidden from the system. One could question if there really is any Member State that wants to show its weaknesses explicitly on paper when its task is to cooperate; probably not. This may be the harsh truth behind why some choose not to participate at all, alternatively refraining from answering certain questions. Further, it is questionable whether the information provided can be relied upon, as there is no mechanism to verify the figures. Interestingly, the Commission has stated that the statistics are not intended to 'shaming or naming' any particular Member State.[280] The probable explanation for this statement is that singling out one Member State could be interpreted as distrust, which would undermine the trust presumption and the EU cooperation as a whole. However, it is no longer possible to defend the Member States if there is to be any difference in practice. Mutual trust is already

[280] See Chapter 5.3.1.

damaged, and the focus should instead be on supporting the Member States to earn the confidence that has been lost by ensuring that fundamental rights are fully respected.

As aforementioned, the absence of a monitoring mechanism within the EAW system makes it impossible to determine whether the issuing Member States are living up to the guarantee they have given in a specific case. Hence, it is difficult to ascertain whether the individual's rights are respected during the EAW surrender procedure and the time after the decision has been executed. However, certain patterns can be discerned regarding the tendency of Member States to question other states' compliance with fundamental rights. Thus, some pieces can be put together in order to understand how the rapid developments in this area and the differences between the Member States have affected the protection of individual rights in practice.

It appears that some Member States are more likely to deviate from the trust presumption by requesting additional information from the issuing judicial authority. The Commission has exemplified Germany, Austria, Netherlands and Ireland as such States.[281] It should be noted that these States have no reported deficiencies, except Austria, which has overcrowded prisons. Further, available data shows that Germany is the Member State that has reported the most refusals on the basis of fundamental rights. Does this mean that the individual's rights can only be taken seriously by those Member States that have the courage to question the principles of EU cooperation? It seems that there are such tendencies. At least in view of the fact that some States are critical of Member States that do not adhere to the underlying principles, as this would sabotage the effectiveness of the system. If this approach towards the surrender procedure exists in more Member States than France and Spain, the development in CJEU case law has not managed to have a full impact in practice in strengthening the protection of individual rights. It should not be forgotten that there is information stating that Romania is not critical of others' prison conditions when receiving an EAW request because of their own situation. Considering that many Member States have been identified as States at risk because of their systemic deficiencies, it is worrying if these are less likely to request supplementary information in this matter. This may result in individuals being surrendered without a sufficient assessment by the two-tier test not being carried out completely, although it might be necessary. It can thus be said that the conflict of interest does not only exist at an EU level, but it has also manifested itself in practice between the Member States. Roughly

[281] See Chapter 5.3.1.

speaking, the Member States have been divided into two different blocs, where one chooses to prioritize fundamental rights by postponing the surrender until satisfied. If this trend continues, the question is how long cooperation based on mutual trust can survive, as only some can genuinely rely on each other.

However, subsequent case law of the CJEU reveals that the *Aranyosi and Căldăraru* judgment left several gaps, which caused uncertainty among some Member States. This raises concerns due to the absence of clear guidelines; the executing judicial authority may make an incorrect assessment leading to the individual concerned being subjected to ill-treatment upon surrender to the issuing Member State. Despite attempts at further clarifications in *ML* and *Dorobantu*, the two-tier test still tends to be insufficient in practice. In other words, the CJEU has not established clear instructions in these matters, leaving it open for judicial discretion on a domestic level. Within the criminal law sphere, it is of crucial importance that such guidelines are established at the EU level in order to ensure that individuals are adequately protected against inhuman and degrading treatment due to inadequate prison conditions, in particular, given that the Member States are responsible for the application of the framework decision.

Given that the CJEU's judgments have established rather vague guidelines, it is relevant to bring them to light. It is remarkable that the CJEU in *Aranyosi and Căldăraru* only implies that the updated information, on which the assessment should be based, needs to be objective, reliable, specific and properly updated without any further guidance. Which sources fall within this definition? This has not been entirely clarified. The sources referred to in the Court's assessment do, however, not appear to be exhaustive. Given the wide range of information on this area, the consequence is that the Member States rely on different evidence in their risk assessments.[282] Thus, the vague wording in the CJEU's ruling leaves it open for a margin of discretion and flexibility in choosing sources for the judicial authorities at the national level. Hence, it endangers the uniform application of the EAW FD across the EU. Such differences may have a decisive impact on the rights of the individual.

Further, it is more than just the overcrowding that causes concern. Other factors linked to material conditions are incredibly worrying and expose prisoners to conditions that no human being should endure, which threatens the EU's founding values. By incorporating the ECtHR's criteria for minimum standards, it became clear that material conditions should be

[282] See Chapter 5.3.1.

taken into account by the executing judicial authority. However, it is unclear how much weight should be attached to the material factors. This is probably difficult for the judicial authorities to determine on the basis of *Muršić v. Croatia*.[283] Undoubtedly, it is an easier task for the ECtHR to make such an assessment as they have much more experience in examining applications of this nature. Based on the ruling, personal space should be a factor that weighs heavily in the assessment, which is relatively easy to determine if the executing judicial authority has access to information indicating that the person will have a surface area of less than 3 square meters. However, the fact that this constitutes a strong presumption of a violation, but not material conditions, confirms that the latter takes a vaguer position. If a Member State does not live up to the Commission's recently adopted recommendations on prison conditions, this also should constitute such a strong presumption as it can be argued that this is at least as serious as overcrowding in terms of the individual's rights protection.[284] Remarkably, neither the minimum standards nor the criteria are explicitly stated in the handbook as it has not been revised since 2017. Nevertheless, the reference to the ECtHR's calculation has proven to be insufficient within the EAW context, confirmed by the *Bivolaru and Moldovan* judgment.[285] Additionally, the CJEU has only determined the calculation for a multi-occupancy cell; questions regarding single-occupancy cells will possibly be a future concern that the CJEU will have to deal with.

What we can know for sure is that continuous human rights violations occur in some Member States due to severe deficiencies in their prisons.[286] Overcrowding in the EU Member States' prisons has been a worrying trend for a long time and the statistics reveal that many Member States have an occupancy-rate that exceeds their capacity. It has also been a problem in Member States where prisons are of a high standard when it comes to material conditions. Overcrowding combined with substandard access to basic necessities is incredibly worrying in terms of the protection of fundamental rights. Member States with combined problems often have something in common: poverty and high corruption.[287] As far as corruption is concerned, it is not certain that the money intended for modernizing prisons will end up in the right hands. Further, it has proved insufficient to urge and recommend the Member States to improve their prison conditions, probably because they lack financial capacity. Bearing these

[283] See Chapters 5.2.3. and 6.1.1.
[284] See Chapter 6.3.
[285] See Chapter 6.4.
[286] See Chapter 6.
[287] Transparency International, *CPI 2022 for Western Europe & EU: Undue influence and fragmented anti-corruption measures hurt progress*, available at: https://www.transparency.org/en/news/cpi-2022-western-europe-eu-corruption-undue-influence-hurt-progress [accessed 24 February 2023].

factors in mind, it may not surprise that the prison standards of such Member States are far from the rest of Europe. It can therefore be argued that the economic situation is the decisive factor in guaranteeing a sufficient prison standard. One example that can be mentioned in this context is Romania, where the ECtHR, on several occasions, has convicted the State for violating the prohibition of inhuman or degrading treatment due to poor detention conditions. Consequently, Romania has been urged to introduce measures to improve its prison conditions without any significant results. By all accounts, the will and intention are there, but within this context, it is not enough for the purpose of protecting fundamental rights. Indeed, some Member States have shown significant improvements, but it remains to be seen whether Romania will accomplish its plans this time given the ambitious improvements to be made. However, one has to remember that this is a State where the prison conditions have failed to meet the established minimum standards since their accession to the EU; it is therefore highly questionable if there will be any change. Concerns are also raised regarding Bulgaria, Cyprus, Lithuania, Latvia and Estonia which do not live up to acceptable material conditions.[288] It could be argued that prison life should not be soft, but having access to running water, quality food and natural light is essential to life. In my view, it is alarming that such conditions exist inside European prisons. The established minimum standards must therefore be ensured in order for the system to safeguard the rights of the individual adequately in practice.

Clarifying the two-tier test is one thing; improving the conditions in the Member States' prisons is quite another. The Commission's recommendations on prison conditions are more than welcome from the point of view of the individual's right to live under humane conditions.[289] Given the current situation as presented above, however, it is an ambitious threshold to reach for some Member States. It appears mostly as wishful thinking or a naive expectation; any difference in practice is difficult to imagine. The lack of proposals for potential measures in order to help the Member States to achieve the target makes this one recommendation out of many. When there is no legally binding nature of these recommendations, it runs the risk of having a meaningless value. In this context, it should be highlighted that the CPT has addressed recommendations directly to the Member States time and again regarding the same problem with varied results. Not even the ECtHR's convictions have resulted in the Member States ensuring the requirements set out in *Muršić v. Croatia*, despite it being a serious breach of an absolute prohibition. In fact, the Commission is only responding to the issues that various reports and the ECtHR have previously found.

[288] See Chapter 6.3.
[289] Ibid.

Furthermore, the timeframe for the drafting of the report becomes problematic. During approximately two years, the violations will continue to be ongoing. The ECtHR has previously given the Member States a long time to improve their prison conditions, as confirmed by the pilot-judgment procedures in *Varga and Others v. Hungary* and *Rezmiveș and Others v. Romania.*[290] As mentioned above, this has not proven to be especially effective, and many of the difficulties remain.

It is, however, remarkable that these recommendations were adopted at the end of 2022, given that the CJEU's stance on prison conditions was revealed in 2016.[291] Additionally, the EU has been aware of the poor prison conditions long before that and the European Parliament has urged the Commission to address this problem repeatedly.[292] Interestingly, the Commission's move to finally act in this matter by adopting recommendations occurred not long after the ECtHR condemned France for carrying out the risk assessment incorrectly in *Bivolaru and Moldovan*.[293] This is probably not a coincidence as the EU wants to show that the special characteristics and autonomy of EU law are able to safeguard fundamental rights. More is definitely required in this respect, which is a future challenge for the EU.

However, detainees who take advantage of the right to free movement by crossing the borders are treated differently compared to detainees on a domestic level. Within the EAW system, the executing Member State may invoke poor prison conditions as a ground for refusal. Alternatively, guarantees are intended to ensure that the requested person will be placed in a facility that does not violate the Charter or the ECHR. Such a two-tier test is not carried out at the national level, resulting in different treatment or even discrimination depending on where the individual is located. In other words, an individual at the national level may expect to face inhuman or degrading treatment in its prison, while a cross-border dimension brings at hand an additional examination of the conditions aiming to protect against the risk of ill-treatment. Such a comparison makes it noticeable that the EAW system has strengthened the protection, provided that the test is carried out successfully. This can, however, also be seen as a rather controversial and undesirable consequence of the two-tier test. It is, therefore, of primary importance that the Member States reach the minimum standards to ensure equal treatment between the detainees.

[290] See Chapters 6.2. and 6.3.
[291] See Chapter 5.2.1.
[292] See Chapter 6.3.
[293] See Chapter 6.4.

7.3. The interaction between the ECHR and EU law – strengthened protection?

In light of 'Opinion 2/13', it seems like there is no desire for the EU, as a supranational organization with its own autonomy and structure, to enter an international organization that has its own Court located outside of the Union to observe its compliance with human rights. Although the EU has not acceded to the ECHR, it becomes apparent that the interaction and dialogue between these systems have evolved in recent years. In fact, the ECtHR has been functioning as an architecture when it comes to fundamental rights in the EU and the ECHR has served as a benchmark for decades as general principles. The CJEU has made it clear that Article 4 of the Charter corresponds to Article 3 of the ECHR, which stipulates an absolute prohibition where no derogation is allowed. This clearly shows the interaction between EU law and the ECHR and confirms that these provisions have the same meaning and scope. Hence, it is important that the EAW system reach the ECHR's threshold, especially since this is considered to be the minimum level of protection. In other words, the principle of mutual trust should not constitute an obstacle.

Given that the Charter became legally binding in 2009, reliance on the ECtHR's findings has become important for developing fundamental rights protection in EU law. This became visible in *Dorobantu,* where case law of the ECtHR filled a gap that had been left empty. As EU law did not contain guidance on calculating the personal space for each detainee in a multi-occupancy cell, the CJEU decided to apply the ECtHR's interpretation of Article 3 of the ECHR in *Muršić v. Croatia*.[294] Remarkably, it did not only become a source of inspiration in establishing EU minimum standards concerning conditions of detention, rather it became directly applicable. Given the CJEU's reasoning in 'Opinion 2/13', it could be argued that this method becomes contradictory as it allows the Member States to observe each other's compliance with fundamental rights based on these criteria.

However, it should be underlined that it is quite difficult to compare the CJEU's and the ECtHR's assessments concerning inhuman and degrading treatment due to prison conditions. Initially, it is of relevance to clarify that the CJEU gives rulings on the interpretation of the EAW FD in order to ensure that the Member States apply it similarly. Thus, it is the Member States who are responsible for the application of the EAW FD where they are required to make a risk assessment in order to determine whether there is a real risk that the person, *upon*

[294] See Chapters 5.2.3. and 6.1.1.

surrender, will be subjected to inhuman or degrading treatment. This is not the case with the ECtHR as it receives applications submitted by individuals against States, where the Court has the task of examining alleged violations. In other words, it requires that the individual concerned should *already* have been affected by the alleged violation of the ECHR. Notably, it becomes natural that the ECtHR carries out the individualized assessment directly distinguished from EU law, where such an assessment is required in the second step of the two-tier test. However, both systems operate in a similar way as the individual-based assessment determines whether it can be considered a violation of the prohibition. Thus, it is not sufficient that the violation is of a general nature. Given the many complaints received by the ECtHR regarding poor prison conditions, it comes as no surprise that they have developed their views on this type of violation.[295] One must also remember that the ECtHR is only intended to protect human rights and is not required to respect the trust presumption in their reasoning. A problem may arise here. If the executing judicial authority decides to execute the EAW based on a deficient assessment of the conditions as a result of vague guidelines, the individual concerned may instead have to turn to the ECtHR at a later stage with its complaint. Such a consequence should not occur within the EAW system.

Even if it could be argued that the minimum standards have strengthened the protection of the requested person's rights during the surrender procedure, *Bivolaru and Moldovan v. France* reveal the truth, risk assessments are not always carried out correctly. Does the ruling mean that the EAW is subject to the ECtHR's jurisdiction? As long as it is justified, the answer will probably be yes. Through the developed *Bosphorus* doctrine, the ECtHR can observe the Member States', as well as the convention parties', compliance with fundamental rights within the framework of an EU law instrument insofar as equivalent protection exists in both systems. The ECtHR signaled that the standards established in *Muršić v. Croatia* must be adhered to within the EAW context, which is agreed upon by the CJEU.

It is interesting that the ECtHR did not criticize the two-tier system itself. Rather, the ECtHR stressed the importance for the Member States to adhere strictly to the case law of the CJEU. This is probably explained by the fact that the CJEU has stated that the equivalent protection applies within the EAW system why the rights are expected to be complied with. The judgment indicated that an EU instrument based on mutual trust could not be used in any way, given that the Member States do not have the right to escape their obligation under ECHR when applying the EU legislation. In other words, there is no room for underestimating

[295] See Chapter 6.

potential risks if the executing judicial authority has access to information indicating the existence of systemic deficiencies in the issuing Member State. Hence, an incorrect application of the two-tier test means that the Member State has acted in violation of its obligations under both EU law and the ECHR. It could therefore be argued that the ruling demonstrates strengthened protection of fundamental rights within the EAW system by highlighting that it is not permissible for the executing judicial authority to violate an absolute prohibition. According to the Commission, France is one of the Member States that values the principles of EU cooperation.[296] One can only speculate whether this was the reason that they did not deviate from the trust presumption.

The ambitious step by the European Court to apply the *Bosphorus* doctrine in a sensitive area as EU criminal law is a step in the right direction in terms of the protection of the fundamental rights of the individual within the EAW system. It underlines the importance of cooperating in a sincere manner and drawing the right conclusions from the evidence that has been provided by the issuing judicial authority. Although the ECtHR did not see any problematic aspects with the two-tier test, it indirectly confirmed that the EU guidelines leave far too much discretion for the national authorities of the Member States to carry out the assessment. However, the *Bivolaru and Moldovan* judgment has made it clear, the EAW post-surrender phase can be subjected to scrutiny by the ECtHR. Whether EU accession to the ECHR would make a difference in practice is difficult to predict. At least concerning prison conditions, as the Member States already have failed to respect the rights under the Convention. Nevertheless, it would probably put demands on the EU to clarify the two-tier test.

[296] See Chapter 5.3.1.

8. Challenges for the future - An area that requires solutions?

The CJEU can expect to face further situations where it has to complement previous rulings on prison conditions. In other words, this is just the beginning of a long journey. The guidelines established by the CJEU, which the Member States are expected to apply, represent the vagueness of the EAW system which risks giving rise to uncertain outcomes, as confirmed by the requests for preliminary rulings. Although EU law is supposed to safeguard the individual's fundamental rights, the CJEU takes a passive role in its assessments which may be explained by the fact that the Court has to satisfy several interests of EU cooperation. At the same time, the EU is aware of the severe deficiencies in the Member States' detention facilities. Thus, it is not possible to turn a blind eye to the challenges that the EAW system faces; future solutions are required. Under the headings below, both non-legislative and legislative measures will be discussed.

8.1. Non-legislative measures

8.1.1. Guidelines and monitoring mechanisms

As highlighted in the previous chapter, a priority at the EU level should be to establish more explicit guidelines to support the Member State's judicial authorities in applying the EAW FD. First of all, there is a need to revise 'the handbook on how to issue and execute a European Arrest Warrant'. The handbook is intended to provide guidance to the Member States on how to carry out the risk assessment but has, in my opinion, lost its function. The current version has not been updated since 2017, which becomes problematic given the significant developments that have taken place within this field in recent years.[297] Hence, it has an almost meaningless value when supporting the judicial authorities in their risk assessments. The Commission must address this issue and ensure that it is continuously updated in order to provide assistance to the Member States.

Further, there is a lack of guidance regarding which sources that qualify for the risk assessment. Certainly, FRA has established a database of aggregated material including information from different bodies which may assist the judicial authority of the issuing Member State in their assessment. The problem that remains is that it is not clear whether the material meets the requirements established by the CJEU, which can be considered a failure in terms of the protection of the individual's rights. However, it has become clear that

[297] See Chapter 2.3.1.

importance is attached to CPT reports. The main issue with these reports is that they only provide an overview of the Member State's prison conditions as it visits selected prisons. The CPT is, of course, not meaningless as it helps the Member States to improve their prison conditions and may establish that systemic and generalized deficiencies exist. However, if the executing Member State can find information relating to the prison where the individual is to be placed, it will be more difficult for the issuing Member State to argue the contrary.[298]

In my opinion, inspection and monitoring bodies on a national level should, first and foremost, be considered relevant for the assessment as these are established for the purpose of preventing ill-treatment in the Member States' prisons.[299] By creating independent bodies in the State parties (NPMs), this mechanism brings easy accessibility to make continuous inspections on a national level which is in line with the up-to-date criteria. Furthermore, it entails a regular dialogue between different authorities within the territory of the Member State in order to be able to solve any inadequacies that have been discovered during the visits. In other words, these bodies are most appropriate to provide evidence in the individualized assessment concerning the precise condition of detention according to the information provided by the issuing Member State.[300]

Since the CJEU ruled that conditions of detention can constitute a ground for refusal, the importance of these bodies has increased within the EAW context. Certainly, there is always a critical aspect regarding bodies operating on a domestic level, as it is difficult to ensure whether the information provided reflects reality. Consequently, problems arise. The EU cannot decide on common standards for how these bodies are operating, nor which results they are reporting. Another problem arises as not all Member States have ratified the OPCAT protocol, meaning they do not need to establish NPMs. Hence, these Member States are unable to provide such information. Thus, it becomes apparent that the information, on which the assessment should be based, may vary across the Union. The European Parliament has, however, underlined the importance of this mechanism by exhorting the Member States to ratify the protocol and adopt NPMs.[301]

[298] See Chapter 5.2.3.
[299] See Chapter 4.5.2.
[300] See Chapter 5.2.3.
[301] See European Parliament, *Motion for a European Parliament Resolution on prison systems and conditions,* (2015/2062(INI)), point 1; see also European Parliament, *Detention conditions in the EU European Parliament resolution of 15 December 2011 on detention conditions in the EU,* (2011/2897(RSP)).

As the reader may have understood, the existing bodies have not been established as a result of the EAW system. A possible solution would be for the EU to establish its own monitoring body which can provide oversight on the Member States' prison conditions. This is of crucial importance within the EAW context, aimed to safeguard fundamental rights. By introducing a new monitoring body, access to information would be based on the EU standard. This would be more reliable and efficient, as the Member States would use the same type of information in their risk assessments. In relation to this mechanism, a database could be established by the EU which provides information suitable for the EAW system.

Another aspect is that the EU has not introduced any control mechanism within the EAW system, which excludes follow-up after the individual has been surrendered to the issuing Member State. A monitoring body can, therefore, also observe whether the issuing Member State is living up to what has been assured. If it turns out that a Member State is not living up to its previous assurances, there would be scope for clear recommendations or guidelines addressed directly to the Member State concerned. The question that arises is whether the Member States would see such a monitoring mechanism as a far-reaching measure, something that remains to be seen if this were to be considered. Hence, this is definitely a challenge for the future and something that the EU should pursue in this context.

8.1.2. Support the Member States economically

Given the differences between the Member States, it is not certain that the financial costs for an improvement of the prison conditions can be covered by the state budget, nor that it is an economic priority for the Government in the Member State in question.[302] Additionally, one could argue that it would be wrong to place the financial burden solely on the Member States. The European Parliament has noticed this problem and called on the EU institutions to support the Member States economically with the aim of improving prison conditions.[303]

However, setting up a fund with the aim of refurbishing existing prisons, and if possible, creating new prison places in those Member States where this is necessary, would contribute to enhancing EU cooperation and a surrender procedure where prison standards are not an issue. In this context, it must be emphasized that new facilities are not always the key to zero overcrowding. However, the positive aspect is that new prison places and renovation of existing ones will ensure that the inadequacies related to the material conditions will be

[302] See Chapter 7.2.
[303] European Parliament, *Resolution of 5 October 2017 on prison systems and conditions 2015/2062(INI),* 5 October 2017, OJ C 346/103.

amended. The question that remains is if this can be achieved in practice, as the total cost of improving prison conditions is expensive. It is highly doubtful whether the Member States would be willing to finance the prison conditions of other states, but there are other ways to go. In this respect, there is, for example, a possibility to set up a fund under the *EU financial programmes*, which the Commission has been invited to do, as supporting the Member States with the detention conditions could contribute to strengthened EU cooperation in criminal matters.[304] Thus, a fund could be established 'outside' the principle of mutual trust as it is not directed at a specific Member State.

8.1.3. Communication between the Member States

The exchange of information should not only be made during the EAW procedure. The key to successful EU cooperation is to communicate and be transparent with information in order to help each other to strengthen the protection of fundamental rights. There is no reason to hide any information as there are already many States that have been questioning each other. Rather, the judicial authorities should strive for a dialogue and exchange of experiences. In this way, some Member States can act as role models for others in their efforts to improve prison conditions. Moreover, no one is singled out as the Member States with deficiencies have to show their will to make a change, which in the long run, hopefully, leads to stronger trust, efficiency and a better EAW system in safeguarding individual rights. The EU would therefore consider establishing a program to assist the Member States' judicial authorities.

8.2. Legislative measures

8.2.1. Reforming the EAW FD

By explicitly introducing the risk of fundamental rights violations as a mandatory non-execution ground in the EAW FD, through a legislative procedure, the CJEU case law would be codified directly into the EU legislation. It could be argued that this would contribute to a uniform application in the EU as it requires that the Member States implement it into their national legislation. However, it is unclear whether such a reform would make any difference when it comes to safeguarding individual rights in the cross-border surrender procedure, especially considering that the Member States are obliged to follow the CJEU's interpretation and are aware that poor prison conditions may constitute a ground for refusal. From my point of view, a reform will probably not overcome the problems as the vague guidelines remain.

[304] Council of the European Union, *Mutual recognition in criminal matters – Conclusions*, Brussels, 23 November 2018, Doc. 14194/18, point. 21.

8.2.2. Harmonization - Competence related to prison conditions

Although the CJEU, and recently the Commission, has established minimum standards in terms of prison conditions to ensure its conformity with fundamental rights, several Member States continue to fall short of these standards. Would harmonization of the prison standards across the EU be the successful solution to solve the issue? Is there even a possibility of harmonizing minimum standards related to the prison population and the material conditions of detention?

Harmonization is a legally binding concept that can be used by the EU in order to create a homogenous system with common normative standards in all Member States. It has successfully been used within the internal market, where standards on goods have been harmonized to a large extent, aiming to reduce the differences between the Member States' legal systems. However, full harmonization appears unrealistic within the criminal law sphere, especially taking into consideration that the Member States are unwilling to let the EU encroach on their sovereignty. Hence, minimum harmonization is preferable in these matters, which creates a common regulation at a 'minimum level' aimed at reducing important differences between the Member States' domestic systems.[305] In other words, this can ensure that the same standard is guaranteed across the Union.

Legislative harmonization of criminal law is limited due to the rules of EU competence. The Lisbon version of the Treaty offered the EU competence to harmonize individual rights, more specifically, criminal procedural rights. One can find the legislative competence in Article 82(2) of the Treaty on the Functioning of the European Union (TFEU)[306], which can serve as a legal basis for harmonization in these matters.[307] The provision establishes a requirement of necessity, which means that the EU legislator may harmonize minimum rules 'to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension'. At the same time, the article requires that such rules must respect that there are differences between the Member States when it comes to their legal traditions and systems. Further, it must concern one of the grounds stipulated in the provision. Article 82(2)(b) of the TFEU establishes the rights of individuals in criminal procedures. By the wording, at least three criteria can be identified.

[305] A. Willems, *The Principle of Mutual Trust in EU Criminal Law*, (Hart Publishing, 2021), p. 130.
[306] Consolidated version of the Treaty on the Functioning of the European Union, 7 June 2016, OJ C 202/47.
[307] Article 82(2) of the TFEU does not provide full harmonization.

As to the first criteria, harmonization of legislation must link to the principle of mutual recognition. In other words, it can only be justified if it can contribute to facilitating an instrument built on this principle. It is not easy to determine what this means in practical terms; however, it is conceivable that if a legislative instrument constitutes a hindrance to mutual recognition, and harmonization would solve or reduce the situation, it may be legitimate. As severe deficiencies in the Member States' prisons may constitute a ground for non-execution, where the executing judicial authorities are obliged to postpone the surrender pending the supplementary information, this can be considered a hindrance. Since some Member States do not comply with the minimum standards, a harmonization would probably reduce the hindrance to mutual recognition. According to me, the first requirement is met. Further, the EAW is a cross-border surrender procedure, which makes it simple to declare that the second criteria is fulfilled.

Lastly, it must fall within the scope of the term 'criminal procedure'. Since the EAW system concerns both the purpose of prosecution (pre-trial phase) and sentence execution (post-trial phase), it is of importance to see if the term is extended to cover both.[308] The European Parliament has stated that it can be applied to the pre-trial phase, which also has been done.[309] However, complexity arises here as the EU has not taken a position on whether it covers the post-trial phase concerning inadequate prison conditions. Yet, the EU has not adopted binding EU legislation related to this phase, but it does not seem that it has closed the door to such a possibility as the deficiencies in the State's prisons constitute a barrier regarding compliance with the EAW as a mutual recognition instrument.[310] Since it has not been excluded from the definition, I assume that the possibility still exists. In my view, it would be remarkable to say that detention conditions do not form part of the criminal procedure, as it clearly affects the rights of the persons who have been sentenced.

EU regulation in this area could improve the situation as harmonization establishes some sort of coherence within the EU. Once the standards are in place, this will protect individuals' rights by ensuring that the minimum standards are complied with. Further, it would improve

[308] Framework Decision on the EAW, Article 1.
[309] European Parliament, *Procedural Rights and Detention Conditions – Cost of Non-Europe Report*, December 2017, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf [accessed 17 November 2022], p. 42. See also Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, which was adopted on the basis of Article 82(2)(b) TFEU.
[310] European Parliament, *Procedural Rights and Detention Conditions – Cost of Non-Europe Report*, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf [accessed 17 November 2022], p. 42.

EU cooperation and its cornerstones as there is no reason to question each other if the standards are equivalent across the Union. In other words, it would contribute to a climate of mutual trust between the Member States. Additionally, it would result in the same fundamental rights protection for those prisoners who are not involved in a cross-border surrender procedure, i.e., individuals at a national level. However, one has to remember that this presupposes that the Member States have the capacity to achieve this in practice. As previously stated, this will be a tough challenge for some of the Member States. In order for the harmonization to be successful, it would therefore have to be combined with e.g., a fund as proposed as an option under non-legislative measures.

Overall, it is uncertain whether Article 82(2)(b) of the TFEU can serve as a legal basis for harmonization in relation to prison conditions during the post-trial phase, as this depends on whether it can fall within the scope of 'criminal procedure'. There is also an opportunity to harmonize on the basis of Article 352(1) of the TFEU. In the absence of necessary powers of action in the Treaties, the provision allows the EU to adopt an act in order to attain one of the objectives stated in the Treaties, which however requires unanimity. Bearing in mind that this is a sensitive field of EU law, it is difficult to imagine that all Member States would agree to this in practice. Nevertheless, there is a legal basis intended for instruments built on mutual recognition and the EU should therefore consider its competence in the post-trial phase.

9. Concluding remarks

Given the EU's awareness of the poor conditions existing in many Member States' prisons, it is worrying that sufficient safeguards have not been provided within the EAW system. The systemic and generalized deficiencies put the rights of individuals at risk in favor of efficient and smooth EU cooperation in criminal law matters. Abandoning mutual trust does not seem to be an option as it would undermine the cornerstones of EU cooperation. Nevertheless, when the Member States no longer trust each other genuinely due to the varying prison standards, the presumption is also at stake.

The alarming situation makes it difficult to see how both interests can be met, at least to the extent that it can ensure that fundamental rights are protected. As long as poor conditions exist across the EU, it will harm the principle of mutual trust and simultaneously violate fundamental rights. Changing the EAW system for the better will not be achieved overnight, but the developments that have taken place at the EU level are far from sufficient. The EU must provide answers to the consequences of building a system on the principles of mutual recognition and mutual trust. These principles may have been successful within the internal market, but one must remember that there is a difference between a system that deals with goods and one that affects human beings. The surrender procedure affects people, and protecting their rights must therefore be a priority within the system.

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