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

ON A COLLISION COURSE! MUTUAL RECOGNITION, MUTUAL TRUST AND THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE RECENT CASE-LAW OF THE COURT OF JUSTICE

STEFANO MONTALDO*

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ABSTRACT: This article focuses on the balance between mutual recognition in criminal matters, mutual trust and the protection of fundamental rights, in the light of the recent case-law of the Court of Justice. Mutual trust implies a presumption that the Member States adequately protect fundamental rights. However, this presumption is rebuttable. Mutual trust is not blind and mutual recognition is not automatic. Besides the grounds for refusal of a request for judicial cooperation codified in EU secondary law, the Court identifies a new general limit to mutual recognition and mutual trust. These principles are barred in exceptional situations, in the event a systemic flaw leads to a serious risk of a manifest violation of the Charter. The article contends that even individual serious in-

* Researcher in EU Law, University of Torino, stefano.montaldo@unito.it.

fringements can amount to precluding the obligation to cooperate incumbent upon the Member States. This approach marks a twofold shift of paradigm. Firstly, it strengthens the European Union's role as a fundamental rights promoter. Secondly, it empowers national authorities, that are entitled to verify whether other Member States properly respect their obligation to protect the rights enshrined in the Charter. Rather than focusing on theoretical containment of distrust, the EU strengthens mutual trust by the means of a more effective protection of fundamental rights.

KEYWORDS: mutual recognition – mutual trust – European arrest warrant – fundamental rights – refusal of execution – systemic deficiencies.

I. INTRODUCTION

When opposing interests underpinning general principles of EU law collide, the search for a balance between them reflects the overall state of the European Union.[1] Whatever the outcome of the balance is, however, this crash has an impact and something has to be sacrificed.[2] But then a post-collision era starts and the identification of the primary values and objectives of the European legal order leads to a new equilibrium. Until the next collision, at least.[3]

All EU policies face the risk of a clash between principles,[4] especially after the Lisbon Treaty's coming into force and the conferral of primary legal authority to the Charter of Fundamental Rights of the European Union (Charter).[5] However, some domains appear more exposed to the phenomenon, due to the close interconnection of princi-

[1] In general, see T. PÉREZ, *Conflicts of rights in the European Union. A theory of supranational adjudication*, Oxford: Oxford University Press, 2009.

[2] Nonetheless, many studies on the conflicts between general principles of EU law share a common denominator, namely the idea that collisions should be resolved ensuring the observance of their equal ranking in the EU legal order: V. TRSTENJAK, E. BEYSEN, *The growing overlap between fundamental freedoms and fundamental rights in the case law of the CJEU*, in *European Law Review*, 2013, p. 293 *et seq.* In case the conflict is solved by the EU legislator, the latter will be given considerable leeway to strike a fair balance, thereby confining the Court of Justice's scrutiny of validity to the so called manifestly inappropriate balance test: G. ANAGNOSTARAS, *Balancing conflicting fundamental rights: the Sky Österreich paradigm*, in *European Law Review*, 2014, p. 111 *et seq.*

[3] S. DE VRJIES, *The protection of fundamental rights within Europe's internal market after Lisbon. An endeavour for more harmony*, in S. DE VRJIES, U. BERNITS, S. WEATHERHILL, *The protection of fundamental rights in the EU after Lisbon*, Oxford and Portland: Hart Publishing, 2013, p. 60. The Author uses the images of a clash of titans and of Plato's praise for harmony in The Republic.

[4] Scholars have extensively analysed the overlap and the subsequent frequent need for a balance between fundamental freedoms and fundamental rights. See for instance, recently, S. REYNOLDS, *Explaining the constitutional drivers behind a perceived judicial preference for free movement over fundamental rights*, in *Common Market Law Review*, 2016, p. 643 *et seq.*

[5] S. IGLÉSIAS SANCHEZ, *The Court and the Charter: the impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights*, in *Common Market Law Review*, 2012, p. 1565 *et seq.*; A. ROSAS, H. KAILA, *L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de Justice: un premier bilan*, in *Il diritto dell'Unione europea*, 2011, p. 1 *et seq.*

ples and rights, which often guard opposing interests.[6] From this point of view, police and judicial cooperation in criminal matters is a powerful magnetic pole,[7] which has attracted meteor swarms over its 15 year evolution.[8] In particular, both EU secondary law and the case-law of the CJEU reveal continuous tension between the effectiveness of judicial cooperation mechanisms and the protection of the fundamental rights of the individuals concerned.[9] In a series of preliminary rulings on the interpretation of the Framework Decision on the European arrest warrant (EAW),[10] the Court tried to reduce tension in favour of the former and in light of the principles of mutual recognition and mutual trust between Member States.[11]

However, the balance struck in Luxembourg has recently been put under pressure by further requests raised by national jurisdictions under Art. 267 TFEU, once again focused on the EAW.[12] These preliminary references have urged the Court of Justice to acknowledge that mutual recognition is not absolute and that the protection of fundamental rights can amount to limiting the duty incumbent upon the requested authority to execute an EAW. Such case-law has important systemic and direct implications for the overall functioning of judicial cooperation mechanisms. However, the new post-collision balance between fundamental rights protection and full effectiveness of EU law it strikes is far from clear.

The article addresses the theoretical questions underpinning fundamental rights protection in EU judicial cooperation mechanisms and outlines the material impact of the Court's legal reasoning. First, the analysis briefly focuses on the notions of mutual recog-

[6] For what concerns judicial cooperation in criminal matters, see T.P. MARGUERY, *The protection of fundamental rights in European criminal law after Lisbon: what role for the Charter of Fundamental Rights?*, in *European Law Review*, 2013, p. 444 *et seq.*

[7] P. DE HERT, *EU criminal law and fundamental rights*, in V. MITSILEGAS, M. BERGSTRÖM, T. KONSTADINIDES (eds), *Research Handbook on EU Criminal Law*, Cheltenham: Edward Elgar Publishing, 2016, p. 105, who underlines that "the penal instrument has both the power to protect and to compress fundamental rights".

[8] See for instance E. GUILD, L. MARIN (eds), *Still not resolved? Constitutional issues of European Arrest Warrant*, Nijmegen: Wolf Legal Publishers, 2009.

[9] Such tension has often been read from the point of view of the collision between security and fundamental rights: C. RIJKEN, *Re-balancing security and justice: protection of fundamental rights in police and judicial cooperation in criminal matters*, in *Common Market Law Review*, 2011, p. 1455 *et seq.*

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

[11] See for instance Court of Justice, judgment of 1 December 2008, case C-388/08 PPU, *Leymann and Pustovarov*, para. 42; Court of Justice, judgment of 22 June 2012, case C-192/12 PPU, *Melvin West*, para. 56; Court of Justice, judgment of 30 May 2013, case C-168/13 PPU, *Jeremy F.*, para. 35. L. MARIN, *Effective and legitimate? Learning from the lesson of 10 years of practice with the European Arrest Warrant*, in *New Journal of European Criminal Law*, 2014, p. 327 *et seq.*

[12] Following the expiry of the five years post-Lisbon transitional period, the strengthened jurisdiction of the Court of Justice under Art. 267 TFEU has led to an increasing number of preliminary references, often specific to certain Member States: Opinion of AG Cruz Villalón delivered on 6 July 2015, case C-237/15 PPU, *Lanigan*, para. 1.

nition and mutual confidence, which the EU legislator and the CJEU have tried to describe as almost absolute principles. Paragraph three considers the limits imposed on these principles by EU secondary law, while paragraph four analyses the debate on the possibility of adding new grounds for refusal to the exhaustive list provided by the European legislator. The developments of such debate are considered in the next part of the article, which focuses on the recent case-law of the CJEU concerning the balance between full effectiveness of judicial cooperation mechanisms and the protection of fundamental rights. In particular, close attention is given to the case-law concerning the grounds for non-execution of European arrest warrants. The last paragraph considers the implications of the Court's approach and outlines the possible future scenario for judicial cooperation in criminal matters, in light of the increased role of fundamental rights.

II. Mutual recognition and mutual trust: unattainable stars in the sky?

Since the end of the Nineties,[13] the principle of mutual recognition has acquired increasing importance and has ultimately become the "cornerstone of judicial cooperation".[14] The TFEU acknowledges the key-role of this principle in both civil and criminal matters and leaves its specific regime to an ever expanding body of EU legislation.[15]

Both secondary law and the case-law of the Court have converged to uphold the golden rule of mutual recognition, pursuant to which the national judicial authority addressees of a cooperation request are, in principle, under the twofold duty to both recognise and execute foreign decisions.[16] The full effectiveness of judicial cooperation mechanisms requires execution to be generally automatic and dealt with as a matter of

[13] Tampere European Council Presidency Conclusions of 16 December 1999.

[14] See for instance the sixth recital of the Council Framework Decision 2002/584, cit. The principle has been described as a pillar and a technique for the construction of the European judicial area: K. Nicolaidis, *Trusting the poles? Constructing Europe through mutual recognition?*, in *Journal of European Public Policy*, 2007, p. 682 *et seq.*; N. Parisi, *Tecniche di costruzione di uno spazio penale europeo. In tema di riconoscimento reciproco delle decisioni giudiziarie e di armonizzazione delle garanzie procedurali*, in *Studi sull'integrazione europea*, 2012, p. 33 *et seq.* Nonetheless, the implementation of mutual recognition instruments at national level has proven to be to a large extent incomplete: G. Vernimmen, L. Surano, A. Weyemberg (eds), *The future of mutual recognition in criminal matters in the EU*, Bruxelles: Editions de l'Université de Bruxelles, 2009.

[15] See respectively Arts 81 and 82 TFEU. On the idea of an evolving and ever expanding body of secondary law see V. Mitsilegas, *The third wave of third pillar law: which direction to EU criminal justice?*, in *European Law Review*, 2009, p. 523 *et seq.* This trend has been confirmed in the post-Lisbon era: C. Amalfitano, *Le prime direttive europee sul ravvicinamento "processuale": il diritto all'interpretazione, alla traduzione ed all'informazione nei procedimenti penali*, in R. del Coco, E. Pistoia (a cura di), *Stranieri e giustizia penale. Problemi di perseguibilità e di garanzie nella normativa nazionale ed europea*, Bari: Cacucci Editore, 2014, p. 1 *et seq.*

[16] Court of Justice, judgment of 16 July 2015, case C-237/15 PPU, *Lanigan*, para. 36; Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, para. 79.

urgency.[17] In order to serve this purpose, a major role is assigned to the issuing authority, while the receiving one is usually prevented from any involvement in assessing the case.[18] The latter cannot impose procedural formalities beyond those expressly permitted by EU law and has to accept the result of the trial that took place in the foreign Member State, even if the application of its national procedural or substantive rules would have led to a different outcome.[19]

The remarkable implications of mutual recognition also derive from mutual trust,[20] whose legal authority is a matter of extensive debate.[21] In its first judgments on the *ne bis in idem* principle, the CJEU affirmed that "the Member States have mutual trust in their criminal justice systems",[22] but failed to attach a clear legal definition to this concept, or provide it with a solid theoretical background. This is why AG Sharpston assumed that mutual recognition and mutual confidence "are different names for the same principle".[23] Accordingly, part of the legal scholars pointed out that mutual confidence merely inspires legislative action, but is not amenable to judicial review.[24] AG Jarabo Colomer, on the other hand, highlighted the autonomous meaning of this concept, which is closely intertwined with mutual recognition, although evokes the much higher level of the fundamental values shared by the Member States and is at the basis of the EU's legal structure.[25] More recently, building on the latter view, the Court started to refer to mutual trust as a "principle" and eventually found its legal basis in Art. 2 TEU, which states the fundamental values the EU is based on and therefore implies and justi-

[17] Art. 17 of Council Framework Decision 2002/584, cit. On the traditional importance of automaticity of cooperation mechanisms in the Area of freedom, security and justice and its gradual crisis, V. MITSILEGAS, *The limits of mutual trust in Europe's Area of freedom, security and justice: from automatic inter-State cooperation to the slow emergence of the individual*, in *Yearbook of European Law*, 2012, p. 319 *et seq.*

[18] C. JANSSENS, *The principle of mutual recognition in EU law*, Oxford: Oxford University Press, 2013, p. 171 *et seq.*

[19] Court of Justice, judgment of 9 March 2006, case C-436/04, *Van Esbroeck*, para. 30.

[20] On the roots of this notion in judicial cooperation in criminal matters, D. FLORE, *La notion de confiance mutuelle: l'"alpha" ou l'"omega" d'une justice pénale européenne*, in G. DE KERCHOVE, A. WEYEMBERGH (dir.), *La confiance mutuelle dans l'espace penal européen*, Bruxelles: Editions de l'Université de Bruxelles, 2005. On the relationship between these two poles, B. NASCIMBENE, *Le Traité de Lisbonne et l'espace judiciaire européen: le principe de la confiance réciproque et reconnaissance mutuelle*, in *Revue des affaires européennes*, 2011, p. 787 *et seq.*

[21] G. DE KERCHOVE, A. WEYEMBERGH (dir.), *La confiance mutuelle*, cit.; with regard to the relationship with the harmonisation of national substantive and procedural laws, C. AMALFITANO, *Conflitti di giurisdizione e riconoscimento delle decisioni penali nell'Unione europea*, Milano: Giuffré Editore, 2006, p. 180 *et seq.*

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

[23] Opinion of AG Sharpston delivered on 15 June 2006, case C-467/04, *Gasparini*, footnote 87.

[24] E. HERLIN-KARNELL, *Constitutional principles in the EU Area of freedom, security and justice*, in D. ACOSTA, C. MURPHY (eds), *EU security and justice law*, Oxford: Hart Publishing, 2014, p. 36.

[25] Opinion of AG Jarabo Colomer delivered on 8 June 2006, case C-150/05, *Van Straaten*, para. 67.

fies mutual confidence between the Member States.[26] As such, mutual trust does not only strengthen judicial cooperation,[27] but also gives rise to judicially enforceable standards.[28]

In this context, mutual recognition and mutual trust have emerged as the motors of European integration in criminal matters. Building on the ever closer integration between Member States, they are at first sight "attractive to Member States",[29] since they secure effectiveness and automaticity of judicial cooperation mechanisms without resorting to further harmonisation of national criminal laws.[30]

III. Set on a collision course: the limits of mutual recognition and mutual trust

In the ambitious reading offered by secondary law and the case-law of the Court, mutual recognition and mutual trust are very conspicuous in EU law. Now enshrined in the category of the general principles of EU legal order, they manifest a *favor integrationis*, urging an almost absolute precedence to the full effectiveness of judicial cooperation in criminal matters. However, judicial cooperation mechanisms are far from absolute: they directly affect individual rights and the fragmentation of national legal orders can also represent a stumbling block to their completion.[31] Mutual recognition and mutual con-

[26] Court of Justice, opinion 2/13 of 18 December 2014, para. 168.

[27] Mutual recognition and mutual trust have been developed in the context of the internal market, but they play a pivotal role in policy areas where the Member States resist further harmonisation: V. Mitsilegas, *The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice*, in *New Journal of European Criminal Law*, 2015, p. 460 *et seq.*

[28] K. Lenaerts, *The principle of mutual recognition in the Area of freedom, security and justice*, in *Il diritto dell'Unione europea*, 2015, p. 525 *et seq.*

[29] V. Mitsilegas, *Mutual recognition, mutual trust and fundamental rights after Lisbon*, in V. Mitsilegas, M. Bergström, T. Konstadinides (eds), *Research Handbook on European Criminal Law*, cit., p. 149.

[30] They also create extra-territoriality, enabling a judicial decision to deploy its effects beyond national legal borders, within the borderless EU judicial area: K. Nicolaidis, *Trusting the poles? Constructing Europe through mutual recognition*, in *Journal of European Public Policy*, 2007, p. 682.

[31] For a critical appraisal, M. Spreeuw, *Do as I say, not as I do. The application of mutual recognition and mutual trust*, in *Croatian Yearbook of European Law and Policy*, 2012, p. 505 *et seq.* From a substantive point of view, it is common ground that the Council Framework Decision on the EAW tries to overcome these blocks by abolishing the double criminality requirement for certain serious crimes numbered in Art. 2, para. 2. The EU legislature followed a similar approach in the other Framework Decisions and Directives adopted in this domain. The fragmentation of national procedural laws has led in many cases the EU legislator to allow the executing authority to adjust the request for judicial cooperation to the specific features of its legal order. See for instance Art. 8, para. 1, of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, in light of which "the executing State may decide to reduce the amount of the penalty enforced to the maximum amount provided for acts of the same kind under the national law", if the acts under consideration fall under its jurisdiction.

fidence are consequently set on a collision course with other general principles, fundamental rights above all.[32]

The EU legislator and the Court have tried to prevent collisions, or at least limit their effects. With regard to the EAW, the CJEU has repeatedly underlined that the procedure of surrender represents a complete departure from the multilateral system of extradition, where the decision to provide judicial assistance is often based on the principle of opportuneness and exceeds the purely legal sphere.[33] In order to facilitate and accelerate judicial cooperation, therefore, the EU has comprehensively regulated the subject, identifying the grounds for refusal of cooperation that national authorities are allowed to invoke.[34]

This leads to a major consequence: execution can be refused or conditioned only in light of the provisions of the relevant Framework Decisions or Directives, which provide an exhaustive list of specific grounds for refusal. Such limits to cooperation mechanisms are usually optional,[35] with the sole exception of the Framework Decision 2002/584 that also provides for compulsory grounds.[36] Conversely, national authorities are not entitled to reject a cooperation request on the basis of new or additional reasons, since they would hamper judicial cooperation and foster mutual distrust.

The predetermination *ope legis* of the grounds for refusal has raised extensive debate among practitioners and scholars.[37] Despite ensuring the effectiveness of the surrender procedure, it deprives the system of flexibility and in principle does not allow national judicial authorities to take into due consideration different expectations of protection.[38]

[32] L. MARIN, *The European arrest warrant and domestic legal orders. Tensions between mutual recognition and fundamental rights: the Italian cas*e, in *Maastricht Journal of European and Comparative Law*, 2008, p. 473. On the more recent debated questions: V. MITSILEGAS, *Mutual recognition, mutual trust and fundamental rights after Lisbon*, in V. MITSILEGAS, M. BERGSTRÖM, T. KONSTADINIDES (eds), *Research Handbook on European Criminal Law*, cit., p. 148 *et seq.*

[33] See, for instance, Court of Justice, judgment of 17 July 2008, case C-66/08, *Kozlowski*, para. 31.

[34] Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni*, para. 44. On the rationale and scope of application of the various grounds for refusal usually listed in EU secondary law concerning judicial cooperation in criminal matters see A. SUOMINEN, *The principle of mutual recognition in cooperation in criminal matters. A study of the principle in four Framework Decisions and in the implementation legislation in the Nordic Member States*, Cambridge: Intersentia, 2011, p. 281 *et seq.*

[35] The Court clarified that the optional nature of these clauses does refer to the implementation of EU law and therefore does not allow national legislators to decide whether to transpose them or not. Instead, it is for the executing judicial authority to decide on their application, on the basis of an individual assessment. See for instance Court of Justice, judgment of 21 October 2010, case C-306/09, *B.*, para. 52.

[36] Art. 3, of Council Framework Decision 2002/584, cit.

[37] In general, see M. MÖSTL, *Preconditions and limits of mutual recognition*, in *Common Market Law Review*, 2010, p. 405; S. MONTALDO, *I limiti della cooperazione in materia penale nell'Unione europea*, Napoli: Editoriale Scientifica, 2015, pp. 334-429.

[38] Scholars have highlighted a shift of approach, from an overreliance on the vague concept of mutual trust to the increasing role of the effectiveness paradigm: E. HERLIN-KARNELL, *From mutual trust to full effectiveness of EU law: the years of the European arrest warrant*, in *European Law Review*, 2013, p. 79 *et seq.*

In this way, on the one hand, the absence of a *de minimis* threshold has led to serious concerns about respecting the principle of proportionality. In fact, national authorities have sometimes issued EAWs in relation to petty offences, such as the case of some stolen cauliflowers.[39] This use of a complex, time-consuming and costly procedure has been harshly criticised,[40] also in light of its consequences on the requested person.[41] However, it is formally correct, since no provisions of the Framework Decision impose a proportionality assessment by either the issuing or executing authorities.

In response to this trend, given the failure of the attempts to amend the existing rules and the signals sent by national legislators and courts,[42] the Commission urged a *de facto* preliminary scrutiny by the issuing authorities and the Council accordingly modified the EAW Handbook.[43] Consequently, infringement of the principle of proportionality is not grounds for refusing surrender, but represents an indirect limit to judicial cooperation all the same. It is a precondition that has to be fulfilled and that the issuing authority has to verify on the basis of the seriousness of the offence and the consequences it causes.[44]

The new trend was codified by Directive 2014/41/EU on the European Investigation Order (EIO). Art. 6, para. 1, let. a), that binds the issuing authority to issue an EIO only in

[39] See for instance the Report from the Commission to the European Parliament and the Council COM(2011) 175 final of 11 April 2011 on the implementation since 2007 of the Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.

[40] K. SUGMAN, P. GORKIC, *Abuse of the European arrest warrant system*, in N. KEJIZER, E. VAN SLIEDREGT (eds), *The European arrest warrant in practice*, Amsterdam: Springer, 2009, p. 245. See also L. MARIN, *Effectiveness at any price? The European arrest warrant 10 years after*, in *New Journal of European Criminal Law*, 2014, p. 326, who defines this trend as a trivialisation of the system.

[41] Albeit falling under the scope of application of the EAW Framework Decision, certain offences are not serious enough to justify the requested person's preventive detention for the purposes of surrender: D. HELENIUS, *Mutual recognition in criminal matters and the principle of proportionality: effective proportionality or proportionate effectiveness?*, in *New Journal of European Criminal Law*, 2014, p. 359.

[42] The Art. 21, para. 2, of the United Kingdom Extradition Act of 2003, lists proportionality among the grounds for refusal, on the basis of three elements: the seriousness of the conduct, the likely penalty that would be imposed and the possibility for the foreign authority to take less coercive measures. Such approach is not shared by the UK Supreme Court, judgment of 30 May 2012, *Assange v. The Swedish Prosecution Authority*. As to other national courts, see for instance Italian Court of Cassation, judgment of 22 May 2013, no. 21988, refusing surrender with regard to the theft of some chickens.

[43] Council Conclusions of 28 May 2010 on follow-up to the recommendations in the final Report on the fourth round of mutual evaluations concerning the European arrest warrant and surrender procedures among the Member States of the EU. For critical remarks: L. MARIN, *Effectiveness at any price?*, cit., p. 327.

[44] The proportionality assessment by the issuing authority applies *de facto* in national legal orders. However, it has been also included in certain national laws implementing the Framework Decision 2002/584. Art. 607, let. b), of the Polish code of criminal procedure, for instance, prevents national authorities from issuing an EAW if it is not required in the interest of the administration of justice.

the event it is necessary and proportionate for the purposes of the proceedings at stake and taking into account the rights of the suspected or accused person.[45]

On the other hand, similar arguments have been raised with regard to limiting the golden rule "recognise and execute" in light of the protection of fundamental rights, which is not included among the grounds for refusal either. This further critical aspect has been recently dealt with also by the CJEU and will be analysed in the following paragraphs.

IV. Meteor approaching! Fundamental rights and the European arrest warrant

Framework Decision 2002/584 makes some general references to the obligation to protect fundamental rights. The twelfth recital states that the act under consideration respects the rights recognised by Art. 6 TEU, and reflected by the Charter.[46] Consequently, in light of Art. 1, para. 3, the Framework Decision "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Art. 6 TEU". In this vein, the twelfth and the thirteenth recitals clarify that the provisions on the EAW should be interpreted so as to prohibit surrender in case the person involved risks becoming subject to the death penalty, torture or inhuman and degrading treatment. Accordingly, judicial cooperation should be limited if prosecution or punishment are grounded on the requested person's sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation.[47]

However, Arts 3, 4 and 4 *bis* of Framework Decision 2002/584 do not include fundamental rights concerns among the grounds for refusal of surrender.[48] As mentioned

[45] European Parliament and Council Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters. At the same time, the Directive 2014/42/EU on freezing and confiscation of instrumentalities and proceeds of crime, which was adopted on the same day, merely refers to proportionality in the seventeenth recital, taking the value of instrumentalities as the reference point for the case-by-case test (European Parliament and Council Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union).

[46] The EU legislator usually includes in preambles a clause stating that fundamental rights and the principles recognised by Art. 6 TEU are fully respected. However, scholars warn about the potential effects of such recurring recital. In fact, it could trigger an *in abstracto* presumption of conformity of the relevant secondary law with fundamental rights: F. Bestagno, *I rapporti tra la Carta e le fonti secondarie di diritto dell'UE nella giurisprudenza della Corte di giustizia*, in *Diritti umani e diritto internazionale*, 2015, pp. 272-273.

[47] Recitals are important terms of reference for the proper interpretation of secondary law, as they state reasons for the adoption of an act and clarify its objectives. Despite being devoid of autonomous legal value, they can be used to determine the nature of a provision and to consequently orient its interpretation: T. Klimas, J. Vaiciukaite, *The law of recitals in European Community legislation*, in *ILSA Journal of International and Comparative Law*, 2008, p. 61 *et seq.*

[48] This choice has been criticised, due to the risk of a violation of the rights enshrined in the European Convention on Human Rights: S. Alegre, M. Leaf, *Mutual recognition in European judicial co-operation: a*

above, the list of those grounds is in principle exhaustive and the Court usually interprets it narrowly.[49]

The sole consequences attached to the risk of a violation of the Charter refer to exceptional situations. On the one hand, under Art. 23, para. 4, surrender can (exceptionally) be postponed "for serious humanitarian reasons", for example if there are substantial grounds for believing that it would clearly endanger the requested person's life or health. On the other hand, the tenth recital emphasises that the whole mechanism of the EAW may be suspended (exceptionally) only in the event of a serious and persistent breach of the principles set out in Art. 2 TEU, determined by the Council pursuant to Art. 7, para. 2, TEU.[50]

The absence of a specific and binding fundamental rights clause has led some commentators to consider that "hardly any fundamental guarantees of the accused person are ensured in this Framework Decision".[51]

This critical remark does not take into due account the overall legal framework of EU judicial cooperation mechanism in criminal matters, but it highlights a general gap of European secondary law in this domain. In fact, the wording of the Framework Decision reflects the general approach of the EU legislator.[52] None of the acts adopted in this domain formally qualifies the protection of fundamental rights as a reason to reject a request for cooperation, with the sole exception of the EIO Directive. Pursuant to Art. 11 of this Directive, an optional grounds for non recognition or non execution applies where there are substantial grounds to believe that the execution of the investigative

step too far too soon? Case study: the European Arrest Warrant, in *European Law Journal*, 2004, p. 200 *et seq.* It has to be underlined that some Member States decided to include a specific human rights protection ground for refusal in their national laws implementing the Framework Decision 2002/584: L. KLIMEK, *European Arrest Warrant*, Berlin: Springer, 2015, pp. 214-216.

[49] The Court has consistently clarified that the national legislature is entitled to limit the scope of application of the optional grounds for refusal, thereby facilitating surrender: Court of Justice, judgment of 6 October 2009, case C-123/08, *Wolzenburg*. See S. MONTALDO, *Mandato d'arresto europeo, principio del reciproco riconoscimento e diritti del condannato*, in *Diritti umani e diritto internazionale*, 2013, p. 226 *et seq.*

[50] This limit to judicial cooperation is in any case dependent upon the outcomes of the political remedy under Art. 7 TEU, whose effectiveness is a matter of debate, in light of the recent practice of the EU institutions: N. LAZZERINI, *Less is more? Qualche rilievo sulla legittimità e il merito delle recenti iniziative delle istituzioni europee in materia di salvaguardia dei valori fondanti dell'Unione*, in *Rivista di diritto internazionale*, 2016, p. 514 *et seq.* See also E. CIMIOTTA, *La prima volta per la procedura di controllo sul rispetto dei valori dell'Unione prevista dall'art. 7 TUE? Alcune implicazioni per l'integrazione europea*, in *European Papers*, 2016, www.europeanpapers.eu, p. 1253 *et seq.*

[51] N.M. SCHALLMOSER, *The European arrest warrant and fundamental rights*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2014, p. 135.

[52] A gap that national legislators have often tried to fill, by including fundamental rights concerns in domestic implementing measures. For a general overview of the situation at national level: G. VAN TIGGELEN, A. WEYEMBERG, L. SURANO (eds), *The future of mutual recognition in criminal matters*, Bruxelles: Éditions de l'Université de Bruxelles, 2009.

measure would be incompatible "with the State's obligations under Art. 6 TEU and the Charter".[53]

The almost absolute lack of grounds for refusal is coupled by the systemic implications of the principle of mutual confidence between Member States. In fact, according to the Court, mutual trust requires "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".[54]

Of course, EU institutions are subject to review regarding their conformity with Treaties and general principles of law, just like the Member States when they implement the law of the Union.[55] The wording of the Framework Decision confirms that any decision relating to the EAW is attended by all appropriate guarantees resulting from fundamental rights and fundamental legal principles referred to by Art. 1, para. 3.[56]

[53] This wording may prospect a future new trend by the EU legislator, but such legislative choice has not been repeated in other recent secondary acts. Another partial exception can be found in Art. 20, para. 3, of the Framework Decision 2005/214/JHA on the mutual recognition of financial penalties, whose field of application, however, has been considered too limited to ensure an effective scrutiny on the respect of fundamental rights: S. PEERS, *EU Justice and Home Affairs Law*, Oxford: Oxford University Press, 2012, p. 725. Other limited exceptions refer to the need to ensure a smooth functioning of the cooperation mechanism despite the fragmentation of national procedural laws. For instance, see Art. 9, para. 2, of the European Parliament and Council Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters: "The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State". Where no common provisions apply, the executing authority is entitled to derogate from the formalities required by the issuing one only in exceptional situations.

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

[55] Court of Justice, judgment of 3 May 2007, case C-303/05, *Advocaten voor de Wereld*, para. 45. On the post-Lisbon approach of the Court to the review of legality of EU secondary law, D. SARMIENTO, *Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe*, in *Common Market Law Review*, 2013, p. 1267 *et seq.*; F. BESTAGNO, *I rapporti fra la Carta e le fonti secondarie*, cit., p. 259 *et seq.* From this point of view, two sources of potential limits to mutual trust and mutual recognition have been identified. Firstly, vertical limits, concerning EU and national legislators' activities. Both are bound by the Charter while adopting EU secondary legislation and the subsequent implementing measures. Secondly, and more remarkably, these general principles can be limited horizontally, on a case by case basis, in the event the Charter is breached or could be breached because of the completion of a judicial cooperation mechanism: K. LENAERTS, J.A. GUTIÉRREZ FONS, *The European Court of Justice and fundamental rights in the field of criminal law*, in V. MITSILEGAS, M. BERGSTRÖM, T. KONSTADINIDES (eds), *Research Handbook on European criminal law*, cit., p. 15.

[56] Court of Justice, judgment of 10 November 2016, case C-477/16 PPU, *Kovalkovas*, para. 37. According to the Court, the protection of fundamental rights implies that the entire surrender procedure must be carried out under judicial supervision. It follows that also the decision on issuing an EAW must be taken by a judicial authority. Moreover, the notion of judicial authority requires autonomous and uniform interpretation, which must take into account the text, context and objective of the Council Framework Decision: Court of Justice, judgment of 10 November 2016, case C-452/16 PPU, *Poltorak*, paras 32-39. See

However, so far, when confronted with the need to strike a balance between the protection of fundamental rights and the full effectiveness of EU law, the CJEU has manifested a clear favour for the latter.[57] *Melloni* emphasises that the exhaustive nature of the list of grounds for refusal prevents States from opposing judicial cooperation by invoking a higher standard of protection of an individual right than the level set by the Charter.[58] In such cases, more extensive protection equals to an undue restriction to the primacy of EU law and the effective functioning of judicial cooperation mechanisms.[59]

Also, in *Radu*, the Court considered that the executing judicial authorities could not refuse to give effect to an EAW on the grounds that the requested person had not been heard before that arrest warrant was issued. A similar situation does not feature among the grounds for non-execution and cannot be derived from the wording of Arts 47 and 48 of the Charter.[60] Instead, an obligation for the judicial authorities to hear the requested person before an EAW was issued would "inevitably lead to the failure of the very system of surrender".[61] This would undermine the "certain element of surprise" of the procedure, which is essential in order to stop the person concerned from taking flight, as a side effect of the freedom of movement.[62]

In the same vein, the Court acknowledged that the implementation of optional grounds for refusal at national level must comply with the principle of non-discrimination. It then found the restrictions respectively imposed by The Netherlands and Germany to the field of application of Art. 4, para. 6, of the Framework Decision 2002/584 to be proportionate and objectively justified, even if they introduced a differ-

also *Advocaten voor de Wereld*, cit., para. 53, for what concerns the principle of legality of criminal offences and penalties.

[57] E. Herlin-Karnell, *From mutual trust to the full effectiveness of EU law*, cit., pp. 86-87; S. Rodin, *Useful effect of the Framework decision on the European Arrest Warrant*, in *Il diritto dell'Unione europea*, 2016, p. 1 *et seq.* It has also been underlined that, by facilitating judicial cooperation, the full effectiveness of Area of freedom, security and justice measures does not undermine the effectiveness of national criminal law: K. Lenaerts, *The principle of mutual recognition*, cit., p. 526.

[58] *Melloni*, cit., para. 63. According to AG Bot, the imposition of a common EU standard of protection is necessary in order to avoid forum shopping in the European judicial area: Opinion of AG Bot delivered on 2 October 2012, case C-399/11, *Melloni*, para. 103.

[59] The finding of the Court has been extensively commented, see for instance N. de Boer, *Addressing rights divergences under the Charter: Melloni*, in *Common Market Law Review*, 2013, p. 1083 *et seq.*; J. Vervaele, *The European arrest warrant and the applicable standards of fundamental rights in the EU*, in *Review of European Administrative Law*, 2013, p. 40 *et seq.*; V. Skouris, *Développements récents de la protection des droits fondamentaux dans l'Union européenne: les arrêts Melloni et Ackerberg Fransson*, in *Il diritto dell'Unione europea*, 2013, p. 229 *et seq.*; A. D'Aloia, *Europa e diritti: luci e ombre dello schema di protezione multilevel*, in *Il diritto dell'Unione europea*, 2014, p. 1 *et seq.*

[60] *Radu*, cit., para. 39.

[61] Ivi, para. 40.

[62] The risk of absconding and impunity plays an increasing role in the case-law of the Court of Justice: see also Court of Justice, judgment of 27 May 2014, case C-129/14 PPU, *Spasic*, paras 63-65.

ent regime for nationals and other EU citizens.[63] In fact, the CJEU affirmed that, by transposing Art. 4, para. 6, Member States are allowed to limit the situations in which the executing judicial authorities may refuse to surrender a person who falls within the scope of that provision,[64] thereby reinforcing the mechanism of cooperation in accordance with the principle of mutual recognition.[65]

This general approach has been critically appraised by legal scholars.[66] The Court has been considered evidently less concerned with protecting the fundamental rights of individuals granted by primary law than with safeguarding the intention of the governments, when they made secondary legislation.[67] Moreover, relying on the effectiveness of the mechanism would hamper more strategic objectives, such as strengthening the chances of the offenders' future rehabilitation, as an integral part of human dignity.[68]

[63] *Kozlowski* and *Wolzemburg*, cit. The case-law of the Court has raised extensive debate on the balance between the effectiveness of the system of surrender, citizenship rights and the protection of private and family life. Also, the execution of an EAW can have a remarkable impact on the chances of personal and social integration of the offender and therefore directly affects the resocialisation goal that criminal sanctions should pursue. S. PEERS, *The European Arrest Warrant: the dilemmas of mutual recognition, human rights and citizenship*, in A. ROSAS, E. LEVITS, Y. BOT, *The Court of Justice and the construction of Europe. Analyses and perspectives on sixty years of case-law – La Cour de Justice et la construction de l'Europe. Analyses et perspectives de soixante ans de jurisprudence*, Den Haag: Asser Press, 2013, p. 523 *et seq.*; S. MONTALDO, *Mandato d'arresto europeo*, cit.

[64] *Wolzemburg*, cit., paras 58 and 59.

[65] On the other hand, Art. 18 TFEU means EU countries cannot completely exempt visiting or resident citizens of other Member States from being subject to these grounds for refusal. Court of Justice, judgment of 5 September 2012, case C-42/11, *Lopes da Silva*. S. RIGHI, *Il caso Lopes da Silva Jorge: Il difficile equilibrio fra mandato d'arresto europeo e diritti fondamentali*, in *Il diritto dell'Unione europea*, 2013, p. 859 *et seq.*

[66] Of course, the Court's view has attracted also positive explanations. According to certain authors the standard set by the EU legislator by the means of secondary legislation is a matter of policy choice which needs to be compatible with the level ensured by the Charter; V. SKOURIS, *Développements récents*, cit., p. 241. It follows that, from a vertical perspective, the Court of Justice takes responsibility for the balancing between mutual recognition and fundamental rights, by examining whether the EU legislator "has placed too much weight on mutual recognition": K. LENAERTS, J.A. GUTIÉRREZ FONS, *The European Court of Justice and fundamental rights*, cit., p. 25.

[67] L. BESSELINK, *The parameters of constitutional conflict after Melloni*, in *European Law Review*, 2014, p. 551. See also V. MITSILEGAS, *Mutual recognition, mutual trust and fundamental rights*, cit., p. 160, according to whom the Court has "deified mutual trust".

[68] P. MENGOZZI, *La cooperazione giudiziaria europea e il principio fondamentale di tutela della dignità umana*, in *Studi sull'integrazione europea*, 2014, p. 225 *et seq.* Scholars have criticised also the adoption of a uniform approach to the prerogatives deriving from residence or stay in a host Member State. The limits to the scope of the optional grounds for refusal of surrender under Art. 4, para. 6, of Council Framework Decision 2002/584, cit., and the proportionality assessment on their compatibility with primary law are shaped on a similar reading of the limits to the access to social benefits in the internal market. See for instance in parallel *Wolzenburg*, cit., paras 63-74, and Court of Justice, judgment of 18 November 2008, case C-158/07, *Förster*. On such parallel, C. JANSSENS, *Case C-123/08, Dominic Wolzenburg, judgment of the Court (Grand Chamber) of 6 October 2009*, in *Common Market Law Review*, 2010, p. 831 *et seq.* Moreover, the case-law of the Court does not go into the need to protect the right to private and family life, which is in-

Other scholars have pointed out a lack of institutional empathy on the part of the Court of Justice.[69]

V. Set on a collision course: from *N.S.* to the recent case-law on fundamental rights and the execution of a European arrest warrant

V.1. Overcoming mutual trust in exceptional situations: *N.S.*

The Court left many questions unanswered and a collision was just a matter of time. Important signals came from AGs, pointing out that the interpretation of the Framework Decision 2002/584 in the light of fundamental rights "has become more imperative since the entry into force of the Charter".[70] More generally, Art. 1, para. 3, was described as a codification of a pre-existing duty to respect fundamental rights, which permeates the Framework Decision and the EU legal order as a whole.[71] The idea of a new fundamental rights-oriented approach to the wording of the Framework Decision and of judicial cooperation mechanisms in general was further supported by AG Mengozzi. In his view, Art. 1, para. 3, should be read in light of the pivotal role of human dignity, the cornerstone of the Charter, and should subsequently allow for limitations to the principle of mutual recognition.[72]

The need for a new balance between the opposite poles was also unveiled by the case-law on the relationship between secondary law and the Charter. In particular, in the well-known *N.S.* case,[73] the Court was confronted with the criteria set out by Regulation 343/2003 (Dublin II Regulation) to identify the State responsible for the examination of an asylum application.[74] The Regulation was deemed to create a categorical duty

stead taken into consideration in the judgments concerning the restriction of the freedom of movement on the grounds of public order and public security: Court of Justice, judgment of 23 November 2010, case C-145/09, *Tsakouridis*, para. 52.

[69] P. Martin Rodriguez, *Crónica de una muerte anunciada: comentario a la sentencia del Tribunal de Justicia (Gran Sala), de 26 de febrero dl 2013, Stefano Melloni*, in *Revista general de derecho europeo*, 2013, p. 34.

[70] Opinion of AG Cruz Villalòn delivered on 6 July 2010, case C-306/09, *I.B.*, para. 44.

[71] Opinion of AG Sharpston delivered on 18 October 2012, case C-396/11, *Radu*, paras 51 and 70.

[72] Opinion of AG Mengozzi delivered on 20 March 2012, case C-42/11, *Lopes da Silva*, para. 28: "Article 1(3) is at pain to remind us [...] that the protection of fundamental rights [...] must be the overriding concern of the national legislature when it transposes acts of the European Union, of the national judicial authorities when they avail themselves of the powers devolved to them by European Union law, but also of the Court when it receives questions on the interpretation of the provisions of Framework Decision 2002/584".

[73] Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S.* A comment from the point of view of mutual recognition and fundamental rights: M. Möstl, *Limit and preconditions*, cit., p. 409.

[74] Council Regulation 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national. This Regulation has been recently repealed by the European Par-

of cooperation upon the Member States, for the benefit of the effectiveness of the whole asylum system.[75] Art. 3, para. 2, of the Dublin II Regulation provided for a certain margin of discretion in favour of the receiving State. Nonetheless, it did not mention fundamental rights concerns as a possible trigger of its application.

In this context, the Court underlined that EU law precludes the application of a conclusive presumption that the Member State responsible for an asylum application observes the fundamental rights.[76] As a consequence, the Dublin II system could not be considered necessarily automatic. Instead, following the duty to interpret secondary law in light of the Charter, the national authorities are required to verify whether the country of destination ensures an appropriate level of protection of fundamental rights. In particular, they cannot transfer an asylum seeker to the formally competent Member State if systemic deficiencies in the asylum procedure and reception conditions therein amount to substantial grounds for believing that the person involved would face a real risk of being subjected to inhuman or degrading treatment.[77]

Therefore, the Court rejected the idea of a blind application of the criteria set out by Regulation 343/2003 to identify the State responsible for the examination of an asylum application.[78] In the event of a manifest and systemic violation of fundamental rights, the protection of the Charter outweighs the implementation of the mechanism for regulating the treatment of refugees and justifies a limit to inter-State cooperation.[79]

liament and Council Regulation 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (Dublin III).

[75] C. CONTARTESE, *The (rebuttable) presumption of the European Union Member States as 'safe countries' under the Dublin regulation*, in C. AKRIVOPOULOU, N. GARIPIDIS (eds), *Human rights and risks in the digital era: globalization and the effects of information technologies*, Hershey: IGI Global, 2012, p. 240 *et seq.*

[76] *N.S.* followed a judgment delivered by the European Court of Human Rights on the same subject: European Court of Human Rights, judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Greece and Belgium*. The Strasbourg Court, on that occasion, underlined for the first time that the presumption for respect of fundamental rights between Member States is rebuttable. See in particular paras 340 and 345.

[77] *N.S.*, cit., para. 94. In practice, the State where the asylum seeker has lodged the applications is then under the obligation to either consider whether another Member State can be identified as responsible for that application, in light of the criteria set out by Regulation 343/2003, or to examine the application itself.

[78] *N.S.*, cit., paras 99 and 100.

[79] The systemic deficiency threshold represents the translation of the findings of the European Court of Human Rights, judgment *M.S.S. v. Greece and Belgium*, cit., in the EU legal order. As far as the asylum system is concerned, this solution has been also codified in the Dublin III Regulation 604/2013. The reformed Art. 3, para. 2, states that "Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment [...], the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible".

Consequently, the relevant national authorities are under the obligation to set aside the obligation to cooperate imposed by a Regulation.[80] An obligation which is inherent to the EU legal order and which binds the Member States to react to serious violations committed in another member State, even in case they benefit from a certain margin of discretion.[81]

Then, by analogy, the question is whether and to what extent the Charter imposes the establishment of a new mandatory ground for non execution of an EAW, where mutual recognition of the foreign decision and surrender would lead to a manifest breach of fundamental rights.[82] In fact, an extensive reading of this judgment would require some adjustments and steps further. As pointed out in the previous paragraph, whereas the Dublin II Regulation left room to the Member States' competences, the Framework Decision 2002/584 provides a comprehensive and strict list of grounds for refusal of cooperation. Any addition to the exhaustive wording of the Framework Decision could then elude the will of the EU legislator.

V.2. Collision ahead! Mutual recognition, detention conditions and inhuman and degrading treatments

The Court was soon challenged with these questions in *Lanigan*. The case concerned the failure to respect the time-limits for the adoption of a decision on execution of an EAW, stipulated by Art. 17, of Framework Decision 2002/584. In its order for reference to the CJEU, the High Court of Ireland pointed out that the Irish procedural system was struc-

[80] P. Gragl, *The shortcomings of Dublin II: Strasbourg's M.S.S. judgment and its implications for the European Union's legal order*, in *European Yearbook of Human Rights*, 2012, p. 123.

[81] From this point of view, the Court of Justice draws inspiration from the case-law of the European Court of Human Rights. In particular, the *Soering* case has a specific relevance, since on that occasion the Strasbourg Court found that a Contracting Party can be held responsible for the violation of a fundamental right committed abroad, as long as it does not react to a serious risk of such violation and surrenders a fugitive to the requesting State. European Court of Human Rights, judgment of 7 July 1989, no. 14038/88, *Soering v. United Kingdom*. *N.S.* sharply differs from *Soering* as to the territorial limits to the jurisdiction of the Court. *Soering* focused on the execution of a request for extradition issued by US authorities in relation to a capital murder. Under Virginia law, the offence was punishable by death or life imprisonment. According to the Strasbourg Court, the serious risk of being subjected to death penalty amounted to a violation of Art. 3 of the European Convention on Human Rights.

[82] Several scholars have urged a positive answer to this question, claiming that Art. 1, para. 3, of the EAW Framework Decision allows for (at least) such interpretation. See for instance T.P. Marguery, *The protection of fundamental rights*, cit.; F. Billing, *The parallel between non-removal of asylum seekers and non-execution of a European arrest warrant on human rights grounds: the CJEU case of N.S. v. Secretary of State for the Home Department*, in *European Criminal Law Review*, 2012, p. 77 *et seq.*; C. Amalfitano, *Mandato d'arresto europeo: reciproco riconoscimento vs diritti fondamentali?*, in *Diritto penale contemporaneo*, 4 luglio 2013, www.penalecontemporaneo.it; V. Mitsilegas, *The symbiotic relationship*, cit., p. 460 *et seq.* The latter author, in particular, urges a more ambitious reading of the implications of *N.S.*, which should be extended to the assessment of individual situations. On this point see the next concluding paragraphs.

turally unable to function within those time-limits, thereby reporting a generalised deficiency of the national legal order. The referring Court then asked whether such a situation could prevent the holding of the requested person in custody and eventually neutralise the duty to execute the EAW, in light of Art. 6 of the Charter.

On one hand, the Court acknowledged that mutual recognition is not absolute and that the presumption that all Member States respect fundamental rights is not conclusive. On the other hand, it considered that a suspect's maintenance in custody is precluded only insofar as the duration of the procedure is excessive in relation to the case's characteristics and the procedure itself has been carried out in a sufficiently diligent manner. However, the duty to execute the EAW persists.[83] If the national authority decides to bring the requested person's custody to an end, it is consequently required to attach any measures it deems necessary to the provisional release so as to prevent him from absconding and to ensure that the material conditions for his effective surrender remain fulfilled for as long as no final decision on the execution has been taken.[84] The Court's findings set a clear dividing line between the standards for the management of the execution procedure and its outcomes. On the one hand, fundamental rights significantly influence the management of the execution procedure, which is attended by all guarantees appropriate for it.[85] On the other hand they do not limit the full effectiveness of the surrender system, even in the event of a self-admitted systemic deficiency of the Irish legal order.

The inheritance of *N.S.* for the EU legal order was once again debated in the joined cases *Aranyosi and Căldăraru*, where the Bremen's court of appeal was asked to execute two arrest warrants, respectively issued by a Romanian district court and a Hungarian first instance court. The referring court raised serious concerns about the risk of a violation of the prohibition of inhuman and degrading treatment, due to the chronic and generalised deficiencies of the prison systems in the issuing Member States.

The national court's findings, in particular, were confirmed by several judgments of the European Court of Human Rights and by a report issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

[83] *Lanigan*, cit., paras 37 and 40.

[84] Ivi, paras 59 and 63.

[85] From this point of view, both the issuing and the executing authorities are bound by the duty to respect fundamental rights in any aspect of their activity. This approach reflects the Court's case-law on the notion of judicial authority. Only judicial authorities capable of ensuring adequate procedural guarantees are entitled to issue or execute an European arrest warrant or other requests for judicial cooperation. Court of Justice, judgment of 30 May 2013, case C-168/13 PPU, *F.*, para. 45; *Poltorak*, cit., para. 39. The Court has also clarified that even a confirmation by a public prosecutor's office of a national arrest warrant issued previously by a police service in connection with criminal proceedings constitutes a judicial decision under the aims of the Council Framework Decision 2002/584, cit., since it ensures an appropriate scrutiny on the decision at stake: Court of Justice, judgment of 10 November 2016, case C-453/16 PPU, *Özçelik*, paras 30, 34 and 38.

Indeed, in light of the case-law of the European Court of Human Rights,[86] Art. 3 of the European Convention on Human Rights, which corresponds *in toto* to Art. 4 of the Charter,[87] implies the positive obligation to ensure that detention conditions respect human dignity and prisoners' health and well-being. Detention must not cause distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in it.[88] As a consequence, the German court urged the CJEU to find a way out of the golden rule "recognise and execute", also in view of the fact that the prohibition stipulated in Art. 4 of the Charter is absolute and closely related to human dignity, a founding pillar of the European legal order.

In this context, building on its opinion 2/13 on the draft accession agreement of the EU to the European Convention on Human Rights,[89] the CJEU confirmed that, as a rule, the Member States are prevented from checking whether another Member State "has actually, in a specific case, observed the fundamental rights guaranteed by the EU".[90] Yet, mutual recognition and mutual trust are not absolute: the presumption concerning the appropriate level of protection of fundamental rights can be rebutted, albeit only in exceptional circumstances.[91] The question then arises as to the meaning and practical implications of such extreme situations.

In order to verify whether *in concreto* the protection of fundamental rights should prevail over the effective functioning of the system of surrender, the executing judicial authority has to make a two-step assessment. Firstly, the relevant national authority must rely on "objective, specific, reliable and properly updated" information on the existence of deficiencies in detention conditions in the issuing Member State.[92] Such deficiencies "may be systemic or generalised" and may affect certain groups of people or specific places of detention.[93]

Secondly, and additionally, the executing authority is required to make a further and more detailed analysis. Building on the detection of general deficiencies, it has to

[86] See for instance European Court of Human Rights, judgment of 10 June 2014, no. 22015/10, *Voicu v. Romania*; European Court of Human Rights, judgment of 10 March 2015, no. 14097/12, *Varga v. Hungary*.

[87] See the explanations on Art. 4, attached to the Charter. In both systems, these are considered absolute rights, which cannot be derogated.

[88] European Court of Human Rights, judgment of 8 January 2013, nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, 37818/10, *Torreggiani et al. v. Italy*. On the subject, G. DELLA MORTE, *La situazione carceraria italiana viola "strutturalmente" gli standard sui diritti umani (a margine della sentenza Torreggiani c. Italia)*, in *Diritti umani e diritto internazionale*, 2013, p. 147 *et seq.*; on the consequences of the case-law of the European Court of Human Rights: S. FOSTER, *The effective supervision of European prison conditions*, in F. IPPOLITO, S. IGLESIAS SÁNCHEZ (eds), *Protecting vulnerable groups. The European human rights framework*, Cheltenham: Hart Publishing, 2015, p. 381 *et seq.*

[89] Opinion 2/13, cit., para. 192.

[90] Ivi, para.191.

[91] *Aranyosi and Căldăraru*, cit., para. 82.

[92] Ivi, para. 89.

[93] Ivi, para. 93.

verify whether there are substantial grounds to consider that the person requested will actually be exposed to the risk of a violation of Art. 4 of the Charter.[94]

At this stage, the executing authority has, in principle, two alternatives. If the information collected is precise and reliable enough to discount the risk of inhuman and degrading treatment, a decision on execution must be timely adopted. However, if a real risk is identified, "the execution of that warrant must be postponed but it cannot be abandoned".[95] Here the CJEU quoted its findings in *Lanigan* and, rather than qualifying the protection of fundamental rights as grounds for refusal of execution, it confirmed a manifest preference for a delayed surrender.[96]

So, what if the real risk of a violation persists, despite postponing execution? In that case, after a reasonable time, the surrender procedure can be brought to an end, as a last resort, since the requested person cannot suffer inhuman and degrading treatment because of the execution of a warrant. Nonetheless, it is highly suggestive that this very last and neglected third alternative laconically appeared in the final line of the judgment. The CJEU did not even take it into consideration in its legal arguments, which are instead entirely focused on the need to preserve the functioning of the EAW system.

In general terms, departing from its effectiveness-centered precedents,[97] the Court tried to avoid mutual recognition, mutual trust and the protection of fundamental rights locking swords. The attempt to reconcile the meteors set on a collision course will need further clarifications at both legislative and judicial levels. Yet such long-awaited revised balance has two major consequences. The evolution of the *N.S.* case-law will have several implications for judicial cooperation in criminal matters as a whole, in terms of increased empowerment of the issuing and executing authorities. Moreover, it represents an important stress-test on the state of the art of fundamental rights protection in the EU. Both the practical and structural future perspectives will be addressed in the following concluding remarks.

[94] In particular, to this purpose, the executing authority can ask for supplementary information from the issuing authority, pursuant to Art. 15, para. 2, of Council Framework Decision 2002/584, cit., or even rely on any other information available. See *infra*, section VI.4.

[95] *Aranyosi and Căldăraru*, cit., para. 98.

[96] In case execution is postponed, the executing authority must inform Eurojust, pursuant to Art. 17, para. 7, of Council Framework Decision 2002/584, cit. Another aspect related to the postponement of execution is the maintenance of the requested person in custody. In line with *Lanigan*, the Court underlined that detention can be maintained only if the executing authority coped with the EAW in a sufficiently diligent manner and the duration of the deprivation of freedom is proportionate to the circumstances of the case. In case of a warrant issued for prosecution purposes, the executing authority must take into account the presumption of innocence, guaranteed by Art. 48 of the Charter: *Lanigan*, cit., paras 58-60; *Aranyosi and Căldăraru*, cit., para. 100.

[97] See *supra*, section IV.

VI. Towards a post-collision order? Practical implications of the revised balance between mutual recognition, mutual trust and fundamental rights protection

VI.1. A new ground for postponing (and, as a last resort, abandoning) execution

The Court acknowledged that mutual recognition and fundamental rights have to be weighed against each other. On the one hand, mutual recognition is not absolute, but it can be set aside only in exceptional circumstances. On the other hand, the Court refused to qualify a (risk of) violation of the Charter as compulsory grounds for non-execution of an EAW. Instead, building on Art. 1, para. 3, of Framework Decision 2002/584, it opted for an *ex novo* mandatory ground for postponement of execution, which leaves the door open to the surrender of the requested person.

At the same time, the Court's overall legal reasoning and the last words of the judgment made clear that the Charter does places a *de facto* limit to the golden rule "recognise and execute". Since the implementation of the EAW mechanism, and of EU secondary law in general, cannot lead to a manifest violation of a fundamental right, the Charter, as a last resort, can impose the abandonment of the surrender procedure.

This is not a matter of mere formalities or definitions. First, as already underlined, while accepting the existence of additional and general limits to the full effectiveness of judicial cooperation mechanisms, the Court revises the balance it struck in its precedents, in favour of increased attention to fundamental rights. Second, the new mandatory ground for postponement/abandonment does not share the legal regime of the grounds for non-execution provided by secondary law, which remain an autonomous and exhaustive legal category. Therefore, the impact of the findings of the Court on the EAW mechanism and on judicial cooperation in criminal matters in general is uncertain.

Caught between the need to preserve the effective implementation of EU law and the aspiration to strengthen its role as a fundamental rights guardian,[98] the Court of Justice draws an undefined dividing line between minor infringements and exceptional situations resulting in systemic flaws.[99] Such a demarcation engenders a range of potential blocks to the precise implementation of EU secondary law, which mainly depend on the interpretation of the exceptional situations threshold. Marking the boundaries of

[98] The role of the Court has been extensively discussed and the acquired primary legal value of the Charter has further amplified the quest for a true EU human rights adjudicator. See for instance J.H.H. Weiler, N. Lockhart, *"Taking rights seriously" seriously: the European Court and its fundamental rights jurisprudence*, in *Common Market Law Review*, 1995, p. 51 *et seq.*; G. de Búrca, *After the EU Charter of fundamental rights: the Court of Justice as a human rights adjudicator?*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 168 *et seq.*

[99] In *N.S.*, cit., paras 82, 84 and 85, the Court respectively referred to "any infringement", "slightest infringement" and "minor infringements" of fundamental rights.

such notion implies a three-limbs assessment: a quantitative appraisal on the presence of a systemic flaw; a qualitative evaluation of the rights at stake; a reliability test on available information concerning the Member State's failure to respect the EU level of protection of a fundamental right. Each of these parameters needs further clarifications.

VI.2. Systemic deficiencies, individual violations?

The Court links the new mandatory ground for postponement/abandonment to the demonstration of deficiencies, "which may be systemic or generalised".[100] At first sight, it seems to resort by analogy to the approach adopted in *N.S.*, according to which only serious and widespread situations can result in a duty to identify a new Member State responsible for an asylum application.[101]

In the AG Bot's view, the *N.S.* formula doesn't suit cooperation in criminal matters perfectly. Even if the situation giving rise to judgments under consideration is theoretically comparable to *N.S.* regarding the presence of a systemic flaw, such a background is a mere *occasio* that does not allow for analogy. In fact, the two domains at stake sharply differ as to form, objectives and substance of EU intervention. Asylum law is fully harmonised at European level, while in criminal matters the European Union can only adopt minimum harmonisation measures. The common European asylum system aims at providing a safe harbour for those who flee from persecution; judicial cooperation in criminal matters, and the EAW in particular, is intended to strengthen prosecution and punishment of criminal conduct throughout Europe, avoiding the risk of absconding and the creation of refuge States for offenders.[102]

In theory, these arguments touch on the core elements of the EAW, but a more ambitious reading of the judgment would be advisable. The scene set by the Court leaves room for greater importance of fundamental rights concerns, irrespectively of their systemic or individual nature.

This view is supported first of all by the legal reasoning of the Court itself. The general premise of the Court is that the enforcement of the EAW cannot lead to a violation

[100] *Aranyosi and Căldăraru*, cit., para. 104.

[101] *N.S.*, cit.

[102] In the aftermath of the *N.S.* judgment it was underlined also that the findings of the Court would not have provided incentives to improve asylum seekers' reception conditions in Greece. That Member State could instead benefit from the new general limit to the ordinary functioning of the asylum system, spilling over immigration flows into the other Member States. I. Canor, *My brother's keeper? Horizontal Solange: "an ever closer distrust among the peoples of Europe"*, in *Common Market Law Review*, 2013, p. 407. A strengthened fundamental rights test would not deploy similar negative effects in the domain of judicial cooperation in criminal matters. The common interest to security in the EU judicial area is in fact a powerful engine towards the effectiveness of the system and, ultimately, the improvement of the protection of fundamental rights at national level.

of fundamental rights and such statement would hardly fit with a distinction between generalised deficiencies and specific failures to comply with the Charter. Therefore, the CJEU urges the executing authorities to refuse the surrender even when the risk of inhuman and degrading treatment may affect "certain groups of people" or "certain places of detention".[103] Moreover, the Court does not require that a certain number of people be affected. Instead, it focuses its attention on the assessment of a real risk for the individual concerned. The overall situation of the prison system can be a signal or even a premise for further investigation, but *de facto* the executing authority needs to receive reassurance regarding the detention conditions the requested person will undergo.

Then, the focal point is the substantial grounds for believing that, upon surrender, an individual will face a real risk of being subject to inhuman or degrading treatment, irrespectively of the identification of confirmed systemic deficiency. Whether that real risk represents the individual materialisation of a generalised failure to comply with fundamental rights or not, its substance doesn't change. If individual situations were excluded from the implications of Art. 1, para. 3, of the Framework Decision, EU law would ratify, if not urge, the violation of a fundamental right.

This conclusion is confirmed by the case-law of the European Court of Human Rights following *M.S.S. v. Greece and Belgium*. In *Tarakhel v. Switzerland*,[104] the Strasbourg Court went a step further and clarified that effective protection of fundamental rights requires an assessment of the impact of a State's conduct on the individual concerned. In particular, the protection of fundamental rights in a specific situation prevails over an obligation of inter-State cooperation even in the event a generalised deficiency in the Member State involved has not been ascertained.[105] An individualised case-by-case assessment cannot therefore be set aside "in the name of uncritical presumed mutual trust".[106] Any diverging reading would amount to opening the door to a lower protection than the level ensured within the system of the European Convention on Human Rights.[107]

Another convincing argument derives from the case-law of the Court of Justice. In *Lanigan*, the Court highlighted that the holding of the requested person for a period exceeding the time necessary to execute an EAW is compatible with Art. 6 of the Charter

[103] *Aranyosi and Căldăraru*, cit., paras 89 and 104.

[104] European Court of Human Rights, judgment of 4 November 2014, no. 29217/12, *Tarakhel v. Switzerland*.

[105] At para. 115, the Strasbourg Court underlined that "[w]hile the structure and overall situation of the reception arrangements in Italy cannot [...] in themselves act as a bar to all removals of asylum seekers", the risk that a number of asylum seekers may be left without accommodation or accommodated in overcrowded facilities, or even in insalubrious or violent conditions, "cannot be dismissed as unfounded".

[106] V. Mitsilegas, *Mutual recognition, mutual trust and fundamental rights*, cit., p. 160.

[107] The risk of diverging standards of protection is pointed out by D. Halberstam, *It's the autonomy, stupid! A modest defense of opinion 2/13 on EU accession to the ECHR, and the way forward*, in *German Law Journal*, 2015, p. 105 *et seq.*

only insofar as the whole procedure has been carried out with due diligence.[108] The appropriate conduct of any procedural phase of the EAW mechanism is in fact a minimum denominator common to both the issuing and the executing authorities. In its preliminary ruling in *Kossowski*, the Court has recently clarified that a plain lack of diligence on the part of the issuing authority should in principle bar mutual recognition and mutual trust.[109] In particular, the *ne bis in idem* principle does not apply to out-of-court decisions dismissing criminal proceedings on the grounds of insufficient evidence, "when it is clear from the statement of reasons for that decision that the procedure was closed without a detailed investigation having been carried out".[110] Consequently, a national authority is entitled not to recognise a foreign decision evidently failing to fulfil a minimum level of diligence, which amounts to a necessary precondition of mutual trust. This finding has important implications because of two main reasons.

Firstly, the Court of Justice confirms that judicial cooperation should be limited only in extreme cases. In *Kossowski*, the exceptional block to mutual trust takes the form of a plain lack of a diligent investigation on the part of the issuing judicial authority. What is more, such a deficiency has to be evidently derived from the statement of reasons for the foreign decision. In fact, for the purposes of the *ne bis in idem*, the receiving national authority is in principle prevented from assessing the foreign authority's activity.[111]

Secondly, this general and exceptional limit to judicial cooperation is not dependent upon the ascertainment of a systemic deficiency in the issuing Member State. On the contrary, it includes even individual situations, in which a case-by-case assessment leads to consider that mutual trust is barred.

If an exceptional lack of diligence can block mutual recognition and mutual trust on an individual basis, *a fortiori* manifest infringements of fundamental rights should trigger a similar regime, irrespectively of their systemic or individualised nature. Therefore, the new mandatory ground for postponement/abandonment of execution should apply even when the executing judicial authority has gathered reliable evidence of a specific deficiency, resulting in a concrete risk of an individual failure to respect the Charter.

The confinement of the scope of application of the mandatory ground for postponement/abandonment of execution to exceptional situations could then be better read in relation to the seriousness of the violation of a fundamental right. In line with

[108] *Lanigan*, cit., para. 58. A similar approach is followed by the European Court of Human Rights in relation to the deprivation of freedom in the framework of an extradition procedure: European Court of Human Rights, judgment of 25 March 2015, no. 11620/07, *Gallardo Sanchez v. Italy*.

[109] Court of Justice, judgment of 29 June 2016, case C-486/14, *Kossowski*.

[110] *Kossowski*, cit., paras 53 and 54.

[111] A. WEYEMBERGH, *La jurisprudence de la CJ relative au principe ne bis in idem: une contribution essentielle à la reconnaissance mutuelle en matière pénale*, in A. ROSAS, E. LEVITS, Y. BOT (eds), *La Cour de Justice et la construction de l'Europe: analyses et perspectives de soixante ans de jurisprudence*, Den Haag: Asser Press, 2013, pp. 542-544. *Gözütok and Brügge*, cit., para. 33; Court of Justice, judgment of 28 September 2006, case C-467/04, *Gasparini*, para. 30.

the Court of Justice's approach in *Bosphorus*,[112] irrespectively of the number of infringements, a manifestly deficient protection to the detriment of an individual could *per se* justify a deviation from the obligation to cooperate. By analogy, the Court followed a similar approach in its case-law concerning the protection of the procedural public policy of the Member States in the domain of judicial cooperation in civil and commercial matters.[113] Accordingly, AG Sharpston, in *Radu*, suggested that the gravity of the violation of the rights of the accused, such as the right to be heard and the right to an effective remedy, is the key-criterion in order to refuse surrender: "The infringement in question must be such as fundamentally to destroy the fairness of the process".[114]

In conclusion, the systemic deficiencies referred to by the Court of Justice should be assessed on the basis of a "gravity test", with the purpose of ascertaining whether (the risk of) a manifest and serious violation of a fundamental right justifies placing a limit to mutual recognition and mutual trust.[115]

VI.3. Are certain rights more equal than others? The scope of application of the new ground for postponing/abandoning execution

The second tier of the assessment concerning the exceptional situations threshold regards a qualitative analysis of the rights whose violation could trigger the enforcement of the new ground for postponement/abandonment of execution.

So far, both in *N.S.* and *Aranyosi and Căldăraru*, the Court was confronted with a serious risk of violation of the prohibition of torture and inhuman and degrading treatment, under Art. 4 of the Charter. The Court took into account also human dignity, the overarching paradigm of the EU legal order enshrined in Art. 1 of the Charter.[116] Human dig-

[112] Court of Justice, judgment of 30 July 1996, case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret*, para. 20.

[113] Court of Justice, judgment of 28 March 2000, case C-7/98, *Krombach*, para. 37; Court of Justice, judgment of 2 April 2009, case C-394/07, *Gambazzi*, para. 27: "Recourse to a public policy clause can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order".

[114] Opinion of AG Sharpston, *Radu*, cit., para. 95.

[115] In relation to the *N.S.* case, it has been contended that the systemic flaws threshold upheld by the Court of Justice finds an additional explanation in the Court's intention to preserve the policy choices made by the EU legislator. From this point of view, slight or minor infringements of a fundamental right could not justify a deviation from EU secondary law which the EU legislature did not agree to. See I. Canor, *My brother's keeper*, cit., p. 404. The anchoring to the seriousness of the violation seems a good solution to preserve the functioning of the system from excessive judicial activism, while also respecting overarching duty to protect fundamental rights.

[116] Court of Justice, judgment of 14 October 2014, case C-36/02, *Omega*.

nity, the right to life and the prohibition of torture and inhuman and degrading treatments are considered absolute rights for the purposes of the EU legal order.[117] As such, they more easily justify a restriction to the effective application of EU secondary law. However, this is not suggestive *per se* of a boundary delimiting the scope of application of the new block to mutual recognition and mutual trust within the narrow area of absolute fundamental rights. The factual background of the cases required the EU secondary acts at stake to be interpreted in light of those specific provisions of the Charter.

On the contrary, the execution of a foreign judicial decision calls into question several non-absolute rights. While acknowledging that an internal hierarchy between fundamental rights rights is inherent to any complex legal order, AGs have on many occasions suggested that even the non-absolute provisions of the Charter deserve protection in the event of a confirmed deficiency and of a real risk of violation.[118] In *N.S.*, AG Trstenjak made no distinctions and expressed the view that the transfer of asylum seekers to a Member State where their rights would be seriously endangered was incompatible with the Charter.[119] The same AG confirmed and more comprehensively explained this approach in *K.*,[120] after the Court had already delivered its judgment in *N.S.*

In relation to judicial cooperation in criminal matters, AG Sharpston contended that the violation of Arts 6, 47 and 48 of the Charter could amount to limiting the execution of an EAW.[121] More recently, AG Bot affirmed that the application of the *ne bis in idem* principle cannot lead to the recognition of a foreign decision manifestly contrary to fundamental rights.[122] In particular, he found that the rights of the victim had been plainly infringed and therefore suggested the Court excluding the receiving authority's obligation to recognise the foreign judgment.[123]

For instance, fundamental rights concerns may be raised in the event an EAW was issued for the execution of a conviction based on statements from witnesses who could not be cross-examined, under the conditions set out by the Strasbourg Court in *Al Khawaya and Tahery v. United Kingdom*.[124] The right to defence and the right to an effective

[117] Court of Justice, judgment of 12 June 2003, case C-112/00, *Schmidberger*. See also A. TANCREDI, *L'emersione dei diritti fondamentali assoluti nella giurisprudenza comunitaria*, in *Rivista di diritto internazionale*, 2006, p. 644 *et seq.*

[118] The same view is expressed by M. BÖSE, *Human rights violations and mutual trust: recent case law on the European Arrest Warrant*, in S. RUGGERI (ed.), *Human rights in European criminal law. New developments in European legislation and case law after the Lisbon Treaty*, Berlin: Springer 2015, p. 139 *et seq.*

[119] Opinion of AG Trstenjak delivered on 22 September 2011, joined cases C-411/10 and C-493/10, *N.S.*, para. 116.

[120] Opinion of AG Trstenjak delivered on 27 June 2012, case C-245/11, *K.*, para. 65.

[121] Opinion of AG Sharpston, *Radu*, cit., paras 95 and 97.

[122] Opinion of AG Bot delivered on 15 December 2015, case C-486/14, *Kossowski*, paras 80-84.

[123] Ivi, para. 81: "It is manifest, in the main proceedings, that the rights of the victim have not been guaranteed, in particular the right to be heard, the right to information and the right to compensation".

[124] European Court of Human Rights, judgment of 15 December 2011, nos 26766/05 and 22228/06, *Al Khawaya and Tahery v. United Kingdom*.

remedy may give rise to turmoil as well.[125] Moreover, the CJEU's findings potentially open the way to further general boundaries to cooperation mechanisms, such as, as discussed above, a proportionality check, in light of the principle of proportionality of offences and penalties under Art. 49 of the Charter. Accordingly, in parallel with judicial cooperation in civil matters, public policy could be invoked as an additional and flexible clause in order to allow the executing State to respect fundamental rights.[126]

A restrictive reading of the Luxembourg case-law would therefore deprive the reconciliation process developed by the Court of substance and the protection guaranteed by the Charter of its effectiveness. The focal point should then be, once again, the demonstration of the gravity of the violation of a right enshrined in the Charter, irrespectively of its absolute nature and in light of the consequences on the individuals concerned.[127]

This approach is even more important because of the general implications of the case-law of the Court of Justice, that must be framed within the whole context of judicial cooperation in criminal matters. The EU *acquis* on the implementation of mutual recognition covers a wide range of national judicial decisions, which likewise require a reconciliation between full effectiveness of judicial cooperation and the protection of fundamental rights.[128]

VI.4. Objective, reliable, specific and properly updated information: demonstrating the serious risk of a violation of a fundamental right

The last constitutive element of the concept of exceptional situation calls into question a reliability test on available information concerning the Member State's failure to respect the EU level of protection of a fundamental right.

[125] See for instance Court of Justice, judgment of 4 June 2013, case C-300/11, *ZZ*, on the right to information concerning the grounds of a sentence, in the event the disclosure be contrary to the interests of State security. See also the case-law of the European Court of Human Rights mentioned therein.

[126] The parallel between judicial cooperation in criminal and civil matters from the perspective of the limits deriving from fundamental rights protection would deserve much more attention, but remains in the background of the present analysis. For an in-depth comment of the recent case-law on this topic see G. Biagioni, Avotinš v. Latvia*. The uneasy balance between mutual recognition of judgments and protection of fundamental rights*, in *European Papers*, 2016, www.europeanpapers.eu, p. 579 *et seq. Krombach*, cit., para. 44; Court of Justice, judgment of 14 December 2006, case C-283/05, *ASML Netherlands*, paras 18-21.

[127] In any event, the wording of opinion 2/13 of the Court of Justice, cit., para. 191, and a comparison with the case-law on the balance between mutual recognition and fundamental rights in judicial cooperation in civil matters leads to consider that only manifest and disproportionate breaches could amount to limiting the twofold duty to recognise and execute the foreign decision. See Court of Justice, judgment of 6 September 2012, case C-619/10, *Trade Agency*, paras 40 and 43.

[128] Opinion of AG Bot, *Aranyosi and Căldăraru*, cit., para. 128. S. Ruggeri, *Human rights in European criminal law*, cit., parts from I to IV.

The problem of the quality and quantity of evidence allowed to support the aforementioned executing authority's double assessment concerning the existence of a deficiency and of a real risk of violation is a major one.[129]

As to the information on the existence of a deficiency, in *Aranyosi and Căldăraru* the Court of Justice refers "*inter alia*" to a set of qualified sources: "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".[130]

Therefore, even soft-law documents acquire evidentiary relevance, insofar as they come from qualified bodies or organizations. This wording has been read as an express preference for information by selected public authorities.[131] However, relying only on these sources of information could prevent the executing authority from having access to useful contributions by NGOs and other private organizations. After all, a literal (and sound) interpretation of the wording of the judgment leads to consider that the list provided by the Court is far from exhaustive. Quite surprisingly, the Court did not make reference to the Fundamental Rights Agency of the European Union. Moreover, and more obviously, any act of the EU institutions and bodies could be an important basin of information concerning the situation of a national legal order.

Rather than aiming at selecting the relevant sources, the Court of Justice merely stressed the importance of the substantive authority of the information collected, irrespectively of the nature of its origin. In fact, provided that the information at stake is "objective, reliable, specific and properly updated",[132] it is for the national courts to weight such information and decide, taking into due consideration the primary role of the principle of mutual trust.[133]

The same approach should apply to the second and *in concreto* test as well. Even if the main reference point is the competent authority in the issuing Member State, that is under the obligation to provide information pursuant to Art. 15, para. 2, of Framework Decision 2002/584, the executing one has a certain degree of discretion. In fact, in order to perform the reconciliation process between mutual recognition and fundamental rights, provided that the aforementioned substantive preconditions concerning the

[129] See *supra*, section V.2.

[130] *Aranyosi and Căldăraru*, cit., para. 89.

[131] S. GÁSPÁR-SZILÁGY, *Joined cases Aranyosi and Căldăraru. Converging human rights standards, mutual trust and new grounds for postponing a European Arrest Warrant*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2016, p. 214.

[132] *Aranyosi and Căldăraru*, cit., paras 89, 94 and 104.

[133] Of course, in the absence of common rules, it is for the national courts to decide on the methods of assessment of evidence and on the weight to be attributed to each source of information. This aspect could increase fragmentation and lead to the risk of diverging national solutions or even wrong domestic judgments. This is why the Court of Justice set a high evidentiary threshold. Moreover, in the event of a doubt, national courts should refer to Luxembourg pursuant to Art. 267 TFEU.

quality of information are met, it is entitled to use "any other information that can be available".[134]

After all, the European Court of Human Rights usually admits reports by private entities, in particular NGOs and other organizations committed to fundamental rights: it is not a matter of formal use, rather of substantive assessment.[135]

In this regard, the need for a close dialogue between the national authorities is one of the judgment's most important practical consequences, in view of the functioning of cooperation mechanisms and of the future development of a truly European judicial space. In fact, particular importance has to be attached to the information provided by the issuing State,[136] in order to avoid any abuse of fundamental rights as a *carte blanche* in the hands of executing authorities.[137]

From this point of view, the role of the requested persons is crucial as well, since during the procedure for the execution of an EAW they can be a decisive source of information on the level of protection of a certain right in the issuing State. The evidentiary contribution of the requested persons will be even more important in the near future. In fact, Art. 10 of the Directive 2013/48/EU on the right of access to a lawyer, whose deadline for transposition at national level will expire in November 2016,[138] also provides the right to appoint a lawyer in the Member State where an EAW was issued, in order to ensure an effective exercise of the right to defence.

VII. Strengthening fundamental rights protection in the EU: the structural implications of the post-collision order

VII.1. Mutual recognition, mutual trust and the empowerment of national judicial authorities: a new paradigm?

Trust implies commitment and ensures shared advantages in terms of closer relationships and more ambitious achievements. In turn, it veils a persistent risk of disap-

[134] *Aranyosi and Căldăraru*, cit., para. 98.

[135] L. Hodson, *NGOs and the struggle for human rights in Europe*, Oxford and Portland: Hart Publishing, 2011. *M.S.S. v. Belgium and Greece*, cit., para. 160.

[136] AG Bot pointed out this concern with regard to the formal qualification of fundamental rights as grounds for refusal of executions. However, he underlined that a lack of effective cooperation between the authorities involved would in any event result in a systemic risk for the Area of freedom, security and justice: opinion of AG Bot, *Aranyosi and Căldăraru*, cit., paras 122-129 and 179.

[137] The questions arises in particular in case of an executing authority's *motu proprio* initiative, where the presumption on the equivalent protection of fundamental rights would be severely endangered. S. Gáspár-Szilágy, *Joined cases Aranyosi and Căldăraru*, cit., para. 215.

[138] Directive 2013/48/EU of the European Parliament and 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.

pointment. As such, it raises the question of who is to be trusted, and to what extent: "The history of trust is the history of the containment of distrust".[139]

Containment of distrust has traditionally represented a primary concern in the discourse of the European institutions, Court of Justice first in line. In order to facilitate mutual recognition and thereby ensure the functioning of judicial cooperation mechanisms, the Court has repeatedly supported the assumption that Member States share a high level of mutual confidence. Conversely, any operational limit to the principle has been usually labelled as a threat to inter-State relations and a potential factor of deflagration of the process of European integration. The ensuing absolute reading of mutual trust has gradually devoid this notion of its conceptual complexity, in favour of a naive and optimistic presumption of blind trust among European peoples.

The recent trend of the Luxembourg case-law paves the way to a new and more mature understanding of mutual trust and, necessarily, mutual recognition. By acknowledging that the presumption concerning the level of protection of fundamental rights is rebuttable, the Court has replaced a theoretical dogma of trust with a decentralised review over the protection of individual rights at national level.

Trust is now coupled by a form of control, through which a Member State is entitled to verify whether its mates properly respect their obligation to protect the rights enshrined in the Charter. Such control, which has been described as a form of horizontal *Solange* test,[140] strengthens the EU system of protection of fundamental rights, on the basis of common EU standards. Its contours, discussed in the previous paragraph, dismantle the assumption that mutual controls equal to mutual distrust and increased suspicion. Instead, the prevalence of an effective and more complete fundamental rights protection system over the full implementation of EU policies becomes now an essential component for the establishment of a sincere mutual confidence.[141]

This approach marks a twofold shift of paradigm. Firstly, it strengthens the European Union's role as a fundamental rights promoter, first and foremost within its borders. The EU accepts that its interest to effective law enforcement via mutual recognition can be set aside, albeit in exceptional circumstances. Secondly, it detaches EU policies, especially in highly sensitive fields for national sovereignty, from primarily focusing on the

[139] For a deeper analysis of the idea of mutual trust in legal matters see F.L. FILLAFER, *Mutual trust in the history of ideas*, in D. GERARD, E. BROUWER (eds), *Mapping mutual trust: understanding and framing the role of mutual trust in EU law*, in *EUI Working Papers*, MWP 2016/13, p. 3 *et seq.*

[140] I. CANOR, *My brother's keeper*, cit., p. 401.

[141] National courts form an integral part of the EU system of judicial remedies: even though they are not mentioned in the Treaties, the Court of Justice has underlined their role under Art. 19 TEU: Court of Justice, opinion 1/09 of 8 March 2011, para. 66.

interests of the Member States, for instance in terms of increased extraterritorial exercise of coercive powers.[142]

VII.2. Mutual trust and the standard of protection of fundamental rights

The problem of fundamental rights protection standards has been widely discussed in the last years, in particular with regard to the relationship between the EU, the national legal orders and the system of the European Convention on Human Rights.

National case-law highlights a widespread trend towards the erosion of the almost absolute reading of the principle of mutual recognition proposed by the Court, in favour of fundamental rights concerns. For instance, Dutch courts have on many occasions rejected the execution of an EAW on the basis of fundamental rights or proportionality grounds.[143] In the same vein, the Federal German Constitutional Court has recently affirmed that the protection of fundamental rights, namely, in that case, the principle of individual guilt, may include the denial of execution of an EAW, if it is indispensable in order to guard constitutional identity.[144] Also, following the previously mentioned European Court of Human Rights judgment in *Torreggiani v. Italy*,[145] two courts in the United Kingdom and Ireland had already refused the execution of an EAW issued by Italy, in order to prevent the requested persons from facing the risk of inhuman and degrading treatment caused by the deficiencies of the Italian prison system.[146] A more in-depth

[142] Moreover, the findings of the Court have to be read in conjunction with the adoption of an increasing number of EU secondary acts on the rights of the individual in criminal procedure. According to some scholars, this new season of legislation has a "transformative effect", since it contributes to a fundamental rights oriented future evolution of judicial cooperation in criminal matters: V. Mitsilegas, *Mutual recognition, mutual trust and fundamental rights*, cit., p. 164.

[143] See the cases reported by W. van Ballegooij, *The European arrest warrant: between the free movement of judicial decision, proportionality and the rule of law*, in E. Guild, L. Marin (eds), *Still not resolved?*, cit., p. 77.

[144] The Court was confronted with a complaint raised by a US citizen, whose surrender had been urged by an Italian judicial authority; however, the Bundesvervassungsgericht found that the complainant had been sentenced to a thirty year custodial sentence without being heard and without proper notice. Then, in light of the provisions of the Basic Law on human dignity, criminal liability and constitutional identity, it considered that the situation required further investigations by the competent German regional court. On one hand, the Court referred to the national notion and standard of protection of the principle of individual guilt; on the other, it considered that the Council Framework Decision on the EAW takes into account fundamental rights and that, as a consequence, a proper interpretation of EU law required surrendered to be refused.

[145] See *supra*, footnote 90.

[146] Judiciary of England and Wales, Judge Howard Riddle, judgment of 17 March 2014, *Corte d'Appello di Palermo v. Domenico Rancadore*; Irish Supreme Court, judgment of 12 October 2013, *Minister for Justice and Equality v. Kelly aka Nolan*.

analysis would certainly reveal remarkable and frequent deviations from Luxembourg orthodoxy on mutual recognition and mutual trust.

Nonetheless, the functioning of judicial cooperation mechanisms would be radically hampered if any national court was entitled to make its own assessment on the subject and to depart from common standards and uniform application of EU law. In *Melloni* the Court addressed this risk and placed primacy, effectiveness and uniformity of EU law at the core of judicial cooperation in criminal matters, even to the detriment of higher national levels of protection of a fundamental right.

Aranyosi and Căldăraru does not put that finding into question. In fact, the Court's reasoning is focused on the respect of the EU standard of protection set by the Charter, which has in principle the same legal value as mutual recognition.[147] It follows that *Aranyosi and Căldăraru* runs in parallel with *Melloni* and that the new ground for postponement/abandonment applies only in case the European level of protection is at stake. Accordingly, the horizontal *Solange* test the national judicial authorities are entitled to make must rely on the common EU standard, in order to avoid fragmentation and to preserve the primacy and uniformity of EU law.

At the same time, the revised balance between fundamental rights and mutual recognition confirms the key-role of the case-law of the European Court of Human Rights for the EU system of protection of fundamental rights. Despite the tensions envisaged following the opinion 2/13,[148] the *acquis* of the European Court of Human Rights is essential for identifying both the standard of protection of a right and the real risk of its violation.[149] From this point of view, the activity of the European Court of Human Rights will be a crucial reference point for the protection *par ricochet* of those rights that are put under pressure in the context of an EAW procedure, given that many of them per se fall under the competences of the Member States.

The revised paradigm equips the Court of Justice and Member States with more effective tools to face the recurring key-challenge of the EU integration process: "One of

[147] For an in-depth analysis, L.S. ROSSI, *Lo stesso valore giuridico dei Trattati? Rango, primato ed effetti diretti della Carta dei diritti fondamentali dell'Unione europea*, in *Il diritto dell'Unione europea*, 2016, p. 329 *et seq.* It has been suggested that the Charter should be endowed with higher constitutional value than ordinary provisions of the Treaties, since it enshrines the founding values of the EU legal order: A. TIZZANO, *L'application de la Charte des droits fondamentaux dans les Etats membres à la lumière de son article 51, paragraphe 1*, in *Il diritto dell'Unione europea*, 2014, p. 429 *et seq.*

[148] N. LAZZERINI, *Gli obblighi in materia di protezione dei diritti fondamentali come limite all'esecuzione del mandato di arresto europeo: la sentenza Aranyosi e Căldăraru*, in *Diritti umani e diritto internazionale*, 2016, p. 490 *et seq.*

[149] From this point of view, *Aranyosi and Căldăraru* also aligns the double assessment of the systemic deficiency and of the individual real risk of a violation with the standard provided by the European Court of Human Rights. European Court of Human Rights, judgment of 7 July 1989, no. 14039/88, *Soering v. United Kingdom*, paras 90-91; European Court of Human Rights, judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*, para. 365.

the greatest achievements of the past decades has been to shift European integration from something that Europe does to something that Europe is".[150]

[150] J.H.H. WEILER, *Editorial. Integration through fear*, in *European Journal of International Law*, 2012, p. 1.