

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

PART III LIMITATIONS ON THE OBLIGATION OF MUTUAL RECOGNITION AND FUNDAMENTAL RIGHTS PROTECTION IN THE EAW, FD 2008/909 AND FD 2008/947

Dr. Tony Marguery, LLM

Dr. Ton van den Brink

Dr. Michele Simonato

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

The following chapters will discuss the various limits to mutual recognition as far as these limits can serve as safeguards for the individuals' fundamental rights. Firstly, the EAW, FD 2008/909 and FD 2008/947 provide minimum requirements that have to be met in order for a judicial decision to be recognizable and enforceable by a foreign judicial authority. If these requirements are validly met, the latter can then only refuse to enforce the foreign decision in certain specific circumstances exhaustively enumerated in the FDs, the so-called grounds for non-execution. Certain of these minimum requirements and grounds for non-execution provided for in the FDs relate to the necessity to protect the individuals' fundamental rights. Secondly, the respect of fundamental rights being one of the parameters of the existence of mutual trust underlying mutual recognition, EU legislation imposing the respect of certain rights in criminal proceedings has been adopted with the aim to increase mutual trust between Member States authorities and therefore facilitate mutual recognition. Finally, mutual recognition can be limited in exceptional circumstances. This is in particular the case to avoid the violation of a fundamental right that otherwise would not be safeguarded by the EU legislation implementing mutual recognition or enhancing mutual trust.

1. Overview of the mechanisms of individuals' fundamental rights protection in the EAW, FD 2008/909, and FD 2008/947

The EAW, FD 2008/909, and FD 2008/947 attempt to strike a balance between effective law enforcement and the protection of fundamental rights. The FDs impose certain minimum requirements on the competent or judicial authority in the executing and issuing Member State to comply with fundamental rights. One may notice that the EAW, FD 2008/909, and FD 2008/947 provide for two mechanisms that can provide fundamental rights protection and eventually imply a limitation of mutual recognition. Firstly, there are provisions in the FDs that protect the rights of the person at hand (*e.g.* the right to be assisted by a legal counsel,¹ and the right to a hearing pending the decision).² Secondly, the FDs establish when the executing authority enjoys the faculty to refuse the execution and enforcement of the judicial decision, the so-called 'grounds for non-execution'. The following sections will briefly describe these mechanisms as far as they ensure the protection of the fundamental rights of the person subject to a decision of conviction and can play a role in the obligation to recognize that decision.

As to the grounds for non-execution, the EAW contains mandatory and optional non-execution grounds, while the FD 2008/909 and FD 2008/947 have optional non-execution grounds only. A number of these non-execution grounds clearly protect the fundamental rights of the persons subjected to the EAW, FD 2008/909, or FD 2008/947. For instance, the competent authority of the executing Member State may refuse to recognize the judgment and enforce the sentence if the judgment was rendered *in absentia*.³ Other grounds for non-execution do not seem directly linked with the protection of the individual's fundamental right (for example, the application of the principle of double criminality),⁴ but may very well

¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, Article 11(2).

² *Ibid.*, Article 18 and 19.

³ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L327/27, Article 9(i). The competent authority may not refuse to recognize the judgment and enforce the sentence if the certificate states that the person was summoned personally or informed via a representative competent according to the national law of the issuing Member State of the time and place of the proceedings which resulted in the judgment being rendered *in absentia*, or that the person has indicated to a competent authority that he or she does not contest the case.

⁴ See for example Article 4(1) EAW or Article 9(1)(d) FD 2008/909.

be used by the national executing authorities as a safeguard against possible divergence between Member States fundamental values, and in particular, fundamental rights.

If a mandatory non-execution ground applies, this will result in a refusal of the executing judicial authority to execute an EAW.⁵ Where the EU legislation provides for an optional non-execution ground, it can be inferred from the case law of the CJEU on the EAW that this means that Member States have discretion to transpose such a ground or not, and if the ground is transposed, that the Member States must also provide a certain discretion in the application of the ground to their judicial authorities. Indeed according to the CJEU:

“[w]here a Member State chose to transpose [Article 4(6) of the EAW] into domestic law, the executing judicial authority must, nevertheless, have a margin of discretion as to whether or not it is appropriate to refuse to execute the EAW. In that regard, that authority must take into consideration the objective of the ground for optional non-execution set out in that provision, which, according to the Court’s settled case-law, means enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person’s chances of reintegrating into society when the sentence imposed on him expires [...]”.⁶

This being said, this research will show that the Member States have interpreted the notion of optional in different ways.

1.1. The FD 2002/584/JHA on the EAW

a) Safeguards for the requested (convicted) person

The FD EAW provides for some procedural safeguards for the requested (convicted) persons. It must be observed that such a EU instrument does not detail the features of these safeguards, whose definition is left upon the national legislators. The Directives adopted within the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, in particular the three Directives analyzed in the next section of this research (Directive 2010/64 on the right to interpretation and translation, the Directive 2012/13 on the right to information, and the Directive 2013/48 on the right of access to a lawyer and on the right to communicate upon arrest) apply to EAW proceedings for the purpose of criminal prosecution, but it remains unclear whether they also apply to EAW issued for the execution of a sentence (see below). One argument in favor of their application to post-trial situations is that aim to ensure a higher level of harmonization between criminal procedural rules of the Member States, thereby enhancing the mutual trust necessary for a proper functioning of the mutual recognition instruments.

While the FD does not say anything about, for example, legal remedies or compensation in case of unjustified damages, it provides for the following safeguards, to be ensured in accordance with the law of the executing Member State:

- The right to be informed, upon arrest, of the EAW and its content, and of the possibility of consenting to surrender (Article 11(1)). Directive 2012/13 applies;
- The right to be assisted by a legal counsel (Article 11(2)). Directive 2013/48 on the right of access to a lawyer applies (see Article 10 of the Directive 2013/48);
- The right to be assisted by an interpreter (Article 11(2)). Directive 2010/64 on interpretation and translation applies;
- The right to be heard by the executing authority in case he does not consent to the surrender (Article 14) and in any case pending the decision on the EAW (Article 19). In

⁵ Ibid, Article 3.

⁶ Case C-579/15 *Poplawski*, Judgement of the Court (5th Chamber) of 29 June 2017, EU:C:2017:503, para. 21.

the latter case, the requested person: (a) is heard in accordance with the law of the executing Member State and with the conditions determined by mutual agreement between the issuing and executing judicial authorities; (b) is assisted by another person designated in accordance with the law of the requesting State. Directive 2013/48 on the right of access to a lawyer applies.

b) The grounds for non-execution of an EAW

Mandatory ('shall refuse')

The following grounds for refusal are compulsory, in the sense that the executing authority must apply them without any discretion. Such a list is exhaustive:

- If the offence is covered by amnesty in the executing State;
- If there is already a final decision of a Member State triggering the EU *ne bis in idem*;
- If the requested person could not be held responsible, owing to his age, in the executing Member State.

Optional ('may refuse')

The following grounds for refusals, if transposed into national legal systems, need to be implemented as optional, in the sense that the executing authority should have the discretion to decide on a case-by-case basis whether to apply them or them:

- Lack of double criminality, *i.e.* if the offence is not included in the list of offences for which the double criminality requirement is abolished; however, in relation to taxes or duties, customs and exchange, execution of the EAW should not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State. The CJEU clarified that Article 2(4) and Article 4(1) of the FD 2002/584/JHA preclude a situation in which the surrender pursuant to an EAW is subject, in the executing State, not only to the condition that the act for which the arrest warrant was issued constitutes an offence under the law of that Member State, but also to the condition that it is, under the same law, punishable by a custodial sentence of a maximum of at least twelve months;⁷
- Pending prosecution in the executing Member State, *i.e.* if the requested person is being prosecuted in the executing State;
- If the executing State has decided not to prosecute the requested person for the same offence;
- If the executing State has jurisdiction over those acts and the criminal prosecution or punishment is statute-barred in the executing State;
- If the executing State is informed that the requested person has been already judged in a third country for the same acts;
- If the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law. The CJEU clarified some aspects of this ground for refusal.⁸ In short, the concepts of 'staying' and 'resident' have an autonomous EU meaning and cannot depend on their national understanding. Member States cannot apply this ground only to nationals, excluding automatically and absolutely the nationals of other Member

⁷ Case C-463/15 PPU *Openbaar Ministerie v A.*, Order of the Court (4th Chamber) of 25 September 2015, EU:C:2015:634.

⁸ Case C-66/08 *Koslowski*, Judgement of the Court (Grand Chamber) of 17 July 2008, EU:C:2008:437, Case C-123/08 *Wolzenburg*, Judgement of the Court (Grand Chamber) of 6 October 2009, EU:C:2009:616 and Case C-42/11 *Lopes da Silva*, Judgement of the Court (Grand Chamber) of 5 September 2012, EU:C:2012:517.

States who are staying or are resident in their territory. However, in order to make sure that the requested person is sufficiently integrated in the Member State of execution, Member States can provide that nationals of other Member States must have lawfully resided in their territory for a certain continuous period of time before the request. Recently, the CJEU has also clarified that it is not compatible with EU law a national legislation that provides for an obligation to refuse the execution of an EAW in these cases, without leaving a margin of discretion upon the executing authority, and without that executing Member State actually taking over the execution of the custodial sentence against the requested person (creating, thereby, a risk of impunity)⁹;

- On the basis of the territoriality principle, *i.e.* if the executing Member State considers the offence as being committed in whole or in part in its territory, or if it has been committed outside the territory of the issuing State and the executing Member State does not allow prosecution for the same offence when committed outside the territory.

1.2. FD 2008/909 Transfer of Prisoners

a) Safeguards for the convicted person: Informing the convicted person and opinion of the convicted person

FD 2008/909 provides convicted persons with a right to be informed of the decision to forward the judgment in a language, which he or she understands. However, FD 2008/909 does not provide for a right to hear the convicted person, which is a striking difference with the EAW. This person is given an opportunity to state his or her opinion orally or in writing. However this right is only granted to convicted persons whose whereabouts is the issuing State. This State must ensure that the opinion of the convicted person is forwarded to the executing State. This opinion is, in particular, taken into account by the competent authority of the issuing State in its decision to transfer the prisoner as well as by the competent authority of the executing State in its reasoned opinion that the enforcement of the sentence in the executing State will not serve the purpose of facilitating the social rehabilitation of the sentenced person into society. As already mentioned, in theory, the Directive 2010/64 on the right to interpretation and translation, the Directive 2012/13 on the right to information, and the Directive 2013/48 on the right of access to a lawyer and on the right to communicate upon arrest do not apply to post-trial proceedings.

b) Double incrimination and consent of the executing State

The executing State has an obligation to recognize judgments that involve deprivation of liberty pursuant to one of the 32 offences listed in the FD and that are punishable in the issuing State by a custodial sentence or a measure involving deprivation of liberty for a maximum period of at least three years (Article 7(1)). For these offences, the competent authority in the executing State is not allowed to verify whether the facts would also give rise to a criminal sanction in that State. In addition, the executing State can allow the recognition without control of double criminality of sentences based on another offence than one of these 32 offences.

Nevertheless, the Member States are allowed to opt out from the obligation to recognize judgments without dual criminality check (Article 7(4)). According to the case law of the CJEU on the EAW, the purpose of the list of 32 offences is not to harmonize these offences. Therefore, the principle of legality in criminal matters is not infringed if the recognition of the conviction is made in a country where the facts do not constitute a criminal offence.¹⁰ Furthermore, according to Article 7(3), for offences others than those covered by the list

⁹ Case C-579/15 *Poplawski*, Judgement of the Court (5th Chamber) of 29 June 2017, EU:C:2017:503.

¹⁰ Case C-303/05 *Advocaten voor de wereld*, Judgement of the Court (Grand Chamber) of 3 May 2007, EU:C:2007:261.

mentioned in paragraph 1, the executing State is allowed to make the recognition of the judgment and the enforcement of the sentence subject to the condition of double incrimination. Therefore, the absence of double incrimination can constitute an optional ground for non-execution. It follows from the *Grundza* case, that “when assessing double criminality, the competent authority of the executing State is required to verify whether the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal penalty in the executing State if they were present in that State.”¹¹ Double incrimination should be considered as an exception to mutual recognition, therefore, the CJEU decides that the application of the ground for non-recognition based on the absence of dual criminality (see below) should be interpreted very strictly by the executing authorities in order to enhance mutual recognition and judicial cooperation. This obviously reduces the executing Member State discretion to refuse to take over the execution of a conviction.

The discretion of the Member States when acting as an executing State is further reduced because its consent is not necessary if:

- This State is the State of nationality of the sentenced person in which he or she lives
- This State is the State of nationality of that person where this person lives in the issuing State but will be deported, once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order.
- The transfer will happen between two states that have accepted to waive their consent (Article 4(7)). Waiving the states’ consent is only possible where the person has the nationality of the executing State, but lives in the issuing State, or where the executing State is the place of lawful residence of the convicted person. A lawful residence is considered to be the place where the convicted person has been legally residing and will retain a permanent right of residence in that State. This provision concerns both EU citizens and third country nationals falling within the scope of application of the long-term residence directive.¹² The case law of the CJEU on the concept of residence should apply to this provision.¹³

There exists nevertheless a mechanism for the consultation of the country where a sentence could be executed in application of this FD (see above Part II 2.2. a)). Both the recitals (see 10) and Article 4(4) of the FD prevent the Member States to consider such a mechanism as a refusal ground even if the executing State is of the opinion that enforcement of the sentence in that latter State would not serve the purpose of facilitating the social rehabilitation and successful reintegration of the sentenced person into society.

c) Interplay with the FD EAW

The FD EAW and FD 2008/909 functions differently, but both can involve the transfer of convicted persons. In the case of an EAW, the whereabouts of the convicted person is per definition not the country where the sentence was decided (issuing the EAW), whereas in the case of FD 2008/909, the whereabouts of the convicted person is either the country where the sentence was decided (issuing country) or the country where the sentence will be executed (executing country). In application of an EAW, the country issuing the warrant does not forward the judgment involving deprivation of liberty to the executing country. The transfer

¹¹ Case C-289/15 *Jozef Grundza*, Judgement of the Court (5th Chamber) of 11 January 2017, ECLI:EU:C:2017:4, para 38.

¹² Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44.

¹³ See in particular Case C-123/08 *Wolzenburg*, Judgement of the Court (Grand Chamber) of 6 October 2009, EU:C:2009:616.

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

takes place from the executing country to the issuing country. In application of FD 2008/909, the issuing country forwards the judgment (with a certificate translated in the relevant language) to the executing country. The transfer of the convicted person takes place from the issuing to the executing country.

Article 25 of the FD 2008/909 provides that, without prejudice to FD EAW, provisions of FD 2008/909 shall apply, *mutatis mutandis* to the extent they are compatible with the provisions on the EAW, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of FD EAW, or where, acting under Article 5(3) of FD EAW, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned. Article 4(6) provides a ground to refuse the execution of an EAW and the surrender of a national or a resident pursuant to an EAW issued for the purposes of execution of a custodial sentence or a detention order if the executing country undertakes to execute the sentence. Article 5(3) provides the possibility for the issuing country to give a guarantee that a suspect will be returned to the country which executes an EAW issued for the purposes of prosecution if that person is a national or a resident of that country.

Although it is very difficult to imagine a situation where a convicted person would be subject of both an EAW and FD 2008/909, Article 25 FD 2008/909 can give rise to problems of interpretation. For example, if a national of X is sentenced to imprisonment in X, this country may request the transfer of this person to Y if the X competent authority is satisfied that the enforcement of the sentence in Y will facilitate the rehabilitation of that person. If, in the meantime, Y issues an EAW against the same person for the purpose of executing a custodial sentence in Y (with respect to different facts than those which gave rise to the sentence in X), then can the competent authority in X refuse the transfer of that person in application of Article 4(6)? In such a scenario, the facts that the convicted person is a national of X and that this country commits to execute the sentence are sufficient to keep the person in X. On the basis of FD 2008/909, the authority of X can transfer a national if it is satisfied the country of transfer is a better place for the person's rehabilitation. Firstly, the authorities involved in EAW proceedings in X may be different than the authorities involved in transfers of prisoners, so they may not be aware of the concurrent proceedings. Secondly, the place where the person will execute his/her sentence may either be X (if the condition of nationality takes precedence as in the EAW) or Y (if the aim of social rehabilitation is prioritized).

d) Exceptions to mutual recognition and rights provided to convicted persons in the FD 2008/909

Article 9 provides for situations when the executing State can refuse to execute the sentence in full or in part. Several grounds relate to fundamental rights protection and will be analyzed below. Other grounds relate to:

- A certificate annexed to FD 2008/909 which is incomplete;
- The convicted person's whereabouts is neither in the issuing nor in the executing State;
- The convicted person did not consent although her or his consent was necessary;
- When this is allowed, the acts to which the judgment relates do not constitute an offence in the executing State;
- The enforcement of the sentence is statute-barred according to the law of the executing State;
- There is immunity under the law of the executing State that makes the enforcement of the sentence impossible;
- The convicted person would not be liable because of his or her age in the executing State;

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

- At the time the judgment was received by the executing State, less than six months of the sentence remain to be served;
- The issuing State has refused a request from the executing State to waive the speciality principle and to prosecute the convicted person for an offence committed before his or her transfer;
- The executing State cannot execute the sentence where this sentence includes psychiatric or health care or another measure involving deprivation of liberty;
- The judgment relates to criminal offences, which under the law of the executing State are regarded as having been committed wholly or for a major or essential part within its territory.

According to Article 10, partial execution of the judgment and sentence is possible upon agreement between the two states involved. It must be stressed that the executing State cannot refuse to execute a sentence if the authorities of that State are not satisfied that the transfer will enhance the social rehabilitation of this person.

In addition to the minimum requirements listed in Articles 9 and 10, specific provisions are linked to fundamental rights in the FD. Recitals 13 and 14 provide that FD 2008/909 respects the fundamental rights and freedom of individuals. Article 3(4) also states that FD 2008/909 shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU. Article 9(1)(c) provides for the application of the principle of *ne bis in idem*. It is unclear yet whether the case law of the CJEU developed on the application of Article 54 CISA in the context of the EAW will also apply to FD 2008/909. It must however be mentioned that Article 9 is not a compulsory ground for refusal. Problems of interpretation may therefore arise. In the case *Mantello* the CJEU decided that “[i]n view of the shared objective of Article 54 of the CISA and Article 3(2) of the FD [on the EAW], which is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, it must be accepted that an interpretation of that concept given in the context of the CISA is equally valid for the purposes of the FD [on the EAW].”¹⁴

Article 9(1)(i) establishes the limits to the recognition of judgments imposing a sentence *in absentia*. The FD 2009/299 has added this provision. In the case *Melloni* the CJEU has ruled that this FD “effects a harmonization of the conditions of execution of an EAW in the event of a conviction rendered in absentia.”¹⁵ It is a uniform standard. Therefore, similarly to what stands regarding the EAW, Member states have also no discretion to deviate from this standard in the context of FD 2008/909.

1.3. FD 2008/947 on probation decisions and alternative sanctions

a) Procedural safeguards

Here also, in theory, Directive 2010/64, Directive 2012/13 and Directive 2013/48 should not apply to post-trial proceedings. They aim however to ensure a higher level of harmonization between criminal procedures of the Member States, thereby enhancing the mutual trust necessary for a proper functioning of the mutual recognition instruments. They may nevertheless play an important role in the proceedings leading to the final decision that will have to be recognized. Further procedural safeguards are provided by national legislation, in particular by the executing State.

b) Double incrimination

¹⁴ Case C-261/09 *Gaetano Mantello*, Judgement of the Court (Grand Chamber) of 16 November 2010, EU:C:2010:683, para 40.

¹⁵ Case C-399/11 *Stefano Melloni v Ministero Fiscal*, Judgement of the Court (Grand Chamber) of 26 February 2013, EU:C:2013:107, para 62.

Probation measures and alternative sanctions. For which criminal offences?

Even if a probation measure or alternative sanction falls within the scope of application of the FD (either as a listed measure under Article 4(1) or by way of recognition (Article 4(2) FD)), recognition may be declined depending on the underlying criminal offence. Member States may decide not to recognize and supervise judgments and probation decisions for specific offences. The approach taken by the FD is comparable to that of the FD EAW. In case of judgments and probation decisions that are based on offences which are listed in Article 10(1) the executing State may not apply the double criminality requirement. However, if the judgment or probation is based on an offence that does not appear on the list, the executing State may refuse to recognize the decision and/or judgment (or to accept the supervision of the measures) if the offence constitutes no criminal offence according to the law of that State (Article 10(3)). The FD 2008/947 even goes a step further than the FD EAW because it grants Member States the right to derogate from Article 10(1), so that they may apply the double criminality requirement to all offences. If they wish to include the listed offences in the double criminality test, they must make a declaration to that end (Article 10(4)). They may make and revoke such a declaration at any time. However, as mentioned above in Part III 1.2. b) for the FD 2008/909, in application of the *Grundza* case,¹⁶ the notion of double incrimination should be interpreted very strictly in order to enhance judicial cooperation.

c) Grounds for non-execution

Article 11 provides for grounds that enable the executing State to refuse to recognize the judgment, the probation decision, to assume responsibility for supervising probation measures or alternative sanctions. These grounds for non-execution are the exception to the general rule that the executing State should recognize judgments and assume responsibility for the supervision of alternative sanctions and probations conditions. In light of the principle of mutual trust, the Member States should refrain from adding refusal grounds that are not mentioned in the FD. According to the Commission, they should also refrain from making refusals grounds mandatory, as the competent authority should be able to assess on a case-by-case basis whether or not to apply a refusal ground in light of the objectives of the FD.¹⁷ The refusal grounds mentioned in FD 2008/947 are for the greater part adopted from FD 2008/909 on the Transfer of Prisoners (as well as from other FDs):

- The certificate referred to in Article 6(1) is incomplete or manifestly does not correspond to the judgment or to the probation decision and has not been completed or corrected within a reasonable period set by the competent authority of the executing State
- The criteria set forth in Articles 5(1), 5(2) or 6(4) are not met;
- Recognition of the judgment and assumption of responsibility for supervising probation measures or alternative sanctions would be contrary to the principle of *ne bis in idem*;
- In a case referred to in Article 10(3) and, where the executing State has made a declaration under Article 10(4), in a case referred to in Article 10(1), the judgment relates to acts which would not constitute an offence under the law of the executing State. However, in relation to taxes or duties, customs and exchange, execution of the judgment or, where applicable, the probation decision may not be refused on the grounds that the law of the executing State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes or duties, customs and exchange regulations as the law of the issuing State;

¹⁶ Case C289/15 *Jozef Grundza*, Judgement of the Court (5th Chamber) of 11 January 2017, ECLI:EU:C:2017:4, para 38.

¹⁷ Commission evaluation report of 5 February 2014, COM (2014) 57 final, p. 10.

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

- The enforcement of the sentence is statute-barred according to the law of the executing State and relates to an act which falls within its competence according to that law;
- There is immunity under the law of the executing State, which makes it impossible to supervise probation measures or alternative sanctions;
- Under the law of the executing State, the sentenced person cannot, owing to his or her age, be held criminally liable for the acts in respect of which the judgment was issued;
- The judgment was rendered in absentia, unless the certificate states that the person was summoned personally or informed via a representative competent according to the national law of the issuing State of the time and place of the proceedings which resulted in the judgment being rendered in absentia, or that the person has indicated to a competent authority that he or she does not contest the case;
- The judgment or, where applicable, the probation decision provides for medical/therapeutic treatment which, notwithstanding Article 9, the executing State is unable to supervise in view of its legal or health-care system;
- The probation measure or alternative sanction is of less than six months' duration; or
- The judgment relates to criminal offences which under the law of the executing State are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory.

As is the case for FD 2008/909, the executing State cannot refuse to execute a probation decision or alternative sanction even if the competent authorities are not satisfied that the execution will enhance the social rehabilitation of the convict.

1.4. Adequacy of fundamental rights protection in the EAW, FD 2008/909, and FD 2008/947

One important remark that should be made to the patchwork protection of fundamental rights offered by the three FDs described above is that it does not include a general fundamental rights non-execution ground for the executing Member State. So in theory, a refusal to execute a foreign decision can only be based on one of the fundamental rights protected through the specific provisions of the relevant FD. Nonetheless, in practice several Member States have in the FDs' implementation process also transposed a general fundamental rights ground for non-execution.¹⁸ For instance in the context of the EAW, Article 11 of the Dutch Surrender of Persons Act (*Overleveringswet*), states that surrender of a person is not allowed in case such a surrender would lead to a flagrant violation of the fundamental rights, as guaranteed by the ECHR, of the person involved. In a similar vein section 21 of the UK's Extradition Act 2003 requires a judge to assess whether the person's extradition would be compatible with the ECHR rights within the meaning of the Human Rights Act 1998.¹⁹ And also Ireland is among the Member States which transposed Article 1(3) EAW in such a way that an executing Irish judicial authority must refuse surrender, where such surrender would be incompatible with the ECHR or the constitution of Ireland.²⁰ This divergence in the transposition of the EAW, illustrates, one may contend, a possible lack of trust between Member States: some Member States want the ability not to recognize an arrest warrant in case execution would lead to a concrete risk of fundamental rights infringement.

Such a lack of mutual trust is not limited to transposition, also judicial authorities seem reluctant to fully trust other Member States in concrete cases. A reference made by the *Hanseatische Oberlandesgericht* in Bremen to the CJEU is the source of the Joined cases C-

¹⁸ G. Vernimmen-Van Tiggelen & L. Surano, 'Analysis of the future of mutual recognition in criminal matters in the European Union', Institute for European Studies, Université Libre de Bruxelles ECLAN, 10. Accessible via <http://ec.europa.eu/justice/criminal/files/mutual_recognition_en.pdf> last accessed on 28 February 2016.

¹⁹ UK Extradition Act 2003, section 21.

²⁰ European Arrest Warrant Bill 2003, Clause 29.

404/15 and C-659/15 PPU *Criminal proceedings against Pál Aranyosi and Robert Căldăraru*²¹, which is the leading case in this respect. The question was whether an EAW had to be carried out although the person whose surrender was requested could suffer a risk of degrading treatment in the prisons of the issuing country contrary to Articles 3 ECHR and 4 CFR. Although it seems that in practice only in a few cases the requests have been refused on the basis of allegations of breach of fundamental rights (see the Report of the Eurojust Strategic Seminar of 10-11 June 2014),²² it is difficult to argue that the judicial authorities executing an EAW should always turn a ‘blind eye’ on the requests coming from a foreign counterpart. Mutual trust does not entail blind faith and cannot only be a legal fiction.

It soon became clear that mutual trust between judicial authorities cannot always be presumed. Trust needs sometimes to be enhanced and sometimes mitigated. This issue has been addressed in two ways. Firstly, the Commission has proposed the adoption of Directives providing minimum requirements in criminal proceedings in order to ensure procedural safeguards and consequently enhance mutual trust. Secondly, the CJEU has ruled that in certain exceptional circumstances a Member State is bound to assess whether carrying out a foreign judicial decision pursuant to mutual recognition will not be detrimental to certain fundamental rights although all formal requirements are respected and no grounds for non-execution formally apply.

2. Limits to mutual recognition: mutual trust and the obligation to respect fundamental rights

2.1. Mutual trust and the respect of fundamental rights, bedrock of mutual recognition

The principle of mutual recognition on which the FDs are based is itself founded on the mutual confidence or mutual trust between the Member States that, according to the CJEU, their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognized at EU level, particularly in the CFR.²³ It seems, at first glance, that mutual recognition presupposes mutual trust: the bedrock upon which the principle of mutual recognition rests.²⁴ A definition of mutual trust conveys the idea that the trust held by every individual Member State that all other Member States maintain an equal level of common values, based on their communal culture of rights.²⁵ The common values and communal culture refer to those enumerated in Article 2 TEU, particularly the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Mutual trust is grounded in these values and culture,²⁶ but also in their *protection* in particular by the ECHR and the case law of the ECtHR, and by the CFR and the national constitutions.²⁷

²¹ Joined cases C-404/15 and C-659/15 PPU *Criminal proceedings against Pál Aranyosi and Robert Căldăraru*, Judgement of the Court (Grand Chamber) of 5 April 2016, EU:C:2016:198.

²² Report of the Eurojust Strategic Seminar of 10-11 June 2014, available at http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejstrategicmeetings/Strategic%20Seminar%20on%20the%20European%20Arrest%20Warrant%20and%207th%20Meeting%20of%20the%20Consultative%20Forum,%20June%202014/CF-EAW-report_2014-09-23-EN.pdf last accessed 16 March 2016.

²³ Case C-168/13 *Jeremy F*, Judgement of the Court (2nd Chamber) of 20 May 2013, EU:C:2013:358, para 50.

²⁴ V. Mitsilegas, ‘The symbiotic relationship between mutual trust and fundamental rights in Europe’s area of criminal justice’ (2015) 6 *New Journal of European Criminal Law* 3.

²⁵ T. Van den Sanden, ‘Het principe van wederzijds vertrouwen in de ruimte van vrijheid, veiligheid en recht’ [2014] 15 *SEW* 235.

²⁶ Programme of measures to implement the principle of mutual recognition of decisions in criminal matters [2001] OJ C12/10.

²⁷ Article 6(1) and 6(3) TEU, See also Council Resolution of 30 November 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings [2009] OJ C295/1, recital 2.

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

This concept of trust is based on the assumption that all Member States system equally protects individuals' fundamental rights because they share common standards of protection. This aspect is also referred at as trust '*in abstracto*'. This being said, mutual trust goes further and implies that all Member State apply '*in concreto*' these standards. Judicial authorities applying mutual recognition must be satisfied that the rights of the individuals will be respected on a case-by-case basis.

This means that protection of fundamental rights is one of the parameters upon which mutual trust depends.²⁸ The result of mutual trust is that it enables mutual recognition. In the context of mutual recognition, in particular in the FD EAW, FD 2008/909, and FD 2008/947, mutual trust means that the competent (judicial) authority in an *executing* Member State, even though it might have 'second thoughts', must in principle agree to an issuing Member State's request to execute an EAW; recognize a judgment and enforce its concomitant sentence; or recognize the judgment or where applicable the probation decision unless a non-execution ground applies. But, this also means that in the context of FD 200/909 and FD 2008/947, the issuing country should have confidence in the system in force in the executing State, before it transfers a person or a judgment. By the time these FDs were adopted, the CFR was not yet binding and it was believed that being party to the ECHR was sufficient to guarantee mutual trust, which in turn would enable mutual recognition. Practice shows that being party to the ECHR is not in itself sufficient to warrant mutual trust.²⁹ Moreover, the sole existence of an equivalent minimum level of fundamental rights protection throughout the EU Member States does not mean much if this protection is not adequately and efficiently upheld. Also, one may wonder why the protection of the individual's fundamental rights in criminal justice should be limited to a minimum standard rather than a high level of protection.

While the facilitation of cooperation between Member States through mutual recognition leads to more effective transnational law enforcement, the persons subject to any of the three FDs should not find their fundamental rights undermined in the process.³⁰ The effective and smooth working of an effective mutual recognition regime in the EAW, FD 2008/909, and FD 2008/947 therefore depends on the existence of a fair balance between the protection of fundamental rights and the effective law enforcement.³¹ Such a balance can be disturbed for example if the levels of fundamental rights protection in the EU diverge from one Member State to another or if one State has an actual poor human rights records. The disturbance of the balance between effective enforcement of mutual recognition and the respect of the individuals' fundamental rights may well have an impact on the 'presupposed' mutual trust between the Member States of the EU. The trust underlying judicial cooperation in the AFSJ where mutual recognition of judicial decisions is a 'cornerstone' depends in particular on adherence to sufficiently high fair trial standards and the availability of effective defense rights across the EU. That is one of the reasons why certain procedural safeguards have been harmonized through EU Directives.

2.2. Enhancing mutual trust through harmonization: the right to a fair trial as implemented by Directive 2010/64, Directive 2012/13 and Directive 2013/48

²⁸ Directive 2012/13/EU, recital (3); Directive 2010/64/EU, recital (3).

²⁹ See for instance Directive 2012/13/EU, recital (7).

³⁰ M. Möstl, 'Preconditions and Limits of Mutual Recognition', [2010] 47 CMLR 408.

³¹ This reverberates also in the case law of the ECtHR, in which the ECtHR stated that 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'. See application no 14038/88 *Soering v the United Kingdom*, Judgement (Plenary) of 7 July 1989, CE:ECHR:1989:0707JUD001403888, para 89.

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

The EU institutions acknowledge the importance of fundamental rights in police and judicial cooperation in criminal matters.³² This cooperation, as we will see, is based on the confidence that Member States share an equivalent level of fundamental rights protection. Such a protection requires detailed rules on, and a more consistent implementation of, the protection of the procedural rights and guarantees, in particular some of the rights to a fair trial, arising from the CFR and from the ECHR.³³ It requires also further developments within the Union of the minimum standards set out in the ECHR and the CFR.³⁴ The European Council of Tampere in 1999 already then considered the adoption of certain minimum rules in the field of procedural law necessary for the adequate functioning of the principle of mutual recognition.³⁵ In line with these ambitions, the Council introduced a proposal for a general FD on procedural rights in criminal proceedings in 2004.³⁶ It failed to reach consensus, so the initiative failed. By way of alternative, it was decided to develop separate legislative initiatives on various procedural rights.³⁷ This package of 6 legislative initiatives was formulated in the so-called “Swedish Roadmap”³⁸ which is the action plan of the European Council Stockholm Programme (2009) in the area of procedural rights. In the meantime, the ToL had entered into force, which made the package of initiatives subject to the new procedures and the ToL legal framework more in general. This includes the applicability of the CFR. The implementation of this Roadmap by the Commission has led in particular to the adoption Directive 2010/64;³⁹ Directive 2012/13;⁴⁰ and Directive 2013/48.⁴¹ The rights laid down in these directives apply only in the pre-trial and trial stages.⁴² They may, however, have significant impact on the decision post-trial made by a judicial authority implementing the EAW, FD 2008/909 or FD 2008/947. That is why their analysis has been included in this research.⁴³ As was pointed out during the impact assessment of Directive 2012/13,⁴⁴ just like

³² See for instance European Council 5 November 2004, The Hague Programme: strengthening freedom, security and justice in the European Union, 14292/1/04 REV 1, 4.

³³ Directive 2012/13/EU, recital (8), and Directive 2010/64/EU, recital (7).

³⁴ See for example, Council Resolution of 30 November 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings [2009] OJ C295/1 or Directive 2010/64/EU, recital (7).

³⁵ Tampere Council Conclusions of 15 and 16 October 1999 to the establishment of an Area of Freedom Security and Justice, para 37.

³⁶ Commission Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (COM/2004/0328 final).

³⁷ Presidency of the Council of the EU, Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, Brussels, 1 July 2009, document No. 11457/09, DROIPEN 53, COPEN 120.

³⁸ Council Resolution of the Council of 30 November 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings [2009] OJ C295/1.

³⁹ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1.

⁴⁰ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.

⁴¹ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1.

⁴² Council Resolution of 30 November 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings [2009] OJ C295/1, recital (1).

⁴³ It should be noted that in addition to these three Directives, several other procedural Directives have been adopted since the start of this project, but as they were not yet implemented in the Member States they are not part of this research, see for example http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm (last accessed October 2017). In particular, Directive 2016/1919 of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L297/1, Directive 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1 and Directive 2016/343 of 9 March 2016 on the

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

Directives 2013/48 and 2010/64, “inadequate provision of information on rights or on the charges against an accused person may not only lead to problems (...) in the Member State where the original criminal proceedings take place, but also in other Member States where a court in the Member State in which the proceedings take place wishes to seek cooperation from other Member State(s) in order to advance the criminal proceedings or enforce a (...) custodial sentence.” In particular, as explained in Part I section 1 of this book, the assessment for the respect of these Directives can have an impact on the enforcement of mutual recognition at two stages of the proceedings. Firstly, when a violation has taken place in the past in the issuing State during the proceedings that ended with the judgment of conviction. Secondly, when a violation takes place in the executing State during the proceedings leading to the recognition of a judgment of conviction (present violations).

a) Directive 2010/64 on the right to interpretation and translation

The Directive on the Right on Interpretation and Translation in criminal proceedings was the first of the Swedish Roadmap being adopted (on 20 October 2010).⁴⁵ It was even the first protective EU legislative measure, establishing minimum standards to guarantee the rights of defense. The Directive ensures that suspects may exercise their right of defense. As such, it serves a double purpose:⁴⁶

- To protect individual rights;
- To strengthen cooperation between Member States.

The transposition deadline of the Directive was 27 October 2013. Despite the fact that the Directive was largely uncontroversial (which was the reason why it was the first of the protective measures to be adopted – see below) no less than 16 Member States failed to transpose and/or notify within the set deadline their implementing rules under the Directive on the right to interpretation and translation in criminal proceedings.⁴⁷

The Directive builds on rights enshrined in the ECHR and the CFR. The level of protection that the Directive provides should therefore at least be the level of protection offered under the ECHR (Article 8 of the Directive). The EU legislature has, however, considered that the protection offered under the ECHR as such does not suffice to guarantee that national authorities in the EU have sufficient trust in the criminal law systems of other Member States (Recital 6). In order to achieve that, the EU legislature considers that not only the rights and guarantees of the ECHR need to be implemented more consistently by the Member States, but also that the standards need to be further developed and strengthened (Recital 7).

Scope of application

The Directive applies to suspects and accused persons throughout the course of criminal proceedings, *i.e.* from the moment they are made aware of the fact that they are suspected or

strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1.

⁴⁴ Commission Impact Assessment accompanying the Proposal for a Directive on the right to information in criminal proceedings SEC(2010) 907.

⁴⁵ The other measures included:

- a measure on Information on Rights and Information about the Charges
- a measure on Legal Aid and Legal Advice
- a measure on Communication with Relatives, Employers and Consular Authorities
- a measure on Special Safeguards for Vulnerable Persons
- a Green Paper on the Right to Review of the Grounds for Detention

⁴⁶ Recital 2 of the Directive.

⁴⁷ Report from the Commission 31st Annual Report on monitoring the application of EU law (2013), COM(2014) 612 final.

accused of having committed a criminal offence until the conclusion of the proceedings (including the decision on sentencing and/or appeal).⁴⁸ Victims are excluded from the rights enshrined in the Directive, although there has been discussion to expand these rights to include them as well.⁴⁹ However, the Directive does apply to all suspected and accused persons (not only EU citizens) and may concern any language (not necessarily one of the official languages of the EU). The term “criminal proceedings” is not defined by the Directive and depends on the case law of the ECtHR in light of Article 6 ECHR. The Directive not only covers criminal proceedings, but also proceedings in the framework of the EAW.⁵⁰ However, an exception is made for minor offences (Article 1(3) of the Directive). If *e.g.* the police are empowered to fine individuals directly, the rights enshrined in the Directive only apply to the subsequent court proceedings, provided that such an appeal is available.

The Directive does not regulate the translation of documents in the defendant’s language into the language of the court. This significant limitation of the scope of application of the Directive has been highlighted by the recent decision of the CJEU in case *Covaci*.⁵¹ This case concerned a Romanian citizen who had presented a forged proof of insurance and had failed to show a valid mandatory civil liability insurance for his motor vehicle at a simple police stop in Germany. The authorities issued a penalty order imposing a fine on Mr Covaci. This procedure concerned a simplified criminal proceeding. According to German law, the convicted person had two weeks to lodge an objection, thereby activating a regular criminal court proceeding. The question at stake was whether the Directive is limited to documents of public authorities only or whether it applies to documents produced by the accused or suspected person as well. The CJEU concluded – although the Directive is applicable to such simplified criminal proceedings – that it does not cover the latter documents, meaning that individuals are not entitled on the basis of the Directive to claim free translation of their documents into the court’s language. The CJEU added however that Member States may offer such free translations as a matter of national policy discretion: first, the Directive is a measure of minimum harmonization, allowing the Member States to offer a higher level of protection. Second, Member States’ authorities have the option to qualify such objections as an essential document in the sense of Article 3 of the Directive (Article 3(3)). If a Member State authority chooses to do so, the Member State concerned bears the costs of the translation of such documents.

Another issue with regard to the scope of application of the Directive is whether it applies to special procedures, such as the recognition of foreign judgments. Can a convicted person be obliged to bear the costs of translation of foreign court decisions? According to the CJEU in the case *Balogh*, the Directive does not apply “after the final determination of whether the suspected or accused person committed the offence and, where applicable, after the sentencing of that person.”⁵² Arguably this is different in case of EAW procedures: since Article 1(1) of the Directive does not specify to what types of EAW procedures the right to translation and interpretation applies, it may be assumed that it applies to both prosecution and enforcement EAWs.

⁴⁸ Article 1 par. 2 of Directive 2010/64.

⁴⁹ Impact assessment of the proposed Directive, COM (2009) 338 final.

⁵⁰ Article 1 par. 1 of the Directive 2010/64.

⁵¹ Case C-216/14 *Covaci*, Judgement of the Court (1st Chamber) of 15 October 2015, EU:C:2015:686.

⁵² Case C-25/15 *Balogh*, Judgement of the Court (5th Chamber) of 9 June 2016, EU:C:2016:423, para 36-37, it must be observed however that this case concerns the recognition of judgments in the context of the European ECRIS system of exchanging criminal records information, as governed by Framework Decision 2009/315/JHA on the exchange of information extracted from the criminal record [2009] OJ L93/23 and Council Decision 2009/316/JHA on the European Criminal Records Information System [2009] OJ L93/33.

Basic rights recognized by the Directive

The Directive lays down the general right of suspected and accused persons to benefit from the services of an interpreter (Article 2) and of written translation of all documents which are essential to exercise the rights of the defense (Article 3). If the conditions for interpretation and translation are met, the Member States shall bear the costs thereof. These costs may not be passed on to the suspected and accused persons, irrespective of the outcome of the case (Article 4). Article 6(3) (e) ECHR contains the right to an interpreter so the Directive must at least live up to this provision. This right is limited to suspect and accused persons who do not speak or understand the language of the proceedings. Thus, no right to interpretation exists in a language the suspected or accused person is most comfortable with (even if that would be a minority language enjoying specific rights).⁵³ The Directive has adopted (in Article 2) the same wording, implying that the protection of the Directive does not extend beyond the protection provided for by the ECHR. This is different for the material scope of application of the right to interpretation. Article 6(3)(e) does not cover the relations between the accused and his counsel but only applies to the relations between the accused and the judge.⁵⁴ The Directive explicitly covers the former situation as well and thus *significantly expands the right to an interpretation*.⁵⁵ The application of the right to interpretation to proceedings for the execution of EAWs (Article 2(7)) concerns another expansion of the rights guaranteed under the ECHR as these latter proceedings are not protected under the Convention.

In order to prevent abuse, the right to interpretation is qualified and applies only to the extent “where necessary of the purpose of safeguarding the fairness of the proceedings” and it should be “in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural application” (Article 2(2)). Article 3 regards the right to have “essential documents” translated. Even though the ECHR contains no explicit right to translation of essential documents (unlike is the case for the right of interpretation) it may nevertheless be implied from the more general demand that the suspected or accused person is able to understand the content of the trial. At least the following documents qualify as essential documents: any decision depriving a person of his liberty, any charge or indictment and any judgment. As was previously mentioned, the Member States enjoy discretion to add other documents as essential documents as well. This may be a general decision of the national legislature or may be decided by competent authorities in individual cases (Article 3(3)). Essential documents do not necessarily have to be translated fully: there is no obligation to do so for parts “which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them.” By way of exception, an oral translation or summary of essential documents may be provided on the condition that such a summary does not impair the fairness of the procedure (Article 3(7)). The suspected or accused person may waive the right to have essential documents translated (Article 3(8)) provided that:

- The suspected or accused person has received legal advice or has otherwise obtained full knowledge on the consequences of the waiver,
- The waiver is unequivocal and
- The waiver has been given voluntarily.

⁵³ See e.g. application no 10210/82 *K. v France*, Commission Decision (Plenary) of 7 December 1983, CE:ECHR:1983:1207DEC001021082

⁵⁴ Application no 6185/73 *X. v. Austria*, Commission Decision (Plenary) of 25 May 1975, CE:ECHR:1975:0529DEC000618573

⁵⁵ Article 2(2) of Directive 2010/64.

The Member States enjoy discretion with regard to the following points. They should ensure “a mechanism” to ascertain whether a suspected or accused person needs the assistance of an interpreter/translation, but the Directive contains no further criteria thereto. Similarly, the directive obliges Member States to create a right to challenge a decision finding there is no need for interpretation/translation and to complain about the quality of the interpretation/translation. Also in this regard, the Directive contains no concrete requirements.

Quality requirements

The Directive aims at guaranteeing high quality interpretation and translation. The general – minimum - requirements are that (a) translation and interpretation are sufficient to safeguard the fairness of the procedure; that (b) translation and interpretation allow the accused or suspected persons to have sufficient knowledge of the case against them and (c) that the accused or suspected persons are able to exercise their rights of defense. A number of additional measures seek to ensure that such a high quality is actually achieved. The Member States “shall endeavor” to establish a register for qualified translators and interpreters (Article 5). Such registers shall “where appropriate” be made available to legal counsel and relevant authorities. This stimulates the practical availability of the services. Furthermore, the communication with the help of an interpreter should be part of the training of judges, public prosecutors and judicial staff (Article 6). Other mechanisms to ensure the quality of translation and interpretation include the obligation for Member States to create a mechanism to complain about the quality of translation or interpretation. The obligation enshrined in Article 7, to record all instances in which translation and /or interpretation has taken place, may equally be seen as a guarantee on the quality of the services provided.

b) Directive 2012/13/EU on the right to information in criminal proceedings

This Directive lays down minimum standards concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. Directive 2012/13 was adopted in application of Article 82(2) TFEU on 22 May 2012 and should have been implemented in the Member States by 2 June 2014.

Access to information for suspects and accused persons is a key factor in ensuring fair proceedings. A suspect or an accused person must be able to prepare his defense adequately. In particular, he needs to know in detail the case against him and what evidence there is. Very general standards concerning the rights to an effective remedy and to a fair trial are provided in Articles 5 and 6 ECHR. These two provisions are, in an even less specific manner, reflected in Articles 47 and 48 of the CFR. In application of Articles 5(2) and 6(3)(a) ECHR, a person arrested or charged with a criminal offence has the right to be informed promptly of the reasons for his arrest or the nature and cause of the accusation against him in a language which he understands. These standards on the right to information remain very general. The ECtHR has ruled on the necessity to inform a suspect of his rights in order to enable him to exercise them effectively,⁵⁶ but the case law does not provide any guideline on what means and at which moment in criminal proceedings information on defense rights should be provided. The right to information must be ensured from the moment a person is suspected to have committed a crime until the judgment on the conviction is decided. Therefore, Directive 2012/13 applies to persons “from the time they are made aware (...) that they are suspected or accused of having committed a criminal offence” – irrespective of whether they are deprived

⁵⁶ Application no 54784/00 *Padalov v Bulgaria*, Judgement (5th Section) of 10 August 2006, CE:ECHR:2006:0810JUD005478400, para 54; application no 32432/96 *Talat Tunc v Turkey*, Judgement (4th Section) of 27 March 2007, CE:ECHR: 2007:0327JUD003243296; application no 36391/02 *Salduz v Turkey*, Judgement (Grand Chamber) of 27 November 2008, CE:ECHR: 2008:1127JUD003639102.

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

of liberty – until the “final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.”

The right of information in EAW procedures

Recital 39 of Directive 2012/13 provides that the “right to written information about rights on arrest provided in this Directive should also apply, *mutatis mutandis*, to persons arrested for the purpose of the execution of a European Arrest Warrant.” In this respect, *the Directive goes further* than the protection granted by the ECHR and the CFR. Article 5 also lays down that persons who are arrested for the purpose of the execution of an EAW are provided promptly with an appropriate Letter of Rights. These provisions do not exclude the ‘surrender for execution’ from the scope of the Directive. Hence it can be interpreted in the sense that Directive 2012/13 applies to requested persons even if they have already been convicted and sentenced in the issuing Member State. In order to guide the Member States in drawing up a Letter of Rights, a model is annexed to the Directive. It must be noted that the precise scope of the right to information in the context of EAW’s proceedings remains unclear. Which is the information that must be provided to the arrested or detained person? Considering the particular features of mutual recognition, which imply a quasi-automaticity of the recognition of foreign decisions without precise knowledge of the case itself, the obligation to inform imposed on the competent authorities in the executing State should have a rather limited scope. These authorities are indeed not able to inform about the details of the case and the accusation or to grant access to the materials of the case.

The rights recognized by Directive 2012/13

According to Article 3, the Member states must ensure that suspects or accused persons are *provided either orally or in writing information* concerning a) the right of access to a lawyer; b) the right to have free legal advice; c) the right to be informed of the accusation (see below); d) the right to interpretation and translation and e) the right to remain silent. The Directive insists also on the fact that the information must be provided in simple and accessible language.

For those suspects or accused persons who are arrested or detained, the information must be *provided in writing* and in a language that they understand. Because these persons are deprived of their liberty, this ‘Letter of Rights’ contains, in addition to the rights provided in Article 3, a) the right to access to the materials of the case; b) the right to have consular authorities and one person informed; c) the right of access to urgent medical assistance and d) the maximum time the person may be deprived of liberty before being brought before a judicial authority. In addition to that, the Letter of Rights must also provide information on the remedies available under national law in order to challenge the arrest and the detention, and to request for provisional release. The arrested or detained person must be able to keep in their possession the Letter of Rights throughout the period of deprivation of liberty. An indicative model of Letter of Rights is annexed to Directive 2012/13.

With regards to suspects and accused persons, Article 6 provides that in order to safeguard the fairness of the proceedings, these persons *must be informed promptly and in detail* about the reasons for their arrest or detention, and about the criminal act that they are suspected or accused of having committed. Furthermore, suspects and accused persons must be informed promptly of any changes in the given information.

Finally according to Article 7, persons arrested and detained or their lawyers must be able to challenge the lawfulness of the deprivation of liberty and therefore granted access to the materials of the case. In addition and in order to safeguard the fairness of the proceedings,

suspects and accused persons or their lawyers must be granted access in due time to all material evidence in the possession of the competent authorities, whether for or against these persons. Paragraph 4 of Article 7 provides that a judicial authority can limit the right of access and refuse access if this would threaten the life or the fundamental rights of another person or if refusal is necessary to safeguard an important public interest.

c) Directive 2013/48 on the right of access to a lawyer in criminal proceedings

The assistance of a defense lawyer is crucial to protect the right to a fair trial. It is expressly provided by Article 6(3)(c) ECHR, which can apply even before the trial, already during the investigation. In the well-known case *Salduz v Turkey*⁵⁷ as well as in the following related case law, the ECtHR has stressed the importance of legal assistance for a proper defense, by stating that the right to a lawyer arises as from the first interrogation by the police, and that the rights of the defense are prejudiced if incriminating statements made in the absence of a lawyer are used for a conviction. Especially in the early stages of the criminal investigation it is the counsel's task to ensure the respect of the privilege against self-incrimination and more in general of the equality of arms. The Directive 2013/48 was adopted on 22 October 2013 and should have been transposed into national law by 27 November 2016. It essentially consolidates the 'Salduz doctrine' of the ECtHR into a EU legal instrument. Nevertheless, for some aspects it *goes beyond* the existing Strasbourg case law and can guide its future jurisprudence. In the case *A.T. v Luxembourg*,⁵⁸ for example, the ECtHR referred to the Directive 2013/48 in order to clarify that the assistance of a lawyer is essential even if the suspect does not confess a crime, and – most importantly – that the assistance is not effective if the suspect does not have the possibility to discuss the case with the lawyer before the questioning (as provided by Article 3 of the Directive).

For the purpose of this project concerning the transfer of convicted persons, it is important to bear in mind that similarly to Directive 2012/13, Directive 2013/48 applies to suspects "from the time they are made aware (...) that they are suspected or accused of having committed a criminal offence" – irrespective of whether they are deprived of liberty – until the "final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal." In principle, therefore, it does not apply to convicted persons. Nevertheless, the Directive also applies to the requested persons in EAW proceedings "from the time of their arrest in the executing Member State in accordance with Article 10"; and Article 10 does not exclude the 'surrender for execution' from the scope of the Directive. Hence it can be interpreted in the sense that the Directive 2013/48 applies to requested persons even if they have already been convicted and sentenced in the issuing Member State. Also Article 10(3) – whereby some provisions of the Directive apply also to EAW in the executing Member State (see below) – seems to have a normative meaning inasmuch as it extends the protection accorded to suspects (already ensured by the other provisions) to persons requested for surrender. In any event, this study aims to explore to what extent fundamental rights – including defense rights – are respected during the transfer of convicted persons pursuant to the existing mutual recognition instruments. For this reasons, regardless of the applicability of the Directive 2013/48 to EAW proceedings and to other instruments for the transfer of convicted persons, it is important to shed light on whether convicted persons across the EU have the possibility to

⁵⁷ *Salduz v Turkey* (n 55).

⁵⁸ Application no 30460/13 *A.T. v Luxembourg*, Judgment (5th Section) of 9 April 2015, CE:ECHR:2015:0409JUD003046013.

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

access a lawyer – and to exercise the other rights related to the legal assistance – in the course of the procedure.

The rights recognized by Directive 2013/48

The Directive provides that the following rights related to legal assistance need to be respected in all Member State, in accordance with their national law (in the sense that the Directive does not detail the procedural rules necessary to protect such rights):

Article 3 aims to ensure that the *right of access to lawyer* (*i.e.* the right to contact a lawyer) is ensured ‘without delay’, ‘in such a time and in such a manner so as to allow the persons concerned to exercise their rights of defense practically and effectively’. The Directive specifies some events that may trigger the exercise of such a right. Member States should also endeavor to make general information available to facilitate the obtaining of a lawyer by suspected and accused persons.

In order to ensure the effectiveness of the access to a lawyer, the Directive provides for other ancillary rights (Articles 3 and 4). For example, it provides for the *right to meet* in private with the lawyer before being questioned by the police or other law enforcement authorities, being such a possibility crucial in order to allow them to discuss the defense strategy. Article 4 adds that Member States shall respect the *confidentiality* of the communications between suspects and their lawyer (*i.e.* law enforcement authorities cannot access or intercept such communications). The assistance of a lawyer would not be effective if the lawyer could not participate actively during the questioning (*e.g.* intervening, asking questions, advising the client, etc.). An ‘*effective participation*’ needs therefore to be ensured (and noted using the recording procedure available in that Member State).

The right to be assisted by a lawyer can be waived according to Article 9 of the Directive; however, in this case the suspects must have been provided with clear information about the content of the right and the consequences of waiving it; and such a waiver must be given voluntary and unequivocally. Although less relevant for the purposes of the project, it is worth mentioning that the participation of the lawyer must be ensured also with respect to other investigative acts, such as identity parades, confrontations, and reconstruction of the scene of a crime. Furthermore, also the exceptions to the aforementioned rights – expressly provided by Article 3(5)(6) – apply only to the ‘pre-trial stage’, therefore falling beyond the scope of this project.

In addition to the right of access to a lawyer *stricto sensu* – which applies even if the person is not deprived of his/her liberty – Article 5 specifically provides other *rights in case the suspect or accused person is held in custody*. The right to have at least one person (nominated by the detained person) informed about the deprivation of liberty could be derogated, according to the Directive, only if there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; or if there is an urgent need to prevent a situation where criminal proceedings could be substantially jeopardized. Article 5 specifies that if the accused is a child, Member States “shall ensure that the holder of parental responsibility of the child is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto, unless it would be contrary to the best interest of the child, in which case another appropriate adult shall be informed.”

Suspects and accused persons who are deprived of liberty *must be able also to communicate without undue delay* with at least one third person nominated by them. Limitation to this right may be provided only in ‘view of imperative requirements or proportionate operational requirements’. Like in the provisions contained in the Vienna

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

Convention on Consular relations of 1963, Article 7 of the Directive guarantees to all non-national detainees the right to *communicate with their respective consular authorities*.

The Directive finally provides that every Member State must ensure that suspects and accused persons have an *effective remedy* under national law in the event of a breach of the rights under this Directive.

In particular, the right of access to a lawyer in surrender procedures

The rights concerning the access to a lawyer in EAW proceedings are specified in Article 10 of the Directive. These provisions build on Article 11 of FD EAW, which states that a person who is arrested for the purpose of an EAW has the right to be assisted by a legal counsel in accordance with the national law of the executing Member State. Article 10 was very much discussed (and amended) during the negotiation. The main debated point was whether the access to a lawyer should be recognized only in the executing Member State (*i.e.* the State receiving the request to surrender a person) or also in the issuing State (*i.e.* the State issuing an EAW, either for the purpose of prosecuting a suspect or for executing a sentence). The rationale is that the possibility to challenge the EAW only in the executing State would not be ‘effective’ if the requested person is not aware of the reasons that led to the issuing of the EAW and the rules of that issuing State. The final version of Article 10 eventually states the right of access to a lawyer in the executing State, and provides for the right to appoint a lawyer also in the issuing Member State (but without detailing content and rules). The ‘ancillary’ function of the lawyer in the issuing State is “to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under FD 2002/584/JHA.”

Like Article 3, Article 10 provides for different rights to be ensured in the executing Member States upon arrest pursuant to the EAW. The questions for national rapporteurs will aim to elucidate whether such rights are actually recognized in their respective Member State, and whether they are protected whenever a convicted person is transferred abroad, also beyond the FD EAW. Such rights consist of:

- The right of access to a lawyer (‘in such time and in such a manner as to allow the requested persons to exercise their rights effectively and in any event without undue delay from deprivation of liberty’);
- The right to meet and communicate with the lawyer;
- The right for the lawyer to be present at the hearing of the requested person and to participate (and to have his participation noted);
- The right to confidential communication (Article 4 applies);
- The right to have a third person informed of the deprivation of liberty (Article 5 applies);
- The right to communicate, while deprived of liberty, with third person (Article 6 applies);
- The right to communicate with consular authorities (Article 7 applies);
- The right to be informed by the executing authority that – without undue delay after deprivation of liberty – s/he has the right to appoint a lawyer in the issuing State;

If the requested person wishes to exercise the right to appoint a lawyer in the issuing Member State, the executing authority must promptly inform the competent authority in the issuing State. After the competent authority of the executing Member State has informed the issuing State that the requested person wishes to appoint a lawyer also in the issuing Member State, the competent authority of the issuing Member State shall provide the requested persons ‘with information to facilitate the appointment of a lawyer’. This is the only specific obligation concerning the access to a lawyer imposed by the Directive upon the issuing Member State. Finally, it is worth highlighting that Article 10 of Directive 2013/48 provides that the right of access to a lawyer ‘is without prejudice to the time limits set out in FD

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

2002/584/JHA or the obligation on the executing judicial authority to decide, within those time-limits (...) whether the person is to be surrendered'. In other words, this provision aims to stress that the access to a lawyer must be provided in such a way not to hinder the purposes of the EAW, *i.e.* an effective and efficient surrender.

3. Beyond minimum requirements and formal grounds for refusal: the respect of fundamental rights in the EU multi-level constitutional order

In addition to the EU legislation providing minimum requirements and grounds for non-execution analyzed in the previous sections, the protection of individuals' fundamental rights can also be guaranteed and result in a limitation of mutual recognition in certain exceptional circumstances unforeseen in this legislation. The EU Member States have a general obligation to respect a certain level of fundamental rights protection in criminal justice within their jurisdiction. The Member States' obligation to respect individuals' fundamental rights not only stems from EU law, but also from the Member States constitutions and from international standards provided by treaties to which they are party, in particular the ECHR. This obligation must therefore be seen through the prism of the multi-layered constitutional framework binding on the EU and its Member States.

In the context of mutual recognition, tensions can occur. On the one hand, Member States must comply with the principle of mutual recognition and execute foreign judicial decisions with a minimum of control. On the other hand, these Member States are also bound to ensure that fundamental rights are respected. This means that they not only should respect the minimum requirements imposed by EU law, but they should also make sure that while applying mutual recognition the fundamental rights of the individual are not violated. However depending on the fundamental right applying to the case and the source of this right, sometimes a judicial authority will have to reconsider mutual recognition and mutual trust. The EU multi-layered constitutional framework may in fact oblige the national judicial authorities to guarantee a level of individuals' fundamental right that goes beyond what is provided in EU secondary legislation. It is therefore essential to explain how the various sources of fundamental rights interact in the multi-layered constitutional framework.

3.1. The ECHR

All EU Member States are party to the ECHR and, therefore, must respect the standards of human rights imposed by this Convention also when they are empowering EU law and implementing EU obligations. However, since its judgment in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Irland*,⁵⁹ the ECtHR traditionally applies the so-called 'Bosphorus presumption' to exonerate, under certain conditions, EU Member States from their responsibility under the ECHR when they apply EU law.⁶⁰ In other words, when applying EU law, national judicial authorities are presumed to be complying with the ECHR as long as they comply with EU fundamental rights. This presumption is based on a case-by-case consideration made by the ECtHR that the protection of the individual's fundamental

⁵⁹ Application No. 45036/98 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Irland*, Judgement (Grand Chamber) of 30 June 2005.

⁶⁰ See on the Bosphorus doctrine for example, O. de Schutter, 'Bosphorus Post-Accession: Redefining the Relationships between the European Court of Human Rights and the Parties to the Convention', in V. Kosta, N. Skoutaris, V.P. Tzevelekos (eds), *The EU Accession to the ECHR*, (Oxford and Portland: Hart Publishing, 2014) 177 et seq.; T. Lock, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights', [2010] *Human Rights Law Review* 529 et seq.; S Peers, 'Bosphorus European Court of Human Rights', [2006] *European Constitutional Law Review* 443; K. Kuhnert, 'Bosphorus – Double standards in European human rights protection?' [2006] *Utrecht Law Review*, 177-189; A. Hinarejos, 'Case Comment', [2006] *European Law Review*, 251-258.

rights provided by EU law is equivalent to the ECHR at the relevant time. In other words, the national judicial authorities acting within the scope of mutual recognition should only have to wonder whether their actions actually live up to EU fundamental rights. Nevertheless, the Bosphorus presumption can be rebutted if the protection of the ECHR is manifestly deficient. This can also be the case in the context of mutual recognition.⁶¹ Consequently, the Member States must still make sure that the automatic application of mutual recognition and the EU fundamental rights will not result in a manifest deficiency of the ECHR. However, it is unclear what a manifest deficiency is in the case law of the ECtHR. The question that remains to be answered is whether when applying EU fundamental rights, the application of mutual recognition can be limited in circumstances that correspond to manifest deficiency. Therefore, it is essential to scrutinize the case law of the ECtHR in order to identify when the Strasbourg Court considers that a Member State should let the ECHR prevail in transnational criminal proceedings.

Indeed, unless this would entail a manifest deficiency in the respect of a specific ECHR right, a State normally may not be held responsible before the ECtHR for violations committed in other countries. A EU Member State is, in principle, only accountable before the ECHR for its acts within its territory.⁶² Thus in the context of enforcement of foreign judicial decisions based on mutual recognition, the control of the merits of a case in the light of fundamental rights should happen as much as possible in the country which has issued that decision. Consequently, a national judicial authority bound to recognize and enforce a judgment made in another Member State should not have jurisdiction to decide on the merits of that judgment and control whether the ECHR has been respected in that State. One may nevertheless wonder whether a manifest violation of a fundamental right that has happened in the proceedings that resulted in the order to be recognized or that will happen during the recognition process or that will be the result of this process could limit the mutual recognition obligation. In such situations, the obligation to recognize and enforce a foreign judgment may well have to be set aside in order to avoid a violation of the ECHR.

In particular, “if a *serious and substantiated complaint* is raised before [national courts] to the effect that the protection of a ECHR right has been manifestly deficient and that this situation cannot be remedied by EU law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law.”⁶³ The case law of the Strasbourg Court decided in the context of extradition may become here relevant.⁶⁴ One may contend that a manifest deficiency could occur if, for example, a court would be obliged to transfer a prisoner in application of mutual recognition to another EU Member State where that person would suffer an inhuman or degrading treatment in violation of Article 3 ECHR.

⁶¹ See T. P. Marguery, ‘Je t’aime moi non plus. The Avotiņš v Latvia judgment: an answer of the ECtHR to the CJEU’, [2017] 10 *Review of European Administrative Law*, 113-134.

⁶² See for example about the scope of the ECHR in criminal matters, A. van Hoek and M. Luchtman, ‘Transnational cooperation in criminal matters and the safeguarding of human rights’, [2005] *Utrecht Law Review*, 1-39.

⁶³ Application no 17502/07 *Avotiņš v Latvia*, Judgement (Grand Chamber) of 23 May 2016, CE:ECHR:2016:0523JUD001750207, para.116.

⁶⁴ See however the Opinion of Advocate General Bot in Joined case C-659/15 PPU (*Căldăraru*) and C-404/15 (*Aranyosi*) who contended that the fundamental principle governing the rules for removal and expulsion according to which no one may 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, is enshrined in Article 19(2) of the Charter and in Article 3 ECHR cannot apply to the EAW. The argument is based on a literal interpretation of Recital 13 of the Framework Decision that precludes the removal, expulsion or extradition which would be contrary to this principle. Since the Recital does not mention surrender the principle cannot apply to the EAW, see paras. 45-48.

3.2. EU fundamental rights and the relation with the ECHR

Article 6 TEU summarizes the sources of EU fundamental rights, which must be respected both by the Member States when acting within the scope of EU law and the Union⁶⁵ and have the value of primary law.⁶⁶ Therefore, national authorities must apply them as primary sources of fundamental rights as soon as they act within the scope of Union law (see below). These sources are consisting in the CFR and the general principles of EU law (the ECHR and the constitutional traditions common to the Member States). They reiterate in part the same rights and aim for a single standard of human rights in Europe.⁶⁷ However, two questions must be clarified, first what is the relation between the CFR and the general principles, in particular the ECHR, second, when are EU fundamental rights applying in the context of mutual recognition.

a) The CFR and the ECHR

Unlike the ECHR, the CFR and the general principles of EU law are direct sources of EU law. General principles are sometimes unwritten and may be perceived as vague by individuals (for example, the principle of legitimate expectations).⁶⁸ By contrast, the nature of the CFR is clear. It has the same legal value as the Treaties (Article 6(1) TEU). The CFR ‘reaffirms’ existing rights (preamble) and does not extend the scope of EU law or create or modify any competence of the Union (Articles 6 TEU and 51(2) CFR). It offers protection of certain rights that are not covered by the ECHR, such as economic and social rights. The CFR was drafted in order to codify fundamental rights and principles guaranteed at the European level and give them greater visibility⁶⁹ and legitimacy.⁷⁰ The CFR contributes to the requirement of legal certainty of a polity based on the rule of law. It has become the main source of fundamental rights in the case law of the CJEU concerning EU criminal law. National judicial authorities should therefore always first consider the application of the CFR when they act in the scope of Union law.

The compatibility between the ECHR and the CFR is guaranteed by the CFR itself. According to Article 52(3), the rights affirmed by the CFR that are also guaranteed by the ECHR should be given the same meaning and scope as in the latter. Consequently, the EU and the Member States when acting in the scope of EU law, at least, must provide the same level of protection of these rights as provided by the ECHR. The Explanations of the CFR provide a list of those rights where both the meaning and the scope are the same as the corresponding articles of the ECHR⁷¹ and a list where the meaning equals the corresponding articles of the ECHR, but where the scope is wider.⁷² An interpretation of the CFR can go beyond the protection afforded by the ECHR (Article 52(3) *in fine*). For example, Article 47 CFR may offer broader protection than the ECHR by granting the right to legal aid to both

⁶⁵ In contrast to the established case-law of the CJEU, Article 6 TEU does not refer to other international texts as a source of inspiration for the general principles of EU law.

⁶⁶ Joined Cases C-402/05 P and 415/05 P *Kadi and Al Bakaraat International Foundation v Council and Commission*, Judgement of the Court (Grand Chamber) of 3 September 2008, EU:C:2008:461, para 308.

⁶⁷ K. Lenaerts and E. De Smijter, ‘The Charter and the role of the European courts’ (2001) 1(8) MJ 90-101.

⁶⁸ A. Arnall, ‘What is a General Principle of EU Law?’ in R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law* (Portland: Hart Publishing, 2011) 7-23; T. Tridimas, *The General Principles of EU Law*, (2nd edn, Oxford: OUP, 2007).

⁶⁹ Presidency Conclusions, Cologne European Council Meeting, 3 and 4 June 1999, available at http://www.europarl.europa.eu/summits/kol2_en.htm Accessed 1 December 2011.

⁷⁰ The CFR was proclaimed during the Nice summit in 2000 after a unanimous agreement by the Member States and the EU institutions.

⁷¹ Arts 2, 4, 5(1) and (2), 6, 7, 10(1), 11, 17, 19(1), 19(2), 48 and 49(1) (with the exception of the last sentence) and (2).

⁷² Arts 9, 12(1), 14(1), 14(3), 47(2) and (3) and 50.

natural and legal persons.⁷³ Moreover, according to Article 53 CFR, the CFR cannot be interpreted in a way that would limit or adversely affect human rights and fundamental freedoms “recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union 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.” Read in combination with Article 52(3), this means, on the one hand, that, if the ECtHR increases the level of protection of one of the rights enshrined in the ECHR, Member States must apply this level and the CJEU has to adapt its case-law and to provide the same level of protection. On the other hand, if the ECtHR decreases the level of protection of one right below the level afforded by the CJEU for the same right, Article 53 upholds the highest level of protection. Consequently, national judicial authorities must apply the CFR’s level and not the ECHR.

b) The scope of the Member States’ obligation to respect the CFR

If the EU is always bound to respect the CFR, the Member States’ obligation is limited to the situations when they are implementing Union law (Article 51(1) CFR), which since the Case *Åkerberg Fransson* should be understood as ‘acting within the scope of EU law.’⁷⁴ In the context of this book, as soon as a competent authority implements an obligation or a right stemming from one of the FDs or Directives subject of this study, it must also respect the CFR.⁷⁵ Member States are acting within the scope of Union law when they issue or execute a request based on mutual recognition.

When implementing the obligation to recognize a judicial decision, national judicial authorities may wonder whether they their own national standards of fundamental rights should prevail above EU standards. These standards and the application thereof must at least live up to the CFR standards (which in turn must at least leave up to the ECHR standards under the conditions seen above), but they may also go further and provide a higher level of protection. In such a case, the application of the national fundamental right must not compromise the primacy, unity and effectiveness of EU law.⁷⁶ For example, if one of the FDs in the present study provides for a uniform level of protection in respect of a particular right,⁷⁷ the Member States competent national authority must apply this standard even if its national constitution would be more favorable to the individual. By contrast, when EU law leaves discretion to the Member States a higher level of protection can be allowed by the national constitution.⁷⁸ In case of doubt concerning the compatibility of that FD with the CFR or the ECHR, that authority will have to refer a question to the CJEU. This situation leaves national authorities with an important burden; not only they sometimes must set aside a level of protection that would be more benefic to convicted persons, but they also have to assess when applying a level of fundamental right that is higher than the EU level will undermine the

⁷³ Case C-279/09 *Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, Judgement of the Court (2nd Chamber) of 22 December 2010, EU:C:2010:811, paras 35-36.

⁷⁴ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, Judgement of the Court (Grand Chamber) of 26 February 2013, EU:C:2013:105, paras 17-21.

⁷⁵ Member States are acting within the scope of EU law when they transpose, implement or simply apply one of the Framework Decisions subject to this research; see T. Marguery, ‘European Union Fundamental Rights and Member States Action in EU Criminal Law’, (2013) 20 MJ 298.

⁷⁶ *Stefano Melloni v Ministerio Fiscal* (n 15), para 60.

⁷⁷ For example, in the Melloni case, the CJEU decided that Article 4a(1) of the EAW provided a uniform standard of protection of the right of the defence, see *Stefano Melloni v Ministerio Fiscal* (n 15), paras 62-63.

⁷⁸ For example, this is the case of the right to bring an appeal against a decision of the executing judicial authority consenting to an application that requests the extension of a surrender for an offence other than that which was the basis of the original EAW, see C 168/13 PPU *F*, Judgment of the Court (2nd Chamber) of 30 May 2013, EU:C:2013:358.

effectiveness of EU law. This assessment might be difficult to make in the context of mutual recognition considering the sometime diverging objectives pursued by EU legislation in this domain.⁷⁹

3.3. The non-respect of fundamental rights as a limit to mutual trust and consequences on mutual recognition

Similarly to the general limitation imposed by the ECHR preventing States to assess the respect of the Convention by another State, the EU principle of mutual trust prevents the judicial authorities of one Member State to question the respect of fundamental rights by their foreign counterparts. It should be stressed that the impact of possible fundamental rights violation on mutual trust and mutual recognition in the context of this research can however take place at different levels depending on the FD concerned. In the context of the EAW for the execution of a sentence, the prisoner is transferred from the Member State executing the EAW to the Member State issuing the warrant. The question is here whether a violation of fundamental right that has or will occur in the issuing State can have consequences on the obligation to surrender bore by the executing authorities. The mutual recognition obligation can be limited, or even refused. In other words, can the respect for fundamental rights be construed as a ground for non-execution of mutual recognition?

In the context of FD 2008/909 and FD 2008/947, the impact of a fundamental right's violation on mutual trust can happen not only at the level of the enforcement of mutual recognition, but also at the moment the competent judicial authorities take a decision to issue a request for mutual recognition. On the one hand, the executing authority can have doubts concerning the respect for the individual's fundamental rights in the proceedings that were concluded with the judgment that must be enforced. Similarly to the EAW, the question is whether this authority is bound to enforce this judgment or whether enforcement should be conditioned or refused. On the other hand, by contrast to EAW proceedings, the question can also be whether the *issuing* authority must take into consideration a possible violation that could happen in the executing State if the convicted person or judgment were to be transferred to that State. In this last scenario, a loss of trust will prevent the obligation of mutual recognition to take place first of all. Both scenarios equally undermine judicial cooperation in criminal matters.

All three FDs state that they shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU.⁸⁰ Not only Article 6 TEU, but also the national constitutions of the Member States, Articles 2 TEU and 67(1) TFEU would prevent a treatment that would breach one of these rights. Article 6(1) TEU declares specifically that the Union recognizes the rights set out in the CFR and Article 6(3) stipulates that fundamental rights, as guaranteed by the ECHR constitute general principles of Union law.⁸¹ Article 2 TEU states that the "Union is founded on [...] respect for human rights."⁸² Article 67(1) TFEU states that the Union shall constitute an AFSJ with respect for fundamental rights.⁸³ These Treaty provisions oblige the EU and its Member

⁷⁹ For example, when implementing FD 2008/909 or FD 2008/947 authorities must on the one hand facilitate judicial cooperation, and on the other ensure the social rehabilitation of the convicted person, which might include the respect of the right to family life.

⁸⁰ Council Framework Decision 2002/584/JHA, Article 1(3); Council Framework Decision 2008/909/JHA, Article 3(4); and Council Framework Decision 2008/947/JHA, Article 3(4).

⁸¹ Article 6(1) TEU and Article 6(3) TEU.

⁸² Article 2 TEU.

⁸³ Article 67(1) TFEU. Article 67(1) differs from its predecessors (Article 29 EU and Article 67 EC) in that the Article 67(1) refers specifically that the AFSJ respects fundamental rights. See P. P. Craig, *The Lisbon Treaty: Law, Politics, and Reform*, Oxford: Oxford University Press 2010, 343.

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

States when acting in the scope of EU law to respect EU fundamental rights,⁸⁴ comprised of the rights laid down in the CFR, the ECHR and general principles of Union law.

The respect for fundamental right first of all poses problems when it comes into tension with the obligation to enforce mutual recognition. It seems that the abovementioned provisions cannot be construed as a *general* ground that precludes the *executing* judicial or competent authority to execute an EAW; recognize a judgment and enforce its concomitant sentence; or recognize the judgment or, where applicable, the probation decision, if there is a risk of infringement of the fundamental rights of the individual subjected to any of the three FDs.⁸⁵ This does not mean, however, that mutual trust between Member States of the EU should be blind. In exceptional circumstances, such a trust can be rebutted, but the consequences of such a rebuttal on mutual recognition may remain unclear.

As the CJEU decided in its Opinion 2/13:

“[t]hat principle [of mutual trust] requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (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).

[...] Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.”⁸⁶

In the area of mutual recognition in criminal matters, the CJEU has clarified in which exceptional circumstances can national courts depart from their obligation to trust a foreign counterpart. However, as was explained earlier, the case law of the ECtHR must also be taken into account. It seems in this respect that the case law of the two European Courts converge towards the same standards of fundamental rights.

a) The prohibition of torture and degrading treatment: from the Soering case to the Joined cases C-404/15 and C-659/15

⁸⁴ Member States are acting within the scope of EU law when they transpose, implement or simply apply one of the Framework Decisions subject to this research; see T. Marguery, ‘European Union Fundamental Rights and Member States Action in EU Criminal Law’, (2013) 20 MJ 298.

⁸⁵ European Commission 19 May 2005, Communication from the Commission to the Council and the European Parliament: Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States, COM(2005) 195 final, 6. However, contra see Silvis, Justice Silvis of the ECtHR states that there is a general ground in the Framework Decisions, but that this ground does not have direct effect. See J. Silvis, ‘Extradition and Human Rights: Diplomatic Assurances and the Human Rights in the Extradition Context’, lecture presented 20 May 2014, PC-OC meeting in Strasbourg, France. Accessible

via https://www.coe.int/t/dghl/standardsetting/pcoc/PCOC_documents/Documents%202014/Special%20session%20Extradition%20-%20Extradition%20and%20human%20rights%20-%20Silvis.pdf (last accessed on 13 April 2017); see also N. M. Schallmoser, ‘The European Arrest Warrant and Fundamental Rights: Risks of Violation of Fundamental Rights through the EU Framework Decision in Light of the ECHR’ (2014) 22 European Journal of Crime, Criminal Law and Criminal Justice 136.

⁸⁶ Opinion 2/13 *Adhésion de l’Union à la CEDH*, Opinion of the Court of Justice (Full Court) of 18 December 2014, EU:C:2014:2454, para 191 and 192.

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

In the leading case *Soering* the ECtHR decided on the application of Article 3 ECHR in extradition proceedings and that the extradition of a fugitive must be refused if “*substantial grounds* have been shown for believing that the person concerned, if extradited, faces a *real risk* of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.”⁸⁷ The CFR voices the *Soering* judgment in Article 19(2), which states that no one may 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.⁸⁸ The exact phrasing of Article 19(2) can also be found in EAW Recital 13.⁸⁹ The EAW however does not specifically oblige the *executing* Member State to assess whether the person to be surrendered risks subjection to torture or inhuman or degrading treatment or punishment. It is precisely that question that the *Hanseatische Oberlandesgericht* in Bremen posed to the CJEU in the joined cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru.⁹⁰ Although the CJEU does not make any reference either to Article 19(2) CFR nor to Recital 13 of the EAW or to the *Soering* judgment, the CJEU has clarified how mutual trust can be limited in the field of judicial cooperation in criminal matters.

In this case, the Higher Regional Court of Bremen had to decide on two EAWs. The first EAW concerned the surrender of Mr Aranyosi to Hungary for the purpose of prosecution, whereas the second EAW concerned the surrender of Mr Caldăraru to Romania for the purpose of executing a final sentence. In both cases, the referring court was satisfied that if the fugitives were sent back respectively to Hungary and Romania, they might be subject to conditions of detention amounting to a violation of Article 3 ECHR and the general principles enshrined in Article 6 TEU. Such a decision would be therefore in violation with the German law that provides that a request for mutual legal assistance is unlawful if contrary to Article 6 TEU.⁹¹ The CJEU firstly recalls that the application of the EAW cannot have the effect to modify the obligation that the Member States have to respect fundamental rights.⁹² It clearly emphasizes that this obligation has a special nature in the present cases that concern a possible violation of a right – the right not to be tortured or suffer degrading treatment protected by Articles 4 CFR and 3 ECHR – that is absolute and can, in no circumstances, be limited.⁹³ This right even constitutes one of the fundamental values of the Union and its Member States.⁹⁴ The execution of an EAW must not have the consequence that the person subject to it would suffer inhuman or degrading treatment. If the judicial authority of the executing Member State is “in possession of evidence of a *real risk* of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law, and in particular, by Article 4 of the CFR” this judicial authority is bound to assess the existence of that risk.⁹⁵

⁸⁷ *Soering v the United Kingdom* (n 31), para 91.

⁸⁸ Article 19(2) Charter. See also Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/24, which state that Article 19(2) incorporates the relevant case law of the ECtHR on Article 3 ECHR, naming ECHR 7 July 1989, *Soering v The United Kingdom* (n 30), and ECtHR 17 December 1996, application no 25964/94 *Ahmed v Austria*, Judgement (Chamber) of 17 December 1996, CE:ECHR:1996:1217JUD002596494 in the process.

⁸⁹ Council Framework Decision 2002/584/JHA, recital (13).

⁹⁰ Joined cases C-659/15 PPU and C-404/15 *Căldăraru and Aranyosi*, Judgement of the Court (Grand Chamber) of 5 April 2016, EU:C:2016:198.

⁹¹ *Ibid*, paras 42 and 59.

⁹² *Ibid*, para 83.

⁹³ *Ibid*, paras at 85-87.

⁹⁴ *Ibid* para 87.

⁹⁵ *Ibid* para 88.

The test imposed by the CJEU consists of two steps. First of all, when assessing the violation of the right not to be tortured or suffer degrading treatment, “the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.”⁹⁶ The CJEU leaves a rather large margin of appreciation to national courts in order to be satisfied that a real risk of inhuman or degrading treatment exists.⁹⁷ The use of the conjunction ‘or’ seems to allow for a broad comprehension of the deficiencies affecting the detention conditions. Such deficiencies do not have to be systematic or generalized, but they can simply affect a particular place of detention.⁹⁸ Therefore, in order to meet the test a national court may for example refer to a ‘pilot judgment’ of the ECtHR⁹⁹ or to cases where a violation of Article 3 ECHR was found in specific situations due to the particular conditions suffered by the detained person or in specific detention facilities.¹⁰⁰

The existence of a real risk of inhuman treatment is not enough to rebut mutual trust and limit the obligation to surrender. The executing judicial authority must also assess whether the person concerned will concretely be subject to that risk. The assessment must be “specific and precise”.¹⁰¹ In other words, the executing authority cannot only rely on general information that a MS has a very bad human rights record affecting one or more detention facilities; it must also be in possession of information about the specific place where the individual concerned will be detained, and about the conditions of detention in this specific facility.¹⁰² The executing authority “is bound to determine whether, in the particular circumstances of the case, there are *substantial grounds* to believe that, following the surrender of that person to the issuing Member State, he will run a *real risk* of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4.”¹⁰³ If the executing authority does not have the information concerning the situation in a particular detention

⁹⁶ Ibid para 89.

⁹⁷ See the Dutch national rapport on that for example.

⁹⁸ In this sense, the CJEU clarifies the discussion that arose after the *MSS v Belgium and Greece* case of the ECtHR and the NS and ME cases of the CJEU on the significance of the reference to ‘systemic breaches’ considered by certain as an additional requirement to rebut the presumption of safety accorded to Dublin states, see C. Costello and M. Mouzourakis *Reflexions on reading Tarakel: Is ‘How Bad is Bad Enough’ Good Enough?* (2014) 10 A&MR 404-411.

⁹⁹ These types of judgments identify structural problems underlying repetitive cases against many countries and imposing an obligation on states party to the ECHR to address those problems. In the present case, the Bremmen Court relied on the case: *Varga and Others v Hungary* Nos application no 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, Judgement (2nd Section) of 10 March 2015, CE:ECHR:2015:0310JUD001409712.

¹⁰⁰ In the *Caldararu* reference, the Bremmen court relied for example on the case of *Sandu Voicu v Romania* application no 45720/11, Judgement (3rd Section) of 3 March 2015, CE:ECHR:2015:0303JUD004572011 concerning the failure to provide adequate health care in detention facilities, on the case *Bujorean v Roumanie* application no 13054/12, Judgement (3rd Section) of 10 June 2014, CE:ECHR:2014:0610JUD001305412 concerning detention conditions in the Botoșani’s prison, on the case *Mihai Laurențiu Marin v Roumanie* application no 79857/12, Judgement (3rd Section) of 10 June 2014, CE:ECHR:2014:0610JUD007985712 concerning the Poarta Albă and Măgineni’s prisons and on the case *Constantin Aurelian Burlacu v Romania* application no 51318/12, Judgement (3rd Section) of 10 June 2014 concerning poor conditions of detention in the Bucharest police headquarters and in Rahova Prison.

¹⁰¹ *Căldăraru and Aranyosi* (n 90) para 92.

¹⁰² Ibid, para 92.

¹⁰³ Ibid, para 94.

facility or is aware of systemic deficiencies in the issuing Member State, then it must request all necessary information from the issuing authority showing that the particular prison is safe or that measures have been taken to address the systemic deficiencies. Consequently, the decision to surrender the individual concerned must be suspended as long as it is necessary. Once the information is received and if the executing authority finds the existence of a real risk of inhuman or degrading treatment, it must postpone the execution of the EAW.¹⁰⁴ It seems that the execution can be suspended as long as the risk of inhuman treatment is present in the issuing State. The executing authority can however only decide to keep the individual concerned in detention as long as it is proportionate for the purpose of the case. In application of Article 6 CFR and Article 5 ECHR, and similarly to the *Lanigan* case,¹⁰⁵ the executing authority will have to decide to put an end on the detention eventually. The court must also take the presumption of innocence into account in cases where the fugitive is to be surrendered for prosecution.¹⁰⁶ Nevertheless, that authority must make sure that all necessary measures will be taken in order to avoid the individual to abscond.

Although the *Aranyosi* and *Căldăraru* cases concerned the EAW FD, the findings may apply by analogy to all cases where a decision should be taken by a competent authority as to the transfer of a prisoner to another Member State, thus in particular in application of FD 2008/909. However, as mentioned above, the situation will then be reversed. It should be because there is a risk of degrading treatment in the executing State that the transfer should not take place.

b) Can a violation of other fundamental rights limit mutual trust and, consequently, mutual recognition? Considerations on the right to fair trial and family life.

This question has not been answered by the CJEU yet. As mentioned earlier however when applying EU fundamental rights the CJEU is bound to respect the level of protection guaranteed by the ECHR and the case law of the ECtHR. It is therefore necessary to turn to the ECHR and analyze the extent to which it provides an obligation on EU Member States to ensure the protection of the ECHR in transnational proceedings is not manifestly deficient. In particular, the right to fair trial and family life may be undermined in proceedings implying the transfer of a judgment or of a person from one Member State to another.

The right to a fair trial (Article 6 ECHR and 47/48 CFR) and the right to a family life (Article 8 ECHR and 7 CFR) must be taken into account in proceedings based on mutual recognition. In any case, by contrast to Article 4 CFR, interference with the right to a fair trial and the right to a family life are allowed both under the ECHR and the CFR. According to Article 52(1) CFR “[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

The right to a fair trial

A priori, the right to a fair trial does not cover post-trial situation and therefore should not apply to proceedings that do not have the purpose the determination of a criminal charge.¹⁰⁷

¹⁰⁴ Ibid, para 98.

¹⁰⁵ Case C-237/15 PPU *Francis Lanigan v Minister for Justice and Equality*, Judgement of the Court (Grand Chamber) of 16 July 2015, EU:C:2015:474.

¹⁰⁶ *Căldăraru and Aranyosi* (n 90), para 100.

¹⁰⁷ Application no ECtHR, *Szabó v Sweden*, Judgement (2nd Section) of 27 June 2006, CE:ECHR:2006:0627DEC002857803.

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

Consequently, issues arising in the context of the EAW for the execution of a sentence or to FD 2008/909 and FD 2008/947 should not be covered by the right to a fair trial.

However, in the *Soering* case, not only the application of Article 3 ECHR but also Article 6 ECHR came under discussion. The ECtHR did “not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.”¹⁰⁸ Does the CJEU have to follow the interpretation made in *Soering* by the ECtHR in application of Article 52 CFR and the Explanations relating to the CFR?¹⁰⁹ With regard to Article 6(1), the right to a fair trial is enshrined in Article 47 CFR. The Explanations confirm that, with regard to the determination of any criminal charge, the meaning and the scope of that right is the same as in the ECHR. Article 48 on the presumption of innocence and right of defense has also the same meaning and scope as Article 6(2)(3) ECHR. In theory, if the ECtHR decides that extradition can be refused if one of these rights has been violated or will be violated, so must the CJEU in EAW’s proceedings. Indeed, in the *Stapleton* judgment, the ECtHR recalled that following the *Soering* judgment an issue might, exceptionally, be raised under Article 6 in extradition cases in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. In this case, the United Kingdom had issued an EAW for the purpose of prosecution against Mr Stapleton whose whereabouts were in Ireland. Mr Stapleton contested his surrender before the Irish jurisdiction arguing that if surrendered he would be subject to a real risk of unfairness in the criminal proceedings that would take place more than 30 years after the alleged offences. Although the ECtHR decided the applicant’s complaint as manifestly ill-founded, in particular because the extradition of a suspect can be refused in application of Article 6 ECHR only in cases where this would lead to a flagrant denial of justice (thus not real risk of unfairness), the ECtHR clearly applies its case law on extradition to the EAW. The criterion used by the ECtHR in order to bring the circumstances of the case within its jurisdiction although it concerns a transnational case is not the letter of the law. The fact that the FD EAW does not regulate extradition does not mean that it has not the same effects on the person subject to it.

The test imposed by the ECtHR in respect of Article 6 ECHR in extradition procedure is indeed more difficult to meet than the real risk test of Article 3. It must be stressed that the right to a fair trial is not absolute by contrast to Article 3 ECHR, therefore, the ECtHR imposes the existence of a ‘flagrant denial of justice’. Moreover, in the context of the EAW it takes into account the membership of the State to the EU in order to assess the violation of Article 6.¹¹⁰ The ECtHR listed in *Othman* what flagrant denial can consist of. Such is the case, for example, of a conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge, a trial which is summary in nature and conducted with a total disregard for the rights of the defense, a detention without any access to an independent and impartial tribunal to have the legality the detention reviewed, a deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country or the use at trial of evidence obtained by torture.¹¹¹

In fact, “in the twenty-two years since the *Soering* judgment, the Court has never found that an expulsion would be in violation of Article 6. This fact [...] serves to underline the

¹⁰⁸ *Soering v the United Kingdom* (n 31), para 113.

¹⁰⁹ The CJEU recalls briefly the necessary link between the interpretation of the CFR and the rights enshrined in the ECHR *Căldăraru and Aranyosi* (n 89), para 8.

¹¹⁰ Application no 56588/07 *Stapleton v Ireland*, Judgement (3rd Section) of 21 December 2007, CE:ECHR: 2010:0504DEC005658807, para 30.

¹¹¹ Application no 8139/09 *Othman (Abu Qatada) v the United Kingdom*, Judgement (4th Section) of 17 January 2012, EC:ECHR: 2012:0117JUD000813909, para 259 and 263.

Court's view that "flagrant denial of justice" is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article."¹¹² Moreover, in case concerning EAWs the ECtHR follows the case law of the CJEU¹¹³ and decides that when a violation of Article 6 in the issuing country is relied on by the fugitive, it is more appropriate for the courts of the issuing Member State to assess the violation of the right to fair trial.¹¹⁴ Unless, the CJEU decides to provide a more extensive protection to fugitives by for example, as suggested by AG Sharpston in her Opinion on the *Radu* case, requesting a less stringent test, it is very unlikely that Article 47 or 48 will base a successful challenge against the execution of an EAW or any other decision implementing mutual recognition and implying the transfer of a person.¹¹⁵ Moreover, it should be kept in mind that in contrast to the prohibition of torture or degrading treatment, the right to fair trial is perfectly subject to limitation. This is also a point made by the ECtHR in *Stapleton*.¹¹⁶ The conclusion drawn with regard to the right to a fair trial will be applicable to the right to family life, which is the subject of the following section.

The right to family life

Article 8 ECHR states that everyone has the right to respect for his private and family life, his home and his correspondence.¹¹⁷ Similarly to Article 6 ECHR, the right to family life is not absolute. Interference by a public authority in the exercise of the rights protected by Article 8 is prohibited, unless such interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹¹⁸ The aim of Article 8 is to prevent and protect people against an arbitrary interference by public authorities.¹¹⁹ It corresponds to Article 7 CFR and therefore, the CJEU must at least provide the same level of protection as the ECtHR in its case law. In the context of the ECHR, this right must be protected in extradition cases as well as in transfer proceedings. The violation of this right might take place in the State of destination. In this case, the question will be for the requested authorities whether extradition should take place. By contrast, a violation may also be constituted by the refusal to transfer a prisoner in application of a bilateral or multilateral convention concerning the transfer of sentenced persons.

¹¹² *Ibid*, para 260.

¹¹³ See for example *Jeremy F* (n 23), para 50.

¹¹⁴ *Stapleton v Ireland* (n 109), para 29.

¹¹⁵ Case C-396/11 *Radu*, Opinion of AG Sharpston of 18 October 2012, EU:C:2012:648, para 79-85.

¹¹⁶ *Stapleton v Ireland* (n 109), para 29.

¹¹⁷ Article 8(1) ECHR. In its case-law on Article 8, the ECtHR uses as two-stage test. The first stage assesses whether the applicant's complaint falls within the ambit of this provision. This entails that the ECtHR must decide whether the situation at stake amounts to "private life", "family life", "home" or "correspondence."¹¹⁷ If the complaint falls within any of these four rights, the ECtHR applies the second stage: has there been interference? The second stage is two-fold. First, the ECtHR assesses whether a public authority interfered with a right protected under Article 8. If the answer is affirmative, the ECtHR must then assess whether the interference (i) is in accordance with the law, (ii) pursues a legitimate aim, and (iii) it is necessary in a democratic society.

¹¹⁸ Article 8(2) ECHR.

¹¹⁹ Application no 2512/04 *Nolan and K. v Russia*, Judgement (1st Section) of 12 February 2009, CE:ECHR:2009:0212JUD000251204, para 84.

In extradition cases the right to a private life and the right to a family life are at stake. The ECtHR gives broad, non-exhaustive, definitions of these two rights.¹²⁰ The right to a private life encompasses, *inter alia*, the following: the moral and physical integrity of the person;¹²¹ the right to personal development;¹²² the right to establish and develop relationships with other human beings and the outside world; and a prohibition on treatment that causes a loss of dignity.¹²³ Also with regards to the right to family life the ECtHR takes a broad approach. In *X, Y, and Z v the United Kingdom*, the ECtHR said that the notion of family life “is not confined solely to families based on marriage, and may encompass other *de facto* relationships. When deciding whether a relationship may be said to amount to ‘family life’, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by other means.”¹²⁴ The ECtHR ruled that in addition to the relationship between a parent and his or her child, the following relations, amongst others, fall within the scope of the right to family life: (i) children and grandparents,¹²⁵ (ii) siblings,¹²⁶ (iii) uncles/aunts and nephews/nieces.¹²⁷

The number of cases in which the ECtHR had to rule on Article 8 complaints in extradition related cases is small. The issue was first raised in *Raidl v Austria* before the ECcHR. The applicant, a Russian national, was suspected of killing the manager of a firm together with two accomplices in Severodvinsk, Russian Federation. She left Russia and applied for asylum in Austria. After issuance of an international arrest warrant by the Russian authorities, the Austrian authorities arrested the applicant. While detained, the applicant married an Austrian national. The applicant was later extradited under the Austrian Extradition Act. Before her extradition, the applicant attempted suicide and was admitted to a psychiatric ward. The applicant complained that her extradition violated her right to respect for her private and family life. The extradition by the Austrian authorities interfered with her private life, because it exposed her to a higher risk of suicide. The extradition interfered with her family life, as her husband was not able to come to Siberia, where she was detained, which meant that her relationship would most likely come to an end. The ECcHR found that the extradition constituted an infringement of her right to private and family life. However, the Commission continued, the interference was justified under Article 8(2) ECHR. The extradition decision was in accordance with Austrian law. The extradition also served a purpose enumerated in this provision: the prevention of crime. The Commission also found that the interference was

¹²⁰ Application no 39630/09 *El-Masri v The Former Yugoslav Republic of Macedonia*, Judgement (Grand Chamber) of 13 December 2012, EC:ECHR: 2012:1213JUD003963009, para 248; application no 2346/02 *Pretty v the United Kingdom*, Judgement (4th Section) of 29 April 2002, CE:ECHR:2002:0429JUD000234602, para 61.

¹²¹ Application no 8978/80 *X and Y v the Netherlands*, Judgement (Chamber) of 26 March 1985, CE:ECHR:1985:0326JUD000897880, para 22.

¹²² *Pretty v the United Kingdom* (no 120), para 61.

¹²³ I. Roagna, *Protecting the right to respect for private and family life under the European Convention on Human rights*, Council of Europe human rights handbooks, Strasbourg: Council of Europe 2012, 12.

¹²⁴ Application no 21830/93 (*X, Y, and Z v the United Kingdom*), Judgement (Grand Chamber) of 22 April 1997, CE:ECHR:1997:0422JUD002183093, para 36.

¹²⁵ Application no 6833/74 *Marckx v Belgium*, Judgement (Plenary) of 13 June 1979, CE:ECHR:1979:0613JUD000683374.

¹²⁶ Application no 10465/83 *Olsson v Sweden*, Judgement (Plenary) of 24 March 1988, CE:ECHR:1988:0324JUD001046583.

¹²⁷ Application no 16580/90 *Boyle v the United Kingdom*, Judgement (Chamber) of 24 February 1994, CE:ECHR:1994:0228JUD001658090.

Part III Limitations on the obligation of mutual recognition and fundamental rights protection in the EAW, FD 2008/909 and FD 2008/947

proportionate to the legitimate aim pursued, given the seriousness of the crime she was accused of and her mental state.¹²⁸

In *Launder v the United Kingdom*¹²⁹ the applicant was a British national to be extradited to Hong Kong for corruption related offences nineteen years prior to extradition. Launder lived in Hong Kong between 1972 and 1983, but had since moved to the United Kingdom where he resided with his wife and three children. Launder complained that the extradition would be unlawful considering that the offences for which extradition was requested, occurred nineteen years ago. He also complained that his extradition to the United Kingdom would be disproportionate, because his family would be thousands of miles away from him. The ECcHR reiterated the points made in *Raidl v Austria* regarding lawfulness, legitimate aim, and necessity. However, the Commission gave a restrictive interpretation of proportionality in extradition cases. It stated that “it is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting State would be held to be an unjustified or disproportionate interference with the right to respect for family life.”¹³⁰ The Commission decided that Launder and his family had lived in Hong Kong already and had thereafter frequently changed domicile. In addition, his family was free to come visit him in Hong Kong. For these reasons the Commission rejected Launder’s complaint under Article 8 ECHR.

In *King v the United Kingdom* the ECtHR also ruled for the first time on the admissibility of a complaint under Article 8 in an extradition case.¹³¹ In this ruling the Court followed the earlier decision of the ECcHR in *Launder v United Kingdom*. King was to be extradited from the United Kingdom to Australia for narcotics related offences. He complained that he had wife, two children, and a mother in bad health, which would make extradition to Australia violate his right to family life, because there would be limited to no opportunities for contact. The Court did not find that this situation constituted such an exceptional circumstance that it outweighed the legitimate aim pursued by extradition. Therefore, the ECtHR did not find the applicant’s extradition disproportionate to the legitimate aim served under Article 8, and for this reason, declared the application inadmissible.¹³²

Last, in *Shakurov v Russia*, the ECtHR ruled for the first time on the merits of the right to family life in an extradition case. The applicant was an Uzbek national to be extradited from Russia to Uzbekistan for alleged desertion.¹³³ The applicant was married, had two children (one that required that medical treatment in Russia), owned property in Russia, lived in Russia, and had employment in Russia. The ECtHR followed the reviewing courts and decided that the situation as presented by the applicant did not constitute an exceptional circumstance that would render extradition disproportionate to the legitimate aim pursued and concluded that no violation of Article 8 had taken place.¹³⁴

The overview above of the ECcHR’ decisions and the ECtHR’s case law illustrates that the circumstances to render extradition disproportionate must be very exceptional. In its Recommendations the Council of Europe recommended that “when deciding on extradition

¹²⁸ Application no 25342/94 *Raidl v Austria*, European Commission on Human Rights Decision of 4 September 1995.

¹²⁹ Application no 27279/95 *Launder v United Kingdom*, European Commission on Human Rights Decision of 8 December 1997.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² Application no 9742/07 *King v United Kingdom*, Judgement (4th Section) of 26 January 2010, CE:ECHR:2010:0126DEC000974207.

¹³³ Application no 55822/10 *Shakurov v Russia*, Judgement (Chamber) of 5 June 2012, para 14-17.

¹³⁴ *Ibid.*, para 202-203.

requests”, the Contracting Parties must “bear in mind the hardship that might be caused by the extradition procedure to the person concerned and his or her family, in cases where the procedure is manifestly disproportionate to the seriousness of the offence and when the penalty likely to be passed will not significantly exceed the minimum period of one-year detention or will not involve the deprivation of liberty.”¹³⁵ Moreover, these cases concern extradition to countries that were not a member of the EU. Consequently, it must be concluded that the threshold imposed by the ECtHR’s test allowing for a refusal to extradite someone to a country where his or her right to family life would be violated is very high. Considering this threshold and the purpose of the FDs subject to this research which is the fight against crime, it must be concluded that the presumption of mutual trust is unlikely to be defeated by a challenge based on Article 6 – *i.e.* Article 47 and 48 CFR – or on Article 8 ECHR – *i.e.* Article 7 CFR.

Finally, by contrast to the previous cases, in transfer proceedings the refusal to transfer a prisoner can also constitute an interference with Article 8 ECHR. The ECtHR however has decided in *Serçe v Romania*, that a prisoner does not enjoy the right to choose his or her place of detention and consequently the complaint of the applicant against the refusal from Romania to transfer him to Turkey was declared incompatible *ratione materiae* with Article 8 ECHR.¹³⁶

The purpose of the next Part of this research (Part IV) is to analyze the implementation of FD EAW, FD 2008/909, FD 2008/947 and the three procedural Directives. The question posed will be whether the implementation of that EU legislation and the practice of mutual recognition actually provide individuals with adequate and equivalent fundamental rights national in conformity with the multi-layered constitutional framework described in Part III.

¹³⁵ Recommendation No. R(80)7 concerning the practical application of the European Convention on Extradition, 1.

¹³⁶ Application no 35049/08 *Serçe v Romania*, Judgement (3rd Section) of 30 June 2015.