FACULTY OF LAW AND CRIMINOLOGY

The Role of the CJEU in Ensuring that the Principles of Mutual Trust and Recognition Enshrined in the FDEAW Stay in Line with the CFR

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Nederlands Abstract

Met dit onderzoek wordt getracht inzicht te krijgen in het evenwicht dat het Hof van Justitie van de Europese Unie (HvJ) heeft gevonden tussen de bescherming van de fundamentele rechten, enerzijds, en een effectieve justitiële samenwerking tussen de lidstaten in het kader van het mechanisme van het Europees aanhoudingsbevel (EAB) geboden door het kaderbesluit betreffende het Europees aanhoudingsbevel (KEAB).

Aan de ene kant heeft dit laatste tot doel een verouderd en multilateraal uitleveringsstelsel te vervangen door een eenvoudiger en doeltreffender stelsel dat gebaseerd is op de beginselen van wederzijds vertrouwen en wederzijdse erkenning. In wezen houdt het beginsel van wederzijds vertrouwen het vermoeden in dat alle lidstaten over voldoende en gelijkwaardige beschermingsnormen met betrekking tot de fundamentele rechten beschikken. Wat het beginsel van wederzijdse erkenning betreft, moeten alle lidstaten beslissingen van de autoriteiten van andere lidstaten als hun eigen beslissingen beschouwen. Samen zorgen deze beginselen ervoor dat wanneer een lidstaat een EAB uitvaardigt, hij redelijkerwijs kan verwachten dat deze door de aangezochte lidstaat wordt uitgevoerd. Met andere woorden kan de tenuitvoerlegging van een EAB alleen worden geweigerd onder bepaalde omstandigheden, die uitputtend zijn opgesomd in het EAB.

Aan de andere kant vormt de bescherming van de fundamentele rechten geen van de genoemde omstandigheden en kan daarom in beginsel geen aanleiding zijn om een EAB niet ten uitvoer te leggen. Strafrechtelijke zaken leiden echter door hun aard tot situaties waarin de grondrechten van de verdachte in gevaar zijn, met name het recht op een eerlijk proces en het recht om niet te worden gemarteld of aan onmenselijke of vernederende behandelingen te worden onderworpen. In het kader van het KEAB kunnen dergelijke schendingen zich bijvoorbeeld voordoen wanneer de uitvaardigende lidstaat, ondanks het algemene vermoeden dat alle lidstaten de grondrechten waarborgen, tekortkomingen vertoont met betrekking tot de onafhankelijkheid en de onpartijdigheid van zijn rechterlijke macht of met betrekking tot de voorwaarden van zijn gevangenissen. In dit verband heeft het HvJ onlangs bevestigd dat het recht op een eerlijk proces en het recht om niet te worden

onderworpen aan foltering of onmenselijke of vernederende behandeling, onder bepaalde omstandigheden worden erkend als de grondslagen voor uitzonderingen op de uitvoering van een EAB.

Gelet op het voorgaande wordt met het onderzoek getracht te begrijpen hoe en waarom de rechtspraak van het Hof lijkt verschoven te zijn van een prioritering van doeltreffende justitiële samenwerking in strafzaken op basis van de beginselen van wederzijds vertrouwen en wederzijdse erkenning naar een standpunt dat de grondrechten beter beschermt.

Abbreviations

CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FDEAW	Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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Introduction

This research seeks to understand the balance that the Court of Justice of the European Union (CJEU) has afforded to the protection of fundamental rights, on the one hand, and the guarantee of effective judicial cooperation among the Member States, on the other hand, in the context of the European Arrest Warrant (EAW) mechanism provided by the Framework Decision on the European Arrest Warrant (FDEAW). The latter, adopted on 13 June 2002, was aimed at replacing an outdated, multilateral system of extradition with a more simple and effective one based on the principles of mutual trust and recognition. In essence, the principle of mutual trust entails a presumption that all Member States possess sufficient and equivalent standards of protection with respect to fundamental rights.[1] As for the principle of mutual recognition, it requires that all Member States consider decisions emanating from the authorities of other Member States as they would their own.[2] Combined, these principles ensure that when a Member State issues an EAW, it can reasonably expect it to be executed by the addressee Member State.[3]

Based on the foregoing, the execution of an EAW can only be refused under certain circumstances, exhaustively listed in the FDEAW.[4] The protection of fundamental rights does not constitute one of said circumstances and may therefore not, in principle, warrant the non-execution of an EAW.[5] However, by virtue of their nature, criminal matters lead to situations where the fundamental rights of the accused are at risk, in particular the right to a fair trial and the right to not be tortured or subjected to inhuman or degrading treatment. In the context of the FDEAW, for instance, such violations can occur when, in spite of the general presumption that all Member States

[1] Judgment of the 21 December 2011, *N.S.*, Joined Cases C-411/10 and C-493/10, EU:C:2011:865, paras. 78 to 80 (hereinafter *N.S.*); Judgment of 26 February, *Melloni*, C-399/11, EU:C:2013:107, paras. 37 and 63 (hereinafter *Melloni*); Opinion 2/13 of 18 December 2014, *Accession of the EU to the*
[2] Judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, EU:C:2007:261, para. 29 (hereinafter *Advocaten voor de Wereld*); A. SANGER, "Force of Circumstance: The European Arrest Warrant and Human Rights", *Democracy and Security*, Vol. 6(1), Routledge, 2010, p. 19.
[3] Judgment of 29 January 2013, *Radu*, C-396/11, EU:C:2013:39, paras. 33 to 36 (hereinafter *Radu*); *Melloni*, paras. 36 to 38; A. P. VAN DER MEI, "The European Arrest Warrant: Recend developments in the case law of the Court of Justice", *Maastricht Journal of European and Comparative Law*, Vol. 24(6), SAGE Publications, 2017, pp. 882 and 883.
[4] *Radu*, para. 43; *Melloni*, paras. 37 and 63; A. WILLEMS, "The Court of Justice of the European Union's Mutual trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal", *German Law Journal (20)*, Cambridge University Press, 2019, pp. 482 and 483.
[5] *Ibid*.

safeguard fundamental rights, the issuing Member State presents deficiencies with respect to the independence and impartiality of its judiciary or with the conditions of its prisons.[6] Having regard to this, the CJEU has recently confirmed that the right to a fair trial and the right to not be subjected to torture or inhuman or degrading treatment be recognized, under certain circumstances, as the bases for praetorian exceptions to the execution of an EAW.[7]

The aforementioned paragraphs describe the two parts of the equation surrounding the mechanism of the EAW, namely effective judicial cooperation and the protection of fundamental rights. Since the adoption of the FDEAW, it has been up to the CJEU to ensure that a certain balance exists between these two sides of the equation, a mission which it has carried out with varying degrees of success in the past two decades. The current analysis seeks to understand the role the CJEU has played in ensuring that the principles of mutual trust and recognition upon which the FDEAW is built stay in line with the fundamental rights enshrined in the EU Charter of Fundamental Rights (CFR). In order to do so, it is subdivided into four Parts. **Part I** sets out the general legal framework of the two sides of the equation, taking into account their definitions, scopes of application and relevance for the current analysis. **Part II** focuses on the FDEAW itself, describing its binding strength, how it functions and the way in which the Court interpreted its most relevant provisions. **Part III** combines the information gathered in **Parts I** and **II** in a thorough analysis of the evolution of the CJEU's case law regarding the FDEAW. Finally, **Part IV** reiterates the underlying aspects of **Parts I**, **II** and **III**, combining them into the three main points of relevance for the current analysis.

Before continuing, one of three things must be stated. Firstly, the analysis carried out is purely legal. It is not intended to put forth a personal opinion on the current political situation surrounding the FDEAW. Therefore, where they bear relevance, the issues regarding certain Member States such as Romania, Hungary and Poland are always described in a neutral manner and in conjunction with the opinions of other Member States or EU institutions, including the CJEU. Secondly, to the extent

[6] Judgment of 5 April 2016, *Aranyosi and Căldăraru*, Joined Cases C-404/15 and C-659/15 PPU, EU:C:2016:198 (hereinafter *Aranyosi and Căldăraru*); Judgment of 25 July 2018, *LM*, C-216/18 PPU, EU:C:2018:586 (hereinafter *LM*).
[7] Opinion 2/13, paras. 191 and 192; *Aranyosi and Căldăraru*, para. 104; *LM*, para. 79.

possible, the analysis of the thesis' different premises is structured in a similar manner, starting with their definition, continuing onto their general scope of application and/or interpretation before finishing with their relevance for the current analysis. Depending on the premise in question, adopting the aforementioned analytical structure may not be possible. Even in such circumstances, however, the analysis always provides a delimitation of the relevant subject matter before delving into its importance. Finally, as for the legal sources taken into account, they can be subdivided into three categories: EU primary law, EU secondary law and supplementary legal sources. The Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the CFR and the general principles of EU law recognized by the CJEU in its case law fall under EU primary law.[8] The FDEAW, as well as any other Framework Decisions or Directives mentioned throughout the paper, constitute EU secondary law.[9] Finally, having regard to the relationship it shares with the CJEU, the European Court of Human Rights (ECtHR) and its interpretations of the European Convention on Human Rights (ECHR) are relied upon where necessary as supplementary legal sources.[10]

Part I – Legal Framework

This Part delves into the legal framework of the two main premises surrounding the FDEAW. Chapter I examines that of fundamental rights and their protection. Chapter II analyzes that of the principles of mutual trust and recognition.

Chapter I – Fundamental Rights

The following Sections explore the side of the equation concerning the protection of fundamental rights. Section I defines the founding values of the European Union, which include the protection of fundamental rights. Section II focuses on the three

[8] B. DE WITTE, "Legal Instruments and Law-Making in the Lisbon Treaty", *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty*, S. GRILLER and J. ZILLER (eds.), Springer, 2008, pp. 79 to 108.
[9] *Ibid*.
[10] Judgment of 29 May 1997, *Kremzow v. Austria*, C-299/95, EU:C:1997:254, para. 14 (hereinafter *Kremzow v. Austria*); Judgment of 26 February, 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, para. 44 (hereinafter *Åkerberg Fransson*); P. CRAIG and G. DE BÚRCA, *EU law: text, cases and materials*, 6th ed., Oxford University Press, 2015, pp. 385 and 386.

main sources of fundamental rights at the EU level. Finally, Section III sets out the specific rights relevant for the current analysis.

Section I – The Founding Values of the European Union

Article 2 TEU sets out that the EU is founded, *inter alia*, on the values of democracy, the rule of law and fundamental rights, which are common to all Member States.[11] As stated in Article 3(1) TEU, promoting the aforementioned values constitutes one of the Union's main objectives.[12] Member States are also under an obligation to comply with and promote the three values and may therefore not, either by positive or negative action, jeopardize this objective.[13]

The Copenhagen criteria, partially crystallized in Article 49 TEU, and the "*nuclear option*", set out in Article 7 TEU, bear witness to the aforementioned.[14] First, all *candidate* Member States must abide by the three Copenhagen criteria, one of which is the respect of the values enshrined in Article 2 TEU.[15] Second, all *accepted* Member States must continue to uphold said values, lest they be sanctioned on the

[11] Article 2 TEU, "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. (...)*"; European Parliament Research Service, *An EU mechanism on democracy, the rule of la wand fundamental rights – Annex*, 2016, p. 20.

[12] Article 3(1) and (5), TEU, the EU promotes these values both internally and externally; European Parliament Research Service (n11), p. 21.

[13] Article 2 TEU; Editorial Comments, "Safeguarding EU values in the Member States – Is something finally happening?", *Common Market Law Review*, Vol. 52, Kluwer Law International, 2015, p. 620; K.-P. SOMMERMAN, "The Objectives of the European Union", *The Treaty on European Union (TEU): A Commentary*, H-J. BLANKE and S. MANGIAMELLI (eds.), Springer, 2013, p. 167.

[14] Articles 2, 7 and 49 TEU; Article 7 TEU sets out that "*On a reasoned proposal (...) the Council, (...), may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2.*" and "*The European Council, (...), may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, (...)*"; Article 49 TEU states tha "*Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. (...)*"; European Parliament Research Service (n11), p. 21; Editorial Comments (n13), p. 620.

[15] Articles 2 *jo*. 49 TEU; C. HILLION, "The Copenhagen Criteria and their Progeny", *EU Enlargement: A Legal Approach*, C. HILLION (ed.), Hart Publishing, 2004, p. 2; R. JANSE, "Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement", *International Review of Constitutiona Law*, Vol. 17(1), Oxford University Press, 2019, pp. 44 to 46. The Copenhagen criteria require the candidate country to ensure (1) *stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities*, (2) the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union and (3) the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union. The first criterion is reiterated by Articles 2 *jo*. 49 TEU, which provides that any European State that which respects and promotes the values enshrined in Article 2 TEU may apply to become an EU Member State.

basis of the Article 7 procedures.[16] Indeed, in the case of a clear risk of a serious breach of the values encompassed in Article 2 TEU, the Commission, Parliament or other Member States can issue a reasoned proposal against the concerned Member State.[17] Moreover, if said breach becomes serious and persistent, the Council possesses the prerogative to suspend certain rights of the latter.[18]

The values of democracy, rule of law and fundamental rights are intertwined.[19] Indeed, in its 2014 and 2019 communications on the rule of law, the Commission confirmed this "*triangular*" relationship, stating "*there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa*".[20] As such, even though the current analysis focuses mostly on the fundamental rights prong of Article 2 TEU, the other two values – especially that of the rule of law – must also be taken into consideration.

In its *Les Verts* judgment, the CJEU confirmed that the EU is a community based on the rule of law.[21] The judgments that followed, as well as the case law from the ECtHR, later served as a basis for a more concrete definition of the rule of law, coined by the Commission in its 2014 communication.[22] According to the latter, the rule of law entails compliance with six legal principles stemming from the common constitutional traditions of the Member States.[23] Among these are the principles of

[16] Articles 2 *jo*. 7 TEU; Editorial Comments (n13), p. 620.
[17] C. HILLION, "Overseeing the rule of law in the European Union – Legal mandate and means", *European Policy Analysis*, Vol. 1, Swedish Institute for European Policy Studies, 2016, pp. 4 to 5; D. KOCHENOV, "Busting the Myths Nuclear: A Commentary on Article 7 TEU", *EUI Working Paper*, no. 10, European University Institute, 2017, pp. 7 to 11.
[18] C. HILLION, (n17)., pp. 4 to 5; D. KOCHENOV, (n17), pp. 7 to 11.
[19] European Parliament Research Service (n11), pp. 22 to 23.
[20] Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, COM(2014)158 final, 11 march 2014, p. 4 (hereinafter Commission Communication of 2014); Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee of the Regions, *Strengthening the rule of law within the Union – A blueprint for action*, COM(2019)343 final, 17 July 2019, pp. 1 to 3 (hereinafter Commission Communication of 2019); European Parliament, *The triangular relationship between fundamental rights, democracy and the Rule of Law*, 2013, p. 33.
[21] Judgment of 23 April 1986, *Les Verts v. EP*, 294/83, EU:C:1986:166, para 23 (hereinafter *Les Verts*); P. CRAIG and G. DE BÚRCA (n10), p. 382.
[22] European Parliament Research Service (n11), pp. 26 and 27; O. MADER, "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law", *Hague Journal on the Rule of Law*, Vol. 11, Springer, 2019, pp. 138 to 139.
[23] Commission Communication of 2014, p. 4. These principles are the principle of legality, legal certainty, prohibition of arbitrariness of the executive, independent and impartial courts, effective judicial review including respect for fundamental rights and equality before the law.

independence and effective judicial protection, both of which have been recognized as being at risk in Poland in the Court's *LM* judgment concerning the FDEAW.[24]

Section II – The Main Sources of Fundamental Rights in the European Union

At the level of the EU, fundamental rights are protected by three main sources. The first, discussed in Point A, are the general principles of EU law. The second, examined in Point B, is the ECHR. Finally, Point C analyzes the CFR, which constitutes the most important source of fundamental rights for the current analysis.

A – General Principles of EU law

a - Definition

Initially, the EU was established to encourage economic cooperation among its members, not to protect human rights.[25] Nevertheless, the Court changed its stance in the *Stauder* case, recognizing for the first time the existence of general principles of EU law, which included fundamental human rights and their protection.[26] To justify the emergence of these general principles of EU law, the Court relied upon on what can nowadays be summarized as a combination of two main premises, enshrined in Article 6(3) TEU: the national constitutional traditions of the Member States and the ECHR (discussed in Point B).[27]

The concept of common constitutional traditions stems from the idea that all Member States share the values of democracy, fundamental rights and rule of law discussed in

[24] *LM*, para. 79.
[25] P. CRAIG and G. DE BÚRCA (n10), p. 382.
[26] Judgment of 12 November 1969, *Stauder v. City of Ulm*, 29/69, EU:C:1969:57, para. 7 (hereinafter *Stauder*); P. CRAIG and G. DE BÚRCA, *ibid*., p. 383.
[27] Judgment of 17 December 1970, *Internationale Handelgesellschaft*, 11/70, EU:C:1970:114, para. 4 (hereinafter *Internationale Handelgesellschaft*); Judgment of 14 May 1974, *Nold v. Commission* , 4/73, EU:C:1974:51, para. 13 (hereinafter *Nold*); Judgment of 28 October 1975, *Roland Rutili v. Ministre de L'intérieur*, 36/75, EU:C:1975:137, para. 32 (hereinafter *Rutili*); Opinion 2/13, para. 37; P. CRAIG and G. DE BÚRCA, *ibid*., p. 383. The CJEU, when protecting fundamental rights, draws inspiration not only from the constitutional traditions of Member States, but also from international treaties such as the ECHR.

Section I.[28] Indeed, not only must candidates for the EU meet the Copenhagen criteria, one of which is the respect and the promotion of the values enshrined in Article 2 TEU, but all Member States must continue to do so if they wish to keep their membership rights.[29] Therefore, and since the contrary would amount to their rejection or sanction, all (candidate) Member States can be "*presumed*" as upholding said values, *including fundamental rights*, in their national law.[30] In other words, the importance of the common constitutional traditions in the development of the general principles of EU law is, in principle, significant.[31]

Yet, in spite of the foregoing, the CJEU has seldom referred to explicit constitutional provisions as a justification for its decisions, preferring to rely on the more centralized provisions of the ECHR and the CFR.[32] This is due to two main issues, discussed in Subpoint b, which incidentally temper the importance of the common constitutional traditions with respect to this paper.

b – Relevance

The use of general principles of EU law – seen from the perspective of the common constitutional traditions – as a basis for the protection of fundamental human rights presents two main problems.[33] Firstly, despite the "*presumption*" that all Member States guarantee the protection of fundamental human rights to a certain degree, inconsistencies related to the origin and scope of application of said rights remain.[34] Secondly, the fact that a specific fundamental right is effectively consecrated in the

[28] Stauder, para. 7; *Internationale Handelgesellschaft*, para. 4; *Les Verts*, para. 23; O. MADER, "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law", *op. cit*., pp. 134 to 138.
[29] Articles 2, 7 and 49 TEU; R. JANSE, "Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement", *op. cit*., pp. 44 to 46; Editorial Comments n13, p. 620; O. MADER, "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law", *op. cit*., p. 137; C. HILLION, "The Copenhagen Criteria and their Progeny", *op. cit*., p. 2; D. KOCHENOV, "Busting the Myths Nuclear: A Commentary on Article 7 TEU", *op. cit*., p. 7 to 11.
[30] D. KOCHENOV, "The Acquis and Its Principles: the Enforcement of the 'Law' versus the Enforcement of 'Values' in the European Union", *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, A. JAKAB and D. KOCHENOV (eds.), Oxford University Press, 2017, p. 12.
[31] D. KOCHENOV, "The Acquis and Its Principles: the Enforcement of the 'Law' versus the Enforcement of 'Values' in the European Union", *ibid*. pp. 10 to 17; P. CRAIG and G. DE BÚRCA (n10), p. 383.
[32] P. CRAIG and G. DE BÚRCA, *ibid*., pp. 388 to 390.
[33] *Ibid*.
[34] *Ibid*.

Constitutions of all Member State does not suffice to ensure its consistent interpretation throughout the Union.[35]

Based on the foregoing, the CJEU distanced itself – although not entirely[36] – from the common constitutional traditions approach in order to favor more centralized sources of fundamental rights, namely the CFR and the ECHR.[37] Some authors argue, on the contrary, that constitutional traditions have regained their strength with the emergence of the CFR, even more so when it was granted its binding force.[38] Nevertheless, this is not the case with respect to judicial cooperation in criminal matters, as demonstrated by the relevant judgements of the CJEU.[39] As such, with respect to the current analysis, the common constitutional traditions are referred to marginally.

B – The European Convention on Human Rights

a – Definition

The ECHR, briefly mentioned in Point A, is the second source of fundamental rights protection in the Union.[40] Before the adoption of the CFR, it constituted a source of inspiration for the CJEU, not only to develop the general principles of EU law, but also to rule on matters which had not yet been specifically touched upon by EU law.[41]

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[35] *Ibid*.
[36] *Advocaten voor de* Wereld, paras. 3 and 49; Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16, EU:C:2018:117, para. 35 (hereinafter *Associação*); Judgment of 24 June 2019, *Commission v. Poland*, C-619/18, EU:C:2019:531, para. 49 (hereinafter *Commission v. Poland*). *Advocaten voor de Wereld* is the only EAW case relevant to the current analysis where the common constitutional traditions are explicitly mentioned as a justification for the principle of legality of criminal offences and penalties.
[37] European Parliament Research Service (n11), p. 27; O. MADER, "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law", *op. cit*., pp. 144 to 148.
[38] M. FICHERO and O. POLLICINO, "The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?", *German Law Journal*, Vol. 20, Cambridge University Press, 2019, pp. 1097 to 1118.
[39] The *Radu*, *Melloni*, *Aranyosi and Căldăraru*, *LM*, relevant for the current analysis, make no mention of the common constitutional traditions.
[40] O. MADER, "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law", *op. cit*., pp. 138 and 139; K. LENAERTS, "Interlocking legal orders in the European Union and comparative law", *The International and Comparative Law Quarterly*, Vol. 52(4), Cambridge University Press, 2003, pp. 880 to 883.
[41] P. CRAIG and G. DE BÚRCA, *op. cit.*, p. 386.

Nevertheless, there stopped the ECHR's "*strength*" in matters of EU law.[42] Indeed, despite being cited in Article 6(2) and (3) TEU, respectively as a Convention to which the EU must accede and as one of the two main bases for general principles of EU law, the CJEU has refused to give more effectiveness to the ECHR than that of an interpretative tool.[43]

In its 2014 Opinion 2/13 on EU accession to the ECHR, the Court argued that the Accession Agreement of 2013, according to which the EU would accede to the ECHR and thereby be subjected, much like the Member States themselves, to review by the European Court of Human Rights (ECtHR), negatively affected the autonomy of EU law.[44] This followed up on what the Court had formerly mentioned in more specific instances such as in the *Kremzow v. Austria* and *Åkerberg Fransson* cases, where it ruled that although it did not possess the jurisdiction to apply the ECHR due to the fact that it does not explicitly pertain to EU law, it could nevertheless refer to it as an inspiration source.[45]

b – Article 52(3) of the CFR

The tendency to use the ECHR as an interpretative tool is reflected by Article 52(3) of the CFR.[46] According to the explanations to the Charter, which must be taken into consideration on the basis of Article 52(7) of the CFR, the provision ensures the

[42] T. ISIKSEL, "European Exceptionalism and the EU's Accession to the ECHR", *The European Journal of International Law*, Vol. 27(3), Oxford University Press, 2016, p. 575.
[43] *Kremzow v. Austria*, para. 14; *Åkerberg Fransson*, para. 44; T. ISIKSEL, *ibid*., p. 575; European Parliament, *Fact Sheet – The Protection of Fundament Rights in the EU fact sheet*, 2020, pp. 1 and 2.
[44] Opinion 2/13, paras. 179 to 181; D. HALBERSTAM, "'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward", *German Law Journal*, Vol. 16(1), German Law Journal GbR, 2015, p. 121. The accession by the EU to the ECHR would render the latter part of EU law, the interpretation of which falls under the competence of the CJEU. In the event that, after accession, a Member State would refer a question regarding the ECHR to the ECtHR instead of the CJEU, it would be asking an EU law question to a non-EU court. As such, the CJEU prefers to maintain the ECHR as an interpretative tool.
[45] *Kremzow v. Austria*, para. 14; *Åkerberg Fransson*, para. 44; P. CRAIG and G. DE BÚRCA, *op. cit.*, p. 385 and 386.
[46] Article 52(3) CFR, "*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Righs and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*"; D. HALBERSTAM, "'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward", *op. cit*., p. 121.

consistency between the ECHR and the CFR.[47] Indeed, Article 52(3) of the CFR provides that, insofar as the rights in the Charter correspond to the rights in the Convention, the meaning and scope of said rights, including their limitations, are the same as those provided by the ECHR.[48] Moreover, when defining the meaning, scope and interpretation of the relevant rights, one must look at the case law of the ECtHR and the CJEU.[49]

The Explanations to the Charter also distinguish between two categories of corresponding rights.[50] The first consists of the rights which correspond fully, both in meaning and in scope. The second encompasses rights which correspond in meaning, but for which the CFR offers a wider scope of application. The latter is provided by the last part of Article 52(3) of the CFR, which grants the Union the possibility to guarantee a more extensive protection of the rights in question.[51] *A contrario*, the CFR may never offer a weaker protection than that provided by the ECHR.[52]

c – Relevance

On the basis of Article 52(3) CFR, the ECHR bears importance with regards to the fundamental rights relevant to the current analysis, namely the right to a fair trial and the right to not be subjected to torture or inhuman or degrading treatment. Articles 47 and 48 of the CFR and Article 6 of the ECHR protect the right to a fair trial.[53] Article 4 of the CFR and Article 3 of the ECHR protect the right to not be subjected to torture and inhuman or degrading treatment.[54] According to the Explanations to the Charter,

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[47] Article 52(7) CFR, "*The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States*"; S. DOUGLAS-SCOTT, "The Court of Justice of the European Union and the European Court of Human Rights after Lisbon", *The Protection of Fundamental Rights in the EU after Lisbon*, S. DE VRIES, U. BERNITZ and S. WEATHERILL (eds.), Hart Publishing, 2013, p. 162.

[48] *Explanations relating to the Charter of Fundamental Rights*, OJ C 303, 14. December 2007, pp. 33 and 34 (hereinafter *Explanations to the CFR*).

[49] *Ibid*., pp. 33 and 34.

[50] *Ibid*., pp. 33 and 34.

[51] *Ibid*., pp. 33 and 34; S. DOUGLAS-SCOTT, "The Court of Justice of the European Union and the European Court of Human Rights after Lisbon", *op. cit*., p. 164.

[52] *Ibid*.; P. CRAIG and G. DE BÚRCA, *op. cit.*, p. 386. The authors argue that, by setting out that "*this provision shall not prevent Union law from providing more extensive protection*", Article 52(3) CFR maintains the idea that the ECHR is a"*floor*" for human rights rather than a "*ceiling*".

[53] Articles 47 and 48 CFR *jo*. Article 6 ECHR; *Explanations to the CFR*, *ibid*., pp. 33 and 34.

[54] Article 4 CFR *jo*. Article 3 ECHR; *Explanations to the CFR*, *ibid*., pp. 33 and 34.

these provisions correspond either partially or fully, which entails that the CJEU can refer to the ECHR and the ECtHR's case law regarding their interpretation.[55]

The CJEU has referred to the ECHR and the ECtHR's case law in cases related to the Area of Freedom, Security and Justice (AFSJ), which encompasses both the European asylum system and effective judicial cooperation in criminal matters, in order to accept that potential violations of fundamental rights may, under certain circumstances, constitute an exception to the *blind* application of mutual trust.[56] The latter, which is a key constitutional principle of the EU, entails *inter alia* the presumption that all Member States provide sufficient and equivalent safeguards of fundamental rights.[57] Applied to the AFSJ, and more specifically to the FDEAW, it presupposes a duty on the part of the executing Member State to execute any EAW that meets the requirements set out in the framework decision and does not fall under one of the mandatory or optional refusal grounds provided by the latter.[58]

In its *N.S.* judgment, concerning the European asylum system, the CJEU ruled that Article 4 CFR must be interpreted as meaning that a Member State may not transfer an asylum seeker to the receiving Member State where they cannot be unaware that the latter presents systemic deficiencies in the asylum procedure which provide substantial grounds to believe that the asylum seeker's right to not be subjected to

[55] S. DOUGLAS-SCOTT, "The Court of Justice of the European Union and the European Court of Human Rights after Lisbon", *op. cit*., pp. 161 to 163; S. PEERS and S. PRECHAL, "Article 52 – Scope and Interpretation of Rights and Principles", *The EU Charter of Fundamental Rights – A Commentary*, S. PEERS, T. HERVEY, J. KENNER and A. WARD (eds.), Hart Publishing, 2014, pp. 1455 to 1457; *Explanations to the CFR*, *ibid*., pp. 33 and 34. Article 47(2) and (3) of the CFR corresponds to Article 6(1) of the ECHR and Article 48 of the CFR corresponds to Article 6(2) and (3) of the ECHR. Nevertheless, only the latter correspond fully, as the limitation and determination of civil rights and obligations or criminal charges does not apply with regards to EU law and its implementation. Article 4 of the CFR corresponds fully to Article 3 of the ECHR.

[56] A. WILLEMS, "The Court of Justice of the European Union's Mutual trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal", *op. cit*., p. 480.

[57] Opinion 2/13, paras. 191 and 192; T. WISCHMEYER, "Generating Trust Through Law? Judicial Cooperation in the European Union and the 'Principle of Mutual trust'", *German Law Journal*, Vol. 17(3), Cambridge University Press, 2016, p. 342; C. KRENN, "Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13", *German Law Journal*, Vol. 16(1), Cambridge University Press, 2015, p. 159.

[58] Articles 1(2), 3, 4 and 4a , FDEAW; *Radu*, para. 34; *Melloni*, paras. 37 and 63; European Commission, *Commission Notice – Handbook on how to Issue and Execute a European Arrest Warrant*, C(2017) 6389 final, 28 September 2018, p. 39 (hereinafter *Handbook on the EAW*); A. WILLEMS, "The Court of Justice of the European Union's Mutual trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal", *op. cit*., pp. 469 and 470.

inhuman or degrading treatment faces a real risk of being violated.[59] In doing so, the Court, having regard to the corresponding nature of Article 4 CFR and Article 3 ECHR, followed the ECtHR's *M.S.S. v. Belgium and Greece* judgment, where systemic deficiencies in the Greek asylum system were found to pose a similar risk to an asylum seeker's rights protected by Article 4 CFR.[60]

With regards to effective judicial cooperation, on the other hand, the CJEU first showed reluctance to apply the systemic deficiencies test to limit the principle of mutual trust on the basis of fundamental rights protection.[61] In *Radu*, for instance, the Court refused to follow advocate general Sharpston's proposal to transpose the *N.S.* reasoning to the sphere of judicial cooperation in criminal matters.[62] Instead, it argued that the grounds for optional and mandatory refusal of an EAW, listed in Articles 3 to 4a FDEAW, had to be regarded as exhaustive and did not include potential violations of fundamental rights.[63] In other words, the Member State responsible for the execution of an EAW could not invoke deficiencies in the issuing Member State that put the right to not be subjected to inhuman and degrading treatment at risk in order to justify the non-execution of an EAW.

However, the CJEU's more recent *Aranyosi and Căldăraru* and *LM* judgments show the contrary. In essence, the Court was respectively asked whether the right to not be subjected to torture or inhuman or degrading treatment and the right to a fair trial could lead – having regard to systemic or generalized deficiencies in the issuing Member State putting the relevant rights at risk – to the non-execution of an EAW, despite not being encompassed in Articles 3 to 4a FDEAW as an "*official*" ground for

[59] *N.S.*, para. 106; D. HALBERSTAM, "'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward", *op. cit.*, p. 127.
[60] *N.S.*, para. 88; ECtHR Judgment of 21 January 2011, *M.S.S. v. Belgium and Greece*, no. 30696/09 (hereinafter *M.S.S.*); C. KRENN, "Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13", *op. cit*., pp. 159 to 160.
[61] Opinion of Advocate General Sharpston in Radu, delivered on 18 October 2012, *Radu*, C-396/11, EU:C:2012:648, para. 76 (hereinafter Opinion of AG Sharpston in *Radu*); T. WISCHMEYER, "Generating Trust Through Law? Judicial Cooperation in the European Union and the 'Principle of Mutual trust'", *op. cit*., p. 379.
[62] *Radu*, para. 43; Opinion of AG Sharpston in *Radu*, para. 76.
[63] *Radu*, para. 43; A. WILLEMS, "The Court of Justice of the European Union's Mutual trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal", *op. cit*., pp. 482 and 483.

refusal.[64] In a similar manner to that of *N.S.*, the CJEU *partially* referred to the ECHR and the ECtHR's case law and answered both questions in the positive, thereby confirming the existence of two new praetorian grounds for refusal of an EAW and, by extension, a limitation to the principle of mutual trust.[65]

Finally, it must be mentioned that there have been instances regarding the EAW that were brought directly before the ECtHR. Only a handful of such judgments have been registered and most of them are irrelevant with regards to this paper, as they were declared either inadmissible or unfounded.[66] However, the 2019 case of *Romeo Castaño v. Belgium* demonstrates the balance that the ECtHR gives to Article 2 ECHR on the one hand, and Article 3 ECHR, on the other.[67] The Court held that Belgium had violated the *procedural* aspect of the right to life enshrined in Article 2 ECHR by refusing to execute the EAW issued against *N.J.E.*, a member of the ETA terrorist group, on the basis that said execution would lead to a violation of her rights under Article 3 ECHR.[68] The Court based its reasoning on the lack of factual evidence gathered by the Belgian authorities to justify the non-execution of the EAW.[69] In doing so, it struck a balance between effective judicial cooperation in criminal matters and the respect of fundamental rights in a way similar to that of the CJEU in the *Aranyosi and Căldăraru* and *LM* cases.[70]

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[64] *Aranyosi and Căldăraru*, para. 74; *LM*, para. 34; A. WILLEMS, "The Court of Justice of the European Union's Mutual trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal", *op. cit*., pp. 488 and 489; O. MADER, *op. cit*., pp. 149 and 150;

[65] *Aranyosi and Căldăraru*, paras. 43 and 60. The CJEU mentions the fact that the ECtHR found the prison conditions in both Hungary and Romania to be in violation of Article 3 ECHR due to filth, overcrowding and lack of heating in a number of "*pilot*" cases. It also refers to paragraph 191 of its own Opinion 2/13, which reiterates that, on the basis of mutual trust, Member States must presume that other Member States provide sufficient and equivalent protection to fundamental rights, *save in exceptional circumstances*.

[66] Council of Europe – European Court of Human Rights, *Factsheet – Case-law concerning the European Union*, February 2020, pp. 10 and 11 (hereinafter *Factsheet on the case law concerning the EU*). This is the case for the ECtHR judgments of *Pianese v. Italy and the Netherlands* and the *Pirozzi v. Belgium*. The former was declared inadmissible, the latter confirmed that there had been no violation of Articles 5(1) and 6(1) ECHR, which respectively protect the right to liberty and security and the right to a fair trial.

[67] ECtHR Judgment of 9 July 2019, *Romeo Castaño v. Belgium*, no. 8351/17 (hereinafter *Romeo Castaño v. Belgium*); *Factsheet on the case law concerning the EU*, p. 11.

[68] *Romeo Castaño v. Belgium*, para. 34; *Factsheet on the case law concerning the EU*, p. 11.

[69] *Romeo Castaño v. Belgium*, paras. 82 and 86.

[70] *Aranyosi and Căldăraru*, para. 104; *LM*, para 7; *Romeo Castaño v. Belgium*, paras. 82 and 86.

Based on the foregoing, the influence of the ECHR and the ECtHR's case law on the CJEU's case law with respect to matters pertaining to the AFSJ is manifest and must therefore be taken into account. Indeed, it is clear from the recent evolution of the CJEU's judgments on the EAW, that the latter has partially relied on the ECtHR's case law on the corresponding rights in order to relatively soften its "*pro-mutual-trust*" stance to the benefit of fundamental rights protection.[71] Moreover, the fact that some instances regarding the EAW are brought before the ECtHR may further the influence of its decisions on those of the CJEU.[72] However, seeing as the current focuses more specifically on the role of the CJEU, the ECHR and ECtHR's judgments will always be referred to in conjunction with the corresponding provisions of EU law.

C – The Charter of Fundamental Rights of the European Union

a – Definition

Nowadays, the CFR constitutes the first and most important source of fundamental rights in EU law.[73] Drafted from 1999 to 2000, it was meant to grant a "*body*" to both the general principles of EU law and the ECHR discussed above. In other words, its main function was to render visible the EU's pre-existing obligation to respect fundamental rights.[74] Its legal status was confirmed in 2009, with the adoption of the Treaty of Lisbon. Referenced in Article 6(1) TEU, it is a binding source of primary EU law, which entails that a national court, when confronted with a conflict between its national law and the CFR (in a situation where it applies), must set aside its own

[71] *N.S.*, para. 88; *Aranyosi and Căldăraru*, paras. 43 and 60; *LM*, paras. 42 to 45 and 60 to 62; A. WILLEMS (n4), pp. 482 to 486; In *N.S.*, the CJEU refers to the ECtHR's *M.S.S. v. Belgium and Greece* judgment as a basis for the development of the systemic or generalized deficiencies test in matters regarding the European asylum system. This reasoning was later applied with respect to judicial cooperation in criminal matters in *Aranyosi and Căldăraru*, where the CJEU once again referred to the ECtHR's case law to consider deficiencies in the Hungarian and Romanian prisons that could justify the non-execution of an EAW on the basis of potential violations of the right to not be subjected to inhuman or degrading treatment. Finally, in *LM*, the CJEU built upon its *Aranyosi and Căldăraru* jurisprudence to justify the application of the deficiencies test to instances where the right to a fair trial is at risk.

[72] *Romeo Castaño v. Belgium* is a very recent case, nothing impedes that, in the future, similar cases be brought before the ECtHR. Having regard to the latter's past influence on the CJEU, it is probable that the EU Court will continue to refer to it.

[73] P. CRAIG and G. DE BÚRCA (n10), pp. 394 to 400.

[74] P. CRAIG and G. DE BÚRCA (n10), p. 396; Council of the European Union, *Presidency Conclusions – Tampere European Council*, 15 and 16 October 1999 (hereinafter Tampere Conclusions).

national law in order to grant full force and effect to the latter.[75] This was not always the case, however, and it is therefore important to distinguish the strength of the CFR *before* and *after* the Treaty of Lisbon, especially since the CJEU has ruled on issues related to the FDEAW in both time periods.[76]

Before the adoption of the adoption of the CFR, the ECHR and the general principles of EU law greatly influenced the CJEU's case law on fundamental rights.[77] The lack of a more centralized source of fundamental rights was nevertheless troublesome, as both the CJEU and the national Constitutional Courts believed their respective legal systems possessed the more protective provisions for said rights.[78] This problem remained even after the adoption of the CFR in 2000. Indeed, the latter's lack of binding legal force left the Courts with the possibility to rely on either the national constitutional traditions of the Member States, the ECHR or a combination of both.[79] During this time period, the CJEU only ruled on four cases regarding the EAW, one of which being *Advocaten voor de Wereld*, where the FDEAW's validity was challenged *inter alia* on the basis of the principles of equality and non-discrimination.[80] The CFR is mentioned marginally, as support for the CJEU's answer based on the general principles of EU law.[81]

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[75] P. CRAIG and G. DE BÚRCA, *op. cit.*, p. 394; Judgment of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paras. 22 and 24; Judgment of 22 June 2010, *Melki and Abdeli*, Joined Cases C-188/10 and C-189/10, EU:C:2010:363, paras. 43 and 44; *Åkerberg Fransson*, paras. 45 to 48.

[76] Although overwhelmingly in the post Lisbon period.

[77] See Points A and B; F. FERRARO and J. CARMONA, "Fundamental Rights in the European Union – The Role of the Charter after the Lisbon Treaty", *European Parliamentary Research Service*, Brussels, March 2015, pp. 4 and 5.

[78] F. FERRARO and J. CARMONA, *ibid*., p. 5; G. BECK, "The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor", *European Law Journal*, Vol. 17(4), Oxford University Press, July 2011, pp. 470 and 471.

[79] S. DOUGLAS-SCOTT, "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review*, Vol. 11(4), Oxford University Press, 2011, pp. 650 to 653.

[80] *Advocaten voor de* Wereld, para. 44; Judgment of 17 July 2008, *Kozlowski*, C-66/08, EU:C:2008:437; Judgment of 12 August 2008, *Santesteban Goicoechea*, C-296/08 PPU, EU:C:2008:457; Judgment of 1 December 2008, *Leymann and Pustovarov*, C-388/08, EU:C:2008:669. Eurojust, Case Law by the Court of Justice of the European Union on the European Arrest Warrant, October 2018, pp. 5 and 7.

[81] *Advocaten voor de Wereld*, paras. 45 *jo*. 46: "*(…) the Union is founded on the principle of the rule of law and it respects fundamental rights, as guaranteedby the European Convention for the Protection of Human Rights and Fundamental Freedoms (…) and as they result from the constitutional provisions common to the Member States, as general principles of Community law. It is common ground that those principles include the principle of the legality of criminal offences and penalties and the principle of equality and non-discrimination, which are also reaffirmed respectively in Articles 49, 20 and 21 of the Charter of Fundamental Rights of the European Union*".

The remaining case law on the EAW, which was decided after the CFR gained the legally binding strength of the treaties, shows a clear shift from the use of the ECHR and general principles of EU law to provisions of the CFR in matters concerning fundamental rights.[82] Nevertheless, on the basis of Article 52(3) and (4) CFR, the ECHR and the common constitutional traditions of the Member States continue to constitute a source of inspiration for the CJEU in said matters.

*b – Articles 51, 52 and 53 of the CFR: The "*Horizontal*" Clauses*

In its Chapter VII, the CFR sets out a number of general clauses regarding not only its material and "*personal*" scope of application, but also the standard of protection it affords.[83] Among these, Articles 51, 52 and 53 CFR, often referred to as the "*horizontal clauses*" bear the most relevance for the current analysis.[84]

Article 51(1) CFR determines the Charter's material and "*personal*" scope of application. Besides applying to EU institutions, the CFR also applies to Member States, albeit only when they are implementing EU law.[85] In other words, the CFR is not aimed at creating "*freestanding*" fundamental rights, rather it requires that Member States respect the provisions of the CFR and the case law of the CJEU when they act in the scope of EU law.[86] The FDEAW is a form of secondary EU legislation which must be implemented into national legislation.[87] As such, when implementing the provisions set out in the FDEAW, Member States must have regard to the fundamental rights encompassed in the CFR and the case law of the CJEU.[88]

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[82] The *Radu*, *Melloni*, *Aranyosi and Căldăraru* and *LM* make no mention of the constitutional traditions. As for the ECHR, the CJEU refers to it in conjunction with the CFR.
[83] P. CRAIG and G. DE BÚRCA, *op. cit.*, p. 397.
[84] P. CRAIG and G. DE BÚRCA, *op. cit.*, pp. 397 to 400
[85] Article 51(1) CFR, "*The provisoins of this Charter are addressed to (...) Member States only when they are implementing EU law*"; A. WARD, "Article 51 – Field of Application", *The EU Charter of Fundamental Rights – A Commentary*, S. PEERS, T. HERVEY, J. KENNER and A. WARD (eds.), Hart Publishing, 2014, p. 1415 and 1433.
[86] Judgment of 13 July 1989, *Wachauf*, 5/88, EU:C:1989:321, para. 19 (hereinafter *Wachauf*); *Åkerberg* para. 20; S. DOUGLAS-SCOTT, "The European Union and Human Rights after the Treaty of Lisbon", *ibid.*, pp. 652 and 653; S. GREE, J. GERARDS and R. SLOWE, *Human Rights in the Council of Europe and the European Union – Achievements, Trends and Challenges*, Cambridge University Press, 29 March 2018, pp. 300 to 307.
[87] M. J. BORGERS, "Implementing Framework Decisions", *Common Market Law Review*, Vol. 44(5), Kluwer Law International, 2014, p. 1361 to 1386.
[88] F. FONTANELLI, "The Court Goes 'All-in'", *The ECJ Under Siege – New Constitutional Challenges for the ECJ*, G. MARTINICO and F. FONTANELLI (eds.), The Icfai University Press, 2009, pp. 34 to 39.

Article 52(3) CFR was already discussed in Point B, on account of the bridge it forms between the ECHR and the CFR.[89] Article 52(1) CFR addresses the issue of potential derogations to the rights enshrined in the Charter.[90] It sets out three requirements for the application of said limitations, similar to those of legality, legitimacy and proportionality of the ECtHR's "*three-part*" test.[91] First, the limitations on the relevant rights must be provided for by law.[92] Second, they must be justified by a legitimate aim, namely one of the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.[93] Last but not least, a *general* proportionality test must be applied in order to determine the balance that must be afforded between the right in question and its limitation.[94]

In the context of the FDEAW, the question of fundamental rights limitations is particular. In essence, an EAW constitutes a limitation to an individual's right to liberty for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order and must therefore meet the requirements of legality, legitimacy and proportionality mentioned above.[95] To begin with, the legality of an EAW requires that it be issued for an offence that is provided by law.[96] Next, an EAW may only be issued for the legitimate purposes stated in Article 1(1) FDEAW,

[89] See Point B, b, "*Article 52(3) of the CFR"*.
[90] P. CRAIG and G. DE BÚRCA, *op. cit.*, p. 397.
[91] S. PEERS and S. PRECHAL, "Article 52 – Scope and Interpretation of Rights and Principles", *op. cit*., pp. 1468 to 1469; J. GERARDS, "How to improve the necessity test of the European Court of Human Rights", *International Journal of Constitutional Law*, Vol. 11(2), 2013, Oxford University Press, pp. 466 and 467. The CJEU's reliance on the ECHR before the adoption of the CFR, as mentioned in Point B, explains why these tests are so similar.
[92] *Ibid*.
[93] *Ibid*.
[94] *Ibid*. The "*general*" proportionality test consists of three "*sub-tests*". These are: (1) the obligation to respect the essence of the right, (2) the *sensu stricto* proportionality test and (3) the requirement of necessity.
[95] Article 1(1) FDEAW, "*The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.*"; R. BALL, *The Legitimacy of the European Union through Legal Rationality – Free Movement of Third Country Nationals*, Routledge, 15 October 2013, pp. 253 and 254; L. MANCANO, "Mutual recognition in criminal matters, deprivation of liberty and the principle of proportionality", *Maastricht Journal of European and Comparative Law*, Vol. 25(6), 2019, pp. 718 to 732.
[96] L. MARIN, "Effective and Legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant", *New Journal of European Criminal Law*, Vol. 5(3), 2014, pp. 333 and 334.

namely conducting a criminal prosecution or executing a custodial sentence or detention order.[97] Finally, it must always be proportionate to its objectives.[98]

Nevertheless, the aforementioned must be distinguished from the current analysis, which focuses on the rights to a fair trial and the right to not be subjected to torture and inhuman or degrading treatment.[99] In the *Aranyosi and Căldăraru* and *LM* judgments, the CJEU ruled on whether potential violations to said rights can, under certain circumstances, constitute exceptions to the execution of an EAW.[100] In other words, it didn't delve into whether the relevant rights are subject to limitations by an EAW, rather it ruled on whether *their* protection can justify limitations to the effective judicial cooperation in criminal matters based on the principles of mutual recognition and mutual trust.[101] Thus, while Article 52(3) CFR must be taken into consideration, Article 52(1) CFR bears relatively little importance for the matter at hand.

The third and final provision is Article 53 CFR, which sets out the standard of protection for the rights enshrined in the Charter. It states that no interpretation of the CFR can be detrimental to the current level of protection afforded to said rights by national, supranational and international law, in their respective fields of application.[102] The provision has nevertheless been the subject of heated discussion in situations falling under the scope of both national and EU law, especially when the

[97] Article 1(1) FDEAW; R. BALL, *op. cit*., pp. 253 and 254.
[98] *Handbook on the EAW*, p. 19. Among other things, the issuing judicial authority must take into consideration how serious the offense is, to what degree it is generally punished, the likelihood for the individual to be detained, the interests of the victims and whether *less coercive cooperative measures* exist in order to attain a similar or identical goal.
[99] M. NOWAK and A. CHARBORD, "Article 4 – Prohibition of Torture and Inhuman or Degrading Treatment or Punishment", *The EU Charter of Fundamental Rights – A Commentary*, S. PEERS, T. HERVEY, J. KENNER and A. WARD (eds.), Hart Publishing, 2014, pp. 61, 65 and 66; N. MAVRONICOLA, "Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying and Absolute Right in a Penal Context", *Human Rights Law Review*, Vol. 15(4), Oxford University Press, December 2015, pp. 721 to 723. Article 3 ECHR, which corresponds to Article 4 CFR on th basis of Article 52(3) CFR, is *absolute* and can therefore never be limited, rendering the application of the three-part test to it void.
[100] *Aranyosi and Căldăraru*, para. 104; *LM*, para 79.
[101] *Aranyosi and Căldăraru*, para. 104; *LM*, para 79.
[102] Article 53 CFR, "*Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions*."; B. DE WITTE, "Article 53 – Level of Protection", *The EU Charter of Fundamental Rights – A Commentary*, S. PEERS, T. HERVEY, J. KENNER and A. WARD, (eds.), Hart Publishing, 2014, p. 1523.

former granted a higher degree of protection to a given fundamental right than the Charter.[103]

This was particularly the case in the *Melloni* judgment, where the Court was asked *inter alia* whether an executing Member State, having regard to its more protective national law on trials *in abstentia*, could avail itself of Article 53 CFR in order to make the surrender of a person convicted under such circumstances conditional upon the conviction being open to review in the issuing Member State, despite such a possibility not being covered by the FDEAW, in order to ensure the protection of the right to a fair trial.[104]

In principle, Article 53 CFR does not impede national Courts from applying a national standard of fundamental rights protection when said standard is higher than the one provided by the Charter.[105] Nevertheless, this is only allowed insofar the unity, primacy and effectiveness of EU law is not undermined.[106] *In casu*, the CJEU stated that answering the question in the positive would compromise the efficacy of the FDEAW and undermine the principles of mutual trust and recognition on which it is based by casting doubt on the uniformity of the standard of fundamental rights protection afforded by said framework decision.[107] As such, and to the contrary of what was stated above with respect to the *Aranyosi and Căldăraru* and *LM* judgments, the Court's interpretation of Article 53 CFR in *Melloni* demonstrates a prioritization of effective judicial cooperation at the expense of fundamental rights.

c – Relevance

The right to not be subjected to torture or inhuman or degrading treatment and the right to a fair trial are respectively enshrined in Article 4 CFR and Articles 47 and 48

[103] B. DE WITTE, *ibid*., p. 1523.
[104] *Melloni*, para. 55.
[105] *Internationale Handelgesellschaft*, para. 3; *Melloni*, paras. 59 and 60; B. DE WITTE, *op. cit*., p. 1523.
[106] *Ibid*.; A. WILLEMS, "The Court of Justice of the European Union's Mutual trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal", *op. cit.*, pp. 484 to 486.
[107] *Melloni*, paras. 59 to 63; B. DE WITTE, *ibid*., p. 1523 and 1524; A. WILLEMS, "The Court of Justice of the European Union's Mutual trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal", *op. cit.*, pp. 484 to 486.

CFR.[108] Article 51(1) CFR sets out that the provisions of the Charter apply to Member States when they implement EU law, as confirmed by the CJEU in the *Åkerberg Fransson* judgment.[109] Applied to the FDEAW, which consists of secondary EU law that must be implemented into national law, this premise entails that Member States are obliged to respect the relevant fundamental rights and CJEU case law when doing so.[110]

The FDEAW itself reiterates the importance of fundamental rights in its Article 1(3) and Recitals 12 and 13. *Inter alia*, these provisions state not only that the framework decision itself respects the fundamental rights value encompassed in Article 6 TEU and reflected in the Charter, but also that it does not modify the Member States' obligations to observe said rights when implementing EU law.[111] Yet, it must be mentioned that the FDEAW's main objective is the promotion of effective judicial cooperation based on the principles of mutual trust and, by extension, the principle of mutual recognition, which in essence requires Member States to consider judicial decisions emanating from another Member State as "*one of their own*".[112] In that vein, Article 1(2) FDEAW, read in conjunction with Recital 6 of the same Framework Decision, sets out a general duty for a Member State to carry out the execution of EAWs, which is only limited by the mandatory and optional grounds for refusal provided by Articles 3 to 4a FDEAW.[113] Fundamental rights are not included in the latter, which bears witness to the "*effective judicial cooperation*"-"*fundamental rights protection*" dichotomy that surrounds the FDEAW.

The aforementioned is further defined by the CJEU's case law regarding situations where it is asked to interpret the CFR relative to the FDEAW and vice-versa. A clear

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[108] V. MITSILEGAS, "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU", *Common Law Market Review*, Vol. 43, Kluwer Law International, 2006, p. 1280. These rights are particularly at risk in criminal matters.
[109] *Wachauf*, para. 19; *Åkerberg Fransson*, paras. 18 to 21. A. WARD, "Article 51 – Field of Application", *op. cit*., pp. 1415 and 1433; S. DOUGLAS-SCOTT, "The European Union and Human Rights after the Treaty of Lisbon", *op. cit*., pp. 652 and 653; S. GREE, J. GERARDS and R. SLOWE, *Human Rights in the Council of Europe and the European Union – Achievements, Trends and Challenges*, *op. cit*., pp. 300 to 307.
[110] M. J. BORGERS, "Implementing Framework Decisions", *op. cit.*, pp. 1361 to 1386; F. FONTANELLI, "The Court Goes 'All-in', *op. cit.*, pp. 34 to 39.
[111] *Aranyosi and Căldăraru*, para. 84; *Handbook on the EAW*, p. 46.
[112] A. SANGER, "Force of Circumstance: The European Arrest Warrant and Human Rights", *op. cit*., p. 19.
[113] *Handbook on the EAW*, p. 39.

example of this can be drawn from the comparison of the *Melloni* and *Aranyosi and Căldăraru* judgments, in which the Court respectively sought to prioritize effective judicial cooperation and fundamental rights protection by relying on the "*horizontal clauses*" of the Charter.[114] In *Melloni*, the CJEU provided a *narrow* interpretation of Article 53 CFR and confirmed that the effectiveness of EU law, *in casu* the FDEAW, trumped the application of a higher national standard of fundamental rights protection, as it would affect the unity, primacy and effectiveness of the relevant framework decision.[115] In *Aranyosi and Căldăraru*, on the other hand, the Court partially relied on Article 51(1) CFR to reiterate the importance for *both* the executing and issuing Member State to observe the Charter's provisions when implementing the FDEAW.[116] By doing so, it effectively set the basis to construe a new (exceptional) ground for the refusal of EAWs, namely the protection of the fundamental right encompassed in Article 4 CFR.[117]

To conclude, it is evident that, since its adoption in 2000 and its rise to the rank of EU primary law in 2009, the CFR has become a tool of increasing importance for the CJEU. In the 18 years following the adoption of the FDEAW, the Court has provided both narrow and extensive interpretations of the different horizontal provisions of the Charter, which coincide in part with its shift from a prioritization of judicial cooperation in criminal matters based on mutual trust and mutual recognition, on the one hand, to a more protective stance of the fundamental rights enshrined in Articles 4, 47 and 48 CFR. In other words, the Charter constitutes a source which transcends

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[114] *Aranyosi and Căldăraru*, para. 84; *Melloni*, paras. 55 to 64. The reliance on the "*horizontal clauses*" does not exclude the fact that Articles 4, 47 and 48 CFR, which respectively protect the right to not be subjected to torture and inhuman or degrading treatment and the right to a fair trial, were the bases upon which the CJEU built its argumentation.

[115] *Melloni*, para. 63; B. DE WITTE, "Article 53 – Level of Protection", *op. cit*., pp. 1523 and 1524; A. WILLEM, "The Court of Justice of the European Union's Mutual trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal", *op. cit.*, pp. 484 to 486; F. FERRARO and J. CARMONA, "Fundamental Rights in the European Union – The Role of the Charter after the Lisbon Treaty", *op. cit*., pp. 12 and 13.

[116] *Aranyosi and Căldăraru*, para. 84, "*(...) compliance with Article 4 of the Charter (...) is binding, as is stated in Article 51(1) of the Charter, on the Member States and (...) on their courts, where they are implementing EU law, which is the case when the issuing judicial authority and the executing judicial authority are applying the provisions of national law adopted to transpose the Framework Decision*". A. WARD, "Article 51 – Field of Application", *op. cit*., p. 1415; S. DOUGLAS-SCOTT, "The European Union and Human Rights after the Treaty of Lisbon", *op. cit*., pp. 652 and 653.

[117] *Aranyosi and Căldăraru*, para. 104; K. BOVEND'EERDT, "Case Note – The Joined Cases *Aranyosi and Căldăraru*: A New Limit to the Mutual trust Presumption in the Area of Freedom, Security and Justice?", *Utrecht Journal of International and European Law*, Ubiquity Press, 2016, pp. 117 to 119.

both sides of the "*effective judicial cooperation*" - "*fundamental rights protection*" dichotomy surrounding the FDEAW.

Section III – The Relevant Fundamental Rights

The following Points delve into the fundamental rights that are relevant in the current analysis. They specify how they are interpreted and whether or not they can be limited. Point A examines the right to liberty briefly. The right to a fair trial is analyzed in point B. Point C defines what falls under the right to not be subjected to torture or inhuman and degrading treatment.

A – The right to liberty

a – Definition

The right to liberty is enshrined in Article 6 CFR, which corresponds, both in meaning and in scope, to Article 5 ECHR on the basis of Article 52(3) CFR.[118] Article 5 ECHR sets out, *inter alia*, that no one shall be deprived of their liberty, save in a number of exhaustively listed situations.[119] The lawful arrest of an individual for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order, as mentioned in Article 1(1) FDEAW, falls under Article 5(1)(b) and (c) ECHR.[120] Therefore, as long as an EAW is issued for the aforementioned purposes and on the basis of an offense that is legally defined, it meets the requirements of lawfulness and legitimacy required for deprivation of liberty.[121]

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[118] *Explanations to the CFR, op. cit.*, p. 33.
[119] D. WILSCHER, "Article 6 – Right to Liberty and Security", *The EU Charter of Fundamental Rights – A Commentary*, S. PEERS, T. HERVEY, J. KENNER and A. WARD, (eds.), Hart Publishing, 2014, p. 121; L. MARIN, "Effective and Legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant", *op. cit.*, pp. 333 and 334. This is part of the "*three-part*" limitations test of legality, legitimacy and proportionality mentioned above.
[120] D. WILSCHER, *ibid.*, p. 121; L. MANCANO, "Mutual Recognition in Criminal Matters, Deprivation of Liberty and the Principle of Proportionality", *op. cit.*, pp. 718 to 732. Article 5(1)(b) and (c) respectively set out "*the lawful arrest or detention of a person for non-compliance with the lawful order of acourt or in order to secure the fulfilment of any obligation prescribed by law*; *the lawful arrest or detention of a person effected for the purpose of bringing him beforethe competent legal authority of reasonable suspicion of having committed and offenceor when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so*"
[121] L. MANCANO, *ibid.*, pp. 718 to 732.

b – Relevance

Among the three requirements for the limitation of the right to liberty, it is the proportionality of said limitation that has been the subject of debate, in particular in the context of the FDEAW. When issuing an EAW, which presupposes a limitation to the right to liberty, the competent judicial authority must take into consideration, *inter alia*, how serious the offense is, to what degree it is generally punished, the likelihood for the individual to be detained, the interests of the victims and whether *less coercive cooperative measures* exist in order to attain a similar or identical goal.[122] In the event that, based on the foregoing, the decision to issue an EAW is deemed as proportionate, said proportionality must be maintained throughout the whole procedure.[123] A clear example of potential issues that arise with respect to the proportionality of the deprivation of liberty can be derived from the analysis of the *Lanigan* judgment, concerning the expiry of the 60-day time limit for the decision to execute an EAW.[124]

In *Lanigan*, the individual concerned had opposed his surrender after being arrested on the basis of an EAW issued by a British Court.[125] This opposition eventually led to the expiry of the 60-day time limit under which the competent Irish Court should have decided on the execution of the EAW.[126] The latter therefore asked the CJEU whether the EAW was still executable and, if so, whether Mr. *Lanigan* could be detained with that objective in mind.[127] The Court answered the first question in the positive, stating that the expiry of the 60-day time limit is not mentioned as one of the grounds for non-execution of an EAW encompassed in Articles 3 to 4a, FDEAW.[128] As for the second question, the CJEU referred to the case law of the ECtHR on the right to liberty to state that, in such a situation, the individual concerned may only be remanded in custody insofar the duration thereof is not excessive (i.e. proportionate),

[122] *Handbook on the EAW*, p. 19; L. MANCANO, "Judicial Harmonisation through Autonomous Concepts of European Union Law. The Example of the European Arrest Warrant Framework Decision", *European Law Review*, Vol. 43(1), Sweet & Maxwell, 2018, pp. 83 and 84.
[123] *Handbook on the EAW*, p. 19. An EAW should *always* be proportional to its aim.
[124] A. P. VAN DER MEI (n3), pp. 887 to 889; Judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474 (hereinafter *Lanigan*).
[125] *Lanigan*, paras. 14 to 19.
[126] *Ibid.*
[127] *Lanigan*, para. 20.
[128] *Lanigan*, paras. 36 to 42.

having regard to factors such as the risk that he or she will abscond or the duration during which he or she has already been detained.[129]

The aforementioned serves to provide an insight on the potential issues that can arise with regards to the right to liberty in the context of the FDEAW. However, as mentioned in the former Section, the right to liberty must be distinguished from the right to a fair trial and the right to not be subjected to torture or inhuman and degrading treatment.[130] Indeed, whereas the very essence of the EAW is based on the lawful, legitimate and proportional limitation of an individual's right to liberty, it is in no way aimed at limiting the latter's rights as encompassed by Articles 4, 47 and 48 CFR.

B – The Right to not be Subjected to Torture or Inhuman or Degrading Treatment

a – Definition

The right to not be subjected to torture or inhuman or degrading treatment or punishment is encompassed in Article 4 CFR and Article 3 ECHR. On the basis of Article 52(3) CFR and the explanations thereof, these provisions correspond both in meaning and in scope.[131] As such, the case law of the ECtHR is relevant to determine not only how the right in question is defined, but also what sort of practices it encompasses.[132]

In order for a practice to be considered as inhuman or degrading in the *general* sense of the term, it must meet a minimum level of severity.[133] To assess whether this threshold is met, the Court can take a number of different criteria into consideration,

[129] A. P. VAN DER MEI (n3), pp. 888 and 889; *Lanigan*, paras 57 to 60; ECtHR Judgment of 22 March 1995, *Quinn v. France*, no. 18580/91, para. 42; ECtHR Judgment of 24 March 2015, *Gallardo Sanchez v. Italy*, no. 11620/07, para. 40.
[130] See Section II, C, b, "*Articles 51, 52 and 53 of the CFR: The "*Horizontal*" Clauses*".
[131] *Explanations to the CFR*, *op. cit*., p.33.
[132] *Ibid*.
[133] ECtHR Judgment of 18 January 1978, *Ireland v. UK*, no. 5310/71, para. 162 (hereinafter *Ireland v. UK*); D. LONG, "Guide to Jurisprudence on torture and Ill-Treatment: Article 3 of the European Convention for the Protection of Human Rights", *Association for the Prevention of Torture*, Vol. 1, 2002, pp. 13 to 20;

among which the duration of the treatment, how psychologically or physically trying it is and against whom it is directed.[134] Whether the practice must then be categorized as torture or inhuman or degrading treatment in the *strict* sense depends on by how much it exceeds the aforementioned threshold.[135]

b – Relevance

Over three decades ago, the ECtHR established its case law on extraditions in general in its *Soering* and *Cruz Varas* judgments.[136] In *Soering*, the Court stated that the UK would breach Article 3 ECHR if it carried out the execution of an extradition application made by the USA and directed against a German national residing in the UK.[137] The criteria upon which the Court based its decision was the presence of the death penalty in the USA, which it considered constituted a "*real risk*" to the German national's rights as protected by Article 3 ECHR.[138]

The *Cruz Varas* case allowed the ECtHR to further determine how the existence of a "*real risk*" to the relevant rights was to be established. The situation at hand concerned two Chilean individuals who alleged that their expulsion[139] to Chile could not take place on account of them having been previously been tortured there. According to them, this latter fact sufficed to prove the existence of real risk of treatment contrary to Article 3 ECHR.[140] The Court ruled in the negative, stating that it required "*substantial grounds*" to believe that such a risk existed.[141] Moreover, it specified that these grounds were to be assessed mainly on the basis of information

[134] *Ireland v. UK*, para. 162.
[135] D. LONG (n133), pp. 13 to 20.
[136] ECtHR Judgment of 7 July 1989, *Soering v. UK*, no. 14038/88 (hereinafter *Soering*); ECtHR Judgment of 7 June 1990, *Cruz Varas and others v. Sweden*, no. 15576/89 (hereinafter *Cruz Varas*); M. K. ADDO and N. GRIEF, "Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?", *European Journal of International Law*, Vol. 9(3), Oxford University Press, 1998, p. 511.
[137] *Soering*, para. 11.
[138] *Soering*, para. 92.
[139] *Cruz Varas*, paras. 20 to 75; D. LONG (n133), pp. 20 to 21. The *Cruz Varas* case was about the expulsion of political asylum seekers, not extradition *per se*. It is nevertheless important in casu as the ECtHR defined what constitutes a "*real risk*" of a breach of Article 3 ECHR.
[140] *Cruz Varas*, para. 77; D. LONG, *op. cit.*, pp. 20 to 21.
[141] *Cruz Varas*, paras. 80 and 81.

which was known or should have been known when the expulsion was under scrutiny.[142]

The CJEU's case law regarding the right to not be subjected to torture and inhuman or degrading treatment in the context of the EAW mechanism is clearly inspired by the ECtHR's jurisprudence.[143] This is the case in *Aranyosi and Căldăraru*, where the Court accepted that systemic or generalized deficiencies in the issuing Member State, posing both a general and specific risk for the concerned individual's rights in Article 4 CFR, could constitute a "*new*" ground for refusal of an EAW.[144] In doing so, the Court not only referred to the ECtHR's "*pilot cases*" regarding Hungary and Romania as evidence for the existence of deficiencies in both Member States, but also set out a number of minimal requirements for the application of the "*new*" ground for refusal very similar to those of the ECtHR.[145]

C – The Right to a Fair Trial

a – Definition

The right to a fair trial is enshrined in Article 6 ECHR and Articles 47 and 48 CFR.[146] On the basis of Article 52(3) CFR and the explanations thereof, these rights correspond.[147] Article 47(2) and (3) CFR corresponds to Article 6(1) ECHR and Article 48 CFR corresponds to Article 6(2) and (3) ECHR.[148] Nevertheless, only the latter correspond fully in meaning and in scope, as the limitation and determination of

[142] *Cruz Varas*, paras. 82 and following.
[143] *N.S.*, paras. 106 and 112; *Aranyosi and Căldăraru*, paras. 89, 93, 94 and 104; *LM*, paras. 60, 61, 68, 74, 75 and 79.
[144] *Aranyosi and Căldăraru*, para. 104; A. WILLEMS (n4), pp. 488 and 489; O. MADER (n22), pp. 149 and 150.
[145] *Aranyosi and Căldăraru*, paras. 43, 60 and 104.
[146] A. WARD, "Article 47 – Right to an Effective Remedy and to a Fair Trial", *The EU Charter of Fundamental Rights – A Commentary*, S. PEERS, T. HERVEY, J. KENNER and A. WARD, (eds.), Hart Publishing, 2014, pp. 1197 and 1198; D. SAYERS, "Article 48 – Presumption of Innocence and Right of Defence (Criminal Law)", *The EU Charter of Fundamental Rights – A Commentary*, S. PEERS, T. HERVEY, J. KENNER and A. WARD, (eds.), Hart Publishing, 2014, pp. 1303, 1306 and 1307.
[147] See Section II, B, b and c; *Explanations to the CFR*, pp. 33 and 34.
[148] *Ibid.*

civil rights and obligations or criminal charges does not apply with regards to EU law and its implementation.[149]

The right to an effective remedy, which is enshrined in Article 47(1) CFR, is based on Article 13 ECHR.[150] However, by guaranteeing the right to an effective remedy *before a court*, the Charter provision provides a more extensive protection than that of the Convention.[151] Moreover, the CJEU considered the relevant right as a general principle of EU law, rendering it applicable to both EU institutions and Member States when implementing EU law, which is the case in the context of the FDEAW.[152] For the sake of simplicity, however, both aforementioned rights are considered as falling under the right to a fair trial *sensu lato*, unless otherwise required.

The right to a fair trial *sensu lato* is aimed at providing both *institutional* and *procedural* guarantees for an effective remedy.[153] On the institutional level, this entails that the concerned individual must be tried before an independent and impartial Court or Tribunal.[154] On the procedural level, he or she can expect, among other things, to be presumed innocent, to be tried within a reasonable time and to not be subjected to legal "*uncertainty*".[155]

b – Relevance

Recital 12 FDEAW sets out that the framework decision respects fundamental rights and observes the principles recognized by Article 6 TEU and reflected in the Charter, in particular Chapter VI thereof, which encompasses Articles 47 and 48 CFR. These rights are closely linked to Article 2 TEU, not only because they fall under the

[149] *Ibid.*; A. WARD (n146), pp. 1197 and 1198. In other words, the Charter provides a higher degree of protection than the Convention, as the right to a fair hearing is not solely limited to civil rights.
[150] *Ibid*.
[151] *Ibid*.
[152] Judgment of May 1986, *Johnston*, 222/84, EU:C:1986:206, para. 19, "*It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the directive provides.*"; A. WARD (n146), pp. 1197 and 1198.
[153] Council of Europe – European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (criminal limb)*, 31 December 2019, pp. 17 to 94 (hereinafter Guide on Article 6 ECHR).
[154] *Ibid*., pp. 17 to 27.
[155] *Ibid*., pp. 27 to 94.

fundamental rights value protected by the latter, but also because they constitute one of the important bases upon which the value of the rule of law is built.[156]

Indeed, Article 2 TEU states, among other things, that the EU is founded on the values of fundamental rights and the rule of law.[157] In its *Les Verts* judgment, the CJEU recognized that the concept of rule of law entails that there must exist a possibility to review the actions of both the Member States and the EU institutions in order to determine whether they comply with EU law.[158] On the *procedural* part of the equation, this means that Member States can be challenged when they fail to meet the Article 47 CFR requirements of providing a system of legal remedies and procedures in general.[159] On the *substantive* part of the equation, the lack of such a system can eventually lead to unchecked violations of fundamental rights or, at the very least, puts the latter at risk.[160]

In other words, the right to a fair trial encompassed in Articles 47 and 48 CFR, combined with the value of the rule of law encompassed in Article 2 TEU, constitutes the *gateway* to the protection of all other fundamental rights.[161] For example, in the event that an individual were to allege a violation of his or her right to not be subjected to torture or inhuman or degrading treatment, he or she would first require an access to an independent and impartial court or tribunal before being able to assert the relevant rights. Thus, if the right to a fair trial is not upheld, other (potential) fundamental rights violations are more likely to go unnoticed.

Section I discussed the relationship between Article 2 TEU and Article 7 TEU. On the basis of the latter, all Member States must uphold the values of democracy, fundamental rights and the rule of law.[162] In the event of a clear risk of a serious breach of said values, the Commission, Parliament or other Member States can issue a

[156] European Parliament (n20), p. 33; European Parliament Research Service (n11), pp. 6 and 7; Editorial Comments (n13), p. 620.
[157] C. HILLION (n17), pp. 1 and 9; O. MADER (n22), pp. 136 to 138.
[158] *Les Verts*, para. 23; O. MADER (n22), pp. 137 and 138; P. CRAIG and G. DE BÚRCA (n10), pp. 390 and 391.
[159] M. KLAMERT and D. KOCHENOV, "Article 2 TEU", *The Treaties and the Charter of Fundamental Rights – A Commentary*, M. KELLERBAUER, M. KLAMERT and J. TOMPKIN (eds.), Oxford University Press, 2019, pp. 8 to 9; *Commission Communication of 2014*, p. 4.
[160] *Ibid*.
[161] *Ibid*.; D. KOCHENOV (n30), p. 12.
[162] Editorial Comments (n13), p. 620.

reasoned proposal against the concerned Member State.[163] Recently, both the Commission and the Parliament activated the mechanism of Article 7(1) TEU against Poland and Hungary respectively, asking the Council to review whether a clear risk of a serious breach of the EU founding values existed in these Member States.[164] Though these reasoned proposals demonstrate a concern of a more *general* nature, they also present consequences in the context of the FDEAW, especially with regards to Poland.

In the *LM* judgment, the CJEU built upon its *Aranyosi and Căldăraru* judgment to include the right to a fair trial as a "*new*" ground for refusal of an EAW.[165] Indeed, where systemic or generalized deficiencies in the issuing Member State (*in casu* Poland) engender a real, general *and* individualized risk to an individual's right to a fair trial, the executing Member State may refuse the execution of the EAW.[166] In order to justify this, the CJEU first had regard to the Commission's reasoned proposal, which addressed the lack of independent and legitimate constitutional review and the threats to the independence of the ordinary judiciary in Poland.[167] It then referred to its own case law regarding effective judicial protection in order to confirm the criteria by which the judiciary must abide if it is to be independent and impartial.[168] Combined, the *Aranyosi and Căldăraru* and *LM* judgments bear witness to the CJEU's more recent shift towards the prioritization of the protection of fundamental rights.[169]

Chapter II – The Principles of Mutual trust and Mutual Recognition

[163] C. HILLION (n17), pp. 4 to 5; D. KOCHENOV (n17), pp. 7 to 11.
[164] European Parliament, *Press Release – Rule of Law in Poland and Hungary has Worsened*, 16 January 2020, https://www.europarl.europa.eu/news/en/press-room/20200109IPR69907/rule-of-law-in-poland-and-hungary-has-worsened, (accessed on Monday 4 March 2020). In December 2017, the Commission raised concerns about threats to the independence of the judiciary and the rule of law in Poland. In September 2018, the Parliament raised concerns, *inter alia*, about judicial independence in Hungary.
[165] *LM*, paras. 59, 68 and 79.
[166] *LM*, para. 68.
[167] *LM*, paras. 18 to 22 and 79.
[168] *LM*, paras. 62 to 68.
[169] *Aranyosi and Căldăraru*, para. 104; *LM*, para. 79

The following Sections examine the main aspects of the effective judicial cooperation side of the equation. Section I delves into the principle of mutual trust. It starts by defining the latter, before going over its application and finishing with an examination of its relevance. Section II provides a similarly structured analysis of the principle of mutual recognition.

Section I – The Principle of Mutual Trust

A – Definition

In essence, the principle of mutual trust is based on the presumption that all Member States provide sufficient and equivalent protection to the values encompassed in Article 2 TEU, among which the respect of fundamental rights.[170] As mentioned in Chapter I, upholding the aforementioned values is not only a prerequisite for any State candidate to the EU on the basis of the Copenhagen criteria, but doing so remains an obligation for any Member States even after accession.[171] It is on this basis that it can be assumed that each Member State adheres to the values enshrined in Article 2 TEU, as a result of which it can trust that all other Member States do the same.[172]

Though the principle of mutual trust is not explicitly mentioned in the Treaties, it has nevertheless been recognized as one of the main structural principles of the EU and, more specifically, of the AFSJ.[173] Indeed, in its *N.S.*, *Radu* and *Melloni* judgments, the CJEU confirmed the importance of the principle of mutual trust with regards to

[170] T. WISCHMEYER (n57), pp. 342 and 343.
[171] Articles 2 *jo*. 7 and 49 TEU; C. HILLION (n15), p. 2; R. JANSE (n15), pp. 44 to 46; Editorial Comments (n13), p. 620.
[172] Articles 2 *jo*. 7 and 49 TEU; H. BATTJES, E. BROUWER, P. DE MORREE and J. OUWERKERK, *The Principle of Mutual Trust in European Asylum, Migration, and Criminal law – Reconciling Trust and Fundamental Rights,* FORUM – Institute for Multicultural Affairs, December 2011, pp. 38 to 39; T. WISCHMEYER (n57), pp. 342 and 343.
[173] Opinion 2/13, para. 191; M. CREMONA, "Structural Principles and their Role in EU External Relations Law", *Structural Principles in EU External Relations Law*, M. CREMONA (eds.), Hart Publishing, 2018, pp. 16 to 18. Structural principles are aimed at helping with the construction of a certain internal or external aspect of the EU, in this case the AFSJ.

the European asylum system and effective judicial cooperation in criminal matters.[174] It later reaffirmed its position on the matter in Opinion 2/13.[175]

B – Application

It is in *N.S.* that the Court first recognized the principle of mutual trust as constituting the basis for the creation of the AFSJ.[176] It stated that the European asylum system, which under certain circumstances requires a Member State to transfer an asylum seeker to the Member State responsible for him or her, is intended to function with as little hindrance as possible.[177] In doing so, the common asylum system calls for a certain degree of mutual confidence among Member States, itself based on the presumption that each and every one of them complies with EU law and, in particular, with fundamental rights.[178]

Based on the foregoing, the Court put forth that the principle of mutual trust could only be derogated from in very exceptional circumstances. This is the case, for instance, where a Member State cannot be unaware that the Member State responsible presents systemic deficiencies with respect to its asylum procedure that would put the asylum seeker's right to not be subjected to torture or inhuman or degrading treatment, encompassed in Article 4 CFR, at a real risk were he or she to be transferred to the latter.[179] By contrast, "*any infringement of fundamental rights*" or "*the slightest infringement*" of one of the three Directives aimed at providing minimal standards of protection to asylum seekers are insufficient to serve as a refusal ground for the transfer.[180] In other words, despite recognizing that the principle of mutual trust is not absolute, the requirements for the application of its exception are strict.

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[174] *N.S.*, paras. 78 to 83; *Radu*, para. 34; *Melloni*, paras. 37 and 63; S. PRECHAL (n1), p. 76.
[175] Opinion 2/13, paras. 191 and 192.
[176] *N.S.*, para. 83; S. PRECHAL (n1), pp. 76 and 77. The author, citing the Court, mentions that "*The raison d'être of the European Union and the creation of an area of freedom, security and justice (…) (are) based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights*".
[177] *N.S.*, paras. 79 to 85.
[178] *N.S.*, paras. 83 and 84.
[179] *N.S.*, para. 106; D. HALBERSTAM (n44), p. 127; E. BROUWER, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof", *Utrecht Law Review*, Vol. 9(1), Ubiquity Press, 2013, pp. 135 to 147.
[180] *N.S.*, paras. 81, 82 and 85; E. BROUWER (n179), pp. 135 to 147.

In the *Radu* and *Melloni* judgments, the Court adopted an even narrower position than the one above. Essentially, the cases respectively concerned the question of whether the protection of fundamental rights could, under certain circumstances, constitute either an exception to or a condition for the execution of an EAW.[181] In *Radu*, the Court refused to accept that a limitation to the principle of mutual trust be recognized on the basis of the protection of fundamental rights.[182] It argued that since the grounds for refusal of an EAW, which are exhaustively listed in Articles 3 to 4a FDEAW, do not explicitly encompass fundamental rights, the executing judicial authority was not entitled to refuse the execution of an EAW on the ground that the requested person's right to be heard, which falls under the right to a fair trial, had been violated in the issuing Member State.[183]

In *Melloni*, the Court followed its line of thought from *Radu* and refused to accept that the executing Member State be allowed to make the surrender of the requested individual, who had been tried *in abstentia*, conditional upon a retrial in the issuing Member State, as such a possibility was not encompassed in Articles 3 to 4a FDEAW.[184] More importantly, however, it added the first of two negative obligations of the principle of mutual trust by providing a narrow interpretation of Article 53 CFR.[185] According to the latter, the executing Member State, having regard to its own, higher national standard of fundamental rights protection, could not require of the issuing Member State that it guarantee a higher degree of fundamental rights protection than that of the CFR in its national law, as it would cast a doubt on the uniformity of the standard of protection of fundamental rights afforded by the framework decision, thereby undermining the principles of mutual trust and recognition upon which it is based.[186]

Finally, Opinion 2/13 condensed the aforementioned into the three main obligations that pertain to the principle of mutual trust. First, it reiterates the narrow interpretation

[181] *Radu*, para. 31; *Melloni*, para. 63; A. WILLEMS (n4), pp. 482 to 486; A. P. VAN DER MEI (n3), pp. 897 and 898.
[182] *Radu*, para. 43.
[183] *Radu*, para. 43; A. WILLEMS (n4), pp. 482 and 483.
[184] *Melloni*, para. 63; B. DE WITTE (n102), pp. 1523 and 1524; A. WILLEMS (n4), pp. 484 to 486.
[185] *Melloni*, para. 63; S. PRECHAL (n1), pp. 81 and 82; L. F.M. BESSELINK, "Analysis and Reflections – The Parameters of Constitutional Conflict after *Melloni*", European Law Review, Vol. 39(4), Sweet & Maxwell, 2014, pp. 538 and 539.
[186] *Ibid.*

of Article 53 that the Court adopted in *Melloni*, thereby confirming that higher national standards of fundamental rights protection can only be accepted in situations where the unity, primacy and effectiveness of EU law would *not* be affected.[187] Second, it refers to both *N.S.* and *Melloni* to reiterate that the principle of mutual trust, which is the basis upon which the AFSJ is built, requires of Member States that they presume all other Member States as providing sufficient and equivalent standards of fundamental rights protection.[188] Third, Opinion 2/13 adds a second negative obligation for Member States: in addition to the first negative obligation coined in *Melloni*, a Member State may also not verify whether another Member State has actually observed the fundamental rights guaranteed by the EU.[189] It must nevertheless be mentioned, with regards to the second and third obligations, that the Court recognizes that they must be upheld, save *in exceptional circumstances*.[190]

C – Relevance

The Court's approach regarding the principle of mutual trust has been widely criticized.[191] Already in *Radu*, advocate general Sharpston had urged the Court to apply its *N.S.* reasoning to the FDEAW and recognize that deficiencies in the issuing Member State could, if they put one's right to a fair trial at a real risk, limit the principle of mutual trust and warrant the non-execution of an EAW.[192] The CJEU refused to follow her opinion, and maintained its line of thought in *Melloni* and Opinion 2/13, where it essentially stated that the common values enshrined in Article 2 TEU implied *and* justified the existence of mutual trust among Member States.[193] Many authors considered that the aforementioned reasoning resulted in an obligation of "*blind trust*" with respect to effective judicial cooperation in criminal matters, as it created a presumption of compliance with fundamental rights that was virtually

[187] Melloni, paras. 37, 60 and 63; Opinion 2/13, paras. 188 and 192.
[188] Opinion 2/13, para. 191; T. WISCHMEYER (n57), pp. 354 to 360.
[189] Opinion 2/13, para. 192; S. PRECHAL (n1), pp. 81 and 82.
[190] *N.S.*, paras. 78 to 80, *Melloni*, paras. 37 and 63; Opinion 2/13, paras. 191 and 192; A. WILLEMS (n4), pp. 486 to 488; S. PRECHAL (n1), pp. 85 to 90.
[191] A. WILLEMS (n4), pp. 486 to 488; S. PEERS, "The EU's Accession to the ECHR: The Dream Becomes a Nightmare", *German Law Journal*, Vol. 16, pp. 219 to 222.
[192] Opinion of AG Sharpston in *Radu*, paras. 80 to 83.
[193] *Melloni*, para. 63; Opinion 2/13, para. 168; A. WILLEMS, *op. cit.*, pp. 486 to 488; S. PRECHAL (n1), 81 to 85.

irrebuttable.[194] In doing so, they argued that whereas the *N.S.* judgment had provided an evolution towards a less absolute interpretation of the principle of mutual trust in the European asylum prong of the AFSJ, the *Radu*, *Melloni* judgments and Opinion 2/13 had shown stagnation with respect to the other prong of the AFSJ.[195]

For the purpose of the current analysis, Opinion 2/13 must nevertheless be seen as a turning point in the CJEU's case law regarding the FDEAW.[196] On the one hand, and in line with the aforementioned, it is true that the Court set out three obligations for Member States that greatly reinforce the principle of mutual trust.[197] Indeed, Member States may not only *not* avail themselves of their higher national standards of fundamental rights protection to refuse the execution of an EAW, but they must also presume – which includes that they may not verify – that the issuing Member State presents sufficient and equivalent standards of protection with respect to EU law.[198] On the other hand, however, a closer reading of paragraph 191 of Opinion 2/13 shows a slight shift from the Court's absolute recognition of mutual trust with respect to judicial cooperation in criminal matters to the adoption of a more lenient stance, similar to the one it recognized for the European asylum system in *N.S.*[199] Indeed, the Court refers to both the *N.S.* and *Melloni* judgments to justify that the protection of fundamental rights may, in exceptional circumstances, justify a limitation to the principle of mutual trust.[200]

Now, although it had *explicitly* accepted a limitation to mutual trust in *N.S.*, the Court had done no such thing in its *Melloni* judgment.[201] In other words, the Court *implicitly*

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[194] K. LENAERTS, "La vie après l'avis: Exploring the principle of mutual (yet not blind) trust", *Common Market Law Review*, Vol. 54, Kluwer Law International, 2017, pp. 806; S. PEERS (n191), pp. 219 to 222; P. EECKHOUT, "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky", *Fordham International Law Journal*, Vol. 38(4), Fordham University School of Law, 2015, pp. 968 to 971. Lenaerts refers to the other two authors as providing a reading of Opinion 2/13 in which the CJEU granted greater importance to the principles of mutual trust and recognition than the protection of fundamental rights, before stating that Opinion 2/13 must not be read as such, as the Court's objective was not to confuse "*blind*" trust with mutual trust.
[195] N. CAMBIEN, "Mutual Recognition and Mutual Trust in the Internal Market", *European Papers*, Vol. 2(1), 2017, pp. 102 to 107; S. PEERS (n191), pp. 219 to 222; P. EECKHOUT (n194), pp. 968 to 971.
[196] K. LENAERTS (n194), p. 806; S. PEERS (n191), pp. 219 to 222, P. EECKHOUT, (n194), pp. 968 to 971.
[197] Opinion 2/13, paras. 188, 191 and 192; S. PRECHAL (n1), pp. 81 and 82.
[198] *Melloni*, paras. 37 and 63; *Ibid*.
[199] *N.S.*, paras. 78 to 80; *Melloni*, paras. 37 to 63; Opinion 2/13, para. 191; K. LENAERTS (n194), p. 806; S. PEERS (n191), pp. 219 to 222, P. EECKHOUT, (n194), pp. 968 to 971.
[200] *Ibid*.
[201] Opinion 2/13, para. 191, "*(...) the principle of mutual trust (...) requires, particularly with regard to the area of freedom, security and justice, each of those States,* ***save in exceptional circumstances****, to*

loosened its stance on the principle of mutual trust, a premise clearly illustrated by a direct comparison of its case law before and after Opinion 2/13. In *Radu* and *Melloni*, the Court had prioritized the principle of mutual trust.[202] In its more recent judgments of *Aranyosi and Căldăraru* of and *LM*, the Court referred in part to paragraphs 191 and 192 of its Opinion 2/13 as a justification for the recognition of a fundamental rights exception to the execution of EAWs.[203] Nevertheless, as of now, only the right to a fair trial and the right to not be subjected to torture or inhuman or degrading treatment have been explicitly accepted as bases for the application of this exception.[204] Moreover, the latter only applies under strict conditions, namely the existence of a real risk, both general and individualized, to one of said rights, on account of systemic or generalized deficiencies in the Member State that issued the EAW.[205] Thus, despite having adopted a less absolute stance of the principle of mutual trust, the Court continues to uphold its importance in the context of the AFSJ, in particular for the FDEAW.

It follows from the aforementioned that the presumption of mutual trust has transitioned from being absolute to being rebuttable under certain circumstances. Therefore, with respect to the current analysis, it can be posited that the principle of mutual trust must, since the adoption of its new interpretation in Opinion 2/13, be considered as a *hybrid* principle.[206] Indeed, on the one hand, it continues to ensure

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consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, judgments in N. S. and Others, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 to 80, and Melloni, EU:C:2013:107, paragraphs 37 and 63)." in comparison to *Melloni*, para. 63 "*Consequently, (…), by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision*." In *Melloni*, no mention is made of exceptional circumstances.

[202] *Radu*, para. 31; *Melloni*, paras. 37 and 63; N. CAMBIEN (n195), pp. 102 to 107; S. PEERS (n191), pp. 219 to 222; P. EECKHOUT (n194), pp. 968 to 971.

[203] *Aranyosi and Căldăraru*, paras. 78, 82 and 88; *LM*, para. 37; K. LENAERTS (n194), pp. 805 to 807.

[204] *Aranyosi and Căldăraru*, para. 104; *LM*, para. 79; M. DOROCIAK and W. LEWANDOWSKI, "A *Check* Move for the Principle of Mutual Trust from Dublin: The Celmer Case", *European Papers*, Vol. 3(2), 2018, pp. 868 to 871.

[205] *Aranyosi and Căldăraru*, para. 104; *LM*, para. 79; M. DOROCIAK and W. LEWANDOWSKI (n204), pp. 868 to 871.

[206] The "*hybrid*" nature of the principle mutual trust referred to in the current analysis does *not* correspond to the one posited by A. WILLEMS, who considers the principle as possessing legal and political elements, on the one hand, and social elements, on the other hand; A. WILLEMS, "Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character", *European Journal of Legal Studies*, Vol. 9(1), European University Institute, 2016, pp. 211 to 249.

effective judicial cooperation by way of the three obligations mentioned above.[207] On the other hand, its more lenient interpretation has also constituted a basis for the Court to recognize the application of the deficiencies test with respect to effective judicial cooperation in criminal matters, thereby ensuring the protection of fundamental rights.[208]

Section II – The Principle of Mutual Recognition

A – Definition

The principle of mutual recognition was first established as the cornerstone of the European internal market in the CJEU's *Cassis de Dijon* judgment, where it stated that Member States should, save in exceptional and legitimate circumstances of public interest, allow the importation of products that have been lawfully produced and marketed in another Member State.[209] In other words, the principle entails that Member States must recognize each other's national rules on product requirements as binding, save in exceptional circumstances.[210]

Two decades later, during the Tampere European Council of 15 and 16 October 1999, the European Council also referred to the principle of mutual recognition as being the cornerstone of effective judicial cooperation in the AFSJ.[211] In essence, it requires Member States to consider judicial decisions emanating from the courts and authorities of another Member State as "*one of their own*".[212] As opposed to the principle of mutual trust, the principle of mutual recognition is specifically mentioned in EU primary and secondary law, including the FDEAW.[213] Indeed, the FDEAW is

[207] Opinion 2/13, paras. 191 and 192; *N.S.*, paras. 78 to 80; *Melloni*, paras. 37 and 63.
[208] *Ibid*.
[209] Judgment of 20 February 1979, *Cassis de Dijon*, 120/78, EU:C:1979:42, para. 14 (hereinafter *Cassis de Dijon*); N. CAMBIEN (n195), pp. 98 to 102; M. DOROCIAK and W. LEWANDOWSKI (n204), pp. 859 and 860.
[210] *Ibid*.
[211] *Tampere Conclusions*, paras. 33 to 37; L. MARIN, "'Only You': The Emergence of a Temperate Mutual Trust in the Area of Freedom, Security and Justice and Its Underpinning in the European Composite Constitutional Order", *European Papers*, Vol. 2(1), 2017, pp. 142 to 144.
[212] *Advocaten voor de Wereld*, para. 29; K. LENAERTS (n194), p. 814; A. SANGER (n2), p. 19.
[213] For EU primary law, see, for example, Articles 67(3) and (4) and 82(1) and (2) TFEU: (1) "*the Union shall endeavour to ensure a high level of security (...) through the* ***mutual recognition*** *of judgments in criminal matters*", (2) "*the Union shall facilitate access to justice, in particular through the* ***principle of mutual recognition***", (3) " *judicial cooperation in criminal matters in the Union shall*

deemed as the first concrete measure in the field of criminal law that implements the principle of mutual recognition.[214] Additionally, Article 1(2) FDEAW refers to said principle as the basis upon which the general duty for Member States to execute and EAW is based.[215]

B – Application

The transposition of the principle of mutual recognition from the European internal market to the AFSJ posed particular problems with regards to the FDEAW. Indeed, the recognition of judicial decisions convicting an individual or requiring his or her surrender does not bear the same connotation as the recognition – for example – of his or her professional qualifications, especially with regards to fundamental rights.[216] In other words, whereas the non-recognition of an individual's professional qualifications may lead to the violation of his or her right of establishment and/or freedom to provide services, the *absolute* recognition of a decision in criminal matters can lead to the violation of the right to a fair trial or the right to not be subjected to inhuman or degrading treatment.[217]

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*be based on the **principle of mutual recognition** of judgments and judicial decisions*" and (4) "*to the extent necessary to facilitate **mutual recognition** (...) the Council (...) may establish minimal rules*"; For EU secondary law, see, for example, Council of the European Union, *Council Framework Decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters*, 18 December 2008, Article 1(2), "*Member States shall execute any EEW on the basis of the **principle of mutual recognition** (...)*"; *Advocaten voor de Wereld*, para. 29; E. HERLIN-KARNELL, "Constitutional Principles in the EU Area of Freedom, Security an Justice", *EU Security and Justice Law: After Lisbon and Stockholm*, D. ACOSTA and C. MURPHY (eds.), Hart Publishin, Oxford, 2014, pp. 2 to 6; N. CAMBIEN (n195), p. 95.

[214] Recital 6 FDEAW, "*The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation.*".

[215] Article 1(2) FDEAW "*Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.*".

[216] See, for instance, European Parliament and Council of the European Union, *Directive 2005/36/EC on the recognition of professional qualifications*, 7 September 2005, Recital 19 and Article 21; Judgment of 30 April 2014, *Ordre des Architectes v. État Belge*, C-365/13, EU:C:2014:280, paras. 3 to 7 and 27; N. CAMBIEN (n195), p. 98. On the basis of its Recital 19, Directive 2005/36/EC is built upon the principle of mutual recognition. In this vein, Article 21 of the Directive sets out a principle of *automatic* mutual recognition of the formal qualifictions of certain professions, which entails that the receiving Member State may require of the individual in question that he or she prove the extent of his or her qualifications.

[217] V. MITSILEGAS (n108), pp. 1280 and 1281; W. VAN BALLEGOOIJ, *The Nature of Mutual Recognition in European Law – Re-examining the Notion from an Individual Rights Perspective With a View to Its Further Development in the Criminal Justice Area*, Intersentia, 2015, pp. 136 to 147. Both authors posit that the automatic mutual recognition of judgments in the criminal sphere can have substantial impacts on an individual's fundamental rights. In other words, what applies to the economic sphere cannot fully be transposed to the criminal sphere on account of the differences that exist between them.

Despite a few dissenting opinions, the majority of authors agree with the (limited) transposition of the principle of mutual recognition to criminal matters.[218] They do so primarily on the basis that it must be read in conjunction with the principle of mutual trust, which entails that all Member States criminalize the same offences and possess sufficient and equivalent standards of protection for fundamental rights.[219] Whether these authors argue that mutual trust is the basis upon which mutual recognition is built or, on the contrary, that mutual recognition presupposes mutual trust, is irrelevant in the current analysis, as they all agree on one thing: much like the principle of mutual trust, the principle of mutual recognition in the criminal sphere should not be considered as absolute.[220]

The CJEU's case law on the FDEAW confirms the aforementioned. Indeed, according to the Court, the principle of mutual recognition, upon which the mechanism of the EAW is based, is itself founded on the mutual trust that exists among Member States.[221] As such, not only must both principles be considered conjunctively, but the fundamental rights limitations that apply to the principle of mutual trust also affect the principle of mutual recognition.[222]

C – Relevance

[218] *Ibid*.
[219] W. WAGNER, "Negative and Positive Integration in EU Criminal Law Co-operation", *European Integration online Papers*, Vol. 15(6), 2011, pp. 15 to 17; M. J. BORGERS, "Mutual Recognition and the European Court of Justice: The Meaning of Consistent and Autonomous and Uniform Interpretation of Union Law for the Development of the Principle of Mutual Recognition in Criminal Matters", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 18(1), Brill Nijhoff, Netherlands, 2010, pp. 99 to 105.
[220] *Aranyosi and Căldăraru*, para. 77; Judgment of 1 June 2016, C-241-15, *Bob-Dogi*, EU:C:2016:385, para. 33 (hereinafter *Bob-Dogi*); N. CAMBIEN (n195), p. 100; S. DOUGLAS-SCOTT, "The EU's Area of Freedom, Security and Justice: A Lack of Fundamental Rights, Mutual Trust and Democracy?", *Cambridge Yearbook of European Legal Studies*, Vol. 11, pp. 74 to 82. The school of thought which considers mutual trust to be the basis of mutual recognition falls in line with the CJEU's case law, which states that "*the principle of mutual recognition on which the European arrest warrant is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights (...)*"; This must be compared with the Opinion of Advocate General Bot delivered on 15 December 2015, *Kossowski*, C-486/14, EU:C:2015:812, para. 74, where he considers that it is because Member States are bound to cooperate that they must trust each other.
[221] *Lanigan*, paras. 77 to 82; *Aranyosi and Căldăraru*, para. 77; *Bob-Dogi*, para. 33; N. CAMBIEN (n195), p. 100; S. DOUGLAS-SCOTT (n220), pp. 74 to 82.
[222] *Ibid.*

As stated in Point A, the FDEAW is the first concrete measure in the field of criminal law that implements the principle of mutual recognition.[223] On the basis of the latter, Article 1(2) FDEAW sets out a general duty for Member States to execute any EAW, which in turn entails that the executing Member State must consider the decisions emanating from the issuing Member State as it would one of its own.[224] Article 2(2) FDEAW constitutes the embodiment of the aforementioned. Indeed, by providing a list of 32 offences for which double criminality is presumed, it prohibits the executing Member State from verifying, prior to the execution of the EAW, whether the offence in question is also criminalized in its national law.[225]

In the *Advocaten voor de Wereld*, the CJEU was asked, *inter alia*, whether the double criminality presumption for 32 offences provided by Article 2(2) FDEAW violated not only the principle of legality of criminal offences and penalties, but also the principles of equality and non-discrimination.[226] With regards to the principle of legality, which requires that an offence and its penalties be not only clearly and precisely defined, but also predictable, *Advocaten voor de Wereld* argued that Article 2(2) FDEAW, by merely *listing* 32 offences for which double criminality is presumed, did not meet these standards.[227] As for the principles of equality and non-discrimination, which require that, unless objectively justified, comparable situations may not be treated differently and different situations may not be treated similarly, *Advocaten voor de Wereld* stated that Article 2(2) FDEAW led to an unjustified difference in treatment between individuals, depending on whether they committed their offence in the executing Member State or in another Member State.[228]

The Court answered both questions in the negative. In doing so, it referred explicitly to the high degree of trust among Member States and the principle of mutual recognition, on which the Council had relied when adopting the FDEAW and determining what offences would fall under its Article 2(2).[229] Among other things,

[223] Recital 6 FDEAW.
[224] *Advocaten voor de Wereld*, para. 29; K. LENAERTS (n194), p. 814; A. SANGER (n2), p. 19.
[225] Article 2(2) FDEAW, "*the following offences (...) without verification of the double criminality of the act, give rise to surrender (...)*".
[226] *Advocaten voor de Wereld*, para. 44.
[227] *Ibid.*, paras. 48 and 49.
[228] *Ibid.*, paras. 55 and 56.
[229] *Ibid.*, para. 57.

the Council had indeed taken a number of different criteria into consideration, such as the nature, seriousness and degree of punishment of the relevant offences, to justify the assumption that they were criminalized in all Member States.[230] In other words, through a similar reasoning to the one applied to the principle of mutual trust, the Court confirmed that it is because all Member States criminalize the offenses in Article 2(2) FDEAW to a certain degree, be it on account of their nature or seriousness, that the requirement of double criminality is irrelevant and "*automatic*" mutual recognition can ensue.[231]

Now, the principle of mutual recognition transcends the entirety of the FDEAW and, as such, it also applies to instances that do not fall under Article 2(2) FDEAW.[232] Indeed, irrespective of whether an EAW is issued inside or outside of the scope of Article 2(2) FDEAW, it is only the exhaustively listed situations of mandatory or optional refusal grounds encompassed in Articles 3 to 4a FDEAW that the executing Member State must or may refuse the execution of an EAW.[233] Among these is the possibility for the executing Member State to verify that the offence for which the EAW was issued also constitutes an offence in its national law.[234] Even then, however, the executing Member State will be obliged to carry out the EAW where it finds this to be the case.[235] The aforementioned leads back to an issue similar to the one regarding mutual trust, discussed in Section I: having regard to the virtually

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[230] *Ibid.*
[231] *Ibid.*
[232] Recital 6 FDEAW; *Aranyosi and Căldăraru*, paras. 30 and 48; *LM*, para. 14. In *Aranyosi and Căldăraru*, the offences in question are robbery and driving without a license, respectively. As such, they do not fall under Article 2(2) FDEAW. In *LM*, the offence in question is, *inter alia*, trafficking of narcotics. As such, it falls under Article 2(2) FDEAW. In both situations, the principle of mutual recognition still applies.
[233] Article 1(2) *jo.* 3 to 4a FDEAW; *Radu*, para. 43; *Melloni*, paras. 37 and 63; K. LENAERTS (n194), p. 814; A. WILLEMS (n4), pp. 482 to 486.
[234] Article 2(4) FDEAW, "*For offences* ***other than those covered by paragraph 2****, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.*"
[235] S. BRAUM, *The Carles Puigdemont case: European criminal law in a crisis of confidence*, https://www.theeconomyjournal.eu/texto-diario/mostrar/1219252/the-carles-puigdemont-case-european-criminal-law-in-crisis-of-confidence, (accessed on Friday 8 March 2020). This premise stems from an *a contrario* analysis of the First Chamber of the Higher Regional Court of Schleswig-Holstein Decision of 5 April 2018 concerning Puigdemont, a Catalan politician against whom Spain had issued an EAW on the basis, *inter alia*, of rebellion. As the latter does not figure among the 32 offences of Article 2(2) FDEAW, the German Court was entitled to verify whether the double criminality requirement was met. Since § 81 of the German Criminal Code requires that "*high treason*" (the equivalent of rebellion in German Law) be perpetrated with *violence*, which had not been the case, the double criminality requirement was not met.

absolute nature of the principle of mutual recognition, what is the balance that must be afforded between its application and the protection of fundamental rights, which do not figure among the exhaustive grounds for refusal encompassed in Articles 3 to 4a FDEAW?

On account of the conjunctive nature of the principles of mutual trust and recognition, the evolution of the Court's case law, discussed in Section I, also applies here. Before Opinion 2/13, in the *Advocaten voor de Wereld*, *Radu* and *Melloni* judgments, it can be argued that the Court sought to prioritize effective judicial cooperation based on mutual recognition and mutual trust over the protection of fundamental rights.[236] Indeed, the Court first confirmed the validity of Article 2(2) FDEAW, which constitutes the embodiment of mutual recognition in the framework decision, with regards to the principle of legality and the principles of equality and non-discrimination.[237] Moreover, even in situations that did not fall under Article 2(2) FDEAW, the Court had regard to the exhaustive nature of Articles 3 to 4a FDEAW and refused to accept that potential violations of fundamental rights constitute a praetorian exception to the execution of an EAW.[238]

The aforementioned changed after Opinion 2/13, where the Court first recognized that exceptional circumstances could constitute a limitation to mutual trust and, by extension, to mutual recognition.[239] The *Aranyosi and Căldăraru* of and *LM* judgments demonstrate a *slight* prioritization of fundamental rights protection, as the Court accepted that potential violations of fundamental rights may, under certain circumstances, lead to the non-execution of an EAW. Yet, once again, similar to what was stated for mutual trust in Section I, the exceptions are not only currently limited to the right to a fair trial and the right to not be subjected to torture or inhuman or degrading treatment, but they are also subject to strict conditions, namely the existence of a real risk, both general and individualized, to one of said rights, on account of systemic or generalized deficiencies in the issuing Member State.[240] In

[236] *Advocaten voor de Wereld*, para. 57; *Radu*, para. 31; *Melloni*, paras. 37 and 63; N. CAMBIEN (n195), pp. 102 to 107; S. PEERS (n191), pp. 219 to 222, P. EECKHOUT, (n194), pp. 968 to 971.
[237] *Advocaten voor de Wereld*, C-303/05, EU:C:2007:261, paras. 58 to 61.
[238] *Radu*, para. 43; *Melloni*, paras. 37 and 63; E. BROUWER, "Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines for National Courts", *European Papers*, Vol. 1(3), 2016, pp. 913 to 915.
[239] *Aranyosi and Căldăraru*, paras. 78, 82 and 88; *LM*, para. 37; K. LENAERTS (n194), pp. 805 to 807.
[240] *Ibid*.

other words, even in its recent case law, more protective of fundamental rights, the CJEU continues to uphold the importance of the principles of mutual trust and recognition.

Part II – The FDEAW

The fundamental rights and principles of mutual trust and recognition discussed in Part I constitute the two main forces that both transcend and pull on the mechanism of the EAW. On the one hand, the FDEAW was adopted in order to facilitate judicial cooperation between Member States in criminal matters by replacing the traditional system of extradition with a more simple and effective procedure.[241] On the other hand, it does not modify Member States' obligations to respect fundamental rights when implementing and applying the mechanism in question.[242]

For the most part, the balance afforded to these two forces has been unproblematic. There are, however, instances where the presumption that all Member States sufficiently protect fundamental rights, upon which the principles of mutual trust and recognition are construed, is erroneous.[243] In order to understand why these issues exist, the following Chapters delve into a more concrete analysis of the FDEAW. First, Chapter I examines the binding strength of the framework decision. Next, Chapter II elaborates on the main aspects of the functioning of the EAW mechanism. Finally, Chapter III analyses how the CJEU has interpreted certain provisions of the FDEAW, as well as the consequences of said interpretations.

Chapter I – The Binding Strength of the FDEAW

[241] Recital 6 and Articles 1(2) *jo*. 2 to 4a FDEAW; *Handbook on the EAW*, pp. 11, 12 and 39; A. P. VAN DER MEI (n3), pp. 882 and 883.
[242] Recitals 12 and 13 and Article 1(3) FDEAW; *Handbook on the EAW*, p. 44; T. MARGUERY, "Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters", European Papers, Vol. 1(3), 2016, p. 946.
[243] See, for instance, the CJEU's praetorian exceptions to the execution of EAWs in *Aranyosi and Căldăraru* and *LM*.

Framework Decisions are an obsolete type of EU legislation that function in a similar manner to that of Directives.[244] Indeed, their provisions and objectives have to be transposed and implemented in the national legal systems of every Member State.[245] Much like the current Directives, however, Framework Decisions granted Member States quite some freedom with regards to the form and method to achieve the objectives set out in therein.[246] In that sense, what is their binding strength? Like other Framework Decisions, the FDEAW gets its binding strength from two principles, namely the duty of conforming interpretation (Section I) and the principle of sincere cooperation (Section II).[247] In the current analysis, they are considered as "*sub-principles*" of mutual trust and recognition, as they essentially ensure that the provisions of the FDEAW are complied with.

Section I – The Duty of Conforming Interpretation

A – Definition

The principle or duty of conforming interpretation stems from the principle of indirect effect.[248] Initially, the principle of indirect effect was developed in the *Von Colson* judgment of 1984, in which the Court stated that national courts are required to interpret their national law in line with Directives.[249] More than 20 years later, the CJEU transposed the indirect effect of Directives to the Third Pillar of Community Law in the seminal case of *Maria Pupino*. *In casu*, the Court was asked whether the children who had been victims of Ms. *Pupino*'s violent behaviour could be heard out

[244] European Union, Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - Protocol (No. 36) on transitional provisions, 9 May 2008, 12008E/PRO/36 (hereinafter Protocol No. 36 to the Treaty of Lisbon); M. J. BORGERS (n87), pp. 1361 to 1386.
[245] Article 34(2)(b) EU, "*The Council shall take measures and promote cooperation (...) it may – (...) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect*"; Judgment of 16 June 2005, *Pupino*, C-105/03, EU:C:2005:386, paras. 33 and 34 (hereinafter *Pupino*); M. J. BORGERS (n219), pp. 99 to 105.
[246] *Ibid.*
[247] Article 4(3) TEU, "*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties*"; M. J. BORGERS (n87), pp. 1361 to 1386; P. CRAIG and G. DE BÚRCA (n10), pp. 445 to 446.
[248] P. KENT, *Law of the European Union*, Pearson Education, 2008, pp. 107 to 109.
[249] Judgment of 10 April 1984, *Von Colson*, 14/83, EU:C:1984:153, para. 28 (hereinafter *Von Colson*); Judgment of 13 November 1990, *Marleasing*, C-106/89, EU:C:1990:395, paras. 8 and 13 (hereinafter *Marleasing*); P. KENT (n248), pp. 107 to 109.

of Court on account of their young age and vulnerability.[250] Whereas the Italian Code of Criminal Procedure did not allow this, the Framework Decision Standing of Victims in Criminal Procedures (FDSVCP) did.[251]

Based on the foregoing, the Italian Court was unsure whether its national law contravened the "*letter and spirit*" of Community law and, if so, whether it had to interpret it in conformity with the latter.[252] The CJEU answered in the positive, stating that the duty of conforming interpretation also applied to Framework Decisions adopted in the context of Title VI TEU.[253] In other words, when confronted with a dissension between its national law and a Framework Decision, a national Court must interpret, so far as possible, all relevant national provisions in a way which conforms to the wording and purpose of Framework Decision in question.[254] Failing to do so would not only render the latter ineffective, but also constitute a violation of the sincere cooperation Member States owe to each other.[255]

B – Application

Post-Lisbon and the abolishment of the tripartite Pillar structure, the Court's *Pupino* reasoning continues to apply, as borne witness by the *Poplawski* and *Lopes da Silva* judgments.[256] Unsurprisingly, these cases also reiterate the limitations that apply to the duty of conforming interpretation: though a national court must interpret its national legislation as much as possible in conformity with the relevant Framework

[250] *Pupino*, para. 12; C. LEBECK, "Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after *Pupino*", *German Law Journal*, Vol. 8(5), Cambridge University Press, 2007, pp. 516 to 522.
[251] *Pupino*, paras. 13 to 17; C. LEBECK (n250), pp. 516 to 522.
[252] *Pupino*, para. 18.
[253] Title VI EU concerned police and judicial cooperation in criminal matters. It contained Article 34(2)(b) EU; *Pupino*, paras. 38, 42 and 43; M. FLETCHER, "Impact of the *Pupino* Decision on EU Law", *The Court of Justice and European Criminal Law – Leading Cases in a Contextual Analysis*, V. MITSILEGAS, A. DI MARTINO and L. MANCANO (eds.),Hart Publishing, 2019, p. 70. The CJEU relied on the binding nature of Framework Decisions, the principle of loyal cooperation and the effet utile of the FDSVCP as a justification for its answer.
[254] *Pupino*, para. 61; Opinion of Advocate General Kokott delivered on 11 November 2004, *Pupino*, C-105/03, EU:C:2004:712, para. 36 (herinafter Opinion of AG Kokott in *Pupino*); M. FLETCHER (n253), pp. 75 to 77; C. LEBECK (n250), pp. 520 to 523.
[255] *Pupino*, paras. 38, 42, 43 and 61; L. KLIMEK, *Mutual Recognition of Judicial Decisions in European Criminal Law*, Springer International Publishing, Switzerland, 2017, pp. 128 and 129.
[256] Judgment of 5 September 2012, *Lopes da Silva*, C-42/11, EU:C:2012:517, para. 54 (hereinafter *Lopes da Silva*); Judgment of 29 June 2017, *Poplawski*, C-579/15, EU:C:2017:503, paras. 30 and 31 (hereinafter *Poplawski*); M. FLETCHER (n253), pp. 75 to 77.

Decision, said interpretation may neither be *contra legem* nor violate the conjunctive principles of legal certainty and legality of criminal law.[257]

Article 49 CFR consecrates the principle of legality and proportionality of criminal offences and penalties.[258] The latter is a general principle of EU law, developed throughout the years by the CJEU, with inspiration from the values enshrined in Article 2 TEU and the ECtHR's case law on Article 7 ECHR.[259] It follows from Article 49 CFR, that criminal law does not apply retroactively, unless its application would lead to a more lenient result.[260] One may therefore not be tried for an act which was not criminalised at the time it was carried out.[261] Moreover, the principle of legality is often used in conjunction with the principle of legal certainty.[262] The latter, also considered as a general principle of EU law, requires that rules be sufficiently clear, precise and predictable, so as to ensure that individuals are aware of their obligations and rights respectively imposed and protected by law.[263] As such, it also entails the non-retroactivity of criminal law.

The prohibition of *contra legem* interpretations of national law constitutes the second limit to the duty of conforming interpretation. A *contra legem* interpretation is one that is contrary to the express terms of the relevant legislation.[264] In other words, a

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[257] *Pupino*, paras. 44 and 45; *Lopes da Silva*, para. 55; *Poplawski*, paras. 32 and 33; Opinion of Advocate General Bot, delivered on 6 February 2018, *Lada*, C-390/16, EU:C:2018:65, para. 102; C. LEBECK (n250), pp. 520 to 526.

[258] Article 49(1) CFR, "*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable t the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that shall be applicable*"; M. FLETCHER, op. cit., p. 80.

[259] See Part I, Chapter I, Section II, B and C, "*The ECHR*" and "*The CFR*". On the basis of Article 52(3) CFR, read in conjunction with the Explanations to the Charter that must be taken into consideration according to Article 52(7) CFR, Article 7 ECHR, which sets out the premise "*no punishment without law*", corresponds both in meaning and in scope to Article 49(1) and (2) CFR (save for the last sentence of Article 49(1) CFR); C. PERISTERIDOU, *The Principle of Legality in European Criminal Law*, Intersentia, 2015, p. 178.

[260] *Pupino*, paras. 44 and 45; *Lopes da Silva*, para. 55; *Poplawski*, paras. 32 and 33; Opinion of Advocate General Bot, delivered on 6 February 2018, *Lada*, C-390/16, EU:C:2018:65, para. 102; C. LEBECK (n250), pp. 520 to 526; *Explanations to the CFR*, pp. 30 and 31.

[261] C. PERISTERIDOU (n259), pp. 187 and 188.

[262] C. PERISTERIDOU (n259), p. 179.

[263] *Pupino*, paras. 44 and 45; J. VAN MEERBEECK, "The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust"*, European Law Review*, Vol. 41(41), Sweet & Maxwell, 2015, p. 280.

[264] *Pupino*, para. 47; S. HAKET, "Coherence in the Application of the Duty of Conforming Interpretation in EU Law", *Review of European Administrative Law*, Vol. 8(2), Paris Legal Publishers, 2015, pp. 220 and 221.

national Court is not obliged to interpret its national legislation in conformity with a Framework Decision when the wording of the national provisions does not allow for such an interpretation.[265]

C – Relevance

The *Pupino* case constitutes a prime example of the aforementioned. Though the principle of conforming interpretation seeks to ensure a certain degree of harmony throughout the EU, it may not, especially when applied to criminal matters, entail a worsening of the accused's situation, nor contribute to a blatant contradiction between the Framework Decision and the national legislation.[266] *In casu*, Ms. *Pupino*'s actions dated *before* the adoption of the FDSCVP.[267] Moreover, the Italian Code of Criminal Procedure did not coincide with the latter, as it did not provide the specific possibility for children to be heard out of Court.[268]

Based on the foregoing, it can be argued that there should *not* have been, in principle, a duty of conforming interpretation on behalf of the Italian Court. Firstly, applying the Framework Decision in question to a situation that occurred before its adoption would violate the principle of non-retroactivity of criminal law as encompassed by the principles of legal certainty and legality.[269] Secondly, one could also argue that interpreting the Italian legislation as allowing the children to be heard out of Court would constitute a *contra legem* interpretation.[270]

Nevertheless, the CJEU concluded the opposite. It stated that the Framework Decision was of procedural nature and did not, as such, lead to an extension of Ms. *Pupino*'s

[265] *Ibid.*; Opinion of Advocate General Jacobs delivered on 16 March 2000, *Centrosteel*, C-456/98, EU:C:2000:137, para. 32 (hereinafter Opinion of AG Jacobs in *Centrosteel*)
[266] *Pupino*, paras. 24 *jo*. 45. "*The French Government observed that a conforming interpretation cannot lead to an interpretation that is contra legem, or to a worsening of the position of an individual in criminal proceedings, on the basis of the Framework Decision alone, which is precisely what would happen in the main proceedings*."
[267] C. PERISTERIDOU (n259), p. 192.
[268] M. FLETCHER (n253) p. 70.
[269] *Pupino*, paras. 24 *jo*. 45. The observations of the French Government.
[270] *Ibid*.

criminal liability.[271] Moreover, the Court reiterated that the duty of conforming interpretation requires of the National Court that it "*consider the whole of national law*" when assessing the *contra legem* exception.[272] In the Advocate General's observations, mention is made of the existence of other provisions in Italian law that render the out-of-court hearing of children *conceivable*.[273] The mere fact that such a possibility exists sufficed to trump the *contra legem* exception.

It follows from the foregoing that the duty of conforming interpretation grants quite the binding strength to Framework Decisions. Indeed, though it is not absolute, its exceptions are interpreted strictly.[274] For them to apply, the conforming interpretation must either effectively worsen the accused's criminal liability or be *absolutely* incompatible with the national legislation.[275] This falls in line with the effective judicial cooperation side of the relevant analysis, as it sets out a general duty for the national courts to interpret their national provisions so far as possible in light of the wording and purpose of the Framework Decision in question. In the context of the FDEAW, this entails that national courts will have to interpret their national legislation in a way that doesn't contravene the framework decision's main objective, which is to ensure efficient judicial cooperation among Member States based on the mutual recognition of judicial decisions and, by extension, on the mutual trust among Member States.[276]

Section II – The Principle of Sincere Cooperation

A – Definition

Article 4(3) TEU, which sets out a general duty for Member States and EU institutions to assist each other in tasks flowing from the Treaties, provides the

[271] *Pupino*, paras. 44, 45 and 46, "*However, the provisions which form the subject-matter of this reference for a preliminary ruling do not concern the extent of the criminal liability of the person concerned but the conduct of the proceedings and the means of taking evidence.*"
[272] *Pupino*, paras. 47 and 48; Opinion of AG Kokott in *Pupino*, para. 40; M. FLETCHER (n253), pp. 73 to 75; C. LEBECK (n250), pp. 517 to 523.
[273] *Ibid*.
[274] C. LEBECK (n250), pp. 517 to 523.
[275] *Pupino*, paras. 43 to 48; Opinion of AG Kokott in *Pupino*, para. 40; C. LEBECK (n250), pp. 517 to 523.
[276] Recital 6 *jo*. Article 1(2) FDEAW. For the relationship between the principles of mutual recognition and mutual trust see Part I, "*Legal Framework*".

principle of sincere cooperation.[277] The notion is generally associated with the EU's external relations, irrespective of whether the Union's competences in the matter are shared or exclusive.[278] Indeed, in the aforementioned context, when the EU decides to take action, the duty of sincere cooperation entails both a positive and a negative obligation for the Member States.[279] On the one hand, they must facilitate the carrying out of the Union's objective.[280] On the other hand, they may not act in a way that would affect the latter negatively.[281]

Nevertheless, the principle of sincere cooperation is not limited to EU external relations, nor does it solely apply to Member States.[282] As stated by Marcus Klamert, the principle creates a horizontal, vertical, reverse vertical and institutional loyalty. Horizontal loyalty refers to the relationship that exists between Member States themselves.[283] According to the author, it is particularly exemplified by the principle of mutual recognition.[284] Vertical loyalty covers the relationship between Member States and EU institutions.[285] More specifically, it implies that the *all* authorities of a Member State are submitted to the principle of sincere cooperation, *including* national Courts.[286] As for the reverse vertical and institutional loyalties, they respectively refer to the loyalty owed by EU institutions to Member States and the loyalty that must

[277] M. J. BORGERS (n87), pp. 1361 to 1386; P. CRAIG and G. DE BÚRCA (n10), pp. 445 to 446; M. KLAMERT, "The Principle of Loyalty in EU Law", *Oxford Studies in European Law*, P. CRAIG and G. DE BÚRCA (eds.), Oxford University Press, 2014, pp. 31 to 33. The terms "*sincere*" and "*loyal*" cooperation are interchangeable, as are the notions of "*principle*" and "*duty*".
[278] Judgment of 2 June 2005, *Commission v. Luxembourg*, C-266/03, EU:C:2005:341, paras. 57 and 58 (hereinafter *Commission v. Luxembourg*); Judgment of 14 July 2005, *Commission v. Germany*, C-433/03, EU:C:2005:462, paras. 63 and 64 (hereinafter *Commission v. Germany*); P. CRAIG and G. DE BÚRCA (n10), p. 354; M. KLAMERT (n277), pp. 111 to 113.
[279] Article 4(3) TEU second and third subparagraphs; *Commission v. Luxembourg*, para. 57; *Commission v. Germany*, para. 63; P. VAN ELSUWEGE, "The Duty of Sincere Cooperation and its Implications for Autonomous Member State Action in the Field of External Relations", *Between Compliance and Particularism – Member States Interests and European Law*, M. VARJU (eds.), Springer Nature Switzerland AG, Switzerland, 2019, pp. 283 and 284.
[280] *Ibid*..
[281] *Ibid*..
[282] Judgment of 17 December 1981, *Luxembourg v. Parliament*, 30/81, EU:C:1983:32, para. 37 (hereinafter *Luxembourg v. Parliament*); P. CRAIG and G. DE BÚRCA (n10), p. 354; P. VAN ELSUWEGE (n279), pp. 285 and 286; M. KLAMERT (n277), pp. 22 to 29.
[283] M. KLAMERT (n277), pp. 22 and 23.
[284] *Cassis de Dijon*, 120/78, EU:C:1979:42, para. 14; M. KLAMERT (n277), pp. 22 to 24.
[285] M. KLAMERT (n277), pp. 23 to 25; P. VAN ELSUWEGE (n279), pp. 285 and 286.
[286] *Pupino*, 43 and 61; Judgment of 4 July 2005, *Adelener*, C-212/04, EU:C:2005:443, para. 122; M. KLAMERT (n277), pp. 23 to 25.

exist between all EU institutions.[287] On the contrary to the horizontal and vertical loyalty, however, they bear no particular relevance for the general analysis.

B – Application

Similarly to the duty of conforming interpretation, the application of the principle of sincere cooperation to Framework Decisions also stems from the *Pupino* case. The CJEU justified this on two grounds. Firstly, it relied on the similarity between Article 249(3) EC and Article 34(2)(b) EU to justify the transposition of the duty of conforming interpretation and indirect effect applicable to the *directives* of the first pillar to the *framework decisions* of the third pillar.[288] Secondly, having regard to Advocate General Kokott's opinion, the CJEU reinforced its first argument with the principle of effectiveness of EU law, stating that the EU would not be able to carry out its tasks effectively if the principle of sincere cooperation were not also applicable and binding with respect to criminal matters.[289]

Moreover, the *Pupino* judgment establishes a clear link between the duty of conforming interpretation and the principle of sincere cooperation. Indeed, the Court considered that loyal cooperation between Member States constituted the foundation upon which the duty of conforming interpretation is built: it is on account of the general obligation of loyalty incumbent upon Member States that their respective courts are obliged to interpret their national law as much as possible in conformity with the provisions of Framework Decisions.[290] Having regard to the relationship shared between these two premises, it can be derived that the limitations, mentioned in Section I, which apply to the duty of conforming interpretation in criminal matters,

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[287] *Luxembourg v Parliament*, para. 37; Judgment of 13 October 1992, *Portugal and Spain v Council*, Joined cases C-63/90 and C-67/90, EU:C:1992:381, paras. 52 and 53; M. KLAMERT (n277), pp. 25 to 29; P. VAN ELSUWEGE (n279), pp. 285 and 286.

[288] Article 249(3) EC, "*A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*" and Article 34(2)(b) EU, see footnote n245; *Pupino*, C-105/03, EU:C:2005:386, paras. 33 and 34; V. MITSILEGAS, *EU Criminal Law*, Bloomsbury Publishing, 2009, pp. 26 and 27; M. FLETCHER, "Extending 'Indirect Effect' to the Third Pillar: The Significance of Pupino?", *European Law Review*, Vol. 30(6), Sweet & Maxwell, 2005, pp. 862 to 877.

[289] *Pupino*, para. 42; Opinion of AG Kokott in *Pupino*, para. 26; M. KLAMERT (n277), p. 272; E. HERLIN-KARNELL, "In the Wake of Pupino: *Advocaten voor de Wereld* and *Dell'Orto*", *German Law Journal*, Vol. 8(12), Cambridge University Press, 2007, p. 1151.

[290] *Pupino*, paras. 42 *jo*. 43; Opinion of AG Kokott in *Pupino*, para. 70(1).

also apply with respect to the principle of sincere cooperation.[291] In other words, the sincere cooperation between Member States may not lead them to violate the principles of legality or legal certainty nor the prohibition of *contra legem* interpretations.

C – Relevance

The *Pupino* judgment did not make unanimity when it was adopted. Some authors considered that, in interpreting the FDSVCP extensively, the CJEU had overstepped its boundaries and effectively "*rewritten*" Italian law by giving no other option to the national court than to apply the possibility of out-of-court hearing to children.[292] Basing their arguments on this first premise, others assimilated the newly given *indirect* effect of Framework Decisions to a form of *direct* effect, which they argued constituted an explicit violation of Article 34(1) and (2) EU.[293] A third group focused on the fact that the Court had partially relied on a mere comparison of Article 249(3) EC with Article 34(2)(b) EU to justify the transposition of loyal cooperation to matters of *intergovernmental* cooperation.[294]

Perhaps the most relevant element for the current analysis, however, is the recurrent view regarding the potential problems that *Pupino* created for the fundamental rights of the individuals in question.[295] As mentioned above, in Point B, the duty of conforming interpretation is an important aspect of the principle of loyal cooperation, which entails that the exceptions that apply to the duty of conforming interpretation must be understood as also applying to the principle of sincere cooperation.[296] In other words, Member States must sincerely cooperate only insofar said cooperation

[291] See Section I, B, "*Application*"; *Pupino*, paras. 42 to 45; Opinion of AG Jacobs in *Centrosteel*, para. 32; C. PERISTERIDOU, (n259), pp. 179,187 and 188; J. VAN MEERBEECK (n263), p. 280; S. HAKET (n264), pp. 220 and 221.
[292] V. MITSILEGAS (n288), p. 29.
[293] D. SARMIENTO, "Un paso más en la constitucionalización del tercer pilar de la Unión Europea. La sentencia Maria Pupino y el efecto directo de las decisiones marco", *Revista Electrónica de Estudios Internacionales*, No. 10, Dialnet, 2005, pp. 6 to 17.
[294] E. HERLIN-KARNELL (n289), p. 1152.
[295] D. SARMIENTO (n293), pp. 26 to 32; E. HERLIN-KARNELL (n289), pp. 1155 and 1156; V. MITSILEGAS (n288), p. 29; C. LEBECK (n250), pp. 518 and 519. All authors address the potential issues the *Pupino* judgment creates for an individual's right to a fair trial and the principles of legality and legal certainty of criminal law.
[296] *Pupino*, paras. 42 to 45; Opinion of AG in *Centrosteel*, para. 32; C. PERISTERIDOU (n259), pp. 179,187 and 188; J. VAN MEERBEECK (n263), p. 280; S. HAKET (n264), pp. 220 and 221.

does not lead them to violate the principles of legality or legal certainty nor the prohibition of *contra legem* interpretations.

Nevertheless, the Court interpreted these exceptions strictly. First, it stated that the principles of legality and legal certainty, which entail that criminal law may not apply retroactively, do not cover criminal norms of procedural nature.[297] Second, the Court confirmed that *the entirety* of a Member State's legislation must be taken into consideration when assessing whether a blatant contradiction really exists between said legislation and the framework decision in question.[298] In the case of Ms. *Pupino*, the aforementioned meant that Italy was required to uphold its obligation to "*cooperate sincerely*", despite the FDSCV having been adopted *after* her offence and the Italian Code of Criminal Procedure not setting out the possibility for children to be heard out of court.

Based on the foregoing, the prioritization of loyal cooperation can lead to violations of fundamental rights similar to those caused by a close-to-absolute reading of the duty of conforming interpretation.[299] In *casu*, for instance, the CJEU's strict interpretation of the *contra legem* and legal certainty *could* have led to a violation of Ms. *Pupino*'s right to a fair trial by worsening her criminal liability. This would have been the case had one of the victims revealed supplementary information leading to aggravating circumstances for the teacher. Nevertheless, this is pure speculation, and merely serves to illustrate the CJEU's initial tendency to prioritize effective judicial cooperation in criminal matters over the protection of certain fundamental rights. As such, much like the duty of conforming interpretation, the principle of sincere cooperation falls under the premise of effective judicial cooperation based on mutual recognition and trust.

Chapter II – The Functioning of the FDEAW

[297] *Pupino*, paras. 44, 45 and 46.
[298] *Pupino*, paras. 24 *jo*. 45, 47 and 48; Opinion of AG Kokott in *Pupino*, para. 40.
[299] D. SARMIENTO (n293), pp. 26 to 32; E. HERLIN-KARNELL (n289), pp. 1155 and 1156; V. MITSILEGAS (n288), p. 29; C. LEBECK (n250), pp. 518 and 519.

The FDEAW is mainly aimed at ensuring effective judicial cooperation between Member States in criminal matters.[300] Most of its provisions are designed with this objective in mind, and therefore constitute manifestations of the principles of mutual trust and recognition on which said judicial cooperation is based.[301] Nevertheless, the mechanism of the EAW in no way modifies the Member States' obligation to respect fundamental rights. The following Sections delve into the provisions that are the most relevant with respect to the functioning of the FDEAW. More specifically, Section I examines the latter's "*pilot provisions*" with respect to effective judicial cooperation, on the one hand, and the protection of fundamental rights, on the other hand. Section II focuses on the provisions that *effectively* apply when issuing and executing an EAW.

Section I – The "*Pilot Provisions*" of the FDEAW

The FDEAW's "*pilot provisions*" are provisions of general application that transcend the Framework Decision in its entirety. They can be subdivided into three different categories, each corresponding to one of the main premises studied in the current analysis. Point A defines the "*pilot provisions*" that explicitly encompass the principle of mutual recognition and the protection of fundamental rights, before referring to how they implicitly consecrate the principle of mutual trust. Point B examines the relevance of these provisions for the current analysis.

A – Definition

Recital 6 FDEAW states that the EAW is the first concrete measure to apply the principle of mutual recognition in the field of criminal law. Article 1(2) FDEAW completes Recital 6 by providing that Member States *shall* execute *any* EAW on the basis of said principle. This general duty to execute any EAW, entails that the executing Member State must consider the decisions emanating from the issuing Member state as it would one of its own.[302] In other words, when an issuing Member

[300] Recital 6 *jo*. Article 1(2) FDEAW.
[301] See, for example, Part II, Chapter II, Section II, C, "*Relevance*", where Article 2(2) FDEAW, which entails a double criminality presumption for a list of 32 offences, is briefly discussed.
[302] Article 1(2) FDEAW; *Advocaten voor de Wereld*, para. 29; K. LENAERTS (n194), p. 814; A. SANGER (n2), p. 19.

State effectively delivers an EAW, it can reasonably expect the executing Member State to carry it out automatically, provided the conditions set out in the FDEAW are met.[303]

Recital 12 FDEAW provides that the FDEAW respects not only the fundamental rights and principles enshrined in Article 6 TEU, but also the rights and principles reflected in the CFR, in particular Chapter VI thereof. Article 6 TEU encompasses the three main sources of fundamental rights discussed in Chapter I, namely the general principles of EU, the ECHR and the CFR.[304] As for Chapter VI CFR, it contains Articles 47 and 48 CFR, which consecrate the right to a fair trial *sensu lato*.[305] Recital 13 FDEAW "*imposes*" a more specific obligation on the executing Member States. They may not remove, expel or extradite the individual against whom an EAW is directed when he or she runs a serious risk of being subjected to inhuman or degrading treatment in the issuing Member State. Finally, Article 1(3) FDEAW grants partial concreteness to Recitals 12 and 13 FDEAW by stating the fact that Member States may not falter in their obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU.

Contrary to the principle of mutual recognition and the protection of fundamental rights, the principle of mutual trust is not explicitly mentioned in the FDEAW. However, on account of its hybrid nature, its application to the Framework Decision can be derived from the abovementioned "*pilot provisions*" of both the principle of mutual recognition and the protection of fundamental rights.[306] Indeed, on the one hand, mutual trust entails a presumption that all Member States provide sufficient and equivalent protection to fundamental rights.[307] On the other hand, applied to the FDEAW, the mutual trust presumption assures the executing Member State that the issuing Member State upholds sufficient guarantees to ensure the protection of the

[303] *Radu*, paras. 33 to 36; *Melloni*, paras. 36 to 38; L. BAY LARSEN, "Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice", *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, P. CARDONNEL, A. ROSAS and N. WAHL (eds.), Hart Publishing, Oxford, 2012, pp. 123 to 124; A. P. VAN DER MEI (n3), pp. 882 and 883.
[304] *Ibid*.
[305] *LM*, para. 57; A. WARD (n146), pp. 1197 to 1998; D. SAYERS (n146), pp. 1303, 1306 and 1307; *Handbook on the EAW*, p. 46.
[306] See Part I, Chapter II, Section I, C, "*relevance*", for the hybrid nature of the principle of mutul trust. Opinion 2/13, paras. 191 and 192; *N.S.*, paras. 78 to 80; *Melloni*, paras. 37 and 63; L. MARIN (n211), pp. 142 to 144.
[307] *N.S*, para. 83; Opinion 2/13, paras. 191 and 192; S. PRECHAL (n1), pp. 76 and 77.

concerned individual's fundamental rights, were he or she to be "*automatically*" surrendered on the basis of mutual recognition.[308]

B – Relevance

The different articles and recitals referred to in Point A do not possess the same legal value. On the one hand, recitals merely serve as interpretative tools for the CJEU when it defines EU hard law.[309] On the other hand, the FDEAW's articles possess strength similar to that of Directive provisions, as guaranteed by the duty of conforming interpretation and the principle of sincere cooperation discussed in Chapter I.[310] This distinction is particularly relevant for the fundamental rights side of the FDEAW, as Recitals 12 and 13 FDEAW present a larger and more specific array of fundamental rights protections than their counterpart Article 1(3).[311] By contrast, although Recital 6 broadly mentions the principle of mutual recognition and does not, in doing so, grant a base for its effective application, Article 1(2) FDEAW remedies this situation by explicitly consecrating that Member States must observe this principle when executing EAWs.[312]

Recital 12 FDEAW grants particular importance to the protection of the right to a fair trial encompassed in Articles 47 and 48 CFR. Recital 13 FDEAW implicitly refers to Article 4 CFR, by prohibiting Member States from surrendering an individual to

[308] *Radu*, paras. 33 to 36; *Melloni*, paras. 36 to 38; L. BAY LARSEN (n303), pp. 123 to 124.
[309] Judgment of 29 April 1999, *CCAA*, C-288/97, EU:C:1999:214, para. 23, "*it is clear from the first recital (...) that (...)*"; T. KLIMAS and J. VAICIUKAITE, "The Law of Recitals in European Community Legislation", *ILSA Journal of International & Comparative Law*, Vol. 15(1), 2008, pp. 83 to 88.
[310] *Pupino*, paras. 42 and 43; Opinion of AG Kokott in *Pupino*, para. 40 M. J. BORGERS (n87), pp. 1361 to 1386; C. LEBECK (n250), pp. 516 to 522; M. FLETCHER (n253), pp. 70 to 76; M. KLAMERT (n277), pp. 22 to 25.
[311] Recitals 12 and 13 jo. Article 1(3) FDEAW. Recital 12 FDEAW states that "*This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union(7),* ***in particular Chapter VI thereof****. (...)*", Recital 13 FDEAW sets out that "*No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty,* ***torture or other inhuman or degrading treatment or punishment***." both of which must be contrasted with Article 1(3) FDEAW, which mentions that "*This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.*"
[312] Recital 6 *jo*. Article 1(2) FDEAW. Recital 6 FDEAW states that "*The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law* ***implementing the principle of mutual recognition*** *which the European Council referred to as the 'cornerstone' of judicial cooperation*.", it is given conecreteness by Article 1(2) FDEAW, which provides that "*Member States shall execute any European arrest warrant* ***on the basis of the principle of mutual recognition*** *and in accordance with the provisions of this Framework Decision*."

another Member State where his or her right to not be subjected to torture or inhuman or degrading treatment would be at serious risk. Combined, these Recitals set out a more precise protection of fundamental rights than that of Article 1(3) FDEAW and its general obligation for Member States to comply with Article 6 TEU. Now, it is generally agreed upon that Article 1(3) FDEAW must be read in conjunction with Recitals 12 and 13 FDEAW.[313] This relationship is clear from the *Aranyosi and Căldăraru* of and *LM* judgments, where the Court's interpretation of Article 1(3) FDEAW, which states that the Framework Decision does not modify Member States' obligation to respect the fundamental rights and principles encompassed in Article 6 TEU, is either explicitly or implicitly inspired by Recitals 12 and 13 FDEAW.[314] Indeed, as of now, the CJEU has only recognized a praetorian exception to the execution of an EAW in cases where the right to a fair trial and the right to not be subjected to torture or inhuman or degrading treatment are at risk in the issuing Member State. Incidentally, these are the rights that are specifically mentioned in Recitals 12 and 13 FDEAW, respectively.[315]

Section II – Issuing and Executing EAWs

Next to the "*pilot provisions*" mentioned in Section I, the FDEAW sets out a number of more specific provisions regarding the issuing and execution of EAWs. They implicitly safeguard the concerned individual's fundamental rights, all the while ensuring the swift and effective execution of the EAW. The following Points delve into the provisions of the FDEAW that are the most relevant for the current analysis. They can be divided into three categories. Point A examines the first category, which consists of the purely formal and procedural rules of the EAW. Point B concerns the second category, which describes the authorities that possess the prerogative to issue (and execute) the EAW. Finally, the last category, relating to the effective (non)execution of the EAW, is addressed in Point C.

[313] L. MANCANO, *The European Union and the Deprivation of Liberty – A Legislative and Judicial Analysis from the Perspective of the Individual*, Hart Publishing, 2019, pp. 110 to 112; *Handbook on the EAW*, p. 46.
[314] *Aranyosi and Căldăraru*, para. 104; *LM*, para. 79.
[315] *Ibid*.

A – The Strictly Procedural Rules of the FDEAW

The strictly procedural rules encompassed in the first category have, for the most part, caused issues which bear little relevance for the current analysis.[316] Nevertheless, they illustrate the bilateral nature of the FDEAW by representing the counteracting forces of effective judicial cooperation and the protection of fundamental rights. On the one hand, for example, the obligation for the EAW to contain information on the reasons behind its adoption or the obligation for Member States to provide the individual in question with a legal counsel bear witness to the procedural protection of the accused's right to a fair trial.[317] On the other hand, the fact that the executing Member State must decide on the execution of the EAW within a time limit of 60 days, shortened to 10 days in the event that the concerned individual consents to his or her surrender, is a testimony to the swift and effective cooperation required by the FDEAW.[318]

B – The Competent Authorities to Issue and Execute EAWs

The second category of rules concerns the prerogative to issue and execute EAWs. According to Article 6 FDEAW, it is the issuing and executing judicial authorities designated by the Member States that are respectively competent to issue and execute – or refuse the execution of – an EAW.[319] At first glance, *who* can issue and execute EAWs may seem to bear no relevance for the current analysis. In reality, however, the question regarding what constitutes an "*issuing judicial authority*" has been brought before the CJEU on numerous occasions, *inter alia* in the *Poltorak* and *Kovalkovas*, judgments.[320] More specifically, in these cases, the Court was asked what the scope of

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[316] See, for example, Part I, Chapter I, Section III, A, "*The Right to Liberty*", on the right to liberty and the interpretation of the 60-day time period during which the executing Member State must decide on the execution of an EAW; *Lanigan*, paras. 57 to 60; A. P. VAN DER MEI (n3), pp. 888 and 889.
[317] See, for example, Article 11(2) FDEAW, "*A requested person (…) shall have a right to be assisted by a legal counsel and by an interpreter (…)*"; D. SAYERS (n146), pp. 1303, 1306 and 1307; Guide on Article 6 ECHR, pp. 17 to 94.
[318] Article 17(1) and (2), FDEAW.
[319] Article 6 FDEAW, "*(1) The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State. (2) The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State*."
[320] Judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858 (hereinafter *Poltorak*); Judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861 (hereinafter *Kovalkovas*); Judgment of 27 May 2019, *OG and PI*, Joined Cases C-508/18 and C-82/19 PPU

the "*issuing judicial authority*" entailed, whether it could encompass non-judicial authorities and, if so, what criteria had to be met.[321] The Court confirmed that sufficient independence from the executive power was of particular importance when defining whether an authority, be it judicial or non-judicial, could be deemed as falling under the definition of "*issuing judicial authority*".[322]

On this basis, another issue can be raised: what are the constituent elements of judicial independence and, by extension, of effective judicial protection? This question was addressed in the CJEU's recent judgments of *Associação Sindical dos Juízes Portugueses* (*Associação*) and *Commission v. Poland*, where the Court was essentially asked to determine whether legislative modifications, adopted in Portugal and Poland respectively, violated the principles of judicial independence and, by extension, of effective judicial protection.[323] The *Associação* and *Commission v. Poland* judgments do not specifically refer to the interpretation of the FDEAW. However, as mentioned in Part I, the guarantee of judicial independence and effective judicial protection constitute elements of the right to a fair trial encompassed in Articles 47 and 48 CFR.[324] As such, the Court's reasoning in *Associação* and *Commission v. Poland* is particularly important with regards to the *LM* judgment, where the Court accepted that deficiencies in the independence of the issuing Member State's judiciary independence could constitute a real risk to the right to a fair trial of the individual subjected to the EAW and lead to the refusal of said EAW's execution by the executing Member State.[325]

C – The Effective (Non)-Execution of EAWs

(hereinafter *OG and PI*), EU:C:2019:456; Judgment of 27 May 2019, *PF*, C-509/18, EU:C:2019:457 (Hereinafter *PF*); K. LENAERTS, "The Court of Justice of the European Union as a Guardian of the Authority of EU Law: A Networking Exercise ", *The Authority of EU Law – Do We Still Believe in It?*, W. HEUSEL and J.-P. RAGEADE (eds.), Springer, 2019, pp. 25 to 27; C. HEIMRICH, "European arrest warrants and the independence of the issuing judicial authority – How much independence is required? – Case note on joined cases C-508/18 and C-82/19 PPU *OG* and *PI*", *New Journal of European Criminal Law*, Vol. 10(4), SAGE Publications, 2019, pp. 389 to 398.

[321] *Poltorak*, para. 17; *Kovalkovas*, para. 17; K. LENAERTS (n320), pp. 25 to 27.

[322] *Poltorak*, para. 59; *Kovalkovas*, para. 55; K. LENAERTS, (N320), pp. 25 to 27.

[323] *Associação*, para. 18; *Commission v. Poland*, paras. 60 and 98.

[324] Article 2 TEU *jo*. Article 19(1) TEU and Articles 47 and 48 CFR; *LM*, para. 48; A. WARD (n146), pp. 1197 to 1998; D. SAYERS (n146), pp. 1303, 1306 and 1307; *Handbook on the EAW*, p. 46

[325] *LM* para. 79; A. WILLEMS (n4), pp. 489 to 495.

Articles 2 to 4a FDEAW provide the last category of rules, which concerns the *actual* (non)-execution of EAWs. On the basis of Article 2(1), an EAW may be issued for acts punishable by the law of the issuing Member State by 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. Article 2(2) FDEAW sets out a presumption of double criminality, which entails that, for a list of 32 offences, the executing Member State may not verify whether the offence in question is also criminalized in its national law. The only requirements for the application of the double criminality presumption are that the offence be listed in Article 2(2) FDEAW and punishable by a maximum period of at least 3 years of imprisonment in the issuing Member State. Finally, Article 2(4) FDEAW covers all other offences that do not fall under Article 2(2) FDEAW, and for which double criminality is not presumed.[326]

Articles 3 to 4a FDEAW, on the other hand, respectively set out the grounds for mandatory and optional *non*-execution of an EAW. These include, *inter alia*, the application of the *ne bis in idem* principle, a lack of double criminality where the double criminality presumption doesn't apply and, since the adoption of Framework Decision 2009/299/JHA, trials *in abstentia*.[327] The grounds provided by Articles 3 to 4a FDEAW are *exhaustive*, as confirmed by the CJEU in *Radu* and *Melloni*.[328] As fundamental rights are not specifically mentioned among the grounds for refusal, the may not, in principle, be invoked by the executing Member State in order to refuse the execution of an EAW mentioned among these.[329] Nevertheless, as mentioned *supra*,

[326] *Advocaten voor de Wereld*, paras. 58 to 61; *Radu*, para. 43; *Melloni*, paras. 37 and 63. Though Article 2(2) FDEAW can be considered as the embodiment of the principle of mutual recognition in the FDEAW, said principle also applies to situations falling outside the scope of Article 2(2) FDEAW. Indeed, even when it can verify the double criminality of the offence in question the executing Member State will only be able to refuse the execution of an EAW in the event that said offence is not criminalized in its own national law.

[327] Council of the European Union, *Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial*, 26 February 2009, Article 2 (hereinafter 2009 Framework Decision). The 2009 Framework Decision inserted Article 4a FDEAW, which states that the executing Member State may refuse to execute an EAW in cases of in abstentia convictions, save in a number of circumstances it enumerates in its points a to d; A. P. VAN DER MEI (n3), p. 891; *Handbook on the EAW*, pp. 40 to 46.

[328] *Lopes da Silva*, para. 29; *Radu*, para. 43; *Melloni*, para. 37 and 63; K. BOVEND'EERDT (117), p. 116.

[329] A. P. VAN DER MEI (n3), p. 891; K. BOVEND'EERDT (117), p. 115 and 116; *Handbook on the EAW*, pp. 46 to 48.

the CJEU has recently opened up the possibility for the executing Member State to rely on potential fundamental rights violations as a ground for the non-execution of an EAW.[330] As of now, this praetorian exception only applies to protect the right to a fair trial and the right to not be subjected to torture or inhuman or degrading treatment, in situations where deficiencies in the issuing Member State, be they systemic or generalized, give the executing Member State reason to believe that a real risk exists for the rights in question.[331]

Chapter III – The Interpretation of the FDEAW

Article 6(1) FDEAW sets out that it is up to the Member States themselves to determine the judicial authority competent to issue an EAW. As mentioned in Chapter II, this raised questions with respect to the concept of "*issuing judicial authority*" in the recent *Poltorak* and *Kovalkovas* judgments. *Inter alia*, the Court was asked what the scope of the concept entailed, whether it could encompass non-judicial authorities and, if so, what criteria had to be met.[332] In answering these questions, the CJEU determined that one of the main criteria by which an authority must abide to be considered an "*issuing judicial authority*" is sufficient independence from the executive power.[333] Again, as mentioned in Chapter II, the constituent elements of independence are addressed in a more general manner (i.e. in matters that do not specifically pertain to the FDEAW) in the recent *Associação* and *Commission v.*

[330] *Aranyosi and Căldăraru*, para. 104 ; *LM*, para. 79; A. LAZOWSKI, "The Sky is Not the Limit: Mutual Trust and Mutual Recognition après *Aranyosi and Căldăraru*", *Croatian Yearbook of European Law and Policy*, Vol. 14(1), University of Zagreb, 2018, pp. 13 to 17; A. WILLEMS (n4), pp. 489 to 495; K. BOVEND'EERDT (n117), pp. 116 to 119.
[331] *Ibid*.
[332] *Poltorak*, para. 17; *Kovalkovas*, para. 17. In both judgments, the following four questions were asked "*(1) Are the expressions "judicial authority", within the meaning of Article 6(1) of [the] Framework Decision, and "judicial decision", within the meaning of Article 1(1) of [the] Framework Decision, autonomous terms of EU law? (2) If the answer to Question 1 is in the affirmative: what are the criteria for determining whether an authority of the issuing Member State is such a "judicial authority" and whether the [European arrest warrant] issued by it is consequently such a "judicial decision"? (3) If the answer to Question 1 is in the affirmative: is the Swedish [police board] covered by the term "judicial authority", within the meaning of Article 6(1) of [the] Framework Decision, and is the European arrest warrant issued by that authority consequently a "judicial decision" within the meaning of Article 1(1) of [the] Framework Decision? (4) If the answer to Question 1 is in the negative: is the designation of a national police authority, such as the Swedish [police board], as the issuing judicial authority in conformity with EU law?*"; K. LENAERTS (n320), pp. 25 to 27; C. HEIMRICH (n320), pp. 389 to 398.
[333] *Poltorak*, para. 59; *Kovalkovas*, para. 55; K. LENAERTS, (n230), pp. 25 to 27; C. HEIMRICH (n320), pp. 389 to 398.

Poland judgments.[334] The following Sections delve into a deeper analysis of these two premises. Section I discusses the notion of "*issuing judicial authority*". Section II focuses on the requirement of independence.

Section I – The Notion of "*Issuing Judicial Authority*"

An EAW is a *judicial decision*.[335] As such, any decisions regarding its execution or non-execution may solely be taken by a *judicial authority*.[336] The main objective of these two premises is to ensure the absence of external influence from the executive power, especially in situations where the validity and executability of an EAW are in question.[337] The CJEU's *Poltorak* and *Kovalkovas* judgments shed light on the matter, as the Court established the criteria that must be met if an authority is to be considered an "*issuing judicial authority*".

A – The *Poltorak* and *Kovalkovas* Judgments

The *Poltorak* and *Kovalkovas* judgments respectively concerned whether the Swedish police board and the Lithuanian Ministry of Justice could be considered as "*issuing judicial authorities*" in the sense of Article 6(1) FDEAW.[338] With that in mind, the Court was asked whether the concept of "*issuing judicial authority*" was an autonomous concept of EU law and, if so, what requirements had to be met in order to fall under its ambit.[339]

The Court first stated that Article 6(1) FDEAW, by providing that the law of the Member State itself designates the "*issuing judicial authority*", refers to the

[334] *Associação*, para. 18; *Commission v. Poland*, paras. 60 and 98.
[335] Article 1(1) FDEAW; *Poltorak*, para. 28; *Kovalkovas*, para. 29. Both Judgments state that "*(...) It follows from Article 1(1) (...) that the European arrest warrant constitutes a 'judicial decision', which requires that it be issued by a 'judicial authority', within the meaning of Article 6(1) thereof.*"; *Handbook of the EAW*, p. 11.
[336] Article 6(1) FDEAW; *Ibid*.
[337] *OG and PI*, paras. 73 and 74; *PF*, paras. 51 and 52. Both judgments state that "*The issuing judicial authority must (...) give assurancs to the executing judicial authority that (...) it acts independently (...) in the issuing of a European Arrest Warrant. That independence requires that there are statutory rules and an institutional framework capable of guaranteeing that (...)*"; C. HEIMRICH (n320), pp. 389 to 398.

[338] *Poltorak*, para. 10; *Kovalkovas*, para. 10.
[339] *Poltorak*, para. 17; *Kovalkovas*, para. 17; See footnote n332 for the four questions asked.

procedural autonomy of the Member States.[340] Procedural autonomy entails that Member States remain competent to legislate on issues of procedural nature insofar they have not been directly regulated by EU primary or secondary law.[341] *In casu*, however, the Court distinguished the Member States' procedural autonomy to *designate* the "*issuing judicial authority*" from the competence to *define* the concept in question.[342] Having regard to the context and objective of the FDEAW, which is the effective judicial cooperation of Member States in criminal matters, the CJEU declared that the definition of the concept in question could not be left to the assessment of each Member State as it required an autonomous and uniform interpretation throughout the Union.[343] In other words, the concept of "*issuing judicial authority*" must be considered as an autonomous concept of EU law.[344]

After confirming the autonomous nature of the concept of "*issuing judicial authority*", the CJEU provided two *cumulative* tests, namely a "*test of independence*" and a "*test of administering justice*", required for its application.[345] The first test requires that the authority in question be sufficiently independent from the executive power.[346] The second test requires that it possess a certain role in the administration of justice.[347] Based on the foregoing, the Court ruled that neither the Swedish police board nor the Lithuanian Ministry of Justice could be considered as "*issuing judicial authorities*". On the one hand, neither authority in question can be considered as administering justice, as the term "*judiciary*" does not cover police services or ministries of Member States.[348] On the other hand, *even if* the authorities in question could be considered as playing a role in the administration of justice, they do not possess the sufficient independence from the executive required to guarantee effective

[340] *Poltorak*, paras. 30 to 33; *Kovalkovas*, paras. 31 to 34.
[341] Judgment of 7 January 2004, Delena Wells, C-201/02, EU:C:2004:12, para. 67 (hereinafter *Delena Wells*); L. BAY LARSEN, "Afterword(s) on Mutual Recognition and the Proteciton of Fundamental Rights Revisited – Following the Judgment in *Aranyosi and Căldăraru*", *The Needed Balances in EU Criminal Law: Past, Present and Future*, C. BRIÈRE and A. WEYEMBERGH (eds.), Bloomsbury Publishing, 2017 pp. 433 to 442; K. KOWALIK-BAŃCZYK, "Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings", *Yearbook of Antitrust and Regulatory Studies*, Vol. 5(6), Centre of Antitrust and Regulatory Studies – University of Warsaw, 2012, pp. 218 to 220.
[342] *Poltorak*, para. 30; *Kovalkovas*, para. 31.
[343] *Poltorak*, paras. 29 to 33; *Kovalkovas*, paras. 30 to 34
[344] *Ibid*.
[345] *Poltorak*, paras. 29 to 35; *Kovalkovas*, 30 to 36; *Handbook on the EAW*, p. 12.
[346] *Ibid*.
[347] *Ibid*.
[348] *Ibid*.

judicial protection. Indeed, both the Swedish police board and the Lithuanian Ministry of Justice fall under the ambit of the executive branch.[349]

B – Relevance

The *Poltorak* and *Kovalkovas* judgments mainly focus on what constitutes an issuing judicial authority in the sense of Article 6(1) FDEAW. Nevertheless, they also demonstrate the underlying tug-of-war that exists between EU law and national law and, more specifically, between the idea of an "*autonomous concept of EU law*", on the one hand, and "*procedural autonomy*", on the other hand. The following paragraphs delve into the relationship between these two concepts, all the while assessing their relevance for the current analysis.

By virtue of its nature, the FDEAW is binding upon Member States as to the result to be achieved, but grants them the choice of form and methods to do so.[350] In other words, it is entirely possible that Member States present varying implementations and interpretations of the FDEAW's provisions insofar they achieve the goals set out by the Framework Decision in question.[351] Now, whereas the disparate yet equivalent interpretations and implementations of some of the FDEAW's provisions do not present particular issues, the same cannot be said for certain more "*troublesome*" concepts. This is the case, for instance, of the notion of "*issuing judicial authority*" encompassed in Article 6(1) FDEAW.[352]

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[349] *Ibid*.; *OG and PI*, para. 90; *PF*, para. 57; C. HEIMRICH (n320), pp. 389 to 398. In application of the *Poltorak* and *Kovalkovas* "*administering*" and "*independence*" tests, Article 6(1) FDEAW must be interpreted as "*including the Prosecutor General of a Member State who, whilst institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and whose legal position, in that Member State, affords him a guarantee of independence from the executive in connection with the issuing of a European arrest warrant*.". In application of the same tests, Article 6(1) FDEAW must be interpreted as "***not** including public prosecutors' offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant.*"

[350] Article 34(2)(b) EC, see footnote n245; D. LECZYKIEWICZ, "Effectiveness of EU Law Before National Courts", *The Oxford Handbook of European Union Law*, A. AMULL and D. CHALMERS (eds.), OUP Oxford, 2015, pp. 219 to 225.

[351] *Ibid*. ; S. MIETTININ, *Criminal Law and Policy in the European Union*, Routledge, 2013, pp. 90 to 92.

[352] See the *Poltorak*, *Kovalkovas*, *OG and PI* and *PF* judgments; V. MITSILEGAS, "Managing Legal Diversity in Europe's Area of Criminal Justice: The Role of Autonomous Concepts", R. COLSON and S. FIELD (eds), *EU Criminal Justice and the Challenges of Diversity. Legal Cultures in the Area of Freedom Security and Justice*, Cambridge University Press, 2016, p. 127.

Article 6(1) FDEAW sets out that it is up to the Member States to designate the "*issuing judicial authority*". Read on the most basic level, this provision is based on the Member States' procedural autonomy, which entails that Member States remain competent to legislate on issues of procedural nature so long as EU primary or secondary law have not directly regulated them.[353] Had the Court maintained such a reading of Article 6(1) FDEAW, it would have been entirely possible to envisage a situation in which the issuing Member State recognizes its non-judicial prosecutorial authorities as possessing the competence to issue an EAW, whereas the executing Member State solely grants said competence to its judiciary. In such a situation, the executing Member State might be reticent to comply with the issued EAW if it senses that the relevant prosecutorial authority does not possess sufficient independence from the executive. More specifically, the concerned individual's right to a fair trial, which requires guarantees of judicial independence and effective judicial protection, would be at stake.[354]

To remedy this problem, the Court interpreted Article 6(1) FDEAW in a way that would ensure a more uniform protection of the principles of independence and effective judicial protection throughout the Union. On the one hand, the Court agreed that it is up to Member States, on account of their procedural autonomy, to *designate* which authorities are competent to issue EAWs.[355] On the other hand, however, the Court stated that the concept of "*issuing judicial authority*" is an autonomous concept of EU law, which entails that its constituent elements are defined by the CJEU.[356] Applied to the current analysis, the Court's reasoning in *Poltorak* and *Kovalkovas* show a shift towards the protection of fundamental rights, in particular the right to a fair trial, by ensuring a uniform interpretation of the notion of "*issuing judicial authority*" and, by extension, of the principles of judicial independence and effective judicial protection.

[353] *Poltorak*, paras. 30 to 33; *Kovalkovas*, paras. 31 to 34; L. BAY LARSEN (n341), pp. 433 to 442; K. KOWALIK-BAŃCZYK (n341), pp. 218 to 220.
[354] A. WARD (n146), pp. 1197 and 1198; D. SAYERS (n146), pp. pp. 1303, 1306 and 1307.
[355] *Poltorak*, paras. 30 to 33; *Kovalkovas*, paras. 31 to 34; L. BAY LARSEN (n341), pp. 433 to 442; K. KOWALIK-BAŃCZYK (n341), pp. 218 to 220.
[356] *Poltorak*, para. 30 to 33; *Kovalkovas*, pars. 31 to 34; *OG and PI*, para. 90; *PF*, para. 50; C. HEIMRICH (n320), pp. 389 to 398; *Handbook on the EAW*, p. 12.

Section II – The Principles of Independence and Effective Judicial Protection

The *Poltorak* and *Kovalkovas* requirement of independence also holds true on a more general scale. Indeed, as mentioned in Part I, all Member States must uphold the values encompassed in Article 2 TEU.[357] Among these are the rule of law and the protection of fundamental rights.[358] The value of the rule of law requires, *inter alia*, that all Member States provide independent and impartial courts capable of guaranteeing individuals with effective judicial protection.[359] In this vein, Article 19(1) TEU sets out that all Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by EU law, including fundamental rights.[360] It must be read in conjunction with Article 47 CFR, which not only encompasses the right to an effective remedy, but also the principle of independence and impartiality of the judiciary.[361]

In its recent *Associação* and *Commission v. Poland* judgments, the CJEU dealt with the interpretation of the aforementioned provisions. Although these cases do not specifically concern the interpretation of the FDEAW, they set out the requirements for judicial independence and effective judicial protection, which constitute elements of the right to a fair trial.[362] Seeing as the latter was recognized, in *LM*, as one of the fundamental rights whose protection can, under certain circumstances, warrant the non-execution of an EAW, the *Associação* and *Commission v. Poland* must be taken into consideration in the current analysis.[363] The following Points examine the facts, conclusions and relevance of the Portuguese and Polish judgments. Point A focuses

[357] Articles 2, 7 and 49 TEU; C. HILLION (n17), pp. 4 to 5; D. KOCHENOV (n17), pp. 7 to 11; K. SOMMERMAN (n13), pp. 167 and 168.
[358] *Stauder*, para. 7; *Internationale Handelgesellschaft*, para. 4; *Les Verts*, para. 23; O. MADER (n22), p. 138 and 139.
[359] Opinion 2/13, para. 168; *Associação*, paras. 30 to 32; *Commission v. Poland*, paras. 43 to 47; *Commission Communication of 2014*, p. 4.
[360] *Associação*, para. 32, *Commission v. Poland*, para. 47; R. JANSE, pp. 44 to 47.
[361] Article 47(2) CFR; *Associação*, paras. 30 to 32 and 41; *Commission v. Poland*, paras. 43 to 47 and 57, "*In order for that protection to be ensured, maintaining such a court or tribunal's independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy.*"; A. WARD (n146), pp. 1197 and 1198.
[362] *Ibid*.
[363] *LM*, paras. 50 to 54 and 63 and 64 and 79, the *LM* judgment applies the *Associação* reasoning in the context of the FDEAW.

on the *Associação* case. Point B provides insight into the *Commission v. Poland* case. Finally, Point C discusses their relevance.

A – The *Associação* Judgment

The *Associação* judgment is a landmark case with regards to judicial independence and effective judicial protection. In view of meeting the EU law requirements with respect to the elimination of excessive budget deficit, the Portuguese legislature temporarily reduced the remuneration of a series of office holders and employees in the public sector, including that of the judges of the Tribunal de Contas (Court of Auditors).[364] The *Associação Sindical dos Juízes Portugueses* (ASJP) argued that the salary-reduction measures affected the principle of judicial independence enshrined in Article 19(1) TEU and Article 47 CFR.[365] Unsure of whether this was the case, the Supreme Administrative Court of Portugal asked the CJEU whether the aforementioned articles were to be interpreted as precluding the application of such measures to the members of the judiciary.[366]

The CJEU answered the question in the negative, stating that a temporary reduction of the salary of the members of the judiciary did not constitute a violation of the principles of judicial independence set out in Article 19(1) TEU and of effective judicial protection provided by Article 47 CFR.[367] It reiterated, on the basis of its former *Wilson* judgment, that the main characteristic of an independent and impartial body is that it not be submitted to any hierarchical or external pressure that could affect its decision-making.[368] Among the elements that ensure said independence, the CJEU grants the most importance to protection against removal from office and proportionate remuneration – meaning neither too low or too high – for the functions

[364] *Associação*, paras. 11 to 18.
[365] *Associação*, para. 13.
[366] *Associação*, para 18.
[367] *Associação*, paras. 41 to 52.
[368] *Associação*, paras. 38, 44 and 45; Judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, para. 51 (hereinafter Wilson), para. 51; Judgment of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paras. 27 and 37 (hereinafter *Margarit Panicello*). In order to determine whether a body is a court or tribunal, one must have regard, *inter alia*, to whether it is established by law, whether it is permanent, wheter its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is ***independent***. In order to determine the latter characteristic, one must have regard to whether the members of the body enjoy sufficient guarantees **against the removal from office** and whether they receive **commensurate and proportionate remuneration** for their functions.

carried out by the body in question.[369] *In casu*, the Court made a distinction between an excessive or insufficient remuneration, on the one hand, and the temporary and general reduction of remuneration that had been adopted under circumstances of austerity in order to eliminate an excessive budgetary deficit, on the other hand.[370]

B – The *Commission v. Poland* Judgment

In 2017, Poland adopted a number of legislative reforms.[371] Among these was the creation of a "*New Law of the Supreme Court*", aimed at modifying Article 30 of the old Law of the Supreme Court of 2002.[372] These laws are quite similar, as both deal with the retirement age of the Supreme Court judges and the possibility to postpone said retirement.[373] The 2002 law set the retirement age of the judges at the age of 70 with a possibility to continue the exercise of their functions until the age of 72.[374] This possibility was subjected to two conditions, namely the submission, to the First President of the Supreme Court, of a "*declaration of continuation*" six months before retirement and a health certificate demonstrating their soundness of mind.[375] The 2017 law reduced the retirement age to 65, with a possible extension submitted to similar requirements *but for one thing*: the "*declaration of continuation*" and health

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[369] *Ibid*.; G. GERAPETRITIS, *New Economic Constitutionalism in Europe*, Bloomsbury Publishing, 2019, pp. 139 to 142; M. KRAJEWSKI, "*Associação Sindical dos Juízes Portugueses*: The Court of Justice and Athena's Dilemma", European Papers, Vol. 3(1), 2018, p. 403.
[370] Associação, paras. 46 to 49; M. KRAJEWSKI (n369), pp. 398 and 399.
[371] *LM*, para. 21; *Commission v. Poland*, paras. 25 and 26. These two judgments must be read conjunctively. In *Commission v. Poland*, only the New Law of the Supreme Court is taken into consideration. In *LM*, mention is made of the Commission's reasoned proposal directed against Poland on the basis of Article 7(1) TEU. This reasoned proposal refers in particular to "*(1) The changes to the constitutional role of the National Council for the Judiciary in safeguarding independence of the judiciary, in combination with the Polish Government's invalid appointments to the Trybunał Konstytucyjny (Constitutional Tribunal) and its refusal to publish certain judgments; (2) the fact that the Minister for Justice is now the Public Prosecutor, that he is entitled to play an active role in prosecutions and that he has a disciplinary role in respect of presidents of courts, which has the potential for a chilling effect on those presidents, with consequential impact on the administration of justice;* ***(3)*** *the fact that the* ***Sąd Najwyższy (Supreme Court)*** *is affected by compulsory retirement and future appointments, and that the new composition of the National Council for the Judiciary will be largely dominated by political appointees; and (4) the fact that the integrity and effectiveness of the Trybunał Konstytucyjny (Constitutional Court) have been greatly interfered with in that there is no guarantee that laws in Poland will comply with the Polish Constitution, which is sufficient in itself to have effects throughout the criminal justice system*."
[372] *Ibid*.
[373] *Commission v. Poland,* paras. 9 to 14.
[374] *Ibid*.
[375] *Ibid*.

certificate that are submitted to the First President are then transmitted to the President of Poland.[376]

The Commission argued that the 2017 law violated the principles of judicial independence and effective judicial protection encompassed in Article 19(1) TEU and Article 47 CFR on two grounds.[377] Firstly, it alleged that the New Law on the Supreme Court breached the principle of judicial independence and, in particular, of the irrevocability of judges, by providing that the lowering of the retirement age applied to judges who had been appointed before 3 April 2018.[378] Secondly, the Commission put forth that, by granting the President of the Republic of Poland discretion to extend, twice, each time for a period of three years, the mandate of the Supreme Court judges beyond the newly fixed retirement age, the 2017 law failed to meet the standards required by the relevant articles.[379]

The Court sided with the Commission, stating that the new law adopted by the Polish authorities violated the principle of judicial independence on two levels. Firstly, the lowering of the judges retirement age, which was applicable not only from the moment the law entered into force but also, in a certain way, retroactively to the judges already in function, resulted in the premature retirement of 27 out of the 72 judges of the Polish Supreme Court, including the First President.[380] Secondly, the Court considered that the fact that any potential extension of mandate was submitted to the sole discretion of the President of the Republic, in such a way that no objective control existed to verify whether said decision was arbitrary, granted the President the power to influence, albeit implicitly, the judges' decisions.[381] Indeed, not only was the

[376] *Ibid*.; I. PEREIRA DE SOUSA, "The Rule of Law Crisis in the European Union: From Portugal to Poland (and Beyond)", *Teisė*, Vol. 114, Vilnius University Press, 2020, pp. 148 to 150.
[377] *Commision v. Poland*, para 25.
[378] *Commission v. Poland*, para 26.
[379] *Ibid*.
[380] *Commission v. Poland*, para. 62, "*The Commission also points out that those national provisions have affected, immediately, 27 of the 72 judges of the Sąd Najwyższy (Supreme Court)*"
[381] *Commission v. Poland*, paras. 112 to 118, "(…) Such procedural rules must thus, in particular, be such as to preclude not only any ***direct influence***, in the form of instructions, but also types of ***influence which are more indirect*** and which are liable to have an effect on the decisions of the judges concerned (…)".

President's decision unchallengeable before a court or tribunal, but it also did not have to state objective and verifiable criterion in order to be justified.[382]

C – Relevance

Despite not being explicitly linked to the interpretation of the FDEAW, the *Associação* and *Commission v. Poland* judgments bear relevance for the current analysis for two main reasons. The first is the Court's extension of the scope of application and content of Article 19(1) TEU. It is discussed in Subpoint a. The second, discussed in Subpoint b, concerns the general transition from the prioritization of effective judicial cooperation in criminal matters to the beginning of a prioritization of fundamental rights, in particular the right to a fair trial.

a – An Extensive Interpretation of Article 19(1) TEU

The most important aspect of the *Associação* judgment is the Court's interpretation of Articles 19(1) TEU and 47 CFR.[383] Again, Article 19(1) TEU provides that Member States must ensure effective judicial protection *in the fields covered by EU law*.[384] *A contrario*, and if read on the most basic level, this provision entails that the material scope of Article 19(1) TEU is limited to situations that are governed by EU law.[385] Article 47 CFR sets out the principles of judicial independence and effective judicial protection.[386] Though it functions in a similar manner to Article 19(1) TEU, it must be read in conjunction with Article 51(1) CFR, which states that the Charter's provisions apply to Member States *only when they are implementing EU law*.[387]

Having regard to the aforementioned, the CJEU was faced with two questions. First, whether there exists a difference between the notion "*in the fields covered by EU law*"

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[382] *Commission v. Poland*, para. 114, *"(...) Such an extension is now subject to a decision of the President of the Republic, which is discretionary inasmuch as its adoption is not, as such, governed by any objective and verifiable criterion and for which reasons* ***need not be stated****. In addition, any such decision* ***cannot be challenged*** *in court proceedings*."
[383] M. CLAES and M. BONELLI, "Judicial serendipity: how Portuguese judges came to the rescue of the Polish Judiciary – ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*", *European Constitutional Law Review*, Vol. 14, Cambridge University Press, 2018, p. 622.
[384] M. CLAES and M. BONELLI (n383), pp. 630 to 632.
[385] *Ibid*.
[386] A. WARD, (n146), pp. 1197 and 1198.
[387] *Associação*, para. 29; M. CLAES and M. BONELLI (n383), pp. 630 to 632.

of Article 19(1) TEU, on the one hand, and the notion "*when implementing EU law*" of Article 47 CFR, on the other hand.[388] Second, having regard to the fact that Article 19(1) TEU, as opposed to Article 47 CFR, only requires Member States to ensure effective judicial protection and not judicial independence, whether it must also be interpreted as encompassing the latter.[389] The answer to these two questions would not only affect the scope of application of the relevant articles, but also the Court's jurisdiction with respect to their protection.[390]

In answering the first question, the CJEU confirmed that Article 19(1) TEU's "*in the fields governed by EU law*" was broader than Article 51(1) CFR's "*when implementing EU law*".[391] In doing so, it implicitly extended its jurisdiction to rule on the matter at hand. Indeed, whereas, under Article 47 CFR *jo*. 51(1) CFR, the CJEU would only have been competent in an instance where Portugal was implementing EU law, under Article 19(1) TEU, the catalyst for the Court's jurisdiction is independent of such an implementation, rather it merely requires the *potentiality* for a national court or tribunal to decide on the interpretation or application of EU law.[392] In other words, since the Tribunal de Contas is a court competent to *potentially* interpret or apply provisions of EU law, it necessarily falls under Article 19(1) TEU and must therefore be capable of guaranteeing effective judicial protection.[393]

Despite Article 19(1) TEU being considered as being broader in the general sense, the provision itself does not mention the principle of judicial independence, as opposed to Article 47 CFR. This was pointed out by the Portuguese Government and Advocate General Øe, who argued that, since Article 19(1) TEU's phrasing does not *explicitly* set out a guarantee for judicial independence, it should therefore not be interpreted in

[388] *Associação*, para. 29; M. KRAJEWSKI (n369), pp. 399 to 401; M. CLAES and M. BONELLI (n383), pp. 630 to 632.
[389] *Associação*, paras. 40 to 45; M. KRAJEWSKI (n369), pp. 397; M. CLAES and M. BONELLI (n383), pp. 633 to 635.
[390] *Associação*, para. 40; I. PEREIRA DE SOUSA (n376), p. 149; M. KRAJEWSKI (n369), pp. 403 and 404; M. CLAES and M. BONELLI (n383), pp. 630 to 635.
[391] *Associação*, para. 29.
[392] *Associação*, para. 40; I. PEREIRA DE SOUSA (n376), p. 149; M. KRAJEWSKI (n369), pp. 403 and 404; M. CLAES and M. BONELLI (n383), pp. 630 to 635.
[393] *Ibid*.

that manner.[394] The Court disregarded this argument and interpreted Article 19(1) TEU as also encompassing judicial independence.[395] It did so through an analogical reasoning based on Article 2 TEU, which consecrates the rule of law as one of the founding values of the Union.[396] Article 19(1) TEU gives concrete expression to Article 2 TEU by ensuring that the CJEU and the national courts and tribunals function in harmony to guarantee effective judicial protection in the fields covered by EU law.[397] In order to do so, these courts and tribunals must be courts and tribunals in the sense of EU law, meaning they must meet a certain number of requirements, among which judicial independence.[398]

b – A Shift Towards the Protection of the Right to a Fair Trial

In *Associação*, the Court extended Article 19(1) TEU's scope of application.[399] From that point onwards, the provision must be considered as setting out a general obligation for Member States to ensure that their courts and tribunals are both sufficiently independent and capable of providing effective judicial protection.[400] The extension of Article 19(1) TEU's scope of application is not particularly important for the Portuguese situation. Indeed, though it is true that the proportionate and commensurate remuneration of judges constitutes one of the two main elements the CJEU considers as primordial in ensuring judicial independence, the CJEU ruled that the temporary and general reduction of the remuneration of a series of office holders and employees in the public sector, including the Tribunal de Contas, did not constitute a violation of Article 19(1) TEU.[401]

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[394] *Associação*, paras. 40 to 45; Opinion of Advocate General Øe delivered on 18 May 2017, *Associação*, C-64/16, EU:C:2017:395, paras. 65 to 67 (hereinafter Opinion of AG Øe in *Associação*); M. CLAES and M. BONELLI (n383), pp. 637.
[395] *Associação*, para. 52.
[396] *Associação*, paras. 30 and 31.
[397] *Associação*, paras. 32 and 36; Judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, para. 73 (hereinafter *Rosneft*).
[398] *Associação*, para. 38 and 44; *Wilson*, para. 51; *Margarit Panicello*, para. 27.
[399] *Associação*, paras. 29 and 40; I. PEREIRA DE SOUSA (n376), p. 149; M. KRAJEWSKI (n369), pp. 403 and 404; M. CLAES and M. BONELLI (n383), pp. 630 to 635.
[400] *Ibid*.
[401] *Associação*, para. 52.

Some authors argue that the real reason behind the Court's reasoning in *Associação* was to address the issues concerning the rule of law in Poland.[402] Indeed, under the new interpretation of Article 19(1) TUE, the CJEU can address issues regarding the principles of independence and effective judicial protection even in instances where the Member State in question is *not* "*implementing EU law*", something which it could not have done under Articles 47 *jo*. 51(1) CFR.[403] The *Commission v. Poland* case addresses just one of the changes brought by the recent Polish legislative reforms.[404] The *LM* judgment refers to a number of other areas where the Commission considered there to be issues with the rule of law, as encompassed by Article 2 TEU, that led it to adopt a reasoned proposal, on the basis of Article 7(1) TEU, directed against Poland.[405]

In both *LM* and *Commission v. Poland*, the Court recognized that the legislative reforms in Poland posed a threat to the rule of law and the principles of judicial independence and effective judicial protection it encompasses.[406] The guarantees of judicial independence and effective judicial protection, provided by Article 19(1) TEU and Article 47 CFR, constitute elements of the right to a fair trial.[407] The latter is of particular importance in criminal matters; even more so in complex situations such as the one set out in the FDEAW, which involve multiple Member States and their respective judiciaries.[408] Indeed, whereas a singular judicial authority will often decide a purely national matter of criminal nature, transnational criminal matters tend to involve two or more judicial bodies depending on the amount of Member States involved. Consequently, the probability that at least one of these bodies fails to meet the standards required by Article 19(1) TEU and Article 47 CFR, increases. Based on this increased risk to the right to a fair trial, the Court built upon its *Aranyosi and Căldăraru* judgment to recognize that potential violations of said right could, under certain circumstances, constitute an exceptional ground for the refusal of the

[402] *Associação*, paras. 29 and 40; I. PEREIRA DE SOUSA (n376), p. 149; M. KRAJEWSKI (n369), pp. 403 and 404; M. CLAES and M. BONELLI (n383), pp. 630 to 635.
[403] *Ibid*.
[404] See footnote n371.
[405] *Ibid*.
[406] Articles 2, 7 and 49 TEU; Article 47(2) CFR; *LM*, para. 79; *Commission v. Poland*, para. 124; A. WARD (n146), pp. 1197 and 1198.
[407] Article 47(2) CFR; *Associação*, paras. 30 to 32 and 41; *Commission v. Poland*, paras. 43 to 47 and 57; C. HILLION (n17), pp. 4 to 5; D. KOCHENOV (n17), pp. 7 to 11; K. SOMMERMAN (n13), pp. 167 and 168.
[408] T. MARGUERY (n242), pp. 243 to 245; V. MITILEGAS (n288), pp. 26 and 27.

execution of an EAW, thereby extending its case law on the prioritisation of the protection of fundamental rights.[409]

Part III – The CJEU and the FDEAW

The principles of mutual recognition and trust and the protection of fundamental rights, discussed in Part I, constitute the two main forces that transcend and pull on the FDEAW. The manner in which these premises interact with the mechanism of the EAW, is analysed in Part II. Throughout both Parts, brief mention is made of the balance that the CJEU has afforded to effective judicial cooperation based on mutual trust and recognition, on the one hand, and the protection of fundamental rights, on the other hand, these past two decades. The following Chapters analyse the changes in the Court's case law with respect to the FDEAW more specifically, retracing its evolution from a prioritization of effective judicial cooperation to the prioritization of the protection of fundamental rights.

Chapter I starts by referring to the evolution of the Court's competence to rule on issues regarding judicial cooperation in criminal matters, to which the FDEAW pertains. It is followed by Chapter II, which analyses the *Advocaten voor de Wereld* judgment and the Court's prioritization of effective judicial cooperation. Chapter III examines the *Radu* and *Melloni* judgment, delving into the transitional period between the prioritization of effective judicial cooperation and the prioritization of the protection of fundamental rights. Finally, Chapter IV addresses the more recent cases of *Aranyosi and Căldăraru* and *LM*, in which the Court effectively started to recognize that the protection of fundamental rights could, under certain circumstances, amount to an exception to the principles of mutual trust and recognition.

[409] *Aranyosi and Căldăraru*, para. 104; *LM*, paras. 43 to 45, 60 to 68 and 79; M. DOROCIAK and W. LEWANDOWSKI (n204), pp. 868 to 871; M. KRAJEWSKI, "Who is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestice Judges – ECJ 25 July 2018, Case C-216/18 PPU, The Ministr for Justice and Equality v. LM", European Constitutional Law Review, Vol. 14(4), Cambridge University Press, 2018, pp. 792 to 796.

Chapter I – The Competence of the CJEU

The following Sections provide insight into the CJEU's competence to rule on the interpretation of the FDEAW. Section I starts by briefly describing the Court's general competences to rule on preliminary references and infringement procedures. Section II delves into a more specific analysis of its competence in criminal matters. Finally, Section III examines the relevance of the aforementioned for the current analysis.

Section I – The General Competences of the CJEU

In general, the CJEU is competent, *inter alia*, to rule on questions relating to the interpretation of EU law and on proceedings directed against EU Member States or Institutions that have failed to comply with their obligations derived from EU law.[410] The first situation concerns the mechanism of preliminary references. In accordance with Article 19(3)(b) TEU, read in conjunction with Article 267(b) TFEU, the CJEU is competent to rule on preliminary questions, referred to it by national courts, regarding the interpretation of EU law.[411] As of now, the entirety of the CJEU's case law on the FDEAW stems from the aforementioned system.[412]

The second situation concerns the mechanism of infringement proceedings. Article 258 TFEU grants the Court the competence to rule on directed by the Commission against a Member State who has failed to fulfil its obligations flowing from the treaties themselves.[413] Such proceedings are not *explicitly* present in the context of the FDEAW. However, as discussed in Part II, they are mentioned both in the

[410] D. CRAIG and G. DE BURCA (n10), pp. 464 and 465.
[411] Article 19(3)(b) TEU, "*The Court (...) shall (...) give preliminary rulings on the interpretation of EU law or the validity of acts adopted by the institutions*" *jo*. Article 267(b) TFEU, "*The Court shall have jurisdiction to give preliminary rulings (...)*";D. CRAIG and G. DE BURCA (n10), pp. 464 and 465.
[412] Eurojust, *Case law by the Court of Justice of the European Union on the European Arrest Warrant*, 15 March 2020, pp. 3 to 7 (hereinafter *Eurojust – EAW case law*).
[413] Article 258 TFEU, "*If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter (...). If the State concerned does not comply with the opinion (...), the latter (Commission) may bring the matter before the Court of Justice of the European Union*."; C. E. KOOPS, Contemplating Compliance: European Compliance Mechanisms in International Perspective, pp. 89 and 90; D. CRAIG and G. DE BURCA (n10), pp. 429 to 435. There are other mechanisms of infringement procedures, but they bear no relevance with respect to the current analysis.

Commission v. Poland and *LM* judgments.[414] This entails that they bear *implicit* importance with respect to the current analysis.

Section II – The Specific Competences of the CJEU

In order to understand the CJEU's competence with respect to judicial cooperation in criminal matters, it is important to address two questions. The first relates to the legal status of Framework Decisions before and after Lisbon. The second concerns the CJEU's effective competence in such matters before and after the 1st of December 2014.

Before Lisbon, Article 34(2)(b) EU consecrated the existence of Framework Decisions.[415] As mentioned above, they functioned in a manner similar to that of Directives, setting out an obligation of result that Member States had to achieve, but leaving them a choice as to the forms and methods to do so.[416] However, a lack of national implementation of a Framework Decision could not lead to infringement proceedings by the Commission.[417] Moreover, on the basis of Article 35 EU, the CJEU's jurisdiction on the matter was restrained.[418] Indeed, the preliminary ruling procedure was only applicable insofar the Member State agreed to it in an official declaration.[419] These differences were due to the intergovernmental nature of the third pillar, under which the FDEAW had been adopted.[420] The adoption of the Treaty of Lisbon led to the replacement of the Framework Decision tool by Directives.[421] From then onwards, the pre-existing Framework Decisions remained applicable insofar they required no specific modifications or were not set aside by more recent legislation, as

[414] See footnote n371.
[415] See footnote n245.
[416] *Ibid*.; A. GIANNAKOULA, "Framework Decisions under the Lisbon Treaty: Current Status and Open Issues", *European Criminal Law Review*, Nomos Verlagsgesellschaft mbH & Co. KG, 2017, pp. 275 and 276.
[417] *Ibid*.
[418] Article 35 EU, "*The Court (...) shall have jurisdiction,* ***subject to the conditions laid down in this article****, to give preliminary rulings on the valitidy and interpretation of Frameworkd Decisions (...)"*; *Ibid*.; D. CRAIG and G. DE BURCA (n10), pp. 15.
[419] Article 35(2) "*By a* ***Declaration*** *(...), any Member State shall be able to accept the jusirdiction of the Court to give preliminary rulings as specified in paragraph 1*"; *Ibid*.
[420] A. GIANNAKOULA (n416), pp. 275 and 276.
[421] A. GIANNAKOULA (n416), pp. 275 and 276; V. MITSILEGAS, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, Hart Publishing, 2016, pp. 5 to 11.

stated in Article 9 of Protocol no. 36 to the Treaty of Lisbon.[422] On this basis, the FDEAW remains applicable to this day.

As mentioned above, the competences of the Court and the Commission were limited in the area of judicial cooperation before the adoption of the Treaty of Lisbon.[423] Said limitations remained after the latter's adoption, as stated in Article 10 of Protocol no. 36 to the Treaty of Lisbon.[424] In other words, between 2009 and the 1st of December 2014, the CJEU could continue to answer preliminary questions on the legality, validity and interpretations of Framework Decisions as well as that of the national measures implementing them, but only insofar the Member States had a declaration agreeing to its jurisdiction.[425] This transitional period only applied to pre-existing legislation, to which the FDEAW pertains. As of the 1st of December 2014, the Court was granted *full jurisdiction* in relation to judicial cooperation in criminal matters.[426] This entails it is now entirely competent to review the legality, the implementation and the interpretation of acts of judicial cooperation in criminal matters adopted both before and after the adoption of the Treaty of Lisbon, irrespective of whether the latter fell under the transitional period or not.[427]

Section III – Relevance

The consequences of the CJEU's full jurisdiction with respect to judicial cooperation in criminal matters are threefold. Firstly, it has led to a steady increase of preliminary questions regarding the FDEAW. Indeed, only 12 cases date from before the 1st of

[422] Article 9, Protocol No. 36 to the Treaty of Lisbon, "*The legal effects of the acts (…) adopted (…) prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. (…)*"
[423] See footnotes n418 and n419.
[424] Article 10 Protocol No. 36 to the Treaty of Lisbon, "*As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.*"
A. GIANNAKOULA (n416), pp. 275 and 276; V. MITSILEGAS (n421), pp. 5 to 11.
[425] *Ibid*.
[426] A. GIANNAKOULA (n416), pp. 277; V. MITSILEGAS (n421), pp. 5 to 11.
[427] Article 9 *jo*. 10 Protocol No. 36 to the Treaty of Lisbon; A. GIANNAKOULA (n416), pp. 275 and 276; V. MITSILEGAS (n421), pp. 5 to 11.

December 2014. Among these, four were decided before the adoption of the Treaty of Lisbon, and eight during the transitional period.[428] The rest of the judgments, which constitute the majority, dates *after* the Court was granted full jurisdiction with respect to judicial cooperation in criminal matters.[429] These numbers coincide with the evolution of the CJEU's case law regarding fundamental rights.

Secondly, the full jurisdiction helps protect the fundamental rights of the concerned individuals and the values enshrined in Article 2 TEU. Again, the evolution of the CJEU's case law bears witness to this. On the one hand, the decisions of *Radu* and *Melloni*, taken before the 1st of December 2014 clearly prioritized judicial cooperation over the protection of fundamental rights.[430] On the other hand, it is only from 2016 onwards that the Court explicitly recognized, in the *Aranyosi and Căldăraru* and *LM* judgments, that the protection of the fundamental rights to a fair trial and to not be subjected to torture or inhuman or degrading treatment could, under certain circumstances, constitutes a praetorian exception to the general duty to execute EAWs.[431]

Thirdly, on the judicial cooperation side of the equation, the extended competence in the matter allowed for a higher degree of interpretative uniformity and implementation at the national level. A clear example of this comes from the *Poltorak* and *Kovalkovas* judgments and their corollaries, all of which date from after 2014.[432] The CJEU considered the notion of "*issuing judicial authority*" as an autonomous concept of EU law, thereby ensuring that the executing Member State knows, at least to some extent, whether a *competent* authority issued the EAW.[433] The aforementioned may explain why, despite the recognition of judge-made exceptions regarding the fundamental rights to a fair trial and to not be subjected to inhuman and degrading treatment, there has been an increase of the *effective* execution of EAWs.

[428] *Inter alia*, *Advocaten voor de Wereld*; *Eurojust – EAW case law*, pp. 3 to 7.
[429] *Inter alia*, *Radu*, *Melloni*, *Aranyosi and Căldăraru*, *LM*; *Ibid*.
[430] *Radu*, paras 36 to 42; *Melloni*, paras. 61 to 64; A. P. VAN DER MEI (n3), p. 884; A. WILLEMS (n4), pp. 483 to 486; T. WISCHMEYER (n57), pp. 379 to 381.
[431] *Aranyosi and Căldăraru*, para. 104; *LM*, para. 79; A. LAZOWSKI (n330), pp. 13 to 17; K. BOVEND'EERDT (n117), pp. 116 to 119.
[432] *Poltorak*, paras. 30 to 33; *Kovalkovas*, paras. 31 to 34; *OG and PI*, paras. 48 and 49; *PF*, paras. 27 and 28. V. MITSILEGAS (n352), p. 127; L. BAY LARSEN (n341), pp. 433 to 442; K. KOWALIK-BAŃCZYK (n341), pp. 218 to 220.
[433] *Ibid*.

Indeed, whereas in 2005, merely 1/8th of the EAWs were executed, more than 1/3rd of them are executed nowadays.[434] This can seem paradoxical. If anything, the recognition of new grounds for non-execution should lead to a decrease of said executions. However, it can be argued that these numbers must be interpreted as follows: through the recognition of common standards of protection emanating from a "*centralized*" source, Member States are more inclined to mutually recognize each other's decisions and cooperate swiftly.[435] Indeed, they can rely on the requirements set out by the CJEU rather than decide said requirements by themselves.

Chapter II – *Advocaten voor de Wereld*: The Prioritization of Judicial Cooperation

This Chapter delves into the CJEU's first judgment regarding the FDEAW. Section I provides a brief description of the facts of the case. It is followed by an analysis of the judgment's conclusions in Section II. Finally, Section III defines the relevance of the *Advocaten voor de Wereld* case for the current analysis.

Section I – Facts of the Case

The judgment in question concerned the validity of the FDEAW.[436] The preliminary question was issued by the Belgian *Arbitragehof*, in the course of an action for annulment brought by the non-profit organisation *Advocaten voor de Wereld* against the Belgian Law of 19 December 2003 on the transposition of the FDEAW.[437] The *Advocaten voor de Wereld* organisation had raised two main issues with respect to the Framework Decision.[438] First, it asked whether the FDEAW was compatible with the Article 34(2)(b) EU, according to which Framework Decisions may only be utilized

[434] https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do, (accessed on 21 April 2020).
[435] *Poltorak*, paras. 30 to 33; *Kovalkovas*, paras. 31 to 34; *OG and PI*, paras. 48 and 49; *PF*, paras. 27 and 28. V. MITSILEGAS (n352), p. 127; L. BAY LARSEN (n341), pp. 433 to 442.
[436] *Advocaten voor de Wereld*, para. 1; F. GEYER, "European Arrest Warrant: Advocaten voor de Wereld VZW v. Leden van de Ministerraad: Cour of Justice of the European Communities, Judgment of 3 May 2007, Case C-303/05", *European Constitutional Law Review*, Vol. 4(1), Cambridge University Press, 2008, pp. 149 to 161.
[437] *Advocaten voor de Wereld*, para. 2.
[438] F. GEYER (n436), p. 157.

in order to approximate the laws and regulations of the Member States.[439] Second, it questioned whether Article 2(2) FDEAW, which sets out the presumption of double criminality for a list of 32 offences, was compatible with Article 6(2) EU and the principle of legality and equality and non-discrimination it guarantees.[440]

With regards to the first question, *Advocaten voor de Wereld* argued one of two things. To begin with, it stated that the Council should have adopted a convention rather than a framework decision, seeing as the latter could only be used to progressively approximate the criminal rules and regulations of the Member States in the circumstances enumerated in the Articles 29 and 31 EU, to which it considered the situation in question did not pertain.[441] Building upon the aforementioned, the non-profit organisation put forth that, since the FDEAW was aimed at replacing a number of pre-existing extradition conventions among the Member States, the only way that its provisions could derogate from said conventions would be for them to be encompassed in a new convention.[442]

As for the second question, *Advocaten voor de Wereld* considered that Article 2(2) FDEAW, by abolishing the double criminality requirement for a list of 32 offences under certain circumstances, constituted a violation of the principles of legality in criminal matters and equality and non-discrimination.[443] Concerning the principle of legality, the organisation argued that, since the 32 offences were merely listed and not defined in the Framework Decision, Article 2(2) FDEAW did not meet the requirements of clarity, foreseeability and predictability that generally allow individuals to recognize whether or not their actions are illegal.[444] On the ground of equality and non-discrimination, *Advocaten voor de Wereld* challenged what could be

[439] *Advocaten voor de Wereld*, para. 16; See footnotes n225 and n245.
[440] *Ibid*.
[441] *Advocaten voor de Wereld*, paras. 25 and 33; F. GEYER (n436), pp. 153 and 154. "*(...) the development of an area of freedom, security and justice features as one of the objectives of the Union and the first paragraph of Article 29 EU states that, (...) common action is to be developed among the Member States, inter alia in the field of judicial cooperation in criminal matters. (...) closer cooperation between judicial and other competent authorities of the Member States in accordance with the provisions of Articles 31 [EU] and 32 [EU]' is to contribute to the achievement of that objective.*"
[442] *Advocaten voor de Wereld*, para. 26; F. GEYER (n436), pp. 153 and 154.
[443] *Advocaten voor de Wereld*, para. 44.
[444] *Advocaten voor de Wereld*, paras. 48 to 50.

considered as a "*justice à deux vitesses*".[445] They argued that Article 2(2) FDEAW led to a difference in treatment between individuals whose acts fell under one of the 32 offences, on the one hand, and individuals whose acts continued to require a verification of double criminality, on the other hand.[446]

Section II – The Conclusions of the CJEU

After confirming its competence on the matter under Article 35(1) and (2) EU, the CJEU answered both questions in the positive, thereby confirming the FDEAW's validity.[447] They are discussed in Points A and B, respectively.

A – With Regards to the First Question

Regarding the first question, the CJEU followed Advocate General Colomer's opinion and reiterated the FDEAW's main objective, which was to replace the pre-existing multilateral system of extradition with a more simple and effective mechanism based on the principle of mutual recognition.[448] Said principle requires that the laws and regulations for the different Member States be approximated with respect to judicial cooperation in criminal matters.[449]

In order to do so, the Council is free to choose whichever legal instrument encompassed in Article 34(2) EU, seeing as there is no order of priority between conventions or framework decisions, *inter alia*.[450] As such, nothing in the conjunctive reading of Articles 34(2)(b) and 31(1)(e) EU implies that framework decisions may solely be used to approximate the laws and regulations of the different Member States

[445] This term is no used by the non-profit organization; it constitutes an interpretation of its argumentation.
[446] *Advocaten voor de Wereld*, paras. 55 and 56.
[447] *Advocaten voor de Wereld*, paras. 15 to 26.
[448] *Advocaten voor de Wereld*, para. 28; Opinion of Advocate General Colomer delivered on 12 September 2006, Advocaten voor de Wereld, C-303/05, EU:C:2005:552, para. 16 (hereinafter Opinion of AG Colomer in *Advocaten voor de Wereld*).
[449] *Advocaten voor de Wereld*, para. 29.
[450] *Advocaten voor de Wereld*, para. 37; D. A. HEID, "Before and After the Treaty of Lisbon: The Legal Framework of Police Cooperation in the EU Compared", Police Cooperation in the European Union under the Treaty of Lisbon – Opportunities and Limitations, H. ADEN (ed.), Nomos, 2015, pp. 73 and 74.

in matters regarding the constituent elements of criminal offences and their penalties as listed in the latter provision.[451]

In addition, on the same basis, the argument according to which the replacement of the multilateral conventions can only take place by a legal instrument of identical nature is invalid. Indeed, requiring that the Council adopt a convention in order to approximate the laws and regulations of the different Member States not only contravenes the "*equivalence*" among the legal instruments provided by Article 34 (2) EU, but it also risks depriving the Council of its effectiveness to adopt framework decisions in matters previously pertaining to international conventions.[452]

B – With Regards to the Second Question

The second question is more substantive in nature and refers to the potential violations of the principles of criminal legality and equality and non-discrimination. As such, for the current analysis, it bears more importance than the first question.

The CJEU first considered that Article 2(2) FDEAW did not breach the principle of legality of criminal offences and penalties, which requires that these be sufficiently clear, precise and foreseeable.[453] Indeed, although it is true that the provision in question merely provides a list of offences for which double criminality is presumed, the constituent elements and penalties corresponding to these offences are defined by the "*issuing Member State*".[454] It follows from Article 1(3) FDEAW that the Framework Decision does not modify the obligation for Member States to respect the fundamental rights and principles enshrined in Article 6 EU.[455] Since the principle of legality falls under the latter, the Court considered that the FDEAW offered sufficient guarantees as to its protection.[456]

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[451] *Advocaten voor de Wereld*, para. 38.
[452] *Advocaten voor de Wereld*, paras. 32, 38 and 42; F. GEYER (n436), pp. 153 and 154.
[453] *Advocaten voor de Wereld*, paras. 49 and 50.
[454] *Advocaten voor de Wereld*, para. 52; L. KLIMEK, *European Arrest Warrant*, Springer, 2015, p. 222 to 224.
[455] *Advocaten voor de Wereld*, para. 53; L. KLIMEK (n454), pp. 222 to 224.
[456] *Advocaten voor de Wereld*, para. 54.

As for the principles of equality and non-discrimination, the Court reiterated that, unless objectively justified, these principles require that different situations be treated differently and comparable situations be treated similarly.[457] In its argumentation, *Advocaten voor de Wereld* had considered that Article 2(2) FDEAW created a situation where individuals in comparable situations would be treated differently.[458] The Court disregarded the argument of the non-profit organisation, stating that "*even if*" the situation of an individual whose acts fall under Article 2(2) FDEAW could be considered as comparable to that of an individual whose acts do not fall under said provision, the difference of treatment would *still* be justified.[459] In support of this, the CJEU relied on the principles of mutual recognition and trust, and stated that it is on account of the severity of the relevant offences that it can be presumed that all Member States criminalize them and that no test of double criminality is required.[460]

Section III – Relevance

This section analyses three aspects of the *Advocaten voor de Wereld* judgement. Point A addresses how the CJEU explicitly referred to the CFR. Point B the balance that the CJEU afforded to the effective judicial cooperation and the protection of fundamental rights.

A – Reference to the CFR

The case in question dates from after the CFR's adoption, but before it gained its legally binding force. It is one of the first situations in which the CJEU explicitly mentioned the CFR.[461] According to advocate general *Colomer*, it was important for the CJEU to start assuming the use of the Charter as an interpretative tool, not only in matters of the first pillar, but also in those falling under the third pillar.[462] Though

[457] *Advocaten voor de Wereld*, para. 56.
[458] *Advocaten voor de Wereld*, para. 55.
[459] *Advocaten voor de Wereld*, paras. 56 *jo*. 58.
[460] *Advocaten voor de Wereld*, para. 57; L. KLIMEK (n454), pp. 224; O. POLLICINO, "European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems", *German Law Journal*, Vol. 9(10), pp. 1318 and 1329.
[461] F. GEYER (n436), pp. 158; E. HERLIN-KARNELL (n289), p. 1154.
[462] *Ibid*.; Opinion of AG Colomer in *Advocaten voor de Wereld*, para. 79, "*(...) The Court must break its silence and recognise the authority of the Charter of Fundamental Rights as an interpretative tool at*

most authors agree that the advocate general's opinion provided sufficient justification to his reasoning, their opinions differ regarding how well the Court relied upon the latter to justify its own decision.[463] They can be subdivided into two categories.

A first category of authors agrees that the Court acknowledged the importance of the CFR by explicitly referencing it in paragraph 46 of the judgment.[464] Moreover, they consider that the fact that the CJEU refrained from mentioning the Charter's non-binding nature constituted a step towards the recognition of its authority and its effective use in criminal matters.[465]

The second category of authors, which falls in line with what is stated in the current analysis, contains those who partially disagree with the aforementioned.[466] According to them, it is important to recognize that the CJEU followed advocate general *Colomer*'s opinion and "*broke its silence*" on the Charter in matters pertaining to the third pillar.[467] That being said, they are unsure of whether the mentioning of the CFR possessed any added value *in casu*.[468] Indeed, the CJEU merely draws upon the CFR once, in order to substantiate its argument that the relevant principles are general principles of EU law as protected by Article 6 EU and, more specifically, that flow from the ECHR and the Member Sates' constitutional traditions.[469] In other words, the CFR is used in the background, rather than as the main source of fundamental rights.

B – The Balance Afforded to Effective Judicial Protection and the Protection of Fundamental Rights

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the forefront of the protection of the fundamental rights which are part of the heritage of the Member States (…)".

[463] Opinion of AG Colomer in *Advocaten voor de Wereld*, paras. 72 to 78; F. GEYER (n436), pp. 158; E. HERLIN-KARNELL (n289), p. 1154; M. J. BORGERS, *Case note: Hof van Justitie EG (Advocaten voor de Wereld)*, No. 619, May 03, 2007, pp. 3 to 5.

[464] *Advocaten voor de Wereld*, para. 46; F. GEYER (n436), pp. 158 and 159.

[465] *Ibid*.

[466] E. HERLIN-KARNELL (n289), p. 1156; M. J. BORGERS (n463), pp. 3 to 5.

[467] *Advocaten voor de Wereld*, para. 46; *Ibid*.

[468] E. HERLIN-KARNELL (n289), p. 1154 and 1155; M. J. BORGERS (n463), pp. 3 to 5.

[469] *Advocaten voor de Wereld*, para. 45 *jo*. 46. The CJEU first mentions the constitutional traditions and the ECHR, both of which make up the general principles of EU law, before substantiating them by a reference to the CFR.

The Court established a similar reasoning with respect to both the principle of legality and the principles of equality and non-discrimination. First, the FDEAW is not aimed at harmonizing the constituent elements or the penalties of the criminal offences listed in its Article 2(2).[470] Consequently, it is up to the Member States, when implementing the relevant framework decision in their national law, to define the aforementioned criteria.[471] Since, in doing so, Article 1(3) FDEAW does not modify the Member States' obligation to protect fundamental rights as provided by Article 6 EU, it can be assumed that the principles of legality and equality and non-discrimination are respected in the course of national implementation.[472] This must be combined with the principle of mutual trust, which presumes that Member States respectively provide similar or equivalent standards of protection for fundamental rights.[473] As such, and by way of an extensive interpretation, Article 2(2) FDEAW violates neither the principle of legality nor the principles of equality and non-discrimination.[474]

For the purpose of the current analysis, it can be posited that the aforementioned reasoning results in a prioritization of judicial cooperation over the protection of fundamental rights, irrespective of whether this was, in fact, the CJEU's intention. Indeed, the Court assumes, on the basis of the fact that the FDEAW does not modify the Member States' obligations to respect fundamental rights and the presumption that all Member States possess sufficient and equivalent standards of protection for said rights, that the implementation and application of Article 2(2) FDEAW will not cause any problems with respect to the principles of legality and equality and non-discrimination.[475] This argumentation is redundant, akin to a mathematical demonstration that states that *2 + 2 = 4* because *4 = 2 + 2*. The Court does not address the potential problems with respect to fundamental rights that could arise

[470] *Advocaten voor de Wereld*, para. 52.
[471] *Ibid*.
[472] *Advocaten voor de Wereld*, para. 53.
[473] See Part II, Chapter II, Section I, "*The Pilot Provisions of the FDEAW*".
[474] *Advocaten voor de Wereld*, paras. 53 to 60, respectively for legality and equality and non-discrimination. E. HERLIN-KARNELL (n289), p. 1156; M. J. BORGERS (n463), pp. 3 to 5; F. GEYER (n436), pp. 159 to 161; L. KLIMEK (n255), pp. 555 to 558. See Part I, Chapter II, Section I, "*The Principle of Mutual Trust*".
[475] *Ibid*. See also, for instance, *Advocaten voor de Wereld*, para. 53, "*Accordingly, while Article 2(2) of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties*."

from the implementation and application of Article 2(2) FDEAW, nor does it provide any criteria, requirements or conditions aimed at avoiding such issues.

Chapter III – The *Radu* and *Melloni* Judgments: A Lost Battle for Fundamental Rights?

The following Sections delve into the *Radu* and *Melloni* judgments. Section I focuses on the *Radu* judgment, addressing the latter's facts and conclusions in its Points A and B, respectively. Section II does the same for the *Melloni* judgment. Finally, Section III analyses the relevance of both judgments for the current analysis.

Section I – The *Radu* Judgment

A – Facts of the Case

Mr. *Radu*, a Romanian national, was subject to four EAWs issued by the German authorities for the purposes of prosecution with respect to aggravated robbery.[476] He opposed his surrender, *inter alia*, on the basis that he had not been heard before the arrest warrants were issued.[477] In doing so, Mr. *Radu* submitted one of three arguments. First, he stated that, pursuant to Article 6 TEU, both the Charter and the ECHR were to be considered as EU primary law, in accordance with which the FDEAW had to be interpreted and applied.[478] Second, Mr. *Radu*, pointed out that the Framework Decision had been implemented inconsistently throughout the Union.[479] He argued that an EAW is subjected to a requirement of reciprocity, which is not met where said inconsistencies exist.[480] Last and most importantly, he submitted that the executing Member State is under an obligation to verify whether the issuing Member

[476] *Radu*, para. 2.
[477] *Radu*, para. 19.
[478] *Ibid*.
[479] *Ibid*. Advocaten voor de Wereld, paras. 17, 19 and 22; Opinion of AG Colomer in *Advocaten voor de Wereld*, para. 7. The *German Bundesverfassungsgericht* had declared the German law implementing the FDEAW as unconstitutional. The *Czech Ústavní soud*, on the other hand, had dismissed a similar action for unconstitutionality.
[480] *Ibid*.

State respects the fundamental rights protected by the CFR and the ECHR and, if that is not the case, to refuse the execution of the EAW.[481]

Based on the foregoing, the Romanian Court of appeal referred a number of preliminary questions to the CJEU. The latter decided to answer all admissible questions simultaneously, on account of their similarity.[482] As such, the Court deemed the main issue to be whether the FDEAW, when read in light with Articles 47 and 48 CFR and Article 6 ECHR, must be interpreted as granting the possibility for the executing judicial authority to refuse the execution of an EAW when the issuing judicial authority did not hear the concerned individual, irrespective of the fact that such a possibility is not encompassed the optional or mandatory grounds for refusal of an EAW enshrined in Articles 3 to 4a FDEAW.[483]

B – The Conclusions of the CJEU

The CJEU answered the question negatively on the basis of four grounds.[484] To begin with, it argued that the purpose of the FDEAW is to replace the multilateral extradition conventions among Member States with a more centralized, simplified and effective system of surrender.[485] As a justification, it combined the principles of mutual trust and recognition with the EU's objective to achieve an area of freedom, justice and security.[486]

The CJEU's second argument stated that a Member States' obligation to execute an EAW must or can only be refused in the situations *exhaustively* enumerated under Articles 3 to 4a FDEAW.[487] It then proceeded to specify the difference that exits between an EAW issued for the purpose of executing a criminal sentence or detention order taken *in abstentia*, on the one hand, and an EAW issued for the purposes of conducting a criminal prosecution.[488] Whereas the former situation can, under certain

[481] *Ibid*.
[482] *Radu*, para. 23.
[483] *Radu*, para. 31; *Eurojust – EAW case law*, pp. 19 to 20.
[484] *Eurojust – EAW case law*, pp. 19 to 20.
[485] *Radu*, paras. 33 and 34.
[486] *Ibid*. See Part I, Chapter II, Section I, "*The Principle of Mutual Trust*".
[487] *Radu*, paras. 35 and 36; See Part I, Chapter II, Sections I and II, "*The Principle of Mutual Trust*" and "*The Principle of Mutual Recognition*".
[488] *Radu*, paras. 37 and 38.

circumstances, fall under Article 4a FDEAW and warrant the non-execution of the EAW, the latter is merely of procedural nature and thereby fails to constitute a ground for non-execution.[489]

Referring to the fundamental rights invoked, the Court reiterated that right to a fair trial and the right to be heard enshrined in Articles 47 and 48 CFR do not include the possibility for the executing Member State to refuse the execution of the EAW when the concerned individual was not heard in the issuing Member State.[490] This third argument must be read in conjunction with the second and fourth ones, which respectively set out the exhaustiveness of the grounds for refusal and the effectiveness of the EAW mechanism.

Finally, the CJEU argued that the creation of the area of freedom, security and justice would be jeopardized if the effectiveness of the EAW mechanism were not guaranteed.[491] It is the very essence of the FDEAW to ensure the speedy cooperation among Member States in criminal matters.[492] The obligation for the issuing Member State to hear the individual in question before issuing an EAW would blatantly contravene this objective.[493] Indeed, an EAW must possess a certain degree of unexpectedness, so as to not facilitate the flight of the individual concerned.[494] In addition, the Court reiterated that the FDEAW sets out a number of guarantees that protect the latter's right to be heard in the executing Member State.[495]

Section II – The *Melloni* Judgment

A – Facts of the Case

Mr. *Melloni* was the subject of an EAW issued by the Italian authorities for the execution of a prison sentence of 10 years which had been decided in his absence.[496]

[489] *Ibid*.
[490] *Radu*, para. 39.
[491] *Radu*, paras. 40 and 41.
[492] *Ibid*.
[493] *Ibid*.
[494] *Ibid*.
[495] *Radu*, para. 42; See footnote n317.
[496] *Melloni*, para. 2.

The Spanish executing Court authorized the surrender, despite *Melloni*'s opposition.[497] The latter argued that, were he to be surrendered, he would not be entitled to a retrial in Italy.[498] The Spanish executing Court rejected *Melloni*'s argument, stating that his right to a fair trial had not been violated as he had not only been notified of his trial, but had also been represented by his lawyers during the latter.[499]

Mr. *Melloni* started a procedure of constitutional review before the Spanish Constitutional Court against the aforementioned decision.[500] He argued that his right to a fair trial, enshrined in Article 24(2) of the Spanish Constitution, had been violated.[501] According to the Spanish Constitutional Court's previous case law, the aforementioned article requires that a person convicted *in abstentia* be able to challenge the surrender decision aimed at the execution of that conviction, *even if* a lawyer represented him or her at the trial.[502] On the other hand, Article 4a(1) FDEAW only allows for the execution an EAW to be refused on such grounds in a limited number of situations.[503] These do not include the situation where the individual concerned was aware of the trial and/or was represented and defended by a lawyer.[504]

Having regard to the conflict between the two provisions, the Spanish Constitutional Court submitted three preliminary questions to the CJEU. First, whether Article 4a(1) FDEAW must be interpreted as precluding the executing Member State, in the circumstances it specifies, from making the execution of an EAW conditional upon the conviction in question being open to review.[505] If so, whether the provision in question conforms to the requirements provided by Article 47 and 48(2) CFR regarding the right to a fair trial and the right of the defense.[506] Finally, if the aforementioned questions were answered in the positive, whether Article 53 CFR allows the executing Member State to make the surrender of a person convicted *in*

[497] *Melloni*, para. 17.
[498] *Melloni*, para. 18.
[499] *Melloni*, para. 23.
[500] *Melloni*, para. 18.
[501] *Ibid*. A. WILLEMS (n4), pp. 483 to 486.
[502] *Ibid*.
[503] *Melloni*, para. 23, See footnote n327.
[504] *Ibid*.
[505] *Melloni*, para. 26.
[506] *Ibid*.

abstentia conditional upon the possibility of a retrial or review in the issuing Member State in order to avoid further violations of the relevant rights.[507]

B – The Conclusions of the CJEU

After declaring all three questions admissible, the CJEU answered the first and second ones in the positive and the third one in the negative. They are discussed in Subpoints a, b and c, respectively.

a – With Regards to the First Question

With regards to the first question, the Court adopted a literal and teleological interpretation of Article 4a(1) FDEAW.[508] It started by referring to its former *Radu* judgment, stating that the FDEAW, which is based on the principle of mutual recognition, was adopted to replace the old multilateral extradition system by a more simple and effective one on account not only of the EU's objective to create an area of freedom, security and justice, but also of the mutual trust that exists among Member States.[509]

Based on the foregoing, Article 1(2) FDEAW sets out a general duty for the executing Member State to proceed with the concerned individual's surrender.[510] It must or can only be refused in the exhaustively listed grounds encompassed in Articles 3 to 4a FDEAW.[511] Although Article 4a(1) FDEAW constitutes one of the optional grounds for refusal, it may only be applied, *inter alia*, in cases where the individual in question was informed of the trial and waived his or her possibility to attend it and/or in situations where a lawyer represented him or her.[512]

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[507] *Ibid*.
[508] *Melloni*, para. 39; V. FRANSSEN, "Melloni as a wake-up call – setting limits to higher national standards of fundamental rights' protection, European Law Blog", *10 March 2014*, https://europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/, (accessed on 22 March 2020).
[509] *Melloni*, paras. 36 to 38; *Radu*, paras. 33 to 36; See Part I, Chapter II, Sections I and II, "*The Principle of Mutual Trust*" and "*The Principle of Mutual Recognition*".
[510] *Melloni*, para. 38; *Radu*, paras. 35 and 36.
[511] *Ibid*.
[512] *Melloni*, para. 42; See fotnote n327.

To justify the aforementioned, the CJEU focused on the aims of the EU legislature in adopting the 2009 Framework Decision modifying the FDEAW. A first objective was to replace the more lenient Article 5 FDEAW with the provision in question, its more stringent counterpart.[513] The second was to improve the mutual recognition of judicial decisions rendered *in abstentia* by harmonizing and limiting the grounds for their refusal, all the while maintaining certain standards of protection for the accused's rights.[514]

The CJEU concluded that, in the circumstances of the case, Article 4a(1) FDEAW did in fact preclude the executing Member State from subjecting the surrender to the condition that the individual's *in abstentia* conviction be opened to review in the issuing Member State.[515]

b – With Regards to the Second Question

After reiterating the legally binding nature of the CFR on the grounds of Article 6(1) TEU, the Court referred to the ECtHR's case law in order to remind the non-absolute nature of the right to a fair trial and the right to be heard encompassed in Articles 47 and 48(2) CFR.[516] Insofar sufficient safeguards are provided, *inter alia* the notification of the trial and/or the representation by a lawyer, the accused can waive his or her right to a fair trial expressly or tacitly without there being a violation of said right.[517]

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[513] *Melloni*, para. 41; Recital 6 and Article 2 Framework Decision 2009. "*The object of Framework Decision 2009/299 is,* ***firstly****, to repeal Article 5(1) of Framework Decision 2002/584, which, subject to certain conditions, allowed for the execution of a European arrest warrant issued for the purposes of executing a sentence rendered in absentia to be made conditional on there being a guarantee of a retrial of the case in the presence of the person concerned in the issuing Member State and,* ***secondly****, to replace that provision by Article 4a. That provision henceforth* ***restricts the opportunities for refusing to execute such a warrant*** *by setting out, as indicated in recital 6 of Framework Decision 2009/299, 'conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused*".
[514] *Ibid*.
[515] *Melloni*, para. 46.
[516] *Melloni*, paras. 49 and 50; Judgment of 6 September 2012, *Trade Agency*, C-619/10, EU:C:2012:531, paras. 52 and 55; ECtHR Judgment of ECtHR, 24 April 2012, *Haralampiev v. Bulgaria*, no. 20491/92, paras. 56 to 59."*(...) right of the accused to appear in person at his trial, (...) is not absolute (...). The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest." and "This interpretation (...) is in keeping (...) the case-law of the European Court of Human Rights*".
[517] *Ibid*.

Article 4a(1)(a) and (b) FDEAW merely sets out the situations in which the accused is deemed to have *unambiguously* waived his or her right to be present at the trial.[518] This falls in line with one of the 2009 Framework Decision's main objectives which, as mentioned in Subpoint a, is to ensure the smooth mutual recognition of judicial decisions taken *in abstentia* by harmonizing and limiting the grounds for their refusal, all the while ensuring that the accused's rights are not neglected.[519]

On this basis, someone who, having been effectively informed of his or her trial, refused to go and/or mandated their representation to a lawyer, cannot invoke the violation of his or her right to be heard and require a retrial.[520] As such, Article 4a(1) FDEAW conforms to the requirements set out by Articles 47 and 48(2) CFR.[521]

c – With Regards to the Third Question

The third question concerns the "*conflict*" between the unity, primacy and effectiveness of EU law and the standards of fundamental rights protections granted by national law.[522] On the basis of Article 53 CFR, nothing in the Charter can be interpreted as restricting or adversely affecting the fundamental rights protection currently afforded, within their respective scope, by EU law, international law and national law.[523] In such a situation, what happens when a national provision such as Article 24(2) Spanish Constitution, provides higher standards of protection than that of EU law, namely Article 4a(1) FDEAW?[524] Must the national provision be given priority, even if that entails disregarding the latter provision?[525]

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[518] *Melloni*, para. 52; Opinion of Advocate General Bot delivered on 2 October 2012, Melloni, C-399/11, EU:C:2012:600, paras. 73 to 80 (hereinafter Opinion of AG Bot in *Melloni*). The Advocate General refers to the case law of the ECtHR regarding the non-absolute nature – subject to certain conditions (see footnote n516) – of the right to a fair trial. He considers that Article 4a FDEAW has the effect of "*codifying*" the ECtHR's case law in the context of the FDEAW.
[519] *Ibid*.; See footnote n513.
[520] *Ibid*.
[521] *Melloni*, paras. 53 and 54.
[522] V. CONSTANTINESCO, "La Conciliation Entre la Primauté du Droit de L'union Européenne et l'Identité Nationale des Etats Membres", *Common European Legal Thinking – Essays in Honour of Albrecht Weber*, H.-J. BLANKE, P. C. VILLALÓN, T. KLEIN and J. ZILLER (eds.), Springer International Publishing, 2015, p. 108; A. WILLEMS (n4), pp. 483 to 486.
[523] Article 53, CFR *jo*. *Explanations to the CFR*, pp. 35; B. DE WITTE (n102), p. 1523.
[524] *Melloni*, paras. 25 and 26; V. FRANSSEN (n508); V. CONSTANTINESCO (n522), p. 108; A. WILLEMS (n4), pp. 483 to 486).
[525] *Ibid*.

It follows from the principle of primacy of EU law that rules of national order, even those of constitutional nature, cannot undermine the effectiveness of EU law that fully comply with the CFR.[526] The 2009 Framework Decision, which is aimed at modifying the FDEAW to include specific limitations to the refusal of the execution of an EAW in cases of trial *in abstentia* effects, according to the CJEU, an *exhaustive* harmonization reflecting the consensus among Member States as to the scope that must be given to the procedural rights granted to individuals in the circumstances in question.[527]

As such, despite the fact that recital 14 of the 2009 framework decision states that it is not designed to harmonize national legislation *per se*, its provisions do ensure that the standards of protection for the fundamental right to a fair trial are limited to the situations it enumerates.[528] Allowing a Member State to rely on Article 53 CFR in order to provide a ground for refusal of the execution of an EAW that is not encompassed in Article 4a(1) FDEAW would undermine the efficacy of the 2009 Framework Decision – which inserts said provision in the FDEAW – and affect the principles of mutual trust and recognition it is based upon.[529]

Consequently, the CJEU concluded that Article 53 CFR cannot be interpreted as allowing the executing Member State to invoke its own constitutional safeguards for the right to a fair trial in order to refuse or render the surrender of a person convicted *in abstentia* conditional upon said conviction being open to review in the issuing Member State.[530]

Section III – Relevance

Much like what was stated for *Advocaten voor de Wereld*, a conjunctive reading of the *Radu* and *Melloni* cases demonstrates the Court's prioritization of effective

[526] *Internationale Handelsgesellschaft*, para. 3; *Melloni*, paras. 58 and 59; B. DE WITTE (n102), p. 1523.
[527] Recital 14 Framework Decision 2009; *Melloni*, para. 62. What is put forth here is the harmonisation of fundamental rights standards, *not* the harmonisation of national law.
[528] *Ibid*.
[529] *Melloni*, para. 63.
[530] *Melloni*, para. 64; A. P. VAN DER MEI (n3), p. 897.

judicial protection over the protection of fundamental rights.[531] More specifically, while the *Radu* judgment confirms the exhaustive nature of the grounds for refusal, the *Melloni* case builds upon this reasoning and justifies it with a narrow interpretation of Article 53 CFR.[532] Indeed, by refusing that a breach of fundamental rights enshrined either in EU law or national constitutional law constitute a valid ground for the refusal of the execution of an EAW in instances that do not fall under the mandatory or optional grounds for refusal enshrined in Articles 3 to 4a FDEAW, the CJEU effectively prevents Member States from "*creating*" new refusal grounds aimed at protecting said rights.[533]

However, it must be borne in mind that the *Radu* and *Melloni* judgments were adopted right before Opinion 2/13, which, as discussed in Part I, can be considered as constituting the implicit turning point in the CJEU's case law regarding effective judicial cooperation in criminal matters.[534] Based on the foregoing, two categories of authors can be distinguished. The first, which is minoritarian and represented by advocate general Bot's opinion in the *Melloni* judgment, argues in favor of the CJEU's effectiveness and primacy argument.[535] It is discussed in Point A. The second category, overwhelmingly majoritarian and best represented by advocate general Sharpston's opinion in the *Radu* judgment, deems both judgments as missed opportunities for the CJEU to adopt a more protective stance regarding fundamental rights.[536] It is examined in Point B. Finally, point C analyzes the conjunctive reading of *Radu*, *Melloni* and Opinion 2/13, reiterating why the latter constitutes the turning point in the CJEU's case law.

A – Effective Judicial Cooperation in Criminal Matters

As an answer to the first question, advocate general Bot deemed that an interpretation of Article 4a(1) FDEAW rendering it possible for a Member State to make the

[531] N. CARIAT, *La Charte des Droits Fondamentaux et l'Equilibre Constitutionenel entre l'Union Européenne et les Etats Membres*, Bruylant, 2016, pp. 93 to 106.
[532] *Radu*, paras. 36 to 42; *Melloni*, paras. 61 to 64; A. P. VAN DER MEI (n3), p. 897.
[533] *Ibid*.
[534] Opinion 2/13, paras. 191 and 192; T. WISCHMEYER (n57), pp. 354 to 360; S. PRECHAL (n1), pp. 81 and 82.
[535] See, for instance, Opinion of AG Bot in *Melloni*, paras. 103 and 119 to 125.
[536] See, for instance, Opinion of AG Sharpston in *Radu*, paras. 70 to 77.

surrender of an individual conditional upon the possibility of a retrial would equate to the creation of a new ground for refusal.[537] This, according to him, would not only contravene the FDEAW's explicitly and exhaustively stated grounds for refusal, but also the 2009 Framework Decision's objective to ensure the effectiveness of mutual recognition of decisions rendered *in abstentia* all the while protecting the individual's right of the defense by providing clear and common grounds for non-recognition of decisions taken *in abstentia*.[538]

Regarding the second question and the conformity of Article 4a(1) FDEAW with the right to a fair trial encompassed in Articles 47 and 48(2) CFR, advocate general Bot referenced the ECHR's case law on the matter.[539] The latter reiterates that the right to a fair trial is not absolute, and can be waived, either tacitly or expressly, by the accused, so long as said waiver is unequivocal.[540] *In casu*, advocate general Bot considered that Article 4a(1) FDEAW, by explicitly providing the situations in which there is no violation to the right to a fair trial, constitutes a "*codification*" of the ECtHR's case law and must therefore be assumed as complying with the requirements of Articles 47 and 48(2) CFR.[541]

However, it is the answer to the third question that bears the most importance for the current analysis. Much like the two first questions, the advocate general's interpretation coincides with that of the CJEU. Indeed, he considered that the fundamental rights protection set out in Article 53 CFR could not, *in the circumstances of the case*, be considered as a minimum standard to which Member States can add additional safeguards.[542] He justified this on the basis of the primacy and effectiveness of EU law, relying on three main grounds.

First, he considered that the interpretation of Article 53 CFR suggested by the Spanish Constitutional Court would lead to a situation of "*justice à deux vitesses*".[543] Indeed,

[537] Opinion of AG Bot in *Melloni*, para. 65.
[538] *Melloni*, paras. 41 to 46; Recital 4 Framework Decision 2009; Opinion of AG Bot in *Melloni*, paras. 69 and 70.
[539] *Melloni*, paras. 49 and 50; Opinion of AG Bot in *Melloni*, paras. 77 to 80; See footnote 518.
[540] *Ibid*.
[541] *Ibid*.
[542] *Internationale Handelsgesellschaft*, para. 3; *Melloni*, para. 59; Opinion of AG Bot in *Melloni*, para. 98.
[543] This is not the term used by the Advocate General, it is an interpretation of his argumentation.

he argued that a difference would exist between individuals convicted *in abstentia* in the issuing Member State depending on whether they fled to Spain, on the one hand, or another Member State, on the other hand.[544] In the former situation, the execution of the EAW would be rendered conditional to a right to retrial, effectively paralyzing the relevant mechanism of judicial cooperation in instances where the issuing Member State is not ready to ensure a review of the accused's decision.

Second, advocate general Bot distinguished situations in which the EU provides a common definition and degree of protection to a fundamental right from those where no such definition exists. By looking at the European legislator's main objectives when adopting the FDEAW and, more specifically, the 2009 Framework Decision, he considered the situation in question as falling under the first category.[545] To supplement this, the advocate general relied on the autonomous nature of the EU legal order.[546] Due to the latter, the level of protection deriving from a national Constitution cannot be automatically transposed to the EU level nor relied upon in the context of the application of EU law.[547] As such, even in situations where national law provides a higher degree of protection of fundamental rights, it must be adapted to conform to the effectiveness of EU law and its objectives, *in casu* the creation of an area of freedom, security and justice.[548]

Third, Article 53 CFR must be read in conjunction with Articles 51 and 52 CFR.[549] As mentioned in Part I, Article 51 CFR sets out that the Charter's provisions apply to Member States *only* when they are implementing EU law.[550] Moreover, Article 52(3)

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[544] *Melloni*, paras.58 to 64; Opinion of AG Bot in *Melloni*, paras. 102 and 103; A. LAZOWSKI, "Stepping into Uncharted Waters No More: The Court of Justice and EU Criminal Law", *The Needed Balances in EU Criminal Law: Past, Present and Future*, C. BRIÈRE and A. WEYEMBERGH (eds.), Bloomsbury Publishing, 2017, pp. 122 and 123.
[545] *Ibid*.
[546] N. DE BOER, *Uniformity of deference to national constitutional traditions in the protection of fundamental rights? Opinion of AG Bot in case C-399/11 Melloni*, 25 October 2012, https://europeanlawblog.eu/2012/10/25/uniformity-or-deference-to-national-constitutional-traditions-in-the-protection-of-fundamental-rights-case-c-39911-melloni-opinion-ag-bot/, accessed on 19 March 2020).
[547] *Melloni*, paras. 58 to 64; Opinion of AG Bot in *Melloni*, paras. 111 to 113; A. LAZOWSKI (n544), pp. 122 and 123.
[548] *Ibid*.; L. MANCANO (n313), pp. 110 to 112.
[549] Opinion of AG Bot in *Melloni*, para. 129. See Part I, Chapter I, Section II, C, b and c, "*Articles 51, 52 and 53 of the CFR: The 'Horizontal' Clauses*" and "*Relevance*".
[550] *Wachauf*, para. 19; *Åkerberg Fransson*, paras. 18 to 21; *Associação*, paras. 29 and 40; *Explanations to the CFR*, p. 32; I. PEREIRA DE SOUSA (n376), p. 149; M. KRAJEWSKI (n369), pp. 403 and 404; M.

and (4) CFR refer to the ECtHR and the national constitutional traditions of the Member States as other sources of fundamental rights.[551] Read together, the aforementioned provisions entail that the CFR may not only *not* affect the other sources of fundamental rights adversely, but also applies *exclusively* to matters falling within the scope of EU law.[552] In other words Article 53 CFR does not require that Member States reduce their standards of fundamental rights protection in instances that fall under the scope of their national law, nor does it preclude them from providing additional safeguards in instances that fall under the scope of EU law, *insofar they do not jeopardize its effectiveness*.[553] With respect to the case in question, the advocate general argued that allowing a Member State to invoke its more protective national law to create a new ground for refusal *not* provided by Articles 3 to 4a FDEAW would have an adverse effect on the FDEAW's objectives, namely the creation of an area of freedom, security and justice based on effective judicial cooperation among Member States.[554]

B – The Protection of Fundamental Rights

For many others, the CJEU's reasoning in both *Radu* and *Melloni* constituted a missed opportunity for it to start prioritizing the protection of fundamental rights rather than "*absolute*" effective judicial cooperation. This point of view is illustrated particularly well by advocate general Sharpston's opinion in the *Radu* judgment, despite its failure to convince the Court.

Advocate general Sharpston's main argument can be summarized as follows: although it is true that Article 1(2) FDEAW sets out a general obligation for Member States to execute EAWs on the basis of the principle of mutual recognition, said provision must be read in conjunction with its counterpart Article 1(3) FDEAW, which states that the Framework Decision does *not* modify the Member States' obligation to respect fundamental rights included in Article 6 TEU. In other words,

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CLAES and M. BONELLI (n383), pp. 630 to 635; A. WARD (n109), pp. 1515 and 1433; S. DOUGLAS-SCOTT (n109), pp. 652 and 653.

[551] Opinion of AG Bot in *Melloni*, paras. 129 and 136; *Explanations to the CFR*, p. 32 to 35; S. PEERS and S. PRECHAL (n55), pp. 1455 to 1457.

[552] *Ibid*.

[553] *Melloni*, paras. 58 to 64; Opinion of AG Bot in *Melloni*, paras. 129 and 136.

[554] *Ibid*.; A. WILLEMS (n4), pp. 483 to 486; E. BROUWER (n238), pp. 913 to 915.

she considers Article 1(3) FDEAW as constituting a second general obligation for Member States, that of respecting fundamental rights, which "*permeates*" *all* provisions of the FDEAW.[555] This includes Articles 3 to 4a FDEAW, even though they do not explicitly recognize fundamental rights violations as either mandatory or optional grounds for refusal.[556]

In support of her argument, advocate general Sharpston relies on the case law of both the CJEU and the ECtHR.[557] The latter had already ruled on both the right to a fair trial and the right to not be subjected to inhuman or degrading treatment in its *Soering* judgment, where it stated that violations of said rights could lead to the non-execution of an extradition, respectively in instances where there are flagrant risks of denial of justice and/or where substantial grounds show a real risk of subjection to degrading treatment.[558] The CJEU provided a similar reasoning in the *N.S.* judgment, where it ruled that, having regard to its obligation to respect fundamental rights, a Member State cannot send an asylum seeker back to another Member State where systemic deficiencies in its asylum procedure constitute substantial grounds to believe that a real risk exists for the violation of the person's right enshrined in Article 4 CFR.[559]

Now, as discussed in Part I, the *N.S.* judgment was not taken under the "*judicial cooperation in criminal matters*" prong of the AFSJ, nor did it concern the right to a fair trial as the situation in *Radu* did.[560] In spite of this, advocate general Sharpston argued in favor of a transposition of the "*systemic deficiencies*" test to the violation of the right to a fair trial in the context of matters related to effective judicial

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[555] *Soering*, paras. 91 and 113; *N.S.*, paras. 78 to 80; Opinion of AG Sharpston in *Radu*, paras. 66 to 68 and 69 to 78; A. WILLEMS (n4), pp. 483 to 486; E. BROUWER (n238), pp. 914. Advocate General Sharpston first recognizes the importance of mutual trust and recognition in ensuring effective judicial cooperation (paras. 66 to 68), before stating that "*However, I do not believe that a narrow approach – which would exclude human rights considerations altogether – is supported either by the wording of the Framework Decision or by the case-law."* and *"Article 1(3) of the Framework Decision makes it clear that the decision* ***does not affect the obligation to respect fundamental rights*** *and fundamental principles as enshrined in Article 6 EU (now, after amendment, Article 6 TEU). It follows, in my view, that the duty to respect those rights and principles* ***permeates the Framework Decision****. It is implicit that those rights may be taken into account in founding a decision not to execute a warrant*." (paras. 69 to 78).
[556] *Ibid*.
[557] *Ibid*.
[558] *Ibid*.
[559] *Ibid*.
[560] *Ibid*.

cooperation, to which the mechanism of the EAW pertains.[561] Nevertheless, having regard to the principles of mutual trust and recognition on which the FDEAW is based, she stated that such a test should be submitted to stringent requirements. For instance, in the words of the advocate general herself, the latter would require that the deficiency in the trial process be "*such as to fundamentally destroy its fairness*".[562] Thus, Sharpston argues that Articles 3 to 4a FDEAW must not be read as exhaustive on account of the general obligation incumbent upon Member States to respect fundamental rights, which flows from Article 1(3) FDEAW. *A contrario*, this entails that "*new*" grounds for refusal based on potential fundamental rights violations may be adopted, albeit under stringent conditions so as to not render the principles of mutual recognition and mutual trust devoid of purpose.

C – Opinion 2/13: A Turning Point in the Case Law of the CJEU

The opinions of both advocate generals in the *Radu* and *Melloni* judgments demonstrate the underlying principles that affect the FDEAW. On the one hand, advocate general Bot argued in favor of effective judicial cooperation in his *Melloni* opinion. On the other hand, advocate general Sharpston argued in favor of the protection of fundamental rights in her *Radu* opinion. In both judgments, the CJEU adopted a position akin to that of advocate general Bot and refused to accept that Member States oppose the execution of an EAW or render its execution conditional on the basis of grounds that were not provided in the exhaustive Articles 3 to 4a FDEAW.[563] As such, it sought to prioritize effective judicial cooperation over the protection of fundamental rights. Nevertheless, for the purpose of the current analysis, the *Radu* and *Melloni* judgments must be read in conjunction with Opinion 2/13, which can be considered as constituting a turning point in the CJEU's case law regarding the FDEAW.[564]

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[561] *Ibid*.
[562] Opinion of AG Sharpston in *Radu*, paras. 83 and 85, another part of the test would bet o put the burden of proof on the person who alleges that there is a real risk that his or her right to a fair trial will be violated.
[563] *Radu*, paras. 36 to 42; *Melloni*, paras. 61 to 64; A. P. VAN DER MEI (n3), p. 897.
[564] *Radu*, paras. 36 to 42; *Melloni*, paras. 37 and 63; Opinion 2/13, paras. 191 and 192; K. LENAERTS (n194), p. 806; P. EECKHOUT (n194), pp. 968 to 971; S. PEERS (n191), pp. 219 to 221.

On the one hand, and in line with the effective judicial cooperation side of the equation, Opinion 2/13 confirms three main obligations for the Member States that reinforce the principles of mutual recognition and trust on which the FDEAW is based.[565] First, the executing Member State may *not* avail itself of its higher national standards of fundamental rights protection to refuse or render conditional the execution of an EAW.[566] Second, it must presume that the issuing Member State presents sufficient and equivalent guarantees of fundamental rights protection. Third, in the wake of the aforementioned, the executing Member State may not effectively verify whether the issuing Member State presents sufficient and equivalent standards of protection with respect to fundamental rights.[567]

On the other hand, and in line with the fundamental rights protection side of the equation, a closer reading of paragraph 191 of Opinion 2/13 shows a slight shift from the Court's absolute recognition of mutual trust and recognition with respect to judicial cooperation in criminal matters to the adoption of a more lenient stance, similar to that recognized in *N.S.* and posited by advocate general Sharpston in her *Radu* opinion.[568] Indeed, the Court refers to *both* the *N.S.* and *Melloni* judgments to declare that the protection of fundamental rights may, *in exceptional circumstances*, justify a limitation to the principle of mutual trust.[569] Paradoxically, although it had *explicitly* accepted such a limitation to the principle of mutual trust in *N.S.* with respect to the European asylum system, the Court had done no such thing in its *Melloni* judgment.[570] In other words, the Court *implicitly* loosened its stance on the principle of mutual trust with respect to effective judicial cooperation.

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[565] Opinion 2/13, paras. 188, 191 and 192; S. PRECHAL, *op. cit*., pp. 81 and 82; K. LENAERTS (n194), p. 806.
[566] Melloni, para. 63; Opinion 2/13, paras. 191 and 192; K. LENAERTS (n194), p. 806; P. EECKHOUT (n194), pp. 968 to 971; S. PEERS (n191), pp. 219 to 221.
[567] *Ibid*.
[568] *N.S*., paras. 78 to 80; Opinion 2/13, para. 191; Opinion of AG Sharpston in Radu, paras. 75 to 77; K. LENAERTS (n194), p. 806; I. CANOR, "My brother's keeper? horizontal Solange: 'an ever closer distrust among the peoples of Europe'", *Common Market Law Review*, Vol. 50(2), Kluwer Law International, 2013, pp. 385 and 386; E. URÍA GAVILÁN, *La Adhesión de la Unión Europea al Convenio Europeo de Derechos Humanos*, J.M. Bosch Editor, 2018, pp. 365 to 374; S. RUIZ TARRÍAS, "La decisión marco sobre la orden europea de detención y entrega reinterpretada por el Tribunal de Justicia de la Unión Europea", *Anuario Iberoamericano de Justicia Constitucional*, Vol. 23(2), Dialnet, 2019, p. 476.
[569] Opinion 2/13 of 18 December 2014, *Accession of the EU to the ECHR*, EU:C:2014:2454, para. 191; Judgment of 26 February, *Melloni*, C-399/11, EU:C:2013:107, paras. 37 and 63; Judgment of the 21 December 2011, *N.S*., Joined Cases C-411/10 and C-493/10, EU:C:2011:865, paras. 78 to 80.
[570] *Ibid*.; Opinion of AG Sharpston in *Radu*, paras. 76 and 77.

Thus, though on a first basis, the *Radu* and *Melloni* judgments, by confirming the exhaustiveness of the grounds for refusal of an EAW encompassed in Articles 3 to 4a FDEAW and prohibiting that the executing Member State rely on a potential violation of the fundamental rights (i.e. the right to a fair trial) as a justification to refuse or render conditional the execution an EAW, thereby prioritizing the effective judicial cooperation side of the FDEAW, their conjunctive reading with the CJEU's Opinion 2/13 demonstrates that these judgments cannot be considered as a completely lost battle for the protection of fundamental rights.

Chapter IV – *Aranyosi and Căldăraru* and *LM*: The Prioritization of Fundamental Rights?

This Chapter delves into the CJEU's most recent case law regarding the FDEAW. Section I discussed the case facts and conclusions of the *Aranyosi and Căldăraru* judgment in its Points A and B, respectively. Section II provides a similarly structured analysis of the *LM* judgment. Finally, Section III, discusses the relevance of these judgments for the current analysis.

Section I – The *Aranyosi and Căldăraru* Judgment

A – Facts of the Case

Mr. *Aranyosi* was the subject of two EAWs issued by the Hungarian authorities for two counts of burglary.[571] He was located in Bremen on the 14th of January 2015 and placed in pre-trial detention by the local German authorities.[572] Before initiating the transfer, the latter asked the issuing Hungarian authorities in which correctional facility they would place Mr. *Aranyosi*, their main concern being that the detention conditions in a number of Hungarian prisons did not satisfy the minimum European standards.[573]

[571] *Aranyosi and Căldăraru*, paras. 29 to 31; K. BOVEND'EERDT (n117), pp. 113 and 114.
[572] *Aranyosi and Căldăraru*, para. 32; *Ibid*.
[573] *Aranyosi and Căldăraru*, para. 34.

The public prosecutor of the Miskolc district responded by stating that, in the circumstances of the case, there was no reason to believe that either detention or a custodial sentence would be required.[574] Moreover, it stated that it is up to the Hungarian judicial authorities to determine the offence in question and the penalties to be imposed upon it.[575] The Hungarian public prosecutor did not, however, answer the question regarding the *location* of the correctional facility in which Mr. *Aranyosi* would be placed in the event of surrender.[576]

The public prosecutor of Bremen decided in favor of the surrender, despite not having received a concrete answer as to where Mr. *Aranyosi* would be sent.[577] It justified this by mentioning, *inter alia*, that there was no specific evidence indicating the existence of a risk to the accused's right to not be subjected to inhuman or degrading treatment or torture.[578] Mr. *Aranyosi*'s lawyer argued the contrary before the Higher Court of Bremen, underlining the impossibility to effectively verify the conditions of detention in a correctional facility when the latter is not known.[579]

Despite acknowledging the validity of the EAW issued by the Hungarian authorities**,** the Higher Regional Court of Bremen referred to a number of different sources to justify the existence of a risk to Mr. *Aranyosi*'s rights encompassed in Articles 3 ECHR and 6 TEU.[580] As such, it asked the CJEU whether Article 1(3) FDEAW, which confirms that the framework decision does not modify the Member States' obligation to respect the fundamental rights and principles as encompassed in Article 6 TEU, must be interpreted as meaning that the executing judicial authority must refuse the surrender of the person subjected to the EAW when there are strong

[574] *Aranyosi and Căldăraru*, paras. 36 and 37; K. BOVEND'EERDT (n117), pp. 113 and 114.
[575] *Aranyosi and Căldăraru*, para. 37; A. WILLEMS (n4), pp. 489 to 491.
[576] *Aranyosi and Căldăraru*, paras. 35 to 37; K. BOVEND'EERDT (n117), pp. 113 and 114.
[577] *Aranyosi and Căldăraru*, para. 38.
[578] *Ibid*.
[579] *Aranyosi and Căldăraru*, para. 39.
[580] *Aranyosi and Căldăraru*, paras. 40 to 44, "*The ECtHR has found Hungary to be in violation by reason of the overcrowding in its prisons (ECtHR, Varga and Others v. Hungary, Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, of 10 March 2015). (...) was in violation of Article 3 ECHR by imprisoning the applicants in cells that were too small and that were overcrowded. (...) 450 similar cases against Hungary were brought before it with respect to inhuman conditions of detention.*".

indications that his or her rights encompassed in Article 4 CFR would be at risk were he or she to be sent back to the issuing member state.[581]

The situation with Mr. *Căldăraru* is virtually identical to *Aranyosi*'s. *Căldăraru* was the subject of an EAW issued by the Romanian authorities for having driven without a license.[582] He was arrested in Bremen on the 15th of November 2015, and the public prosecutor of Bremen requested that his surrender be declared lawful, despite the Romanian authorities having failed to designate the correctional facility to which the accused would be sent.[583] Much like in *Aranyosi*, the Higher Regional Court of Bremen referred to the "*information currently available*" and expressed its concerns regarding Mr. *Căldăraru*'s right to not be subjected to inhuman or degrading treatment or torture.[584] As such, it stayed the proceedings and referred the abovementioned question to the CJEU.[585]

B – The Conclusions of the CJEU

The CJEU started by reiterating the issues already mentioned in its former case law regarding the FEDAW, namely the balance to be afforded between effective judicial cooperation based on mutual recognition and mutual trust, on the one hand, and the protection of fundamental rights, on the other hand.[586]

With regards to effective judicial cooperation, the CJEU reminded that the main objectives of the FDEW were the replacement of a multilateral system of extradition with a more effective and simple one based on the principle of mutual recognition and the constitution of an AFSJ where a high degree of confidence reigns among Member

[581] *Aranyosi and Căldăraru*, para. 74; K. BOVEND'EERDT (n117), p. 115.
[582] *Aranyosi and Căldăraru*, para. 48.
[583] *Aranyosi and Căldăraru*, paras. 51, 52 and 57.
[584] *Aranyosi and Căldăraru*, paras. 60 and 61, "*In a number of judgments issued on 10 June 2014, the ECtHR found Romania to be in violation by reason of the overcrowding in its prisons (ECtHR, Voicu v. Romania, No 22015/10; Bujorean v. Romania, No 13054/12; Mihai Laurenţiu Marin v. Romania, No 79857/12, and Constantin Aurelian Burlacu v. Romania, No 51318/12). The ECtHR held it to be established that Romania was in violation of Article 3 ECHR by imprisoning the applicants in cells that were too small and overcrowded, that lacked adequate heating, that were dirty and lacking in hot water for showers*."
[585] *Aranyosi and Căldăraru*, para. 74; K. BOVEND'EERDT (n117), pp. 115.
[586] *Melloni*, paras. 36 and 37; *Lanigan*, paras. 27 and 28; *Aranyosi and Căldăraru*, para. 74; *Ibid*.

States.[587] The principle of mutual recognition and the constitution of a functional AFSJ are both based on the principle of mutual trust, which entails a presumption that all Member States are capable of providing equivalent and effective protection to fundamental rights.[588] More specifically, and referring to Opinion 2/13, the principle of mutual trust requires, in the context of the AFSJ, that all Member States consider all other Member States as complying with EU law and the fundamental rights it protects, *save in exceptional circumstances*.[589] Applied to the FDEAW, this entails that Member States have a general duty, set out in Article 1(2) FDEAW, to execute an EAW, and may only refuse to do so in the cases exhaustively listed in Articles 3 to 4a FDEAW.[590]

The foregoing does not, however, preclude the protection of fundamental rights. Firstly, in Opinion 2/13, the CJEU had already recognized that limitations to the principles of mutual recognition and trust were possible in exceptional circumstances.[591] Secondly, Article 1(3) FDEAW provides that the framework decision does not modify the Member States' obligations to respect the fundamental rights and principles encompassed in Article 6 TEU.[592] Thirdly, having regard to the ECtHR's case law on Article 3 ECHR, which must be read in conjunction with Article 15(2) ECHR and corresponds to Article 4 CFR, the right to not be subjected to inhuman or degrading treatment or torture is absolute and can therefore not be subject to any limitations.[593] Finally, Article 51(1) CFR renders Article 4 CFR binding upon Member States and their national Courts when they implement EU law, as is the case when they apply their national provisions which transposed the FDEAW.[594]

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[587] *Ibid*.
[588] Opinion 2/13, paras. 191 and 192; *Aranyosi and Căldăraru*, para. 77; T. WISCHMEYER (n57), p. 342; C. KRENN (n57), p. 159.
[589] Opinion 2/13, paras. 191 and 192; *Aranyosi and Căldăraru*, para. 78; *Ibid*.
[590] *Lanigan*, para. 36; *Aranyosi and Căldăraru*, paras. 79 and 80; I. KORENICA and D. DOLI, "No More Unconditional 'Mutual Trust' Between the Member States: An Analysis of the Landmark Decision of the CJEU in Aranyosi and Caldararu", *European Human Rights Law Review*, Vol. 21, Sweet & Maxwell, 2016, pp. 542 to 555.
[591] *N.S.*, paras. 78 to 80; *Melloni*, paras. 37 and 63; Opinion 2/13, paras. 191 and 192; *Aranyosi and Căldăraru*, para. 82; K. LENAERTS (n194), p. 806; I. KORENICA and D. DOLI (n590), pp. 542 to 555.
[592] *Aranyosi and Căldăraru*, para. 83; Opinion of AG Sharpston in *Radu*, paras. 69 to 77.
[593] *Aranyosi and Căldăraru*, paras. 84 to 87; E. BRIBOSIA and A. WEYEMBERGH, "Arrêt '*Aranyosi et Căldăraru'*: Imposition de Certaines Limites à la Confiance Mutuelle dans la Coopération Judiciaire Pénale", *Journal de Droit Européen*, n°230, Bruylant, 2016, pp. 225 to 227.
[594] *Wachauf*, para. 19; *Åkerberg Fransson*, paras. 18 to 21; *Aranyosi and Căldăraru*, para. 84; *Associação*, paras. 29 and 40; *Explanations to the CFR*, p. 32; I. PEREIRA DE SOUSA (n376), p. 149; M. KRAJEWSKI (n369), pp. 403 and 404; M. CLAES and M. BONELLI (n383), pp. 630 to 635; A. WARD (n109), pp. 1515 and 1433; S. DOUGLAS-SCOTT (n109), pp. 652 and 653.

It follows from the aforementioned that, in instances where the executing judicial authority has reason to believe that a real risk exists to the concerned individual's right to not be subjected to inhuman or degrading treatment were he or she to be surrendered to the issuing Member State to be detained, the executing judicial authority must assess said risk on the basis of a two-stage test.[595] The executing judicial authority must first verify, on the basis of known information, whether there are generalized or systemic deficiencies in the detention conditions of the issuing Member State which put at risk the rights provided by Article 4 CFR.[596] Nevertheless, this *general* analysis of the detention conditions does not suffice to justify the refusal to execute an EAW.[597] Indeed, the executing Member State must also verify whether the *person in question* is at risk of being subjected to treatment contrary to Article 4 CFR.[598] Finally, even if both the *general* and *specific* tests point towards the existence of a real risk of a violation of the latter Article, the execution of the EAW must be postponed until the executing judicial authority obtains the information it requires to discount the existence of such a risk.[599] It is only in situations where the real risk cannot be discounted within a reasonable time that the executing judicial authority may refuse the execution of the EAW.[600]

Section II – The *LM* Judgment

A – Facts of the Case

Mr. *Celmer* was the subject of three EAWs issued by the Polish authorities for counts of drug trafficking.[601] He was arrested in Ireland on the 5th of May 2017 and brought

[595] *Melloni*, paras 59 and 63; Opinion 2/13, paras. 191 and 192; *Aranyosi and Căldăraru*, para. 88; K. BOVEND'EERDT (n117), pp. 115.
[596] *Aranyosi and Căldăraru*, paras. 43, 60 and 89 to 91, the "*known information*" may be obtained from a number of different sources, including the ECtHR's judgments and reports produced by bodies of the Council of Europe, such as the European Committe for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.
[597] *Aranyosi and Căldăraru*, paras. 91 and 93; A. WILLEMS (n4), pp. 489 to 491.
[598] *Aranyosi and Căldăraru*, paras. 92 to 94; K. BOVEND'EERDT (n117), pp. 117.
[599] *Aranyosi and Căldăraru*, paras. 95 to 104, in particular para. 98, "*If, in the light of the information (…), that authority finds that there exists, (…), a real risk of inhuman or degrading treatment, (…), the execution of that warrant must be postponed but it cannot be abandoned*". E. BRIBOSIA and A. WEYEMBERGH (n593), pp. 225 to 227.
[600] *Ibid*.
[601] *LM*, para. 14.

before the High Court of Ireland, the executing judicial authority.[602] Mr. *Celmer* challenged his surrender, *inter alia*, on the basis of a real risk to his right to a fair trial encompassed in Article 6 ECHR.[603] More specifically, he argued that, were he to be sent back to Poland, he would face a flagrant denial of justice in light of the legislative reforms the Republic of Poland had recently taken.[604] As a justification for the aforementioned, Mr. *Celmer* referred in particular to the Commission's reasoned proposal of the 20th of December 2017, submitted in accordance with Article 7(1) TEU and directed against Poland on account of issues with the rule of law.[605]

On the basis of this information, the High Court of Ireland concluded that the Polish legislative reforms had indeed affected a large portion of the judiciary in a way that violated the rule of law.[606] *Inter alia*, the Irish Court referred to the fact that the Polish Minister for Justice would possess a disciplinary role with regards to the presidents of the Courts and that political appointees would largely dominate the new composition of the National Council of the Judiciary, responsible for the nomination of judges.[607] The first measure would have a potential "*chilling effect*" on the presidents of the Courts and thwart the impartial administration of justice.[608] The second measure would lead to the potential politicization of the judiciary.[609]

Having regard to the "*wide and unchecked powers*" of this new judiciary, the High Court of Ireland considered the existence of a real risk for Mr. *Celmer*'s right to a fair trial laid down in Article 6 ECHR.[610] Accordingly, it referred to the CJEU's *Aranyosi* and *Căldăraru* judgment and submitted that the EAW in question should be refused.[611] However, the Irish Court was uncertain as to how it should apply the two-

[602] *LM*, para. 15.
[603] *LM*, para. 16.
[604] *Ibid.*; M. DOROCIAK and W. LEWANDOWSKI (n204), pp. 868 to 871.
[605] *LM*, paras. 17 to 20.
[606] *LM*, paras. 21 to 24; See footnote n371.
[607] *Ibid*.
[608] *Ibid*.
[609] *Ibid*.
[610] *Ibid*.
[611] *LM*, paras. 22 and 23, the Irish Court also referred to its own national law and Recital 10 and Article 1(3).

step test in the case at hand.[612] Therefore, it asked the CJEU the following two questions.

Firstly, whether it is sufficient for the executing Member State to verify the risk of an unfair trial in the issuing Member State in a general, abstract manner, or whether it must also apply the second part of the test, which focuses on the individual concerned and the risk he or she personally runs of being subjected to an unfair trial.[613] Secondly, in the event that such an individualized test is also required, whether the executing judicial authority must also ask additional information from the issuing court before discounting the risk of a fair trial violation and, if so, the kind of information that is necessary to do so.[614]

B – Conclusions of the CJEU

The Court first referred to the importance of the principles of mutual trust and recognition in the AFSJ.[615] It reiterated that the principle of mutual trust, especially in this situation, entails that each Member States must presume all the other Member States as providing sufficient safeguards to the fundamental rights protected by EU law.[616] This, in turn, is based on the premise stated in Article 2 TEU, according to which the EU is founded on the values – including fundamental rights and the rule of law – common to all Member States.[617] Combined, the aforementioned principles lead to what the Court had already confirmed on a few occasions, namely that a Member State cannot require from another Member State that it give a higher level of fundamental rights protection than that provided by EU law, nor can it verify, save in exceptional situations, whether it has observed said rights in a specific situation.[618]

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[612] *Aranyosi and Căldăraru*, 91 to 104; *LM*, para. 24; A. WILLEMS (n4), pp. 489 to 491; K. BOVEND'EERDT (n117), pp. 117; E. BRIBOSIA and A. WEYEMBERGH (n593), pp. 225 to 227.
[613] *LM*, para. 25; M. DOROCIAK and W. LEWANDOWSKI (n204), pp. 868 yo 871; M. KRAJEWSKI (n409), pp. 792 to 796.
[614] *Ibid*.
[615] *LM*, para. 36; See Part I, Chapter II, Sections I and II, "*The Principle of Mutual Trust*" and "*The Principle of Mutual Recognition*"
[616] *Poltorak*, para. 26; Opinion 2/13, paras. 191 and 192; *Aranyosi and Căldăraru*, para. 77; *LM*, para. 36; T. WISCHMEYER (n57), p. 342; C. KRENN (n57), p. 159.
[617] Articles 2 *jo*. 7 and 49 TEU; Judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, para. 34 (hereinafter *Achmea*); *LM*, para. 35; H. BATTJES, E. BROUWER, P. DE MORREE and J. OUWERKERK (n172) pp. 38 and 39 ; T. WISCHMEYER (n57), pp. 342 and 343; M. CREMONA (n173), pp. 16 to 18.
[618] *N.S.*, paras. 78 to 80; *Melloni*, paras. 37 and 63; Opinion 2/13, paras. 191 and 192; *LM*, para. 37; Opinion of AG Sharpston in *Radu*, paras. 74 to 77.

The relationship between these principles is also mentioned in the FDEAW. The latter constitutes the "*cornerstone*" of judicial cooperation in criminal matters, as confirmed by a combined reading of recital 6 and Article 1(2) FDEAW.[619] It follows from this that the executing Member State is under a general duty to execute an EAW and may only refuse said execution in the instances exhaustively listed in Articles 3 to 4a FDEAW.[620]

Nevertheless, the CJEU referred to its former case law to justify that the existence of systemic or generalized deficiencies creating a real risk for the right to a fair trial may constitute an exceptional ground for non-execution of an EAW, despite it not being explicitly mentioned in the FDEAW.[621] It did so by combining the application of the *Aranyosi* and *Căldăraru* two-pronged test with the cardinal importance of the right to a fair trial it recognized in *Associação Sindical dos Juízes Portugueses*.[622] The latter requires, *inter alia*, that the courts and tribunals of Member States meet the requirements of effective judicial protection, which include the independence and impartiality of the judges.[623] It is one of the bases upon which effective judicial cooperation is built: a mechanism such as the EAW can only function correctly if Member States can trust that the courts and tribunals of the other Member States meet the aforementioned requirements.[624]

Based on the abovementioned relationship between the principles of mutual trust and recognition, on the one hand, and the right to a fair trial, on the other hand, the Court

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[619] *LM*, paras. 39 to 41; See Part. II, Chapter II, Section I, "*The 'Pilot' Provisions of the FDEAW*".
[620] *LM*, paras. 41 and 42; K. LENAERTS (n194), p. 814; A. SANGER (n2), p. 19.
[621] *Wilson*, paras. 51 and 52; *Associação*, paras. 49 to 54 and 62 to 64; *LM*, 60 to 69; M. DOROCIAK and W. LEWANDOWSKI (n204), pp. 868 to 871; M. KRAJEWSKI (n409), pp. 792 to 796. KRAJEWSKI mentions how the CJEU followed the general lines of advocate general *Tarchev*'s opinion, agreeing to the transposition of the *Aranyosi* and *Căldăraru* two-pronged test to situations concerning the right to a fair trial, but refusing to apply the criterion, coined by the ECtHR, of a "*flagrant denial of justice*" as a threshold for the application of said test, deeming it "*impossible to prove*" for the applicant. Rather, the CJEU required the lower threshold of a "*real risk of breach*".
[622] *LM*, paras. 43 to 47 and 48 to 51. Having regard to the importance of the right to a fair trial, which encompasses the principles of independence and effective judicial protection (paras. 48 to 51), the Court recognizes the application of its *Aranyosi* and *Căldăraru* two-pronged test (paras. 43 to 47) to the right to a fair trial enshrined in Article 47(2) CFR; C. HILLION (n17), pp. 4 to 5; D. KOCHENOV (n17), pp. 7 to 11; K. SOMMERMAN (n13), pp. 167 and 168; T. MARGUERY (n242), pp. 243 to 245; V. MITILEGAS (n288), pp. 26 and 27.
[623] *Wilson*, paras. 51 and 52; *Associação*, para. 45; *LM*, paras. 62 to 67.
[624] *Ibid.*

confirmed that a breach of judicial independence, which is one of the facets of the right to a fair trial and one of the bases upon which the principle of mutual trust is construed, may in exceptional circumstances warrant the non-execution of an EAW.[625] Before doing so, however, the executing judicial authority must apply the two-pronged test of *Aranyosi* and *Căldăraru* and determine whether the systemic or generalized deficiencies in the issuing Member State entail a real risk, both in general and in the specific circumstances of the case, that the concerned individual's right encompassed in Article 47(2) CFR would be violated were he or she to be surrendered.[626] As for the information upon which the executing judicial authority may rely, the CJEU ruled that a reasoned proposal emanating from the Commission on the basis of Article 7(1) TEU and directed against the issuing Member State does not warrant the *automatic* non-execution of an EAW.[627]

Section III – Relevance

The Court's decisions in *Aranyosi and Căldăraru* and *LM* judgments show its transition from the prioritization of effective judicial cooperation to the prioritization of the protection of fundamental rights. Indeed, they constitute the effective application to the sphere of effective judicial cooperation of the limitation to the principle of mutual trust recognized in the Court's Opinion 2/13, according to which the presumption that all Member States provide sufficient and equivalent standards of fundamental rights protection can, in exceptional circumstances, be rebutted.[628] Nevertheless, the extent of the prioritization of the protection of fundamental rights bears a number of caveats.

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[625] Article 2 TEU *jo*. Article 19(1) TEU and Articles 47 and 48 CFR; *Associação*, paras. 49 to 54; *LM*, paras. 58 to 69; A. WARD (n146), pp. 1197 to 1998; D. SAYERS (n146), pp. 1303, 1306 and 1307; *Handbook on the EAW*, p. 46; M. KRAJEWSKI (n409), p. 795.

[626] *LM*, paras. 68 and 69; C. HILLION (n17), pp. 4 to 5; D. KOCHENOV (n17), pp. 7 to 11; K. SOMMERMAN (n13), pp. 167 and 168; T. MARGUERY (n242), pp. 243 to 245; V. MITILEGAS (n288), pp. 26 and 27.

[627] Recital 10 FDEAW; *LM*, paras. 68 to 73; M. KRAJEWSKI (n409), p. 796 and 797. Recital 10 FDEAW only allows for a suspension of the implementation of the FDEAW in respect of a Member State when there is a serious and persistant breach by said Member State of the values enshrined in Article 2 TUE, determined by the European Council pursuant to Article 7(2) TEU and with the cosequences provided by Article 7(3) TEU. ***A contrario***, a reasoned proposal rendered by the Commission on the basis of Article 7(1) TEU does not in itself suffice to warrant the automatic non-execution of an EAW and the executing Member State will have to carry out the two-step test.

[628] *N.S.,* paras. 78 to 80; *Melloni*, para. 37 and 63; Opinion 2/13, paras. 191 and 192; Opinion of AG Sharpston in *Radu*, paras. 76 and 77; A. WILLEMS (n4), pp. 489 to 49; M. DOROCIAK and W. LEWANDOWSKI (n204), pp. 868 to 871.; K. LENAERTS (n194), p. 806.

From the perspective of fundamental rights protection, it is true that the *Aranyosi and Căldăraru* and *LM* judgments show the Court's shift from ensuring "*absolute*" effective judicial cooperation based on the principles of mutual trust and recognition towards the recognition of the protection of fundamental rights. As of now, the Court has confirmed that the right to a fair trial and the right to not be subjected to torture or inhuman or degrading treatment, respectively encompassed in Article 4 CFR and Articles 47 and 48 CFR, could *under certain circumstances* constitute praetorian exceptions to the execution of EAWs, despite not being encompassed in Articles 3 to 4a FDEAW, which it had previously considered exhaustive.[629]

Yet, from the perspective of effective judicial cooperation, the Court maintains stringent requirements for the application of these praetorian exceptions. Indeed, they may only apply in instances where the executing Member State has reason to believe that a real risk exists to the concerned individual's right to a fair trial or right to not be subjected to torture or inhuman or degrading treatment were he or she to be surrendered to the issuing Member State.[630] The assessment of said risk follows a two-stage test.[631] The executing Member State must first verify, on the basis of known information, whether there are generalized or systemic deficiencies in the issuing Member State which would put the relevant rights at risk.[632] Next to this *general* analysis, the executing Member State must then verify the existence of an *individualized* risk for the fundamental rights of the person in question.[633] Finally, even if both the *general* and *specific* tests point towards the existence of a real risk of a violation of Articles 4, 47 and 48 CFR, the execution of the EAW must be postponed until the executing judicial authority obtains the information it requires to discount the existence of such a risk.[634] It is only in situations where the real risk

[629] *Ibid*.; P. EECKHOUT (n194), pp. 968 to 971; S. PEERS (n191), pp. 219 to 221. See the transition from *Radu* and *Melloni* to *Aranyosi and Căldăraru* and *LM*.
[630] *Melloni*, paras. 59 and 63; Opinion 2/13, paras. 191 and 192; M. KRAJEWSKI (n409), p. 796 and 797. The Court continues to refer to *Melloni* and the "*effective judicial cooperation*" side of Opinion 2/13 in *Aranyosi and Căldăraru*.
[631] *Ibid*.
[632] *Aranyosi and Căldăraru*, paras. 68 and 69; C. HILLION (n17), pp. 4 to 5; D. KOCHENOV (n17), pp. 7 to 11; K. SOMMERMAN (n13), pp. 167 and 168; T. MARGUERY (n242), pp. 243 to 245; V. MITILEGAS (n288), pp. 26 and 27; M. KRAJEWSKI (n409), p. 796 and 797.
[633] *Aranyosi and Căldăraru*, paras. 91 to 104; *Ibid*.
[634] *Aranyosi and Căldăraru*, paras. 95 to 104: K. BOVEND'EERDT (n117), pp. 117.

cannot be discounted within a reasonable time that the executing judicial authority may refuse the execution of the EAW.[635]

Based on the foregoing, the Court's reasoning in *Aranyosi and Căldăraru* and *LM* judgments still allows for the following (speculative) situations. With regards to the right to not be subjected to torture or inhuman or degrading treatment, the fact that the issuing Member State, for instance Romania or Hungary, possesses significant deficiencies with respect to the detention conditions in a *portion* of its prisons, the executing Member State would still find itself under an obligation to execute the EAW were the individual concerned to be sent to a prison that does not present said deficiencies.[636] Similarly, if the issuing Member State, for instance Poland, presents issues with respect to the independence of a portion of its judiciary, it can be posited that the executing Member State would still have to carry out the EAW in the event that the individual concerned would be tried before one of the courts or tribunals unaffected by said deficiencies, as there would be no *individualized* risk to his or her right to a fair trial.[637]

In addition, as of now, the CJEU has only recognized the right to a fair trial and the right to not be subjected to torture or inhuman or degrading treatment as potential bases for the application of its praetorian exception to the general obligation for Member States to execute EAWs.[638] Only time will tell whether the Court will build upon the aforementioned and recognize that the protection of other fundamental rights, such as the right to liberty, constitute a basis for the non-execution of an EAW. Having regard to the current state of the Court's case law, however, it can be argued that it will not, *in the close future*, extend its praetorian exceptions to the execution of

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[635] *Ibid*.
[636] *Aranyosi and Căldăraru*, paras. 43 and 60; Judgment of 15 October 2019, *Dorobantu*, C-128/18, EU:C:2019:857, paras. 70 to 79 (hereinafter *Dorobantu*); See footnote n65. The CJEU mentions the fact that the ECtHR found the prison conditions in both Hungary and Romania to be in violation of Article 3 ECHR due to filth, overcrowding and lack of heating in a number of "*pilot*" cases. It also refers to paragraph 191 of its own Opinion 2/13, which reiterates that, on the basis of mutual trust, Member States must presume that other Member States provide sufficient and equivalent protection to fundamental rights, *save in exceptional circumstances*.
[637] *LM*, para. 21; See footnote n371. The legislative reforms in Poland affected, *inter alia*, the Constitutional Court, the Supreme Court and the organization of the national courts. A situation *could* be envisaged in which the reorganization of the national courts takes effect without modifying its independence or impartiality.
[638] *Aranyosi and Căldăraru*, para. 104; *LM*, para. 79; *Dorobantu*, para. 85.

EAWs to other fundamental rights.[639] Indeed, as mentioned in Part I, the right to a fair trial and the right to not be subjected to torture or inhuman or degrading treatment can be considered as "*fundamental*" fundamental rights.[640] On the one hand, the right to a fair trial constitutes the *gateway* for the protection of other fundamental rights.[641] On the other hand, the right to not be subjected to torture or inhuman or degrading treatment is *absolute* and can therefore not be subjected to any limitations.[642] Since, even for fundamental rights of such importance, the application of the *Aranyosi and Căldăraru* and *LM* exceptions is subject to particularly stringent requirements, it can be posited that the CJEU's praetorian exceptions to the EAW will not, *for the time being,* extend to include other fundamental rights.

Thus, though the CJEU adopted a looser stance with respect to the principles of mutual trust and recognition in the *Aranyosi and Căldăraru* and *LM* judgments, thereby demonstrating an intention to start prioritizing the protection of fundamental rights in the context of the FDEAW, said prioritization is far from being one-sided. The fact that the Court recognized the praetorian exception to the execution of EAWs solely for the rights enshrined in Articles 4, 47 and 48 CFR and rendered its application subject to stringent conditions bears witness to the importance it still affords to effective judicial cooperation in criminal matters. In other words, rather that constituting an absolute prioritization of the protection of fundamental rights, the *Aranyosi and Căldăraru* and *LM* judgments must be seen as the first building blocks towards a more effective protection of fundamental rights in the future.

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[639] *Dorobantu*, para. 85. A. MOHAY, "Plot twist? Case C-128/18 Dorobantu: detention conditions and the applicability of the ECHR in the EU legal order", *EU Law Analysis*, 28 October 2019, http://eulawanalysis.blogspot.com/2019/10/plot-twist-case-c-12818-dorobantu.html, (accessed on 25 April 2020); A. KARAPATAKIS, "Case C-182/18 Dorobantu – The Aftermath of *Aranyosi and Căldăraru*, European Law Blog, 28 October 2019, https://europeanlawblog.eu/2019/10/28/case-c-128-18-dorobantu-the-aftermath-of-aranyosi-and-caldararu/, (accessed on 25 April 2020). In Dorobantu, the Court was asked to elaborate upon the application criteria of the *Aranyosi and Căldăraru* test. The authors give particular attention to the fact that, once again, in delimiting the issue of personal space and how to calculate it; the CJEU refers to the ECtHR case law, aligning with the latter.

[640] Articles 4, 47 and 48 CFR; *N.S.*, para. 82, "*(...) it **cannot** be concluded (...) that **any infringement** of a fundamental right by the Member State responsible will affect the obligations of the other Member States*"; M. KLAMERT and D. KOCHENOV (n159), pp. 8 to 9; D. KOCHENOV (n30), p. 12; C. HILLION (n17), pp. 1 and 9; O. MADER (n22), pp. 136 to 138; D. LONG (n133), pp. 13 to 20; *Commission Communication of 2014*, p. 4.

[641] *Ibid*.; D. KOCHENOV (n30), pp. 10 to 17. Before an individual can uphold his or her "*other*" fundamental rights before a court or tribunal, he or she requires that said court or tribunal be independent and impartial so as to guarantee effective judicial protection.

[642] *Soering*, paras. 11 and 92; *Cruz Varas*, paras. 20 to 75; *Aranyosi and Căldăraru*, paras. 85 to 87; *Dorobantu*, paras. 62 and 82; S. PRECHAL (n1) p. 88; M. K. ADDO and N. GRIEF (n136), p. 511; A. MOHAY (n639); A. KARAPATIKAS (n639).

Part IV – Analysis and Reflections on the Future[643]

Before the adoption of the Treaty of Lisbon in 2009, the CJEU's competence to rule on matters pertaining to the AFSJ was limited. *Inter alia*, this entailed that it could only answer preliminary questions regarding the legality, validity and interpretation of Framework Decisions insofar the Member States had a declaration agreeing to its jurisdiction.[644] The Court's limited jurisdiction with respect to judicial cooperation in criminal matters remained even after the adoption of the Treaty of Lisbon, albeit only for acts that had been adopted before said Treaty and had not been replaced or modified, as was the case for the FDEAW.[645] In other words, the CJEU's jurisdiction with respect to the FDEAW remained limited until the 1st of December 2014, where it finally gained full jurisdiction in relation to judicial cooperation in criminal matters.[646] From then onwards, the Court became fully competent to review the legality, the implementation and the interpretation of acts of judicial cooperation in criminal matters adopted both before and after the adoption of the Treaty of Lisbon, irrespective of whether they fell under the transitional period or not.[647]

The aforementioned coincides with the evolution of the CJEU's case law regarding the FDEAW and the balance it afforded to effective judicial cooperation, on the one hand, and the protection of fundamental rights, on the other hand. Before the Treaty of Lisbon, the Court only ruled on 4 cases on the matter, including *Advocaten voor de Wereld*.[648] During the transitional period from 2009 to 2014, it ruled on 8 cases, among which *Radu* and *Melloni*.[649] It is only after 2014, when the Court was granted full jurisdiction with respect to judicial cooperation in criminal matters, that the vast

[643] All concepts and principles discussed in this Part have already been defined thoroughly in Parts I, II and III with respect to their scope of application or interpretation and their relevance for the current analysis.
[644] Article 35 EU, see footnote n419; A. GIANNAKOULA (n416), pp. 275 and 276; V. MITSILEGAS (n421), pp. 5 to 11; D. CRAIG and G. DE BURCA (n10), pp. 15.
[645] Articles 9 and 10 Protocol No. 36 to the Treaty of Lisbon; *Ibid*.
[646] *Ibid*.
[647] *Ibid*.
[648] *Eurojust – EAW case law*, pp. 3 to 7.
[649] *Ibid*.

majority of judgments regarding the FDEAW were decided, including *Aranyosi and Căldăraru* and *LM*.[650]

This increase in the number of judgments must be analyzed in conjunction with the legal status of the CFR before and after the Treaty of Lisbon and the Court's increased attention for the protection of fundamental rights in the more recent years. In *Advocaten voor de Wereld* and *Pupino*, which were decided before 2009, where the CFR gained the legally binding strength equal to that of the Treaties, the Court made little mention of the protection of fundamental rights and established a prioritization of effective judicial cooperation.[651] The *Radu* and *Melloni* judgments reiterated the Court's intention to prioritize effective judicial cooperation over the protection of fundamental rights in criminal matters, despite having been decided after the CFR gained legally binding strength.[652] Nevertheless, they must be read in conjunction with the *N.S.* judgment and Opinion 2/13, where the Court confirmed that the principle of mutual trust was not absolute and could, *under exceptional circumstances*, be limited in order to protect fundamental rights.[653] Finally, in its more recent judgments of *Associação*, *Commission v. Poland*, *Aranyosi and Căldăraru* and *LM*, it can be argued that the CJEU continued on its path towards the prioritization of the protection of fundamental rights.[654]

What is stated above must be considered as transcending the following Chapters, which analyze the evolution of the balance the Court has afforded to the effective judicial cooperation based on mutual trust and recognition, on the one hand, and the protection of fundamental rights, on the other hand, with regards to the FDEAW. More specifically, these Chapters respectively delve into the *underlying* aspects of Parts I, II and III. Chapter I analyzes the hybrid nature of the principle of mutual trust and its central position in the maintenance of balance between the principle of mutual recognition and the protection of fundamental rights. Chapter II focuses on the

[650] *Ibid*.
[651] Article 1(2) FDEAW; *Advocaten voor de Wereld*, para. 29; K. LENAERTS (n194), p. 814; A. SANGER (n2), p. 19.
[652] *Radu*, paras. 40 to 43; *Melloni*, paras. 37 and 63.
[653] N.S., paras. 78 to 80; *Ibid*.; Opinion 2/13, paras. 191 and 192; K. LENAERTS (n194), p. 806.
[654] *Aranyosi and Căldăraru*, para. 104; *Associação*, paras. 36, 37 and 40; *LM*, para. 79; *Commission v. Poland*, paras. 34 to 36; A. WARD (n146), pp. 1197 to 1998; D. SAYERS (n146), pp. 1303, 1306 and 1307; M. KRAJEWSKI (n409), p. 795; *Handbook on the EAW*, p. 46.

mechanism of the EAW itself, arguing that the Court has adopted judgments outside the context of the FDEAW that have nevertheless affected the aforementioned balance. Finally, Chapter III assesses the evolution of the Court's case law as discussed in Part III, providing insight as to what the future may hold.

Chapter I – The Hybrid Nature of the Principle of Mutual Trust

Recital 6 FDEAW sets out that the FDEAW is the first concrete measure in the field of criminal law implementing the principle of mutual recognition, which is considered as being the "*cornerstone*" of effective judicial cooperation and functions by requiring that all Member States consider decisions emanating from the authorities of other Member States as they would one of their own.[655] It must be read in conjunction with Article 1(2) FDEAW, which sets out a general duty for Member States to execute *any* EAW on the basis of said principle of mutual recognition, and Articles 3 to 4a FDEAW, which *exhaustively* define the grounds for optional or mandatory refusal of EAWs.[656] Combined, the aforementioned constitutes the effective judicial cooperation side of the equation.

Recitals 12 and 13 FDEAW confirm that the Framework Decision respects the fundamental rights and principles encompassed in Article 6 TEU, in particular the right to a fair trial and the right to not be subjected to torture or inhuman or degrading treatment.[657] They must be read in conjunction with Article 1(3) FDEAW, which states that the FDEAW does not modify the general obligation for Member States to respect the fundamental rights and principles enshrined in Article 6 TEU.[658] Combined, the aforementioned provisions constitute the other side of the equation, namely the protection of fundamental rights. In spite of its apparent importance with

[655] *Advocaten voor de Wereld*, para. 29; K. LENAERTS (n194), p. 814; A. SANGER (n2), p. 19; See Part II, Chapter II, Section I, "*The Pilot Provisions of the FDEAW*".
[656] *Radu*, paras. 40 to 43; *Melloni*, paras. 37 and 63; S. PRECHAL (n1), p. 89; A. WILLEMS (n4), pp. 482 to 486; *Ibid*.
[657] See Part II, Chapter II, Section I, "*The Pilot Provisions of the FDEAW*". L. MARIN (n211), pp. 142 to 144; S. PRECHAL (n1), pp. 76 and 77; L. BAY LARSEN (n303), pp. 123 to 124.
[658] *Ibid*.

respect to the application of the FDEAW, the latter is not included as one of the optional or mandatory ground for refusal provided in Articles 3 to 4a FDEAW.[659]

The principle of mutual trust consists in a presumption that all Member States possess sufficient and equivalent guarantees for the protection of fundamental rights.[660] It is based, *inter alia*, on the general obligation for all candidate States to the Union and Member States to uphold the EU's founding values set out in Article 2 TEU, which include the protection of fundamental rights.[661] For the purpose of the current analysis, and in the current state of affairs, it must be considered as a hybrid principle, a centrepiece in the equation, which has allowed the CJEU to ensure the balance between effective judicial cooperation and the protection of fundamental rights. This has not always been the case, however, and the evolution of the principle of mutual trust from being associated to effective judicial cooperation to constituting a more neutral centrepiece must be assessed.

At first, the CJEU viewed the principle of mutual trust in a more absolute manner. The presumption that all Member States guaranteed sufficient and equivalent standards of protection of fundamental rights was virtually irrebuttable, in particular with respect to judicial cooperation in criminal matters.[662] In the context of the FDEAW, the Court applied this close-to-absolute interpretation of the principle of mutual trust in conjunction with the principle of mutual recognition in order to prioritize effective judicial cooperation.[663] A clear example of the aforementioned are the judgments of *Radu* and *Melloni*, where the Court confirmed the exhaustiveness of the mandatory and optional grounds for refusal of an EAW set out in Articles 3 to 4a FDEAW.[664] Since the protection of fundamental rights do not fall under these provisions, the executing Member State could not rely upon it to refuse or render conditional the execution of an EAW, even in instances where it believed that the issuing Member State would be unable to guarantee said protection.

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[659] Articles 3 to 4a FDEAW; *Ibid*.
[660] Opinion 2/13, paras. 191 and 192; T. WISCHMEYER (n57), p. 342; C. KRENN (n57), p. 159
[661] Articles 2, 7 and 49, TEU; *Les Verts*, para. 23; *Internationale Handelsgesellschaft*, para. 4; C. HILLION, (n17)., pp. 4 to 5; D. KOCHENOV, (n17), pp. 7 to 11; R. JANSE (n15).
[662] *Radu*, paras. 40 to 43; *Melloni*, paras. 37 and 63; *Ibid*.
[663] Ibid.
[664] *Ibid*.; A. WILLEMS (n4), pp. 482 to 486.

In close relation to the *Radu* and *Melloni* judgments, however, the Court had recognized, in the *N.S.* judgment regarding the European asylum system, that exceptional circumstances could warrant a limitation to the close-to-absolute reading of the principle of mutual trust.[665] Indeed, where a Member State, who has an obligation under the Dublin Regulation to send an asylum seeker to the Member State responsible for him or her, has substantive reasons to believe that deficiencies regarding the asylum procedure in said Member State would constitute a real risk to the asylum seeker's right to not be subjected to torture or inhuman or degrading treatment, it can refuse to send the concerned individual back to the Member State responsible.[666] In other words, under the aforementioned circumstances, the first Member State could rebut the mutual trust presumption that the Member State responsible provides equivalent and sufficient guarantees for the protection of fundamental rights.

The reasoning of the CJEU in *Radu*, *Melloni* and *N.S.* is summarized in Opinion 2/13. As mentioned in Parts I and III, the latter must be considered a turning point for the Court's case law regarding the FDEAW.[667] It can therefore be posited that it is also in Opinion 2/13 that the principle of mutual trust acquired its hybrid nature. Indeed, on the one hand, the CJEU refers to the principle of mutual trust as entailing one of three obligations that ensure effective judicial cooperation. First, Member States must presume all other Member States as providing sufficient and equivalent standards of protection of fundamental rights.[668] Second, they may not verify whether other Member States effectively provide said standards of protection.[669] Third, in line with the *Melloni* judgment, Member States may not avail themselves of Article 53 CFR to demand a higher level of national protection of fundamental right from another Member State than that provided by EU law in situations where such a demand would affect the unity, primacy and effectiveness of the latter.[670] On the other hand, from the perspective of the protection of fundamental rights, Opinion 2/13 constitutes the first

[665] *N.S.*, paras. 78 to 80; *Melloni*, paras. 37 and 63; Opinion 2/13, paras. 191 and 192; Opinion of AG Sharpston in *Radu*, paras. 76 and 77.
[666] *Ibid*.
[667] *Ibid*.; K. LENAERTS (n194), p. 806; S. PEERS (n191), pp. 219 to 222, P. EECKHOUT, (n194), pp. 968 to 971.
[668] *Ibid*.
[669] *Ibid*.
[670] *Ibid*.

time that the CJEU *implicitly* recognized that the deficiencies test could also apply with respect to effective judicial cooperation in criminal matters and constitute a limitation to the presumption of mutual trust and its corollary obligations.[671]

The CJEU's recent cases of *Aranyosi and Căldăraru* and *LM* demonstrate the effective application of the new hybrid interpretation of the principle of mutual trust in the second prong of the AFSJ. With regards to the protection of fundamental rights, these judgments respectively recognize that potential violations of the right to not be subjected to torture or inhuman or degrading treatment, provided by Article 4 CFR, and the right to a fair trial, encompassed in Articles 47 and 48 CFR, constitute limitations to the "*blind*" mutual recognition of an EAW when the issuing Member States shows signs of deficiencies that put the relevant rights at risk.[672] With regards to effective judicial cooperation, however, the application of the aforementioned praetorian exceptions is still subject to stringent conditions, a testimony to the fact that the three corollary obligations of the mutual trust presumption must still be respected.[673] Thus, the Court's hybrid interpretation of the principle of mutual trust constitutes the middle ground between the two sides of the equation and, as such, allows the CJEU to keep the balance between them.

Chapter II – The Mechanism of the EAW

The balance that the CJEU has afforded to the protection of fundamental rights and the effective judicial cooperation on which the FDEAW is based can also be derived from an analysis of its case law that was not explicitly aimed at providing insight into that very issue. This is the case, for instance, of the *Pupino* judgment, the *Poltorak* and *Kovalkovas* judgments, and the *Associação* and *Commission v. Poland* judgments discussed in Part II. The *Pupino* judgment was aimed at defining the legal strength of

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[671] *Ibid*.
[672] Opinion 2/13, paras. 191 and 192; *Aranyosi and Căldăraru*, para. 104; *LM*, para. 79; *Dorobantu*, para. 85; A. MOHAY (n639); A. KARAPATIKAS (n639).
[673] *N.S.*, para. 82; *Ibid.* ; M. KLAMERT and D. KOCHENOV (n159), pp. 8 to 9; D. KOCHENOV (n30), p. 12; C. HILLION (n17), pp. 1 and 9; O. MADER (n22), pp. 136 to 138; D. LONG (n133), pp. 13 to 20.
[673] *Ibid.*; *Soering*, paras. 11 and 92; *Cruz Varas*, paras. 20 to 75; *Aranyosi and Căldăraru*, paras. 85 to 87; *Dorobantu*, paras. 62 and 82; S. PRECHAL (n1) p. 88; M. K. ADDO and N. GRIEF (n136), p. 511; A. MOHAY (n639); A. KARAPATIKAS (n639).

Framework Decisions in general. Applied to the FDEAW, its reasoning shows a clear prioritization of effective judicial cooperation. In the *Poltorak* and *Kovalkovas* judgments, the Court was asked to interpret the concept of "*issuing judicial authority*" encompassed in Article 6(1) FDEAW, the result of which can be interpreted as providing a certain degree of protection of fundamental rights, all the while ensuring that effective judicial cooperation is maintained. Finally, the *Associação* and *Commission v. Poland* shed light on the constituent elements of judicial independence. In doing so, they demonstrate the CJEU's more recent prioritization of fundamental rights, *in casu* the right to a fair trial. These three categories of judgments are assessed in the following paragraphs.

In *Pupino*, the Court recognized the applicability of the principle of sincere cooperation and the duty of conforming interpretation to Framework Decisions in general. The principle of sincere cooperation, which stems from Article 4(3) TEU, sets out a general duty for Member States and EU institutions to assist each other in tasks flowing from the Treaties.[674] It entails both a positive obligation to facilitate the carrying out of the Union's objective, on the one hand, and a negative obligation to not act in a way that would affect the latter negatively, on the other hand.[675] As for the duty of conforming interpretation, it requires of national courts, when confronted with a dissension between their national law and a Framework Decision, that they interpret the relevant national provisions so far as possible in a way which conforms to the wording and purpose of said Framework Decision.[676] Now, although the principle of sincere cooperation and the duty of conforming interpretation are not absolute, in the sense that they do not allow for *contra legem* interpretations or violations of the principles of legality and legal certainty, the Court interpreted said exceptions strictly in its *Pupino* judgment.[677] Applied to the FDEAW, these principles and their strictly interpreted exceptions lead to a prioritization of effective judicial cooperation.[678] Indeed, since the main objective of the FDEAW is achieving effective judicial

[674] *Pupino*, para. 43; M. J. BORGERS (n87) pp. 1361 to 1386; P. CRAIG and G. DE BÚRCA (n10), pp. 445 to 446; M. KLAMERT (n277), pp. 31 to 33.
[675] Ibid.; P. VAN ELSUWEGE (n279), pp. 285 and 286; M. FLETCHER (n288), pp. 862 to 877.
[676] *Pupino*, para. 61; opinion of AG Kokott in *Pupino*, para. 36; M. FLETCHER (n253), pp. 75 to 77; L. KLIMEK (n255), pp. 128 and 129.
[677] See Part II, Chapter I, "*The Binding Strength of the FDEAW*"; *Pupino*, paras. 43 to 48; Opinion of AG Kokott in *Pupino*, para. 40; C. LEBECK (n250), pp. 517 to 523.
[678] *Ibid*.

cooperation among Member States in criminal matters, and national courts are under an obligation to interpret their national provisions as much as possible in conformity with said objective, it can be posited that the *Pupino* reasoning falls under the judicial cooperation side of the equation.

In the more recent *Poltorak* and *Kovalkovas* judgments, the Court established a balance between the protection of fundamental rights and effective judicial cooperation in criminal matters by stating that the notion of "*issuing judicial authority*" encompassed in Article 6(1) FDEAW was to be considered as an autonomous concept of EU law, entailing that its constituent elements were to be defined by the CJEU itself.[679] In doing so, the Court stepped on the Member States' procedural autonomy, according to which Member States remain competent to legislate on issues of procedural nature so long as EU primary or secondary law have not directly regulated them.[680] The Court's prioritization of the autonomous nature of the concept of "*issuing judicial authority*" entails one of two things. With respect to the protection of fundamental rights, the new, uniform definition of "*issuing judicial authority*" ensures the protection of the concerned individual's right to a fair trial by assuring the executing Member State that the issuing Member State's judicial authority meets the requirements of independence and effective judicial protection.[681] As regards effective judicial cooperation, the existence of a European definition of what constitutes an "*issuing judicial authority*" leads to an increase in the trust among Member States and facilitates the mutual recognition of their decisions.[682]

Finally, the *Associação* and *Commission v. Poland* judgments define the constituent elements of judicial independence and effective judicial protection. Despite not explicitly concerning the FDEAW, they present significant consequences with respect to the more recent prioritization that the Court affords to the protection of fundamental rights, in particular the right to a fair trial. Indeed, the Court adopted an extensive interpretation of both the *scope of application* and the *content* of Article

[679] *Poltorak*, paras. 30 to 33; *Kovalkovas*, paras. 31 to 34; *OG and PI*, paras. 48 and 49; *PF*, paras. 27 and 28. V. MITSILEGAS (n352), p. 127; L. BAY LARSEN (n341), pp. 433 to 442; K. KOWALIK-BAŃCZYK (n341), pp. 218 to 220.
[680] *Ibid*.
[681] *Ibid*.
[682] *Ibid*.

19(1) TEU.[683] As concerns the latter's scope of application, the CJEU ruled, *inter alia*, that any court or tribunal that can *potentially* be asked to apply or interpret EU law must be capable of providing effective judicial protection.[684] With regard to the content of Article 19(1), the Court considered that the capability to ensure effective judicial protection necessarily entails that the relevant court or tribunal must be independent.[685] Applied in the context of the FDEAW, the Court's reasoning in *Associação* and *Commission v. Poland* falls under the fundamental rights protection part of the equation. Indeed, by setting out a *general* obligation for Member States and their courts to meet the requirements of judicial independence and effective judicial protection, constituent elements of the right to a fair trial, the CJEU recognized the importance to protect said right in all fields covered by EU law, including the FDEAW.[686] The consecration, in *LM*, of potential violations of the right to a fair trial in the issuing Member State as the basis for a praetorian exception to the executing Member State's general duty to execute and EAW bears witness to the aforementioned.[687]

Chapter III – The Evolution of the CJEU's FDEAW Case Law

Part III analysed the evolution of the CJEU's FDEAW case law from the prioritization of effective judicial cooperation to the prioritization of the protection of fundamental rights. In *Advocaten voor de Wereld*, it was argued that the Court's argumentation was redundant, akin to a nonsensical mathematical demonstration where *2 + 2* is proven to equal *4* simply because *4* is equal to *2 + 2*.[688] Indeed, the Court had essentially argued, on the basis of the principle of mutual trust and

[683] *Associação*, paras. 36, 37 and 40; Opinion of AG Øe in *Associação*, paras. 65 to 67; PEREIRA DE SOUSA (n376), p. 149; M. KRAJEWSKI (n369), pp. 403 and 404; M. CLAES and M. BONELLI (n383), pp. 630 to 635.
[684] *Ibid*.
[685] *Ibid*.
[686] Articles 2, 7 and 49 TEU; *Les Verts*, para. 23; Opinion 2/13, para. 168; *Commission v. Poland*, paras. 43 to 47; C. HILLION (n17), pp. 4 to 5; D. KOCHENOV (n17), pp. 7 to 11; K. SOMMERMAN (n13), pp. 167 and 168; O. MADER (n22), p. 138 and 139.
[687] *LM*, para. 79.
[688] *Advocaten voor de Wereld*, paras. 53 to 60, respectively for legality and equality and non-discrimination. E. HERLIN-KARNELL (n289), p. 1156; M. J. BORGERS (n463), pp. 3 to 5; F. GEYER (n436), pp. 159 to 161; L. KLIMEK (n255), pp. 555 to 558. See Part I, Chapter II, Section I, "*The Principle of Mutual Trust*".

recognition, that since the FDEAW's provisions must be implemented into national law and all Member States must be presumed as possessing sufficient and equivalent standards of protection of fundamental rights, Article 2(2) FDEAW could not lead to a violation of the principle of legality or the principles of equality and non-discrimination.[689] In doing so, the Court had prioritized effective judicial cooperation, as it confirmed a close-to-absolute (i.e. irrebuttable) reading of the principles of mutual trust and recognition.

The CJEU applied a similar reasoning in the *Radu* and *Melloni* judgments, where it confirmed that the general duty provided by Article 1(2) FDEAW to execute any EAW could only be limited in the exhaustively listed situations of Articles 3 to 4a FDEAW.[690] In that vein, since the protection of fundamental rights is not explicitly encompassed in the aforementioned provisions, the Court considered that the executing Member State could not rely on said protection as a justification for the non-execution of an EAW.[691] Again, this constituted a prioritization of effective judicial cooperation based on the principles of mutual trust and recognition, as the CJEU's decisions were for the most part based on the general presumption that Member States sufficiently protect fundamental rights, which it considered to be a sufficient justification that there would be no violations of fundamental rights.

It is only after the transitional period of Opinion 2/13 and the recognition of the principle of mutual trust as a hybrid principle that the Court's stance on the protection of fundamental rights changed with respect to the FDEAW.[692] Indeed, although Opinion 2/13 reiterates the three obligations of the effective judicial cooperation side of the principle of mutual trust, it also recognizes that exceptional circumstances can constitute a limit to the close-to-absolute reading of said principle.[693] Based on the foregoing, the Court adopted a more protective stance of fundamental rights in its

[689] *Ibid*.
[690] *Radu*, para. 43; *Melloni*, paras. 37 and 63; A. WILLEMS, (n4), pp. 482 and 483.
[691] *Ibid*.
[692] *N.S.*, paras. 78 to 80; *Melloni*, paras. 37 and 63; Opinion 2/13, paras. 191 and 192; Opinion of AG Sharpston in *Radu*, paras. 76 and 77. K. LENAERTS (n194), p. 806; S. PEERS (n191), pp. 219 to 222, P. EECKHOUT, (n194), pp. 968; S. PRECHAL (n1), pp. 76 to 81.
[693] *Ibid*.

more recent *Aranyosi and Căldăraru* and *LM* judgments.[694] Yet, as mentioned in Part III, two questions can be raised, the answers to which only time will give.

First, the Court maintains stringent requirements for the application of these praetorian exceptions. Indeed, they may only apply in instances where the executing Member State has reason to believe that a real risk exists to the concerned individual's right to a fair trial or right to not be subjected to torture or inhuman or degrading treatment were he or she to be surrendered to the issuing Member State.[695] The assessment of said risk follows a two-stage test.[696] The executing Member State must first verify, on the basis of known information, whether there are generalized or systemic deficiencies in the issuing Member State which would put the relevant rights at risk.[697] Next to this *general* analysis, the executing Member State must then verify the existence of an *individualized* risk for the fundamental rights of the person in question.[698] Finally, even if both the *general* and *specific* tests point towards the existence of a real risk of a violation of Articles 4, 47 and 48 CFR, the execution of the EAW must be postponed until the executing judicial authority obtains the information it requires to discount the existence of such a risk.[699] It is only in situations where the real risk cannot be discounted within a reasonable time that the executing judicial authority may refuse the execution of the EAW.[700]

Second, as of now, the CJEU has only recognized the right to a fair trial and the right to not be subjected to torture or inhuman or degrading treatment as potential bases for the application of its praetorian exception to the general obligation for Member States to execute EAWs. Only time will tell whether the Court will build upon the aforementioned and recognize that the protection of other fundamental rights, such as the right to liberty, constitute a basis for the non-execution of an EAW. Having regard to the current state of the Court's case law, however, it can be argued that it will not,

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[694] *Aranyosi and* Căldăraru, para. 104; *LM*, para. 79; A. WILLEMS (n4), pp. 489 to 491; S. PRECHAL (n1), pp. 87 to 90.
[695] Melloni, paras. 59 and 63; Opinion 2/13, paras. 191 and 192; *Aranyosi and Căldăraru*, 88 and 91 to 104; C. HILLION (n17), pp. 4 to 5; D. KOCHENOV (n17), pp. 7 to 11; K. SOMMERMAN (n13), pp. 167 and 168; T. MARGUERY (n242), pp. 243 to 245; V. MITILEGAS (n288), pp. 26 and 27; M. KRAJEWSKI (n409), p. 796 and 797; K. BOVEND'EERDT (n117), p. 117.
[696] *Ibid*.
[697] *Ibid*.
[698] *Ibid*.
[699] *Ibid*.
[700] *Ibid*.

in the close future, extend its praetorian exceptions to the execution of EAWs to other fundamental rights. Indeed, as mentioned in Part I, the right to a fair trial and the right to not be subjected to torture or inhuman or degrading treatment can be considered as "*fundamental*" fundamental rights.[701] On the one hand, the right to a fair trial constitutes the *gateway* for the protection of other fundamental rights.[702] On the other hand, the right to not be subjected to torture or inhuman or degrading treatment is *absolute* and can therefore not be subjected to any limitations.[703] Since, even for fundamental rights of such importance, the application of the *Aranyosi and Căldăraru* and *LM* exceptions is subject to particularly stringent requirements, it can be posited that the CJEU's praetorian exceptions to the EAW will not, *for the time being,* extend to include other fundamental rights.

Conclusion

It can be posited from the foregoing that the CJEU plays a fundamental role in ensuring that the provisions of the FDEAW, which are mainly aimed at guaranteeing effective judicial cooperation between Member States, stay in line with the fundamental rights provided by the CFR. The Court has nevertheless not always been keen on accepting that the protection of fundamental rights constitute a limitation or an exception to the effectiveness of EU law, as borne witness by its initial case law with respect to the FDEAW, and it is not until recently that it started to take its role of "*balancer*" more at heart. As of now, it has recognized risks to the right to a fair trial and the right to not be subjected to torture or inhuman or degrading treatment as exceptional limitations to the principles of mutual trust and recognition upon which the mechanism of the EAW is built. As mentioned in Part IV, only time will tell whether the CJEU will loosen the requirements for the application of said exceptions, or whether it will accept that other "*less fundamental*" fundamental rights constitute

[701] Articles 4, 47 and 48 CFR; *N.S.*, para. 82, "*(...) it **cannot** be concluded (...) that **any infringement** of a fundamental right by the Member State responsible will affect the obligations of the other Member States*"; M. KLAMERT and D. KOCHENOV (n159), pp. 8 to 9; D. KOCHENOV (n30), p. 12; C. HILLION (n17), pp. 1 and 9; O. MADER (n22), pp. 136 to 138; D. LONG (n133), pp. 13 to 20; *Commission Communication of 2014*, p. 4.
[702] *Ibid*.; D. KOCHENOV (n30), pp. 10 to 17; M. KLAMERT and D. KOCHENOV (n159), pp. 8 to 9; Communication from the Commission to the European Parliament and the Council, *ibid*., p. 4.
[703] *Soering*, paras. 11 and 92; *Cruz Varas*, paras. 20 to 75; *Aranyosi and Căldăraru*, paras. 85 to 87; *Dorobantu*, paras. 62 and 82; S. PRECHAL (n1) p. 88; M. K. ADDO and N. GRIEF (n136), p. 511; A. MOHAY (n639); A. KARAPATIKAS (n639).

exceptions to the general duty to execute EAWs. This raises an important question with respect to the other side of the equation: what is to happen to effective judicial cooperation if the thresholds for the application of said exceptions are lowered? It took the CJEU more than a decade to recognize that the protection of fundamental rights could constitute a limitation to effective judicial cooperation, yet it is important that it maintain its role of "*balancer*" and not let the pendulum swing to the opposite side. Indeed, *both* the protection of fundamental rights and the effectiveness of EU law are objectives of primordial importance for the EU.

Bibliography

I. Legislation

A. EU Primary Law

Articles 2, 3, 4, 7, 19 and 49, TEU

Articles 67, 82, 258 and 267, TFEU

Articles 4, 47, 48, 49, 51, 52 and 53, CFR

Articles 9 and 10, Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - Protocol (No. 36) on transitional provisions, 9 May 2008, 12008E/PRO/36.

Articles 34 and 35 EU

Article 249(3) EC

B. EU Secondary Law

Articles 1, 2, 3, 4, 4a, 5, 8 and 15, FDEAW.

Recitals 6, 10, 12, 13, FDEAW.

C. Other

Articles 3 and 6 ECHR

Recital 19 and Article 21, European Parliament and Council of the European Union, *Directive 2005/36/EC on the recognition of professional qualifications*, 7 September 2005.

Article 1(2), Council of the European Union, *Council Framework Decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters*.

Article 2, Council of the European Union, *Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial*, 26 February 2009.

II. Case Law

A. CJEU Cases

Judgment of 26 February, *Melloni*, C-399/11, EU:C:2013:107.

Judgment of 12 November 1969, *Stauder v. City of Ulm*, 29/69, EU:C:1969:57.

Judgment of 17 December 1970, *Internationale Handelgesellschaft*, 11/70, EU:C:1970:114.

Judgment of 14 May 1974, *Nold v. Commission* , 4/73, EU:C:1974:51.

Judgment of 28 October 1975, *Roland Rutili v. Ministre de L'intérieur*, 36/75, EU:C:1975:13.

Judgment of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49.

Judgment of 20 February 1979, *Cassis de Dijon*, 120/78, EU:C:1979:42.

Judgment of 17 December 1981, *Luxembourg v. Parliament*, 30/81, EU:C:1983:32.

Judgment of 10 April 1984, *Von Colson*, 14/83, EU:C:1984:153.

Judgment of 23 April 1986, *Les Verts v. EP*, 294/83, EU:C:1986:166.

Judgment of May 1986, *Johnston*, 222/84, EU:C:1986:206.

Judgment of 13 July 1989, *Wachauf*, 5/88, EU:C:1989:321.

Judgment of 13 November 1990, *Marleasing*, C-106/89, EU:C:1990:395.

Judgment of 13 October 1992, *Portugal and Spain v Council*, Joined cases C-63/90 and C-67/90, EU:C:1992:381.

Judgment of 29 May 1997, *Kremzow v. Austria*, C-299/95, EU:C:1997:254.

Judgment of 29 April 1999, *CCAA*, C-288/97, EU:C:1999:214.

Judgment of 7 January 2004, *Delena Wells*, C-201/02, EU:C:2004:12.

Judgment of 2 June 2005, *Commission v. Luxembourg*, C-266/03, EU:C:2005:341.

Judgment of 4 July 2005, *Adelener*, C-212/04, EU:C:2005:443.

Judgment of 14 July 2005, *Commission v. Germany*, C-433/03, EU:C:2005:462.

Judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587.

Judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, EU:C:2007:261, para. 29

Judgment of 17 July 2008, *Kozlowski*, C-66/08, EU:C:2008:437.

Judgment of 12 August 2008, *Santesteban Goicoechea*, C-296/08 PPU, EU:C:2008:457.

Judgment of 1 December 2008, *Leymann and Pustovarov*, C-388/08, EU:C:2008:669.

Judgment of 22 June 2010, *Melki and Abdeli*, Joined Cases C-188/10 and C-189/10, EU:C:2010:363.

Judgment of the 21 December 2011, *N.S.*, Joined Cases C-411/10 and C-493/10, EU:C:2011:865.

Judgment of 5 September 2012, *Lopes da Silva*, C-42/11, EU:C:2012:517.

Judgment of 6 September 2012, *Trade Agency*, C-619/10, EU:C:2012:531.

Judgment of 29 January 2013, *Radu*, C-396/11, EU:C:2013:39.

Judgment of 26 February, 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105.

Judgment of 30 April 2014, *Ordre des Architectes v. État Belge*, C-365/13, EU:C:2014:280.

Opinion 2/13 of 18 December 2014, *Accession of the EU to the ECHR*, EU:C:2014:2454.

Judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474.

Judgment of 5 April 2016, *Aranyosi and Căldăraru*, Joined Cases C-404/15 and C-659/15 PPU, EU:C:2016:198.

Judgment of 1 June 2016, C-241-15, *Bob-Dogi*, EU:C:2016:385.

Judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858.

Judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861.

Judgment of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126.

Judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236.

Judgment of 29 June 2017, *Poplawski*, C-579/15, EU:C:2017:503.

Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16, EU:C:2018:117.

Judgment of 25 July 2018, *LM*, C-216/18 PPU, EU:C:2018:586.

Judgment of 27 May 2019, *OG and PI*, Joined Cases C-508/18 and C-82/19 PPU, EU:C:2019:456.

Judgment of 27 May 2019, *PF*, C-509/18, EU:C:2019:457.

Judgment of 24 June 2019, *Commission v. Poland*, C-619/18, EU:C:2019:531.

B. ECtHR Cases

ECtHR Judgment of 18 January 1978, *Ireland v. UK*, no. 5310/71.

ECtHR Judgment of 7 July 1989, *Soering v. UK*, no. 14038/88.

ECtHR Judgment of 7 June 1990, *Cruz Varas and others v. Sweden*, no. 15576/89.

ECtHR Judgment of 22 March 1995, *Quinn v. France*, no. 18580/91.

ECtHR Judgment of 21 January 2011, *M.S.S. v. Belgium and Greece*, no. 30696/09.

ECtHR Judgment of 24 April 2012, *Haralampiev v. Bulgaria*, no. 20491/92.

ECtHR Judgment of 24 March 2015, *Gallardo Sanchez v. Italy*, no. 11620/07.

ECtHR Judgment of 9 July 2019, *Romeo Castaño v. Belgium*, no. 8351/17.

C. AG Opinions

Opinion of Advocate General Colomer delivered on 12 September 2006, Advocaten voor de Wereld, C-303/05, EU:C:2005:552.

Opinion of Advocate General Sharpston delivered on 18 October 2012, *Radu*, C-396/11, EU:C:2012:648.

Opinion of Advocate General Jacobs delivered on 16 March 2000, *Centrosteel*, C-456/98, EU:C:2000:137.

Opinion of Advocate General Kokott delivered on 11 November 2004, *Pupino*, C-105/03, EU:C:2004:712.

Opinion of Advocate General Bot delivered on 2 October 2012, *Melloni*, C-399/11, EU:C:2012:600.

Opinion of Advocate General Bot delivered on 15 December 2015, *Kossowski*, C-486/14, EU:C:2015:812.

Opinion of Advocate General Øe delivered on 18 May 2017, *Associação*, C-64/16, EU:C:2017:395.

Opinion of Advocate General Bot, delivered on 6 February 2018, *Lada*, C-390/16, EU:C:2018:65.

III. Doctrine

ADDO (M. K.) and GRIEF (N.), "Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?", *European Journal of International Law*, Vol. 9(3), Oxford University Press, 1998, pp. 510 to 524.

BALL (R.), *The Legitimacy of the European Union through Legal Rationality – Free Movement of Third Country Nationals*, Routledge, 15 October 2013, pp. 253 and 254.

BATTJES (H.), BROUWER (E.), DE MORREE (P.) and OUWERKERK (J.), *The Principle of Mutual Trust in European Asylum, Migration, and Criminal law – Reconciling Trust and Fundamental Rights,* FORUM – Institute for Multicultural Affairs, December 2011, pp. 38 to 39.

BAY LARSEN (L.), "Afterword(s) on Mutual Recognition and the Proteciton of Fundamental Rights Revisited – Following the Judgment in *Aranyosi and Căldăraru*", *The Needed Balances in EU Criminal Law: Past, Present and Future*, C. BRIÈRE and A. WEYEMBERGH (eds.), Bloomsbury Publishing, 2017 pp. 433 to 442.

BAY LARSEN (L.), "Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice", *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, P. CARDONNEL, A. ROSAS and N. WAHL (eds.), Hart Publishing, Oxford, 2012, pp. 123 to 124.

BECK (G.), "The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor", *European Law Journal*, Vol. 17(4), Oxford University Press, July 2011, pp. 470 to 494.

BESSELINK (L. F.M.), "Analysis and Reflections – The Parameters of Constitutional Conflict after *Melloni*", European Law Review, Vol. 39(4), Sweet & Maxwell, 2014, pp. 531 and 552.

BORGERS (M. J.) "Mutual Recognition and the European Court of Justice: The Meaning of Consistent and Autonomous and Uniform Interpretation of Union Law for the Development of the Principle of Mutual Recognition in Criminal Matters", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 18(1), Brill Nijhoff, Netherlands, 2010, pp. 99 to 114.

BORGERS (M. J.), "Implementing Framework Decisions", *Common Market Law Review*, Vol. 44(5), Kluwer Law International, 2014, p. 1361 to 1386.

BORGERS (M. J.), *Case note: Hof van Justitie EG (Advocaten voor de Wereld)*, No. 619, May 03, 2007, pp. 3 to 5.

BOVEND'EERDT (K.), "Case Note – The Joined Cases *Aranyosi and Căldăraru*: A New Limit to the Mutual trust Presumption in the Area of Freedom, Security and Justice?", *Utrecht Journal of International and European Law*, Ubiquity Press, 2016, pp. 112 to 121.

BRIBOSIA (E.) and WEYEMBERGH (A.), "Arrêt '*Aranyosi et Căldăraru'*: Imposition de Certaines Limites à la Confiance Mutuelle dans la Coopération Judiciaire Pénale", *Journal de Droit Européen*, n°230, Bruylant, 2016, pp. 225 to 227.

BROUWER (E.), "Mutual Trust and Human Rights in the AFSJ: In Search of Guidelines for National Courts", *European Papers*, Vol. 1(3), 2016, pp. 893 to 920.

BROUWER (E.), "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof", *Utrecht Law Review*, Vol. 9(1), Ubiquity Press, 2013, pp. 135 to 147.

CAMBIEN (N.), "Mutual Recognition and Mutual Trust in the Internal Market", *European Papers*, Vol. 2(1), 2017, pp. 93 to 116.

CANOR (I.), "My brother's keeper? horizontal Solange: 'an ever closer distrust among the peoples of Europe'", *Common Market Law Review*, Vol. 50(2), Kluwer Law International, 2013, pp. 383 to 421.
CARIAT (N.), *La Charte des Droits Fondamentaux et l'Equilibre Constitutionenel entre l'Union Européenne et les Etats Membres*, Bruylant, 2016, pp. 93 to 106.

CLAES (M.) and BONELLI (M.), "Judicial serendipity: how Portuguese judges came to the rescue of the Polish Judiciary – ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*", *European Constitutional Law Review*, Vol. 14, Cambridge University Press, 2018, p. 622 to 643.

CONSTANTINESCO (V.), "La Conciliation Entre la Primauté du Droit de L'union Européenne et l'Identité Nationale des Etats Membres", *Common European Legal Thinking – Essays in Honour of Albrecht Weber*, H.-J. BLANKE, P. C. VILLALÓN, T. KLEIN and J. ZILLER (eds.), Springer International Publishing, 2015, p. 103 to 114.

CRAIG (P.) and DE BÚRCA (G.), *EU law: text, cases and materials*, 6th ed., Oxford University Press, 2015, pp. 382, 383, 386, 388 to 390, 394 to 400

CREMONA (M.), "Structural Principles and their Role in EU External Relations Law", *Structural Principles in EU External Relations Law*, M. CREMONA (eds.), Hart Publishing, 2018, pp. 3 to 30.

DE WITTE (B.), "Article 53 – Level of Protection", *The EU Charter of Fundamental Rights – A Commentary*, S. PEERS, T. HERVEY, J. KENNER and A. WARD, (eds.), Hart Publishing, 2014, pp. 1523 to 1538.

DE WITTE (B.), "Legal Instruments and Law-Making in the Lisbon Treaty", *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty*, S. GRILLER and J. ZILLER (eds.), Springer, 2008, pp. 79 to 108.

DOROCIAK (M.) and LEWANDOWSKI (W.), "A *Check* Move for the Principle of Mutual Trust from Dublin: The Celmer Case", *European Papers*, Vol. 3(2), 2018, pp. 857 to 873.

DOUGLAS-SCOTT (S.), "The Court of Justice of the European Union and the European Court of Human Rights after Lisbon", *The Protection of Fundamental Rights in the EU after Lisbon*, S. DE VRIES, U. BERNITZ and S. WEATHERILL (eds.), Hart Publishing, 2013, pp. 153 to 179.

DOUGLAS-SCOTT (S.), "The EU's Area of Freedom, Security and Justice: A Lack of Fundamental Rights, Mutual Trust and Democracy?", *Cambridge Yearbook of European Legal Studies*, Vol. 11, pp. pp. 53 to 85.

DOUGLAS-SCOTT (S.), "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review*, Vol. 11(4), Oxford University Press, 2011, pp. 645 to 682.

EECKHOUT (P.), "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky", *Fordham International Law Journal*, Vol. 38(4), Fordham University School of Law, 2015, pp. 953 to 992.

FERRARO (F.) and CARMONA (J.), "Fundamental Rights in the European Union – The Role of the Charter after the Lisbon Treaty", *European Parliamentary Research Service*, Brussels, March 2015, pp. 4 and 5.

FICHERO (M.) and POLLICINO (O.), "The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?", *German Law Journal*, Vol. 20, Cambridge University Press, 2019, pp. 1097 to 1118.

FLETCHER (M.), "Extending 'Indirect Effect' to the Third Pillar: The Significance of Pupino?", *European Law Review*, Vol. 30(6), Sweet & Maxwell, 2005, pp. 862 to 877.

FLETCHER (M.), "Impact of the *Pupino* Decision on EU Law", *The Court of Justice and European Criminal Law – Leading Cases in a Contextual Analysis*, V. MITSILEGAS, A. DI MARTINO and L. MANCANO (eds.),Hart Publishing, 2019, p. 67 to 82.

FONTANELLI (F.) "The Court Goes 'All-in'", *The ECJ Under Siege – New Constitutional Challenges for the ECJ*, G. MARTINICO and F. FONTANELLI (eds.), The Icfai University Press, 2009, pp. 31 to 61.

GERAPETRITIS (G.), *New Economic Constitutionalism in Europe*, Bloomsbury Publishing, 2019, pp. 139 to 142.

GERARDS (J.), "How to improve the necessity test of the European Court of Human Rights", *International Journal of Constitutional Law*, Vol. 11(2), 2013, Oxford University Press, pp. 466 to 490.

GEYER (F.), "European Arrest Warrant: Advocaten voor de Wereld VZW v. Leden van de Ministerraad: Cour of Justice of the European Communities, Judgment of 3 May 2007, Case C-303/05", *European Constitutional Law Review*, Vol. 4(1), Cambridge University Press, 2008, pp. 149 to 161.

GIANNAKOULA (A.) "Framework Decisions under the Lisbon Treaty: Current Status and Open Issues", *European Criminal Law Review*, Nomos Verlagsgesellschaft mbH & Co. KG, 2017, pp. 275 and 288.

GREE (S.), GERARDS (J.) and SLOWE (R.), *Human Rights in the Council of Europe and the European Union – Achievements, Trends and Challenges*, Cambridge University Press, 29 March 2018, pp. 300 to 307.

HAKET (S.), "Coherence in the Application of the Duty of Conforming Interpretation in EU Law", *Review of European Administrative Law*, Vol. 8(2), Paris Legal Publishers, 2015, pp. 215 to 246.

HALBERSTAM (D.), "'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward", *German Law Journal*, Vol. 16(1), German Law Journal GbR, 2015, pp. 105 to 146.

HEID (D. A.), "Before and After the Treaty of Lisbon: The Legal Framework of Police Cooperation in the EU Compared", Police Cooperation in the European Union under the Treaty of Lisbon – Opportunities and Limitations, H. ADEN (ed.), Nomos, 2015, pp. 65 to 80.

HEIMRICH (C.), "European arrest warrants and the independence of the issuing judicial authority – How much independence is required? – Case note on joined cases C-508/18 and C-82/19 PPU *OG* and *PI*", *New Journal of European Criminal Law*, Vol. 10(4), SAGE Publications, 2019, pp. 389 to 398.

HERLIN-KARNELL (E.), "Constitutional Principles in the EU Area of Freedom, Security an Justice", *EU Security and Justice Law: After Lisbon and Stockholm*, D. ACOSTA and C. MURPHY (eds.), Hart Publishing, Oxford, 2014, pp. 2 to 6.

HERLIN-KARNELL (E.), "In the Wake of Pupino: *Advocaten voor de Wereld* and *Dell'Orto*", *German Law Journal*, Vol. 8(12), Cambridge University Press, 2007, p. 1147 to 1160.

HILLION (C.), "Overseeing the rule of law in the European Union – Legal mandate and means", *European Policy Analysis*, Vol. 1, Swedish Institute for European Policy Studies, 2016, pp. 1 to 16.

HILLION (C.), "The Copenhagen Criteria and their Progeny", *EU Enlargement: A Legal Approach*, C. HILLION (ed.), Hart Publishing, 2004, pp. 1 to 22.

IPEREIRA DE SOUSA (I.), "The Rule of Law Crisis in the European Union: From Portugal to Poland (and Beyond)", *Teisė*, Vol. 114, Vilnius University Press, 2020, pp. 144 to 153.

ISIKSEL (T.), "European Exceptionalism and the EU's Accession to the ECHR", *The European Journal of International Law*, Vol. 27(3), Oxford University Press, 2016, pp. 565 to 589.

JANSE (R.), "Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement", *International Review of Constitutiona Law*, Vol. 17(1), Oxford University Press, 2019, pp. 43 to 65.

KENT (P.), *Law of the European Union*, Pearson Education, 2008, pp. 107 to 109.

KLAMERT (M.) and KOCHENOV (D.), "Article 2 TEU", *The Treaties and the Charter of Fundamental Rights – A Commentary*, M. KELLERBAUER, M. KLAMERT and J. TOMPKIN (eds.), Oxford University Press, 2019, pp. 22 to 30.

KLAMERT (M.), "The Principle of Loyalty in EU Law", *Oxford Studies in European Law*, P. CRAIG and G. DE BÚRCA (eds.), Oxford University Press, 2014, pp. 31 to 33.

KLIMAS (T.) and VAICIUKAITE (J.), "The Law of Recitals in European Community Legislation", *ILSA Journal of International & Comparative Law*, Vol. 15(1), 2008, pp. 61 to 93.

KLIMEK (L.), *European Arrest Warrant*, Springer, 2015, p. 222 to 224.

KLIMEK (L.), *Mutual Recognition of Judicial Decisions in European Criminal Law*, Springer International Publishing, Switzerland, 2017, pp. 128 and 129.

KOCHENOV (D.), "Busting the Myths Nuclear: A Commentary on Article 7 TEU", *EUI Working Paper*, no. 10, European University Institute, 2017, pp. 1 to 13

KOCHENOV (D.), "The Acquis and Its Principles: the Enforcement of the 'Law' versus the Enforcement of 'Values' in the European Union", *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, A. JAKAB and D. KOCHENOV (eds.), Oxford University Press, 2017, pp. 9 to 27.

KOOPS (C. E.), *Contemplating Compliance: European Compliance Mechanisms in International Perspective*, pp. 89 and 90.

KORENICA (I.) and DOLI (D.), "No More Unconditional 'Mutual Trust' Between the Member States: An Analysis of the Landmark Decision of the CJEU in Aranyosi and Caldararu", *European Human Rights Law Review*, Vol. 21, Sweet & Maxwell, 2016, pp. 542 to 555.

KOWALIK-BAŃCZYK (K.), "Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings", *Yearbook of Antitrust and Regulatory Studies*, Vol. 5(6), Centre of Antitrust and Regulatory Studies – University of Warsaw, 2012, pp. 215 to 234.

KRAJEWSKI (M.), "*Associação Sindical dos Juízes Portugueses*: The Court of Justice and Athena's Dilemma", European Papers, Vol. 3(1), 2018, p. 395 to 407.

KRAJEWSKI (M.), "Who is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestice Judges – ECJ 25 July 2018, Case C-216/18 PPU, The Ministr for Justice and Equality v. LM", European Constitutional Law Review, Vol. 14(4), Cambridge University Press, 2018, pp. 792 to 813.

KRENN (C.), "Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13", *German Law Journal*, Vol. 16(1), Cambridge University Press, 2015, pp. 147 to 167.

LAZOWSKI (A.), "Stepping into Uncharted Waters No More: The Court of Justice and EU Criminal Law", *The Needed Balances in EU Criminal Law: Past, Present and Future*, C. BRIÈRE and A. WEYEMBERGH (eds.), Bloomsbury Publishing, 2017, pp. 111 to 140.

LAZOWSKI (A.), "The Sky is Not the Limit: Mutual Trust and Mutual Recognition après *Aranyosi and Căldăraru*", *Croatian Yearbook of European Law and Policy*, Vol. 14(1), University of Zagreb, 2018, pp. 1 to 30.

LEBECK (C.), "Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after *Pupino*", *German Law Journal*, Vol. 8(5), Cambridge University Press, 2007, pp. 501 to 533

LECZYKIEWICZ (D.), "Effectiveness of EU Law Before National Courts", *The Oxford Handbook of European Union Law*, A. AMULL and D. CHALMERS (eds.), OUP Oxford, 2015, pp. 212 to 248.

LENAERTS (K.), "Interlocking legal orders in the European Union and comparative law", *The International and Comparative Law Quarterly*, Vol. 52(4), Cambridge University Press, 2003, pp. 873 to 903.

LENAERTS (K.), "La vie après l'avis: Exploring the principle of mutual (yet not blind) trust", *Common Market Law Review*, Vol. 54, Kluwer Law International, 2017, pp. 805 to 840.

LENAERTS (K.), "The Court of Justice of the European Union as a Guardian of the Authority of EU Law: A Networking Exercise ", *The Authority of EU Law – Do We Still Believe in It?*, W. HEUSEL and J.-P. RAGEADE (eds.), Springer, 2019, pp. 21 to 30.

LONG (D.), "Guide to Jurisprudence on torture and Ill-Treatment: Article 3 of the European Convention for the Protection of Human Rights", *Association for the Prevention of Torture*, Vol. 1, 2002, pp. 13 to 20.

MADER (O.), "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law", *Hague Journal on the Rule of Law*, Vol. 11, Springer, 2019, pp. 133 to 170.
MANCANO (L.), "Judicial Harmonisation through Autonomous Concepts of European Union Law. The Example of the European Arrest Warrant Framework Decision", *European Law Review*, Vol. 43(1), Sweet & Maxwell, 2018, pp. 69 to 88.

MANCANO (L.), *The European Union and the Deprivation of Liberty – A Legislative and Judicial Analysis from the Perspective of the Individual*, Hart Publishing, 2019, pp. 110 to 112.

MANCANO (L.); "Mutual recognition in criminal matters, deprivation of liberty and the principle of proportionality", *Maastricht Journal of European and Comparative Law*, Vol. 25(6), 2019, pp. 718 to 732.

MARGUERY (T.), "Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters", European Papers, Vol. 1(3), 2016, p. 943 to 964.

MARIN (L.), "'Only You': The Emergence of a Temperate Mutual Trust in the Area of Freedom, Security and Justice and Its Underpinning in the European Composite Constitutional Order", *European Papers*, Vol. 2(1), 2017, pp. 141 to 157.

MARIN (L.), "Effective and Legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant", *New Journal of European Criminal Law*, Vol. 5(3), 2014, pp. 326 to 347.

MAVRONICOLA (N.), "Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying and Absolute Right in a Penal Context", *Human Rights Law Review*, Vol. 15(4), Oxford University Press, December 2015, pp. 721 to 743.

MIETTININ (S.), *Criminal Law and Policy in the European Union*, Routledge, 2013, pp. 90 to 92.

MITSILEGAS (V.), "Managing Legal Diversity in Europe's Area of Criminal Justice: The Role of Autonomous Concepts", R. COLSON and S. FIELD (eds), *EU Criminal Justice and the Challenges of Diversity. Legal Cultures in the Area of Freedom Security and Justice*, Cambridge University Press, 2016, p. 127.

MITSILEGAS (V.), "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU", *Common Law Market Review*, Vol. 43, Kluwer Law International, 2006, pp. 1277 to 1311.

MITSILEGAS (V.), *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, Hart Publishing, 2016, pp. 5 to 11.

MITSILEGAS (V.), *EU Criminal Law*, Bloomsbury Publishing, 2009, pp. 26 and 27.

NOWAK (M.) and CHARBORD (A.), "Article 4 – Prohibition of Torture and Inhuman or Degrading Treatment or Punishment", *The EU Charter of Fundamental Rights – A Commentary*, S. PEERS, T. HERVEY, J. KENNER and A. WARD (eds.), Hart Publishing, 2014, pp. 61 to 100.

PEERS (S.) and PRECHAL (S.), "Article 52 – Scope and Interpretation of Rights and Principles", *The EU Charter of Fundamental Rights – A Commentary*, S. PEERS, T. HERVEY, J. KENNER and A. WARD (eds.), Hart Publishing, 2014, pp. 1455 to 1522.

PEERS (S.), "The EU's Accession to the ECHR: The Dream Becomes a Nightmare", *German Law Journal*, Vol. 16, pp. 213 to 222.

PERISTERIDOU (C.), *The Principle of Legality in European Criminal Law*, Intersentia, 2015, p. 178.

POLLICINO (O.), "European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems", *German Law Journal*, Vol. 9(10), pp. 1313 to 1355.

PRECHAL (S.), "Mutual Trust Before the Court of Justice of the European Union", *European Papers*, Vol. 2(1), 2017, pp. 75 to 92.

RUIZ TARRÍAS (S.), "La decisión marco sobre la orden europea de detención y entrega reinterpretada por el Tribunal de Justicia de la Unión Europea", *Anuario Iberoamericano de Justicia Constitucional*, Vol. 23(2), Dialnet, 2019, pp. 459 to 490.

SANGER (A.), "Force of Circumstance: The European Arrest Warrant and Human Rights", *Democracy and Security*, Vol. 6(1), Routledge, 2010, pp. 17 to 51.

SARMIENTO (D.), "Un paso más en la constitucionalización del tercer pilar de la Unión Europea. La sentencia Maria Pupino y el efecto directo de las decisiones marco", *Revista Electrónica de Estudios Internacionales*, No. 10, Dialnet, 2005, pp. 6 to 17.

SAYERS (D.), "Article 48 – Presumption of Innocence and Right of Defence (Criminal Law)", *The EU Charter of Fundamental Rights – A Commentary*, S. PEERS, T. HERVEY, J. KENNER and A. WARD, (eds.), Hart Publishing, 2014, pp. 1303 to 1350.

SOMMERMAN (K.-P.), "The Objectives of the European Union", *The Treaty on European Union (TEU): A Commentary*, H-J. BLANKE and S. MANGIAMELLI (eds.), Springer, 2013, pp. 157 to 183.

URÍA GAVILÁN (E), *La Adhesión de la Unión Europea al Convenio Europeo de Derechos Humanos*, J.M. Bosch Editor, 2018, pp. 365 to 374.

VAN BALLEGOOIJ (W.), *The Nature of Mutual Recognition in European Law – Re-examining the Notion from an Individual Rights Perspective With a View to Its Further Development in the Criminal Justice Area*, Intersentia, 2015, pp. 136 to 147.

VAN DER MEI (A. P.), "The European Arrest Warrant: Recend developments in the case law of the Court of Justice", *Maastricht Journal of European and Comparative Law*, Vol. 24(6), SAGE Publications, 2017, pp. 882 to 904.

VAN ELSUWEGE (P.), "The Duty of Sincere Cooperation and its Implications for Autonomous Member State Action in the Field of External Relations", *Between Compliance and Particularism – Member States Interests and European Law*, M. VARJU (eds.), Springer Nature Switzerland AG, Switzerland, 2019, pp. 283 and 298.

VAN MEERBEECK (J.), "The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust", *European Law Review*, Vol. 41(41), Sweet & Maxwell, 2015, pp. 275 to 288.

WAGNER (W.), "Negative and Positive Integration in EU Criminal Law Co-operation", *European Integration online Papers*, Vol. 15(6), 2011, pp. 15 to 17.
WARD (A.), "Article 51 – Field of Application", *The EU Charter of Fundamental Rights – A Commentary*, S. PEERS, T. HERVEY, J. KENNER and A. WARD (eds.), Hart Publishing, 2014, p. 1413 to 1454.

WARD (A.), "Article 47 – Right to an Effective Remedy and to a Fair Trial", *The EU Charter of Fundamental Rights – A Commentary*, S. PEERS, T. HERVEY, J. KENNER and A. WARD, (eds.), Hart Publishing, 2014, pp. 1197 and 1276.

WILLEMS (A.), "Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character", *European Journal of Legal Studies*, Vol. 9(1), European University Institute, 2016, pp. 211 to 249.

WILLEMS (A.), "The Court of Justice of the European Union's Mutual trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal", *German Law Journal (20)*, Cambridge University Press, 2019, pp. 468 to 495.

WILSCHER (D.), "Article 6 – Right to Liberty and Security", *The EU Charter of Fundamental Rights – A Commentary*, S. PEERS, T. HERVEY, J. KENNER and A. WARD, (eds.), Hart Publishing, 2014, p. 121 to 152.

WISCHMEYER (T.) "Generating Trust Through Law? Judicial Cooperation in the European Union and the 'Principle of Mutual trust'", *German Law Journal*, Vol. 17(3), Cambridge University Press, 2016, pp. 399 to 382.

IV. Other

A. MOHAY (A.), "Plot twist? Case C-128/18 Dorobantu: detention conditions and the applicability of the ECHR in the EU legal order", *EU Law Analysis*, 28 October 2019, http://eulawanalysis.blogspot.com/2019/10/plot-twist-case-c-12818-dorobantu.html, (accessed on 25 April 2020).

BRAUM (S.), *The Carles Puigdemont case: European criminal law in a crisis of confidence*, https://www.theeconomyjournal.eu/texto-diario/mostrar/1219252/the-carles-puigdemont-case-european-criminal-law-in-crisis-of-confidence, (accessed on Friday 8 March 2020).

Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, COM(2014)158 final, 11 march 2014.

Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee of the Regions, *Strengthening the rule of law within the Union – A blueprint for action*, COM(2019)343 final, 17 July 2019.

Council of Europe – European Court of Human Rights, *Factsheet – Case-law concerning the European Union*, February 2020, pp. 10 and 11.

Council of Europe – European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (criminal limb)*, 31 December 2019, pp. 17 to 94.

Council of the European Union, *Presidency Conclusions – Tampere European Council*, 15 and 16 October 1999.

DE BOER (N), *Uniformity of deference to national constitutional traditions in the protection of fundamental rights? Opinion of AG Bot in case C-399/11 Melloni*, 25 October 2012, https://europeanlawblog.eu/2012/10/25/uniformity-or-deference-to-national-constitutional-traditions-

in-the-protection-of-fundamental-rights-case-c-39911-melloni-opinion-ag-bot/, (accessed on 19 March 2020).

Editorial Comments, "Safeguarding EU values in the Member States – Is something finally happening?", *Common Market Law Review*, Vol. 52, Kluwer Law International, 2015, pp. 619 to 628.

Eurojust, *Case law by the Court of Justice of the European Union on the European Arrest Warrant*, 15 March 2020, pp. 3 to 7.

Eurojust, *Case Law by the Court of Justice of the European Union on the European Arrest Warrant*, October 2018, pp. 5 and 7.

European Commission, *Commission Notice – Handbook on how to Issue and Execute a European Arrest Warrant*, C(2017) 6389 final, 28 September 2018, p. 39.

European Parliament Research Service, *An EU mechanism on democracy, the rule of la wand fundamental rights – Annex*, 2016, pp. 26 and 27.

European Parliament, *Fact Sheet – The Protection of Fundament Rights in the EU fact sheet*, 2020, pp. 1 and 2.

European Parliament, *Press Release – Rule of Law in Poland and Hungary has Worsened*, 16 January 2020, https://www.europarl.europa.eu/news/en/press-room/20200109IPR69907/rule-of-law-in-poland-and-hungary-has-worsened, (accessed on Monday 4 March 2020).
European Parliament, *The triangular relationship between fundamental rights, democracy and the Rule of Law*, 2013, p. 33.
Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14. December 2007, pp. 33 and 34

FRANSSEN (V.), "Melloni as a wake-up call – setting limits to higher national standards of fundamental rights' protection, European Law Blog", *10 March 2014*, https://europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/, (accessed on 22 March 2020).
https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do, (accessed on 21 April 2020).

KARAPATAKIS (A.), "Case C-182/18 Dorobantu – The Aftermath of *Aranyosi and Căldăraru*, European Law Blog, 28 October 2019, https://europeanlawblog.eu/2019/10/28/case-c-128-18-dorobantu-the-aftermath-of-aranyosi-and-caldararu/, (accessed on 25 April 2020).